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Chapter XII Provisional application of treaties

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A. Introduction

1. 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.¹ At the same session, the Commission took note of an oral report, presented by the Special Rapporteur, on the informal consultations held on the topic, under his chairmanship. The Commission also decided to request from the Secretariat a memorandum on the 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 on the Law of Treaties (“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.

2. At its sixty-fifth session (2013), 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 Vienna Convention both in the Commission and at the Vienna Conference of 1968–69, and included a brief analysis of some of the substantive issues raised during its consideration.

B. Consideration of the topic at the present session

3. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/675) which sought to provide a substantive analysis of the legal effects of the provisional application of treaties.

4. The Commission considered the second report at its 3231st to 3234th meetings, from 25 to 31 July 2014.

1. Introduction by the Special Rapporteur of the first report

5. In introducing his second report, the Special Rapporteur provided an overview of the consideration of the topic thus far. He indicated that, in response to a request addressed to States to provide information on their practice, he had received submissions from ten States. He was of the view, however, that it was still premature to draw any conclusions on the practice of States, on the basis of the submissions received, and requested that the Commission reiterate its request to States.

6. The Special Rapporteur indicated that the purpose of the second report was to provide a substantive analysis of the legal effects of the provisional application of treaties. He noted that while there was no intention to undertake an exhaustive analysis of the domestic constitutional law of States, an analysis of the legal effects of provisional

¹ At its 3132nd meeting, on 22 May 2012, (*Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), 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 C to the report of the Commission (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10)).

application of treaties invariably took place in the light of domestic practice, given that States in explaining their practice tended to do so in terms of their domestic practice.

7. The question of the legal effects of provisional application of treaties was at the heart of his second report and was central to the Commission's approach to the provisional application of treaties. No analysis would provide real practical value for the understanding of the provisional application of treaties without a consideration of the legal consequences of the provisional application of treaties in relation to the other parties to the treaty and third States. He noted that the comments received from States, both in the Sixth Committee and in writing, had pointed to the fact that provisional application of treaties did have legal effects, both internationally and domestically. He recalled that there had been cases before international tribunals in which the dispute had been precisely related to the legal scope of the provisional application of a treaty.

8. He observed that the source of the legal obligations in question could be traced to a clause in the treaty itself or arose from a separate agreement adopted in parallel to the main treaty. Since the decision to provisionally apply a treaty could manifest itself expressly or tacitly, the legal nature of the obligations, as well as the scope of the legal effects thereof, would depend on what was stipulated in the treaty. In his report, the Special Rapporteur identified four ways in which article 25, paragraph 1, of the Vienna Convention on the Law of Treaties had been manifested: (1) when a treaty established that it would apply provisionally from the moment of its adoption; (2) when the treaty established that it would be applied provisionally by the signatory States; (3) when the treaty left open the possibility for each State to decide if it wished to provisionally apply the treaty or not from the moment of the adoption of the treaty; and (4) when the treaty was silent on its provisional application and States applied article 25, paragraph 1. In other words, the obligations under the provisional application of treaties could take a contractual form or the form of one or more unilateral acts. As such, the legal analysis of the effect of unilateral acts was also of relevance to a study on the origin of obligations arising from the provisional application of treaties.

9. The Special Rapporteur further stated that the rights established by the provisional application of treaties as actionable rights would also depend on how the provisional application had been enshrined in the treaty or agreed to. Hence, the scope of the rights would be clearer in those cases where the treaty explicitly established that it would be provisionally applied from the moment of adoption or that of signature. In such cases, the contractual parties were known, and the States would know what the specific scope of its enforceable rights were in relation to the other States parties. The Special Rapporteur noted that such arrangement was common to the case of the provisional application of bilateral treaties.

10. In his view, the scope of obligations was likewise clearer in those cases where the treaty provided for provisional application from the moment of adoption or signature. The analysis of the scope of obligations became more complex when a State decided unilaterally to apply a treaty provisionally. In principle, the scope of the obligations arising from the provisional application could not exceed those established in the treaty. In the case of a unilateral declaration, the State in question would not be able to alter or amend the scope and content of what was covered by the provisional application of the treaty. It was important to bear in mind the distinction between domestic law obligations arising from the provisional application of treaties as opposed to those generated under provisional application of treaties internationally. Such distinction was also relevant when coming to the enforceability of rights by third States.

11. The Special Rapporteur further indicated that the regime that applied to the termination of treaties applied *mutatis mutandis* to the provisional application of treaties. He noted that some States followed the practice of performing the obligations agreed upon

during a transitional period over which the provisional application of a treaty is being phased out, in the same manner as the case of the termination of the treaty itself and that this was evidence that those States assigned the same legal effects to the termination of the provisional application of treaties as those for the termination of the treaty itself.

12. As for the legal consequences of breach of a treaty being applied provisionally, the Special Rapporteur limited himself to reiterating the applicability of the existing regime of the responsibility of States, as provided for in the 2001 articles on the responsibility of states for internationally wrongful acts.²

2. Summary of the debate

13. During the debate on the second report, general agreement was expressed with the Special Rapporteur's view that the provisional application of a treaty, although juridically distinct from entry into force of the treaty, did nonetheless produce legal effects and was capable of giving rise to legal obligations, and that those were the same as if the treaty were itself in force for that State; a conclusion that was supported both in the case-law and by State practice. In terms of a further view, strictly speaking, the legal effect arose less from the act of applying a treaty provisionally, and more from the underlying agreement between States as reflected in the clauses in the treaty permitting its provisional application.

14. Several additional general observations were made concerning the legal consequences of the provisional application of treaties. The view was expressed that the provisional application of a treaty could not result in the modification of the content of the treaty, nor could States (or international organizations) which had not participated in the negotiation of the treaty resort to its provisional application, and the provisional application of a treaty could not give rise to a distinct legal regime separate from the treaty. Nor could provisional application give rise to rights for the State beyond those that were accepted by States and provided for in the treaty.

15. In general, members expressed support for the Special Rapporteur's decision not to embark on a comparative study of domestic provisions relating to the provisional application of treaties. Others were of the view that such an analysis, as part of a broader study on State practice, was both feasible and necessary for a proper consideration of the topic since the possibility of the resort to the provisional application of a treaty depended also on the internal legal position of the State in question. It was observed that the validity of a clause permitting provisional application was not only a matter of international law, but was also to be determined in the light of the applicable domestic law. It was also noted that any study of State practice had to include the legislative practice of States. On the other hand, the view was expressed that while the provisional application of a treaty could have effects in the domestic legal system, that was not relevant for the Commission's consideration of the present topic. In terms of a further suggestion, the practice of the depositaries of treaties could be studied.

16. Different views were expressed concerning the Special Rapporteur's characterization of the decision to provisionally apply a treaty as a unilateral act. It was noted that such a view could not be reconciled with article 25 of the Vienna Convention, which specifically envisaged provisional application being undertaken on the basis of agreement between States and as an exercise of the free will of States. The source of the obligation that arose following a declaration to provisionally apply a treaty was the treaty itself, not the declaration, and the provisional application of a treaty involved a treaty-based relationship, in which the conduct of the State was not unilateral. It was also stated that it

² G.A. res. 56/83, annex, of 12 December 2001.

was possible for a State to separately unilaterally declare its intention to provisionally apply a treaty (and reference was made to the possible example of the Syrian Arab Republic's purported provisional application of the Convention on the Prohibition of Chemical Weapons³).

17. Support was expressed for the applicability by analogy of article 70 of the Vienna Convention, dealing with the termination of treaties, to the termination of provisional application. Other members noted that while there was some overlap in the legal position of the termination of treaties and that of provisional application, this did not mean that the same rules applied, even *mutatis mutandis*. Nor, under this view, were the provisions on termination in the underlying treaty relevant to termination of its provisional application. In terms of a further view, if it were ascertained that article 70 did apply then it would have to be clarified whether this meant that the rules and procedures for the termination of treaties, existing at the domestic level, would apply equally to the termination of their provisional application. A difference of opinion was also expressed as to the applicability of the rules on the unilateral acts of States⁴ to the termination of provisional application, as well as to the assertion that such termination could not be undertaken arbitrarily. The view was expressed that the possibility of unilateral termination of provisional application should, in principle, be limited so as to ensure the stability of treaties, and that following the termination of provisional application the principle of *pacta sunt servanda* would continue to apply. Other members were of the view that article 25, paragraph 2, envisaged termination occurring at will (subject to the requirement of giving notice).

18. As regards the consequences arising from a breach of an obligation in a treaty being provisionally applied, support was expressed for the applicability of the rules on responsibility for internationally wrongful acts, which, it was noted, was envisaged in article 73 of the Vienna Convention. It was also noted that article 12 of the 2001 articles referred to an obligation "regardless of its origin or character", which could cover obligations emanating from treaties being provisionally applied. In terms of another view, the matter required further reflection particularly as some adaptation of the rules on the responsibility of States might be called for in the case of a treaty being provisionally applied.

19. Suggestions for further consideration included: whether provisional application extended to the entire treaty, or whether it was possible to only provisionally apply parts thereof, or indeed whether it was only possible to provisionally apply parts; analyzing further the relationship between the provisional application of treaties and their entry into force; analyzing the modalities for the termination of provisional application; considering whether the rules of customary international law on the provisional application of treaties were the same as those in the Vienna Convention; as well as studying the applicability of the regime on the reservations to treaties. It was also suggested that the Special Rapporteur proceed to consider the different consequences arising from the provisional application of bilateral as opposed to multilateral treaties. Support was also expressed for the Special Rapporteur's intention to deal with the provisional application of treaties by international organizations.

³ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, of 3 September 1992, United Nations, *Treaty Series*, No. 33757, vol. 1974, p. 45.

⁴ See Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 176.

20. While support was expressed for the Special Rapporteur's intention to propose draft guidelines or conclusions, in terms of another view the Commission should not rule out the possibility of developing draft articles, as it had done in its work on the effects of armed conflicts on treaties.

3. Concluding remarks of the Special Rapporteur

21. In summarizing the debate on the second report, the Special Rapporteur observed, *inter alia*, that there had been general agreement that the basic premise underlying the topic was that, subject to the specificities of the treaty in question, the rights and obligations of a State which had decided to provisionally apply the treaty, or parts thereof, were the same as if the treaty were in force for that State. As a consequence of this, there was agreement in the Commission that, in principle, a breach of an obligation which arose out of the provisional application of a treaty constituted an internationally wrongful act, thereby triggering the rules on the responsibility of states for internationally wrongful acts.

22. He recalled that the various manifestations of provisional application identified in his report were merely illustrative, and did not exclude the possibility of other examples. He had presented the types more commonly found in practice as a means to attempt a greater systematization of the rules applicable to the provisional application of treaties, which had not been done during the negotiation of what became article 25 of the Vienna Convention. He had also taken note of the various suggestions made for how to undertake the work on the topic, including adopting a more inductive approach and considering not only State practice, but also jurisprudence and academic opinions.

23. The Special Rapporteur confirmed that he had likewise taken note of the concerns expressed regarding the reference in his analysis to the applicability of the rules on the unilateral acts of States. He clarified that he had intended to highlight the fact that it was typically left to the negotiating or contracting State to unilaterally decide whether to provisionally apply a treaty or not. As such, the legal obligation for the State arose not when the treaty, containing a clause allowing for provisional application, was concluded, but at the point in time at which the State unilaterally decided to resort to such provisional application. He clarified that he had, on purpose, not referred to the unilateral declaration in question as being the "source" of the legal obligations, but rather its "origin" in a temporal sense, i.e. the act which triggered the provisional application.

24. The Special Rapporteur observed further that he had taken note of the suggestions for specific issues to be considered in his future reports, such as the possibility of contracting States acquiescing to the provisional application, by a third State, of a treaty which did not expressly provide for provisional application; as well as undertaking a study of the practice of treaty depositaries. While he noted that there had been different views in the Commission as to the necessity of undertaking a comparative study of domestic legislation, he also recalled the suggestion that there be a consideration of the applicability of articles 27 and 46, paragraph 1, of the Vienna Convention. He indicated that this would be done as part of a broader study of all articles in the Vienna Convention which might be of relevance to the provisional application of treaties (and not limited to the termination of treaties).

25. The Special Rapporteur further indicated his intention to complete, in his next report, the analysis of the contributions made by States on their practice. He also intended to consider the legal regime applicable to treaties between States and international organizations, and those between international organizations, and indicated that he would propose draft guidelines or conclusions for the consideration of the Commission at its next session.