United Nations A/CN.4/675

General Assembly

Distr.: General
9 June 2014
English
Original: Spanish

International Law Commission
Sixty-sixth session
Geneva, 5 May-6 June and
7 July-8 August 2014

Second report on the provisional application of treaties

By Juan Manuel Gómez-Robledo, Special Rapporteur*

Contents

* The Special Rapporteur is deeply grateful to Pablo Arrocha for his invaluable contribution to the preparation of this report.

14-55003 (E) 200614 030714

I. Introduction

1. In his first report on the provisional application of treaties,[1] submitted in June 2013 for consideration by the International Law Commission, the Special Rapporteur presented a general preliminary analysis to serve as a guide for identifying possible areas of study for future reports.

2. In particular, the Special Rapporteur discussed issues concerning the background and terminology associated with this legal concept, and analysed the purposes and usefulness of the provisional application of treaties. He also embarked on a study of the legal regime of provisional application, focusing on three key areas: the source of obligations, forms of expression of intention and forms of termination of the regime created by provisional application.

3. In addition, he indicated that the legal consequences arising both within the State and at the international level would be considered in subsequent reports.

Purpose of the present report

4. The purpose of this second report is to provide a substantive analysis of the legal effects of the provisional application of treaties, in follow-up to paragraph 37 of the first report.

5. The issue of the legal effects of provisional application has been raised repeatedly, both by the Commission members and by the States that have taken part in the discussions on this topic, as a priority for the further study of this question, as it concerns the impact of this treaty law concept on the acquisition of international rights and obligations by the State or States that decide to make use of it.

6. The Special Rapporteur will accordingly take into account the comments made by States during the relevant discussion in the Sixth Committee at the sixty-eighth session of the General Assembly, as well as the information on State practice that has been received to date in response to the Commission's request to Member States in its annual report,[2] of which the General Assembly took note in its resolution 68/112, paragraph 1.

7. While the Commission has already received several reports on the practice of States, the Special Rapporteur finds it advisable and necessary to collect more information on the subject in order to be in a position to present the Commission with a more structured vision and possible conclusions on State practice.

8. The reports submitted thus far have, of course, been taken into account in the preparation of the present report, and the Special Rapporteur is grateful to the States that provided them. He will nonetheless postpone any conclusions on State practice to a later date.

[1] A/CN.4/664.

[2] A/68/10, chap. III, para. 27.

II. Analysis of views expressed by Member States

9. In the discussion held by the Sixth Committee during the sixty-eighth session of the General Assembly, many delegations referred in their statements to the provisional application of treaties and, in particular, to the Special Rapporteur's first report.

10. The Special Rapporteur sincerely thanks all delegations for their valuable contributions, comments and input, which have been duly considered and have served as guideposts for the study of the issue in this second report.

11. In their statements, Member States identified important areas of study in relation to the provisional application of treaties. For example, some States suggested that the Special Rapporteur should focus on the ways in which States could express their consent to the provisional application of a treaty. Others suggested that he should analyse whether "provisional accession" was a possibility and whether that would be equivalent to provisional application upon the treaty's entry into force. It was also suggested that he should examine the provisional establishment of subsidiary bodies created by the treaty itself, as well as the provisional application of treaties by international organizations. Those and other topics were reflected in the summary of the discussion prepared by the Secretariat.[3]

12. Those contributions also included questions on legal effects, such as, for example, whether provisional application from the date of signature had consequences that differed from those of provisional application from the date of ratification and whether provisional application referred to the entire treaty or to only some of its provisions.

13. In general, the Special Rapporteur has discerned that the area of interest which the vast majority of delegations have in common is, primarily, the question of the legal effects of the provisional application of treaties.

14. In this connection, an analysis of the information furnished by States thus far shows that the provisional application of a treaty undoubtedly creates a legal relationship and therefore has legal effects. This does not seem to be a matter of debate. On the contrary, all the comments and questions submitted to the Special Rapporteur presume that provisional application does indeed have legal effects, even beyond the obligation not to defeat the object and purpose of the treaty in question, as set out in article 18 of the Vienna Convention on the Law of Treaties.

15. The Special Rapporteur also appreciates and shares the views of the Commission members and of Member States to the effect that the task of the Commission is not to encourage or discourage recourse to provisional application, but to provide guidance to enhance understanding of that mechanism. The provisional application of a treaty should be understood as a transitory and to some extent palliative mechanism, never as a means of avoiding the ratification of treaties and their entry into force in accordance with the requirements they establish.

16. With respect to the practice of States, as reported to him, the Special Rapporteur would like to make two observations.

17. First, the statements made in the Sixth Committee show that States are especially interested in highlighting the fact that the provisional application of a

[3] A/CN.4/666.

treaty will also depend on the provisions of domestic law and the particular circumstances in each State. In other words, States were very careful to indicate that recourse to provisional application, including the manner of expressing consent, is subject to the relevant domestic legal rules. In that connection, some States suggested that a comparative analysis of domestic law should be prepared in order to shed light on the operation of that mechanism within States.

18. Although the Special Rapporteur understands States' concern about the need to respect the requirements laid down in their domestic law, he does not propose to carry out such a comparative study. That endeavour would take considerably longer than the time available, and there are valid doubts as to its usefulness to the Members of the General Assembly. In terms of international law, as stated by the Permanent Court of International Justice, "municipal laws are merely facts which express the will and constitute the activities of States".[4] Likewise, the discussions in the Commission, from the time the topic was first introduced, have tended towards the view that an analysis of domestic law is not relevant to the study of the provisional application of treaties.

19. The Special Rapporteur agrees with the comments made by some Commission members to the effect that the Commission need not concern itself with the domestic legislation invoked by States for the purpose of applying or not applying a treaty provisionally. The analysis of the provisional application of treaties will therefore focus on its legal effects at the international level, while naturally bearing in mind that provisional application may give rise to an actual occurrence of the possibility envisaged in article 46 (1) of the Vienna Convention on the Law of Treaties, i.e. a manifest violation of internal law with respect to a rule of fundamental importance regarding competence to conclude treaties, as was also suggested by some members of the Commission.

20. Second, by the time the present report was completed, the Commission had received reports on national practice regarding the provisional application of treaties from only 10 States: Botswana, the Czech Republic, Germany, Mexico, Micronesia (Federated States of), Norway, the Russian Federation, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America. The Special Rapporteur highly appreciates these reports, which are an important complement to the discussions held in the General Assembly and an invaluable source of information on the position of those States.

21. It is interesting to note that one State, the Federated States of Micronesia, submitted a report on its practice to the Commission even though that State is not a party to the Vienna Convention on the Law of Treaties. In the Special Rapporteur's view, this reflects the degree of interest in the Commission's study of this topic.

22. As noted above, the Special Rapporteur intends to collect more information on State practice before presenting conclusions drawn from the analysis of such practice.

[4] *Certain German Interests in Polish Upper Silesia, Merits, Judgment, P.C.I.J., Series A, No. 7*, 1926, at p. 19.

III. Legal effects of provisional application

23. As early as 1966, Special Rapporteur Fitzmaurice, in the context of his work on the law of treaties, put before the Commission the view that treaty clauses that are applied provisionally undoubtedly have legal effects that de facto bring those clauses into force.[5] The memorandum prepared by the Secretariat in 2013, which is also referred to in the Special Rapporteur's first report, points out that the general position maintained by the Commission has been that the provisional application of a treaty results in an obligation to execute the treaty, even if only on a provisional basis.[6]

24. Bearing in mind the analysis put forward in the first report on this topic, as well as the contributions from States, it seems appropriate to accept the premise that the provisional application of treaties has legal effects, although this should not be interpreted as a simplified form of entry into force of the treaty or of some of its provisions. It has already been clarified in the first report that entry into force falls under a different legal regime.[7]

25. At the same time, the information submitted by States such as Norway and Botswana, while not contradicting this conclusion, indicates that the process for allowing provisional application is the same as the process for seeking the ratification and entry into force of a treaty. Switzerland, for example, does not regard "provisional application" and "provisional entry into force" as two distinct legal concepts; it thus views these concepts as being the same from the standpoint of their legal effects. It even raises the question of whether, that being the case, the regime governing reservations should also cover provisional application. The United States, meanwhile, reports that, in the view of a member of the Senate Foreign Relations Committee, a treaty that is applied provisionally has the same legal status as any other United States agreement concluded by the President and that treaties applied provisionally have full effect at the domestic level pending a decision to ratify them.

26. Such effects may have an impact both within a State and internationally, depending on the treaty itself and on the specific clauses that are applied provisionally. The subject matter of the treaty in question is also of relevance. Treaties on human rights or tariff reduction, to cite two examples, will produce effects primarily within the State.[8]

27. Even if the proposal by some legal writers to regard provisional application as the application not of the treaty per se but of a parallel agreement, created by virtue of the provisional application itself, were to be taken into account,[9] this would not affect the conclusion that such provisional application would produce legal effects.

---

[5] *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. 67.V.2), para. (1) of the commentary to article 22, "Entry into force provisionally" ("But there can be no doubt that such clauses have legal effect and bring the treaty into force on a provisional basis").

[6] See A/CN.4/658, para. 66.

[7] See A/CN.4/664, paras. 7-24.

[8] Juan de Dios Gutiérrez Baylón, *Derecho de los Tratados* (Mexico City, Editorial Porrúa, 2010), p. 74.

[9] Daniel Vignes, "Une notion ambigüe: l'application à titre provisoire des traités", in *Annuaire français de droit international*, vol. 18 (1972), p. 192.

28. As indicated above and as several Member States have recalled, the use of provisional application is not confined to the States parties to a treaty; international organizations may also apply a treaty provisionally,[10] if the treaty is subject to signature and ratification by these subjects of international law.

29. Moreover, *Kardassopoulos*[11] and *Yukos*,[12] in which the material dispute at arbitration concerned the interpretation and scope of article 45 of the Energy Charter Treaty, which governs the provisional application of that instrument, show that this mechanism produces legal effects that entail rights and obligations under international law. In this case, the arbitral tribunal analysed the procedure for the provisional application of the Treaty, but did not question the legal validity of the concept of provisional application per se. In other words, the issue was one not of public international law, but of the constitutional law of one of the parties to the dispute.[13]

30. It should not be forgotten, however, that the effects of treaties "relate to the authors of the act: from their will do they proceed and they are nothing apart from that will".[14] The work of Georg Nolte, Special Rapporteur on subsequent agreements and subsequent practice in relation to the interpretation of treaties, has underscored the necessity of always discerning the will of the parties.

31. Lastly, the Special Rapporteur wishes to highlight the academic research carried out by Anneliese Quast Mertsch on the binding nature of the obligations arising from the provisional application of treaties, which is very valuable for understanding the characteristics and scope of the legal effects of the provisional application of treaties.[15]

A. Source of obligations

32. In discussing the legal regime of provisional application in his first report, the Special Rapporteur indicated that the source of the obligation to apply a treaty provisionally may arise from a provision of the treaty or from a separate or parallel agreement concerning the treaty; he also indicated that the intention to apply a treaty provisionally may be communicated either expressly or tacitly.[16]

33. This means that the legal nature of the obligations and the scope of the legal effects will depend, first of all, on what the treaty says with respect to the possibility of applying it provisionally in whole or in part. The United States, in the report on

---

[10] Paul Reuter, *Introduction to the Law of Treaties* (London, Kegan Paul International, 1995), p. 68.

[11] International Centre for Settlement of Investment Disputes, *Ioannis Kardassopoulos v. Georgia, Decision on Jurisdiction*, 6 July 2007, case No. ARB/05/18.

[12] Permanent Court of Arbitration, *Yukos Universal Limited (Isle of Man) v. the Russian Federation, Interim Award on Jurisdiction and Admissibility*, 30 November 2009, case No. AA 227.

[13] Ulrich Klaus, "The Yukos Case under the Energy Charter Treaty and the Provisional Application of International Treaties", in *Policy Papers on Transnational Economic Law*, No. 11 (Halle, Martin-Luther-University, 2005), p. 4.

[14] Reuter, *Introduction to the Law of Treaties*, p. 94.

[15] See Anneliese Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Leiden, Martinus Nijhoff Publishers, 2012).

[16] See A/CN.4/664, paras. 43-47.

its practice, divides the list of treaties it has applied provisionally into those it has so applied in full[17] and those it has so applied in part,[18] for example. That list includes treaties with provisional application provisions that are subject to domestic law,[19] specific eligibility requirements,[20] exceptions[21] and time limits,[22] among others.

34. Article 25 of the Vienna Convention on the Law of Treaties states that "a treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed".

35. This presumes that provisional application results from an agreement between negotiating States, as defined in article 2, paragraph 1 (e), of the Vienna Convention on the Law of Treaties.[23] However, at least four types of situations can be distinguished:

---

[17] See Air Transport Agreement between the Government of the United States of America and the Government of the Federal Democratic Republic of Ethiopia, 17 May 2005, TIAS 06-721.1; Protocol Additional to the Agreement between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States of America, 12 June 1998, 1988 U.S.T. Lexis 214; Air Transport Agreement between the Government of the United States of America and the Government of the Republic of Guatemala, 8 May 1997, TIAS 01-97; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (United Nations, *Treaty Series*, vol. 2167, No. 37924); Convention on Early Notification of a Nuclear Accident (United Nations, *Treaty Series*, vol. 1439, No. 24404); International Dairy Arrangement of the General Agreement on Tariffs and Trade (United Nations, *Treaty Series*, vol. 1186, No. 814).

[18] See Treaty between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, with Protocol, 8 April 2010, TIAS 11-205; International Telecommunication Convention (United Nations, *Treaty Series*, vol. 1531, No. 26559).

[19] See Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (United Nations, *Treaty Series*, vol. 1836, No. 31364); Agreement between the Government of the United States of America and the Government of the Kingdom of Denmark on Enhancing Cooperation in Preventing and Combating Serious Crime, 14 October 2010, TIAS 11-505; Agreement between the Government of the United States of America and the Government of the Czech Republic on Enhancing Cooperation in Preventing and Combating Serious Crime, 12 November 2008, TIAS 10-0091; Arrangement on Provisional Application of the Agreement on the Establishment of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER Project, 21 November 2006, TIAS 07-016; Agreement on an International Energy Program (United Nations, *Treaty Series*, vol. 1040, No. 15664); Protocol of Provisional Application of the General Agreement on Tariffs and Trade (United Nations, *Treaty Series*, vol. 55, No. 814).

[20] See Food Assistance Convention, 25 April 2012, TIAS 13-101; Food Aid Convention, 1999 (United Nations, *Treaty Series*, vol. 2073, No. 32022); International Natural Rubber Agreement, 1994 (United Nations, *Treaty Series*, vol. 1964, No. 33546); International Sugar Agreement, 1977 (United Nations, *Treaty Series*, vol. 1064, No. 16200).

[21] See Millennium Challenge Compact between the United States of America Acting Through the Millennium Challenge Corporation and the Republic of Cape Verde, 10 Feburary 2012, TIAS 12-1130.1.

[22] See "Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe (CFE) of November 19, 1990, adopted at Vienna on May 31, 1996", United States Senate Treaty Document No. 105-5, 7 April 1997.

[23] Denise Mathy, "Article 25", in *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. I, Olivier Corten and Pierre Klein, eds. (Oxford, Oxford University Press, 2011), p. 649.

(a) Cases in which the treaty establishes that it is to be applied provisionally from the time of its adoption, i.e. once the requirements referred to in articles 9 and 10 of the Vienna Convention on the Law of Treaties, concerning, respectively, the adoption and authentication of the text of a treaty, have been met. In these cases, a State's obligation to apply the treaty provisionally arises from the mere participation of that State in its adoption; in the absence of such an express provision, the obligation arises as a result of an unequivocal indication by the State that it accepts provisional application, usually through its consent to a decision or resolution adopted for that purpose.[24] A State that does not so consent or that requires what may be called a more substantial legal basis will not be subject to that obligation. For example, as the Czech Republic indicated in the report on its practice, the legal basis for the provisional application of agreements concluded between the European Union and third States or international organizations is set out in article 218 (5) of the Treaty on the Functioning of the European Union, which provides as follows:

> "The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force."[25]

(b) Cases in which the treaty establishes that it is to be applied provisionally by the States that have become signatories through any of the modalities referred to in article 10 (b) of the Vienna Convention on the Law of Treaties, in which case the obligation to apply the treaty provisionally arises from the signature, signature ad referendum or initialling of the treaty or of the final act of a conference incorporating the text.[26]

(c) Cases in which the treaty does not require the negotiating or signatory States to apply it provisionally, but leaves open the possibility for each State to decide whether or not it wishes to apply the treaty provisionally, pursuant to article 25, paragraph 1 (a), of the Vienna Convention on the Law of Treaties, at any point in the process from the adoption of the text until or even after its entry into force. In these circumstances, the expression of intention that creates the obligations arising from provisional application may take the form of a unilateral declaration by the State.[27] When two or more States agree to apply a treaty provisionally, they may do so by means of a parallel agreement, which can take various forms. For example, in the report on its practice, the United States drew the Commission's attention to the Treaty on Mutual Legal Assistance between that State and Ukraine, in which the parties agreed to provisional application through an exchange of diplomatic notes.

(d) A final case is that of a treaty that says absolutely nothing about provisional application. In this case, it is useful to consider a hypothetical example in which one or more negotiating States react, for whatever reason, to a decision by a State or States to apply a treaty provisionally by invoking the fact that article 25, paragraph 1 (b), refers to "the negotiating States", which could imply that the consent of all the negotiating States is required in order for one or more of them to apply the treaty provisionally. What legal consequences would such a situation

---

[24] Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge, United Kingdom, Cambridge University Press, 2007), p. 172.

[25] Consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 83/47, 30 March 2010, article 218 (5).

[26] Aust, *Modern Treaty Law and Practice*, p. 172.

[27] Mathy, "Article 25", p. 651.

have? The Special Rapporteur has not encountered any examples of a situation of this kind, but would appreciate any information that could be provided in this regard.

36. In short, the source of the obligations incurred as a result of provisional application may take the form of one or more unilateral declarations or the form of an agreement. In any event, it is undeniable that a commitment to apply a treaty provisionally has legal effects.[28]

37. Regarding unilateral declarations, the International Court of Justice has recognized that:

> "Declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations … When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made."[29]

38. In this view, a State's decision to apply a treaty provisionally is an autonomous unilateral act governed solely by the intentions of that State and creating a new legal situation for it,[30] distinct from the rights and obligations created contractually by the treaty itself with regard to the parties once the treaty has entered into force.

39. The United States considers, for example, that the President's power to decide unilaterally to apply a treaty provisionally arises exclusively from its domestic law and that, consequently, the unilateral provisional application of a treaty should be understood as a matter of constitutional law.

40. Of relevance in this regard is the Commission's work on unilateral acts of States capable of creating legal obligations and, in particular, the Guiding Principles contained in paragraph 176 of the report of the Commission on the work of its fifty-eighth session.[31] In its resolution 61/34, the General Assembly commended the dissemination of these principles, which set out the basic criteria that must be met in order for a unilateral declaration to produce obligations under international law.

---

[28] Ibid., p. 652.

[29] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 253, para. 43.

[30] Albane Geslin, *La mise en application provisoire des traités* (Paris, Éditions A. Pedone, 2005), p. 188.

[31] See A/61/10, para. 176.

41. In particular, principles 1,[32] 3,[33] 9[34] and 10[35] highlight the effects produced by the obligations incurred with respect to third States, which are entitled to require that such obligations be respected; the need to take account of the reactions of such third States to determine the legal effects of a unilateral declaration; and the conditions for revoking a unilateral declaration, in particular when other subjects of international law can invoke the enforceability of the obligations created by virtue of the unilateral declaration.

42. In any event, it seems that the determining factor in defining the source of the obligations arising from provisional application is the clear expression of intention, which may be manifested in writing, orally or by any conduct that is indicative of such intention, especially active conduct,[36] although the above-mentioned Guiding Principles acknowledge that informal conduct or even, in certain situations, silence can produce the same effects.

43. In short, the form in which the intention to apply a treaty provisionally is expressed will have a direct impact on the scope of the rights and obligations assumed by the State in question.

B. Rights

44. In cases where States agree that a treaty is to be applied provisionally from the time of its adoption or signature, the rights enjoyed by States under the treaty will be enforceable from the time of adoption or signature, respectively.

45. This is clearer still in the case of bilateral treaties in which the parties agree that the treaty is to be applied provisionally prior to its entry into force. The Russian Federation provided some examples of this in the report on its practice: the Agreement between the Government of the Russian Federation and the Government of the Republic of Serbia on the Supply of Natural Gas from the Russian Federation to the Republic of Serbia (13 October 2012) and the Agreement between the Government of the Russian Federation and the Government of the Republic of Azerbaijan on the Construction of a Road Bridge over the Samur River in the Locality of Yarag-Kazmalyar (13 August 2013).

---

[32] "Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected". See A/61/10, para. 176.

[33] "To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise". Ibid.

[34] "No obligation may result for other States from the unilateral declaration of a State. However, the other State or States concerned may incur obligations in relation to such a unilateral declaration to the extent that they clearly accepted such a declaration". Ibid.

[35] "A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to: (i) Any specific terms of the declaration relating to revocation; (ii) The extent to which those to whom the obligations are owed have relied on such obligations; (iii) The extent to which there has been a fundamental change in the circumstances." Ibid.

[36] Reuter, *Introduction to the Law of Treaties*, p. 34.

46. The first agreement stipulates that it is to be applied provisionally from the date of signature, while the second establishes that it is to be applied provisionally 30 days after the date of signature.

47. Similarly, Mexico, in the report on its practice, cites the provisional application agreed upon in four bilateral treaties: the Air Transport Agreement between the Government of the United Mexican States and the Government of the Republic of Colombia (9 January 1975);[37] the Trade Agreement between the Government of the United Mexican States and the Government of the Gabonese Republic (14 September 1976);[38] the Agreement on Cultural, Scientific and Technical Cooperation between the Government of the United Mexican States and the Government of the Gabonese Republic (14 September 1976);[39] and the General Agreement on Cooperation between the United Mexican States and the Gabonese Republic (14 September 1976).[40]

48. The first of these agreements establishes, in article 17:

> "This Agreement shall be applied provisionally from the date of its signature and shall enter into force definitively on the date indicated in an exchange of diplomatic notes, such exchange to take place once the Contracting Parties have obtained the approval required by them in accordance with their respective constitutional procedures."

49. The second agreement provides, in article VIII, that it will "enter into force" provisionally, treating this concept as equivalent to provisional application:

> "This Agreement shall enter into force provisionally on the date of its signature. It shall subsequently be ratified in accordance with the procedure in force in each country."

50. The third and fourth agreements include a provision very similar to the one cited from the second agreement in articles XV and V, respectively:

> "This Agreement shall enter into force provisionally on the date of its signature, and definitively following the exchange of the relevant instruments of ratification."

51. In these circumstances, the agreement between the parties to apply the treaty provisionally arises from the treaty itself and, in turn, gives rise to rights and obligations that are mutually recognized and therefore enforceable and opposable vis-à-vis third parties.

52. It should be noted that Germany, in the report on its practice, indicated that most of its bilateral agreements do not provide for provisional application, while the United Kingdom provided the Commission with a long list of treaties that provide for provisional application, clarifying that, for that State, provisional application is not legally binding per se in the case of so-called memorandums of understanding, probably because the United Kingdom does not regard instruments of that type as having treaty status.

---

[37] See United Nations, *Treaty Series*, vol. 1364, No. 23023.
[38] See United Nations, *Treaty Series*, vol. 1379, No. 23121.
[39] See United Nations, *Treaty Series*, vol. 1379, No. 23120.
[40] See United Nations, *Treaty Series*, vol. 1400, No. 23407.

C. Obligations

53. The question of the scope of the obligations arising from provisional application is especially relevant in cases where the treaty does not require the negotiating or signatory States to apply it provisionally, but leaves open the possibility for each State to decide whether or not it wishes to apply the treaty provisionally.

54. In such cases, as noted above, the nature and scope of the obligations will be comparable to those arising from a unilateral declaration, unless two or more States conclude a parallel agreement. While States may in these cases have unilaterally undertaken in good faith to apply the treaty or part of the treaty provisionally, this "does not signify that the State making the declaration is free to amend the scope and the contents of its solemn commitments as it pleases", as the International Court of Justice held in the *Case concerning military and paramilitary activities in and against Nicaragua*.[41]

55. Thus, the scope of the obligations may not exceed what is expressly set out in the treaty, and, given the need to ensure stable relations with the other negotiating or signatory States, it is understood that a State may not alter "the scope and the contents of its solemn commitments".

56. A good example of this situation is reflected in the provisional application provided for in article 23 of the recently adopted Arms Trade Treaty,[42] which stipulates:

> "Any State may at the time of signature or the deposit of its instrument of ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State."

57. At the time of writing of the present report, 18 States had submitted a declaration of provisional application pursuant to the above-cited article: Antigua and Barbuda, Austria, Costa Rica, Denmark, Estonia, Finland, Germany, Hungary, Iceland, Latvia, Mexico, Norway, Saint Vincent and the Grenadines, Serbia, Slovakia, Spain, Trinidad and Tobago and the United Kingdom; all of these States except Serbia and Spain have ratified the treaty.[43]

58. Under their declarations, these States have unilaterally undertaken to apply in the domestic sphere articles 6 and 7 of the Arms Trade Treaty ("Prohibitions" and "Export and Export Assessment", respectively).

59. At this point, it is necessary to draw a distinction, while avoiding overly broad categories that do not reflect the variety of situations that may arise, as it is always important to take specific circumstances into account.

60. The proposed distinction is between the obligations resulting from provisional application that produce effects exclusively in the domestic sphere of the State that has opted for this mechanism, on the one hand, and obligations that produce effects

---

[41] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 418, para. 59.

[42] See General Assembly resolution 67/234 B.

[43] See http://disarmament.un.org/treaties/t/att.

at the international level, on the other, including, of course, for the other negotiating or signatory States.

61. For example, in the case of a multilateral human rights treaty, compliance with provisional application is generally enforceable only by individuals who acquire rights under the treaty.

62. In contrast, in a case such as that of the Arms Trade Treaty, the obligation to carry out the risk assessment process established in the treaty before authorizing any export of the items covered will have effects at the international level, as this is an obligation that is enforceable by the importing State.

63. These examples raise the question of whether the obligations acquired by virtue of provisional application will have different legal consequences, in terms of their effects, depending on whether they apply in the domestic sphere or the international sphere. This question will become clearer once a more representative sample of State practice has been made available.

64. Moreover, a distinction should be drawn in this connection between the enforceability of an obligation thus acquired and its opposability vis-à-vis third parties. These are separate legal concepts and, for the purposes of this study, only the enforceability of the obligation is relevant, at least for this second report.

65. In any event, and beyond these distinctions, the obligations arising from provisional application fall within the scope of the *pacta sunt servanda* principle, in that they constitute a commitment to perform the obligations thus acquired in good faith.[44]

66. Another emblematic case in relation to the legal effects of provisional application and, in particular, to the obligations arising from such application is the accession by the Syrian Arab Republic to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction. The Syrian Arab Republic deposited its instrument of accession to this international treaty on 14 September 2013, and the treaty entered into force for that State on 14 October 2013.[45] However, upon depositing its instrument of accession, the Syrian Arab Republic informed the United Nations Secretary-General, as depositary of the treaty, that it "shall comply with the stipulations contained [in the Convention] and observe them faithfully and sincerely, applying the Convention provisionally pending its entry into force for the Syrian Arab Republic".[46]

67. It was on this basis that the Executive Council of the Organization for the Prohibition of Chemical Weapons adopted its decision entitled "Destruction of Syrian Chemical Weapons", in which it affirmed that "the provisional application of the Convention gives immediate effect to its provisions with respect to the Syrian Arab Republic".[47]

---

[44] See Andrew Michie, "The provisional application of treaties in South African law and practice", in *South African Yearbook of International Law*, vol. 30 (2005), p. 6.

[45] See "Syria's Accession to the Chemical Weapons Convention Enters into Force" at http://www.opcw.org/news/article/syrias-accession-to-the-chemical-weapons-convention-enters-into-force/.

[46] See C.N.592.2013.TREATIES-XXVI.3, 14 September 2013.

[47] See EC-M-33/DEC.1, 27 September 2013, eleventh preambular paragraph.

68. In this case, it was the decision of the Executive Council of the Organization for the Prohibition of Chemical Weapons recognizing the legal effects of provisional application that made it possible to implement the treaty immediately through the establishment of a binding plan of action for chemical disarmament in that country.

D. Termination of obligations

69. In his first report, the Special Rapporteur indicated that, pursuant to article 25, paragraph 2, of the Vienna Convention on the Law of Treaties, provisional application may be terminated by a unilateral notification or by arrangement between the negotiating States.

70. On the assumption that provisional application has legal effects giving rise to rights and obligations, it may be presumed that the regime resulting from the termination of provisional application must be, mutatis mutandis, the same as that resulting from the termination of a treaty.

71. In this case, article 70 of the Vienna Convention on the Law of Treaties sets out the consequences of the termination of a treaty:

> "1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:
>
> "(a) releases the parties from any obligation further to perform the treaty;
>
> "(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.
>
> "2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect."

72. In practice, treaties generally do not contain provisions concerning the consequences or effects of their termination, except in the case of treaties such as multilateral human rights treaties, for example.[48]

73. It may be assumed that the term "consequences" in article 70 refers to the "effects" of termination[49] and accordingly establishes the general treaty law regime for this purpose.

74. In any event, a treaty may contain transitional provisions on its partial or full application in which acts that the States parties undertake to perform during or after termination are specified.[50]

75. It is interesting to note that for some States, such as Mexico, in cases where provisional application must be terminated in advance, the State must perform the

---

[48] See American Convention on Human Rights, article 78 (2), and European Convention for the Protection of Human Rights and Fundamental Freedoms, article 58 (2).

[49] Hervé Ascensio, "Article 70", in *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. II, Olivier Corten and Pierre Klein, eds. (Oxford, Oxford University Press, 2011), p. 1586.

[50] Aust, *Modern Treaty Law and Practice*, p. 302.

obligations agreed upon during a transitional period over which they are phased out, in the same manner as in the case of termination of the effectiveness of a treaty pursuant to article 70, paragraph 1 (b), of the Vienna Convention on the Law of Treaties.

76. This pattern of conduct shows that some States regard the effects of provisional application as having the same legal validity as the effects of a treaty in force.

77. The United States pointed out, in the report on its practice, that clauses concerning the termination of provisional application may refer to the treaty's entry into force,[51] to an express decision not to ratify the treaty[52] or to the expiration of a given time period,[53] among other issues.

78. It should be stressed that nothing in the Vienna Convention on the Law of Treaties prevents a State from terminating the provisional application of a treaty and subsequently rejoining the treaty regime through ratification or accession.

79. The Convention is silent in this regard, as it assumes, rather, that a decision by a State to cease the provisional application of a treaty indicates an intention not to become a party to it in the future, as reflected in article 25, paragraph 2; nonetheless, such a decision may be based on domestic circumstances of various kinds, of a legal or political nature, or it may be a means of reminding other negotiating or signatory States of the importance of conducting and concluding their ratification processes.[54]

80. In any event, "general international treaty law has never established a rule of no return with respect to the signing of treaties".[55]

81. Lastly, the intention of a State that has decided to terminate, by some means or other, the provisional application of a treaty is subject to the requirement that it explain to the other States to which the treaty applies provisionally, or to the other negotiating or signatory States, whether that decision was taken for other reasons. During the negotiation of the Vienna Convention on the Law of Treaties, various ideas concerning the possible inclusion of a provision on termination as a consequence of unreasonable delay or reduced probability of ratification were discussed, but were not accepted.[56]

---

[51] See Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (United Nations, *Treaty Series*, vol. 1836, No. 31364); Agreement relating to the International Telecommunications Satellite Organization "INTELSAT" (United Nations, *Treaty Series*, vol. 1220, No. 19677); Agreement on an International Energy Program (United Nations, *Treaty Series*, vol. 1040, No. 15664).

[52] See Agreement relating to the International Telecommunications Satellite Organization "INTELSAT" (United Nations, *Treaty Series*, vol. 1220, No. 19677); Agreement on an International Energy Program (United Nations, *Treaty Series*, vol. 1040, No. 15664).

[53] See Agreement relating to the International Telecommunications Satellite Organization "INTELSAT" (United Nations, *Treaty Series*, vol. 1220, No. 19677); Agreement on an International Energy Program (United Nations, *Treaty Series*, vol. 1040, No. 15664); Agreement between the United States of America and Cuba Extending the Provisional Application of the Maritime Boundary Agreement of December 16, 1977, TIAS 12-208.1.

[54] Martin A. Rogoff and Barbara E. Gauditz, "The provisional application of international agreements", in *Maine Law Review*, vol. 39, No. 1 (1987), No. 1, p. 52.

[55] Gutiérrez Baylón, *Derecho de los Tratados*, p. 184.

[56] See A/CN.4/658, paras. 101-108.

82. It should be borne in mind, however, that provisional application cannot be revoked arbitrarily, in view of the obligations it has created, as established in principle 10 of the above-mentioned Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations.

83. Furthermore, the termination of the provisional application of a treaty does not necessarily entail the termination of obligations created by such provisional application prior to its termination, as indicated in article 70, paragraph 1 (b), of the Vienna Convention, regarding the termination of a treaty.

84. Considering that provisional application is intended to serve as a transitional stage prior to a treaty's entry into force, the treaty ceases to be applied provisionally precisely when it enters into force, but it is clear that performance obligations under provisional application will produce legal effects specific to each case.

85. When a treaty enters into force, provisional application will terminate for the States parties, but not for those States that have applied the treaty provisionally but have not yet expressed their consent to be bound by the treaty.[57] The Vienna Convention supports the presumption that provisional application ends when the treaty enters into force, but does not prohibit the continuation of provisional application by those States that are not yet in a position to ratify or accede to the treaty. This presumption was also discussed during the negotiations that led to the adoption of article 25 of the Convention, but references to termination based on the passage of time were not accepted.[58]

IV. Legal consequences of the breach of a treaty applied provisionally

86. Given that provisional application produces legal effects and is capable of creating rights and obligations under international law, it may be concluded that a breach of an obligation arising from the provisional application of a treaty will also have legal consequences, including all those established by the law of State responsibility for internationally wrongful acts.

87. Under the treaty regime established by the Vienna Convention of 1969, in particular article 60, the operation of a treaty may be suspended or terminated as a result of a breach of the treaty.

88. It may be assumed that, in the aforementioned cases in which provisional application is the result of an agreement between two or more States, the breach of a treaty applied provisionally may also give rise to the termination or suspension of provisional application by any State or States that have been affected by the breach.

[57] René Lefeber, "Treaties, provisional application", in *The Max Planck Encyclopedia of Public International Law*, R. Wolfrum, ed. (Oxford, Oxford University Press, 2008), para. 10.

[58] See A/CN.4/658, paras. 91-100.

89. The universally recognized international legal principle *inadimplenti non est adimplendum*[59] underlies this legal consequence. This principle modifies the rule of *pacta sunt servanda* and incorporates the concept of negative reciprocity.[60]

90. This circumstance may be more likely to arise in the case of breaches during the provisional application of bilateral treaties. In any event, "the breach does not invariably entail the termination of the treaty or the impairment of the agreement as a whole".[61]

Responsibility regime

91. As established by the Commission in the commentaries to article 1 of the draft articles on responsibility of States for internationally wrongful acts, it is a principle of international law that every internationally wrongful act of a State entails the international responsibility of that State.[62] This principle has been widely reiterated in international jurisprudence.[63]

92. Article 2, which refers to the elements of an internationally wrongful act of a State, establishes that:

> "There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> "(a) is attributable to the State under international law; and
>
> "(b) constitutes a breach of an international obligation of the State."

93. As it has already been established that provisional application can create obligations for a State, acts attributable to the State that constitute a breach of such an international obligation will meet the definition set out in that article.

94. The Special Rapporteur shares the view expressed in the Commission's discussions on this subject by several members who reiterated that the existing regime concerning the responsibility of States for internationally wrongful acts also applies to cases in which a State breaches obligations arising from the provisional application of a treaty.

95. That being the case, the Special Rapporteur will not go into further detail on the responsibility regime, but will merely reiterate the applicability of the existing legal regime.

---

[59] *The Diversion of Water from the Meuse, Judgment, P.C.I.J., Series A/B, No. 70*, 1937, dissenting opinion of M. Anzilotti, p. 50.

[60] Bruno Simma and Christian J. Tams, "Article 60", in *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. II, p. 1353.

[61] Gutiérrez Baylón, *Derecho de los Tratados*, pp. 191-192.

[62] *Yearbook of the International Law Commission 2001*, vol. II, Part Two (United Nations publication, Sales No. E.04.V.17 (Part 2)), as corrected.

[63] See, for example, *Phosphates in Morocco, Judgment, P.C.I.J., Series A/B, No. 74*, 1938, preliminary objections, p. 28; *S.S. "Wimbledon", Judgment, P.C.I.J., Series A, No. 1*, 1923, p. 30; *Factory at Chorzów, Judgment, P.C.I.J., Series A, No. 9*, 1927, p. 21; *Corfu Channel case, Judgment of 9 April 1949, I.C.J. Reports 1949*, p. 4, at p. 23; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, para. 283; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, para. 47; *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 174, at p. 184.

V. Conclusion

96. The Special Rapporteur does not find it necessary to revert in this second report to the question of what the final outcome of the consideration of this topic should be. Rather, he will simply refer the reader to the ideas outlined in his first report and in his presentation to the Commission.

97. The Special Rapporteur would like to be more precise as to his plans for future work, but must recall that his efforts will be highly contingent on the receipt of more information on State practice, which will provide him with a representative sample of such practice from which to draw conclusions.

98. At any rate, the Special Rapporteur is mindful that his mandate also includes the study of the question of the provisional application of treaties by international organizations. This will naturally be addressed as part of his further work. The Special Rapporteur will of course be highly appreciative of any guidance and advice in this regard from the members of the Commission.