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**Draft report of the International Law Commission on the  
work of its sixty-seventh session**

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**Chapter X  
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. 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.

3. At its sixty-sixth session (2014), the Commission considered 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.

## B. Consideration of the topic at the present session

4. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/687) which continued the analysis of State practice, and considered the relationship of provisional application to other provisions of the Vienna Convention on the Law of Treaties, of 1969, as well as the question of provisional application with regard to international organizations. The report included proposals for six draft guidelines on provisional application.

5. The Commission also had before it a memorandum (A/CN.4/676), prepared by the Secretariat, on provisional application under the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, of 1986.

6. The Commission considered the second report at its 3269th to 3270th, and 3277th to 3279th meetings, held on 14 and 15 and 23, 24 and 28 July 2015.

7. At its 3279th meeting, on 28 July 2015, the Commission referred draft guidelines 1 to 6 to the Drafting Committee.

8. [At its ... meeting, on ... July 2015, the Chairman of the Drafting Committee presented the interim report of the Drafting Committee on “provisional application of treaties”, containing ... draft guidelines provisionally adopted by the Drafting Committee at the sixty-seventh session. The report, together with the draft guidelines, was presented for information only at this stage, and is available on the Commission website.]

## 1. Introduction by the Special Rapporteur of the third report

9. In introducing his third report, the Special Rapporteur recalled the work carried out by the Commission at previous sessions, and the content and purpose of his first two reports. In particular, he recalled his assessment that subject to the specific characteristics of the treaty in question, the rights and obligations of the State which had consented to provisionally apply a treaty were the same as the rights and obligations that stemmed from the treaty itself as if it were in force; and that a violation of an obligation stemming from the provisional application of a treaty activated the responsibility of the State.

10. Approximately 20 member States had provided comments on their practice. While he noted that the practice of States was not uniform, the Special Rapporteur continued to be of the opinion that it was not necessary to carry out a comparative study of domestic laws. He noted that the number of treaties that provided for the provisional application of treaties and which had been applied provisionally was relatively high.

11. His third report focused on two major issues : first, the relationship with other provisions of the Vienna Convention on the Law of Treaties, 1969, and, second, the provisional application of treaties with regard to the practice of international organizations. As regards the former, his analysis, which had not been intended to be exhaustive, focused on articles 11 (Means of expressing consent to be bound by a treaty), 18 (Obligation not to defeat the object and purpose of a treaty), 24 (Entry into force), 26 (*Pacta sunt servanda*) and 27 (Internal law and observance of treaties). Those provisions were chosen because they enjoyed a natural and close relationship with provisional application. As regards the provisional application of treaties between States and with international organizations, or among international organizations, the Special Rapporteur observed that the Secretariat's memorandum had clearly indicated that the States took as valid the formulation adopted in the Vienna Convention of 1969. Nonetheless, the Special Rapporteur reiterated his view that an analysis of whether article 25 of the 1969 Convention reflected customary international law would not affect the general approach to the topic.

12. Chapter IV of his report focused on several aspects: (1) international organizations or international regimes created through the provisional application of treaties; (2) the provisional application of treaties negotiated within international organizations, or at diplomatic conferences convened under the auspices of international organizations; and (3) the provisional application of treaties of which international organizations were parties. As regards the creation of the international organizations or international regimes, the Special Rapporteur clarified that he was referring to those international bodies created by treaties, and which played a significant role in the application of the treaty, even though they were not designed to become fully fledged international organizations. With regards the provisional application of treaties negotiated within international organizations, or at diplomatic conferences convened under the auspices of international organizations, the Special Rapporteur referred, in particular, to the establishment of the Organization for the Nuclear Test Ban Treaty (CTBTO). Despite the fact that the convention was not in force, the CTBTO in its transitional form had been operating for nearly twenty years. The Special Rapporteur also referred to more than fifty treaties negotiated under the auspices of ECOWAS, a significant number of which made provision for the provisional application of treaties. He submitted for the consideration of the Commission the possibility of studying the practice of the provisional application of treaties in the context of regional international organizations.

13. In his view, the task before the Commission was to develop a series of guidelines for States wishing to resort to the provisional application of treaties, and he proposed that the Commission could also consider within those guidelines the preparation of model clauses to guide negotiating States. He noted that the six draft guidelines on the provisional application of treaties were the outcome of the consideration of the three reports which had to be read each in the light of the other. The starting point for their drafting was article 25 of both the 1969 and 1986 treaties.

## **2. Summary of the debate**

### **(a) General remarks**

14. The view was generally expressed that national laws and practice on the method for State adherence to treaties, whether or not provisionally, differed considerably, and any attempt at categorization, even if possible, would likely not be pertinent for the purpose of identifying relevant rules under international law. Caution was also advised in regard to the classification of States as to whether their internal law accepted or not, and to what extent, the provisional application of treaties. It was pointed out that in some national legal systems, the possibility of provisionally applying treaties was the subject of ongoing dispute.

15. Others were of the view that domestic rules could not be ignored. There was value in analysing the different domestic laws and practices on the processes applied prior to consenting to provisional application, which could provide greater insights on how States viewed the nature of provisional application as a legal phenomenon. It could, for example, be worth assessing whether States, in their practice, appeared to interpret Article 25 in a manner that suggested that, as a matter of international law, it could only be resorted to by a State where its domestic law so provided. In terms of a similar view, the Commission had to first take a position on the applicability of article 46 of the Vienna Convention (Provisions of internal law regarding competence to conclude treaties) to the provisional application of treaties. It was observed that the interplay between internal law and international law could take two different forms. First, provisions of internal law could address the procedure or conditions for the expression of the consent of a State to its provisional application of the treaty. Second, the relevant provisions of a given treaty sometimes referred also to internal substantive law.

16. It was generally agreed that provisional application of treaties had legal effects and created rights and obligations. The Special Rapporteur was nonetheless called upon to further substantiate his conclusion that the legal effects of provisional application were the same as those of entry into force, and that such effects could not be subsequently called into question in view of the provisional nature of the treaty's application. What was not entirely clear was whether the provisional application would produce the exact same effects as the entry into force of the treaty. Several possibilities were raised. One solution was to compare provisional application to the regime of the termination of treaties, under article 70 of the Vienna Convention. Another possibility was to invoke the solution for the invalidity of the treaty, where acts committed in good faith were enforceable against the parties to the treaty. In terms of a further view, while the legal effects of provisional application might be practically the same as those of entry into force, provisional application was merely provisional, had legal effects for only those States that agreed to apply a treaty provisionally, and for only those parts of a treaty on which there was such agreement. Furthermore, it was suggested that the Special Rapporteur could also address whether the termination and suspension processes for both regimes were identical.

17. Members endorsed the Special Rapporteur's assessment that the effects of a provisionally applied treaty were the same as those stemming from a treaty in force,

including as far as regards the effects of the treaty in the future. It was maintained that a State could not hide behind the fact that the treaty was being provisionally applied to contend that it could not accept the validity of some of the effects produced by that treaty. Accordingly a provisionally applied treaty was subject to the *pacta sunt servanda* rule in article 26 of the Vienna Convention. Its breach would also trigger the operation of the applicable rules on international responsibility for wrongful acts, as in the case of the breach of a treaty in force. In terms of a further view, the distinction between treaties in force and those being provisionally applied was less substantive and more procedural, with provisional application simpler to commence and to end.

18. As regards the example, cited in the report, of the unilateral provisional application of the Chemical Weapons Convention by Syria, the view was expressed by some members that it did not concern provisional application *stricto sensu* under article 25 of the Vienna Convention, unless the Special Rapporteur considered that the agreement of the parties had been evidenced by their silence or inaction in relation to the unilateral declaration. If so, then further analysis of the phrase “have in some other manner so agreement”, in article 25, was needed, with a view to determining whether acquiescence in the form of silence or inaction could represent agreement for the provisional application of the treaty. In terms of another view, the parties in question had tacitly consented to the provisional application of the treaty in view of the fact that the decision by Syria was notified by the depositary to the States Parties and none objected to such decision.

19. As regards future work, it was proposed that the Special Rapporteur focus on the legal regime and modalities for the termination and suspension of provisional application. For example, it would be interesting to know to what extent the provisional application of a treaty might be suspended or terminated by, for example, violations of the treaty by another party which was also applying it provisionally, or in situations where it was uncertain if the treaty would enter into force. The view was expressed that the indefinite continuation of provisional application, particularly given that it allowed for a simplified means of termination as provided in Article 25 (2), could have undesirable consequences.

20. It was also suggested that he could seek to identify the type of treaties, and provisions in treaties, which were often the subject of provisional application, and whether or not certain kinds of treaties addressed provisional application similarly. Likewise, the question of who the beneficiaries of provisional application were was considered worth discussing. It was also suggested that the Special Rapporteur could undertake an analysis of limitation clauses used to modulate the obligations being undertaken in order to comply with internal law, or conditioning provisional application on respect for internal law, although it was generally felt that this was beyond the scope of the topic.

21. Several members supported the view that it was worth drafting model clauses which could be of practical importance to States and international organizations in the context of the draft guidelines. However, the Special Rapporteur was cautioned against developing model clauses on the provisional application of treaties which could prove complex due to the differences between domestic legal systems.

**(b) Relationship with other provisions of the Vienna Convention on the Law of Treaties, of 1969**

22. The report’s treatment of the relationship of article 25 with the other provisions of the 1969 Vienna Convention was welcomed. Nonetheless, it was pointed out that other provisions of the Vienna Convention were also relevant. For example, article 60, since the material breach of a provisionally applied treaty could, under that view, lead to the suspension or termination of the provisional application. In terms of yet another

view, it was to be doubted that article 60 would operate in the same manner in relation to a treaty being provisionally applied. With regard to the relationship with article 26, it was noted that the *pacta sunt servanda* principle could be used to limit the legal confusion which might result from the unilateral termination of provisional application.

23. In terms of another view, it was not necessary to extend the review of the relationship of article 25 to other rules of the law of treaties and also study the relationship with articles 19 and 46 of the Vienna Convention of 1969, as the focus was best placed on specifying the differences between a treaty being provisionally applied and from that in force for a particular State.

**(c) Provisional application with regard to international organizations**

24. Some speakers expressed doubts as to the assertion that the 1986 Vienna Convention, in its entirety, reflected customary international law. It was recalled that the European Union had, for example, taken the view that the provisions of the convention did not reflect customary law. It was noted, however, that it could be possible to assert that Article 25 of the 1969 Vienna Convention, and perhaps Article 25 of the 1986 Vienna Convention, reflected a rule of customary international law. However, further analysis into the matter, in a future report of the Special Rapporteur, would be necessary before any such conclusion could be reached.

25. It was observed that even if a treaty was negotiated within an international organization, or at a diplomatic conference convened under the auspices of an international organization, the conclusion of the treaty was an act of the States concerned and not of the international organization.

26. It was further observed that the provisional application of treaties with international organizations was different. Such arrangements were more complicated, because they were often designed to ensure the greatest participation simultaneously of the most members of the Organization and of the Organization itself. It was considered worth investigating whether international organizations had considered or were considering provisional application as being a useful modality or mechanism, and if they had decided to incorporate it in their legal regimes.

27. It was also suggested that the Special Rapporteur look at other categories of treaties which might enjoy a special form of provisional application. For example, headquarters agreements were not typically permanent, but were often agreed for a specific conference or event to be held by the international organization in the state in question. By their nature they needed to be implemented immediately, and therefore often provided for provisional application.

**(d) Comments on the draft guidelines**

28. In general, members supported the approach taken by the Special Rapporteur to prepare draft guidelines for the purpose of providing States and international organizations with a practical tool. Some members were, however, of the view that the draft guidelines proposed by the Special Rapporteur were better presented as draft conclusions. Another general remark was that it would be better to separate the case of States from that of international organizations.

29. Several drafting suggestions were made concerning draft guideline 1, with a view to bringing the provision more into line article 25 of the Vienna Convention. For example, it was noted that the reference to internal law not prohibiting provisional application did not appear to be in accordance with article 25, and needed to be deleted since it suggested that States could turn to their national laws to escape an

obligation in a treaty being provisionally applied. It was also suggested that the draft guideline could be coupled with another on the scope of the draft guidelines.

30. Concerning draft guideline 2, it was proposed that the reference to a resolution by an international organization be clarified. The view was expressed that resolutions in many cases could not be equated with the agreement establishing provisional application. It was also suggested that reference be made to other forms of agreement such as an exchange of letters or diplomatic notes. In terms of a further view, the provision could also be clearer as to the possibility of acquiescence by negotiating or contracting States to provisional application by a third State.

31. Regarding draft guideline 3, it was suggested, *inter alia*, that the provision could be simplified; and that reference be made to the fact that provisional application was only occurring prior to the entry into force of the treaty for the relevant party. It was suggested that the elements of the means of expressing consent, and the temporal starting point of provisional application, could be separated into two draft guidelines.

32. It was suggested that the term “legal effects” in draft guideline 4 be clarified and the provision further developed, since it was the key provision of the draft guidelines. For example, it could be considered whether the obligations of provisional application extended to the whole treaty or only to select provisions. Another possibility was to indicate that the legal effect of provisional application of a treaty could continue after its termination. In terms of a further suggestion the provision could be drafted taking into account the formulation of article 26 of the Vienna Convention, and that it be specified that a provisional application of a treaty could not result in the modification of the content of the treaty.

33. Concerning draft guideline 5, it was suggested that it be clarified that the effects of obligations arising from provisional application depended on what States had provided for when they agreed upon the provisional application. Furthermore, it was necessary to take into account which entry into force of treaty was being referred to, i.e., of the treaty itself or of the entry into force for the State itself. It was observed that when a multilateral treaty entered into force, provisional application terminated only for those States that had ratified or acceded to the treaty. Provisional application continued, however, for any State that had not yet ratified or acceded to the treaty, until such time as the treaty entered into force for that State. The view was also expressed that the draft guideline could recognize the possibility of setting specific terms for the termination of provisional application.

34. While some members expressed doubts on the need to include draft guideline 6, others expressed support. It was pointed out that the draft guideline had omitted the question of whether the unilateral suspension or termination of provisional application was wrongful under international law, thereby triggering the rules of international law on the responsibility of states for internationally wrongful acts.

### **3. Concluding remarks of the Special Rapporteur**

35. The Special Rapporteur indicated that, in his opinion, article 25 of the Vienna Convention was the point of departure for the Commission’s consideration of the topic. It could go beyond the article only to the extent that it proved useful to ascertain the legal consequences of provisional application. In his view, the primary beneficiary of provisional application was the treaty itself, since it was being applied despite not being in force. In addition, those negotiating States who could partake in the provisional application were also potentially beneficiaries.

36. The Special Rapporteur observed that the preponderance of views within the Commission were not in favour of undertaking a comparative study of internal legislation applicable to provisional application. At the same time, he recalled that he

continued to receive submissions from member States as to their practice, which invariably also included information about the prevailing position under their respective internal law. Nonetheless, this did not contradict his stated intention of not undertaking a comparative law analysis, as the primary focus was on the international practice of States. To remove any doubt, he could accept the suppression of the reference to internal law in draft guideline 1, and to discuss the matter instead in the corresponding commentary.

37. The Special Rapporteur did not agree with the assertion that the provisional application of a treaty might also be terminated if it were uncertain that the treaty would enter into force, or if it had been applied provisionally for a prolonged period of time. In his view, it was not feasible to refer to termination of provisional application of the treaty solely on the basis of the unpredictability of its entry into force. Furthermore, article 25 imposed no such limitation on the termination of provisional application.

38. He indicated his intention to consider the question of the termination of provisional application and its legal regime, in his next report, together with a study of other provisions in the Vienna Convention of relevance to provisional application, including articles 19, 46 and 60.

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