

Agenda item No. 82

Report of the International Law Commission

Cluster I - **Provisional application of treaties**

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At the 18th Plenary meeting of

Sixth committee

27 October 2021.

Madame Chair,

Thank you for giving me the floor.

I would like to make a few brief remarks with respect to the work of the International Law Commission on the topics concerning provisional application of treaties. Reports submitted by International Law Commission will certainly have significant impact on the development of the practice of states in the field that is not free from legal difficulties and uncertainty. However, it seems that further work is needed in order to complete the topic and to provide proper guidelines in this very sensitive field of international treaty law.

It seems that one of the problems concerning provisional application of the treaties is contained in its determination provided, *inter alia*, in Guideline 3 “A treaty or a part of a treaty is applied provisionally pending its entry into force .... if the treaty itself so provides, or if in some other manner it has been so agreed.”

All of the elements of this determination are subject to other guidelines. However, what remains problematic is the part of this provision stating ---in English - “pending its entry into force”, or--- in Russian “до его вступления в силу”. In fact, during provisional application it is uncertain whether a treaty will enter into force or not.

The very definition of the provisional application of treaties should reflect commencement and termination of provisional application. While it could be reasonably expected that in ordinary state of affairs provisional application shall be terminated when a treaty enters into force, that might not be the case for variety of reasons. Some of those reasons could be justified, some not. Well known ground for termination of the provisional application is when the State or international organization provides notification of its intention not to become a party to a treaty. However, as reflected in Guideline 9, provisional application may be terminated without necessarily expressing intention not to become a party to a treaty, but that possibility needs to be agreed in advance of provisional application. That clearly follows from the Article 25 of the Vienna Convention on the Law of Treaties.

Whether the State or international organization will express its consent to be bound by a treaty is, at the time of provisional application, uncertain, and it seems that that should be clearly reflected in guidelines and corresponding commentaries.

In the general commentary, the ILC has provided that “provisional application serves the overall purpose of preparing for or facilitating the entry into force of the treaty”.

While fully in agreement with this position, it might be the case that termination of the provisional application could be done in good, or bad faith, taking benefit of provisional application without real intention to express consent to be bound by the treaty.

In this context, it seems desirable that the ILC provide a more detailed analysis of the termination of provisional application of treaty and the possible consequences thereof, particularly whether under certain circumstances termination of provisional application could give rise to state responsibility. It seems that Guideline 8 (Responsibility for breach) does not fully cover the situations of unlawful termination of the provisional application. It seems that the relationship between Guideline 9 and Guideline 8 should be further examined, in order to provide appropriate guideline to state practice and to indicate on possible consequences of acting in bad faith.