Provisionally Applied Treaties: Their Binding Force and Legal Nature

By
Anneliese Quast Mertsch

BRILL

LEIDEN • BOSTON
2012
CONTENTS

2.2.3. Unambiguous Reference to Provisionally Applied Treaties ............................................. 25
2.2.4. A Provision on Provisional Application ................................................................. 27
2.2.5. Conclusion ................................................................................................................ 27
2.3. The Drafting of the Provision ......................................................................................... 28
  2.3.1. The Drafting of the Provision Within the ILC .......................................................... 28
    2.3.1.1. The Retention or Deletion of (then) Draft Article ................................................... 30
    2.3.1.2. The Legal Force of Provisionally Applied Obligations ............................................. 32
    2.3.1.3. The Termination of Provisional Application ........................................................... 35
    2.3.1.4. The Terminology of the Mechanism ........................................................................ 39
    2.3.1.5. Constitutional Law and Provisional Application ....................................................... 42
    2.3.1.6. Conclusion ............................................................................................................ 43
  2.3.2. The Drafting of the Provision at the 1968–1969 Vienna Conference ............................... 44
    2.3.2.1. The Retention or Deletion of a Draft Article on Provisional Application .................. 44
    2.3.2.2. The Terminology for the Mechanism ....................................................................... 47
    2.3.2.3. The Legal Force of Provisionally Applied Obligations .............................................. 49
    2.3.2.4. The Termination of Provisional Application ............................................................ 54
    2.3.2.5. Constitutional Law and Provisional Application ....................................................... 57
    2.3.2.6. Conclusion ............................................................................................................ 59
  2.3.3. Conceptualisation and Codification in Light of the Uncertainty Surrounding Provisional Application ................................................................. 60
B. Provisional Application in Internal Law ............................................................................ 62
  3. Internal Regulation of and Approaches towards Provisional Application ............................ 62
  4. Internal Issues to Which Provisional Application can Give Rise ........................................ 64
  5. Internal Acceptance of Provisional Application .................................................................. 70
  6. Conclusion ...................................................................................................................... 72
II The View that Provisionally Applied Treaties are Non-Legally Binding

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>73</td>
</tr>
<tr>
<td>2. The Discretion Allowed by Provisional Application</td>
<td>76</td>
</tr>
<tr>
<td>2.1. The Effect of the Power of Unilateral Termination</td>
<td>77</td>
</tr>
<tr>
<td>2.1.1. Article 25(2) and the Principle of <em>Pacta Sunt Servanda</em></td>
<td>78</td>
</tr>
<tr>
<td>2.1.2. The Problem in Context: Academic Writings and the VCLT 1969</td>
<td>80</td>
</tr>
<tr>
<td>2.1.3. The Extent of the Discretion Accorded to States to Unilaterally Terminate</td>
<td>82</td>
</tr>
<tr>
<td>2.1.4. The Absence of General Compulsory Jurisdiction</td>
<td>85</td>
</tr>
<tr>
<td>2.1.5. Evidence that a Power of Unilateral Termination does not Necessarily Imply Absence of Legally Binding Force</td>
<td>86</td>
</tr>
<tr>
<td>2.1.6. Conclusion</td>
<td>89</td>
</tr>
<tr>
<td>2.2. The Hierarchy between a Provisionally Applied Treaty and Internal Law</td>
<td>89</td>
</tr>
<tr>
<td>2.2.1. Introduction</td>
<td>89</td>
</tr>
<tr>
<td>2.2.1.1. The Reception of Treaties in Internal Law</td>
<td>90</td>
</tr>
<tr>
<td>2.2.1.2. International Law and the Relationship between Treaties and Internal Law</td>
<td>93</td>
</tr>
<tr>
<td>2.2.2. Provisional Application and the Possibility of Invoking Internal Law</td>
<td>95</td>
</tr>
<tr>
<td>2.2.2.1. The Written Bases for the Possibility of Invoking Internal Law</td>
<td>95</td>
</tr>
<tr>
<td>2.2.2.2. Is this Possibility a General Feature of Provisional Application?</td>
<td>103</td>
</tr>
<tr>
<td>2.2.2.3. The Link between the Possibility of Invoking Internal Law and the Binding Force of a Provisionally Applied Treaty</td>
<td>106</td>
</tr>
<tr>
<td>2.2.2.4. The Critical Date for Determining the Reference to 'Internal Law'</td>
<td>110</td>
</tr>
<tr>
<td>2.2.2.5. Conclusion</td>
<td>112</td>
</tr>
<tr>
<td>2.3. Third Party Interpretation and the Discretion Allowed by Provisional Application</td>
<td>112</td>
</tr>
</tbody>
</table>
III The View that Provisionally Applied Treaties are Legally Binding
1. Introduction
   A. Arguments for the View that Provisionally Applied Treaties are Legally Binding
      2. Similarity to Treaties in Force
         2.1. Provisionally Applied Treaties as Treaties Provisionally in Force
         2.2. ‘Entry into Force’ and ‘Application’ in the VCLT 1969
         2.3. ‘Entry into Force’ and ‘Application’ in Academic Writings and Treaty Practice
         2.4. Does ‘Application’ Imply That the Treaty is Binding?
      2.5. Conclusion
   3. The Intention of the Participants to be Bound by Provisionally Applied Treaties
      3.1. The Argument that Agreements on Provisional Application are Legally Binding because they are “Governed by International Law”
      3.2. The Argument that the Purpose of Provisional Application Implies a Legally Binding Obligation
      3.3. The Argument that Provisionally Applied Treaties are Legally Binding on the Basis of Legitimate Expectations (‘Vertrauensschutz’)
         3.3.1. Does the Relevant Conduct Give Rise to Legitimate Expectations?
         3.3.2. Legitimate Expectations and Good Faith as Source of Obligations
      3.4. Evaluation and Conclusion
   4. The (Collateral) Agreement Approach
   5. Conclusion
B. Explanations for the Legal Effects of a Treaty Awaiting its Entry into Force
   6. Introduction
6.1. A Collateral Agreement as Legal Construct and Formal Source ......................................................... 143
6.2. Other Legal Constructs and Substitute Sources .......... 144
   6.2.1. The Notification or Declaration of Provisional Application ........................................................................ 145
   6.2.2. The Final Clause in Which Provisional Application is Agreed and Reference to Article 24(4) .................................................. 147
   6.2.2.1. Partial, Anticipated Entry into Force of the Treaty ................................................................. 150
   6.2.2.2. Retroactive Effect of the Treaty .................................................. 151
   6.2.2.3. Legal Effect of a Signed but Unratified Treaty ........................................................................... 152
   6.2.2.4. Consent at the Time of the Adoption of the Text of the Treaty ...... 153
   6.2.2.5. Practical Reasons for Treating a Treaty not in Force as a Treaty .................................................. 154
6.3. Conclusion ........................................................................................................... 157
7. Conclusion ............................................................................................................ 158

IV. The Binding Force of Provisionally Applied Treaties in the Practice of States and International Organisations .................................................................................. 161
   1. Introduction .................................................................................................... 161
A. The Views Expressed by States and International Organisations ...................................................................... 161
   2. The View that Provisionally Applied Treaties are Legally Binding ........................................................................... 161
      2.1. The 1968–1969 Vienna Conference .................................................. 162
      2.2. Institutional Responses to the 2007–2008 Questionnaire ................................................................. 163
      2.3. Responses to the Council of Europe Questionnaire ........................................................................... 164
      2.4. Opinions of Legal Advisers ........................................................................... 167
      2.5. Support in other 'Sources' ........................................................................... 169
      2.5.1. The Understanding of the ILC and Some of its Members ................................................................. 169
2.5.2. The Yukos and Kardassopoulos Tribunals

2.5.3. Personal Responses to the 2007–2008 Questionnaire

2.6. Evaluation: Provisionally Applied Treaties as 'Pacta' and the Role of Intention

2.7. Conclusion

3. The View that Provisionally Applied Treaties are not Legally Binding

3.1. Provisional Application is Similar to Article 18

3.2. Provisionally Applied Treaties are Considered to be Soft Law

3.3. Conclusion

4. The View that Provisionally Applied Treaties can be Legally Binding or Non-Legally Binding

4.1. International Practice

4.2. Support in other 'Sources'

4.3. Evaluation and Conclusion

5. The Provisional Entry into Force and Application of Commodity Agreements

5.1. Introduction

5.1.1. The Need for Provisional Entry into Force and Provisional Application

5.1.2. The Operation of Provisional Entry into Force and Provisional Application

5.2. The Binding Force of Commodity Agreements Provisionally in Force

5.3. The Legal Effects of the Provisional Application of Commodity Agreements

5.3.1. The View that Provisional Application of Commodity Agreements Involves Legally Binding Rights and Obligations

5.3.2. The View that a Declaration of Provisional Application is Non-Legally Binding

5.3.3. Evaluation and Conclusion

6. Conclusion

B. The Binding Force of Provisionally Applied Treaties: Treaty Practice and the Intention of the 'Parties'

7. Introduction

8. The Wording and Content of Agreements on Provisional Application
Concluding Remarks ................................................................. 235
Appendix (2007–2008 Questionnaire) ...................................... 245
Bibliography ............................................................................... 253
Bibliography of Literature on the Provisional Application of Treaties ........................................................................ 265
Index ............................................................................................ 269