



Statement on behalf of the European Union

By

Eglantine Cujo

Legal Adviser

Delegation of the European Union to the United Nations

at the Sixth Committee

on

Agenda item 78

on

"Provisional application of treaties"

and

"Identification of customary international law"

United Nations

New York

3 November 2014

- CHECK AGAINST DELIVERY -

Mr. Chairman,

The European Union has the honour to address the Sixth Committee on the work of the International Law Commission relating to the topic of provisional application of treaties, in particular considering the second report on the topic presented by the Special Rapporteur Juan Manuel Gómez-Robledo.

The Candidate Countries Turkey, the former Yugoslav Republic of Macedonia*, Montenegro*, Serbia* and Albania*, the country of the Stabilisation and Association Process and potential candidate Bosnia and Herzegovina, as well as the Republic of Moldova and Georgia, align themselves with this statement.

The European Union welcomes the work of the international Law Commission on the topic of provisional application of treaties and reiterates its interest in the important role that the ILC could play in providing guidance and enhancing the understanding of this instrument of international law.

The Union also welcomes the Second Report of the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, and appreciates his efforts to set the general framework of issues to be further considered in the course of the work on the topic of provisional application of treaties.

The Union understands that the work is still at its early phase and more detailed considerations will follow. In this respect, at this stage, the Union would make only some general comments.

The Union agrees that the focus of the analysis should be on the legal effects at the international level, rather than carrying out a comparative analysis of domestic law.

The second report contains an interesting analysis of the legal effects of provisional application. It already makes some distinctions and observations, for example, on the differentiation between agreements that produce effects primarily within a State from those that have effects at international level; on the different sources of obligation (the treaty itself or a parallel agreement); as well as on forms and issues connected with termination of provisional application. These are all important aspects and the Union is looking forward to the further analysis of these issues.

The Union would like to note that it may be beneficial to the practical value of the final outcome of the work of the ILC on this topic if the work focuses on some selected issues that are felt important in practice and which have the potential of presenting a difficulty when parties decide to resort to provisional application of treaties. During the consideration of the second Report the ILC members already pointed to a number of interesting issues that could be studied further.

The Union takes the opportunity to recall that in its last year's statement, it pointed to some specific issues for consideration, for example:

- to what extent provisions involving institutional elements, like provisions establishing joint bodies, may be subject to provisional application or whether there are limitations in that respect;

* *The former Yugoslav Republic of Macedonia, Montenegro, Serbia and Albania continue to be part of the Stabilisation and Association Process.*

- whether provisional application should also extend to provisions adopted by such joint bodies during provisional application;
- whether are there limitations with regard to the duration of the provisional application;
- how the provisional application provided for in Article 25 of the Vienna Convention on the Law of the Treaties (VCLT) relates to the other provisions of VCLT and other rules of international law, including responsibility for breach of international obligations.

The Special Rapporteur already briefly touched upon some of these matters but further more detailed analysis would be welcomed.

The European Union notes that the Special Rapporteur intends to address the provisional application of treaties by international organisations as part of his future work. In this respect, the Union would like to point out that the possibility for provisional application of international agreements with third countries is explicitly envisaged in the Union's Founding Treaties (Article 218(5) TFEU) and this possibility is often used in practice by the EU. Indeed, if the Special Rapporteur takes the opportunity to look at the practice of the Union, he will find ample material for analysis. Should in the course of the considerations specific questions arise, the European Union would be pleased to address them on the basis of its own practice, including by providing more detailed information about its practice.

In concluding, the European Union reiterates its interest in the topic and looks forward to the further work of the International Law Commission in this important area.

Thank you for your attention.

Mr. Chairman,

The European Union has the honour to address the Sixth Committee on the work of the International Law Commission relating to the topic of Identification of customary international law (CIL), in particular considering the second report on the topic presented by the Special Rapporteur Michael Wood.

The Candidate Countries Turkey, the former Yugoslav Republic of Macedonia*, Montenegro*, Serbia* and Albania*, the country of the Stabilisation and Association Process and potential candidate Bosnia and Herzegovina, as well as the Republic of Moldova and Georgia, align themselves with this statement.

The European Union also notes that the Drafting Committee of the ILC has provisionally adopted 8 draft conclusions. Although at this stage these draft conclusions were presented to the ILC for information only, the European Union will take this opportunity to express some preliminary considerations on the texts.

At the outset the European Union would like to commend the Special Rapporteur for the high quality of his second report. The European Union particularly appreciates that, notwithstanding the complex and theoretical nature of the issues related to the two constituent elements of CIL, the Special Rapporteur has not lost sight of the practical purpose of the work of the ILC on this topic aiming to give guidance on the process of identification of customary international law.

It is apparent from the report of the ILC, as well as from the reports of the Special Rapporteur and the Drafting Committee, that there are divergent views in the ILC on the role of international organisations regarding the formation of CIL. It is clear, both historically and today, that the practice of States is central in the formation of customary international law. However, over the last decades the international community has experienced developments by which international organisations play an increasing role in international relations, including in their norms setting.

These developments are particularly visible in the case of regional (integration) organisations such as the European Union. As regards the role of the European Union on the international scene, the following observations should be made in this context.

Firstly, the European Union has legal personality and is subject of international law exercising rights and bearing responsibilities.

Secondly, it is important to note that the EU has full treaty making capacity, which follows from the competences conferred on it by its Member States in many important areas such as trade, development, fisheries, and the environment, to name but few. It is also important to note that the EU is recognized by others as a treaty partner in a large number of multilateral and bilateral treaties, either on its own or alongside its Member States.

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Thirdly, it should be stressed that implicit in this recognition of the EU as a treaty partner is the view that international community considers an organization such as the EU as also capable of contributing to the development of international law in other contexts, including the formation of customary international law. In this context, too, the Union's action is based on the responsibilities that the Member States have trusted on it. Indeed, the EU's founding treaties provide that the Union "shall contribute to the strict observance and the development of international law" (TEU Article 3(5)). In light of the above considerations, the Union could only agree with the Special Rapporteur that "*practice of at least certain international organizations in certain fields, such as in relation to treaties, privileges and immunities, or the internal law of international organizations, could not be dismissed*" (paragraph 175 of the ILC Report).

The Special Rapporteur has illustrated the special characteristic of the European Union by pointing out that there are areas where only the European Union can act on the international plane but not its Member States, unless authorised to do so. The Special Rapporteur also notes correctly that not taking into account the practice of the EU in these areas would effectively imply that the Member States of the Union (now 28 European States) would be limited in their ability to contribute to the formation of customary international law (paragraph 44 of the Second Report). That would be the case in the areas of trade or fisheries matters, for instance. Indeed, in areas where, according to the rules of the EU Treaties, only the Union can act it is the practice of the Union that should be taken into account with regard to the formation of customary international law alongside the implementation by the Member States of the EU legislation.

The European Union invites the International Law Commission to consider these aspects in an adequate way in its coming work. We understand that the Special Rapporteur intends to cover in detail in his third report the aspect of the role of the practice of international organisations (para 43) and is looking forward to his considerations.

The European Union will now turn to the concrete draft conclusions provisionally adopted by the Drafting Committee.

In light of the above considerations, the European Union welcomes the explicit inclusion in draft conclusion 4 of a reference to practice of international organisations. The Union notes that the Drafting Committee intends to revisit this paragraph following the third report of the Special Rapporteur and the Union take the opportunity to express its support for the retention of this text. In addition, the Union urges the ILC to take the same approach in the draft conclusions that follow (5 to 7 for the time being) and have specific paragraphs devoted to international organisations there too. The European Union reserves its right to make concrete drafting suggestions, if need be, when the texts of the draft conclusions are formally presented.

In concluding, the European Union would like to reiterate its interest in the topic of identification of customary international law and its intention to actively participate in its consideration in the future.

Thank you for your attention.

