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Information regarding the "Provisional Application of Treaties" in the Commission's programme of work

The International Law Commission requested States to provide information on their practice concerning the provisional application of treaties, in particular in relation to a) the decision to provisionally apply a treaty; b) the termination of such provisional application; and c) the legal effects of provisional application.

Ad a) In general, the question of whether a treaty should be provisionally applied already arises while the treaty is under negotiation, thus allowing for a corresponding provision to be included in the text of the treaty. If the Parties are interested in making the treaty effective as soon as possible, while at the same time national ratification or other procedures on the part of one or both of the Parties stand in the way of a quick entry into force, they will further examine this option.

Provisional application is not considered a routine provision to be included in every treaty. It is included in a treaty only if considered necessary. The majority of German bilateral agreements does not provide for provisional application.

For Germany, the decision to include a provision on provisional application in a treaty will depend on a legal evaluation of the treaty clauses. The question is whether compliance with the treaty requires an adaptation of national rules and regulations or whether national rules and regulations are already in keeping with the treaty obligations. In Germany, provisional application of a treaty is possible only if and to the extent national laws and regulations are compatible with treaty obligations so that the national legal situation permits fulfilment of the treaty.

In addition, article 59 para. 2 of the Basic Law provides that a treaty requires parliamentary approval if it touches upon matters that, under the constitutional distribution of powers, are to be decided by the legislature. Hence, in cases where parliamentary approval is required, Germany will be reluctant to agree to unlimited provisional application, even if compliance technically would not pose a problem. Instead, clauses providing for "provisional application in accordance with domestic legislation" will be included, the respective clause indicating that provisional application might be limited and in fact limiting provisional application to those provisions of the treaty with which the German legal framework is compatible or for which parliamentary approval is not required (cf. Agreement on the International Tracing Service of December 9, 2011).

Clauses expressly limiting provisional application to certain clearly defined provisions of a treaty are often used in so-called mixed agreements between the EU and its Member States on the one hand and a third party on the other, e.g. association agreements or agreements of partnership and cooperation. The process leading to the insertion of such a clause on partial provisional application includes defining which of the treaty provisions fall under EU competence and whose provisional application is to be authorised by a council decision under article 218 para. 5 TFEU. In this process, it is also determined which of the treaty provisions remain under national competence and which of those are open to provisional application under the various constitutional requirements of the Member States. The aim is to ensure maximum clarity as to which parts of the agreement are subject to provisional application.

In some cases, the need for provisional application is not foreseen while the text of the treaty is being negotiated but is felt at a later stage. A very prominent example for this is the case of Protocol No 14 to the ECHR. Other examples include the agreements on cultural cooperation concluded by Germany with a number of States in 1993/1994. The considerations regarding compatibility with national law will be the same.

Ad b) In practice, in the vast majority of cases, the provisional application of treaties to which Germany is a Contacting Party is terminated because the treaty in question enters into force. The events noted in Germany's official bulletins are the beginning of provisional application and the entry into force of the treaty; not the termination of its provisional application. In these cases, the termination of provisional application does not involve an exchange of notes with the other Party or Parties to the treaty.

In one case, a bilateral agreement that never entered into force but has been applied provisionally for almost 20 years is now in the process of being replaced by a new agreement. The new draft includes a provision on the termination of the provisional application of the old agreement. Apart from this case, there are no other examples of treaties that were provisionally applied by Germany and the provisional application of which was terminated without the treaty actually entering into force.

Ad c) It follows from the above that a provisionally applied treaty is considered an instrument which creates legal obligations and is perceived as a sound basis for further action. Today's functioning of the International Tracing Service serves as an example.