

B. Information concerning the practice of the United Nations, its Funds and Programmes, the Specialized Agencies and related organizations, as well as of other international organizations, including regional international organizations, and other entities

1. United Nations

Communication from the Treaty Section, Office of Legal Affairs, 14 July 2022:

The practice of the Secretariat of the United Nations in the provisional application of treaties draws from the registration of treaties under Article 102 of the *Charter of the United Nations*.

Regarding the registration practice of the Secretariat, its origins can be traced back to the discussions of the Sixth Committee during the first session of the General Assembly.¹⁶⁴ Subsequent practice in relation to the provisional application of treaties can be found in the report of the Secretary-General entitled “Review of the regulations to give effect to Article 102 of the Charter of the United Nations”¹⁶⁵ and as later included in the Article I(2) of the *General Assembly Regulations to give effect to Article 102 of the Charter of the United Nations* annexed to General Assembly resolution 76/120 of 9 December 2021.

The provisions of a treaty will set up the modalities by which it enters into force and whether it is applied provisionally. For multilateral treaties deposited with the Secretary-General, on behalf of which the Treaty Section performs depositary functions, when they provide for provisional application, the Treaty Section processes and circulates any notification of provisional application.

The Treaty Handbook and the *Final Clauses of Multilateral Treaties Handbook* publications constitute additional resources on the matter.

*The Treaty Handbook (Extracts)*¹⁶⁶

3.4 Provisional application

(See the *Summary of Practice*, para. 240.)

Some treaties provide for provisional application, either before or after their entry into force. For example, article 7 (1) of the *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994*, provides

If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force.

The *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995*, also provides for provisional application, ceasing upon its entry into force. Article 56 of the *International Cocoa Agreement, 2010*, also provides for provisional application with effect from the entry into force of the Agreement or, if it is already in force, at a specified date.

¹⁶⁴ See: *Repertory of Practice of United Nations Organs*, Vol. V (1945–1954), paras. 32–34.

¹⁶⁵ See: Doc. A/75/136, para.12.

¹⁶⁶ Revised Edition, 2012, United Nations Sales No. E.12.V.1, pp. 11, 69. Available at: <https://treaties.un.org/doc/source/publications/THB/English.pdf>.

A State provisionally applies a treaty that has entered into force when it unilaterally undertakes, in accordance with its provisions, to give effect to the treaty obligations provisionally, even though its domestic procedural requirements for international ratification, approval, acceptance or accession have not yet been completed. The intention of the State would generally be to ratify, approve, accept or accede to the treaty once its domestic procedural requirements have been met. The State may unilaterally terminate such provisional application at any time unless the treaty provides otherwise (see article 25 of the *Vienna Convention [of the Law of Treaties,] 1969*). In contrast, a State that has consented to be bound by a treaty through ratification, approval, acceptance, accession or definitive signature is governed by the rules on withdrawal or denunciation specified in the treaty as discussed in section 4.5 (see articles 54 and 56 of the *Vienna Convention 1969*).

[...]

Glossary

[...]

provisional application of a treaty that has entered into force

Provisional application of a treaty that has entered into force may occur when a State unilaterally undertakes to give legal effect to the obligations under a treaty on a provisional and voluntary basis. The State would generally intend to ratify, accept, approve or accede to the treaty once its domestic procedural requirements for international ratification have been satisfied. The State may terminate this provisional application at any time. In contrast, a State that has consented to be bound by a treaty through ratification, acceptance, approval, accession or definitive signature generally can only withdraw its consent in accordance with the provisions of the treaty or, in the absence of such provisions, other rules of treaty law.

See article 24 of the *Vienna Convention 1969*.

provisional application of a treaty that has not entered into force

Provisional application of a treaty that has not entered into force may occur when a State notifies the signatory States to a treaty that has not yet entered into force that it will give effect to the legal obligations specified in that treaty on a provisional and unilateral basis. Since this is a unilateral act by the State, subject to its domestic legal framework, it may terminate this provisional application at any time.

A State may continue to apply a treaty provisionally, even after the treaty has entered into force, until the State has ratified, approved, accepted or acceded to the treaty. A State's provisional application terminates if that State notifies the other States among which the treaty is being applied provisionally of its intention not to become a party to the treaty.

See article 25 of the *Vienna Convention 1969*.

Final Clauses of Multilateral Treaties Handbook (Extracts)¹⁶⁷

G. *Provisional application of a treaty*

1. Provisional application of a treaty before its entry into force

Provisional application of a treaty may occur when a State unilaterally decides to give legal effect to the obligations under a treaty on a provisional and voluntary basis. This provisional application may end at any time.

¹⁶⁷ UN Sales No. E.04.V.3 (2003), at pp. 42–44. Available at: <https://treaties.un.org/doc/source/publications/FC/English.pdf>.

A treaty or part of it is applied provisionally pending its entry into force if either the treaty itself so provides or the negotiating States, in some other manner, have so agreed. Article 25 (1) of the Vienna Convention, 1969, states:

Provisional application

A treaty or a part of a treaty is applied provisionally pending its entry into force if:

- (a) the treaty itself so provides; or
- (b) the negotiating States have in some other manner so agreed.

The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997, article 18 states:

Provisional application

Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally paragraph 1 of Article 1 of this Convention pending its entry into force.

Also, article 7 of the *Agreement relating to the implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea, 1994*, provides:

Provisional application

1. If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force by:

- (a) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which before 16 November 1994 notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing;
- (b) States and entities which sign this Agreement, except any such State or entity which notifies the depositary in writing at the time of signature that it will not so apply this Agreement;
- (c) States and entities which consent to its provisional application by so notifying the depositary in writing;
- (d) States which accede to this Agreement.

2. All such States and entities shall apply this Agreement provisionally in accordance with their national or internal laws and regulations, with effect from 16 November 1994 or the date of signature, notification of consent or accession, if later.¹⁶⁸

Article 308 (4) of the *United Nations Convention on the Law of the Sea, 1982*, stipulates:

4. The rules, regulations and procedures drafted by the Preparatory Commission shall apply provisionally pending their formal adoption by the Authority in accordance with Part XI.

¹⁶⁸ The *Agreement relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea, 1994*, applied provisionally with effect from 16 November 1994, the date on which the *United Nations Convention on the Law of the Sea, 1982*, entered into force.

Unless the treaty provides otherwise a State may unilaterally terminate such provisional application at any time upon notification to the depositary.¹⁶⁹

2. Provisional application of a treaty after its entry into force

Provisional application is possible even after the entry into force of a treaty. This option is open to a State that may wish to give effect to the treaty without incurring the legal commitments under it. It may also wish to cease applying the treaty without complying with the termination provisions. The *International Cocoa Agreement*, 1993, article 55 (1) provides:

Notification of Provisional Application

1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government for which the Council has established conditions for accession, but which has not yet been able to deposit its instrument, may at any time notify the depositary that, in accordance with its constitutional procedures and/or its domestic laws and regulations, it will apply this Agreement provisionally either when it enters into force in accordance with article 56 or, if it is already in force, at a specified date. Each Government giving such notification shall at that time state whether it will be an exporting Member or an importing Member.¹⁷⁰

Extracts from the fourth report on the provisional application of treaties, by Juan Manuel Gómez-Robledo, Special Rapporteur:¹⁷¹

105. The International Court of Justice has held that the United Nations is the *supreme* type of international organization and could not carry out the intentions of its founders if it was devoid of international personality.¹⁷² Indeed, the United Nations has a unique character that is projected in a very special relationship in respect of the law of treaties. In view of its legal capacity, the United Nations may sign treaties.

106. The Secretariat of the United Nations, for its part, performs the functions of registration and publication of treaties, under Article 102, paragraph 1, of the Charter of the United Nations, and carries out the functions of the Secretary-General as depositary of treaties, in the latter case when the treaty so provides.

107. With the valuable assistance of the Treaty Section of the Office of Legal Affairs, a description of how the Secretariat works with respect to the provisional application of treaties, in the framework of its registration functions and the depositary functions of the Secretary-General, is presented below.

¹⁶⁹ See paragraph 2 of article 25 of the *Vienna Convention, 1969*. Article 25 (2) of the *Vienna Convention, 1969*, deals with the difference between termination of the provisional application and termination of or withdrawal from a treaty by consent of the parties as provided in article 54 of the *Vienna Convention, 1969*. Pursuant to article 54, a State may terminate the provisional application at any time but a State that has expressed its consent to be bound by a treaty through definitive signature, ratification, acceptance, approval or accession, generally can only withdraw or terminate it in accordance with the treaty provisions or in accordance with general rules of treaty law.

¹⁷⁰ See also the *International Agreement on Olive Oil and Table Olives*, 1986 (article 54), and the *International Sugar Agreement*, 1992 (article 39).

¹⁷¹ Doc. A/CN.4/699 (2016).

¹⁷² *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, *I.C.J. Reports 1949*, p. 179. See also *I.C.J. Summaries 1948–1991*, p. 10.

1. Registration functions

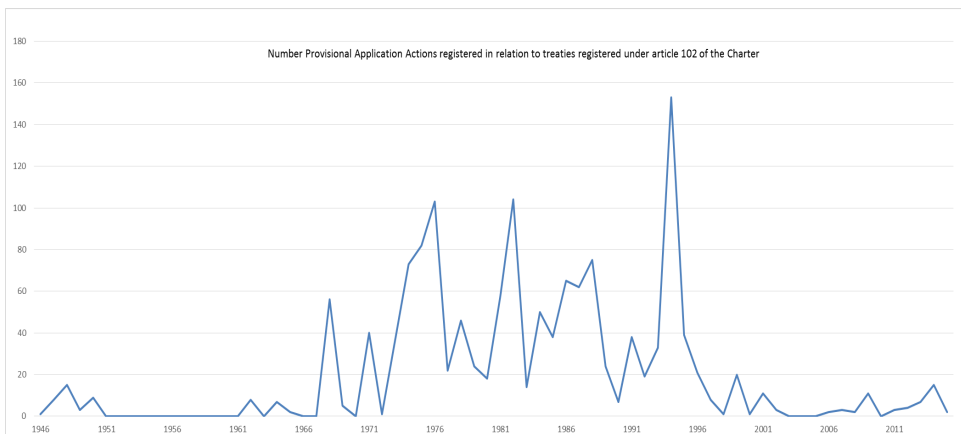
108. Article 102, paragraph 1, of the Charter of the United Nations stipulates the following:

Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

Currently, 53,453 original treaties are registered with the United Nations, amounting to more than 70,000 if one includes subsequent original treaties and agreements. Taking into account all treaties and related actions, the total comes to over 250,000 registrations.¹⁷³

109. On average, about 2,400 treaties and related actions are registered each year with the United Nations.¹⁷⁴ A detailed review of the information gathered from the registration of actions reveals that in some years the number of registrations is particularly high, owing to the fact that certain treaties elicit a greater number of acceptances of provisional application. For example, mainly due to commodity agreements, there were 56 actions on provisional application in 1968; in 1973, there were 103 such actions; in 1982, 104 were registered; in 1988, 75 were registered; and in 1994, 153 were registered. In the last-mentioned year (1994), 113 of the actions on provisional application registered refer exclusively to the Agreement for the Implementation of Part XI of the *United Nations Convention on the Law of the Sea of 10 December 1982*.¹⁷⁵ The following graph, provided by the Treaty Section of the Secretariat, shows some points in time when registered provisional application actions were at a peak.

Number of provisional application actions registered in relation to treaties registered under Article 102 of the Charter of the United Nations



110. It is interesting to note that a large part of the registered actions took place subsequently to the entry into force of the 1969 Vienna Convention. This graph also gives an idea of the vast practice that has existed through the years with respect to recourse to provisional application, going beyond the simple inclusion of a provisional application

¹⁷³ Registrations may be consulted at <https://treaties.un.org>.

¹⁷⁴ Strengthening and coordinating United Nations rule of law activities. Report of the Secretary-General (A/70/206, 27 July 2015, para. 11).

¹⁷⁵ *Agreement for the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982* (New York, 28 July 1994), United Nations, *Treaty Series*, vol. 1836, No. 31364, p. 3.

clause in a treaty, but referring to an action taken, *i.e.*, by registration of the recourse to such provisional application directly by the international community. From 1946 to 2015, a total of 1,349 provisional application actions were registered.

111. All these figures serve to place in context the very wide universe of treaty registration under Article 102 of the Charter of the United Nations.

112. On the other hand, in accordance with article 1, paragraph 2, of the regulations on registration adopted by the United Nations General Assembly in 1946, “[r]egistration shall not take place until the treaty or international agreement has come into force between two or more of the parties thereto.”¹⁷⁶ On the basis of this provision, the standard practice of the Secretariat is to decline to proceed with the registration of treaties until the date of their entry into force. This might suggest *prima facie* that treaties which are applied provisionally but which have not entered into force would not be subject to registration. However, the *Repertory of Practice of United Nations Organs* (1955) describes the practice in the following manner:

32. Article 1 (2) of the regulations lays down the rule that registration cannot take place prior to the entry into force of an agreement between two or more parties. However, in adopting this rule at the first part of the first session of the General Assembly, Sub-Committee 1 generally agreed that the term “entry into force” was intended to be interpreted in its broadest sense. *It was the view of the Sub-Committee that, in practice, treaties which, by agreement, were being applied provisionally by two or more parties were, for the purpose of article 1 (2) of the regulations, in force.*

33. This point was stressed both in the report of Sub-Committee 1 to the Sixth Committee and in the report of the latter to the General Assembly at the second part of its first session. The following statement was made in both reports: “*It was recognized that, for the purpose of article 1 of the regulations, a treaty comes into force when, by agreement, it is applied provisionally by two or more of the parties thereto.*”

34. *In a number of cases to which this interpretation applies, the registration of an agreement was effected prior to its definitive entry into force.* Apart from these instances, the Secretariat has, on several occasions, declined to proceed with the registration of an agreement submitted prior to its actual entry into force. On one occasion, the registering party, after having effected the registration of an agreement, informed the Secretary-General that the date of its entry into force had been postponed for one year. As a result, the registration took effect almost a year before its entry into force. However, the registration was not cancelled and the agreement was published in the chronological order of registration with an accompanying explanatory note.¹⁷⁷

113. Subsequently, in the updated version of the *Repertory of Practice of the United Nations, Supplement No. 3*, this criterion was reiterated, and a more in-depth analysis of this interpretation was made, as follows:

(h) Article 1 (2) of the regulations lays down the rule that registration cannot take place prior to the entry into force of the treaty or international agreement. However, under an early interpretation given to the term “entry into force” by the Sixth Committee for the purpose of that rule, “a treaty comes into force when, by agreement, it is applied provisionally by two or more of the parties thereto”. In a number of cases

¹⁷⁶ General Assembly resolution 97(1) of 14 December 1946, modified by General Assembly resolutions 364 (IV) of 1 December 1949, 482 (V) of 12 December 1955 and 33/141 of 19 December 1978.

¹⁷⁷ *Repertory of Practice of United Nations Organs*, vol. V, Articles 92–111 of the Charter (United Nations publication, Sales No: 1955.V.2 (vol. V)), Article 102, paras. 32–34 (emphasis added).

to which that interpretation applies, the registration of a treaty or agreement was effected prior to its definitive entry into force.

(i) Notifications by the parties or specialized agencies of the definitive entry into force of treaties registered before that time clearly fall within the meaning of subsequent actions requiring registration as certified statements under article 2 of the regulations and have been registered by the Secretariat as such. As regards treaties and agreements for which the Secretary-General acts as depositary or to which the United Nations is a party, and which have been registered on provisional entry into force, the Secretariat *ex officio* registers their *definitive entry into force* on the date on which the conditions for bringing them *definitively into force* have been fulfilled.

(j) A treaty or agreement, even though it contains provisions for provisional application, is often registered only after the definitive entry into force. In such instances, if the registering party or specialized agency specifies the dates of the provisional entry and the definitive entry into force, both dates are recorded in the register. When no reference is made to the provisional entry into force, only the definitive date is recorded and no information about the former is requested by the Secretariat. On the other hand, if only the provisional date of entry into force is given and it appears that the treaty has already entered into force definitively, the Secretariat solicits the required data from the registering party or specialized agency.¹⁷⁸

114. It should be noted that these criteria have not been modified and are still valid. As a result, the criterion agreed by the Sixth Committee of the General Assembly for the purposes of registering treaties under Article 102 of the Charter of the United Nations has equated, *de facto*, provisional application with entry into force when the treaty is applied provisionally, by agreement, by two or more contracting parties. Even today, the Secretariat continues to apply this criterion in the exercise of its registration and publication functions. This would appear contrary to the terminological and substantive distinction referred to by the Special Rapporteur since his first report, in which he pointed out that, although prior to the 1969 *United Nations Conference on the Law of Treaties*, there might have been some confusion between the concepts of entry into force and provisional application, the Vienna Conference had clarified the distinction between the two legal regimes.¹⁷⁹

115. It is important to point out, however, that both the regulations on registration and the *Repertory of Practice of the United Nations* existed prior to the adoption and entry into force of the 1969 Vienna Convention.

116. In accordance with that practice, in the context of its registration function under Article 102 of the Charter of the United Nations, the Secretariat has registered a grand total of 1,733 treaties subject to provisional application, and therefore subject to their *presumed* entry into force. This total includes bilateral treaties, closed multilateral treaties and open multilateral treaties.

117. According to the legal literature, only 3 per cent of all treaties registered with the United Nations since 1945 have been subject to provisional application.¹⁸⁰

118. The diversity of State practice in regard to provisional application is also reflected in the way in which the Secretariat has traditionally proceeded to register successive

¹⁷⁸ *Repertory of Practice of United Nations Organs, Supplement No. 3, vol. IV, Articles 92–111 of the Charter* (United Nations publication, Sales No.: E.73.V.2), Article 102 (emphasis added).

¹⁷⁹ *Yearbook of the International Law Commission, 2013, vol. II (Part One), document A/CN.4/664, paras. 7–24.*

¹⁸⁰ Albane Geslin, *La mise en application provisoire des traités*, Paris, Pedone, 2005, p. 347.

actions in respect of multilateral treaties. Throughout the decades of registration under Article 102 of the Charter of the United Nations, these actions have been classified in a great variety of categories, which show the diversity of provisional application clauses and options that have been submitted to the Secretariat.

119. Thus, the website of the United Nations *Treaty Series* offers 12 different search criteria with respect to actions related to provisional application, as follows: provisional acceptance, provisional acceptance/accession, provisional application; provisional application by virtue of a notification; provisional application by virtue of accession to the Agreement; provisional application by virtue of adoption of the Agreement; provisional application by virtue of signature, adoption of the Agreement or accession thereto; provisional application in respect of the Mandated Territory of Palestine; provisional application of the Agreement as amended and extended; provisional application to all its territories; provisional application under Article 23; and provisional entry into force.¹⁸¹ The existence of specific references such as “Mandated Territory of Palestine”, “all its territories” or “under Article 23”, reflects how fields are created to cover specific treaties, thus reaffirming the difficulty of relying on a single search criterion.

120. Moreover, it is essential to note that the Secretariat registers treaties under Article 102 of the Charter of the United Nations at the express request of States. This implies that, beyond any legal views held by the Secretariat itself, what takes precedence in cases of treaties applied provisionally but not yet in force is the assessment made by States with respect to the validity of the treaty in question, as expressed through the request for registration. Therefore, the States themselves decide, as we have seen, that a treaty applied provisionally has entered into force, on the basis of the criteria adopted by the Sixth Committee in the *Regulations on Registration and Publication of Treaties*.

121. The Secretariat is limited to adding different dates to its registry on the basis of information provided by the State, but without adopting a criterion that draws a meaningful distinction between provisional application and entry into force.

2. *Depositary functions*

122. Articles 76 and 77 of the 1969 Vienna Convention regulates the functions of depositaries. These functions include keeping custody of the treaty, receiving and keeping custody of notifications relating to it, examining whether such communications are in due and proper form, and informing the parties of acts, communications and notifications relating to the treaty.

123. The depositary functions are especially important in dealing with practical aspects such as the date of entry into force and termination of treaties, either in general or with respect to one particular State, or with respect to the date on which the treaty produces legal effects in relation to the other parties to the treaty.¹⁸²

124. On the other hand it has been suggested that the depositary lacks the competence to determine in a definitive manner the legal effects of the notifications it receives, in the sense that its function cannot substantively affect the rights or obligations of the parties to a treaty.¹⁸³

125. Accordingly, the International Court of Justice has found, for example, that depositary functions should be limited to receiving and notifying States of reservations or objec-

¹⁸¹ See: <https://treaties.un.org/pages/searchActions.aspx>.

¹⁸² Shabtai Rosenne, “The Depositary of International Treaties”, *American Journal of International Law*, vol. 61, No. 4 (October 1967), p. 925.

¹⁸³ *Ibid.*, p. 928.

tions thereto.¹⁸⁴ This position emphasizes that the attributions of the depositary are essentially juridical and formal, limiting to the greatest extent possible any political role that might be attributed to it.¹⁸⁵

126. However, the proliferation of multilateral treaties and the growing complexity of such treaties, compounded by the changes in the international community itself, including the rise of new subjects of international law, have had a direct impact on the functions of depositaries, especially with respect to the scope of their functions.¹⁸⁶

127. Without a doubt, the Secretary-General of the United Nations is the depositary *par excellence*. The transfer of this function in the transition from the League of Nations to the United Nations was determined by the General Assembly in 1946.¹⁸⁷ Currently, the Secretary-General is the depositary for more than 560 multilateral treaties.

128. In that regard, the Secretary-General, in his capacity as depositary, is also limited to performing the functions entrusted to him by the parties to a treaty, focusing on the provisions of the treaty itself.

129. As for provisional application, this means in practical terms that the Secretary-General will proceed in accordance with the terms of the multilateral treaties deposited with the Secretariat, without having competence to amend these terms on the basis of his own interpretation of what would be legally correct in accordance with the law of treaties. This is a truly complex task, since, as we have seen, States use a very wide variety of formulas to agree to provisional application of treaties, and these change without maintaining a set pattern.

130. In some cases, as in the case of the *Protocol on the Privileges and Immunities of the International Seabed Authority*, the depositary is limited to receiving and circulating notifications of provisional application under article 19 of the treaty, which provides as follows: "A State which intends to ratify, approve, accept or accede to this Protocol may at any time notify the depositary that it will apply this Protocol provisionally for a period not exceeding two years".¹⁸⁸ What is interesting in this case is that the provisional application period is limited to a maximum of two years. In depositary practice, a provision of this type, for example, simply implies that the Secretary-General would indicate, in the depositary notification, that the State in question has accepted to apply the treaty provisionally for a period of two years (or less), in accordance with the provisions of the treaty, and therefore, when this time period expires, the treaty is no longer applied provisionally.

131. Another example that could be studied is the *recent International Agreement on Olive Oil and Table Olives*, 2015. This treaty contains an article concerning provisional application followed by the provision on its entry into force. The two texts, if read together, are very interesting:

¹⁸⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, *I.C.J. Reports 1951*, p. 27. See also *I.C.J. Summaries 1948-1991*, p. 25.

¹⁸⁵ Rosenne, "The Depositary of International Treaties", p. 931.

¹⁸⁶ Fatsah Ouguergouz, Santiago Villalpando and Jason Morgan-Foster, "Article 77", in Olivier Corten and Pierre Klein (eds.), *The Vienna Convention on the Law of Treaties. A Commentary*, vol. II, Oxford, Oxford University Press, 2011, pp. 1715-1753.

¹⁸⁷ Transfer of certain functions, activities and assets of the Leagues of Nations, General Assembly resolution 24(I) of 12 February 1946.

¹⁸⁸ Protocol on the Privileges and Immunities of the International Seabed Authority (Kingston, 27 March 1998), United Nations, *Treaty Series*, vol. 2214, No. 39357, p. 133.

*Article 30.**Notification of provisional application*

1. A signatory Government which intends to ratify, accept or approve this Agreement, or any Government for which the Council of Members has established conditions for accession but which has not yet been able to deposit its instrument may, at any time, notify the depositary that it will apply this Agreement provisionally when it enters into force in accordance with article 31, or, if it is already in force, at a specified date.
2. A Government which has submitted a notification of provisional application under paragraph 1 of this article will apply this Agreement when it enters into force, or, if it is already in force, at a specified date *and shall, from that time, be a Contracting Party*. It shall remain a Contracting Party until the date of the deposit of its instrument of ratification, acceptance, approval or accession.

*Article 31.**Entry into force*

1. This Agreement shall *enter into force definitively* on 1 January 2017, provided that at least five of the Contracting Parties among those mentioned in annex A to this Agreement and accounting for at least 80 per cent of the participation shares out of the total 1,000 participation shares have signed this Agreement definitively or have ratified, accepted or approved it, or acceded thereto.
2. If, on 1 January 2017, this Agreement has not entered into force in accordance with paragraph 1 of this article, it shall *enter into force provisionally* if by that date Contracting Parties satisfying the percentage requirements of paragraph 1 of this article have signed this Agreement definitively or have ratified, accepted or approved it, or have notified the depositary that they will apply this Agreement provisionally.
3. If, on 31 December 2016, the requirements for entry into force under paragraph 1 or paragraph 2 of this article have not been met, the depositary shall invite those Contracting Parties which have signed this Agreement definitively or have ratified, accepted or approved it, or have notified that they will apply this Agreement provisionally, to decide whether to bring this Agreement into force definitively or provisionally among themselves, in whole or in part, on such date as they may determine.
4. For any Contracting Party which deposits an instrument of ratification, acceptance, approval or accession after the entry into force of this Agreement, this Agreement shall enter into force on the date of such deposit.¹⁸⁹

132. These provisions, which seem to add more confusion to a situation that is already anarchic, are particularly interesting because the State which formulated a notification of provisional application was considered a *contracting party*; the terms “provisional application”, “enter into force provisionally” and “enter into force definitively” coexist in the same article, as if they were equivalent expressions; the contracting parties, via the notification of provisional application, count for the purposes of the entry into force; and, if the treaty does not enter into force within the established time periods, a mandate is given to the depositary to invite the contracting parties to decide whether the treaty will enter into force either provisionally or definitively.

¹⁸⁹ International Agreement on Olive Oil and Table Olives, 2015 (Geneva, 9 October 2015), *Multi-lateral Treaties Deposited with the Secretary-General*, chap. XIX, TREATIES-XIX.49 (emphasis added).

133. The legal doctrine has held that one of the essential elements characterizing the functions of the depositary is that it does not have the power to set criteria for the various actions that States may take in relation to a treaty.¹⁹⁰ The function of the depositary is governed essentially by a requirement of impartiality that considerably limits the scope of its functions.¹⁹¹ But as has been pointed out, the very complex evolution of the depositary's work currently calls into question such affirmations.

134. Another current example is the *Paris Agreement* on climate change adopted on 12 December 2015. The decision of the Conference of the Parties to the Framework Convention on Climate Change, by which this Agreement was adopted, provides as follows: "Recognizes that Parties to the Convention may provisionally apply all of the provisions of the Agreement pending its entry into force, and *requests* Parties to provide notification of any such provisional application to the Depositary."¹⁹² This is another example of provisional application that was not envisaged in the treaty but was rather agreed by a decision of the Conference of the Parties.

135. It is also noteworthy that some treaties on the United Nations Treaty Collection website, such as the *Arms Trade Treaty*, the *Convention on Cluster Munitions*, or the large number of treaties on commodities that contain provisions on provisional application,¹⁹³ a column on the page reflecting their status identifies any declarations of provisional application. This column is generated once the provisional application action is registered by a State, and the system updates automatically upon the deposit of successive provisional application actions.

3. *United Nations publications on treaties*

136. The Treaty Section of the Office of Legal Affairs has prepared a *Treaty Handbook*, whose latest revised edition was published in 2013.¹⁹⁴ The prologue describes the function of the *Handbook* as follows:

This *Handbook*, prepared by the Treaty Section of the United Nations Office of Legal Affairs, is a practical guide to the depositary practice of the Secretary-General and the registration practice of the Secretariat. It is intended as a contribution to the United Nations efforts to assist States in becoming party to the international treaty framework. [...] It is presented in a user-friendly format with diagrams and step-by-step instructions, and touches upon many aspects of treaty law and practice. This *Handbook* is designed for use by States, international organizations and other entities.¹⁹⁵

137. The glossary of the *Handbook* reflects Secretariat practice with regard to registration and publication of treaties under Article 102 of the Charter of the United Nations, together with the depositary practice of the Secretary-General, both of which have been described in previous sections. Thus, the *Handbook* defines provisional application, distinguishing between the case of a treaty that has entered into force and that of a treaty that has not entered into force. These definitions are cited below:

¹⁹⁰ Shabtai Rosenne, "More on the depositary of international treaties", *American Journal of International Law*, vol. 64, p. 851.

¹⁹¹ *Ibid.*, p. 840–841.

¹⁹² FCCC/CP/2015/L.9, para. 5.

¹⁹³ See <https://treaties.un.org/pages/Treaties.aspx?id=19&subid=A&lang=en>.

¹⁹⁴ *Treaty Handbook* (United Nations publication, Sales No.: E.02.V2).

¹⁹⁵ *Ibid.*, p. iv.

Provisional application of a treaty that has entered into force

Provisional application of a treaty that has entered into force may occur when a State *unilaterally undertakes to give legal effect to the obligations under a treaty on a provisional and voluntary basis*. The State would generally intend to ratify, accept, approve or accede to the treaty once its domestic procedural requirements for international ratification have been satisfied. The State may terminate this provisional application at any time. In contrast, a State that has consented to be bound by a treaty through ratification, acceptance, approval, accession or definitive signature generally can only withdraw its consent in accordance with the provisions of the treaty or, in the absence of such provisions, other rules of treaty law [...].

Provisional application of a treaty that has not entered into force

Provisional application of a treaty that has not entered into force may occur when a State *notifies the signatory States to a treaty that has not yet entered into force that it will give effect to the legal obligations specified in that treaty on a provisional and unilateral basis*. Since this is a unilateral act by the State, subject to its domestic legal framework, it may terminate this provisional application at any time. A State may continue to apply a treaty provisionally, even after the treaty has entered into force, until the State has ratified, approved, accepted or acceded to the treaty. A State's provisional application terminates if that State notifies the other States among which the treaty is being applied provisionally of its intention not to become a party to the treaty.¹⁹⁶

138. Since the Special Rapporteur already addressed the latter case, relating to unilateral notifications, in Chapter II, section A (Source of obligations),¹⁹⁷ of his second report, he does not consider it appropriate to deal further with it here. He merely points out that, although some favour has been expressed in both the Commission and the General Assembly for a strict interpretation of article 25 of the 1969 Vienna Convention, giving preference to agreements between the negotiating States and apparently not open to—but not excluding—the possibility that third States might decide to apply the treaty unilaterally and provisionally, the Secretariat *Handbook* describes a practice which is perhaps more extensive than might have been thought.

139. Nor can it be ignored that the *Handbook* also draws attention to the production of legal effects arising out of the provisional application of treaties, noting that States will give effect to the obligations derived from the treaty in question.

140. The Special Rapporteur is in no way suggesting that the *Handbook* constitutes an authoritative interpretation of the 1969 Vienna Convention. The *Handbook* itself contains a note waiving responsibility and explaining that “[t]his *Handbook* is provided for information only and does not constitute formal legal or other professional advice”. Nonetheless, the *Handbook* is offered as a “guide to practice”,¹⁹⁸ and it is logical to conclude that, as the decision was made to include these “definitions” as described above, it is because they reflect State practice with regard to registration and deposit, as discussed in the previous sections.

141. Although this topic was mentioned in the Special Rapporteur's first report,¹⁹⁹ it is appropriate to reiterate the way in which the *Handbook* refers to the provisional application of treaties, as follows:

¹⁹⁶ *Ibid.*, p. 65 (emphasis added).

¹⁹⁷ *Yearbook of the International Law Commission, 2014*, vol. II (Part One), document A/CN.4/675, paras. 32–43.

¹⁹⁸ *Treaty Handbook*, p. 1.

¹⁹⁹ *Yearbook of the International Law Commission, 2013*, vol. II (Part One), document A/CN.4/664, para. 38.

3.4 Provisional application [...]

Some treaties provide for provisional application, either before or after their entry into force. For example, article 7 (1) of the *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea* of 10 December 1982, 1994, provides “If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force”. The *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*,²⁰⁰ of 1995, also provides for provisional application, ceasing upon its entry into force. Article 56 of the *International Cocoa Agreement*,²⁰¹ of 2010, also provides for provisional application with effect from the entry into force of the Agreement or, if it is already in force, at a specified date.

A State provisionally applies a treaty that has entered into force *when it unilaterally undertakes*, in accordance with its provisions, to give effect to the treaty obligations provisionally, even though its domestic procedural requirements for international ratification, approval, acceptance or accession have not yet been completed. The intention of the State would generally be to ratify, approve, accept or accede to the treaty once its domestic procedural requirements have been met. The State may unilaterally terminate such provisional application at any time unless the treaty provides otherwise (see article 25 of the 1969 Vienna Convention). In contrast, a State that has consented to be bound by a treaty through ratification, approval, acceptance, accession or definitive signature is governed by the rules on withdrawal or denunciation specified in the treaty as discussed in section 4.5 (see articles 54 and 56 of the Vienna Convention 1969).²⁰²

142. This citation reveals the way in which the United Nations Secretariat understands, and therefore processes, situations involving provisional application in the performance of its functions.

143. Moreover, in response to regular requests from the General Assembly, the United Nations Secretariat prepared and published a *Handbook on Final Clauses of Multilateral Treaties*, most recently issued in 2003.²⁰³ As the Secretary-General notes in his Foreword, the *Handbook* “incorporates recent developments in the practice of the Secretary-General as depositary of multilateral treaties with regard to matters normally included in the final clauses of these treaties”.

144. In section G (Provisional application of a treaty), the *Handbook* again draws attention to the assumption of a unilateral decision as a point of departure for the implementation of article 25 of the 1969 Vienna Convention and provides some examples of provisional application clauses contained in some multilateral treaties, either before or after their entry into force.²⁰⁴

²⁰⁰ *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (New York, 4 August 1995), United Nations, *Treaty Series*, vol. 2167, No. 37924, p. 3.

²⁰¹ *International Cocoa Agreement*, 2001 (Geneva, 13 March 2001), UNCTAD, TD/COCOA.9/7.

²⁰² Emphasis added.

²⁰³ *Final Clauses of Multilateral Treaties: Handbook*, United Nations publication, Sales No.: E.04.V.3, 2003.

²⁰⁴ *Ibid.*, pp. 42–43.

145. Furthermore, the *Handbook* reflects the distinction found in final clauses of multilateral treaties, as described in the previous section, between the definitive entry into force of a treaty and the so-called provisional entry into force.

146. It is interesting to note, however, that the two Secretariat handbooks referred to by the Special Rapporteur in the present report do not appear to call into question the obligatory character of the provisions of a treaty that States have decided to apply provisionally.

147. Moreover, in addition to the two handbooks cited above, the Secretariat uses the above-mentioned *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*.

148. Clearly, the United Nations Secretariat can record only what States provide to it, while trying to systematize the information coherently and in conformity with the 1969 Vienna Convention and the practice of States. The source of the ambiguous use of the two concepts is the States themselves, not the United Nations.

149. In conclusion, it is worth considering the merits of the idea that, in due time, the Commission should recommend to the Sixth Committee that the 1946 regulations on registration should be revised in order to adapt them to the current state of practice relating to the provisional application of treaties. This would serve as a guide to practice in line with the scope and content of article 25 of the 1969 Vienna Convention, which in turn would enable the Secretariat to reflect at a later time, both in the above-mentioned handbooks and in the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, the new trends in the matter that are developing in accordance with contemporary practice.