Part Three—Miscellaneous documents

A. Memorandum by the United Nations Secretariat:* Procedural History of Article 25 of the Vienna Convention on the Law of Treaties, 1969

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Summary

Article 25 of the Vienna Convention on the Law of Treaties provides for the possibility of the application of treaties on a provisional basis. Its origins lie in proposals for a provision recognizing the practice of the "provisional entry into force" of treaties, made by Special Rapporteurs Sir Gerald Fitzmaurice and Sir Humphrey Waldock during the consideration by the Commission of the law of treaties. The provision, which was included in the 1966 articles on the law of treaties as article 22, was amended at the United Nations Conference on the Law of Treaties by, *inter alia*, substituting the concept of provisional "application" for "entry into force". The present memorandum traces the negotiating his-

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tory of the provision both in the Commission and at the Conference, and provides a brief analysis of some of the substantive issues raised during its consideration.

Introduction

1. At its sixty-fourth session, held in 2012, the International Law Commission included the topic "provisional application of treaties" in its programme of work. At that session, the Commission decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on the subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the *Convention on the Law of Treaties* (hereinafter the "1969 Vienna Convention").[1]

2. The present memorandum provides, in chapter I below, a description of the procedural history of the consideration by the Commission of what it called the "provisional entry into force" of treaties, as well as of the negotiation, at the United Nations Conference on the Law of Treaties, of article 25 of the 1969 Vienna Convention:

> *Provisional application*
>
> 1. 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.
>
> 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

3. Chapter II below contains a description of some of the substantive issues raised during the discussions in the Commission, as well as during the negotiations at the United Nations Conference on the Law of Treaties.

Chapter I
Procedural history

4. The topic "law of treaties" was among those selected by the Commission in 1949 for codification, and was subsequently considered by the Commission at its second to eighteenth sessions, from 1950 to 1966, during which time four successive Special Rapporteurs were appointed.[2] Following an initial consideration of the topic, on the basis of Special Rapporteur Mr. James L. Brierly's first and second reports,[3] submitted in 1950 and 1951, respectively, the Commission next held a substantive discussion of the topic in 1959, on the

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[1] *Yearbook of the International Law Commission* [hereinafter "*Yearbook …*"], *2012*, vol. II (Part Two), para. 143. The Vienna Convention on the Law of Treaties was signed in Vienna on 23 May 1969.

[2] Mr. James L. Brierly (in 1949), Sir Hersch Lauterpacht (in 1952), Sir Gerald Fitzmaurice (in 1955) and Sir Humphrey Waldock (in 1961).

[3] *Yearbook … 1950*, vol. II, document A/CN.4/23, p. 222; and *Yearbook … 1951*, vol. II, document A/CN.4/43, p. 70, respectively.

basis of the first report of Sir Gerald Fitzmaurice,[4] which he had submitted in 1956.[5] The Commission took a further hiatus from the topic in order to concentrate its efforts on other topics, and returned to its consideration of the law of treaties at its fourteenth to eighteenth sessions, from 1962 to 1966, which it undertook on the basis of six reports submitted by Sir Humphrey Waldock,[6] who had since been appointed to replace Sir Gerald as Special Rapporteur for the topic. It was on the basis of Sir Humphrey's reports that the Commission completed the first (in 1964) and second (in 1966) readings of the draft articles on the law of treaties,[7] which it adopted in 1966.

5. The 1966 draft articles on the law of treaties included draft article 22, entitled "Entry into force provisionally", which read as follows:

> 1. A treaty may enter into force provisionally if:
>
> (*a*) The treaty itself prescribes that it shall enter into force provisionally pending ratification, acceptance, approval or accession by the contracting States; or
>
> (*b*) The negotiating States have in some other manner so agreed.
>
> 2. The same rule applies to the entry into force provisionally of part of a treaty.[8]

A. International Law Commission, 1950 to 1966

1. Consideration at the second to sixth sessions, 1950 to 1954

6. Mr. Brierly and Sir Hersch Lauterpacht dealt only with the question of the "provisional entry into force" of a treaty, indirectly (in the case of the former) or as part of the broader question of ratification (in that of the latter). In his proposal for an article 5 (entitled "When ratification is necessary"), submitted in 1951, Mr. Brierly envisaged several scenarios in which a State would not be deemed to have undertaken a final obligation under the treaty until it ratified that treaty.[9] The provision was subsequently recast to deal with the legal effect of signature prior to ratification and was adopted that year, on a preliminary basis,

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[4] *Yearbook … 1956*, vol. II, document A/CN.4/101, p. 104.

[5] While the Commission did not consider Mr. Brierly's third report (*Yearbook … 1952*, vol. II, document A/CN.4/54, p. 50) or the two reports presented by Sir Hersch (*Yearbook … 1953*, vol. II, document A/CN.4/63, p. 90; and *Yearbook … 1954*, vol. II, document A/CN.4/87, p. 123, respectively), owing to a lack of time and to postponement following the resignation of both Rapporteurs, both Sir Gerald and Sir Humphrey drew on the reports of their predecessors when developing their own proposals, and the positions taken by both Mr. Brierly and Sir Hersch were referred to on numerous occasions during the discussions within the Commission in later years. Likewise, owing to lack of time, the Commission was unable to consider Sir Gerald's second to fifth reports, submitted in 1957 to 1960 (*Yearbook … 1957*, vol. II, document A/CN.4/107, p. 16; *Yearbook … 1958*, vol. II, document A/CN.4/115, p. 20; *Yearbook … 1959*, vol. II, document A/CN.4/120, p. 37; and *Yearbook … 1960*, vol. II, document A/CN.4/130), p. 69, respectively. Nonetheless, those reports were referred to extensively by Sir Humphrey.

[6] *Yearbook … 1962*, vol. II, document A/CN.4/144 and Add.1, p. 27; *Yearbook … 1963*, vol. II, document A/CN.4/156 and Add.1–3, p. 36; *Yearbook … 1964*, vol. II, document A/CN.4/167 and Add.1–3, p. 5; *Yearbook … 1965*, vol. II, document A/CN.4/177 and Add.1–2, p. 3; *Yearbook … 1966*, vol. II, document A/CN.4/183 and Add.1–4, p. 1; and *ibid.*, A/CN.4/186 and Add.1–7, p. 51.

[7] *Yearbook … 1966*, vol. II, p. 177, para. 38.

[8] *Ibid.*, p. 180.

[9] See *Yearbook … 1951*, vol. II, document A/CN.4/43, p. 70.

as article 4, which envisaged the possibility of a State being deemed to have undertaken a final obligation by its signature of a treaty "if the treaty provides that it shall be ratified but that it shall come into force before ratification".[10]

7. An early direct reference to the provisional entry into force of a treaty was made by J.P.A. François, in 1951, when he called on the Commission "to consider the imaginary case of a treaty between two States which had been signed and ratified by both parties. The heads of State had exchanged the instruments of ratification. Provisionally the treaty was in force".[11]

8. In his first report, submitted in 1953, Sir Hersch, in his proposal for article 6, on ratification, anticipated the possibility of a treaty expressly providing for entry into force prior to ratification.[12]

2. Consideration at the eighth to twelfth sessions, 1956 to 1960

9. Although Sir Gerald submitted five reports, the Commission was able to consider only parts of his first report[13] (in 1959), in which he proposed a set of 42 draft articles, focusing primarily on the framing, conclusion and entry into force of treaties.

10. The Special Rapporteur's proposal for article 42 (Entry into force (legal effects)), indicated, in its paragraph 1: "A treaty may … provide that it shall come into force provisionally on a certain date, or upon the happening of a certain event, such as the deposit of a specified number of ratifications. In such cases an obligation to execute the treaty on a provisional basis will arise, but, subject to any special agreement to the contrary, will come to an end if final entry into force is unreasonably delayed or clearly ceases to be probable."[14] The commentary to the provision simply stated that it covered the case of provisional entry into force and stated the rule applicable in case this situation became unduly prolonged.[15]

11. While the proposal was never discussed by the Commission, passing references to the possibility of the provisional entry into force of a treaty were made during the debate held in 1959. For example, in the context of the discussion on the general conditions for the obligatory force of treaties, Milan Bartoš suggested that some consideration should be given to the growing practice, particularly in commercial agreements, of inserting a clause concerning the provisional entry into force of an agreement pending ratification[16] and that there were valid practical considerations for the inclusion of a clause concerning the provisional entry into force of treaties.[17]

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[10] See *ibid.*, document A/CN.4/L.28, p. 73. A revised version of the provision, with commentary thereto, was subsequently included (as article 6) in Mr. Brierly's third report, submitted in 1952 (footnote 5 above), which reproduced the articles tentatively adopted by the Commission at its second and third sessions, in 1950 and 1951. However, owing to the resignation of the Special Rapporteur, the Commission never debated that report.

[11] *Yearbook … 1951*, vol. I, 88th meeting, p. 47, para. 37.

[12] *Yearbook … 1953*, vol. II, p. 112, art. 6, para. 2 (*b*): "2. In the absence of ratification a treaty is not binding upon a Contracting Party unless: … (*b*) The treaty, while providing that it shall be ratified, provides also that it shall come into force prior to ratification".

[13] *Yearbook … 1956*, vol. II, document A/CN.4/101, p. 104.

[14] *Ibid.*, p. 116.

[15] *Ibid.*, p. 127, para. 106.

[16] *Yearbook … 1959*, vol. I, 487th meeting, p. 36, para. 37.

[17] *Ibid.*, para. 40.

3. Consideration at the fourteenth session, 1962

12. The provisional entry into force of treaties was dealt with by Sir Humphrey in his first report, which was considered in 1962. The concept was introduced in paragraph 6 of his proposal for article 20 (Mode and date of entry into force): "a treaty may prescribe that it shall come into force provisionally on signature or on a specified date or event, pending its full entry into force in accordance with the rules laid down in this article".[18]

13. The Special Rapporteur explained that paragraph 6 sought to cover what in modern practice was a not infrequent phenomenon—a treaty brought into force provisionally, pending its full entry into force when the required ratifications or acceptances had taken place.[19] He noted that a treaty clause having this effect was, from one aspect, a clause relating to a mode of bringing a treaty into force.[20] The Commission focused on other aspects of article 20,[21] with only passing reference made to paragraph 6.

14. Sir Humphrey's proposal for article 21, dealing with the legal effects of the entry into force of a treaty, also included the following reference to the effects of provisional entry into force:

> 2. (*a*) When a treaty lays down that it shall come into full force provisionally upon a certain date or event, the rights and obligations contained in the treaty shall come into operation for the parties to it upon that date or event and shall continue in operation upon a provisional basis until the treaty enters into full force in accordance with its terms.
>
> (*b*) If, however, the entry into full force of the treaty is unreasonably delayed and, unless the parties have concluded a further agreement to continue the treaty in force on a provisional basis, any of the parties may give notice of the termination of the provisional application of the treaty; and when a period of six months shall have elapsed, the rights and obligations contained in the treaty shall cease to apply with respect to that party.[22]

15. The discussion on paragraph 2 focused on subparagraph (*b*), which the Special Rapporteur had proposed *de lege ferenda*. After several doubts had been expressed regarding the advisability of including the provision,[23] the Special Rapporteur withdrew it and the Commission referred subparagraph (*a*) to the Drafting Committee.[24] The Commission had earlier accepted a procedural proposal by the Special Rapporteur that article 20, paragraph 6, be considered by the Drafting Committee together with article 21, paragraph 2, with a view to being included in an article 19 *bis*, which would contain all the provisions on the rights and obligations of States prior to the entry into force of the treaty.[25]

16. The Drafting Committee, however, adopted a narrower article 19 *bis* (renumbered as article 17) limited to the general obligation of good faith prior to the entry into force of a treaty. In introducing that article, the Special Rapporteur recalled that, in the course of the discussion of various articles, it had been suggested that particular points should be

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[18] *Yearbook … 1962*, vol. II, p. 69.

[19] *Ibid*., p. 71, paragraph (7) of the commentary to article 20.

[20] *Ibid*.

[21] See *ibid*., vol. I, 656th and 657th meetings, pp. 175 *et seq*.

[22] See *ibid*., document A/CN.4/144 and Add.1, p. 27.

[23] See the discussion on the termination of the provisional application of treaties in paras. 85 to 108 below.

[24] *Yearbook … 1962*, vol. I, 657th meeting, pp. 179–180, paras. 12–18.

[25] *Ibid*., p. 179, para. 3.

transferred to article 19 *bis*. One of those points was the question of provisional entry into force. The Drafting Committee had decided, however, that that question should be dealt with in the articles concerning entry into force.[26]

17. The Drafting Committee's subsequent proposal for a revised article 20 (entitled "Entry into force of treaties") no longer included a reference to provisional entry into force.[27] The issue was, instead, entirely subsumed in its proposal for a revised article 21 (entitled "Provisional entry into force"), which read as follows:

> A treaty may prescribe that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part on a given date or on the fulfilment of specified requirements. In that case the treaty shall come into force as prescribed and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or the States concerned shall have agreed to terminate the provisional application of the treaty.[28]

The Commission adopted the article, on first reading, in the form proposed, as (renumbered) article 24.

18. "Provisional entry into force" was also referred to during the consideration of other articles that year. Several members discussed the provisional entry into force of treaties in the context of article 9 (Legal effects of a full signature), in particular the reference in paragraph 2, subparagraph (*c*), to the obligation of good faith on the part of a signatory State, and paragraph 2, subparagraph (*d*), concerning the right of the signatory State to insist on the performance of other signatories.[29] Reference was also made in the commentary to article 12 (Ratification), as adopted in 1962, in which it was noted, "It may not be very often that a treaty expressed to come into force upon signature is made subject to ratification; but this does sometimes happen in practice when a treaty which is subject to ratification is expressed to come into force provisionally upon signature."[30]

4. Consideration at the fifteenth and sixteenth session, 1963 and 1964

19. Sir Humphrey's second and third reports[31] did not revisit the concept of the "provisional entry into force of treaties" directly. Nonetheless, his second report dealt with, *inter alia*, the question of constitutional limitations on the validity of treaties, including those not yet in force.[32] The report also considered the question of the termination of a treaty, which would *ex hypothesi* also terminate the provisional entry into force of the treaty.

20. A passing reference was made in the third report, in which, in the discussion on article 57 (Application of treaty provisions *ratione temporis*), it was indicated, *inter alia*,

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[26] *Ibid*., 661st meeting, p. 212, para. 2.

[27] *Ibid*., 668th meeting, p. 258, para. 34.

[28] *Ibid*., p. 259, para. 37.

[29] *Ibid*., 643rd meeting, p. 88, paras. 86–87; and 644th meeting, pp. 93–94, paras. 69 and 87.

[30] *Yearbook … 1962*, vol. II, p. 173, para. (8) of the commentary to article 12.

[31] See footnote 6 above.

[32] See *Yearbook … 1963*, vol. II, p. 41, proposal for article 5 (Constitutional limitations on the treaty-making power).

that the rights and obligations created by a treaty could not come into force until the treaty itself was in force, either definitively or provisionally under article 24.[33]

5. Consideration at the seventeenth session (first part), 1965

21. Article 24 was considered again in 1965, in the context of the second reading of the articles on the law of treaties. The Commission had before it Sir Humphrey's fourth report,[34] which contained an analysis of comments and observations received from Governments, together with his suggestions for amendments. Japan noted that the technique of provisional entry into force was in fact sometimes resorted to as a practical measure, but the precise legal nature of such provisional entry into force did not seem to be very clear. Unless its legal effect could be precisely defined, it seemed best to leave the matter entirely to the intention of the contracting parties. Provisions of article 23, paragraph 1, could perhaps cover this eventuality.[35] Such sentiments were echoed by the United States, which took the view that while the article accorded with present-day requirements and practices, it might be questioned whether such a provision in a convention on treaties was necessary.[36] Sweden, and later the Netherlands, commented on substantive aspects of the provision.[37]

22. In response, the Special Rapporteur recalled that the Commission had considered that "provisional entry into force" occurred in modern treaty practice with sufficient frequency to require notice in the draft articles, and it seemed desirable for the legal character of that situation to be recognized in the draft articles, lest the omission be interpreted as denying it.[38] He added that leaving the matter to the application of the general rule in article 23, paragraph 1 (on entry into force of a treaty), would not cover the problem altogether, as the States concerned sometimes brought about the "provisional entry into force" by a separate agreement in simplified form.[39]

23. The second-reading debate on article 24[40] was held on the basis of a revised version proposed by the Special Rapporteur.[41] While different opinions were expressed, in par-

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[33] *Yearbook … 1964*, vol. II, document A/CN.4/167 and Add.1–3, p. 10, para. (2) of the commentary to article 57.

[34] See footnote 6 above.

[35] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, annex, pp. 279 *et seq.*

[36] *Ibid.*, commentary to article 24.

[37] *Ibid.* References to the provisional entry into force of treaties were also made in the comments by Luxembourg on article 12 (Ratification) and by Cyprus and Israel in relation to the applicability of article 55 (*Pacta sunt servanda*).

[38] *Yearbook … 1965*, vol. II, document A/CN.4/177 and Add.1, p. 58, art. 24, observation of the Special Rapporteur, para. 1.

[39] *Ibid.*

[40] Provisional entry into force was also referred to in the debate on other articles. In connection with art. 12, see the statements of Mr. Abdullah El-Erian (*Yearbook … 1965*, vol. I, 784th meeting, p. 64, para. 86), Mr. Antonio de Luna (*ibid.*, 785th meeting, p. 70, para. 69) and Mr. Roberto Ago (*ibid.*, p. 71, para. 81). The practice was also referred to by Mr. Paul Reuter, in the context of art. 17, concerning the rights and obligations of States prior to the entry into force of the treaty (*ibid.*, 788th meeting, p. 90, para. 36).

[41] The proposal for a revised text was as follows: "A treaty may prescribe, or the parties may otherwise agree that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part, on a given date or on the fulfilment of specified requirements. In that case the treaty or the specified part shall come

ticular as to how the question of the termination of the provisional entry into force was dealt with, the Commission decided to retain a distinct provision in the draft articles.[42] The Commission also debated a proposal by Mr. Paul Reuter to refer to the provisional "application" of a treaty, as opposed to its provisional "entry into force".[43]

24. On 2 July 1965, the Commission adopted, by a vote of 17 to none, article 24, as follows:[44]

> 1. A treaty may enter into force provisionally if:
>
> (*a*) The treaty itself prescribes that it shall enter into force provisionally pending ratification, accession, acceptance or approval by the contracting States; or
>
> (*b*) The contracting States have in some other manner so agreed.
>
> 2. The same rule applies to the entry into force provisionally of part of a treaty.

6. Consideration at the eighteenth session, 1966

25. Article 24 was next referred to in 1966, in Sir Humphrey's sixth report,[45] in the context of its relationship with articles 55 (*Pacta sunt servanda*)[46] and 56 (Application of a treaty in point of time), primarily in response to a set of comments received from the Government of Israel.

26. The Commission returned to the consideration of article 24 during the adoption of the final draft articles on the law of treaties. While a suggestion by Mr. Shabtai Rosenne to reverse the order of articles 23 and 24[47] was not adopted, the Commission accepted the Drafting Committee's proposal that the words "negotiating States" be substituted for the words "contracting States" in paragraph 1, subparagraph (*b*).[48] With that final amendment, article 24 (subsequently renumbered as article 22) was adopted, on second reading. The Commission also adopted a commentary containing four paragraphs, dealing with the two recognized bases for provisional entry into force (*i.e.* in accordance with the terms of a provision in the treaty itself or on the basis of a separate agreement), the practice of bringing into force provisionally only a certain part of a treaty, and an explanation of the decision to exclude reference to the termination of provisional entry into force.[49]

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into force as prescribed or agreed, and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or it shall have become clear that one of the parties will not ratify or, as the case may be, approve it" (*ibid.,* 790th meeting, p. 106, para. 73).

[42] However, Mr. Taslim Olawale Elias opposed the retention of art. 24, since the issue appeared to be covered by paras. 1 and 3 of art. 23 (*ibid.,* p. 107, para. 84). See also the views of Mr. Senjin Tsuruoka (*ibid.,* 791st meeting, pp. 109–110, paras. 9, 10, 12 and 26). While Mr. José Maria Ruda expressed his sympathy for such views, he nonetheless supported the retention of the article for practical reasons (*ibid.,* 790th meeting, p. 107, para. 85).

[43] *Ibid.,* p. 106, para. 75. See the discussion in paras. 48 and 49 below.

[44] An earlier version proposed by the Drafting Committee was sent back (*ibid.,* 814th meeting, pp. 274–275, paras. 38–56).

[45] See footnote 6 above.

[46] See the discussion in paras. 75 and 76 below.

[47] *Yearbook … 1966*, vol. I (Part Two) 886th meeting, p. 284, para. 63.

[48] *Ibid.,* 887th meeting, p. 293, para. 69.

[49] *Ibid.*, vol. II, p. 210. See also para. (3) of the commentary to article 23 (*Pacta sunt servanda*), previously article 55 ("The words 'in force' of course cover treaties in force provisionally under article 22", p. 211).

B. General Assembly, 1966 and 1967

27. Upon receiving the report of the Commission, the General Assembly, at its twenty-first session, in 1966, decided, in its resolution 2166 (XXI) of 5 December 1966, to invite the submission of written comments and observations on the draft articles. Of those member Governments submitting such comments and observations, only Belgium commented on article 22 (focusing on the mode of termination of provisional entry into force).[50] At the twenty-second session of the Assembly, in 1967, during the debate on the law of treaties, Sweden referred, with approval, to the Belgian comment.[51]

C. United Nations Conference on the Law of Treaties, 1968 and 1969

28. The United Nations Conference on the Law of Treaties was held in Vienna, in two sessions, from 26 March to 24 May 1968 and from 9 April to 22 May 1969, respectively.

1. Consideration at the first session, 1968

29. Draft article 22 was first considered by the Committee of the Whole of the Conference,[52] which had before it 10 proposals for amendments.[53] A proposal to delete the article was not pressed by the sponsors.[54] A number of drafting proposals were referred to the Drafting Committee. Two proposals to delete paragraph 2 were rejected.[55] A proposal to refer to the provisional "application", as opposed to the "entry into force", of treaties was adopted.[56] The Committee of the Whole approved, in principle, two proposals to include a new paragraph, on the termination of the provisional entry into force or provisional application of a treaty.[57]

30. With the aforementioned understanding and decisions, the article was referred to the Drafting Committee, which subsequently proposed the following revised text for article 22:[58]

> 1. 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.

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[50] A/6827, p. 6. See also para. 95 below.

[51] *Official Records of the General Assembly, Twenty-second Session*, *Sixth Committee*, 980th meeting, para. 13.

[52] At its 26th and 27th meetings, held in April 1968 (see *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), vol. I, pp. 140–146).

[53] *Ibid., First and Second Sessions*, *Vienna, 26 March–24 May 1968 and 9 April–22 May 1969* (United Nations publication, Sales No. E.70.V.5), A/CONF.39/11/Add.2, Report of the Committee of the Whole, paras. 222–230.

[54] Proposal by the Republic of Korea, the Republic of Viet Nam and the United States (see *ibid.*, para. 224 (*i*)).

[55] By 63 votes to 11, with 12 abstentions (see *ibid.*, para. 227 (*a*)).

[56] By 72 votes to 3, with 11 abstentions (*ibid.*, para. 227 (*b*)).

[57] By 69 votes to 1, with 20 abstentions (*ibid.*, para. 227 (*c*)).

[58] *Ibid.*, *First Session* (footnote 52 above), 72nd meeting of the Committee of the Whole, p. 426, para. 24.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

31. In introducing the revised text, the Chair of the Drafting Committee pointed out that the article reflected a modified version of the proposal by Czechoslovakia and Yugoslavia for the *chapeau* to paragraph 1, including the reference to the "provisional application" of treaties. The concept of the provisional application of part of a treaty, previously set out in paragraph 2, had been incorporated into paragraph 1. New paragraph 2 reintroduced the issue of the termination of the provisional application of a treaty. All other proposals were rejected by the Drafting Committee. The Committee of the Whole adopted article 22, as proposed by the Drafting Committee, without a vote.[59]

2. Consideration at the second session, 1969

32. The report of the Committee of the Whole on draft article 22 was taken up in the plenary of the United Nations Conference on the Law of Treaties at the second session. The Conference adopted article 22 by 87 votes to 1, with 13 abstentions.[60] Article 22 was renumbered as article 25 of the 1969 Vienna Convention.

Chapter II
Substantive issues discussed during the development of article 25

A. Raison d'être of provisional application of treaties

33. As early as 1953, when Sir Hersch referred to the existence of a treaty which, "while providing that it shall be ratified, provides also that it shall come into force prior to ratification",[61] a common theme in the reports of the Special Rapporteurs and in the debate in the Commission was the extent to which this phenomenon was common in the practice of States. Sir Hersch noted that there were frequent examples of this type of treaty.[62]

34. During the debate on the first report by Sir Gerald,[63] held in 1959, Mr. Bartoš suggested that some consideration should be given to the growing practice, particularly in

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[59] *Ibid.*, p. 427, para. 28.

[60] *Ibid.*, *Second Session, Vienna, 9 April–22 May 1969* (United Nations publication, Sales No. E.70.V.6), 11th plenary meeting, para. 101. The Drafting Committee subsequently rejected several proposals to modify article 22, raised during the debate immediately prior to its adoption, as well as a proposal by Yugoslavia to include a new article (see para. 79 below); *ibid.*, 28th plenary meeting, paras. 45–47.

[61] *Yearbook … 1953*, vol. II, p. 91, art. 6, para. 2 (*b*).

[62] *Ibid.*, pp. 114–115. paragraph 5 (*b*) of the commentary to article 6, paragraph 2 (*b*). Specific examples were cited in the statements by Mr. Briggs in 1962 (*Yearbook … 1962*, vol. I, 644th meeting, p. 94, para. 87), Mr. ElErian in 1965 (*Yearbook … 1965*, vol. I, 790th meeting, p. 112, para. 98), Mr. Bartoš in 1965 (*ibid.*, 791st meeting, p. 115, para. 23) and Mr. Pessou in 1965 (*ibid.*, p. 116, para. 31), as well as in the statement by Venezuela at the first session of the United Nations Conference on the Law of Treaties (see *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (footnote 52 above), 26th meeting, p. 141, para. 29).

[63] See *Yearbook … 1956*, vol. II, document A/CN.4/101, p. 104. In his commentary to article 42, para. 1, the Special Rapporteur simply noted, "This covers the case of provisional entry into force" (p. 127, para. 106).

commercial agreements, of inserting a clause concerning the provisional entry into force of an agreement pending ratification.[64] He reiterated the suggestion in 1962, when he referred to the recent growth of a practice, particularly in the case of customs agreements, whereby they entered into force at once pending definitive ratification.[65]

35. In the commentary to his proposal for article 20, paragraph 6, Sir Humphrey alluded to a modern practice which was a not infrequent phenomenon: a treaty brought into force provisionally, pending its full entry into force.[66] The commentary to (renumbered) article 24, adopted by the Commission in 1962, stated: "This article recognizes a practice which occurs with some frequency today and requires notice in the draft articles".[67]

36. In 1965, Mr. Grigory Tunkin considered article 24 to be descriptive of an existing practice rather than expressive of a rule of law. His own experience showed that it was not uncommon for a bilateral treaty to be subject to ratification but to enter into force immediately upon signature.[68] The Special Rapporteur subsequently noted that the Commission as a whole appeared to be firmly of the opinion that it was dealing with a common phenomenon which had become an ordinary part of existing treaty practice.[69]

37. These views were echoed at the United Nations Conference on the Law of Treaties.[70] Venezuela expressed the view that entry into force provisionally corresponded to a widespread practice and that provisional application met real needs in international relations.[71] A number of delegations opposed a proposal to delete the article on the grounds that it reflected existing practice.[72]

38. The need to expedite the application of a treaty, typically as a matter of urgency, was the common justification offered for the practice. In 1959, Mr. Bartoš referred to the valid practical considerations for the inclusion of a clause,[73] and Mr. Georges Scelle was prepared to admit it in some very exceptional cases, *e.g.* customs agreements intended essentially for the immediate protection of a country's economy.[74] The commentary to article 24, adopted in 1962, stated: "Owing to the urgency of the matters dealt with in the treaty or for other reasons the States concerned may provide in a treaty, which it is necessary for them to

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[64] *Yearbook … 1959*, vol. I, 487th meeting, p. 36, para. 37.

[65] *Yearbook … 1962*, vol. I, 643rd meeting, p. 88, para. 86. See also *ibid.*, 647th meeting, p. 117, para. 97.

[66] *Ibid.*, vol. II, p. 71, para. (7) of the commentary to article 20.

[67] *Ibid.*, p. 182, para. (1) of the commentary to article 24.

[68] *Yearbook … 1965*, vol. I, 791st meeting, pp. 110–111, para. 28.

[69] *Ibid.*, pp. 112–113, para. 55.

[70] See also the view expressed by Sir Humphrey, in his capacity as Expert Consultant to the Vienna Conference, that the practice of provisional application was now well established among a large number of States. See *Official Records of the United Nations Conference on the Law of Treaties, Second Session* (footnote 60 above), 11th plenary meeting, para. 89.

[71] *Ibid.*, *First Session* (footnote 52 above), 26th meeting of the Committee of the Whole, paras. 29 and 31. However, see also the view of Bulgaria that article 22 involved a situation which seldom arose (*ibid.*, para. 59).

[72] See the comments of Israel (*ibid.*, para. 44), France (*ibid.*, para. 45), Switzerland (*ibid.*, para. 46), the United Kingdom (*ibid.*, para. 48), Cambodia (*ibid.*, 27th meeting of the Committee of the Whole, para. 4), Romania (*ibid.*, para. 5), Italy (*ibid.*, vol. II, 11th plenary meeting, para. 83) and Poland (*ibid.*, para. 87).

[73] *Yearbook … 1959*, vol. I, 487th meeting, p. 36, para. 40.

[74] *Ibid.*, para. 41.

bring before their constitutional authorities for ratification or approval, that it shall come into force provisionally".[75] Mr. Abdullah ElErian, in 1965, shared this understanding when he stated that the inclusion of a clause on provisional entry into force in a treaty served a useful purpose where the subject matter was urgent, the immediate implementation of the treaty was of great political significance, or it was psychologically important not to wait for completion of the lengthy process of compliance with constitutional requirements.[76]

39. At the United Nations Conference on the Law of Treaties, Venezuela noted that the practice was based on the urgency of certain agreements.[77] Romania stated that the practice of applying treaties provisionally arose in cases where immediate application was necessitated by the urgency of the content of the treaty.[78] Malaysia observed that the advantages of the treaty could be obtained much sooner.[79] Austria noted that the closely knit structure of international relations might require the immediate application of a treaty.[80] Costa Rica was of the view that the practice should be commended on grounds of flexibility.[81] Italy noted that the purpose of article 22 was, *inter alia*, to provide the necessary element of flexibility to regulate present international treaties.[82] Similarly, the Expert Consultant (Sir Humphrey) recalled that provisional application was typically resorted to in two situations: (*a*) when, because of a certain urgency in the matter at issue, particularly in connection with economic treaties, it was highly desirable that certain steps should be taken by agreement in the very near future; and (*b*) when it was not so much a question of urgency as that the matter was regarded as manifestly highly desirable and almost certain to obtain parliamentary approval.[83]

40. Another reason cited pertained to considerations of domestic law. For example, Sweden noted that provisional application was provided for because there was often no absolute assurance that the outcome of internal constitutional procedures would confirm the provisional acceptance of the treaty.[84] Mr. Antonio de Luna had, in 1965, alluded to this when he noted that the method referred to in article 24 was a much more elegant means of overcoming the difficulties raised by constitutional requirements for ratification than the method of using a special terminology so as to avoid the terms "treaty" and "ratification".[85] At the same session, Mr. Bartoš observed that if a treaty was applied only provisionally, most legal systems would regard that situation as a practical expedient which did not introduce the rules of international law into internal law.[86]

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[75] *Yearbook … 1962*, vol. II, p. 182, para. (1) of the commentary to article 24.

[76] *Yearbook … 1965*, vol. I, 790th meeting, pp. 107–108, para. 96; see also the example referred to in *ibid.*, para. 98.

[77] *Official Records of the United Nations Conference on the Law of Treaties, First Session* (footnote 52 above), 26th meeting of the Committee of the Whole, para. 29.

[78] *Ibid.*, 27th meeting, para. 5.

[79] *Ibid.*, para. 7.

[80] *Ibid.*, *Second Session* (footnote 60 above), 11th plenary meeting, para. 59.

[81] *Ibid.*, para. 67.

[82] *Ibid.*, para. 83.

[83] *Ibid.*, para. 89.

[84] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, annex, pp. 279 *et seq.*

[85] *Yearbook … 1965*, vol. I, 790th meeting, p. 107 para. 92.

[86] *Ibid.*, 791st meeting, p. 110, para. 21. See also the comment of Mr. Eduardo Jiménez de Aréchaga that it was because of the constitutional difficulties which sometimes delayed ratification that he consid-

41. Several delegations at the United Nations Conference on the Law of Treaties were of the same view. For example, Yugoslavia considered the article to be useful legally.[87] Romania observed that provisional application satisfied the actual requirements of States by setting up machinery through which delays in ratification, approval or acceptance could be avoided.[88] Malaysia noted that it was often expedient to avoid the unnecessary delay entailed by going through the traditional channels.[89]

42. However, a number of delegations expressed doubts precisely for reasons of compliance with domestic law. For example, Viet Nam noted that States might commit themselves hastily under the pressure of circumstances without weighing all the difficulties that the subsequent ratification of their commitments might encounter.[90] Venezuela observed that Governments hesitated to commit themselves without complying with the procedure prescribed by internal law unless they were certain that ratification would not give rise to any political difficulty.[91] Greece stated that the provisions of article 22 could lead to a conflict between international law and the constitutional law of a State and thereby give rise to delicate situations.[92] Several delegations, however, observed that the solution for States facing constitutional difficulties was not to conclude treaties containing clauses permitting their provisional application.[93] The Expert Consultant expressed surprise at the degree of anxiety, since to him the article seemed to offer a protection to the constitutional position of certain States rather than the contrary, because there was no need for the State concerned to resort to the procedure of provisional application at all.[94]

43. Guatemala,[95] Costa Rica,[96] Cameroon[97] and Uruguay[98] announced that they could not support the article for reasons of conflict with their respective Constitutions. The Republic of Korea indicated that it had abstained from voting on the provision as that might place its Government in a difficult position because of constitutional considerations.[99] El Salvador indicated that, although article 22 raised certain problems for its delegation, it had voted in favour of the article in recognition of the importance of the international practice involved.[100] Following the adoption of the entire 1969 Vienna Convention, the delegation

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ered art. 24 particularly useful (*ibid.*, p. 112, para. 50).

[87] *Official Records of the United Nations Conference on the Law of Treaties, First Session* (footnote 52 above), 26th meeting of the Committee of the Whole, para. 28.

[88] *Ibid.*, 27th meeting, para. 5.

[89] *Ibid.*, para. 7.

[90] *Ibid.*, 26th meeting, para. 26.

[91] *Ibid.*, para. 30. See also the comments of Switzerland (*ibid.*, para. 46), the United States (*ibid.*, para. 51) and Malaysia (*ibid.*, 27th meeting, para. 7).

[92] *Ibid., Second Session* (footnote 60 above), 11th plenary meeting, para. 73.

[93] See the statements of Uruguay (*ibid.*, para. 78), Canada (*ibid.*, para. 80), Italy (*ibid.*, para. 84), Colombia (*ibid.*, para. 86), Poland (*ibid.*, para. 87) and Uganda (*ibid.*, para. 92).

[94] *Ibid.*, paras. 89 and 90.

[95] *Ibid.*, para. 54.

[96] *Ibid.*, para. 67.

[97] *Ibid.*, para. 72.

[98] *Ibid.*, para. 77.

[99] *Ibid.*, para. 102.

[100] *Ibid.*, paras. 103 and 104.

of Guatemala placed on record its reservations regarding, *inter alia*, article 25, in the light of limitations imposed by its Constitution.[101]

B. Shift from provisional "entry into force" to provisional "application"

44. The various iterations of the provision developed by the Commission were framed in terms of "entry into force" on a provisional basis. Nonetheless, references to the phrase "provisional application" can be found in the Commission's records as far back as 1962. For example, that year, Mr. Alfred Verdross referred to a practice whereby a treaty, once signed, might be put into effect if given practical application even before ratification.[102] Mr. Herbert Briggs cited the example of a treaty between the United States and the Philippines of which a provision had been given application by presidential proclamation on a date earlier than that of entry into force.[103] Mr. Bartoš, referring to several agreements between Italy and Yugoslavia, indicated that those agreements had provided for provisional application pending ratification.[104]

45. Sir Humphrey's proposal for article 21, in paragraph 2, subparagraph (*b*), stated that any of the parties might give notice of the termination of the provisional application of the treaty.[105] He explained that there must come a time when States were entitled to say that the provisional application of the treaty must come to an end,[106] and suggested that it was desirable to make withdrawal from the provisional application of the treaty an orderly process.[107] Mr. Tunkin doubted the advisability of including subparagraph (*b*) because it might be interpreted in such a manner as to allow a State to terminate the provisional application of a treaty, notwithstanding the provisions of the treaty itself.[108]

46. Article 21 (renumbered 24), adopted by the Commission in 1962, included the following clause: "or the States concerned shall have agreed to terminate the provisional application of the treaty".[109] The commentary to the article indicated that the "provisional" application of the treaty would terminate upon the treaty being duly ratified or approved or when the States concerned agreed to put an end to the provisional application of the treaty.[110]

47. Some of the written comments submitted by Governments were formulated in terms of provisional "application". For example, Sweden referred to the termination of provisional application of the treaty.[111] The Netherlands considered the difference between provisional entry into

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[101] *Ibid.*, 36th plenary meeting, para. 69.

[102] *Yearbook … 1962*, vol. I, 644th meeting, p. 93, para. 69.

[103] *Ibid.*, p. 94, para. 87.

[104] *Ibid.*, 647th meeting, p. 117, para. 98.

[105] See *Yearbook … 1962*, vol. II, document A/CN.4/144 and Add.1, p. 71.

[106] *Ibid.*, para. (4) of the commentary to article 21.

[107] *Ibid.*

[108] *Ibid.*, vol. I, 657th meeting, p. 112, para. 15.

[109] *Yearbook … 1962*, vol. II, p. 182.

[110] *Ibid.*, para. (2) of the commentary to article 24.

[111] *Yearbook … 1966*, vol. II, pp. 21 *et seq.*, commentary to article 24; see also the comment by Luxembourg on article 12 (*ibid.*, p. 310).

force and provisional application, and suggested that the term "provisional application" might also be understood to refer to a non-binding form of provisional application.[112]

48. It was in the context of a comment by Mr. Reuter, in 1965, that the propriety of referring to "provisional application", as opposed to "provisional entry into force", was raised directly. In his view:

> The expression "provisional entry into force" no doubt corresponded to practice, but it was quite incorrect, for entry into force was something entirely different from the application of the rules of a treaty. Entry into force might depend on certain conditions, a specified term or procedure, which dissociated it from the application of the rules of the treaty. The practice to which the article referred was not to bring the whole treaty into force with its conventional machinery, including, in particular, the final clauses, but to make arrangements for the immediate application of the substantive rules contained in the treaty.[113]

49. Support for this view was expressed by Mr. Verdross, who stated that what was involved was obviously the application of some of the provisions of the treaty, not the treaty as a whole, and certainly not the final clauses;[114] the Chair (Mr. Bartoš);[115] Mr. de Luna, who agreed about the inappropriateness of the expression "provisional entry into force";[116] Mr. Manfred Lachs, who expressed the view that the provision really related to the application of the clauses of the treaty on a provisional basis;[117] and Mr. Briggs.[118] Mr. Eduardo Jiménez de Aréchaga agreed from a logical point of view, but indicated that the practice of provisional entry into force was a common one.[119]

50. Mr. Roberto Ago explained his understanding of the situation, saying:

> [A]rticle 24 dealt with two entirely different situations. The first, to which Mr. Reuter had referred … was that where the treaty itself did not enter into force until the exchange of the instruments of ratification or approval; it was by a kind of secondary agreement, separate from the treaty, that the parties, at the time of signing, agreed to apply provisionally certain or even all of the treaty's clauses … The second, and more important, situation was that which the Commission had envisaged in 1962 and which the Special Rapporteur had had in mind when proposing his redraft, the case where the treaty actually entered into force at the time of signature but was subject to subsequent ratification; the ratification did no more than confirm what had existed ever since the time of signature. It might be said that in such a case the treaty entered into force subject to a resolutory condition. If the ratification did not take place within the prescribed time, the treaty would cease to be in force; but it would have been in force and produced its effects from the time of signature up to the time when it ceased to be in force through the absence of ratification … If … the entry into force did not take place until the time of ratification, what happened during the interim between signature and ratification was that certain of the treaty's clauses were

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[112] See *ibid*., p. 316.

[113] *Yearbook … 1965*, vol. I, 790th meeting, p. 106, para. 75.

[114] *Ibid*., para. 81.

[115] *Ibid*., pp. 106–107, para. 83.

[116] *Ibid*., p. 107, para. 91.

[117] *Ibid*., p. 108, para. 100.

[118] *Ibid*., 791st meeting, para. 3.

[119] *Ibid*., 790th meeting, para. 76. Mr. Tunkin disagreed with Mr. Reuter's view (see *ibid*., 791st meeting, para. 29).

applied provisionally by virtue of a secondary agreement between the parties, and it was only that agreement which entered into force.[120]

He added later that the first of the situations of which he had spoken, that of the provisional application referred to by Mr. Reuter, should be mentioned in article 24.[121]

51. Mr. Senjin Tsuruoka indicated his agreement with Mr. Ago that what happened was that an agreement distinct from the treaty entered into force in conformity with article 23; the treaty was then applied provisionally according to the conditions provided for in that subsidiary agreement.[122] Mr. Jiménez de Aréchaga, however, was not convinced that there was any practical difference between the two situations that Mr. Ago had mentioned.[123] Mr. Tunkin agreed with Mr. Ago that two possibilities existed, but, on practical grounds, he did not consider that both should be covered in article 24. Provisional entry into force was of importance, and article 24 should be retained to deal with it.[124]

52. Sir Humphrey later recalled that some difference of opinion had arisen as to whether, in the case contemplated by the article, the treaty entered into force provisionally or there was an agreement to apply certain provisions of the treaty. The Drafting Committee had framed article 24 in terms of the entry into force provisionally of the treaty because that was the language very often used in treaties and by States. Moreover, it seemed to him that the difference between the two concepts was a doctrinal question.[125] He added that article 23 (Entry into force of treaties) in fact contemplated cases where a treaty did not provide for its entry into force but where, by separate agreement, the States concerned agreed that it should be brought into force by a certain date. He could not see that there was any great difference between such a case and cases where the States concerned agreed that, although it was subject to ratification, the treaty was to come into force provisionally.[126]

53. At the United Nations Conference on the Law of Treaties, in 1968, the Committee of the Whole considered a joint proposal submitted by Czechoslovakia and Yugoslavia to amend paragraph 1 of article 22 so as to replace the reference to provisional entry into force by provisional application.[127] Support for the amendment was expressed by the United States (if article 22 was to be retained, the words "be applied" should be substituted for "enter into force"),[128] Ceylon (endorsed the use of the term "be applied"),[129] Italy (confusion should be avoided between mere application, which was a question of practice, and entry into force, which was a formal legal notion),[130] Czechoslovakia (the term used should be "provisional

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[120] *Ibid.*, 791st meeting, p. 109, paras. 5–7.

[121] *Ibid.*, p. 110, para. 17.

[122] *Ibid.*, p. 109, para. 11.

[123] *Ibid.*, p. 112, para. 53.

[124] *Ibid.*, para. 54.

[125] *Ibid.*, 814th meeting, p. 274, para. 39.

[126] *Ibid.*, para. 40.

[127] A/CONF.39/C.1/L.185 and Add.1, in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions* (footnote 53 above) Report of the Committee of the Whole, para. 224.

[128] *Ibid., First Session* (footnote 52 above), 26th meeting of the Committee of the Whole, para. 24.

[129] *Ibid.,* paras. 34 and 35.

[130] *Ibid.,* para. 43.

application", because there could hardly be two entries into force),[131] Israel (the word "provisionally" introduced a time element, and unless emphasis was placed on application rather than entry into force, it would be necessary to specify that the word "provisionally" referred to time and not to legal effects),[132] France (the notion of provisional entry into force was difficult to define legally),[133] Switzerland,[134] the United Kingdom (it was the application rather than the entry into force of the treaty that was contemplated),[135] Greece,[136] Cambodia,[137] Thailand[138] and Ecuador (the reference to "provisional application" had a more legal connotation and was more accurate than "entry into force provisionally").[139] Iraq, however, disagreed (from the legal point of view, the situation was the same as when the treaty entered into force. The only difference was in the time factor).[140]

54. The Expert Consultant, Sir Humphrey, recalled that the Commission, and especially its Drafting Committee, had discussed at length the choice between the expressions "provisional application" and "entry into force provisionally". The Commission had finally decided to refer to "entry into force provisionally" because it understood that the great majority of treaties dealing with the institution under discussion expressly used that term. From the point of view of juridical elegance, it also seemed preferable not to speak of application, since it was clear that before any treaty provisions could be applied, some international instrument must have come into force. That instrument might be the main treaty itself, or an accessory agreement such as an exchange of notes outside the treaty. Another reason was that it was very common for that institution to be used in cases where there was considerable urgency to put the provisions of the treaty into force. In those cases, ratification sometimes never took place, because the purpose of the treaty was actually completed before it could take place. Clearly such acts must have a legal basis, and for that reason reference should be made to "entry into force provisionally".[141]

55. Nonetheless, the amendment was adopted, and subsequent versions of the article reflected the new formulation. The matter arose again the following year when an exchange of views was held in the plenary of the Conference regarding the legal implications of the change in formulation.[142]

C. Legal basis for provisional application

56. The Commission initially conceived of the practice of provisional entry into force as a possibility afforded only under the terms of the treaty itself. Sir Hersch, in 1953, provided

[131] *Ibid.,* para. 37.

[132] *Ibid.,* para. 44.

[133] *Ibid.,* para. 45.

[134] *Ibid.,* para. 46.

[135] *Ibid.,* para. 49.

[136] *Ibid.,* para. 54.

[137] *Ibid.,* 27th meeting of the Committee of the Whole, para. 4.

[138] *Ibid.,* para. 8.

[139] *Ibid.,* para. 14.

[140] *Ibid.,* 26th meeting of the Committee of the Whole, para. 52.

[141] *Ibid.,* 27th meeting of the Committee of the Whole, paras. 15–18.

[142] See the discussion in paras. 77–79 below.

examples of specific provisions in treaties permitting application prior to entry into force.[143] Sir Gerald, in his first report, retained this approach in his proposal for article 42, paragraph 1 ("a treaty may, however, provide that it shall come into force provisionally").[144] Likewise, Sir Humphrey, in his first report, initially also limited it to treaties which expressly provided therefor.[145] The debate in the Commission in 1962 was also framed in such terms. For example, Mr. Bartoš cited examples of international agreements in which it had been stipulated that the treaty should be applied from the day of signature, whereas the treaty's binding force was conditional on the exchange of the instruments of ratification.[146]

57. However, Mr. Rosenne noted that sometimes, where a formal agreement was made subject to ratification, an agreement in simplified form was concluded for the interim period to bring the former provisionally into force until it had been ratified or until it had become clear that it was not going to be ratified.[147] The Special Rapporteur, Sir Humphrey agreed, stating that an explanation was necessary in the commentary to indicate that that eventuality was covered, since the language of article 21 did not specifically cover the point.[148] While article 21 (renumbered 24), adopted by the Commission that year, retained the earlier approach, the commentary included the observation that whether the treaty was to be considered as entering into force provisionally in virtue of the treaty or of a subsidiary agreement concluded between the States concerned in adopting the text might be a question.[149]

58. In his fourth report, Sir Humphrey, in response to a comment submitted by Sweden in which the possibility of separate agreement between the parties was raised,[150] proposed to revise article 24 in order to take account of cases where the agreement to bring the treaty into force provisionally was not expressed in the treaty itself but concluded outside it.[151] His proposed text read, *in fine*: "A treaty may prescribe, or the parties may otherwise agree that, pending its entry into force it shall come into force provisionally".[152] The Special Rapporteur explained that the word "otherwise" was intended to cover the case in which there was no provision on the subject in the treaty itself, but the parties made a separate agreement, for example, by an exchange of notes. That agreement would itself constitute a treaty, but would not be the treaty whose provisional entry into force was in question.[153]

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[143] *Yearbook … 1953*, vol. II, pp. 114–115, para. (5 (*b*)) of the commentary on article 6, paragraph 2 (*b*).

[144] See *Yearbook … 1956*, vol. II, p. 116.

[145] *Yearbook … 1962*, vol. II, p. 69, art. 20, para. 6 ("a treaty may prescribe that it shall come into force provisionally"); and p. 71, art. 21, para. 2 (*a*) ("when a treaty lays down that it shall come into full force provisionally").

[146] *Yearbook … 1962*, vol. I, 647th meeting, p. 117, para. 97. See also the statement of Yuen-li Liang, Secretary of the Commission, referring to a passage in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7, para. 42), which provided that a State could not become a party to an agreement on a provisional basis, or with respect to certain of its provisions only, unless such a possibility was provided for in the agreement (*ibid.*, para. 40).

[147] *Ibid.*, 668th meeting, p. 259, para. 38.

[148] *Ibid.*, para. 39.

[149] *Ibid.*, vol. II, p. 182, para. (1) of the commentary to article 24.

[150] *Yearbook … 1965*, vol. II, document A/CN.4/177 and Add.1–2, pp. 3 *et seq.*

[151] *Ibid.*

[152] *Ibid.*, p. 58.

[153] *Yearbook … 1965*, vol. I, 790th meeting, p. 107, para. 90.

59. Different views were expressed on the point in the Commission. For example, while Mr. Rosenne proposed referring only to the agreement of the parties,[154] Mr. Lachs preferred referring to both situations.[155] Mr. ElErian was of the view that the question of whether provisional entry into force had its source in the treaty itself or in a subsidiary agreement was a doctrinal issue which could be left to interpretation.[156] The Special Rapporteur observed that if no provision was made in the treaty itself, States could not be prevented from bringing the whole or part of the treaty into force by separate agreement.[157]

60. The text eventually adopted by the Commission referred to the provisional entry into force of a treaty in two scenarios: where the treaty itself prescribed, or where the negotiating States had in some other manner so agreed.[158] As regards the latter, the commentary indicated that an alternative procedure having the same effect was for the States concerned, without inserting a clause in the treaty, to enter into an agreement in a separate protocol or exchange of letters, or in some other manner, to bring the treaty into force provisionally.[159]

61. At the United Nations Conference on the Law of Treaties, all the proposals for amendments to paragraph 1 of article 22 retained the two possibilities for bringing about the provisional application of a treaty indicated in the version adopted by the Commission.

D. Provisional application of part of a treaty

62. The early proposals for a provision on provisional entry into force, up until and including that made by Sir Humphrey in his first report, were focused on the entire treaty. Nonetheless, in 1962 the Commission adopted, on first reading, a revised version of the article which referred to the provisional entry into force of a treaty either in whole or in part.[160] In 1965, the article was restructured by the Drafting Committee by, *inter alia*, moving the question of provisional entry into force of part of a treaty into a second paragraph, which read, in the form subsequently adopted: "The same rule applies to the entry into force provisionally of part of a treaty". The commentary included the following explanation: "No less frequent today is the practice of bringing into force provisionally only a certain part of a treaty in order to meet the immediate needs of the situation or to prepare the way for the entry into force of the whole treaty a little later."[161]

63. While two proposals to delete paragraph 2[162] were rejected[163] at the United Nations Conference on the Law of Treaties, a joint proposal by Czechoslovakia and Yugoslavia for

[154] *Ibid.*, para. 95.

[155] *Ibid.*, para. 101.

[156] *Ibid.*, para. 97.

[157] *Ibid.,* 814th meeting, p. 274, para. 46.

[158] *Yearbook … 1966*, vol. II, p. 210, para. (1) of the commentary to article 22.

[159] *Ibid.*, para. (2) of the commentary to article 22.

[160] *Yearbook … 1962*, vol. II, p. 182, article 24.

[161] *Yearbook … 1966*, vol. II, p. 210, para. (3) of the commentary to article 22.

[162] Proposals by the Philippines (A/CONF.39/C.1/L.165) and jointly by Czechoslovakia and Yugoslavia (A/CONF.39/C.1/L.185 and Add.1) (*Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions* (footnote 53 above), para. 223). See also the statements of the Philippines (*ibid., First Session*, 26th meeting of the Committee of the Whole, para. 25) and of Malaysia and Thailand (*ibid.*, 27th meeting of the Committee of the Whole, paras. 7 and 8).

[163] By 63 votes to 11, with 12 abstentions (*ibid., First and Second Sessions* (footnote 53 above), Report of the Committee of the Whole, para. 227 (*a*)).

paragraph 1[164] was approved,[165] resulting in the content of paragraph 2 of the Commission's version being moved into the *chapeau* to paragraph 1 ("A treaty or a part of a treaty is applied provisionally").

E. Conditionality

64. During the early consideration in the Commission, references to the provisional entry into force of a treaty typically also alluded to the conditions under which the treaty would enter into force on a provisional basis. Sir Hersch, in his first report, cited examples of treaties coming into force, prior to ratification, upon a certain date, *i.e.* the date of signature, or within 15 days therefrom.[166] In his proposal for article 42, paragraph 1, Sir Gerald envisaged the provisional entry into force of a treaty taking place on a certain date, or upon the happening of a certain event, such as the deposit of a specified number of ratifications.[167] Similarly, Sir Humphrey included a reference to provisional entry into force taking place "on signature or on a specified date or event", in his proposal for article 20, paragraph 6,[168] as well as "upon a certain date or event", in that for article 21, paragraph 2, subparagraph (*a*).[169] Article 21 (renumbered 24), adopted in 1962, spoke of provisional entry into force "on a given date or on the fulfilment of specified requirements".[170]

65. However, the text adopted by the Commission in 1965 excluded any reference to a date or event upon which a treaty would enter into force on a provisional basis. This was maintained in all subsequent versions, including that eventually adopted as article 25 of the 1969 Vienna Convention.

F. Juridical nature of provisional application

1. Consideration in the context of the provisional application of treaties

66. The general position of the Commission, maintained throughout its consideration of the provisional entry into force of treaties, was that such practice resulted in an obligation to execute the treaty, even if only on a provisional basis.[171]

67. For example, Sir Gerald, in his first report, proposed article 42, which, in its paragraph 1, provided that in such cases, an obligation to execute the treaty on a provisional basis would arise.[172] During the debate on the report, in 1959, in response to a query by Mr. Bartoš (who wondered what the juridical status of such agreements would be if one of

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[164] See footnote 162 above.

[165] By 72 votes to 3, with 11 abstentions (see *Official Records of the United Nations Conference on the Law of Treaties*, *First and Second Sessions* (footnote 53 above), Report of the Committee of the Whole, para. 227 (*b*)).

[166] *Yearbook … 1953*, vol. II, pp. 114–115, para. (5 (*b*)) of the commentary to article 6, para. (2) (*b*).

[167] *Yearbook … 1956*, vol. II, document A/CN.4/101, p. 104.

[168] *Yearbook … 1962*, vol. II, p. 69.

[169] *Ibid.*, p. 71.

[170] *Ibid.*, p. 182.

[171] See the statement by Mr. François, in 1951, which, although pertaining more directly to the question of the impact of internal law on the observance of treaties, illustrated the type of legal complexity that could arise in the context of treaties being provisionally applied (*Yearbook… 1951*, vol. I, 88th meeting, p. 47, paras. 37–38).

[172] *Yearbook … 1956*, vol. II, document A/CN.4/101, p. 116.

the parties failed to ratify),[173] the Special Rapporteur recalled that the point was covered in article 42, paragraph 1.[174] Mr. Scelle, however, considered that a treaty which had not been ratified could not be regarded as having been concluded or as having effect.[175]

68. The matter was raised again in 1962, during the consideration of Sir Humphrey's first report, and not only in the context of his proposals on the provisional entry into force of treaties. In the context of draft article 9 (Legal effects of a full signature), specifically as regarding the reference to good faith on the part of a signatory State, in paragraph 2, subparagraph (*c*), Mr. Verdross indicated that if a treaty was signed subject to ratification and not ratified, no obligation would arise. That would not preclude the practice whereby a treaty, once signed, might be put into effect if given practical application even before ratification; it would then be ratified *de facto*.[176] The matter was again taken up by Mr. Bartoš, at a later meeting, during the discussion on article 12 (Legal effects of ratification), where he stated that from time to time it happened that the exchange of the instruments of ratification did not take place until some time after the provisions of the treaty, although up to that point only of provisional validity, had been applied in full. Subsequent ratification in such a case gave binding force to the effects of the treaty and to acts based on the treaty.[177]

69. The view of the two Special Rapporteurs who dealt with the question of the provisional entry into force of treaties in their respective reports, Sir Gerald and Sir Humphrey, was clear: both chose to deal with the arrangement as a species of the entry into force of treaties, with all the legal consequences that followed. Sir Humphrey was the more explicit on the point.[178] In explaining his proposal for article 20, paragraph 6, he indicated that a clause providing for the provisional entry into force of the treaty was, from one aspect, a clause relating to a mode of bringing a treaty into force.[179] The "legal effects" of provisional entry into force were then outlined in his proposal for article 21, in paragraph 2, subparagraph (*a*), which provided that the rights and obligations contained in the treaty shall come into operation for the parties to it.[180] He indicated that paragraph 2 sought to formulate the legal effects of the provisional entry into force of a treaty. Clearly, the rule in 2 (*a*) followed simply from the provisional nature of the entry into force.[181]

70. Notwithstanding the contrary view of at least one member,[182] the Commission retained such contextual reference to "entry into force" in article 22 (renumbered 24), as adopted in 1962.[183] Following on the suggestion by Mr. Bartoš that some explanation was

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[173] *Yearbook … 1959*, vol. I, 487th meeting, p. 36, para. 37.

[174] *Ibid.*, para. 38.

[175] *Ibid.*, para. 39.

[176] *Yearbook … 1962*, vol. I, 644th meeting, p. 93, para. 69.

[177] *Ibid.*, 647th meeting, p. 117, para. 97.

[178] For Sir Gerald's view, see para. 67 above.

[179] *Yearbook … 1962*, vol. II, document A/CN.4/144 and Add.1, p. 71, para. (7) of the commentary to article 20.

[180] *Ibid.*, art. 21, para. 2 (*b*).

[181] *Ibid.*, para. (4) of the commentary to article 21.

[182] *Ibid.*, vol. I, 657th meeting, p. 179, para. 9 (Mr. Castrén).

[183] *Ibid.*, vol. II, p. 182 ("the treaty shall come into force as prescribed and shall continue in force"). See also the view of the Sixth Committee, adopted the following year, in the context of the regulations for the implementation of Article 102 of the Charter of the United Nations ("It was recognized that, for

needed in the commentary to forestall the argument that there was something illogical in a treaty being brought into force provisionally and made subject to the exchange of instruments of ratification in order to have binding force,[184] the commentary to article 24 confirmed that there could be no doubt that such clauses had legal effect and brought the treaty into force on a provisional basis.[185]

71. In its written comments on the provision, submitted in 1965, the Netherlands indicated that it interpreted this article as referring only to cases in which States had legally committed themselves to a provisional entry into force. It added, however, that the signatory States might also enter into a non-binding agreement concerning provisional entry into force (within the limits imposed by their respective national laws).[186]

72. In 1965, the Chair (Mr. Bartoš), commenting on article 24, expressed the view that international relations would be made easier if States were given the possibility of putting certain treaties into force provisionally, before ratification, not as a mere practical expedient, but with all the legal consequences of entry into force. He was convinced that the provisional entry into force really conferred validity and a legal obligation; even if the treaty subsequently lapsed owing to lack of ratification, that dissolution of the treaty would not be retroactive and did not prevent the treaty from having been in force during a certain time. There had been a legal position which had produced its effects, and situations had been created under that regime; consequently, the question could not be said to be purely abstract.[187]

73. At the United Nations Conference on the Law of Treaties, the question of the legal nature of the provisional application of a treaty was discussed primarily in the context of the principle of *pacta sunt servanda*.

2. Consideration in the context of the *pacta sunt servanda* principle

74. The juridical nature of the provisional application of treaties was also raised in the context of the Commission's consideration of the principle of *pacta sunt servanda*. The commentary to article 55, adopted in 1964, indicated that it was necessary on logical grounds to include the words "in force". Since the Commission had adopted a number of articles which dealt with the entry into force of treaties, including cases of provisional entry into force, it seemed necessary to specify that it was treaties in force in accordance with the provisions of the present articles to which the *pacta sunt servanda* rule applied.[188]

75. Israel, in its written comments, submitted in 1965, referred to the commentary to article 55, and observed that the question might arise as to the interrelation of this article with article 24 (on provisional entry into force), it being understood, that the general principle of *pacta sunt servanda* would apply to the underlying agreement upon which the provisional entry into force was postulated.[189]

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the purposes 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") (*Yearbook … 1963*, vol. II, p. 29, para. 129).

[184] *Yearbook … 1962*, vol. I, 668th meeting, p. 259, para. 40.

[185] *Ibid*., vol. II, p. 182, para. (1) of the commentary to article 24.

[186] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, annex, pp. 279 *et seq*.

[187] *Yearbook … 1965*, vol. I, 791st meeting, pp. 110, para. 24. See also the statement of Mr. Tsuruoka (*ibid*., para. 27).

[188] *Yearbook … 1964*, vol. II, p. 177, para. (3) of the commentary to article 55.

[189] See *Yearbook … 1966*, vol. II, p. 59.

76. In response to the latter observation, Sir Humphrey, in his sixth report, recalled that the Commission had not, either in 1962 or in 1965, sought to specify what precisely was the source of the parties' obligations in cases of provisional entry into force.[190] He continued: "Article 24, as it now reads, states the law unambiguously in terms of the treaty's entering into force provisionally; in other words, under article 24 the treaty is stated as being brought 'into force'. Consequently, there does not appear to be any need in the present article to make special reference to 'treaties provisionally in force'. Under the present article, the *pacta sunt servanda* rule is expressed to apply to every 'treaty in force' … treaties may be in force under article 24 as well as under article 23."[191] The commentary to article 23 (formerly article 55), adopted in 1966, confirmed that the words "in force" covered treaties in force provisionally under article 22.[192]

77. At the United Nations Conference on the Law of Treaties, during the discussion on article 23 in 1968, an exchange of views was held as to whether the shift from "provisional entry into force" to "provisional application", in article 22, had modified the juridical nature of that provision. On the one hand, the United Kingdom indicated its understanding that the rule in article 23 continued to apply equally to a treaty which was being applied provisionally under article 22, notwithstanding the minor drafting changes.[193] India disagreed, taking the view that any obligations that might arise under article 22 would come under the heading of the general obligation of good faith on the basis of article 15 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) rather than of article 23 (*Pacta sunt servanda*).[194]

78. Norway advised caution so as to avoid the conclusion that the rule in article 23 did not apply to a treaty which was being provisionally applied.[195] In its view, it was clear that under customary international law the *pacta sunt servanda* principle also applied to a treaty during a period of provisional application.[196] Colombia agreed, proposing that the words "or being applied provisionally" be inserted after the words "in force", in article 23.[197] Yugoslavia also proposed a similar amendment to article 23 with a view to ensuring that the wording of the article should cover treaties applied provisionally, the subject of article 22.[198] Romania expressed the view that it was obvious that the principle of *pacta sunt servanda* was just as applicable to treaties which were in force provisionally.[199]

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[190] See *ibid*., p. 61, paragraph 3 of the observations and proposals of the Special Rapporteur to article 55.

[191] *Ibid*.

[192] *Ibid*., vol. II, p. 211, paragraph (3) of the commentary to article 23.

[193] *Official Records of the United Nations Conference on the Law of Treaties*, *Second Session* (footnote 60 above), 11th plenary meeting, para. 58.

[194] *Ibid*., para. 70.

[195] *Ibid*., 12th plenary meeting, para. 32. See also *ibid*., 29th meeting of the Committee of the Whole, para. 58.

[196] *Ibid*., 12th plenary meeting, paras. 33 and 34.

[197] *Ibid*., para. 45.

[198] *Ibid*., para. 50. See also the views of Nepal (*ibid*., para. 56) and the Ukrainian Soviet Socialist Republic (*ibid*., para. 61).

[199] *Ibid*., para. 58.

79. The President of the Conference, Mr. Ago, subsequently noted that no one had doubted the soundness of the Yugoslav and Colombian amendments. He then stated that it was obvious that the expression "treaty in force" also covered treaties applied provisionally.[200] The Yugoslav amendment was referred to the Drafting Committee and was considered together with a further Yugoslav proposal, for the inclusion of an article 23 *bis*, which would have read as follows: "Every treaty applied provisionally in whole or in part is binding on the contracting States and must be performed in good faith".[201] The Chair of the Drafting Committee later indicated that it had considered the Yugoslav proposal to be self-evident and that provisional application also fell within the scope of article 23 on the *pacta sunt servanda* rule.[202]

3. Consideration in the context of the obligation not to frustrate the object of the treaty or to impair its eventual performance

80. Treaties being applied on a provisional basis were also referred to in the course of the discussion on the good faith obligation to refrain from the frustration of the object of the treaty or to impair its eventual performance. In his first report, issued in 1962, Sir Humphrey proposed article 9, entitled "Legal effects of a full signature", which, in its paragraph 2, subparagraph (*c*), provided: "The signatory State, during the period before it shall have notified to the other States concerned its decision in regard to the ratification or acceptance of the treaty or, failing any such notification, during a reasonable period, shall be under an obligation in good faith to refrain from any action calculated to frustrate the objects of the treaty or to impair its eventual performance".[203]

81. During the debate on article 9 that year, Mr. Bartoš welcomed the "good faith" clause in subparagraph 2 (*c*), in view of the recent growth of a practice, particularly in the case of customs agreements, whereby they entered into force at once pending definitive ratification.[204] Mr. Briggs noted that certain provisions of certain treaties might enter into force on signature.[205] He proposed to include a provision to the effect that, pending the entry into force of a treaty, the obligation not to frustrate the objects of the treaty would be not merely one of good faith, but one which derived from a rule of general international law.[206] Furthermore, Mr. Verdross took the view that paragraph 2, subparagraph (*e*) ("The signatory State shall also be entitled to exercise any other rights specifically conferred by the treaty itself or by the present articles upon a signatory State")[207] did not preclude the practice whereby a treaty, once signed, might be put into effect if given practical application even before ratification.[208]

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[200] *Ibid*., para. 63.

[201] *Ibid*., *First and Second Sessions* (footnote 53 above), A/CONF.39/L.24.

[202] See also *ibid*., *Second Session* (footnote 60 above), 28th plenary meeting, para. 47. See also the statement by Poland (*ibid*., 29th plenary meeting, paras. 2 and 3).

[203] See *Yearbook … 1962*, vol. II, p. 46.

[204] *Ibid*., vol. I, 643rd meeting, p. 88, para. 86.

[205] *Ibid*., 644th meeting, p. 94, para. 87.

[206] *Ibid*., para. 88.

[207] See footnote 203 above.

[208] *Ibid.,* para. 69.

82. In response to the debate, the Special Rapporteur, after proposing to move subparagraph (*d*) into a separate article on the rights and obligations of States pending the entry into force of a treaty in the preparation of which they had participated,[209] added that during the discussion, some members had suggested that the provisions of subparagraph (*e*) could be useful to cover the question of provisional entry into force. He agreed that that was so.[210] The Drafting Committee later proposed a new article (subsequently renumbered as article 17) which was restricted to the general good faith obligation to refrain from acts calculated to frustrate the objects of the treaty.

83. In 1965, Mr. Briggs noted that article 24 (Provisional entry into force) was different from article 17, which set out certain obligations that good faith imposed, pending the entry into force of the treaty, on States which had participated in the preparation of its text. In the case envisaged in article 24, on the other hand, the participants had prescribed that certain parts of the treaty would apply pending the exchange of ratifications.[211]

84. Article 17 was later adopted as article 15 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force). The provisional application of treaties was not raised during the consideration of article 15 at the United Nations Conference on the Law of Treaties.

G. Termination of provisional application

85. The question of the termination of provisional entry into force featured in the earlier proposals in the Commission. However, it was, for the most part, excluded from article 22 of the 1966 draft articles on the law of treaties,[212] only to be reinserted, into what became article 25, at the United Nations Conference on the Law of Treaties, at the behest of Governments.

86. It is worth recalling that paragraph 2 of article 25 indicates only one method of the termination of provisional application, *i.e.* through notification by the State wishing to terminate. Other processes or grounds may be expressly provided for by the treaty itself or by separate agreement between the negotiating States. The negotiating history of the provision reveals that other possibilities for the termination of provisional application were considered.

1. Termination upon entry into force of the treaty being provisionally applied

87. Article 20, paragraph 6, as proposed by Sir Humphrey in his first report, provided that a treaty may enter into force provisionally pending its full entry into force.[213] Likewise,

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[209] *Ibid.*, vol. I, 645th meeting, p. 97, para. 17.

[210] *Ibid.*, para. 18.

[211] *Yearbook … 1965*, vol. I, 791st meeting, p. 108, para. 2.

[212] Up until 1965, the various versions of the draft article, including that adopted in 1962, made specific reference to the termination of provisional entry into force. In 1965, at the suggestion of the Special Rapporteur, who had come to the conclusion that it was somewhat inconsistent that article 24 should be the only article in part I which dealt with termination, the Drafting Committee decided that article 24 should deal only with the case of a treaty's entry into force provisionally (see *ibid.,* 814th meeting, p. 275, para. 44). See also *ibid.,* 791st meeting, p. 113, para. 57, and the views of Mr. Ago (*ibid.,* 814th meeting, p. 275, para. 49). This position was reiterated in para. (4) of the commentary to article 22 of the articles on the law of treaties, of 1966 (see *Yearbook … 1966*, vol. II, p. 210).

[213] *Yearbook … 1962*, vol. II, p. 69.

subparagraph (*a*) of article 21, paragraph 2, referred to the provisional entry into force of a treaty until the treaty enters into full force in accordance with its terms.[214] This assertion was presented as a matter of logic, arising from the provisional nature of the entry into force.[215]

88. The Special Rapporteur's proposal was reflected in the text of article 22 (renumbered 24), adopted in 1962, which, in its second sentence provided for, *inter alia*, the continuation in force of a treaty on a provisional basis "until … the treaty shall have entered into force definitively".[216] The commentary to article 24 indicated that the "provisional" application of the treaty would terminate upon the treaty being duly ratified or approved in accordance with the terms of the treaty.[217]

89. This understanding was retained in all subsequent versions of the provision, as adopted by the Commission. It even survived the decision, taken in 1965, to delete the clause on the termination of the provisional entry into force of a treaty.[218] The article eventually adopted by the Commission retained the idea, in paragraph 1 (*a*), that provisional entry into force was to be undertaken pending ratification, acceptance, approval or accession by the contracting States.[219]

90. At the United Nations Conference on the Law of Treaties, a proposal was made by Hungary and Poland to, *inter alia*, include a more direct reference to provisional application being terminated when the treaty entered into force, in a new paragraph on termination (together with the other grounds for termination).[220] The text which subsequently emerged from the Drafting Committee (and which was later adopted as article 25 of the Convention), however, maintained the Commission's approach of referring to the termination of provisional application upon the entry into force of the treaty in paragraph 1, as opposed to paragraph 2, on the termination of provisional application. During the debate on article 22, held in the plenary of the Conference, in 1969, the Expert Consultant observed that it was implied in the notion of provisional application that such application was provisional pending definitive entry into force.[221]

2. Unilateral termination versus termination by agreement

91. Sir Humphrey's proposal for subparagraph (*b*) of article 21 (2), submitted in 1962, included the possibility of unilateral termination through the giving of notice ("any of the parties may give notice of the termination of the provisional application of the treaty"), the legal effect of which was tied to the lapse of a period of six months (from the giving of the notice).[222] Upon the conclusion of the notice period, the rights and obligations contained in the treaty would cease to apply with respect to that party.[223] In his commentary to the

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[214] *Ibid.*, p. 6.

[215] *Ibid.*, paragraph (4) of the commentary to article 21.

[216] *Ibid.*, p. 182.

[217] *Ibid.*, paragraph (2) of the commentary to article 24.

[218] See footnote 212 above.

[219] *Yearbook … 1965*, vol. II, p. 162.

[220] A/CONF.39/C.1/L.198, reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions* (footnote 53 above), para. 224.

[221] *Ibid.*, *Second Session* (footnote 60 above), 11th plenary meeting, para. 63.

[222] *Yearbook … 1962*, vol. II, p. 71, art. 21, para. 2(*b*).

[223] *Ibid.*

article, he characterized such unilateral termination as a form of withdrawal, and indicated that it seemed desirable to try to give a little more definition to the rule, and perhaps to make withdrawal from the provisional application of the treaty an orderly process.[224] He also hinted at the possibility that this mode of the termination of provisional entry into force might not affect the position of other States for which the treaty had entered into force provisionally, by stating that the draft also suggested that withdrawal would affect only the particular party concerned.[225] However, the text adopted by the Commission in 1962[226] did not include reference to a notice requirement. Instead, the element of initiative, on the part of one or all States, was restricted entirely to mutual agreement.

92. The possibility of termination through notice in subparagraph (*b*) of article 21 (2) was subject to the general proviso "unless the parties have concluded a further agreement to continue the treaty in force on a provisional basis".[227] Although subparagraph (*b*) was not referred to the Drafting Committee (for other reasons), the notion of the termination of provisional entry into force by agreement between the parties survived in the text for article 22 (renumbered 24), adopted by the Commission in 1962.[228] In that version, agreement of the parties was presented as one of two modes of termination (the other being automatic termination upon the entry into force of the treaty): "the treaty … shall continue in force on a provisional basis until … the States concerned shall have agreed to terminate the provisional application of the treaty".[229]

93. This was criticized by the Netherlands, in a written comment in which it maintained that a Government should also be entitled to terminate a provisional entry into force unilaterally if it had decided not to ratify a treaty that had been rejected by Parliament or if it had decided for other similar reasons not to ratify it.[230]

94. In 1965, Mr. José Maria Ruda stated his view that from the point of view of legal theory, so long as definitive consent had not been given, each of the parties should remain free to withdraw from the treaty and, consequently, to terminate its provisional application.[231] Mr. Lachs went further, suggesting that the right of initiative arose in cases in which the ratification of a treaty had been delayed.[232] Mr. Tsuruoka expressed support for the position that the provisional entry into force of the treaty would be presumed to terminate when one of the parties had given notice that it would not ratify the treaty.[233] However, the matter was overtaken by the decision of the Commission to no longer include a specific provision on the termination of provisional entry into force.[234]

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[224] *Ibid*., p. 71, para. (4) of the commentary to article 21.

[225] *Ibid*. He, however, qualified the suggestion by stating that this might be a matter for further examination.

[226] *Ibid*., p. 71.

[227] *Ibid*., art. 21, para. 2 (*b*).

[228] *Ibid*., p. 182.

[229] *Ibid*.

[230] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, annex, pp. 279 *et seq*.

[231] *Yearbook … 1965*, vol. I, 790th meeting, p. 107, para. 87.

[232] *Ibid*., p. 108, para. 103.

[233] *Ibid*., 791st meeting, para. 12. Support for a notification requirement was also indicated by Mr. Tunkin (*ibid*., p. 111, para. 30), Mr. Rosenne (*ibid*., para. 32), Mr. Jiménez de Aréchaga (*ibid*., p. 112, para. 51) and Mr. Ago (*ibid*., 814th meeting, p. 275, para. 49).

[234] See footnote 212 above.

95. Belgium, in its written comments submitted in 1967, referred back to the text adopted by the Commission in 1962 and objected to the linking of the termination of provisional entry into force to mutual agreement. It maintained that this stance meant that it would have been impossible for a State to relinquish the obligation to apply the treaty provisionally unless the other contracting States agreed, adding that it would be advisable to provide a means by which the provisional application of a treaty not yet ratified could be terminated unilaterally.[235] During the debate on the law of treaties held in the Sixth Committee in 1967, Sweden agreed with the Belgian comment, expressing the view that there might be a need to allow States the freedom to terminate such treaties unilaterally without prior notice.[236]

96. At the first session of the United Nations Conference on the Law of Treaties, in 1968, two proposals were made to include a new paragraph reintroducing the question of the termination of provisional application. Under the proposal submitted by Belgium, a State wishing to terminate the provisional entry into force of a treaty could do so by manifesting its intention not to become a party to the treaty, subject to the proviso "unless otherwise provided or agreed".[237] Hungary and Poland submitted a joint proposal for a new paragraph which recognized notification by one of such States of its intention not to become a party to the treaty with respect to that State as among the possible grounds for the termination of provisional application.[238]

97. During the debate, the United States supported the idea of permitting the termination of provisional application either by mutual agreement or upon unilateral notification, and made a proposal of its own.[239] Belgium, referring to its proposed amendment, explained that there was no question of applying the provisions of the draft relating to denunciation of treaties, because a State could not denounce a treaty to which it was not yet party.[240] Italy,[241] France,[242] Switzerland,[243] the United Kingdom[244] and Australia[245] approved of the Belgian amendment.

98. The Committee of the Whole later decided to reinsert a paragraph on termination, based on the Belgian and Polish-Hungarian amendments. The text for article 22, subsequently proposed by the Drafting Committee, contained a new paragraph 2 which established the primary mode of termination of provisional application as being on the basis of unilateral notification, subject to a general proviso as to mutual agreement, reflected in either the treaty or in a subsequent agreement.[246]

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[235] See footnote 50 above.

[236] *Official Records of the General Assembly, Twenty-second Session*, Sixth Committee (Legal Questions), 980th meeting, para. 13.

[237] A/CONF.39/C.1/L.194, reproduced in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions* (footnote 53 above), para. 224.

[238] A/CONF.39/C.1/L.198, *ibid.*

[239] *Official Records of the United Nations Conference on the Law of Treaties, First Session* (footnote 52 above), 26th meeting of the Committee of the Whole, para. 24.

[240] *Ibid.*, para. 42.

[241] *Ibid.*, para. 43.

[242] *Ibid.*, para. 45.

[243] *Ibid.*, para. 47.

[244] *Ibid.*, para. 49.

[245] *Ibid.*, 27th meeting, para. 10.

[246] *Ibid.*, *First and Second Sessions* (footnote 53 above), para. 230.

99. The new paragraph on the termination of provisional application was scrutinized during the debate on article 22, held in the plenary of the Conference, in 1969. Iran maintained that it allowed the possibility of withdrawal by a State which had already signed a treaty and would seem to undermine the *pacta sunt servanda* rule.[247] In response to a comment by the President of the Conference, pointing to the difficulties in understanding the phrase "unless the treaty otherwise provides",[248] the Chair of the Drafting Committee recalled the decision of the Committee of the Whole to include a paragraph on termination, and clarified that a State which had accepted the provisional application of a treaty could decide later that it did not wish to become a party; upon the other States concerned being notified of that intention, provisional application would cease.[249]

100. Several delegations, including Iran,[250] remained unconvinced. Greece noted that paragraph 2 could give rise to insecurity because in parliamentary systems it was possible for a Government to change its mind and to express a different intention at a later stage.[251] Italy queried as to the legal effect of the termination of provisional application (whether *ex tunc* or *ex nunc*).[252] Poland made a late proposal, which was not adopted, to establish a six-month period before the termination of provisional application could take effect.[253] The Conference subsequently adopted article 22 (later renumbered 25), including paragraph 2, without further amendment.

3. Termination as a consequence of unreasonable delay or reduced probability of ratification

101. Sir Gerald's proposal for article 42, made in 1956, included the following reference in paragraph 1: "an obligation to execute the treaty on a provisional basis … will come to an end if final entry into force is unreasonably delayed or clearly ceases to be probable".[254] Unreasonable delay, leading to the perception of the reduced likelihood of ratification, as a ground for termination of provisional entry into force was referred to on several subsequent occasions. For example, Mr. Scelle, during the debate in 1959 on another provision, expressed the view that the days when States could disavow the signatures of their plenipotentiaries had passed; those plenipotentiaries were no longer mere authorized agents. They now had special powers which committed the State to some extent, and the authorities competent to ratify the instrument were no longer free to act arbitrarily. If, acting through simple caprice or with ill intent, they delayed entry into force, a certain State responsibility was entailed. That observation applied to some extent to the special case of treaties that entered into force provisionally.[255]

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[247] *Ibid*., *Second Session* (footnote 52 above), 11th plenary meeting, para. 62.

[248] *Ibid*., para. 65.

[249] *Ibid*., para. 66.

[250] *Ibid*., para. 71.

[251] *Ibid*., para. 75.

[252] *Ibid*., para. 84.

[253] *Ibid*., para. 88.

[254] See *Yearbook … 1956*, vol. II, p. 116. In his commentary to the provision, the Special Rapporteur simply noted that it "states the rule applicable in case [provisional entry into force] becomes unduly prolonged" (*ibid*., p. 127, para. 106).

[255] *Yearbook … 1959*, vol. I, 488th meeting, p. 37, para. 2.

102. Sir Humphrey, in his proposal for article 21, paragraph 2 (*b*), submitted in 1962, cited the circumstance in which the entry into full force of the treaty was unreasonably delayed as the ground for any of the parties to give notice of termination.[256] He explained that he had made the proposal, which was put forward *de lege ferenda*, because it seemed evident that if the necessary ratifications or acceptances, *etc*., were unreasonably delayed so that the provisional period was unduly prolonged, there had to come a time when States were entitled to say that the provisional application of the treaty had to come to an end.[257]

103. The suggested link to "unreasonable delay" did not, however, find favour with the Commission as a whole. Mr. Erik Castrén considered the expression to be far from clear.[258] Mr. Jiménez de Aréchaga doubted the advisability of the rule proposed *de lege ferenda* in paragraph 2 (*b*); it could have the effect of upsetting certain established treaty relations, and seemed more relevant to the termination of treaties than to the legal effects of entry into force.[259] Mr. Tunkin also expressed doubts, noting that it might be interpreted in such a manner as to allow a State to terminate the provisional application of a treaty, notwithstanding the provisions of the treaty itself, on the ground that, in that State's own view, there had been unreasonable delay in the entry into full force of the treaty.[260] The Special Rapporteur subsequently indicated his willingness to drop subparagraph (*b*), and observed that it sometimes occurred that a treaty remained in force provisionally throughout its life, the device of provisional entry into force being used merely because there was no expectation of parliamentary approval for ratification within due time. In those cases, the treaty never entered formally into full force, because the objects of the treaty were achieved without the "provisional" character of the entry into force ever being terminated.[261]

104. Following the demise of subparagraph (*b*), the link between the termination of provisional entry into force and undue delay did not feature in any of the subsequent iterations of the provision up to, and including, article 25 of the 1969 Vienna Convention.

105. Nonetheless, the element of delay, and resultant reduced probability of ratification, was retained in the commentary to article 24, adopted in 1962, which stated, *inter alia*: "Clearly, the 'provisional' application of the treaty will terminate … upon it becoming clear that the treaty is not going to be ratified or approved by one of the parties. It may sometimes happen that the event is delayed".[262]

106. There was an attempt in 1965 to revive the element of reduced probability of ratification. Sweden, in a written comment, recalled the passage in the commentary to article 24 and expressed the view that it came closest to the legal position underlying the prevailing practice.[263] The Special Rapporteur concurred with the Swedish comment and, in his fourth report, submitted in 1965, proposed to include a new reference to the treaty con-

[256] *Yearbook … 1962*, vol. II, p. 71, art. 21, para. 2 (*b*).

[257] *Ibid*., paragraph (4) of the commentary to article 21.

[258] *Ibid*., vol. I, p. 179, 657th meeting, para. 11.

[259] *Ibid*., pp. 179–180, para. 14.

[260] *Ibid*., p. 180, para. 15.

[261] *Ibid*., para. 17.

[262] *Ibid*., vol. II, p. 182, para. (2) of the commentary to article 24.

[263] See *Yearbook … 1966*, vol. II, document A/6309/Rev.1, Part II, annex, pp. 279 *et seq*.

tinuing in force provisionally, *inter alia*, until "it shall have become clear that one of the parties will not ratify or, as the case may be, approve it".[264]

107. That year, Mr. Jiménez de Aréchaga, while agreeing with the Special Rapporteur's new clause, observed that the formulation was more suited to bilateral treaties; a multilateral treaty would not necessarily lapse for the other parties concerned.[265] Mr. Castrén was of the view that the new language brought the provision closer to unilateral termination, which he thought went too far.[266] Mr. Lachs pointed out that in some cases the position as to ratification or non-ratification by a State would never become clear and that there were many cases in which treaties had remained for years on the agenda of the legislative bodies empowered to ratify them, without any action being taken.[267] He also suggested that the point could be covered by specifying that a State must clarify its position within a certain period of time.[268] Mr. Tunkin, in expressing misgivings about the Special Rapporteur's new formulation, stated that the matter could not be left to a mere inference.[269] The issue was overtaken by the Commission's decision not to include a specific reference to the termination of provisional entry into force.[270]

108. At the United Nations Conference on the Law of Treaties, in 1968, Ceylon observed that attention should also be given to limiting the period of provisional application. After a specified date, provisional application would cease until ratification.[271] In 1969, Austria proposed the inclusion of a new paragraph providing that the provisional application of a treaty did not release a State from its obligation to take a position within an adequate time limit regarding its final acceptance of the treaty.[272] India expressed the view that it would probably be desirable to lay down some time limit for States to express their intention in the matter, so that the provisional application of a treaty might not be perpetuated.[273] However, such proposals were not accepted, and the Conference subsequently adopted the article without reference to the effect of delay.[274]

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[264] See *Yearbook … 1965*, vol. II, p. 58, para. 3 of the observations and proposals of the Special Rapporteur.

[265] *Ibid.,* vol. I, 790th meeting, p. 106, para. 77.

[266] *Ibid.,* para. 80.

[267] *Ibid.*, p. 108, para. 102. See also the views of Mr. Ago (*Ibid.,* vol. I, 791st meeting, p. 109, para. 8).

[268] *Ibid.,* 790th meeting, p. 108, para. 102.

[269] *Ibid.,* 791st meeting, p. 111, para. 30.

[270] See footnote 212 above.

[271] *Official Records of the United Nations Conference on the Law of Treaties, First Session* (footnote 52 above), 26th meeting of the Committee of the Whole, para. 32.

[272] *Ibid.*, *First Session* (footnote 52 above), 11th plenary meeting, para. 61.

[273] *Ibid.*, para. 70.

[274] Following the adoption of the article, the Drafting Committee decided not to accept any of the suggestions made during the debate (*ibid.*, 28th plenary meeting, paras. 45–47).

B. Memorandum by the United Nations Secretariat:* Procedural History of Article 25 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986

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	Source
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.
African Charter of Human and Peoples' Rights (Nairobi, 27 June 1981)	*Ibid*., vol. 1520, No. 26363, p. 217.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.

* Prepared by the Secretariat of the International Law Commission (Codification Division of the Office of Legal Affairs). UN Doc. A/CN.4/676 (2015).

Summary

Article 25 of the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986* (hereinafter, "1986 Vienna Convention"), provides for the application of treaties on a provisional basis by negotiating States and negotiating international organizations. When undertaking the preparatory work for the Convention, the International Law Commission modelled that provision on article 25 of the *Vienna Convention on the Law of Treaties* of 1969 (hereinafter, "1969 Vienna Convention"). The present memorandum traces the negotiating history of the provision both in the Commission and at the United Nations Conference on the Law of Treaties between States and International Organizations or Between International Organizations of 1986 (hereinafter, "1986 Vienna Conference").

Introduction

1. At its sixty-fourth session, held in 2012, the Commission included the topic "Provisional application of treaties" in its programme of work.[1]

2. At its sixty-sixth session, held in 2014, the Commission "decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on this subject in the *travaux préparatoires* of the relevant provisions of the [1986] Vienna Convention."[2]

3. The present memorandum provides, in chapter I below, a brief procedural history of the origins and subsequent preparation and negotiation of the 1986 Vienna Convention.[3]

4. Chapter II contains a description of the *travaux préparatoires* of article 25 of the Convention in terms of the work undertaken by the Commission in preparing the draft articles on the law of treaties between States and international organizations or between international organizations, adopted in 1982,[4] as well as in the context of the subsequent negotiation and adoption of the Convention at the diplomatic conference of plenipotentiaries, held in 1986.

5. Article 25 of the 1986 Vienna Convention reads as follows:

> *Provisional application*
>
> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (*a*) the treaty itself so provides; or

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[1] *Yearbook of the International Law Commission* [hereinafter "*Yearbook …*"], *2012*, vol. II (Part Two), para. 141.

[2] *Yearbook … 2014*, vol. II (Part Two), para. 227. The present memorandum supplements an earlier study (*Yearbook … 2013*, vol. II (Part One), document A/CN.4/658)[, reproduced above, at p. 266], also undertaken by the Secretariat at the request of the Commission, on the previous work undertaken by the Commission on the subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the 1969 Vienna Convention.

[3] As at 21 November 2014, the Convention was not yet in force.

[4] The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 1982*, vol. II (Part Two), para. 63.

(*b*) the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Chapter I
Procedural history of the 1986 Vienna Convention

A. Developments prior to 1970

6. During the consideration of the draft articles on the law of treaties from 1950 to 1966, the Commission discussed on several occasions the question of whether the draft articles should apply not only to treaties between States but also to treaties concluded by other entities,[5] and in particular by international organizations. However, the Commission subsequently decided to confine the study to treaties between States.[6]

7. At the United Nations Conference on the Law of Treaties, held in Vienna in 1968 and 1969, the United States of America proposed an amendment that would have extended the scope of the future convention to treaties concluded by international organizations.[7] The United States subsequently withdrew its proposal[8] in the face of concerns that it would serve to delay the work of the Conference.

8. Instead, the Conference adopted a resolution in which, *inter alia*, it

> *[r]ecommend[ed]* to the General Assembly of the United Nations that it refer to the International Law Commission the study, in consultation with the principal international organizations, of the question of treaties concluded between States and international organizations or between two or more international organizations.[9]

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[5] See the first report on the question of treaties concluded between States and international organizations or between two or more international organizations (*Yearbook … 1972*, vol. II, document A/CN.4/258) and the historical survey prepared by the Secretariat (document A/CN.4/L.161 and Add.l–2; mimeographed).

[6] Article 1 of the draft articles on the law of treaties, adopted by the Commission in 1966, reads: "The present articles relate to treaties concluded between States". *Yearbook … 1966*, vol. II, document A/6309/Rev.l, part II, chap. II.

[7] A/CONF.39/C.1/L.15 ("or other subjects of international law"). See *Official Records of the United Nations Conference on the Law of Treaties, First session, Vienna, 26 March–24 May 1968, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (A/CONF.39/11, United Nations publication, Sales No. E.68.V.7), Committee of the Whole, 2nd meeting, paras. 3–5.

[8] *Ibid*., 3rd meeting, para. 64.

[9] *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March–24 May 1968 and 9 April–22 May 1969, Documents of the Conference* (A/CONF.39/11/Add.2, United Nations publication, Sales No. E.70.V.5), Final Act of the United Nations Conference on the Law of Treaties, document A/CONF.39/26, annex, resolution relating to article 1 of the Vienna Convention on the Law of Treaties, p. 285.

B. Consideration by the Commission, 1970 to 1982

9. The General Assembly, in its resolution 2501 (XXIV) of 12 November 1969, acting on the resolution of the conference,

> *[r]ecommend[ed]* that the International Law Commission should study, in consultation with the principal international organizations, as it may consider appropriate in accordance with its practice, the question of treaties concluded between States and international organizations or between two or more international organizations, as an important question.

10. The following year, the Commission decided to include the question in its programme of work and established a subcommittee to undertake a preliminary study.[10] Mr. Paul Reuter was appointed Special Rapporteur for the topic at the twenty-third session, in 1971.[11] On the basis of 11 reports submitted by the Special Rapporteur between 1972 and 1982, the Commission prepared a set of 80 draft articles, and an annex, on the law of treaties between States and international organizations or between international organizations, which it adopted in 1982, together with commentaries.[12]

11. At the time of adoption, the Commission commented on the relationship of the draft articles to the 1969 Vienna Convention, and provided some explanations of the methodological approach undertaken during the preparation of the draft articles. In particular, it indicated the following:

> 35. By comparison with others, the present codification possesses some distinctive characteristics owing to the extremely close relationship between the draft articles and the [1969] Vienna Convention.
>
> 36. Historically speaking, the provisions which constitute the draft articles now under consideration would have found a place in the Vienna Convention had the Conference not decided that it would confine its attention to the law of treaties between States. Consequently, the further stage in the codification of the law of treaties represented by the preparation of draft articles on the law of treaties between States and international organizations or between international organizations cannot be divorced from the basic text on the subject, namely the Vienna Convention.
>
> 37. That Convention has provided the general framework for the present draft articles. This means, firstly, that the draft articles deal with the same questions as formed the substance of the Vienna Convention. The Commission has had no better guide than to take the text of each of the articles of that Convention in turn and consider what changes of drafting or of substance are needed in formulating a similar article dealing with the same problem in the case of treaties between States and international organizations or between international organizations.
>
> …
>
> 40. Treaties are based essentially on the equality of the contracting parties, and this premise leads naturally to the assimilation, wherever possible, of the treaty situation of international organizations to that of States. The Commission has largely followed this principle in deciding generally to follow as far as possible the articles of the Vienna Convention referring to treaties between States for treaties between States and international

[10] *Yearbook … 1970*, vol. II, para. 89.

[11] *Yearbook … 1971*, vol. II (Part One), document A/8410/Rev.1, para. 118 (*a*).

[12] See footnote 4 above.

organizations, and for treaties between international organizations. The increasing number of treaties in which international organizations participate is evidence of the value of treaties to international organizations as well as to States.

41. However, even when limited to the field of the law of treaties, the comparison involved in the assimilation of international organizations to States is quickly seen to be far from exact. While all States are equal before international law, international organizations are the result of an act of will on the part of States, an act which stamps their juridical features by conferring on each of them strongly marked individual characteristics which limit its resemblance to any other international organization. As a composite structure, an international organization remains bound by close ties to the States which are its members; admittedly, analysis will reveal its separate personality and show that it is "detached" from them, but it still remains closely tied to its component States. Being endowed with a competence more limited than that of a State and often somewhat ill-defined (especially in the matter of external relations), for an international organization to become party to a treaty occasionally required an adaptation of some of the rules laid down for treaties between States.

42. The source of many of the substantive problems encountered in dealing with this subject lies in the contradictions which may arise as between *consensuality* based on the equality of the contracting parties and the differences between States and international organizations. Since one of the main purposes of the draft articles, like that of the Vienna Convention itself, is to provide residuary rules which will settle matters in the absence of agreement between the parties, the draft must set forth general rules to cover situations which may be more varied than those involving States alone. For international organizations differ not only from States but also from one another. They vary in legal form, functions, powers and structure, a fact which applies above all to their competence to conclude treaties.[13]

12. The Commission explained further that it had followed a methodology intended to establish the draft articles as being

> independent of the Vienna Convention in the sense that the text as a whole represents a complete entity that can be given a form which would enable it to produce legal effects irrespective of the legal effects of the Vienna Convention. If, as recommended, the set of draft articles becomes a convention, the latter will bind parties other than those to the Vienna Convention and will have legal effects whatever befalls the Vienna Convention.[14]

C. 1986 Vienna Conference

13. Pursuant to the Commission's recommendation that a conference be convoked to conclude a convention,[15] the General Assembly subsequently decided[16] to convene the Conference in Vienna from 18 February to 21 March 1986.[17] In paragraph 5 of its resolu-

[13] *Ibid*., paras. 35–37 and 40–42.

[14] *Ibid*., para. 46.

[15] *Ibid*., para. 57.

[16] General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985.

[17] The General Assembly had before it several reports by the Secretary-General containing the written comments and observations of Member States and intergovernmental organizations. See

tion 39/86 of 13 December 1984, the General Assembly "*refer[red]* to the Conference, as the basic proposal for its consideration, the draft articles on the law of treaties between States and international organizations or between international organizations adopted by the International Law Commission at its thirty-fourth session". Ninety-seven States participated in the Conference, which culminated in the adoption of the Convention.[18]

Chapter II
Development of article 25

A. Consideration by the Commission

1. First reading of the draft articles

14. The Commission undertook the first reading of the draft articles from 1970 to 1980, on the basis of the first nine reports of the Special Rapporteur, Mr. Paul Reuter. The question of the provisional application of treaties was considered for the first time[19] in his fourth report,[20] submitted at the twenty-seventh session in 1975, which included the following proposal for draft article 25:

Article 25. Provisional application

1. 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 or international organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States or international organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or organization shall be terminated if that State or organization notifies the other States or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

15. In the commentary to that article, the Special Rapporteur indicated simply that the text "differ[ed] from article 25 of the 1969 Convention only with respect to the drafting changes needed in order to take account of international organizations".[21]

A/38/145 and Corr.1 and Add.1 and A/39/491; see also the statement on treaties between States and international organizations or between international organizations by the Administrative Committee on Coordination (A/C.6/38/4, annex).

[18] Following a request by the representative of Bulgaria, the Convention as a whole was adopted by a vote of 67 votes to 1, with 23 abstentions, on 20 March 1986 (*Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February–21 March 1986,* vol. I, *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (A/CONF.129/16 (vol. I), United Nations publication, Sales No. E.94.V.5), 7th plenary meeting, para. 52.

[19] An earlier reference to the provisional application of treaties is to be found in the comments of Mr. Sette Câmara, of 14 January 1971, made in response to a questionnaire addressed to Commission members, in which he, *inter alia*, suggested that articles 24 and 25 of the 1969 Vienna Convention "should also be explored for adaptation to the new articles in the pertinent provisions". *Yearbook… 1971*, vol. II (Part Two), document A/CN.4/250, annex II, p. 197.

[20] *Yearbook … 1975*, vol. II, document A/CN.4/285, p. 39.

[21] *Ibid.*

16. The Commission considered the proposal for draft article 25 at its twenty-ninth session in 1977. In introducing the draft article, together with the proposal for draft article 24 (on entry into force), the Special Rapporteur indicated, *inter alia*, that

> [s]ince the text of article 24 of the Vienna Convention was extremely flexible, it could be adapted to any situation which might result from agreements concluded by international organizations. That was why he had not distinguished between treaties concluded between organizations and treaties concluded between States and international organizations. *He had not made that distinction in draft article 25 either**.[22]

17. During the ensuing debate, the primary concern of the members who spoke was that the proposed draft article envisaged States and international organizations being placed on an equal footing. Mr. Laurel B. Francis observed that

> the provisions of article 25, paragraph 1 (*a*), would give international organizations a voice in determining whether a treaty in the negotiation of which they had participated with States could apply provisionally. Article 25, paragraph 1 (*b*), however, seemed to imply that, where both international organizations and States had negotiated a treaty, only the latter could determine whether or not it should apply provisionally. Difficulties would also arise from article 25, paragraph 2, since an international organization would not be able to give the notice to which that provision referred to "other" States because it was not itself a State. If the intention was that international organizations should have the same rights with respect to the entry into force and the provisional application of treaties as the States with which they had negotiated those treaties, paragraph 1 (*b*), and paragraph 2 of article 25 would have to be amended.[23]

18. The Special Rapporteur, confirmed that "[h]is intention had been to place States and international organizations on an equal footing, as that could not cause any difficulties".[24]

19. Mr. N. A. Ushakov, in turn, stated that

> he was convinced that the same formula could not be applied to States and to international organizations and that there must be one provision for treaties concluded between international organizations and another for treaties concluded between States and international organizations.[25]

He added that

> [i]t was not a question of agreements between "parties", … but of agreements between "negotiating" States and international organizations. Article 3 (*c*) of the [1969] Vienna Convention reserved the application of that Convention to the relations of States as between themselves under international agreements to which other subjects of international law were also parties, and he did not see how the articles under consideration would make it possible to apply that provision to treaties to which a large number of States and a single international organization were parties. According to article 25, for example, it would be necessary for the negotiating international organization to agree to the provisional application of the treaty. If the future convention on the law of the sea provided for the participation of the United Nations and did not contain any provisions on entry into force or provisional application, the agreement of the United Nations would be necessary for the entry into force or provisional application of that instrument.[26]

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[22] *Yearbook … 1977*, vol. I, 1435th meeting, para. 4.

[23] *Ibid*., para. 6.

[24] *Ibid*., para. 7.

[25] *Ibid*., para. 8.

[26] *Ibid*., para. 18.

20. In response, the Special Rapporteur pointed out that

> Mr. Ushakov was calling in question the notion of a party to a treaty. He (the Special Rapporteur) believed that the agreement of the single State was essential if, for example, the treaty related to assistance to be provided to that State by a number of international organizations. Similarly, it was inconceivable that a treaty concluded between a large number of States and an international organization, which made that organization responsible for nuclear monitoring, could enter into force or be applied provisionally without the organization's consent. If the Commission decided to give international organizations a special status, it would be necessary to amend … [the] articles so that restrictive rules would apply to international organizations. If the Commission chose that course, he would defer to its wishes, although he held a different view. In the circumstances, he thought that articles 24 and 25 could be referred to the Drafting Committee for consideration. [27]

21. The Drafting Committee subsequently prepared both a draft article 25 and draft article 25 *bis*, as follows:

> *Article 25. Provisional application of treaties between international organizations*
>
> 1. A treaty between international organizations or a part of such a treaty is applied provisionally pending its entry into force if:
>
> (*a*) the treaty itself so provides; or
>
> (*b*) the negotiating international organizations have in some other manner so agreed.
>
> 2. Unless the treaty otherwise provides or the negotiating international organizations have otherwise agreed, the provisional application of a treaty between international organizations or a part of such a treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.
>
> *Article 25* bis. *Provisional application of treaties between one or more States and one or more international organizations*
>
> 1. A treaty between one or more States and one or more international organizations or a part of such a treaty is applied provisionally pending its entry into force if:
>
> (*a*) the treaty itself so provides; or
>
> (*b*) the negotiating State or States and international organization or organizations have in some other manner so agreed.

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[27] *Ibid*., para. 17. See also the views of Mr. Milan Šahović ("it might be advisable to adopt Mr. Ushakov's suggestion and subdivide the articles under consideration, so as to make them easier to understand"), *ibid*., para. 14, and Mr. Stephen Verosta ("[a]ccording to draft article 1, the draft articles did not apply to treaties in general but to two particular kinds of treaty, namely, treaties between one or more States and one or more international organizations and treaties between international organizations. Those were therefore the two categories of treaties which the Commission should take into account in formulating the draft articles"), *ibid*., para. 27. A different view was expressed by Mr. Juan José Calle y Calle ("[w]hile he agreed with Mr. Ushakov that it was essential to make a distinction between States and international organizations in certain articles, he did not think that was necessary in articles 24 and 25"), *ibid*., para. 13, and Mr. Stephen M. Schwebel ("[t]he point concerning the differences between international organizations and States was certainly a valid one, to which all the members of the Commission subscribed, but it should not be pressed too far … He was not convinced that an attempt to categorize treaties according to the preponderant type of party would be a productive endeavour"), *ibid*., paras. 29–30.

> 2. Unless a treaty between one or more States and one or more international organizations otherwise provides or the negotiating State or States and international organization or organizations have otherwise agreed:
>
> (*a*) the provisional application of the treaty or a part of the treaty with respect to a State shall be terminated if that State notifies the other States, the international organization or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty;
>
> (*b*) the provisional application of the treaty or a part of the treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations, the State or States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.[28]

22. In introducing the report of the Drafting Committee, its Chair indicated that "the Drafting Committee had kept to the basic distinction between two different types of treaties, namely, treaties between international organizations and treaties between States and international organizations"[29] and that

> [i]n consequence of the basic distinction between the two types of treaties…the Drafting Committee had prepared separate but parallel articles when that had seemed necessary for the purposes of clarity and precision, namely, with respect to…the provisional application of treaties (articles 25 and 25 *bis*).[30]

Both draft articles were adopted at that session, on first reading, without comment or objection, in the form proposed by the Drafting Committee.[31]

23. The commentary to draft article 25, also adopted in 1977, simply indicated that

> [f]or reasons of clarity, the provisions which correspond to article 25 of the Vienna Convention are set out in two separate symmetrical articles, 25 and 25 *bis*, the texts of which differ from the Vienna Convention only by the drafting changes needed to adapt them to cover the two categories of treaties with which the present draft articles are concerned.[32]

24. The report of the Commission included a further explanation that

> 65. … In accordance with the method adopted from the outset, the Commission endeavoured to follow the provisions of the Vienna Convention as closely as possible, but in doing so it met with problems of both drafting and substance. …
>
> 66. The source of these substantive problems … lies in the contradictions which may arise as between consensus based on the equality of the contracting parties and the differences between States and international organizations. Since one of the main purposes of the draft articles, like that of the Vienna Convention itself, is to provide residuary rules which will settle matters in the absence of agreement between the parties, the draft must set forth general rules to cover situations which may be more varied than those involving States alone. For international organizations differ not only from States but also from one another. They vary in legal form, functions, powers and structure, a fact which applies above all to their competence to conclude treaties… Moreover, although the number and

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[28] *Ibid*., 1451st meeting, para. 45.

[29] *Ibid*., para. 14.

[30] *Ibid*., para. 15.

[31] *Ibid*., para. 45.

[32] *Ibid*., vol. II (Part Two), para. 76, at p. 117. The commentary to article 25 *bis* stated that the comments made on article 25 also applied to article 25 *bis* (*ibid*., at p. 118).

> variety of international agreements to which one or more international organizations are parties have continued to increase, international practice concerning certain basic questions … is almost nonexistent. …
>
> …
>
> 75. The articles of the Vienna Convention relating to the … provisional application … of treaties were adapted to the treaties to which the present draft articles relate. This raised no problems of substance.[33]

2. Comments made in connection with the first reading

25. The only relevant comments by Governments were made in the Sixth Committee at the thirty-second session of the General Assembly, in 1977. Peru agreed with the articles formulated by the Special Rapporteur on, *inter alia*, the provisional application of treaties.[34] The German Democratic Republic suggested that

> a rule should be established providing that the failure of any international organization to become a party to an international treaty should not be regarded as an obstacle to the entry into force or provisional application of the treaty unless the participation of that international organization was essential to the object and purpose of the treaty.[35]

Czechoslovakia was of the view that

> the method adopted by the Commission in following the provisions of the Vienna Convention while keeping in mind the specific position of international organizations was the only possible way to proceed… It would also be appropriate to follow the Vienna Convention with regard to entry into force and provisional application. That method would make it possible to arrive at a certain unification and stabilization of the legal rules, which was one of the main conditions for successful codification.[36]

26. In its written comments on the draft articles as adopted on first reading, the Federal Republic of Germany, while welcoming the fact that the Commission had adhered closely to the wording of the 1969 Vienna Convention, nonetheless expressed the view that

> the Commission's draft of a new parallel convention has certain shortcomings where the requisite adaptations are too cumbersome and perfectionistic in drafting. The intelligibility and transparency of numerous articles suffer as a result (see arts. 1, 3, 10 to 25 *bis*, …). The Commission should examine whether the extensive subdivision of rules and terms relating to the peculiarities of international organizations could not be avoided.[37]

Accordingly, it proposed combining draft articles 25 and 25 *bis*, since, in its view, it did not seem necessary to divide the subject matter into two articles.[38]

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[33] *Ibid*., paras. 65, 66 and 75.

[34] *Official Records of the General Assembly, Thirty-second Session, Sixth Committee, Legal Questions*, 35th meeting (A/C.6/32/SR.35), para. 21.

[35] *Ibid*., para. 32.

[36] *Ibid*., 38th meeting (A/C.6/32/SR.38), para. 9.

[37] *Yearbook … 1981*, vol. II (Part Two), p. 186.

[38] *Ibid*., p. 187.

3. Second reading of the draft articles

27. The second reading of the draft articles was commenced in 1981 at the thirty-third session of the Commission and concluded the following year at the thirty-fourth session, on the basis of the tenth and eleventh reports of the Special Rapporteur. A key focus of the second reading was the simplification of the text. The Commission explained this process as follows:

> 51. As the Commission's work progressed, views were expressed to the effect that the wording of the draft articles as adopted in first reading was too cumbersome and too complex. Almost all such criticisms levelled against these draft articles stemmed from the dual position of principle that was responsible for the nature of some articles:
>
> > On the one hand, it was held that there are sufficient differences between States and international organizations to rule out in some cases the application of a single rule to both;
> >
> > On the other hand, it was held that a distinction must be made between treaties between States and international organizations and treaties between international organizations and that different provisions should govern each.
>
> There is no doubt that these two principles were responsible for the drafting complexities which were so apparent in the draft articles as adopted in first reading.
>
> 52. Throughout the second reading of the draft articles … the Commission considered whether in concrete instances it was possible to consolidate certain articles which dealt with the same subject-matter, as well as the text within individual articles … it proceeded in certain cases to combine two articles into a more simplified single one (arts. … 25 and 25 *bis*).[39]

28. The consolidation of draft articles 25 and 25 *bis* was recommended by the Special Rapporteur in his tenth report, in 1981, in a proposal for a new draft article 25,[40] formulated as follows:

> *Article 25. Provisional application*
>
> 1. 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 participants in the negotiation have in some other manner so agreed.
>
> 2. Unless the treaty otherwise provides or the participants in the negotiation have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization shall be terminated if that State or organization notifies the other States or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

In doing so, he explained that

> [n]o substantive observations were made with regard to articles … 25 and 25 *bis*. The wording of these articles and of their titles may be simplified, and … articles 25 and 25 *bis* may … be combined in a single article.[41]

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[39] *Yearbook … 1982*, vol. II (Part Two), paras. 51–52.

[40] *Yearbook … 1981*, vol. II (Part One), document A/CN.4/341 and Add.1, para. 85.

[41] *Ibid*.

29. No substantive comments on the proposal were made during the plenary debate on the tenth report, held at thirty-third session, prior to the referral of the draft article to the Drafting Committee.[42]

30. Subsequently, the Chair of the Drafting Committee, in introducing a reformulated version of draft article 25, explained that the text of the article "had been prepared following the pattern … of aligning the regime of international organizations on that of States. Accordingly, … article 25 replaced articles 25 and 25 *bis*", and observed that the new formulation "corresponded more closely to [article 25] of the Vienna Convention, with the necessary drafting adjustments".[43]

31. The Commission proceeded to adopt, on second reading,[44] the following formulation for draft article 25, as proposed by the Drafting Committee, without any comments:

> *Article 25. Provisional application*
>
> 1. 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 organizations or, as the case may be, the negotiating States and negotiating organizations have in some other manner so agreed.
>
> 2. Unless the treaty otherwise provides or the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or organization shall be terminated if that State or that organization notifies the other States and the organizations or, as the case may be, the other organizations and the States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

32. In the commentary to articles 24 and 25, also adopted at the thirty-third session, it was explained that

> [n]o substantive changes were made to these two articles after their second reading. Their wording is, however, considerably lighter than that of the corresponding provisions as adopted in first reading, articles 24 and 24 *bis* and articles 25 and 25 *bis* respectively having been merged to form single articles. Articles 24 and 25 as now drafted differ from the corresponding articles of the Vienna Convention only in so far as is necessary to cater for the distinction between treaties between international organizations and treaties between States and international organizations (art. 24, paras. 1 and 3; art. 25, subpara. 1 (*b*) and para. 2).[45]

33. Draft article 25 was included among the draft articles on the law of treaties between States and international organizations or between international organizations transmitted to the General Assembly in 1982.[46]

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[42] *Ibid*., vol. I, 1652nd meeting, paras. 30–31.

[43] *Ibid*., 1692nd meeting, para. 44.

[44] *Ibid*., para. 43.

[45] *Ibid*., vol. II (Part Two), para. 129.

[46] *Yearbook … 1982*, vol. II (Part Two), para. 63.

4. Comments on the draft articles, as adopted on second reading

34. Among the written comments before the Commission during the second reading, the only observation relating to draft article 25 was received from the Council of Europe, which indicated that "[p]rovisional application has already been provided for in a number of instruments drawn up within the Council of Europe, all of which, however, are treaties concluded between States only".[47]

35. The only comment[48] on the draft article, in the debate in the Sixth Committee, held at the thirty-sixth session of the General Assembly in 1981, came from Zaire, which observed that

> [t]he idea of provisional application of treaties, dealt with in article 25, had already been resisted at the Ministerial Conference held at Banjul in 1981 for the purpose of elaborating the African Charter on Human and Peoples' Rights. Several delegations had taken the view that the arbitration and mediation commission referred to in the draft Charter should not be established before the Charter entered into force.[49]

B. Consideration at the 1986 Vienna Conference

36. In preparing for the 1986 Vienna Conference, the General Assembly, at its thirty-ninth session in 1984, called on the prospective participants to hold informal consultations on, *inter alia*, the rules of procedure and "on major issues of substance", in order to facilitate a successful conclusion of its work through the promotion of general agreement.[50] The ensuing negotiations resulted in agreement on a set of rules of procedure, which were subsequently referred to the Conference,[51] and which had been "drafted for the specific use of that Conference in view of its particular nature and the subject-matter to be considered by it".[52] In particular, a distinction was made in the rules of procedure between those articles in the text formulated by the Commission, as listed in annex II to General Assembly resolution 40/76, which required substantive consideration, and all the other articles. Under rule 28 of its rules of procedure, the Conference, *inter alia*, referred to the Committee of the Whole only those draft articles that required substantive consideration. All other articles were referred directly to the Drafting Committee. In addition, in order to expedite its work, the Conference decided that the Drafting Committee would report directly to the plenary of the Conference.[53]

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[47] *Ibid*., annex, p. 143, para. 38.

[48] None of the comments by Governments and international organizations, submitted in writing after the conclusion of the second reading in 1982 (see footnote 17 above), addressed article 25.

[49] *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee, Legal Questions*, 47th meeting (A/C.6/36/SR.47), para. 41.

[50] General Assembly resolution 39/86 of 13 December 1984, para. 8.

[51] General Assembly resolution 40/76 of 11 December 1985, annex I.

[52] *Ibid*., para. 4.

[53] *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, First Session, Vienna, 18 February–21 March 1986,* vol. I, *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (A/CONF.129/16, United Nations publication, Sales No. E.94.V.5), 4th plenary meeting, para. 4.

37. Article 25 was among the articles referred directly to the Drafting Committee, *i.e.*, without substantive consideration in the plenary of the conference.

38. The Chair of the Drafting Committee subsequently introduced a revised formulation for the article—which became article 25 of the 1986 Vienna Convention[54]—at the fifth meeting of the plenary, held on 18 March 1986. In his report to the plenary, he explained that

> [t]he text of paragraph 1 of article 25 remained unchanged. Paragraph 2, however, had been adjusted… The introduction in the basic proposal of the complexities required by the attempt to cover all "other" treaty partner permutations had led to a heavy text which had not, in fact, covered all possible situations. As the text referred to treaty partners being notified, the clear and obvious meaning was that it referred to notifying "other" treaty partners. Thus, the original phrase in paragraph 2, "the other States and the organizations or, as the case may be, the other organizations and the States between which" had been changed to read simply "the States and organizations with regard to which".[55]

39. The only substantive comment on the provision, in plenary, was made by the Brazil, which stated that

> for the record and for the purpose of interpretation, … [article] 25 … of both the 1969 Vienna Convention on the Law of Treaties and the present draft articles adopted by the Drafting Committee … should in its view be considered, in respect of States, against the background of the general principle of parliamentary approval of treaties and of the practice ensuing therefrom; but that his delegation also recognized the residuary nature of those provisions of both the 1969 Convention and the present draft articles as adopted by the Drafting Committee.[56]

40. Article 25 was adopted without a vote at the same meeting.[57]

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[54] See para. 5 above.

[55] *Official Records …* (see footnote 53 above), 5th plenary meeting, p. 14, para. 65.

[56] *Ibid*., p. 14, para. 67.

[57] *Ibid*.

C. Memorandum by the United Nations Secretariat:* State practice in respect of treaties deposited or registered with the Secretary-General (1997–2017), that provide for provisional application, including treaty actions related thereto

Summary

The present study reviews State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application, including treaty actions related thereto. The analysis is limited to bilateral and multilateral treaties registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations, concluded since 1 January 1996, that have been subject to provisional application. It also includes a review of a number of multilateral treaties deposited with the Secretary-General of the United Nations but that have not yet entered into force.

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I. Introduction

1. At its sixty-eighth session, the Commission requested from the Secretariat a memorandum analysing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application, including treaty actions related thereto.[1] This memorandum analyses bilateral and multilateral treaties registered with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations concluded since 1 January 1996 that have been subject to provisional application. In addition, it includes a number of multilateral treaties that are deposited with the Secretary-General of the United Nations but that have not yet entered into force. References to bilateral or multilateral treaties in the present memorandum only pertain to treaties reviewed within its scope.

2. The present memorandum analyses relevant treaties and related treaty actions available in the United Nations Treaty Collection ("Treaty Collection") for the specified time period. Relevant treaties and treaty actions containing the terms "provisional application" and "provisional entry into force" were identified.[2] The terms "temporary application" or "interim application" have also sometimes been used to indicate provisional application. Provisional application is treated differently, however, from other concepts such as "provisional treaties" and "temporary treaties". Provisional treaties are concluded to bridge the gap in time until entry into force of the permanent treaty. Temporary treaties are treaties with a determined end date. The range of terms reflects the diversity of practice among States and international organizations with regard to the provisional application of treaties.

[1] A/71/10, para. 302.

[2] On the terminological shift from "provisional entry into force" to "provisional application" in article 25 of the 1969 Vienna Convention on the Law of Treaties, see A/CN.4/658[, reproduced at p. 266, above].

3. The analysis in the present memorandum is based on over 400 relevant bilateral treaties. Bilateral treaties available in the Treaty Collection are limited to those registered with the Secretariat. Pursuant to article 1, paragraph 2, of the regulations to give effect to Article 102 of the Charter of the United Nations,[3] a treaty shall be registered when it enters into force. The Regulations interpret "entry into force" broadly to include treaties that are provisionally applied.[4] In practice, however, bilateral treaties that are provisionally applied are frequently registered by the parties only after entry into force.[5] Moreover, it is noted that not all bilateral treaties in force have in fact been registered. Accordingly, the number of bilateral treaties provisionally applied during the time period of this study is, in reality, higher than that available in the Treaty Collection.

4. The present memorandum covers over 40 multilateral treaties. The Treaty Collection only contains multilateral treaties that are registered with the Secretariat and/or deposited with the Secretary-General. Multilateral treaties are deposited with the Secretary-General only if he is the designated depository. There are many multilateral treaties in respect of which he is not so designated. Further, multilateral treaties are generally registered only after entry into force.[6] The multilateral treaties available in the Treaty Collection are therefore limited mainly to those that are in force and registered, and those deposited with the Secretary-General that are not yet in force. Similar to bilateral treaties, the number of multilateral treaties provisionally applied during the time period of this study is thus, in reality, higher than that provided in the Treaty Collection.

5. The participation in some multilateral treaties is limited to specific parties. For purposes of the present study, such treaties with limited participation are called "treaties with limited membership". The present study also covers a number of so-called "mixed agreements", which are concluded by the European Union and its member States, on the one part, and a third party, on the other part. While mixed agreements are typically registered as bilateral treaties, they require the ratification, approval or acceptance of the European Union and each of its member States. Accordingly, mixed agreements share certain structural characteristics with bilateral and multilateral treaties, particularly those multilateral treaties with limited membership.

6. The subject area of a treaty can be important for the modalities of provisional application. In the present study, a number of mostly bilateral treaties subject to provisional application concern cross-border transport, cross-border flows of migrants and labour, and questions of nationality, immigration and residence. Several treaties concern free trade between two or more States and/or related international organizations. States also use provisional application in matters of military collaboration. Moreover, cooperation in the field of disarmament and non-proliferation has been the subject of provisional application of both bilateral and multilateral treaties. Many treaties concluded by international organizations with States or other international organizations are host or seat agreements,

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[3] General Assembly resolution 97 (I) of 14 December 1946, modified by General Assembly resolutions 364 (IV) of 1 December 1949, 482 (V) of 12 December 1950 and 33/141 of 19 December 1978.

[4] *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.

[5] The exceptions are treaties registered *ex officio* by the United Nations.

[6] The exceptions are commodity agreements and some other multilateral treaties with limited membership.

which establish new institutional structures and typically include provisions on the legal capacity of the organization in the national legal order.

7. A significant number of the multilateral treaties studied are commodity agreements. Despite their particularities, commodity agreements fall into a broader category of provisionally applied treaties that establish institutional arrangements. The resulting provisionally operational institutional arrangements are distinct from preparatory commissions for the establishment of an international organization such as the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organization.[7] Such preparatory commissions are typically constituted by a provisional agreement that is terminated when the permanent constituent instrument of the organization enters into force.

8. Section II of the present memorandum analyses the practice concerning the legal basis for the provisional application of treaties. As stated in article 25, paragraph 1, of the 1969 *Vienna Convention on the Law of Treaties* ("1969 Vienna Convention"),[8] the legal basis for provisional application can either be included in the treaty itself or in a separate agreement. Section III considers the practice relating to the commencement of provisional application as stipulated in the treaty or dependent on the occurrence of an external event. Section IV examines the practice on different ways to limit the scope of provisional application to part of the treaty, or by reference to the internal law of the parties and international law. Section V addresses the practice relating to different ways to terminate provisional application, either by notification or by agreement of the parties. Each section distinguishes between bilateral and multilateral treaties. While the provisional application of bilateral and multilateral treaties share common characteristics, the practice reviewed in the present memorandum reveals that important differences exist between the two kinds of treaties. Section VI below summarizes the observations made in the previous sections.

II. Legal basis for provisional application

9. Article 25 of the 1969 Vienna Convention provides for two different legal bases of 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 majority of bilateral treaties are provisionally applied on the basis of a clause in the treaty. In contrast, multilateral treaties are frequently also provisionally applied on the basis of a separate agreement. While treaties with a clause on provisional application only exceptionally state the reasons for provisional application,[9] separate agreements are often more explicit in this regard, referring to the need for expedi-

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[7] The Commission was established by a resolution of the States Signatories of the Comprehensive Nuclear Test-Ban Treaty on 19 November 1996 (CTBT/MSS/RES/1).

[8] The same formulation, with the necessary modifications, is included is article 25, paragraph 1, of the 1986 *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (A/CONF.129/15; not yet in force, as of 24 February 2017). For a discussion of the provision, see A/CN/4.676[, reproduced above, at p. 297].

[9] By way of exception, the *Agreement between Germany and Switzerland concerning the construction and maintenance of a motorway bridge across the Rhine between Rheinfelden (Baden-Württemberg) and Rheinfelden (Aargau)* states that "[i]n order that the bridge may be opened to traffic as early as possible, the provisions of this Agreement shall be applied provisionally" (art. 16). United Nations, *Treaty Series*, vol. 2545, p. 275, at p. 296.

ency, or unexpected difficulties in meeting the requirements for ratification at the time of the conclusion of the main treaty.

A. Provisional application by clause in the treaty

10. In both bilateral and multilateral treaties, provisional application clauses are typically contained in the final clauses of the treaty as a separate provision or in the provision on entry into force. Both bilateral and multilateral treaties either use the term "provisional application" or "provisional entry into force" to describe the application of a treaty before its entry into force. The exceptions in this regard are commodity agreements, some of which distinguish between declarations of provisional application by individual States and the provisional entry into force of the agreement. Some treaties include different descriptors for "provisional", such as "temporary" or "interim". When treaties refer to "provisional entry into force", the term "definitive entry into force" may be used to indicate that the treaty entered into force in line with the regular procedures.

1. Bilateral treaties

11. The majority of bilateral treaties contain an explicit clause allowing for provisional application. This clause is typically included in the final clauses of the treaty, either as a separate provision or under the general heading "entry into force".

12. The terminology varies both with regard to the terms "provisional" and "application". Many clauses use the terminology suggested by article 25 of the 1969 Vienna Convention, stating that the agreement "shall be provisionally applied". One bilateral treaty made explicit reference to article 25 of the Convention.[10] Other formulations are "provisional entry into force", "provisional implementation" and "provisional effect". For example, the *Agreement between Argentina and Suriname on visa waiver for holders of ordinary passports* "shall enter into force provisionally" (art. 8).[11] The *Treaty between Switzerland and Liechtenstein relating to environmental taxes in Liechtenstein* stipulates, in article 5, that it "shall be implemented provisionally".[12] Similarly, the *Agreement between Spain and Andorra on the transfer and management of waste*, in article 13, provides that "it shall be implemented and be effective in respect of all its provisions, albeit provisionally".[13] The *Agreement between the Spain and Slovakia on cooperation to combat organized crime* "shall take provisional effect" (art. 14, para. 2).[14] Furthermore, the *Treaty on the Formation of an Association between the Russian Federation and Belarus*, in article 19, states that it "shall be applicable on a provisional basis".[15]

13. Some of the bilateral treaties do not use the descriptor "provisional", but speak instead of "temporary" or "interim" application. For example, the *exchange of letters con-*

[10] *Agreement between Spain and Kuwait on the waiver of visas for diplomatic passports*, *ibid.*, [vol. 2866], No. 50090[, p. 211].

[11] *Ibid.*, [vol. 2957], No. 51407[, p. 213].

[12] *Ibid.*, vol. 2761, p. 23, at p. 29.

[13] *Ibid.*, [vol. 2881], No. 50313[, p. 165].

[14] *Ibid.*, vol. 2098, p. 371, at p. 357.

[15] *Ibid.*, vol. 2120, p. 595, at p. 616.

stituting an Agreement between the United Nations and the Federal Republic of Yugoslavia on the status of the Office of the United Nations High Commissioner for Human Rights in the Federal Republic of Yugoslavia specifies, in paragraph 33, that "[t]he provisions of this Agreement shall apply on a temporary basis".[16] Article 16, paragraph 2, of the Agreement between Malaysia and United Nations Development Programme (UNDP) concerning the establishment of the UNDP Global Shared Service Centre states that the Agreement "shall apply, on an interim basis".[17] As noted in section I, such references to provisional application have to be distinguished from temporary treaties, which have a fixed termination date.

2. Multilateral treaties

14. Like bilateral treaties, many multilateral treaties contain a clause allowing for provisional application. The clause on provisional application is also typically included in the final clauses of the treaty either as a separate provision or within the provision on "entry into force". Compared to the practice relating to bilateral treaties, the clauses on provisional application in multilateral treaties are tailored to the characteristics of the particular multilateral treaty, as discussed in subsequent sections.

15. With regard to terminology, multilateral treaties—like bilateral treaties—use either the term "provisional application" or "provisional entry into force". The *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982* ("Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea"), in article 7, provides that it "shall be applied provisionally pending its entry into force".[18] Similarly, the *Agreement on the amendments to the Framework Agreement on the Sava River Basin and the Protocol on the Navigation Regime to the Framework Agreement on the Sava River Basin states* that it "shall be provisionally applied" (art. 3, para. 5).[19] The *Framework Agreement on a multilateral nuclear environmental programme in the Russian Federation* states, in article 18, paragraph 7, that it "shall be applied on a provisional basis from the date of its signature".[20] Furthermore, article 21, paragraph 1, of the *Statutes of the Community of Portuguese-Speaking Countries*,[21] and article 8 of the *Agreement establishing the "Karanta" Foundation for support of non-formal education policies and including in annex the Statutes of the Foundation* ("Agreement establishing the "Karanta" Foundation")[22] provide that the respective treaty "shall enter into force provisionally".

16. A special case of treaties explicitly providing for provisional application are commodity agreements, which usually include clauses on "provisional application", "provisional

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[16] *Ibid.*, vol. 2042, p. 23, letter from the Federal Republic of Yugoslavia to the Office of the United Nations High Commissioner for Human Rights, para. 33; see also the Agreement between Belarus and Ireland on the conditions of recuperation of minor citizens from Belarus in Ireland, *ibid.*, vol. 2679, p. 65, at p. 79, art. 15.

[17] *Ibid.*, vol. 2794, p. 67, at p. 76.

[18] *Ibid.*, vol. 1836, p. 41, at p. 46.

[19] *Ibid.*, vol. 2367, p. 697, at p. 698.

[20] *Ibid.*, vol. 2265, p. 5, at p. 14. The Protocol on Claims, Legal Proceedings and Indemnification thereto (*ibid.*, p. 35, at p. 38), in article 4, paragraph 8, contains the same formulation.

[21] *Ibid.*, vol. 2233, p. 207, at p. 229.

[22] *Ibid.*, vol. 2341, p. 3, at pp. 29. See also p. 47 (art. 49).

entry into force" or "provisional acceptance". While some commodity agreements use either one of those terms, others distinguish between provisional application and provisional entry into force. For example, the 2005 *International Agreement on Olive Oil and Table Olives* includes article 41 on notification of provisional application and article 42 on entry into force.[23] The latter article states in paragraph 3:

> If, on 1 January 2006, the requirements for entry into force under paragraph 1 or paragraph 2 of this article have not been met, the depositary shall invite those Governments 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.[24]

The Agreement was provisionally in force between 1 January 2006 and 25 May 2007. During that period, the International Olive Council, acting through a Chairperson, a Council of Members and an Executive Secretariat, functioned on a provisional basis.[25] Similar observations can be made with regard to the other commodity agreements.[26]

17. Commodity agreements belong to a broader category of provisionally applied treaties that establish institutional arrangements. Another relevant multilateral treaty in this regard is the *Agreement establishing the CARICOM Regional Organisation for Standards and Quality*.[27] The Agreement provides in article 18 (provisional application) that it "may be provisionally applied by no less than eight signatories of the States mentioned in paragraph 1 of Article 3". The Agreement was provisionally applied on 5 February 2002, in accordance with article 18, thus establishing a Council, a number of Special Committees and a Secretariat.[28] It is noteworthy, however, that the parties also concluded a *Protocol on the Provisional Application of the Agreement establishing the CARICOM Regional Organisation for Standards and Quality* recalling the above-mentioned article 18 and providing for the provisional application among the parties.[29] The Protocol was concluded one day after the adoption of the Agreement.

18. A similar two-step arrangement on provisional application is included in the Agreement establishing the "Karanta" Foundation.[30] The Agreement provides in article 8 (entry into force) that it "shall enter into force provisionally upon signature by the founding member States and, definitively, upon ratification by these same States". Article 9 of the Agreement (transitional arrangements) adds that "[f]or the purpose of establishing the preliminary bodies of the Foundation, an *ad hoc* Steering Committee shall be created". The Statutes of the "Karanta" Foundation, which are annexed to the Agreement, also include a clause on provisional application, in article 49, with the same wording as the above-cited

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[23] *Ibid*., vol. 2684, p. 63, at pp. 128–129.

[24] *Ibid*. (emphasis added).

[25] See art. 3, para. 1, of the 2005 *International Agreement on Olive Oil and Table Olives*.

[26] See *e.g.* art. 7 of the 1994 *International Coffee Agreement*, United Nations, *Treaty Series*, vol. 2086, p. 147.

[27] *Ibid*., vol. 2324, p. 413, at p. 422.

[28] See art. 5 of the *Agreement establishing the CARICOM Regional Organisation for Standards and Quality (CROSQ) on "Composition of CROSQ"*.

[29] United Nations, *Treaty Series*, vol. 2326, p. 359, at p. 360.

[30] *Ibid*., vol. 2341, p. 3, at pp. 29 and 47.

article 8. While the Agreement itself thus established an *ad hoc* Steering Committee to establish the preliminary bodies of the Foundation, the Statutes were also provisionally applied and brought into being the Foundation with its various organs.

19. Amendments to the constituent instruments of international organizations can also be subject to provisional application. Some constituent instruments stipulate that amendments might enter into force for all member States if adopted by a certain majority in the competent organ.[31] However, most constituent instruments do not provide for such a simplified amendment procedure, but instead stipulate high qualitative or quantitative requirements for entry into force of amendments. As a result, some international organizations, through their competent organ, have decided to apply amendments provisionally. For example, the amendment to article 14 of the *Statutes of the World Tourism Organization (UNWTO)*,[32] and the amendment to paragraph 4 of the Financing Rules annexed to the Statutes of UNWTO were registered as being provisionally applied.[33] Article 33 of the Statutes of UNWTO on amendments does not provide for provisional application and requires the approval of two thirds of the members for entry into force of an amendment. In resolution 365 (XII) (1997), the General Assembly of UNWTO noted "with regret that the amendment to Article 14 of the Statutes which it adopted by resolution 134 (V) […] has not yet received approval from the requisite number of States" and "decide[d] that this amendment will be applied provisionally pending its ratification". Following the adoption of resolution 365 (XIII), the General Assembly of UNWTO also adopted resolution 422 (XIV) (2001) in which it directly "decide[d], exceptionally, that the new paragraph 4 of the Financing Rules shall apply immediately, on a provisional basis, pending its entry into force in accordance with paragraph 3 of Article 33 of the Statutes". While resolution 365 (XII) would qualify as a case of provisional application by separate agreement,[34] resolution 422 (XIV) did not only stipulate the amendment but also contained a clause on its provisional application.

20. A dynamic similar to that of the two UNWTO amendments can be observed with regard to *Protocol No. 14 and Protocol No. 14 bis to the Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on Human Rights*).[35] The parties to the Convention adopted Protocol 14 *bis* "[c]onsidering the urgent need to introduce certain additional procedures to the Convention in order to maintain and improve the efficiency of its control system for the long term". Protocol 14 *bis* was adopted in 2009 and entered into force in 2010. Article 6 of the Protocol allowed for the provisional application of Protocol 14 *bis* pending its entry into force, which was relied on by seven States.

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[31] See *e.g.* art. XX of the *Constitution of the International Vaccine Institute* appended to the *Agreement on the establishment of the International Vaccine Institute*, United Nations, *Treaty Series*, vol. 1979, p. 199, at p. 215, and art. 12 of the *Agreement establishing the International Fund for Agricultural Development*, *ibid.*, vol. 1059, p. 191, at p. 205.

[32] *Ibid.*, [vol. 2930], No. 14403[, p. 21].

[33] *Ibid.*

[34] Provisional application by separate agreement will be discussed in more detail in subsection II.B below.

[35] Protocol 14 *bis* ceased to be in force or applied on a provisional basis as from 1 June 2010, date of entry into force of *Protocol No. 14 to the European Convention on Human Rights* (United Nations, *Treaty Series*, vol. 2677, p. 3), amending the control system of the Convention (*ibid.*, vol. 213, p. 221). For more information, see the website of the Treaty Office of the Council of Europe: www.coe.int/en/web/conventions/full-list/-/conventions/treaty/204/signatures?p_auth=TcvmmsqV (accessed on 17 February 2017).

The inclusion of an explicit clause on provisional application distinguishes the 2009 Protocol No. 14 *bis* from the 2004 Protocol No. 14, which was ultimately provisionally applied on the basis of a separate agreement adopted in 2009 owing to difficulties in meeting the conditions for entry into force.[36]

21. The *Rome Statute of the International Criminal Court* ("Rome Statute") is an example of a constituent instrument that explicitly allows for the provisional application of amendments, namely to the Rules of Procedure and Evidence of the Court.[37] Article 51, paragraph 3, of the Rome Statute provides:

> After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

On 10 February 2016, the judges, acting in plenary, adopted provisional amendments to rule 165 of the Rules of Procedure and Evidence under article 51, paragraph 3, of the Rome Statute.[38] This was the first time that the procedure under article 51, paragraph 3, was used. The amendments were subsequently considered by the Study Group on Governance and the Working Group on Amendments of the Assembly of States Parties. The Assembly of States Parties did not take action on the amendments at its fifteenth session from 16 to 24 November 2016 and decided to continue to consider the matter in the Working Group on Amendments.[39] In view of lack of a decision regarding the provisional amendments, different opinions were expressed regarding further application of the provisional rule by the International Criminal Court. On the one hand, it was stated that the Court should not apply the provisional rule while it was being considered by the Working Group on Amendments.[40] On the other hand, it was argued that a majority of delegations were in favour of the adoption of the amendments and "that it is for the Court, and the Court alone, to decide on the manner in which it should implement the provisions that concern it in the Rules of Procedure and Evidence".[41]

B. Provisional application by separate agreement

22. Separate agreements on the provisional application of both bilateral and multilateral treaties are concluded at two different points in time: (1) at the time of the conclusion of the main treaty that does not include a clause on provisional application; and (2) after the conclusion of the main treaty. This distinction is particularly evident in the case of multilateral treaties, in which it is typically more challenging to meet the requirements for entry into force. Multilateral treaties pose the additional difficulty that States that have not negotiated the treaty might accede at a later point in time. The question then arises whether States that

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[36] See subsection II.B.2 below.

[37] United Nations, *Treaty Series*, vol. 2187 p. 3, at p. 117.

[38] See report of the Study Group on Governance Cluster I in relation to the provisional amendments to rule 165 of the Rules of Procedure and Evidence (ICC-ASP/15/7) and report of the Working Group on Amendments (ICC-ASP/15/24).

[39] Assembly of States Parties resolution ICC-ASP/15/Res.5 of 24 November 2016, annex I, para. 19.

[40] ICC-ASP/15/20 (Vol. I), annex V, para. 5 (statement by Kenya).

[41] ICC-ASP/15/20 (Vol. I), annex VI, para. 3 (statement by Belgium).

have not participated in the negotiations would also be considered "negotiating States" in terms of article 25, paragraph 1 (*b*), of the 1969 Vienna Convention.

1. Bilateral treaties

23. Few bilateral treaties have been provisionally applied on the basis of a separate agreement. The terminology of such separate agreements is the same as that used in bilateral treaties that contain a clause on provisional application.

24. As noted above, one can distinguish two categories of separate agreements on provisional application of bilateral treaties on the basis of when such separate agreements are concluded: (1) at the time of conclusion of the main treaty, the parties conclude another treaty that provides for provisional application of the main treaty (in the case of bilateral treaties, the main treaty may then be annexed to the separate treaty on provisional application); or (2) the parties subsequently agree in some other form to provisionally apply the treaty, which is not necessarily made explicit at the time of registration.

25. An example of the first category is the *Agreement on the taxation of savings income and the provisional application thereof between Germany and the Netherlands*.[42] In that Agreement, the two States agreed to provisionally apply the *Convention between the Netherlands in respect of Aruba and Germany concerning the automatic exchange of information about savings income in the form of interest payments* as contained in the appendix to the letter from Germany. The Convention itself does not include a clause on provisional application.

26. The above example contrasts with the *Amendment to the Agreement on air services between the Netherlands and Qatar*.[43] The Amendment was annexed to an exchange of notes between the parties, which "shall be regarded as constituting an agreement between the two Governments on this matter, which shall, in accordance with Article XV, paragraph 2, of the Agreement, be provisionally applied". Article XV (modification), paragraph 2, of the Agreement on Air Services provides:

> Any modifications of this Agreement decided upon during the consultation referred to in paragraph 1 above shall be agreed upon in writing between the Contracting Parties and shall take effect provisionally on the date of such agreement pending each Contracting Party informing the other in writing that the formalities constitutionally required in their respective countries have been complied with.

The parties thus applied a special clause on provisional application, contained in the Agreement, to the amendments. While the exchange of notes constituted the agreement regarding provisional application, such agreement was ultimately based on the provisional application clause in the original treaty.

27. More generally, some amendment clauses in bilateral treaties may reference the provisions on entry into force, which in turn include a clause on provisional application. An example is the *Agreement between the United Nations High Commissioner for Human Rights and Uganda concerning the establishment of an Office in Uganda*, which states in article XXII, paragraph 3, that "[t]his Agreement may be amended by mutual consent of the Parties, and shall enter into force under conditions set out in paragraph 1 above." Paragraph 1 stipulates:

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[42] United Nations, *Treaty Series*, [vol. 2821], No. 49430[, p. 3]. The Netherlands concluded a number of similar treaties in the period under review.

[43] *Ibid*., vol. 2265, p. 77, at pp. 84–85, and p. 507, at p. 511.

> The Agreement shall apply provisionally from the date of its signature by both Parties. It shall enter into force the day on which the OHCHR shall received [sic] a notification from the Government confirming that it has completed the requisite legal formalities for the Agreement to enter into force.

In this context, the question is whether such *renvoi* would imply that "conditions set out in paragraph 1" also include the possibility of provisional application. Other agreements do not include such a *renvoi*. The *Agreement on the establishment of a United Nations High Commissioner for Refugees field office in Ukraine*, in article XVII, paragraph 4, states that "[a]mendments shall be made by joint written agreement".[44] Accordingly, the Agreement was amended by a separate Protocol on amendments to article 4, paragraph 2 of the *Agreement between the United Nations High Commissioner for Refugees and Ukraine*, which provides for the provisional application of the amendments.[45]

28. An amendment to a treaty might also extend the provisional application of that treaty. In an *exchange of notes constituting an agreement between Belgium and the Netherlands extending the Agreement of 13 February 1995 on the status of Belgian liaison officers attached to Europol Drugs Unit in The Hague*, the parties agreed that the said Agreement of 13 February 1995 "which prior to its entry into force, is being implemented on a temporary basis, be extended indefinitely as from 1 March 1996".[46] The initial Agreement of 13 February 1995 was concluded for an initial duration of one year, subject to extension. A similar case is the *exchange of notes constituting an agreement between Spain and the United States of America extending the Agreement relating to tracking stations*, which was "applied provisionally from 29 January 1997".[47] The Agreement relating to tracking stations did not include a clause on provisional application and was initially concluded for a period of 10 years, and has since been extended by a number of exchanges of notes.

29. Examples of the second above-mentioned category of provisional application by separate agreement at a subsequent point in time are: the *Agreement between the Netherlands and the United States of America on the status of United States personnel in the Caribbean part of the Kingdom*;[48] the *Agreement between Latvia and Azerbaijan on cooperation in combating terrorism, illicit trafficking in narcotic drugs, psychotropic substances and precursors and organized crime*;[49] and the *Agreement between the United Nations and Kazakhstan relating to the establishment of the Subregional Office for North and Central Asia of the United Nations Economic and Social Commission for Asia and the Pacific*.[50] While those treaties do not give any indication as to provisional application, they were registered as having been provisionally applied. Although States and international organizations are able to register a provisionally applied treaty under Article 102 of the *Charter of the United Nations*, as noted in section I, treaties are often registered as such only when they enter into force.[51]

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[44] *Ibid.*, vol. 1935, p. 245.

[45] *Ibid.*, vol. 2035, p. 288.

[46] *Ibid.*, vol. 2090, pp. 256–257.

[47] *Ibid.*, vol. 2006, pp. 509 and 512.

[48] *Ibid.*, [vol. 2967], No. 51578[, p. 79].

[49] *Ibid.*, vol. 2461, p. 229.

[50] *Ibid.*, vol. 2761, p. 344.

[51] See section I above.

30. A special case of provisional application by separate agreement is the *Agreement between Germany and Croatia regarding technical cooperation*.[52] While the Agreement contains a clause on provisional application in article 7, article 5 provides for the provisional application of the "Agreement between the Republic of Croatia and the United Nations Development Programme (UNDP) of 12 March 1996 with the exception of the special provisions in Article 9". The Agreement continues: "As the latter Agreement was signed for the Republic of Croatia on 12 March 1996, but never entered into force, the Parties to this Agreement understand that the said Agreement will be applied provisionally until it enters into force."[53] In other words, Germany and Croatia agreed to provisionally apply an agreement to which only Croatia was a party and which had not entered into force.

2. Multilateral treaties

31. A number of multilateral treaties are provisionally applied by separate agreement concluded by the negotiating States or entities when the treaty does not contain a clause on provisional application. As in the case of bilateral treaties, two categories of separate agreements on provisional application of multilateral treaties can be distinguished on the basis of when such separate agreements are concluded: (1) States or international organizations agree to provisionally apply the treaty at the time that the main agreement is concluded; or (2) they agree to provisionally apply the treaty by a later agreement.

32. An example of the first category is the *Agreement establishing the Caribbean Community Climate Change Centre*,[54] which was adopted on 4 February 2002. This agreement did not provide for provisional application, but was applied on the basis of the *Protocol on the provisional application of the Agreement establishing the Caribbean Community Climate Change Centre*, concluded on 5 February 2002 "to provide for the expeditious operationalisation of the Caribbean Community Climate Change Centre".[55] A comparable case is the *Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy*,[56] which was provisionally applied by virtue of the *Protocol on the Provisional Application of the Revised Treaty of Chaguaramas*.[57]

33. *Protocol No. 14 to the European Convention on Human Rights* falls into the second category of provisional application by separate agreement. Protocol No. 14 was provisionally applied based on the *Agreement on the provisional application of certain provisions of Protocol No. 14 pending its entry into force* ("Madrid Agreement").[58] Protocol No. 14 was adopted in 2004, followed by the ratification by most but not all parties to the *European Convention on Human Rights*. To make Protocol No. 14 provisionally applicable, the member States of the Council of Europe adopted the Madrid Agreement. A number of States, all of which had previously ratified Protocol No. 14, provisionally applied the Protocol before it entered into

[52] United Nations, *Treaty Series*, vol. 2306, p. 439.

[53] *Ibid.* (informal translation from the German original).

[54] United Nations, *Treaty Series*, [vol. 2946], No. 51181[, p. 145].

[55] *Ibid.*, [vol. 2953], No. 51181[, p. 181].

[56] *Ibid.*, vol. 2259, p. 293.

[57] *Ibid.*, p. 440.

[58] Council of Europe, *Treaty Series*, No. 194. For the declarations of provisional application made by Albania, Belgium, Estonia, Germany, Liechtenstein, Luxembourg, the Netherlands, Spain, Switzerland and the United Kingdom of Great Britain and Northern Ireland, see United Nations, *Treaty Series*, vol. 2677, p. 30.

force in 2010. The reference to article 25 of the 1969 Vienna Convention in the chapeau of the Madrid Agreement and the declaration of provisional application by the Netherlands underline that provisional application was initially not foreseen. The Netherlands stated that "the above [Madrid] agreement fully satisfies the requirement of Article 25, paragraph 1 (*b*), of the *Vienna Convention on the Law of Treaties*, concerning the provisional application of treaties that do not expressly provide for such application".[59] Due to delayed entry into force of Protocol No. 14, the member States also adopted Protocol No. 14 *bis* shortly after the Madrid Agreement. Protocol 14 *bis* included a clause on provisional application.[60]

34. Commodity agreements represent a special case of provisional application by separate agreement. While commodity agreements typically provide for provisional application and/or entry into force, they may also include a provision such as article 42, paragraph 3, of the 2005 *Agreement on Table Olives and Olive Oil*, which states:

> If, on 1 January 2006, the requirements for entry into force under paragraph 1 or paragraph 2 of this article have not been met, the depositary shall invite those Governments 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.

The provision thus gives Governments the possibility to bring the Agreement provisionally into force by a collective decision. The 1994 *International Tropical Timber Agreement*,[61] 1993 *International Cocoa Agreement*[62] and the 2010 *International Cocoa Agreement* were brought into force provisionally by virtue of such a decision.[63] Such collective decisions are to be distinguished from a decision taken by the organ of an international organization to provisionally apply a treaty concluded with a third party.[64]

35. As many commodity agreements have a limited duration, they make provision for an extension of the agreement through adoption of a decision by the competent organ. According to article 46, paragraph 1, the 1994 *International Tropical Timber Agreement* "shall remain in force for a period of four years after its entry into force unless the Council, by special vote, decides to extend, renegotiate or terminate it in accordance with the provisions of this article". Unlike the other agreements mentioned above, the 1994 *International Tropical Timber Agreement* entered into force only provisionally on 1 January 1997. On 30 May 2000 and 4 November 2002, respectively, the Council decided to extend the Agreement for a period of three years with effect from 1 January 2001 and 1 January 2004 respectively. It thus extended an agreement that was in force provisionally. The extension of the 1993 *International Cocoa Agreement* constitutes a comparable example.

36. Like the 1994 *International Tropical Timber Agreement*, the 2005 *International Agreement on Olive Oil and Table Olives*, article 47, paragraph 1, provides that it "shall remain

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[59] United Nations, *Treaty Series*, vol. 2677, p. 35.

[60] See subsection II.A.2 above.

[61] See United Nations Treaty Collection, Depository, Status of Treaties, Chapter XIX (Commodities), 39, *International Tropical Timber Agreement*, 1994, available at https://treaties.un.org.

[62] See United Nations Treaty Collection, Depository, Status of Treaties, Chapter XIX (Commodities), 38. International Cocoa Agreement, 1993, available at https://treaties.un.org.

[63] C.N.567.2012.TREATIES-XIX.47 (Depository Notification).

[64] See the examples regarding the practice of the European Union in document A/CN.4/699/Add.1.

in force until 31 December 2014 unless the International Olive Council, acting through its Council of Members, decides to prolong it, extend it, renew it or terminate it in advance in accordance with the provisions of this article". On 28 November 2014, the International Olive Council adopted a decision that entered into force as of 1 January 2015, prolonging the Agreement for a period of one year.[65] Unlike the 1994 *International Tropical Timber Agreement*, however, the 2005 *International Agreement on Olive Oil and Table Olives* entered into force definitively on 25 May 2007, in accordance with article 42. At the time of the decision on the prolongation of the agreement, Israel had declared provisional application and never ratified the agreement. It could thus be argued that the decision of the International Olive Council constituted an agreement prolonging the provisional application of the 2005 Agreement in relation to one State.

37. The question of whether the term "negotiating States" in article 25, paragraph 1 (*b*), of the 1969 Vienna Convention would prevent acceding States from entering into an agreement on provisional application cannot be clearly answered based on the multilateral treaties considered in the present study. As noted in the previous paragraph, some commodity agreements never enter into force definitively. When States or other entities extend an agreement that has only entered into force provisionally, such decision also applies to States that acceded to the commodity agreement. For example, several States acceded to the 1994 *International Tropical Timber Agreement* (Guatemala, Mexico, Nigeria, Poland, Suriname, Trinidad and Tobago, and Vanuatu), which was extended several times. It is also noteworthy that, during the period under review, Montenegro, which became independent in 2006, succeeded to *Protocol No. 14 to the European Convention on Human Rights*.[66] As a result, Montenegro had the option of provisionally applying certain provisions of Protocol No. 14 in accordance with the Madrid Agreement, although it did not do so.

III. Commencement of provisional application

38. Both bilateral and multilateral treaties provide for specific conditions under which the commencement of provisional application may take place. Commencement of provisional application may depend on certain procedures stipulated in the treaty or—less frequently—on the occurrence of an external event such as the adoption of a law or the entry into force of another treaty. Treaties might also combine the procedural conditions stipulated in the treaty with the requirement of an external event.

A. Commencement stipulated in the treaty

39. Provisional application typically commences in three different ways: (1) upon signature; (2) on a certain date (including retroactive effect of provisional application); or (3) upon notification. Unlike bilateral treaties, multilateral treaties may also foresee a fourth (4) possibility, namely commencement of provisional application by means of a decision of an organ established by the treaty.

40. With regard to option (3), notification of the provisional application of a bilateral treaty usually takes the form of the receipt of an affirmative note or letter. In multilateral

[65] United Nations, *Treaty Series* [vol. 3034], No. 47662[, p. 303].

[66] *Ibid.*, vol. 2677, p. 34.

treaties, the parties notify the depository of their intention to apply the agreement provisionally. Multilateral treaties may further specify when it is possible to make such a notification. If a notification of provisional application may be made upon signature or at any subsequent time, provisional application remains possible even after entry into force of the treaty. If a notification of provisional application may only be made in conjunction with ratification, acceptance, approval or accession, the possibility of provisional application is precluded after entry into force of the agreement.

1. Bilateral treaties

41. The signature of the parties is a common condition for provisional application of bilateral treaties. Provisional application might begin on the date of signature or shortly thereafter. Examples of the formulations used are: "shall enter into force provisionally on the date of its signing", "shall apply on a temporary basis from the date of signature", "shall be implemented and be effective in respect of all its provisions, albeit provisionally, from the day it is signed", "it will be applied and it will be effective in all of its terms notwithstanding its provisional character from the day of its signature", "shall be applied temporarily from the day of its signature", and "shall apply provisionally after thirty (30) days have elapsed following the date of its signature".

42. Some bilateral treaties also refer to a date on which the treaty will be applied provisionally other than the date of signature. Common formulations are: "shall apply provisionally as of 1 April 2010", "shall be applied provisionally with effect from 1 May 2003" and "shall apply this Agreement provisionally from 1 July 1996 if this Agreement cannot enter into force by 1 July 1996".

43. The provisional application of many bilateral treaties also depends on reciprocal notifications of the parties to the treaties. Relevant formulations are: "shall be applied provisionally from the date of exchange of these Notes", "provisional application shall begin 10 days after the date of exchange of these Notes", "shall be provisionally applied as from the date of receipt of this affirmative Note in reply", "shall be provisionally applied as from the date of the Department's reply", and "shall be provisionally applied from the date of this note".

44. As a variation of provisional application beginning on a certain date, some bilateral treaties provide for provisional application with retroactive effect. The *Agreement between the Competent Authorities of Belgium and Austria Concerning the Reimbursement of Costs in Matters Relating to Social Security* was provisionally applied on 3 December 2001 by signature, definitively on 1 August 2003 by notification and with retroactive effect from 1 January 1994, in accordance with article 5.[67] Article 5, paragraph 1, of the Agreement reads:

> The Contracting States shall notify each other in writing and through the diplomatic channel of the completion of the constitutional formalities required for the entry into force of this Agreement. This Agreement shall enter into force on the first day of the third month following the date of receipt of the final notification, effective as of 1 January 1994. Until its entry into force, this Agreement shall be implemented provisionally on the date of signature, effective as of 1 January 1994.

Similarly, the *exchange of notes constituting an agreement to renew the Status of Forces Agreement for military personnel and equipment for the forces between the Netherlands and Qatar* includes the following stipulation:

[67] *Ibid.*, vol. 2235, p. 14.

> If this proposal is acceptable to the State of Qatar, the Embassy proposes that this Note and the affirmative reply to it shall together constitute an Agreement between the Kingdom of the Netherlands and the State of Qatar, which will be applied provisionally pending Parliamentary approval in the Netherlands from the date of reply of the State of Qatar. If this date is later than 7 September 2005 this Agreement will have retroactive effect as from the latter date.[68]

The Agreement was applied provisionally on 6 August 2005 and entered into force on 18 December 2005, in accordance with the provisions of the said notes.

2. Multilateral treaties

45. Multilateral treaties contain the same procedural conditions regarding commencement of provisional application as bilateral treaties: (1) upon signature; (2) a certain date; or (3) upon notification of the depository. While the procedural conditions might be the same, the prevalence of each of the conditions within the multilateral treaties included in the present study is different. As mentioned above, the clauses on provisional application in multilateral treaties are often more tailored to the specific treaties, and might combine different procedural conditions. Another particularity of multilateral treaties is that amendments may be provisionally applied (4) by means of a decision of an international organization.

46. Multilateral treaties with a limited membership often provide for provisional application by signature. The *Treaty between the Russian Federation, Belarus, Kazakhstan and Kyrgyzstan on the deepening of integration in economic and humanitarian fields*, for example, includes the following article 26:

> This Treaty shall be applied provisionally from the date of its signature and shall enter into force from the date of the transmission to the depositary—which shall be the Russian Federation—of the notifications confirming the completion by the Parties of the internal formalities necessary for the entry into force of the Treaty.[69]

Similar clauses are included in the *Statutes of the Community of Portuguese-Speaking Countries*,[70] the *Agreement concerning permission for the transit of Yugoslav nationals who are obliged to leave the country*,[71] and the Agreement establishing the "Karanta" Foundation.[72] As noted above, some of these treaties concern institutional arrangements whose establishment proceeded on the basis of the signature of the negotiating parties. The *Agreement on collective forces of rapid response of the Collective Security Treaty Organization* is an example of a multilateral treaty concluded and provisionally applied within the framework of an international organization.[73] Moreover, some of the mixed agreements concluded by the European Union and its member States, on the one part, and a third party, on the other part, also allow for provisional application upon signature.[74] As noted in section I,

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[68] *Ibid.*, vol. 2386, pp. 343–346.

[69] *Ibid.*, vol. 2014, p. 15, at p. 60.

[70] *Ibid.*, vol. 2233, p. 207, at p. 229 (art. 21, para. 1).

[71] *Ibid.*, vol. 2307, p. 3, at pp. 125 and 127.

[72] *Ibid.*, vol. 2341, p. 3, at pp. 29 and 47.

[73] *Ibid.*, [vol. 2898], No. 50541[, p. 277].

[74] See *e.g.* the *Protocol to the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other part, on a Framework Agree-*

such mixed agreements have structural characteristics of both bilateral and multilateral treaties, particularly multilateral treaties with limited membership.[75]

47. A number of commodity agreements allow for provisional entry into force by a certain date. For example the 1994 *International Coffee Agreement*, provides, in article 40, paragraph 2 (entry into force):

> This Agreement may enter into force provisionally on 1 October 1994. For this purpose, a notification by a signatory Government or by any other Contracting Party to the *International Coffee Agreement* 1983, as extended, containing an undertaking to apply this Agreement provisionally, in accordance with its laws and regulations, and to seek ratification, acceptance or approval in accordance with its constitutional procedures as rapidly as possible, which is received by the Secretary-General of the United Nations not later than 26 September 1994, shall be regarded as equal in effect to an instrument of ratification, acceptance or approval.[76]

The 1994 *International Tropical Timber Agreement* also stipulates a date for provisional entry into force, but combines it with substantive conditions. As article 41, paragraph 2 (entry into force), states:

> If this Agreement has not entered into force definitively on 1 February 1995, it shall enter into force provisionally on that date or on any date within six months thereafter, if 10 Governments of producing countries holding at least 50 per cent of the total votes as set out in annex A to this Agreement, and 14 Governments of consuming countries holding at least 65 per cent of the total votes as set out in annex B to this Agreement have signed this Agreement definitively or have ratified, accepted or approved it pursuant to article 38, paragraph 2, or have notified the depositary under article 40 that they will apply this Agreement provisionally.[77]

48. Notification is the most common means to commence provisional application. An example is 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* ("Straddling Fish Stocks Agreement"), which provides in article 41, paragraph 1:

> This Agreement shall be applied provisionally by a State or entity which consents to its provisional application by so notifying the depositary in writing. Such provisional application shall become effective from the date of receipt of the notification.

None of the current parties to the Agreement used this possibility before its entry into force on 11 December 2001.[78] In comparison, several member States of the Council of Europe notified the provisional application of the relevant provisions of *Protocol No. 14 to the European Convention on Human Rights* in accordance with the Madrid Agreement.[79] Paragraph (*b*) of the Madrid Agreement states that

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ment between the European Union and Ukraine on the general principles for the participation of Ukraine in Union programmes, *ibid.*, [vol. 2913], No. 35736[, p. 7], art. 10.

[75] See section I above.

[76] United Nations, *Treaty Series*, vol. 1827, p. 3, at pp. 39–40.

[77] *Ibid.*, vol. 1955, p. 81, p. 169.

[78] See also para. 4 of General Assembly resolution 50/24 of 5 December 1995.

[79] See footnote 58 above.

> any of the High Contracting Parties may at any time declare *by means of a notification addressed to the Secretary General of the Council of Europe* that it accepts, in its respect, the provisional application of the above-mentioned parts of Protocol No. 14. Such declaration of acceptance will take effect on the first day of the month following the date of its receipt by the Secretary General of the Council of Europe; the above-mentioned parts of Protocol No. 14 will not be applied in respect of Parties that have not made such a declaration of acceptance.[80]

It is interesting that paragraph (*b*) explicitly provides that the provisionally applied parts of Protocol No. 14 will not be applied in relation to parties that have not accepted provisional application.

49. While the Straddling Fish Stocks Agreement and the Madrid Agreement allow for provisional application at any time before entry into force, a number of other multilateral treaties specify the time at which provisional application may be notified. Article 18 of the *Convention on Cluster Munitions* (provisional application) states:

> Any State may, at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally Article 1 of this Convention pending its entry into force for that State.[81]

Article 18 of the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* ("Anti-Personnel Mine Ban Convention") contains the same formulation.[82] Accordingly, the *Convention on Cluster Munitions* and the Anti-Personnel Mine Ban Convention were provisionally applied by the States that had made such a declaration until entry into force. After entry into force, the possibility of notifying provisional application was excluded because provisional application can only be notified at the time of ratification, acceptance, approval or accession. After entry into force, any such notification would be without effect because ratification, acceptance, approval or accession would lead to the State becoming a party to the convention with immediate effect.

50. Some multilateral treaties are provisionally applied on the basis of a declaration at the time of signature. Article 23 of the *Arms Trade Treaty* (provisional application) provides:

> Any State may at the time of signature or the deposit of instrument of its of ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State.[83]

Unlike the *Convention on Cluster Munitions* and the Anti-Personnel Mine Ban Convention, a State that has signed—but not yet ratified, accepted, approved or acceded to—the *Arms Trade Treaty* would continue to provisionally apply the Treaty even though it entered into force for States that notified ratification, acceptance, approval or accession. Accordingly, the Treaty would enter into force for some States, but would continue to be provisionally applied by others. In this context, it is noteworthy that almost all States that declared provisional application of the Treaty did so when depositing their instruments of ratification, acceptance, approval or accession.[84] When the Treaty entered into force on

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[80] Emphasis added.

[81] United Nations, *Treaty Series*, vol. 2688, p. 39, at p. 112.

[82] *Ibid.*, vol. 2056, p. 252.

[83] *Ibid.*, [vol. 3013], No. 52373[, p. 269].

[84] The only exceptions are Serbia and Spain, which notified provisional application of the Arms Trade Treaty at the time of signature on 12 August 2013 and 3 June 2013, and deposited their instruments

24 December 2014, all States that had declared provisional application under article 23 had also deposited instruments of ratification, acceptance, approval or accession.

51. A characteristic of institutional arrangements such as international organizations is that provisional application may be the result of the decision of organ of that institutional arrangement. As noted above, the General Assembly of UNWTO adopted two amendments to its Statutes, which were provisionally applied.[85] Such provisional application commenced at the time of adoption of the respective resolution. The adoption of a resolution is the most straightforward way to commence provisional application.

52. The different ways in which provisional application may commence is well illustrated by the *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea*, which includes a number of the above-discussed conditions. The relevant article 7 (provisional application), paragraph 1 reads:

> 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.

The chapeau of the subparagraph stipulates a certain date for the commencement of provisional application. Subparagraph (*a*) is comparable to provisional application of amendments by decision of an international organization, subparagraph (*b*) foresees for provisional application by signature, subparagraph (*c*) allows for provisional application by notification of the depository, and subparagraph (*d*) provides for provisional application by accession.

B. Commencement dependent on an event

53. While the commencement of provisional application is mostly determined by clauses in the treaty, it might also depend on the occurrence of external factors or events such as the passing of a law or regulation or the entry into force of a treaty. Such conditions are mostly used in bilateral treaties and underline the flexible nature of provisional application.

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of ratification on 5 December 2014 and 2 April 2014, respectively.

[85] See subsection II.A.2 above.

1. Bilateral treaties

54. The commencement of the provisional application of a bilateral treaty might be conditioned by the rules of an international organization of which the parties are members.[86] The *Agreement in the form of an exchange of letters concerning the taxation of savings income and the provisional application thereof between the Netherlands and the United Kingdom* proposed that

> the Kingdom of the Netherlands and Guernsey apply this Agreement provisionally, within the framework of our respective domestic constitutional requirements, as from 1 January 2005, or the date of application of Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, whichever is later.[87]

The commencement of provisional application of the Agreement might thus depend on the law of the European Communities.

55. The commencement of provisional application might also be determined by another treaty in force between the parties to the treaty that is being provisionally applied. The *exchange of notes between Switzerland and Liechtenstein relating to the distribution of the tax benefits on CO2 and the reimbursement of the tax on CO2 to enterprises under Liechtenstein's law on the exchanges of rights* provides the following:

> The Agreement shall apply provisionally from the date of the provisional implementation of the Treaty of 29 January 2010 between the Principality of Liechtenstein and the Swiss Confederation relating to environmental taxes in the Principality of Liechtenstein and of the Agreement relating to the Treaty and shall enter into force at the same time as the Treaty.[88]

The *Treaty of 29 January 2010 between Switzerland and Liechtenstein relating to environmental taxes in the Principality of Liechtenstein* provides in article 5 that it "shall be implemented provisionally as of 1 February 2010".[89] In a similar vein, the exchange of notes constituting an agreement between the Netherlands and Switzerland concerning privileges and immunities for the Swiss liaison officers at Europol in The Hague, states that the agreement

> shall be applied provisionally from the day on which this affirmative note has been received by the Embassy, but not before the date the Agreement between Switzerland the European Police Office of 24 September 2004 enters into force.[90]

2. Multilateral treaties

56. The commencement of multilateral treaties typically does not depend on the occurrence of a particular event. The exceptions are commodity agreements, which typically include multi-layered conditions for provisional and/or definitive entry into force. Article 42, paragraph 3, of the 2005 *Agreement on Olive Oil and Table Olives* states:

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[86] For a definition of the term "rules of the organization" see art. 2, para. (*b*) of the articles on the responsibility of international organizations, annexed to General Assembly resolution 66/100 of 9 December 2011.

[87] United Nations, *Treaty Series*, [vol. 2865], No. 50061[, p. 73]. The Netherlands has replicated this formulation in a number of other agreements.

[88] *Ibid.*, [vol. 2763], No. 48680[, p. 274].

[89] *Ibid.*, vol. 2761, p. 23, at p. 29.

[90] *Ibid.*, [vol. 2695], No. 47847[, p. 11].

> If, on 1 January 2006, the requirements for entry into force under paragraph 1 or paragraph 2 of this article have not been met, the depositary shall invite those Governments 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.

Similar clauses are contained in other commodity agreements. Such clauses may make provisional entry into force dependent on the decision of the governments concerned.

57. Some commodity agreements are conditional upon each other. Article XXIV (entry into force) of the 1999 *Food Aid Convention* provides that the *Food Aid Convention* may enter into force provisionally or definitively when the 1995 *Grains Trade Convention* is in force.[91]

IV. Scope of provisional application

58. A significant number of treaties or separate agreements on provisional application limit the scope of provisional application. The scope of provisional application may be restricted by express provisions on provisional application of part of the treaty or by references to the internal law of the parties or international law. Both bilateral treaties and multilateral treaties contain such limitations. However, clauses on provisional application of part of the treaty are more commonly found in multilateral treaties than in bilateral treaties. The scope of provisional application of bilateral treaties is more often limited by reference to internal law or international law.

A. Clauses on provisional application of part of the treaty

59. Article 25, paragraph 1, of the 1969 Vienna Convention envisages the possibility of provisional application of part of the treaty, confirming that the negotiating States or international organizations may limit the extent to which the treaty is provisionally applied. Clauses on provisional application of part of the treaty can be found in both bilateral and multilateral treaties. Provisional application of part of a treaty is prescribed in one of two ways: (1) by explicitly identifying the provision(s) that is/are to be provisionally applied; or (2) by stating which provision(s) may not be provisionally applied.

1. Bilateral treaties

60. A number of the bilateral treaties reviewed in the present study allow for provisional application of only part of the treaty. The *Agreement between the Netherlands and Monaco on the payment of Dutch social insurance benefits in Monaco* identifies the article that is to be applied provisionally. Article 13, paragraph 2, states:

> This Agreement shall enter into force on the first day of the second month following the date of the last notification, it being understood that the Netherlands will apply article 4 on a temporary basis as of the first day of the second month following the date of signature.[92]

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[91] *Ibid.*, vol. 2073, p. 135, at p. 151, and *ibid.*, vol. 1882, p. 195.

[92] *Ibid.*, vol. 2205, p. 541, at p. 550.

61. In contrast, the *Agreement between Austria and Germany on the cooperation of the police authorities and the customs administrations in the border areas* specifies which article is not to be applied provisionally. As article 18 provides:

> (1) This Agreement, with the exception of article 11, paragraph 1, shall be applied provisionally from the first day of the second month after the Contracting Parties have notified each other that the domestic conditions for the entry of the force of the Agreement, with the exception of article 11, paragraph 1, have been fulfilled.
>
> (2) This Agreement shall enter into force on the first day of the second month after the Contracting Parties have notified each other that the domestic conditions for the entry into force of the Agreement, including article 11, paragraph 1, have been fulfilled.[93]

62. Among the bilateral treaties provisionally applied by separate agreement, the abovementioned Agreement between Germany and Croatia regarding technical cooperation, in article 5, provides for provisional application of "the Agreement between the Republic of Croatia and the United Nations Development Programme (UNDP) of 12 March 1996 with the exception of the special provisions in Article 9". As explained above, the Agreement between Croatia and UNDP was signed for Croatia on 12 March 1996, but never entered into force. Croatia and Germany agreed to apply the agreement provisionally pending its entry into force.

2. Multilateral treaties

63. Several multilateral treaties considered in the present study provide for the possibility of provisional application of part of the agreement. Like bilateral treaties, multilateral treaties either indicate which provisions are to be applied provisionally or provide which provisions are not to be applied provisionally.

64. The Anti-Personnel Mine Ban Convention, in article 18, provides:

> 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.

Article 1, paragraph 1, of the Convention contains a number of general obligations regarding the use, production, acquisition, and transfer of anti-personnel mines or to assist in such prohibited activities. Article 18 of the *Convention on Cluster Munitions* and article 23 of the *Arms Trade Treaty* include similarly worded clauses on the provisional application of article 1 of the *Convention on Cluster Munitions* and articles 6 and 7 of the *Arms Trade Treaty*, respectively. Like article 1 of the Anti-Personnel Mine Ban Convention, article 1 of the *Convention on Cluster Munitions* pertains to the general obligations of the parties never to use, develop, produce, otherwise acquire, stockpile, retain or transfer cluster munitions, or to assist in activities prohibited under the Convention. Article 6 of the *Arms Trade Treaty* concerns obligations of a State party not to authorize any transfer of conventional arms covered by the Treaty and article 7 of the Treaty treats the export and export assessment with regard to arms whose export is not prohibited by the Treaty.

65. The Document agreed among the States Parties to the *Treaty on Conventional Armed Forces in Europe*, provides in section VI, paragraph 1:

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[93] *Ibid.*, vol. 2170, p. 573, at p. 586.

> This Document shall enter into force upon receipt of by the Depositary of notification of confirmation of approval by all States Parties. Section II, paragraphs 2 and 3, Section IV and Section V of this document are hereby provisionally applied as of 31 May 1996 through December 1996.[94]

In addition to this general clause on provisional application, the different parts singled out to be provisionally applied make reference to the measures to be taken "upon provisional application" of the Document.

66. The *Madrid Agreement on the provisional application of certain provisions of Protocol No. 14 to the European Convention on Human Rights* is another example of provisional application of part of the treaty. While the title of the Agreement already indicates that it concerns the provisional application of part of Protocol No. 14, paragraph (*a*) specifies that

> the relevant parts of Protocol No. 14 are Article 4 (the second paragraph added to Article 24 of the Convention), Article 6 (in so far as it relates to the single-judge formation), Article 7 (provisions on the competence of single judges) and Article 8 (provisions on the competence of committees), to be applied jointly.

The Madrid Agreement further states that "the above-mentioned parts of Protocol No. 14 will apply in respect of individual applications brought against [the High Contracting Party], including those pending before the Court at that date". The Madrid Agreement also stipulates that the parts of the Protocol will not apply in respect of any individual application brought against two or more High Contracting Parties unless Protocol No. 14 *bis* is in force or applied provisionally in respect of all of them. Protocol 14 *bis* concerned amendments to articles 25 (registry, legal, secretaries and rapporteurs), article 27 (single-judge formation, committees, chambers and Grand Chamber) and article 28 (competences of singles judges and committees).

67. The *Protocol on the Provisional Application of the Revised Treaty of Chaguaramas* makes explicit which provisions of the Revised Treaty are not to be applied provisionally. Article 1 states:

> The States Parties to this Protocol have agreed to apply provisionally the *Revised Treaty of Chaguaramas* signed at Nassau, The Bahamas, on 5 July 2001 except Articles 211 to 222 relating to the Caribbean Court of Justice pending its definitive entry into force in accordance with Article 234 thereof.

68. The *Trans-Pacific Strategic Economic Partnership Agreement* is an example of provisional application of part of the treaty that applies only to one party to the Agreement. As article 20.5 of the Agreement (Brunei Darussalam) states:

> 1. Subject to Paragraphs 2 to 6, this Agreement shall be provisionally applied in respect of Brunei Darussalam from 1 January 2006, or 30 days after the deposit of an instrument accepting provisional application of this Agreement, whichever is the later.
>
> 2. The provisional application referred to in Paragraph 1 shall not apply to Chapter 11 (Government Procurement) and Chapter 12 (Trade in Services).

While Brunei Darussalam notified its provisional application under article 20.5 of the Agreement on 10 July 2006, the other parties to the agreement, Chile, New Zealand, Singapore, ratified the agreement under article 20.4 on "entry into force". This situation is

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[94] *Ibid.*, [vol. 2441], No. 44001[, p. 285; vol. 2442, p. 3; vol. 2443, p. 3].

comparable to treaties that have entered into force for some parties but continue to be provisionally applied by others.

69. Commodity agreements do *a priori* not provide provisional application of part of the agreements. However, if the agreement has not entered into force by a certain date, some commodity give governments the option of "bring[ing] this Agreement into force definitively or provisionally among themselves, *in whole or in part*, on such date as they may determine".[95] Such a decision might thus result in provisional entry into force of only part of the agreement.

B. Reference to internal law or rules of the organization

70. In addition to explicit clauses on provisional application of part of the treaty, the scope of provisional application may also be limited by references to the internal law of the parties or the rules of an international organization that is a party to the respective agreement. Such limitations are vaguer than clauses on provisional application of part of the treaty, which typically single out particular provisions. Such limitations are more prevalent in bilateral treaties that in multilateral treaties.

1. Bilateral treaties

71. Many bilateral treaties make the extent of provisional application conditional on the internal law of the parties to the agreement, which might lead to provisional application of only part of the agreement. This is evident in the following formulation included in the *Agreement between Spain and El Salvador on air transport*, which states in article XXIV, paragraph 1:

> The Contracting Parties shall provisionally apply the provisions of this Agreement from the time of its signature *to the extent that* they do not conflict with the law of either of the Contracting Parties.[96]

Such a limitation clause can be interpreted as not requiring the parties to adopt new laws to implement the treaty pending its entry into force.

72. Bilateral treaties refer to internal law in a variety of ways. The *Convention between the Government of the Netherlands and Germany on the general conditions for the 1 (German-Netherlands) Corps and Corps-related units and establishments* refers, in article 15, paragraph 2, to provisional application "in accordance with national law of the Contracting Party concerned".[97] The *Agreement between Spain and the United States of America on cooperation in science and technology for homeland security matters*, in article 21, paragraph 1, states that provisional application shall be "consistent with each Party's domestic law".[98] The *German-Swiss Agreement on the stay of armed forces* prescribes provisional application "in accordance with national law in effect of each State" (art. 13, para. 1).[99] The *Agreement between Denmark and Ukraine on technical and financial cooperation*, in article X, paragraph 2, allows for provisional application "insofar as it does not contradict with

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[95] Art. 42, para. 3, of the 2005 *Agreement on Olive Oil and Table Olives* (emphasis added).

[96] United Nations, *Treaty Series*, vol. 2023, p. 341, at p. 352 (emphasis added).

[97] *Ibid.*, vol. 2332, p. 213, at p. 228.

[98] *Ibid.*, [vol. 2951], No. 51275[, p. 3].

[99] *Ibid.*, vol. 2715, p. 247, at p. 271.

existing legislation of either parties".[100] Furthermore, the *Agreement between Germany and Serbia and Montenegro regarding technical cooperation* states that provisional application shall be "in accordance with appropriate domestic law" (art. 7, para. 3).[101] It is interesting that the *Agreement between Germany and Kazakhstan on the transit of defence material and personnel through the territory of the Republic of Kazakhstan in connection with the contributions of the Armed Forces of the Federal Republic of Germany towards the stabilization and reconstruction of the Islamic Republic of Afghanistan* states that provisional application shall be "in accordance with the legal provisions in effect in the Republic of Kazakhstan" (art. 12, para. 2), *i.e.* only one of the parties.[102]

73. Reference is most often made to internal law generally. Constitutional law is typically not expressly mentioned. This observation is important because some constitutions might prohibit provisional application. Only a number of agreements between the Netherlands and other States concerning the taxation of savings income contain such references. In its exchange of letters with Jersey, for example, the Netherlands proposed that "the Kingdom of the Netherlands and Jersey apply this Agreement provisionally, within the framework of our respective domestic constitutional requirements".[103]

74. Host State agreements between international organizations and States might also contain references to the rules of the respective organization in a more general manner. After providing for provisional application in article XVII, paragraph 1, the *Agreement on the establishment of a United Nations High Commissioner for Refugees (UNHCR) field office in Ukraine* states in paragraph 3 of the same provision that

> [a]ny relevant matter for which no provision is made in this Agreement shall be settled by the Parties in keeping with the relevant resolutions and decisions of the appropriate organs of the United Nations.[104]

The same provision can be found in a number of other agreements concluded between UNHCR, UNDP and the United Nations Industrial Development Organization and the respective host States. While these clauses do not specifically apply to provisional application, they may be relevant when questions regarding the applicability of the agreement arise.

2. Multilateral treaties

75. A number of multilateral treaties refer to the internal law of parties to the treaty. The *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea*, is an example in this regard. As stated in in article 7, paragraph 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.

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[100] *Ibid.*, vol. 2538, p. 89, at p. 96.

[101] *Ibid.*, vol. 2424, p. 167, at p. 190.

[102] *Ibid.*, vol. 2531, p. 83, at p. 120.

[103] *Agreement in the form of an exchange of letters concerning the taxation of savings income and the provisional application thereof, ibid.*, [vol. 2865], No. 50062[, p. 334].

[104] *Ibid.*, vol. 1935, p. 245.

Another treaty containing such a reference is the *Agreement on collective forces of rapid response of the Collective Security Treaty Organization*, which "shall provisionally apply as of the date of signature, unless it contravenes the national laws of the Parties" (art. 17).[105]

76. The *Trans-Pacific Strategic Economic Partnership Agreement*, in article 20.5, paragraph 3, of the Agreement on provisional application by Brunei Darussalam states:

> The obligations of Chapter 9 (Competition Policy) shall only be applicable to Brunei Darussalam *if it develops a competition law and establishes a competition authority*. Notwithstanding the above, Brunei Darussalam shall adhere to the APEC Principles to Enhance Competition and Regulatory Reform.[106]

This requirement of making the provisional application of part of the Agreement subject to the adoption of a competition policy and establishment of a competition authority is interesting because references to internal law are usually intended to relieve the parties from adopting possible implementing legislation when the treaty enters into force.

77. References to the internal law of the parties are common in commodity agreements. Article 26 (provisional application) of the 1995 *Grains Trade Convention* thus provides: "Any Government depositing such a declaration shall provisionally apply this Convention in accordance with its laws and regulations and be provisionally regarded as a party thereto." Similar formulations are contained in article XXII (*c*) (signature and ratification) and article XXIII (*c*) (accession) of the 1999 *Food Aid Convention*, article 40 (entry into force), paragraphs 2 and 3, of the 1994 *International Coffee Agreement*, article 38 of the 2006 *International Tropical Timber Agreement* (notification of provisional application), and article 45 (entry into force), paragraph 2, of the 2001 *International Coffee Agreement*.

78. Some commodity agreements also include references to constitutional procedures. The 1994 *International Natural Rubber Agreement*, in article 60 (notification of provisional application), paragraph 2, states that "a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures and its domestic laws and regulations". Similar formulations are included in article 55 (notification of provisional application), paragraph 1, of the 1993 *International Cocoa Agreement*, article 57 (notification of provisional application), paragraph 1, of the 2001 *International Cocoa Agreement* and article 56 (notification of provisional application), paragraph 1, of the 2010 *International Cocoa Agreement*.

V. Termination of provisional application

79. As implied in article 25, paragraph 1, of the 1969 Vienna Convention, provisional application ends with entry into force of the treaty. In addition, article 25, paragraph 2, of the 1969 Vienna Convention provides for two ways to terminate provisional application: (1) termination by notification of the intention not to become a party to the treaty; and (2) by other agreement between the negotiating States. While option (1) allows for termination of the provisional application at a State's own volition (and at any time), option (2) presupposes some form of agreement between the negotiating States.

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[105] *Ibid.*, [vol. 2898], No. 50541[, p. 277].

[106] *Ibid.*, vol. 2592, p. 225, at p. 384 (emphasis added).

80. With regard to both options, it is important to distinguish between the termination of provisional application for a particular State and termination of provisional application of the treaty. While a notification under option (1) in a bilateral setting terminates provisional application of the treaty, such a notification in a multilateral setting terminates provisional application in relation to that State or international organization. Depending on the form of agreement between the negotiating States regarding termination of provisional application, a similar observation can be made with regard to option (2) as discussed below.

A. Termination by notification

81. Few treaties make reference to the possibility of terminating provisional application by notification in line with article 25, paragraph 2, of the 1969 Vienna Convention. It may thus be inquired whether other pertinent termination clauses would be applicable to the termination of provisional application. This inquiry is particularly relevant because the provisional application of both bilateral and multilateral treaties might have significant consequences for implementing measures taken during provisional application, such as the launching of cooperation projects or the establishment of institutional arrangements.

1. Bilateral treaties

82. A small number of the bilateral treaties analysed contain explicit clauses on termination of provisional application by notification. The *Treaty between Germany and the Netherlands concerning the implementation of air traffic controls by the Federal Republic of Germany above Dutch territory and concerning the impact of the civil operations of Niederrhein Airport on the territory of the Kingdom of the Netherlands* contains a clause that reflects the wording of the 1969 Vienna Convention. The relevant article (art. 16, para. 3) reads:

> This Treaty shall be applied provisionally with effect from 1 May 2003. Its provisional application shall be terminated if one of the Contracting Parties declares its intention not to become a Contracting Party.[107]

The *Agreement between Spain and the International Oil Pollution Compensation Fund*, stipulates:

> The provisional application of this Agreement shall terminate if Spain, through the Ambassador of Spain in London, notifies the Fund before 11 May 2001 that all the aforementioned procedures [required by Spanish law for the conclusion of the Agreement] have been completed, or if prior to that date Spain notifies the Fund, through its Ambassador in London, that those procedures will not be completed.[108]

The *Agreement between the United States of America and the Marshall Islands concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea* contains the following formulation in article 17:

> 2. Provisional Application. Beginning on the date of signature of this Agreement, the Parties shall apply it provisionally Either Party may discontinue provisional application at any time. Each Party shall notify the other Party immediately of any constraints or

[107] *Ibid.*, vol. 2389, p. 117, at p. 173.

[108] *Ibid.*, vol. 2161, p. 45, at p. 50.

> limitations on provisional application, of any changes to such constraints or limitations, and upon discontinuation of provisional application.
>
> 3. Termination. This Agreement may be terminated by either Party upon written notification of such termination to the other Party through the diplomatic channel, termination to be effective one year from the date of such notification.[109]

Pursuant to paragraph 2, provisional application can be "discontinued" by means of notification at any time. In contrast, the termination of the agreement would only take effect one year after the requisite notification.

83. The approach taken in the Agreement between the United States of America and the Marshall Islands is in line with article 25, paragraph 2, of the 1969 Vienna Convention. However, immediate termination could prove prejudicial since the implementation of the agreement might have already started. For the case of termination of provisional application by notification, the *Agreement between the European Community and Jordan on scientific and technological cooperation*, in article 7, provides:

> 2. This Agreement shall enter into force when the Parties will have notified to each other the completion of their internal procedures for its conclusion. Pending the completion by the Parties of said procedures, the Parties shall provisionally apply this Agreement upon its signature. *Should a Party notify the other that it shall not conclude the Agreement, it is hereby mutually agreed that projects and activities launched under this provisional application and that are still in progress at the time of the abovementioned notification shall continue until their completion under the conditions laid down in this Agreement.*
>
> 3. Either of the Parties may terminate this Agreement at any time upon six months' notice. Projects and activities in progress at the time of termination of this Agreement shall continue until their completion under the conditions laid down in this Agreement.
>
> 4. This Agreement shall remain in force until such time as either Party gives notice in writing to the other Party of its intention to terminate this Agreement. In such case this Agreement shall cease to have effect six months after the receipt of such notification.[110]

A considerable number of bilateral treaties covered in this study concern scientific, technological or economic cooperation, or other subject areas related to institutional arrangements. The potentially far-reaching effects of such provisionally applied treaties raise the question of the relationship between the requirements contained in regular termination clauses and the possibility of termination of provisional application by notification under article 25 of the 1969 Vienna Convention.

84. A situation of provisional application might also be relevant in case of the application of a clause stipulating the requirements for the termination of the treaty as such. The *Treaty between Spain and the North Atlantic Treaty Organization represented by the Supreme Headquarters Allied Powers Europe on the special conditions applicable to the establishment and operation on Spanish territory of international military headquarters*, which provides for provisional application in article 25, paragraph 1, states in paragraph 3:

> The present Supplementary Agreement may be denounced by either of the contracting Parties after having been in force for two years and shall cease to be in force one year after notice of the denunciation is received by the other Party.[111]

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[109] *Ibid.*, [vol. 2962], No. 51490[, p. 339].

[110] *Ibid.*, [vol. 2907], No. 50651[, p. 51] (emphasis added).

[111] *Ibid.*, vol. 2156, p. 139, at p. 155.

The question that arises is whether provisional application would count towards the two years mentioned in the clause.

2. Multilateral treaties

85. Considering termination of multilateral treaties, the Straddling Fish Stocks Agreement includes a clause allowing for termination by notification reflecting the wording of article 25, paragraph 2, of the 1969 Vienna Convention. Article 41, paragraph 2, states:

> Provisional application by a State or entity shall terminate upon the entry into force of this Agreement for that State or entity or upon notification by that State or entity to the depositary in writing of its intention to terminate provisional application.

None of the parties to the Straddling Fish Stocks Agreement made use of the possibility of provisional application under article 41, paragraph 1.

86. As few multilateral treaties contain clauses on termination of provisional application by notification, it could be asked whether clauses that allow for withdrawal from multilateral agreements might be relevant. The practice with regard to commodity agreements illustrates that provisional application may be terminated by withdrawal from the agreement. Article 44 of the 2005 *International Agreement on Table Olives and Olive Oil* provides:

> 1. Any Member may withdraw from this Agreement at any time after the entry into force of this Agreement by giving written notice of withdrawal to the depositary. The Member shall simultaneously inform the International Olive Council in writing of the action it has taken.
>
> 2. Withdrawal under this article shall become effective 90 days after the notice is received by the depositary.

The agreement entered into force provisionally on 1 January 2006 and definitively on 25 May 2007, in accordance with article 42. After entry into force of the Agreement, two States (Serbia and the Syrian Arab Republic) denounced the Convention.[112] At the time of denunciation, those States had only been provisionally applying the Agreement.

87. Similar considerations as those drawn with regard to commodity agreements apply to amendments that are being provisionally applied by international organizations. The provisional amendments to rule 165 of the *Rules of Procedure and Evidence of the International Criminal Court* will cease to be effective in relation to a State that withdraws from the Rome Statute. A withdrawal in accordance with article 127, paragraph 1, of the Rome Statute, would take effect one year after the date of receipt of the notification, unless the notification specifies a later date, and would terminate provisional application of the respective amendments.[113]

B. Termination by agreement

88. While article 25, paragraph 2, of the 1969 Vienna Convention allows States and international organizations to terminate provisional application at their own volition, provi-

[112] *Ibid*., vol. 2711, p. 328 (Serbia) and *ibid*., [vol. 3072], No. 47662[, p. 269] (Syrian Arab Republic).

[113] For information regarding withdrawals from the Rome Statute see United Nations Treaty Collection, Depository, Status of Treaties, Chapter XVIII (Penal Matters), 10. Rome Statute of the International Criminal Court, available at https://treaties.un.org.

sional application may also end by agreement of the parties. Provisional application is most frequently terminated by entry into force of the treaty as foreseen in the final clauses of the treaty (1). The termination of provisional application might also (2) depend on the entry into force of a treaty other than the one that is being provisionally applied, (3) take place on a certain date, (4) result from one treaty superseding another treaty, or (5) from an agreement to terminate the treaty before it enters into force. With regard to multilateral treaties, it is also conceivable that (6) the members of an international organization agree to expel another member while the constituent instrument is still being provisionally applied. Although entry into force is ultimately based on an agreement of the negotiating States or international organizations, it can be distinguished from the other options because it will lead to the continued operation of the treaty.

1. Bilateral treaties

89. As made explicit in a number of bilateral treaties, provisional application will end when the treaty enters into force. The *Agreement between Germany and Slovenia concerning the inclusion in the reserves of the Slovenian Office for Minimum Reserves of Petroleum and Petroleum Products of supplies of petroleum and petroleum products stored in Germany on its behalf*, in article 8, thus states: "This Agreement shall be applied provisionally from the date of signature until its entry into force."[114] Similarly, the exchange of notes constituting an Agreement between the Spain and Colombia on free visas, provides:

> For Spain, this Agreement shall have provisional status until such time as it indicates by note that its internal requirements have been fulfilled. For Colombia, no further action is required for this Agreement to enter into force, since it concerns the continued application of the exchange of notes of 1961. This Agreement shall apply indefinitely and may be denounced at two months' notice by either Contracting Party.[115]

90. Most bilateral treaties state that the treaty shall be applied provisionally "pending its entry into force", "pending its ratification", pending the fulfilment of the formal requirements for its entry into force", "pending the completion of these internal procedures and the entry into force of this Convention", "pending the Government[s] … informing each other in writing that the formalities constitutionally required in their respective countries have been complied with", "until the fulfilment of all the procedures mentioned in paragraph 1 of this article", or "until its entry into force".

91. While entry into force generally depends on the fulfilment of certain procedures in the internal law or rules of the parties, it might also be conditioned by external factors. Entry into force, and thereby termination of provisional application, might thus depend on the entry into force of an agreement other than the agreement that is being provisionally applied or some other event. The *Agreement between Germany and the International Tribunal for the Law of the Sea on the Occupancy and Use of the Premises of the International Tribunal for the Law of the Sea in the Free and Hanseatic City of Hamburg*, in article 11, paragraph 2, provides:

> 1. This Agreement may be amended by agreement between the Government and the Tribunal, at any time, at the request of either Party.

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[114] United Nations, *Treaty Series*, vol. 2169, p. 287, at p. 302.

[115] *Ibid.*, vol. 2253, pp. 333–334.

> 2. After being signed by the Parties, this Agreement shall enter into force on the same day as the Headquarters Agreement. It shall be applied provisionally as from the date of signature.[116]

The *Memorandum of Understanding on the implementation of Security Council resolution 986 (1995)* stipulates in section 10:

> 50. The present Memorandum shall enter into force following signature, on the day when paragraphs 1 and 2 of the Resolution become operational and shall remain in force until the expiration of the 180 day period referred to in paragraph 3 of the Resolution.
>
> 51. Pending its entry into force, the Memorandum shall be given by the United Nations and the Government of Iraq provisional effect.[117]

Paragraphs 1 and 2 of Security Council resolution 986 (1995) concerned the authorization to permit the import of petroleum and petroleum products originating in Iraq. Upon operationalization of those paragraphs, provisional application was thus terminated.

92. A number of bilateral treaties also explicitly or implicitly provide for the termination of provisional application independently of the entry into force of the agreement. For example, provisional application may be terminated if a treaty that is being provisionally applied is superseded by another treaty. The provisionally applied Agreement for air services between the Netherlands and Croatia states, in article 20, that "[i]f a multilateral treaty concerning any matter covered by this Agreement, accepted by both Contracting Parties, enters into force, the relevant provisions of that treaty shall supersede the relevant provisions of the present Agreement".[118] While the Agreement entered into force definitively a few months after provisional application commenced, article 20 outlines a possible scenario in which supersession could terminate provisional application. In this context, it is noteworthy that a number of air services agreements with clauses on provisional application state that supersession shall take place upon entry into force of the superseding treaty.[119] This might lead to a situation in which a superseding treaty is being provisionally applied while the preceding treaty is still in force.

93. Provisional application might be limited to the duration of a particular event. The *Exchange of letters constituting an agreement between the United Nations and Spain regarding the hosting of the Expert Group Meeting entitled "Making it work—Civil society participation in the implementation of the Convention on the Rights of Persons with Disabilities"*, to be held in Madrid, from 27 to 29 November 2007, noted that:

> [i]t will continue being applied provisionally, except for when it is already in force, for the duration of the Meeting and for such additional period as is necessary for the completion of its work and for the resolution of any matters arising out of the Agreement.[120]

Without prejudice to the possible termination of provisional application by entry into force, the Agreement envisaged that provisional application would be terminated as a result of the resolution of any matters covered therein.

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[116] *Ibid.*, vol. 2464, p. 87, at p. 98.

[117] *Ibid.*, vol. 1926, p. 9, at p. 18.

[118] *Ibid.*, vol. 1999, p. 267, at p. 277.

[119] See *e.g. Air Transport Agreement between the Netherlands in respect of the Netherlands Antilles* and the *United States of America relating to air transport between the Netherlands Antilles and the United States of America*, *ibid.*, vol. 2066, p. 437, at p. 448.

[120] *Ibid.*, vol. 2486, p. 5.

2. Multilateral treaties

94. A number of multilateral treaties contain provisions regarding the termination of provisional application by agreement of the parties in different ways. As in the case of bilateral treaties, such agreement most typically concerns the conditions for the entry into force of the multilateral treaty.

95. The Madrid Agreement on the provisional application of certain provisions of *Protocol No. 14 to the European Convention on Human Rights* provides in paragraph (*d*) that "[s]uch a declaration [of provisional application] will cease to be effective upon the entry into force of Protocol No. 14 *bis* to the Convention in respect of the High Contracting Party concerned". Protocol No. 14 *bis* states in article 6 that it shall enter into force when "three High Contracting Parties to the Convention have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 5". In addition, paragraph (*e*) of Protocol No. 14 states that

> the provisional application of the above-mentioned provisions of Protocol No. 14 will terminate upon entry into force of Protocol No. 14 or if the High Contracting Parties in some other manner so agree.

Article 19 of Protocol No. 14 stipulates that the Protocol shall enter into force only when "all Parties to the Convention have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 18". As Protocol No. 14 *bis* contained a lower requirement for entry into force, the provisional application of Protocol No. 14 in accordance with the Madrid Agreement was terminated by the entry into force of Protocol No. 14 *bis*. At that point, Ukraine had declared provisional application without expressing its consent to be bound. The question is thus whether the Agreement continued to be applied provisionally in relation to Ukraine following its entry into force. Protocol 14 *bis* itself ceased to be in force or applied on a provisional basis as from 1 June 2010, the date of entry into force of Protocol No. 14 to the Convention.

96. Like the Madrid Agreement, the *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea* provides in article 7, paragraph 3:

> Provisional application shall terminate upon the date of entry into force of this Agreement. In any event, provisional application shall terminate on 16 November 1998 if at that date the requirement in article 6, paragraph 1, of consent to be bound by this Agreement by at least seven of the States (of which at least five must be developed States) referred to in paragraph 1 (*a*) of resolution II has not been fulfilled.

Under this clause, provisional application may be terminated when the Agreement enters into force under the conditions set out in article 6 of the Agreement, namely when at least 40 States have established their consent to be bound in accordance with articles 4 and 5. The Agreement entered into force definitively on 28 July 1996. At that time, several States were provisionally applying the Agreement without having expressed their consent to be bound. As in the case of the provisional application of Protocol No. 14 *bis* by Ukraine, it remains to be established whether the Agreement continued to be applied provisionally by those States until consent to be bound took place. The fact that article 7, paragraph 3, also stipulates that provisional application should terminate on 16 November 1998 would speak against such assumption. This is also confirmed by paragraph 12 (*b*) of the Annex to the *Agreement, on Costs to States Parties and Institutional Arrangements*, which provides:

> Upon the entry into force of this Agreement, States and entities referred to in article 3 of this Agreement which have been applying it provisionally in accordance with article 7 and for which it is not in force may continue to be members of the Authority on a provisional basis pending its entry into force for such States and entities, in accordance with the following subparagraphs…

Subparagraph (*b*) further states that " [i]f this Agreement enters into force after 15 November 1996, such States and entities may request the Council to grant continued membership in the Authority on a provisional basis for a period or periods *not extending beyond 16 November 1998*".[121] After entry into force, States and other entities could continue to be provisional members of the Authority until 16 November 1998, *i.e.* the date termination date for provisional application stipulated in article 7, paragraph 3, of the Agreement.

97. By providing for an end date for provisional application, article 7, paragraph 3, of the *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea* provides another way in which provisional application may be terminated independently of entry into force. The Document agreed among the States Parties to the *Treaty on Conventional Armed Forces in Europe* also specifies a date of terminating provisional application but further stipulates a review by the parties. Section VI, paragraph 1, provides:

> This Document shall enter into force upon receipt by the Depositary of notification of confirmation of approval by all States Parties. Section II, paragraphs 2 and 3, Section IV and Section V of this Document are hereby provisionally applied as of 31 May 1996 through 15 December 1996. If this Document does not enter into force by 15 December 1996, then it shall be reviewed by the States Parties.

A similar combination of a date for terminating provisional application and review by the parties can be found in the *Trans-Pacific Strategic Economic Partnership Agreement*. As explained above, the Partnership Agreement was provisionally applied in part and also by one of the parties, Brunei Darussalam. Article 20.5 states:

> 4. The Commission shall consider whether to accept the Annexes for Brunei Darussalam under Chapter 11 (Government Procurement) and Chapter 12 (Trade in Services), no later than two years after the entry into force of this Agreement in accordance with Article 20.4(1) or (2), unless the Commission otherwise agrees to a later date.
>
> 5. Upon a decision of the Commission accepting the Annexes referred to in Paragraph 4, Brunei Darussalam shall deposit an Instrument of Ratification, Acceptance or Approval within two months of the decision by the Commission. The Agreement shall enter into force for Brunei Darussalam 30 days after the deposit of such instrument.
>
> 6. Unless the Commission decides otherwise, if the conditions in Paragraph 4 or 5 are not met, the Agreement shall no longer be provisionally applied to Brunei Darussalam.

The Partnership Agreement entered into force for Brunei Darussalam on 29 July 2009, thereby terminating provisional application.[122]

98. Treaties specifically stipulating a termination date for provisional application can be distinguished from treaties of limited duration. As noted above, such temporary treaties may be provisionally applied but generally have a fixed end date. A typical example of

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[121] Emphasis added.

[122] See New Zealand, *Treaty Series* 2006, No. 9, available at http://www.treaties.mfat.govt.nz/search/details/t/3599 (accessed on 27 February 2017).

such temporal treaties are commodity agreements. The 1994 *International Tropical Timber Agreement* provides, in article 46, paragraph 1:

> This Agreement shall remain in force for a period of four years after its entry into force unless the Council, by special vote, decides to extend, renegotiate or terminate it in accordance with the provisions of this article.

As explained above, the 1994 *International Tropical Timber Agreement* did not enter into force definitively, but was extended several times by the Council, which prevented the automatic termination of provisional application.[123]

99. Article 46, paragraph 4, of the 1994 *International Tropical Timber Agreement* adds that if a new agreement is negotiated and enters into force during any period of extension, the 1994 Agreement, as extended, shall terminate upon the entry into force of the new agreement. On 27 January 2006, the United Nations Conference for the Negotiation of a Successor Agreement to the International Tropical Timber Agreement, 1994, adopted a new *International Tropical Timber Agreement*, which entered into force definitively on 7 December 2011.[124] This amounts to a case in which one treaty supersedes another treaty, thereby terminating the provisional application of the former treaty.

100. Moreover, article 46, paragraph 5, of the 1994 Agreement states that "[t]he Council may at any time, by special vote, decide to terminate this Agreement with effect from such date as it may determine". Termination of the provisionally applied agreement as such would terminate its provisional application. In some cases, the parties to multilateral treaties may also have the option to terminate the provisional application of the amendment to a treaty. Pursuant to article 51, paragraph 3, of the Rome Statute, for instance, the Assembly of States Parties has the power to reject the above-mentioned provisional amendments to rule 165 of the *Rules of Procedure and Evidence of the International Criminal Court*, which would terminate their provisional application.

101. While the termination of a provisionally applied treaty or a provisionally applied amendment becomes effective in relation to all parties, provisional application might also be terminated in relation to only one State. This would be the case if the competent organ of an international organization decides to expel or exclude a member from the organization. Most commodity agreements and constituent instruments of international organizations allow for the exclusion or expulsion of members.[125]

102. When ratifying, accepting, approving or acceding to a commodity agreement, the parties to the agreement may also do so with retroactive effect dating back to the time of provisional application. For example, out of the 29 parties that declared the provisional application of the 1993 *International Cocoa Agreement*, 18 subsequently ratified the agreement. The ratifications of nine States had retroactive effect dating back to the declaration of provisional application. Other ratifications with retroactive effect were made with regard to the 2006 *International Tropical Timber Agreement*, the 1994 *Coffee Agreement*, 2001 *International Coffee Agreement*, 1999 *Food Aid Convention* and the 1994 *International Coffee Agreement*. Such ratifications with retroactive effect arguably go beyond the mere termination of provisional application.

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[123] See subsection II.B.2 above.

[124] United Nations, *Treaty Series*, vol. 2797, p. 75.

[125] See *e.g.* art. 45 of the 2005 *Agreement on Table Olives and Olive Oil*.

VI. Observations

103. Based on the bilateral and multilateral treaties analysed in the present memorandum, it can be observed that provisional application of treaties is a flexible tool available to States and international organizations to tailor their treaty relations. This flexibility reveals itself with regard to the terminology used, the type of agreement on and conditions for provisional application. While bilateral and multilateral treaties share many characteristics regarding provisional application, the present study illustrates that important differences exist between these two kinds of treaties. In this regard, multilateral treaties with limited membership are typically more comparable to bilateral treaties than to multilateral treaties with open membership.

104. The similarities and differences in the provisional application of bilateral and multilateral treaties are described in the more detailed observations below:

Legal basis of provisional application

(*a*) Most bilateral treaties and multilateral treaties use either the term "provisional application" or "provisional entry into force" to describe the application of a treaty before its entry into force. The terminology used in bilateral treaties varies greatly. In some special cases, including commodity agreements, a distinction is drawn between provisional application by individual States or international organizations and the provisional entry into force of the agreement as a whole.

(*b*) The majority of bilateral treaties are applied on the basis of a clause on provisional application included in the treaty that is being provisionally applied. Provisional application by separate agreement is more prevalent in multilateral treaties, which may be partly due to the qualitative and quantitate requirements for entry into force of such treaties.

(*c*) Separate agreements on the provisional application of multilateral treaties are (1) either concluded at the time of the adoption of the original treaty or (2) at a later point in time.

Commencement of provisional application

(*d*) Bilateral and multilateral treaties provide for the commencement of provisional application under one or more of the following conditions: (1) upon signature; (2) at a certain date; or (3) upon notification. The adoption of a decision by an international organization is a fourth (4) option for commencement of provisional application specific to multilateral treaties, which may be applied provisionally with immediate effect.

(*e*) Multilateral treaties with limited membership are more amenable to commencement of provisional application upon signature (1).

(*f*) As for the commencement of provisional application by notification (3), multilateral treaties may further specify the time of the declaration of provisional application in at least two ways: (*a*) notification of provisional application at the time of signature or at any time, or (*b*) notification of provisional application at the time of ratification, approval, acceptance or accession. In the latter case, provisional application will only be possible in the period before the multilateral treaty enters into force.

(*g*) Treaties, in particular multilateral treaties, may include a several conditions, to be applied in combination or in the alternative, for the commencement of provisional application.

Scope of provisional application

(*h*) The scope of provisional application of both bilateral and multilateral treaties may be limited by a clause on provisional application of part of the treaty or with reference to internal law or rules of the organization.

(*i*) Few treaties provide for the provisional application of part of the treaty. Provisional application of part of the treaty is more common in multilateral treaties than in bilateral treaties.

(*j*) Clauses on provisional application of part of the treaty may either (1) identify the provisions in the treaty that are not provisionally applied, or (2) specify which provisions are to be provisionally applied.

(*k*) Some treaties, such as commodity agreements, allow for provisional entry into force of part of the treaty by a decision of States and/or international organizations that have declared their consent to be bound or their provisional application of the treaty.

(*l*) References to internal law, rules of an international organization or international law with a view to limiting the scope of provisional application are more prevalent in bilateral treaties than in multilateral treaties.

Termination of provisional application

(*m*) Of the bilateral treaties and multilateral treaties that refer to termination of provisional application, few treaties explicitly allow for termination by notification of the intention not to become a party to the treaty.

(*n*) Provisional application may be terminated by withdrawal from a multilateral treaty by a State or international organization for which the treaty is not yet in force.

(*o*) Entry into force of the agreement is the most common way to terminate provisional application by other agreement of the parties (1). Accordingly, the termination of provisional application frequently depends on the different conditions for entry into force of the treaty.

(*p*) Provisional application may also be terminated by other forms of agreements unrelated to entry into force, such as: (2) the entry into force of a treaty other than the treaty that is being provisionally applied; (3) a determined end date for provisional application; (4) if the parties to the treaty that is being provisionally applied conclude a new treaty that supersedes the previous treaty; (5) if the parties decide to terminate the treaty that is being provisionally applied; and (6) if the parties to a multilateral institutional arrangement agree to expel a particular State or international organization while the constituent instrument is still being provisionally applied.

D. Selected bibliography on the provisional application of treaties[1]

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[1] Source: Doc. A/76/10, Chp. V, annex.

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