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.

Contents

* Prepared by the Secretariat of the International Law Commission (Codification Division of the Office of Legal Affairs). UN Doc. A/CN.4/707 (2017).

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.
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> 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.