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MATERIALS ON THE PROVISIONAL APPLICATION OF TREATIES

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Foreword

In 1950, the International Law Commission considered ways and means for making customary international law more readily available, in accordance with article 24 of its Statute. The Commission recommended, *inter alia*, that the General Assembly of the United Nations should authorize the Secretariat to prepare and issue, with as wide a distribution as possible, a *Legislative Series* containing the texts of current national legislation on matters of international interest. In this connection, it was recommended that the Secretariat should assemble and publish from time to time collections of the texts of national legislation on special topics of general interest. The *Legislative Series* is prepared by the Codification Division of the Office of Legal Affairs.

The first 25 volumes in the *Legislative Series* have addressed a broad range of special topics of general interest relating, *inter alia*, to the law of the sea, the law of treaties, nationality, diplomatic and consular law, international organizations, State succession, non-navigational uses of international watercourses, jurisdictional immunities of States and their property, the multilateral treaty-making process, the prevention and suppression of international terrorism as well as the responsibility of States for internationally wrongful acts. The legal materials contained in this series have included not only national legislation but also treaties, judicial decisions, diplomatic correspondence, statements made by States in international organizations and other relevant materials depending on the topic. The present volume of this series is devoted to the topic of the provisional application of treaties.

The Vienna Convention on the Law of Treaties was adopted in 1969 on the basis of a set of draft articles finalised by the International Law Commission in 1966. Article 25 provides for the provisional application of treaties in the following terms:

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

In 2012, the International Law Commission decided to include the topic of provisional application of treaties in its programme of work, with a view to considering a number of issues related to the interpretation and application of Article 25 which had arisen in the period since its adoption. The Commission appointed Juan Manual Gomez Robledo (Mexico) as Special Rapporteur for the topic.

In 2021, the International Law Commission concluded its work on the topic and adopted the *Guide to Provisional Application of Treaties*, constituted of a set of draft guidelines and a draft annex on the provisional application of treaties, together with commentaries thereto. The Commission recommended that the General Assembly take note of and commend the Guide, and accompanying commentaries, to the attention of States

and international organizations. It also recommended that the Assembly "request the Secretary-General to prepare a volume of the *United Nations Legislative Series* compiling the practice of States and international organizations in the provisional application of treaties, as furnished by the latter over the years, together with other materials relevant to the topic." The General Assembly, in resolution 76/113 of 19 December 2021, followed the recommendation of the Commission, and, *inter alia*, requested the Secretary-General to prepare the present volume of the *Legislative Series*.

The volume is constituted of three parts. Part One is dedicated to information about the practice of States and international organizations in connection with the provisional application of treaties. It reproduces excerpts from various sources, including written communications transmitted to the Commission during the course of its work on the topic, statements made during the annual debates on the report of the International Law Commission held in the Sixth Committee of the General Assembly as well as responses received in writing to a communication sent to all States in early 2022 soliciting information regarding their respective State practice for inclusion in the present volume. A similar communication was sent to selected international organizations, both within and beyond the United Nations system, and including regional organizations. Part One also includes information about the practice of the United Nations itself, and reproduces the relevant extracts from, inter alia, the *United Nations Treaty Handbook*.

Part two is dedicated to the work product of the Commission, and reproduces the *Guide to Provisional Application of Treaties*, as well as the accompanying commentaries and General Assembly resolution 76/113.

Part Three reproduces several miscellaneous documents, including three studies prepared by the United Nations Secretariat for the consideration of the International Law Commission during its work on the topic, as well as a bibliography that was included in the 2021 report of the Commission upon conclusion of its work on the topic.

The materials are presented predominantly in English, in some cases on the basis of translations prepared by the Secretariat of the United Nations. Where available the versions in the original language of submission or delivery have been posted on the website accompanying this volume (at locations indicated in the accompanying footnotes).[1]

[1] Available at: https://legal.un.org/legislativeseries/book26.shtml.

Abbreviations

ATT	Arms Trade Treaty
BIICL	British Institute of International and Comparative Law
BWM Convention	International Convention for the Control and Management of Ships' Ballast Water and Sediments
CAAA	Common Aviation Area Agreement
CAHDI	Committee of Legal Advisers on Public International Law
CARICOM	Caribbean Community
CARIFORUM	Caribbean Forum of African, Caribbean and Pacific (ACP) Group States
CCCCC	Agreement Establishing the Caribbean Community Climate Change Centre
CELAC	Community of Latin American and Caribbean States
CETA	Canada-European Union Comprehensive Economic and Trade Agreement
CETS	Council of Europe Treaty Series
CMP	Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol
CoE	Council of Europe
CTBT	Comprehensive Nuclear-Test-Ban Treaty
CTS	Canada Treaty Series
EAC	East African Community
ECAA	European Common Aviation Area
ECOWAS	Economic Community of West African States
ECT	Energy Charter Treaty
EEA	European Economic Area
EFTA	European Free Trade Association
EPA	Economic Partnership Agreement
ESA	Eastern and Southern Africa States
ETS	European Treaty Series
EU	European Union
Europol	European Union Agency for Law Enforcement Cooperation
FAO	Food and Agriculture Organization
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GMDSS	Global Maritime Distress and Safety System
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ILC	International Law Commission
ILO	International Labour Organization
IMO	International Maritime Organization
IMSO	Convention on the International Mobile Satellite Organization
INMARSAT	International Maritime Satellite organization
IOM	International Organization for Migration

LAIA	Latin American Integration Association
LRIT	Long Range Identification and Tracking of Ships
MEPC	Marine Environment Protection Committee
MERCOSUR	Southern Common Market
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
SACU	Southern African Customs Union
SADC	Southern African Development Community
TFEU	Treaty on the Functioning of the European Union
UNDP	United Nations Development Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNHCR	United Nations High Commissioner for Refugees
UNWTO	World Tourism Organization
UPU	Universal Postal Union
VCLT	Vienna Convention on the Law of Treaties
WFP	World Food Programme
WTO	World Trade Organization

Part One—Practice of States and International Organizations and other entities in relation to the provisional application of treaties

A. Information concerning the practice of States in relation to the provisional application of treaties

1. Australia

Statement made in the Sixth Committee, Sixty-seventh session (2012), 23rd meeting, 6 November 2012:

> In Australia, treaties are subject to a two-step domestic process before Australia formally consents to be bound at international law. The first step is to obtain Executive approval prior to signature of the treaty, and the second step involves submitting the treaty for parliamentary scrutiny prior to ratification and its entry into force for Australia. As provisional application of a treaty means that all or part of an agreement would become legally-binding prior to ratification, it does not sit comfortably with the second step of Australia's treaty-making process, whereby a treaty must undergo parliamentary review before its provisions can enter into force. Generally, Australia does not take action to become legally bound to a treaty until any domestic laws necessary to implement the treaty obligations have been passed. Any new Australian legislation to implement a treaty must be in force on or before the date that a treaty enters into force for Australia.
>
> There may be circumstances where there is a strong policy reason to implement a particular agreement as early as possible. In such situations, the Australian Government may—instead of provisional application—exchange a political, non-legally binding undertaking with its treaty partner to apply provisions in the treaty to cover the period until the ratification process has been completed.

Statement made in the Sixth Committee, Sixty-eighth session (2013), 24th meeting, 4 November 2013:[1]

> In Australia, for example, there is a two-step domestic process before Australia formally consents to be bound at international law. Accordingly, Australia's practice is not to provisionally apply treaties.

Statement made in the Sixth Committee, Sixty-ninth session (2014), 26th meeting, 3 November 2014:[2]

> Individual States decide whether to provisionally apply treaties in light of the purpose, scope and content of the specific treaty, as well as domestic legal and political considerations. For example, Australia has adopted a dualist approach to the implementation of treaties under which treaties have no effect in Australian domestic law until incorporated formally by legislation. Accordingly, Australia's general practice is not to provisionally apply treaties—but there are exceptions, for example bilateral air services agreements.

[1] Full text available at: https://www.un.org/en/ga/sixth/68/pdfs/statements/ilc/australia_3.pdf.

[2] Full text available at: https://www.un.org/en/ga/sixth/69/pdfs/statements/ilc/australia_3.pdf.

2. Austria

Statement made in the Sixth Committee, Sixty-seventh session (2012), 20th meeting, 2 November 2012:[3]

> The Austrian constitution does not contain any rules on the provisional application of treaties. However, since Austria has become a member of the European Union in 1995 and in view of the EU practice of provisional application, the need arose to apply provisionally certain treaties with third countries. Austria accepted this practice, but in order to respect democratic legitimacy it applied such treaties provisionally only after their approval by the Austrian parliament. If the treaty does not specify that the provisional application becomes effective only upon notification, allowing Austria to conclude its parliamentary procedure, Austria has adopted the practice of declaring that it would apply the treaty provisionally only after its parliamentary approval in Austria.

[3] Full text available at: https://www.un.org/en/ga/sixth/67/pdfs/statements/ilc/austria_3.pdf.

3. Belarus

Statement made in the Sixth Committee, Sixty-seventh session (2012), 21st meeting, 5 November 2012:[4]

> The Republic of Belarus actively uses provisional application in its international treaty practice. Provisional application of international agreements allows the Belarusian side to start cooperation within these agreements with the parallel execution of domestic procedures, required for its entry into force.
>
> The Law of the Republic of Belarus on "International Treaties" stipulates that an international treaty provisionally applied by the Republic of Belarus prior to its entry into force is subject to execution in the same manner as an international treaty that has entered into force (Art. 32). Thus, within the framework of national legislation, the principle is established of full implementation by Belarus of a provisionally applied international treaty from the date of its signing.
>
> In the Republic of Belarus, the decision on the provisional application of the international agreement or part thereof is taken, as a rule, simultaneously with the decision on its signing or conclusion by exchange of notes, letters or other documents forming an international treaty. In case of agreement between the parties, the commencement of the provisional application of an international treaty, or part thereof, is possible on the basis of acceptance by the relevant government authority of the Republic of Belarus with a separate decision without reference to signing.

Communication transmitted to the Secretariat, 1 August 2022:[5]

> **Provisional application of international treaties by the Republic of Belarus**
>
> *1. General information*
>
> The mechanism for provisional application of international treaties by the Republic of Belarus is governed by article 35 of Act No. 421-Z of the Republic of Belarus of 23 July 2008 on international treaties to which the Republic of Belarus is a party (hereinafter "International Treaties Act").
>
> An international treaty or a part of an international treaty may be provisionally applied by the Republic of Belarus prior to its entry into force if the treaty itself so provides or if the parties have so agreed in writing in another form (a separate treaty or protocol, a resolution adopted by an international organization or at an intergovernmental conference, or a unilateral statement).
>
> A decision to provisionally apply an international treaty is usually made at the same time as the decision to sign or conclude it through an exchange of notes, letters or other documents constituting an international treaty, but the International Treaties Act provides for the possibility of a separate decision on provisional application. The rule on the provisional application of an international treaty shall be included both in the international treaty itself and in the normative legal act of the Republic of Belarus on the signing or conclusion of the treaty by an exchange of documents, and the date of commencement of provisional application in the treaty and in the legal act must be identical.

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[4] Unofficial translation (from Russian) by the United Nations Secretariat. Full text available at: https://www.un.org/en/ga/sixth/67/pdfs/statements/ilc/belarus_3.pdf.

[5] Unofficial translation (from Russian) by the United Nations Secretariat. The original submission is available at: https://legal.un.org/legislativeseries/pdfs/chapters/book26/belarus_r.pdf.

The legislative acts of the Republic of Belarus do not prohibit the provisional application of any international treaties.

Provisional application is provided for in the case of both bilateral and multilateral international treaties to which the Republic of Belarus is a party.

A rule on the provisional application of a bilateral international treaty shall be included in the international treaty if the law of the other contracting party does not prohibit or restrict the provisional application of international treaties.

In accordance with the current practice of the Republic of Belarus in concluding multilateral international treaties, including within regional international organizations such as the Commonwealth of Independent States, if, at the stage of drafting an international treaty, its text includes a provision on provisional application of the treaty or on provisional application of certain provisions of the treaty, it is also recommended to include in the draft text a provision allowing any party to the treaty to declare that it will not apply that treaty provisionally or will apply it provisionally from a date other than the date set out in the treaty.

On the basis of recognized international treaty practice, Belarus does not consider the mechanism of provisional application to be a substitute for the entry into force of an international treaty. Provisional application is used only in special cases requiring the application of international treaty rules before the signatories have expressed their consent to be bound.

So far, the Republic of Belarus has had recourse to the practice of provisional application of international treaties in more than 200 cases.

2. Decision-making procedure for inter-State and intergovernmental international treaties

In accordance with the sixth paragraph of article 35 of the *International Treaties Act*, a proposal agreed upon with the Ministry of Foreign Affairs, the Ministry of Justice and other interested State bodies of the Republic of Belarus to provisionally apply an inter-State or intergovernmental international treaty or to terminate the provisional application of such an international treaty shall be submitted to the Council of Ministers of the Republic of Belarus by the State body competent for the subject matter of the international treaty not later than one month prior to the planned date of negotiation or signing, and, in exceptional cases, not later than 10 working days prior to that date, if no other date has been specified by agreement with the Prime Minister of the Republic of Belarus.

A decision to provisionally apply an inter-State or intergovernmental international treaty or to terminate the provisional application of such an international treaty shall be made:

— In the form of an edict of the President of Belarus, in the case of inter-State treaties and intergovernmental treaties that establish rules different from those contained in the laws of the Republic of Belarus or the decrees and edicts of the President of the Republic of Belarus and/or that concern only matters of legislative regulation but are not regulated by the laws of the Republic of Belarus or by decrees and edicts of the President of the Republic of Belarus; or intergovernmental treaties aimed at attracting resources of international organizations to the Republic of Belarus;

— In the form of a decision of the Council of Ministers of the Republic of Belarus, in the case of other intergovernmental treaties.

3. Decision-making procedure for international inter-agency treaties

In accordance with the eighth paragraph of article 35 of the *International Treaties Act*, a proposal to provisionally apply an international inter-agency treaty or to terminate the provisional application of such an international treaty shall be prepared by the State body competent for the subject matter of the international treaty and shall be agreed upon with the Ministry of Foreign Affairs, the Ministry of Justice and other interested State bodies, or, where necessary, with the President of the Republic of Belarus, the State Secretariat of the Security Council of the Republic of Belarus and the Ministry of Finance.

A decision to provisionally apply an international inter-agency treaty or to terminate the provisional application of such an international treaty shall be made:

— In the form of a decision of the Council of Ministers of the Republic of Belarus, in the case of international inter-agency treaties concerning matters that fall within the competence of two or more national public authorities subordinate to the Government of the Republic of Belarus, or the conclusion of which is provided for by inter-State or intergovernmental treaties;

— In the form of an edict of the heads of a State body of the Republic of Belarus or of a department of a State body, in the case of international inter-agency treaties concerning matters that fall within the competence of a State body of the Republic of Belarus or a department of a State body subordinate (accountable) to the President of the Republic of Belarus;

— In the form of an order of the heads of the relevant State body of the Republic of Belarus or department of a State body, in the case of other international inter-agency treaties.

4. Commencement of provisional application

An international treaty shall be applied provisionally by the Republic of Belarus from the date of its signature or from another date specified by the parties until its entry into force or until the date specified by the parties.

In accordance with the practice of the Republic of Belarus with regard to international treaty law, the date of signature of a treaty and the date of commencement of its provisional application may differ, if it is necessary to take preparatory measures for the effective implementation of its provisions and to communicate the content of those provisions in advance to the persons affected.

5. Termination of provisional application

The provisional application of an international treaty by the Republic of Belarus shall, unless otherwise provided in the treaty, be terminated:

— After the entry into force of the international treaty; or

— After other States or international organizations that are provisionally applying the international treaty have received notification from the Republic of Belarus of its intention not to become a party to the international treaty being provisionally applied by the Republic of Belarus; or

— After the Republic of Belarus has received notification from other States or international organizations that are provisionally applying an international treaty in their relations with the Republic of Belarus of their intention not to become a party to the international treaty being provisionally applied.

6. Performance of a provisionally applied international treaty

In accordance with article 31 of the *International Treaties Act*, international treaties to which the Republic of Belarus is a party, including those being provisionally applied, must be officially published through the posting, on the National Legal Internet Portal of the Republic of Belarus, of the texts of such treaties in the Belarusian and/or Russian languages or of the official translations of such treaties into the Belarusian and/or Russian languages.

The principle that treaties must be performed (*pacta sunt servanda*) applies equally to treaties that have entered into force and to treaties that are provisionally applied. State bodies of the Republic of Belarus are endowed with all the necessary competence to make decisions regarding the provisional application of a treaty within the national legal system.

An international treaty, or a part of an international treaty, that is applied provisionally by the Republic of Belarus pending its entry into force must be performed under the same procedure as international treaties to which the Republic of Belarus is a party that have entered into force.

The Republic of Belarus considers that a violation of the provisions of provisionally applied international treaties entails responsibility in accordance with international law.

4. Belgium

Statement made in the Sixth Committee, Sixty-sixth session (2013), 26th meeting, 5 November 2013:[6]

> Article 167 of the Belgian Constitution revised in 1994, contains an essential principle in the matter according to which all treaties must be submitted to the parliamentary consent of the Competent assembly(s). The assent conditions the effect of treaties in Belgian law.
>
> Neither Article 167 of the Constitution, nor the *Cooperation Agreement* of March 8, 1994 between the Federal State, the Communities and the Regions of the Kingdom of Belgium, relating to modalities for concluding mixed treaties (in the Belgian constitutional sense), envisage the question of the provisional application of treaties.
>
> While provisional application of treaties can certainly be agreed between the parties and produce its effects in international law, it has a limit in domestic law because of the constitutional requirement of consent.
>
> When the effect of the provisionally applied treaty is sought in domestic law, the agreement concerning the provisional application, as well as the provisions of the agreements being provisionally applied, must be subject to the assent procedure.
>
> Before the revision of the Constitution, Belgium had a practice of provisional application of certain agreements, without the prior consent of the competent Assemblies, such as air transport agreements and agreements relating to raw materials.

[6] Unofficial translation (from French) by the United Nations Secretariat. Full text available at: https://www.un.org/en/ga/sixth/68/pdfs/statements/ilc/belgium.pdf.

5. Botswana

Comments transmitted to the Secretariat in writing, 24 January 2014:

> Botswana has not provisionally applied any treaty, but the Constitution of Botswana does not prohibit the provisional application of treaties. The process to be followed for provisional application of a treaty would be the same as the process followed when Botswana seeks to become a party to a treaty.

6. Brazil

Statement made in the Sixth Committee, Seventy-first session (2016), 26th meeting, 28 October 2016:[7]

> Finally, in relation to the topic "provisional application of treaties", Brazil considers it crucial that the Commission continues giving adequate consideration to the fact that some States are not in a legal position to apply provisionally any sort of treaty, in light of constitutional regulations related to the separation of powers. This is the case of Brazil that has therefore made a reservation to Article 25 of the 1969 *Vienna Convention in the Law of Treaties*.

Statement made in the Sixth Committee, Seventy-sixth session (2021), 17th meeting, 26 October 2021:[8]

> The Brazilian constitutional system, as a general rule, requires parliamentary approval of treaties that create binding obligations to Brazil. For this reason, when the National Congress approved the *Vienna Convention on the Law of Treaties*, it objected to article 25, related to provisional application. Therefore, Brazil ratified the Vienna Convention with reservation to this article.
>
> As Brazil disassociates itself from the practice of provisional application of treaties, the guide adopted by the ILC, including its guideline 10, related to the internal law of states, is not applicable to Brazil.
>
> This objection does not affect the obligation not to defeat the object and purpose of a treaty before its entry into force, as prescribed in article 18 of the *Vienna Convention on the Law of Treaties*. It is also without prejudice to Article 24 (4) of the Vienna Convention, according to which certain provisions regarding matters arising necessarily before the entry into force of a treaty apply from the time of the adoption of the text, as stated in the commentary to draft guideline 5. Articles 18 and 24 of the Vienna Convention were not subject to any kind of reservation by Brazil, and they are not directly included in the guide recently adopted.
>
> Although the Brazilian practice does not include provisional application of international agreements, we do not object to other states following this practice, and provisionally applying bilateral or multilateral treaties *vis-à-vis* Brazil. Brazil may only apply the treaty after the parliamentary approval and subsequent ratification, but we do not object to European Union members applying it before its entry into force, based on their own constitutional systems.

[7] Full text available at: https://www.un.org/en/ga/sixth/71/pdfs/statements/ilc/brazil_23.pdf.

[8] Edited by the United Nations Secretariat. Full text available at: https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/17mtg_brazil_1.pdf.

7. Bulgaria

Comments transmitted to the Secretariat in writing, 10 April 2020:

> [*Reference to the practice of the Council of Europe*]
>
> In the process of negotiating the *Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of the Council of Europe* (CETS No 223) article 37(3) was adopted at the suggestion of the Republic of Bulgaria. This article provides for declarations by States through which they may provisionally apply the provisions of the Protocol. At the time of ratification of the protocol, three states have made declarations to this effect.

8. Canada

Communication transmitted to the Secretariat, 19 July 2022:[9]

The following submission delineates the scope of Canada's evolving practice on the provisional application of treaties.

Provisional application and Canada's treaty adoption process

Canada recently put forward its position on the role of provisional application in its treaty adoption process at the General Assembly debate on the 2021 Report of the International Law Commission:

> Provisional application is an integral part of Canada's treaty adoption process, though we generally prefer to rely on entry-into-force provisions as a straightforward mechanism. Canada's current practice is that provisional application may only take effect following the signing of a treaty, and if no domestic implementing legislation is required. If implementing legislation is required, provisional application is delayed until the required legislation enters into force [emphasis added].[10]

A similar position was articulated by Canada in a study published in 2001 by the Council of Europe (CoE) and the British Institute of International and Comparative Law (BIICL):

> Provisional application is possible, for example, when such a provision is included in the legislation (*e.g.* the Department of Transport Act). If, however, changes in Canadian laws or regulations are necessary in order to enable the government of Canada to commit itself to provisional application of a treaty, appropriate legislative or regulatory action must be taken.[11]

The approach taken in relation to the *Canada-European Union Comprehensive Economic and Trade Agreement* (CETA) illustrates this practice. Article 30.7.3 of CETA allows Canada or the European Union (EU) to provisionally apply the treaty granted "that their respective internal requirements and procedures necessary for the provisional application of this Agreement have been completed."[12] Canada therefore enacted the *Canada–European Union Comprehensive Economic and Trade Agreement Implementation Act* and completed other necessary procedures to domestically implement CETA (*e.g.*, administrative and regulatory changes) prior to the initiation of CETA's provisional application pursuant to Article 30.7.3.[13]

In addition to enacting any necessary legislative, regulatory or other changes, Canada also typically provides confirmation to the other State of the completion of Canada's relevant domestic procedures to provisionally apply a given treaty and, if applicable, identifies the

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[9] Also provided in French, see: https://legal.un.org/legislativeseries/pdfs/chapters/book26/canada_f.pdf.

[10] United Nations General Assembly, Sixth Committee, *International Law Commission Report*, Canada Statement—Cluster 1, 28 October 2021, p. 3, available online at https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/19mtg_canada_1e.pdf.

[11] Council of Europe (CoE) and the British Institute of International and Comparative Law (BIICL), "Treaty Making—Expression of consent by States to be Bound by a Treaty", The Hague, Kluwer Law, 2001, p. 301.

[12] "Text of the Comprehensive Economic and Trade Agreement—Chapter thirty: Final provisions" Government of Canada, available online at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/30.aspx?lang=eng.

[13] *Canada–European Union Comprehensive Economic and Trade Agreement Implementation Act* S.C. 2017, c. 6; see also "Order Fixing September 21, 2017 as the Day on which the Act Comes into Force, other than Certain Provisions" Canada Gazette, available online at https://gazette.gc.ca/rp-pr/p2/2017/2017-09-07-x1/html/si-tr47-eng.html.

relevant provisions subject to provisional application (if the intent is to limit provisional application to certain provisions of the treaty).[14]

Canada maintains that the ultimate objective is for States to take the necessary domestic steps to ensure that a treaty formally enters into force. Thus, provisional application should be seen as a "transitional stage" or measure that can facilitate the coming into force of a treaty.[15]

Canada's practice regarding the forms for prescribing or exercising provisional application

Article 25 of the *Vienna Convention on the Law of Treaties* (VCLT) specifies that provisional application may result from the provisions of the treaty in question (Article 25(*a*)). Provisional application may also occur "in some other manner" (Article 25(*b*)) as agreed by the negotiating States, including in the form of a separate treaty or, exceptionally, a decision or resolution adopted at an international organization or conference, or by a declaration of a State accepted by another State or international organization.[16]

Canada's practice is generally to prescribe provisional application in the treaty in question or alternatively as a separate treaty (typically through an exchange of notes or a protocol).

In the treaty in question (examples)

A series of bilateral treaties between Canada and Latin American States concluded between the mid-1940s to the mid-1950s include express provisions on their provisional application in the final clauses. These provisions stipulate that the treaty in question would apply provisionally upon signature or on a certain date, pending the treaty's definitive entry into force.[17]

The plurilateral *Free Trade Agreement between Canada and the States of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland)* allows for the provisional application of the treaty and associated bilateral agreements, on condition that the domestic requirements of each State permit this provisional application.[18]

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[14] See, for example, Note no. JLI—0133 regarding *General Coordination Agreement between the United States of America and Canada on the Use of the Radio Frequency Spectrum by Terrestrial Radiocommunication Stations and Earth Stations* (2021).

[15] See para. 84 of Second Report of the Special Rapporteur on the provisional application of treaties, UN Doc. A/CN.4/675.

[16] Sean D Murphy explains that "[w]hile the draft guideline [on provisional application] identifies these other forms, virtually all agreements on provisional application may be found in the treaty itself that is being provisionally applied or in a separate treaty; very few (if any) examples may be found of provisional application in the form of a resolution adopted at an international organization or by a declaration of a state accepted by others." See Sean D. Murphy, "Provisional Application of Treaties and Other Topics: The Seventy Second Session of the International Law Commission" (2021) 115:4 AJIL, p. 673; see also International Law Commission, *Guide to the Provisional Application of Treaties, with commentaries thereto*, Guidelines 3 and 4 (reproduced at p. 218, below).

[17] See Article X(*c*) of the *Trade Agreement between Canada and Spain*, (E100588–CTS 1955/12); see also Article XIV of the *Agreement between the Government of Canada and the Government of Peru for Air Services between and beyond their respective territories* (E103280–CTS 1955/1); see Article VIII(2) of the *Trade Agreement between Canada and Mexico* (E100538–CTS 1946/4); see also Article X(2) of the *Trade Agreement between Canada and Brazil* (E102985–CTS 1941/18); finally, see Article IX(2) of the *Trade Agreement between Canada and Chile* (E102997–CTS 1941/16).

[18] See Article 41 of the *Free Trade Agreement between Canada and the States of the European Free Trade Association* (Iceland, Liechtenstein, Norway and Switzerland) (CTS 2009/3).

In some other manner (examples)

An exchange of notes has been used to prescribe provisional application[19] or to extend provisional application that was prescribed by the initial treaty.[20] Canada has also prescribed provisional application in the form of a protocol with an international organization.[21]

Canada has not prescribed or exercised provisional application through forms other than the treaty itself or by a separate agreement. Canada has expressed the need for greater clarity regarding the exercise of provisional application "in some other manner" as foreseen at Article 25(*b*) of the VCLT, particularly to clarify whether and, if so under what circumstances, consent for provisional application could be tacit or implied and produce legal effects.[22]

Conclusion

Overall, provisional application is a voluntary and flexible mechanism that allows States to accommodate differences in their respective domestic treaty adoption requirements while not unduly delaying treaty implementation.[23] Canada's views and practice on provisional application will continue to evolve based on our experience and that of other States.

[19] See, for example, *Exchange of Notes between Canada and Sweden providing for the Provisional Application between the two countries of the Provisions of the International Air Services Transit Agreement done at Chicago, December 7, 1944* (now terminated).

[20] See, as an example, *Exchange of Notes (September 23 and October 9 and 12, 1942) Between Canada and Chile Extending the Provisional Application of the Trade Agreement of September 10, 1941* (E104697–CTS 1942/15); cf. Article IX (2) of the *Trade Agreement between Canada and Chile* (E102997–CTS 1941/16).

[21] See Article 17(*b*) of the *Protocol Additional to the Agreement between Canada and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*.

[22] See Statement by Canada, General Assembly of the United Nations, 70th session, Sixth Committee, 25th meeting, UN Doc. A/C.6/70/SR.25, para. 60.

[23] See Memorandum by the ILC Secretariat on provisional application of treaties, United Nations General Assembly, International Law Commission, 69th session, UN Doc. A/CN.4/707[, reproduced at p. 311, below], para. 103.

9. Colombia

Communication transmitted to the Secretariat, 1 August 2022:[24]

1. Provisional application of treaties: jurisprudence of the Constitutional Court of Colombia

The provisional application of treaties, as a concept of public international law, embedded in the Vienna Convention on the Law of Treaties, has historically been applied in the Republic of Colombia particularly in the case of international economic and trade agreements generated within an international organization, thus expediting their processing, incorporating them into the country's laws and giving effect to the international obligations enshrined in the instrument, while it goes through the internal ratification process provided for in the Constitution.

Since the enactment of the 1991 Constitution, Colombia has provisionally applied a very limited number of treaties, including the following:

— *Exchange of notes constituting an agreement between Colombia and Brazil for reciprocal exemption from double taxation in favour of the maritime or airline companies of both countries*;

— *Economic Complementarity Agreement—Free Trade Agreement—between the Republic of Colombia, the United Mexican States and the Bolivarian Republic of Venezuela—Seventh Additional Protocol*;

— *Partial scope trade agreement between the Republic of Colombia and the Bolivarian Republic of Venezuela*;

— *Trade Agreement between the European Union, Colombia and Peru*, signed in Brussels, Belgium, on 26 June 2012;

— *Economic Complementarity Agreement No. 72*, entered into between the Governments of the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, States parties of the Southern Common Market (MERCOSUR), and the Government of the Republic of Colombia, signed on 21 July 2017.

It should, however, be noted that Colombia formulated a reservation to article 25 of the Vienna Convention, given that, while the 1886 Constitution was in force, the provisional application of treaties was prohibited.

The reservation was reflected in Decree No. 3703 of 1985, in the following terms:

> (…) Reservation by Colombia.
>
> With regard to article 25, Colombia formulates the reservation that the Political Constitution of Colombia does not recognize the provisional application of treaties; it is the responsibility of the National Congress to legislate, and thereby to exercise its right to approve or disapprove any treaties and conventions which the Government concludes with other States or with international legal entities, in general entities subject to international law (…).

[24] Unofficial translation (from Spanish) by the United Nations Secretariat. The original submission is available at: https://legal.un.org/legislativeseries/pdfs/chapters/book26/colombia_s.pdf.

However, in the preparatory work for the 1991 Constitution, currently in force in Colombia, the National Constituent Assembly considered it necessary to give the President of the Republic the power to provisionally apply treaties, provided that they were of a commercial or economic nature and had been adopted within an international organization.

The subsequent pronouncements of the Constitutional Court, the highest national court, therefore refer to the possibility that treaties may be provisionally applied, under the aforementioned terms, as described below:

Judgment No. C-249 of 1994:

The Court ruled that:

> Although the general principle regarding the application, force and validity of treaties is determined by their approval in accordance with the national laws of each State, it has been established that a treaty or part thereof may be applied without completing the aforementioned procedures. The rationale for the provisional application of a treaty lies in the importance of the issue being regulated or in the urgency for States of its implementation (…).

In that regard, it added the following:

> Provisional application does not imply that the constitutional procedures to be completed by each State in order to approve treaties should be disregarded, since States do not waive the right or the duty to submit the respective agreement to the competent entity for approval; those procedures, despite the provisional application, must be completed. In addition, when the provisional application clause is agreed upon, it is subject to the condition of subsequent ratification.
>
> The 1991 Constitution enshrined the concept of the provisional application of treaties, restricting its use to treaties of an economic and commercial nature. Thus, when a treaty covers these specific issues, a provisional application clause may be agreed upon, in which case the Government must immediately submit the respective treaty to Congress for approval. If a treaty deals with matters other than those covered in the aforementioned article, and this special clause is included, the negotiator will have to formulate a reservation (…).

The Court thereby noted that the provisional application of treaties was expressly enshrined in article 224 of the 1991 Constitution, which restricted its use to treaties of an economic and commercial nature. When a treaty covers these specific issues, a provisional application clause may thus be agreed upon, in which case the Government must immediately submit the respective treaty to Congress for approval. If a treaty deals with matters other than those covered in the aforementioned article, and this special clause is included, the negotiator will have to formulate a reservation.

Judgment No. C-321 of 2006:

The Constitutional Court ruled on the constitutionality of article 25 of the Vienna Convention. On the matter, the Court ruled as follows:

> (…) given that the Colombian reservation to article 25 of the 1969 Vienna Convention modifies the scope of the obligation set forth therein in relation to Colombia, and said reservation is currently in force, the Chamber concludes that it is necessary to interpret said article in conjunction with the reservation—given that the article and reservation determine the scope of the international obligations of Colombia—from which it follows that article 25 is not currently binding on Colombia, pursuant to the reservation (…).

The Court therefore held that as long as the Government of Colombia does not withdraw the reservation, article 25 of the 1969 Vienna Convention will not be internationally binding on Colombia. Thus, *stricto sensu*, the aforementioned article does not apply in a general manner to the Republic of Colombia and therefore the provisional application of treaties has been used only in those cases where such use has been permitted under the domestic legal system.

Judgment No. C-280 of 2014:

The Court examined the constitutionality of the provisional application of the trade agreement between the Republic of Colombia and the European Union. To that end, it recalled the circumstances under which the measure may be applied in Colombia, noting that, pursuant to the provisions of article 224 of the Constitution, a treaty may be applied provisionally only in cases in which reference is made to a treaty of a commercial nature and when said treaty has been concluded within an international organization.[25]

In the words of the Court:

> (…) Although as a general rule the ratification, entry into force and application of international treaties through which Colombia enters into new obligations are preceded by this procedure, article 224 of the Constitution provides for a special scenario through the provisional application of such instruments. The aforementioned provision provides that the President of the Republic may provisionally apply treaties of an economic or commercial nature agreed upon within the scope of an international organization, if the treaty so provides. In this case, as soon as a treaty provisionally enters into force, it must be sent to Congress for approval. If Congress does not approve it, the application of the treaty shall be suspended.
>
> Thus, in these cases the President may implement the instrument without the constitutional procedures detailed in the previous section having been completed, when three conditions are met:
>
> (i) The content of the agreement is economic or commercial in nature;
>
> (ii) The instrument was negotiated and concluded within the scope of an international organization;
>
> (iii) The treaty expressly provides for its advance application (…).

Consequently, it reiterated what it had expressed in previous pronouncements, stating that the legal effect of the provisional application of an international instrument does not waive the requirement to complete the internal procedures provided for at the constitutional level for the incorporation of treaties into domestic law, but to defer the completion of said procedures, enabling these international provisions undertaken by Colombia to be applied and implemented before the act approving them has been issued, this Court has conducted a constitutional review and the treaty has been ratified.

Thus, with regard to the instrument analysed on that occasion, it determined the following:

— It is a free trade agreement, which implies that it is commercial and economic in nature.

[25] Article 224 of the Constitution of Colombia ("Treaties, in order to be valid, must be approved by Congress. However, the President of the Republic may provisionally apply treaties of an economic and commercial nature agreed upon within the scope of an international organization, if the treaty so provides. In this case, as soon as a treaty provisionally enters into force, it must be sent to Congress for approval. If Congress does not approve it, the application of the treaty shall be suspended").

— The treaty clearly contains a provisional application clause.

— However, it was not concluded within an international organization in the usual manner, as in the case of the agreements concluded within the Latin American Integration Association (LAIA); nonetheless, the national Government argued that the requirement was understood to have been fulfilled, since the provisions of the free trade agreement build upon the provisions of the World Trade Organization, which has the legal status of an international organization.

— It was not provisionally applied before being submitted to Congress for approval; instead, the free trade agreement was subject to the debates provided for under the Constitution for this type of instrument and was provisionally applied before it went through the automatic constitutional review conducted by the Constitutional Court.

Taking into account that one of the requirements is that the instrument must have been concluded within an international organization, the Court established that:

> (…) Given that the legal effect of the provisional application of international treaties is the deferral of the parliamentary approval and constitutional review procedures, which are aimed at ensuring good faith and the respect and strengthening of international relations, the democratic basis of international commitments, their suitability for Colombia and their compliance with the Constitution, and in particular with human rights standards, the requirement set out in article 224 of the Constitution, whereby the international agreement for which provisional application is sought must have been concluded within the scope of an international organization, implies that the treaty must build on and be a direct and specific expression of the purpose of the international organization.
>
> The rationale behind this is that, given that the constituent instrument of the entity, which determines its purpose, has been subject to parliamentary approval and constitutional review procedures, the advance application of an instrument that builds on and expresses said purpose does not entail or carry with it the risks inherent in the deferral of the standard procedures for entry into force of international treaties (…).

Judgment No. C-254 of 2019:

Finally, when the Constitutional Court ruled on the constitutionality of the free trade agreement concluded with Israel, it established the following with respect to the provisional application of treaties:

> (…) Regarding the possibility of Colombia provisionally applying the free trade agreement, notwithstanding the constitutional validity of such treaty clauses, it can be inferred from the statement submitted by the Ministry of Trade that it did not take place. The Court also noted that, although the President of the Republic may provisionally apply trade treaties concluded within international organizations (art. 224), the treaty may only enter into force if all internal procedures have been completed, including the endorsement provided by the act approving the treaty and the declaration of constitutionality. For the foregoing reasons, the motion of unenforceability filed by one of the intervening parties in the case is not admissible (…).

Given the jurisprudence of the Constitutional Court and the number of cases in which international treaties concluded by Colombia have been provisionally applied, it is evident that this concept is applied on an exceptional basis and should therefore be interpreted as restrictively as possible, without admitting analogies.

2. Most recent cases of provisional application of treaties in Colombia

(a) Trade agreement between the European Union, Colombia, Peru and Ecuador

Of the five treaties mentioned, which Colombia has provisionally applied since it was established in the 1991 Constitution that a provisional application clause could be included in treaties concluded by the Republic of Colombia, provided that the concurrent assumptions set out in article 224 are met,[26] one of the most significant cases is the *Trade Agreement between Colombia and Peru, of the one part, and the European Union and its Member States, of the other part*, signed in Brussels, Belgium, on 26 June 2012.

For Colombia, the internal procedures for its approval by Congress began in November 2012 and concluded with its endorsement by President Juan Manuel Santos, by Act No. 1669 of 16 July 2013. In judgment No. C-335/14 of 2014, the Constitutional Court declared that the agreement complied with the Constitution, with regard to both its procedural aspects and its material content.

Through Decree No. 1513 of 18 July 2013, the President of the Republic provisionally applied the Trade Agreement and the European Union was notified of the completion of the internal procedures required for that purpose. By means of the same Decree, it was also decided that the agreement would be provisionally applied as of 1 August 2013.

The market access commitments entered into by the President of the Republic were implemented through Decree No. 1636 of 31 July 2013. The President applied the aforementioned agreement with the following considerations:

> […] the National Government concluded the "Trade Agreement between Colombia and Peru, of the one part, and the European Union and its Member States, of the other part", signed in Brussels, Belgium, on 26 June 2012;
>
> Whereas article 330, paragraph 3, of the aforementioned Agreement provides for it to be provisionally applied, fully or partially; […]
>
> Whereas article 224 of the Constitution of Colombia provides that the President of the Republic may provisionally apply treaties of an economic or commercial nature agreed upon within the scope of international organizations, if the treaty so provides;
>
> Whereas in the preamble […] the Parties affirm and agree to build on the rights and obligations under the Marrakesh Agreement Establishing the World Trade Organization; […]
>
> Whereas in the light of the above, the commitments entered into under the aforementioned Agreement shall be provisionally applied.

From the above, it can be concluded that the agreement is a free trade agreement, of a commercial and economic nature, in which the provisional application clause is established, under article 330, paragraph 3.

Furthermore, among the agreements that Colombia has provisionally applied, this particular one was not applied before it was submitted to Congress for approval. The free trade agreement was, instead, subject to the debates required for this type of instrument and was provisionally applied prior to the automatic constitutional review conducted by the Constitutional Court. Although the constitutional rule that empowers the President to provisionally apply treaties does not, strictly speaking, authorize the President at any

[26] (i) They must be treaties of an economic or commercial nature; (ii) they must be agreed within international organizations; and (iii) once the treaty enters into force provisionally it must immediately be submitted to Congress for approval.

time to provisionally apply the treaty after it has been submitted to Congress or before the required constitutional review, it is also evident that such a situation is not expressly prohibited. Similarly, the fact that approval by Congress is required does not mean that certain fundamental requirements must be met for a treaty to be provisionally applied.

It was also argued that the requirement whereby the treaty should be generated within an international organization was understood to have been fulfilled, since the provisions of the Free Trade Agreement build upon the provisions of the World Trade Organization, which has the status of an international organization.

On 5 November 2014, the National Government issued Decree No. 2247, by which Colombia will continue to apply without interruption, under the terms set forth in Decree No. 1513 of 2013, the Trade Agreement signed with the European Union and its member States, after having complied with all the internal requirements as provided for in Colombian law for its approval.

(b) Economic Complementarity Agreement No. 72 Colombia—MERCOSUR

The agreement was signed on 21 July 2017. Regarding its provisional application, on 20 December 2017, the Government of the Republic of Colombia notified the General Secretariat of the Latin American Integration Association (LAIA) of the issuance of Decree No. 2111 of 2017, which provides for the provisional application of Economic Complementarity Agreement No. 72 between Colombia and those signatory parties that have notified the General Secretariat of LAIA that the Agreement has been incorporated into their domestic law.

On the same date, the General Secretariat of LAIA, through notes ALADI/SUBSE-LC 302/17 and ALADI/SUBSE-LC 303/17, informed the parties that *Economic Complementarity Agreement No. 72* would apply between Colombia and Argentina, and between Colombia and Brazil, as of 20 December 2017. However, its entry into force is pending with regard to Paraguay and Uruguay.

3. Conclusions

— The provisional application of treaties is restricted for Colombia. Colombia formulated a reservation to article 25 of the *Vienna Convention on the Law of Treaties*, given that the provisional application of treaties was prohibited while the 1886 Constitution was in force.

— The 1991 Constitution, currently in force, allows the provisional application only of those treaties that are (i) of an economic or commercial nature and (ii) agreed upon within the scope of an international organization. It further provides that once the treaty provisionally enters into force it must be submitted to Congress for approval immediately.

— The concept is therefore of an exceptional and restrictive nature for Colombia.

— Since the entry into force of the new Constitution, Colombia has provisionally applied a very limited number of treaties.

— The Constitutional Court, which is the highest constitutional court of Colombia, has clarified through its jurisprudence the scope of this concept in domestic law, as described in these comments.

10. Croatia

Communication transmitted to the Secretariat, 27 June 2022:

The national practice of the Republic of Croatia on the provisional application of treaties

Croatian legislation generally allows the provisional application of treaties. The relevant domestic law regulating the provisional application of treaties is the *Law on Conclusion and Execution of Treaties* of 1996. In this regard, Article 10 of the Law stipulates that the consent for provisional application of treaties on behalf of the Republic of Croatia may be granted only upon approval of the President (this provision is no longer applicable after constitutional changes discontinuing the semi-presidential system) or the Government. Such approval is in principle given through a decision of the Government on initiating the process of concluding (*i.e.*, signing) a treaty. At the same time, paragraph 2 of the same Article, paraphrasing almost verbatim paragraph 2 of Article 25 of the *Vienna Convention on the Law of Treaties*, regulates that if not otherwise provided by the treaty or if negotiating parties did not agree otherwise, the provisional application would be terminated if the Republic of Croatia decides not to become a party to the treaty concerned and notifies such intention to other international subjects amongst which the concerned treaty provisionally applies.

From 1991 until June 2022, the Republic of Croatia agreed to the provisional application of 223 bilateral treaties.

Excerpt from the Law on Conclusion and Execution of Treaties (1996):[27]

[…] *Article 10*

Consent of the Republic of Croatia for a treaty or a part thereof to be applied provisionally pending its entering into force may be granted only if so approved by the President of the Republic or the Government of the Republic of Croatia.

Unless otherwise provided by a treaty or unless otherwise agreed between the negotiating parties, such provisional application shall be terminated if the Republic of Croatia has decided not to become a party to the concerned treaty and notifies such intention to other international subjects amongst which the concerned treaty provisionally applies.

[…]

[27] Unofficial translation (from Croatian), provided by the delegation of Croatia.

11. Cuba

Statement made in the Sixth Committee, Seventieth session (2015), 24th meeting, 10 November 2015:[28]

> In Cuban practice, the use of the provisional application clause is not extensive and only applies to cases in which immediate execution is agreed to in the interest of the Parties.
>
> For Cuba, provisional application does not replace the entry into force of treaties, however, provisional application constitutes an important element that the Vienna Convention contributed to international law and that today, given the circumstances in which some treaties are signed, require an immediate application.
>
> In Cuba, it is ensured that most of the treaties that have the clause of provisional application lead to the entry into force and definitive application of the treaty. Examples of this practice are to be found in the signing by the Government of Cuba of bilateral agreements that include provisional application clauses and that are in force or are in the process of complying with the formalities of internal legal regulations for its entry into force.

Communication transmitted to the Secretariat, 27 June 2022:[29]

> Cuba is grateful to the International Law Commission for its work in preparing the *Guide to Provisional Application of Treaties*, including the guidelines concerning the provisional application of treaties by States and international organizations annexed to resolution 76/113, and takes note of the same, bearing in mind the importance of the subject for international law and international relations.
>
> Cuba considers that the provisional application of treaties has its legal basis in strict observance of articles 24 and 25 of the *Vienna Convention on the Law of Treaties*, which gives priority to the principle of party autonomy, in that it is the parties that establish by agreement the scope of the obligations they are to assume, their duration and the termination thereof.
>
> Article 26 of the Convention also applies to the legal institution of provisional application, bearing in mind that the obligations deriving from that regime should be governed by the *pacta sunt servanda* principle, since they constitute a commitment by the parties to perform the obligations in good faith.
>
> At the same time, caution is needed in interpreting the sovereign acts of States in respect of the signature and entry into force of international agreements, it being the parties that assume certain rights and obligations.
>
> The provisional application of a treaty does not replace its entry into force, but should be used as an optional mechanism in exceptional circumstances where there is an urgent need to apply a treaty. Provisionally applied treaties should enter into force definitively once the constitutional approval processes established under the domestic law of the signatory parties have been completed. In other words, provisional application should not serve as a substitute for efforts to seek definitive entry into force.
>
> In the Cuban legal system, the provisional application of treaties is regulated by article 52.2 of resolution 206/215 entitled "Bilateral and Multilateral Treaty Procedures", according to

[28] Unofficial translation (from Spanish) by the United Nations Secretariat. Full text available at: https://www.un.org/en/ga/sixth/70/pdfs/statements/ilc/cuba_3.pdf.

[29] Unofficial translation (from Spanish) by the United Nations Secretariat. The original submission is available at: https://legal.un.org/legislativeseries/pdfs/chapters/book26/cuba_s.pdf.

which a treaty may be provisionally applied prior to its entry into force provided that the foreign party accepts the provisional application and the circumstances make it advisable.

In Cuban practice, provisional application is not overused; treaties are provisionally applied only in cases where, in the interests of the parties, it is decided that the obligations should be implemented immediately.

For Cuba, provisional application is not a substitute for the entry into force of treaties. Cuba ensures the entry into force and definitive application of all treaties with a provisional application clause, as evidenced in the signature by the Government of Cuba of bilateral agreements that have included the provisional application clause and have entered into force following completion of the domestic legal procedures. Examples are the *Agreement between the Government of the Republic of Cuba and the Government of the Republic of Cape Verde on the abolition of visas*, signed on 3 June 1982, and the *Technical and Economic Cooperation Agreement between the Government of the Republic of Cuba and the Government of the People's Republic of China*, signed on 22 July 2014.

12. Czechia

Communication transmitted to the Secretariat in writing, 31 January 2014:

> The Czech Republic applies provisionally the international agreements, but this practice is limited by the Constitution of the Czech Republic. While executive treaties (international agreements concluded within the competence of the Government and respective Ministries, *i.e.*, within the framework of Czech laws) can be provisionally applied fully, the treaties that are subject to the approval of the Parliament before their ratification can be provisionally applied only to the extent that they are compatible with the Czech laws.
>
> [*Reference to the practice of the European Union*:]
>
> [P]rovisional application is quite common for the treaties negotiated in the framework of the European Union (EU). The legal basis for the provisional application of international agreements concluded between the EU and third countries (or international organisations) is enshrined in Article 218(5) of the Treaty on the Functioning of the European Union.
>
> In practice, the EU regularly makes use of the provisional application especially in the case of the so-called mixed agreements which require ratification by all Member States and thus can be very time-consuming. As the provisional application of provisions falling within Member States' legal systems, only those matters covered by the agreements coming within the EU's competence are provisionally applied by the Union or the scope of the provisional application by the member States is limited by the requirement of conformity with internal procedures (or domestic legislation).
>
> Thus, the *Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part*, is being applied on a provisional basis by the Union, pending the competition of the procedures for its conclusion, and the same time provisions falling within the member States' competences are excluded from the provisional application [see Art. 3 of the Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the *Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part* (2011/265/EU)].
>
> As another example, Art. 3 of the Decision of the Council and of the Representatives of the Governments of the Member States, meeting within Council of 15 October 2010 on the signature and provisional application if the *Common Aviation Area Agreement* ("CAAA") between European Union and its Member States, of the one part, and Georgia, of the other part (2012/708/EU) and Art. 29 of the CAAA itself establish that pending its entry into force, the CAAA shall be applied on a provisional basis by the Union and by the Member States, in accordance with their internal procedures and/or domestic legislation as applicable.

13. El Salvador

Communication transmitted to the Secretariat, 14 December 2017:[30]

Legal status of international treaties in the Salvadoran legal system

The domestic legislation of the Republic of El Salvador assigns a particular legal status to international treaties on the basis of a constitutional provision. Article 144 of the Constitution states:

> The international treaties concluded by El Salvador with other States or with international organizations constitute laws of the Republic on entry into force, in accordance with the provisions of the treaty in question and with this Constitution. The law may not modify or derogate from what has been agreed in a treaty in force for El Salvador. In the event of a conflict between a treaty and a law, the treaty shall prevail.

In addition, treaties that restrict or in any way affect constitutional provisions shall not be ratified unless ratification is carried out with the corresponding reservations. The provisions of the treaty in respect of which reservations have been made shall not be the law of the Republic (article 145 of the Constitution).

Given that, in the domestic legal system, no specific law has been adopted on the implementation of international treaties, the only provisions that regulate this area are the ones mentioned above. Accordingly, the Constitution attaches the same force of law to treaties as to laws, and even gives precedence to treaties in the event of a conflict between the implementation of a treaty and a law. Therefore, decisions on the provisional application of such instruments, their termination and the legal effects of their provisional application shall comply with the relevant provisions of those treaties while respecting the constitutional parameters defined in the aforementioned articles.

The Constitutional Chamber of the Supreme Court of Justice of El Salvador has established in its jurisprudence that treaties are an expression of the conscience of the international community and that, when they are ratified by El Salvador, those universal values, precepts and principles (habeas corpus proceedings, 19-R-96, judgment of 7 August 1996) become the country's own.

In that vein, the Constitutional Chamber has held that the Constitution of each State provides rules for the process of entry into force of international treaties in domestic law, their implementation in domestic law, and the regulation of legal relationships between treaties and rules of domestic law (unconstitutionality proceedings, 10–2000, judgment of 11 November 2003).

The practice of the Salvadoran State in the conclusion of international treaties having clauses that require their provisional application

Given the nature of the Salvadoran legal system, the present report will now explain State practice with regard to the ratification of treaties containing provisional application clauses.

The Republic of El Salvador has concluded and ratified three treaties on trade and cooperation that contain clauses referring explicitly to provisional application, namely:

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[30] Unofficial translation (from Spanish) by the United Nations Secretariat. The original submission is available at: https://legal.un.org/legislativeseries/pdfs/chapters/book26/el_salvador_s.pdf.

Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other

Rounds of negotiations between the European Union and Central America for the conclusion of an association agreement began in 2007. The Salvadoran State, as a member of the Central American Integration System, was a party to the negotiations leading to the conclusion of the agreement, and ratified it through Legislative Decree No. 410 of 4 July 2013, published in Official Gazette No. 127, vol. 400, on 11 July 2013.

Article 353 of the agreement stipulates that, for its entry into force, the parties shall approve the agreement in accordance with their internal legal procedures, and it shall enter into force the first day of the month following that in which the parties have notified each other of the completion of those procedures.

However, the fourth paragraph of article 353 reflects the provisional application of part of the agreement, namely the trade pillar, according to which:

> 4. Notwithstanding paragraph 2, Part IV of this Agreement may be applied by the European Union and each of the Republics of the CA Party from the first day of the month following the date on which they have notified each other of the completion of the internal legal procedures necessary for this purpose. In this case, the institutional bodies necessary for the functioning of the Agreement shall exercise their functions.

Therefore, by virtue of that paragraph, the parties may provisionally apply the provisions relating to the establishment of a free trade area and the objectives for promoting trade in goods between the States parties to the agreement.

Free Trade Agreement between the Republic of Colombia and the Republics of El Salvador, Guatemala and Honduras

Ratified by the Republic of El Salvador through Legislative Decree No. 699 of 21 August 2008, published in Official Gazette No. 171, vol. No. 380, on 12 September 2008.

In the particular case of this agreement, the clause concerning the provisional application of its content is not binding on the Salvadoran State. However, it is considered worth mentioning in order to demonstrate that El Salvador, as a party to the agreement, recognizes the possibility of regulating provisional application:

> *Article 21.6*
> *Provisional application*
>
> Without prejudice to article 21.3, this Agreement may be applied provisionally by the Republic of Colombia, in accordance with its constitutional requirements, from the date of its signature and until its definitive entry into force. Provisional application shall also cease at the moment when the Republic of Colombia notifies the other Parties of its intention not to become a Party to the Agreement or its intention to suspend provisional application.

Millennium Challenge Compact between the United States of America, acting through the Millennium Challenge Corporation, and the Government of the Republic of El Salvador, acting through the Ministry of Foreign Affairs

This Compact on cooperation was ratified by the Salvadoran State through Legislative Decree No. 836 of 31 October 2014, published in Official Gazette No. 206, vol. No. 405, on 5 November 2014.

For the provisional application of this instrument, two clauses were established: one relating to the administrative and funding activities required for the provisional application of the Compact and another regulating the procedure by which the parties would begin its provisional application, namely:

> Section 7.5. Provisional application: Until this Compact has entered into force in accordance with Section 7.3, the Parties will provisionally apply the terms of this Compact from the date of a letter from the Government informing MCC that the Government is prepared to provisionally apply the Compact; provided that no MCC Funding, other than Compact Implementation Funding, will be made available or disbursed before this Compact enters into force.

In short, despite the absence of national legislation that specifically regulates the provisional application of treaties, the practice of the Salvadoran State has reflected the ratification of international treaties that contain clauses providing for their provisional application. Therefore, the Republic of El Salvador recognizes the need to provide clarity concerning the way in which such application operates in the context of treaty law, and will continue to support that work within the framework of the International Law Commission.

14. Estonia

Statement made in the Sixth Committee, Seventy-second session (2017), 20th meeting, 25 October 2017:[31]

> Section 23 of the *Estonian Foreign Relations Act* states that the performance of a treaty shall be guaranteed by the Government, or a governmental authority authorised therefor. The Government may temporarily (*i.e.*, provisionally) apply a treaty after approval and prior to the entry into force on the condition that the fundamental rights and freedoms of persons are not restricted thereby and the treaty or a legal act of the Government prescribes temporary (*i.e.*, provisional) application of the treaty.

[31] Full text available at: https://www.un.org/en/ga/sixth/72/pdfs/statements/ilc/estonia_1.pdf.

15. Finland[32]

Communication transmitted to the Secretariat, 17 June 2022:

> The Constitution of Finland or other legislation does not contain specific provisions on the procedure for deciding on the Provisional Application of Treaties. In accordance with established practice, Provisional Application of Treaties is decided in accordance with the same procedure that is followed when committing to treaties in general. If a treaty includes provisions that require the approval of the Finnish Parliament, Finland can apply these kinds of provisions provisionally only after having received the parliamentary approval. The Provisional Application of a Treaty begins from either the date stated in the Treaty, the date decided on by the President of the Republic or the Finnish Government, or the date specified in the Finnish notification. Finland applies Treaties provisionally very rarely.

[32] See also the submission of the Nordic Countries, below at p. 47, below.

16. Germany

Statement made in the Sixth Committee, Sixty-seventh session (2012), 21st meeting, 5 November 2012:[33]

> States may decide to limit the extent of provisional application of a treaty. This has been done in many treaties concluded with Germany's participation. In that case, the extent of provisional application is determined either in the treaty itself or in the instrument containing the agreement on provisional application.
>
> In many States—including Germany—internal law determines to what extent provisional application of a treaty may be agreed to or to what extent a treaty may be provisionally applied. If the implementation of a treaty requires change or adoption of internal national legislation in a negotiating State, the provisional application of this treaty will be impossible for the State, at least until the respective law has been changed or adopted by the legislative bodies. The same might be true if the financial funding demanded by the treaty requires parliamentary approval.

Statement made in the Sixth Committee, Sixty-eighth session (2013), 24th meeting, 4 November 2013:[34]

> In many States—including Germany—constitutional and internal law determine to what extent provisional application of a treaty can be agreed to, or to what extent a treaty may be provisionally applied. States have found several ways to agree on provisional application of a treaty taking into account such constitutional requirements.

Statement made in the Sixth Committee, Seventy-sixth session (2021), 17th meeting, 26 October 2021:[35]

> In a dualist legal system like in Germany, where treaties must be transposed or incorporated into national law to become effective, it is a typical requirement of constitutional law that the competent organ may only agree to provisional application of a treaty if national law is already in conformity with the treaty or is brought into conformity with it first.
>
> This plays an important role especially against the background of the legal effects of provisional application at the level of international law. The principles of *pacta sunt servanda* and State responsibility apply also for provisional application of treaties.
>
> Due to the principle enshrined in the Article 25 of the German Basic Law, that general rules of international law shall be an integral part of federal law, Germany supports the possibility to apply treaties provisionally because the course of actions facilitated by the provisional application of a treaty usually helps to build confidence between the contracting parties, creates an incentive to ratify the treaty and enables the parties to take preparatory measures and thereby serves the further development of international relations.

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[33] Full text available at: https://www.un.org/en/ga/sixth/67/pdfs/statements/ilc/germany_3.pdf.

[34] Summarised in UN Doc. A/C.6/68/SR.24, para. 64.

[35] Full text available at: https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/17mtg_germany_1.pdf.

17. Ghana

Statement made in the Sixth Committee, Sixty-seventh session (2012), 23rd meeting, 6 November 2012:[36]

> It is not uncommon to find States enquiring whether bilateral treaties Ghana has signed could enter into force provisionally in light of our national constitutional provision requiring all agreements to be ratified by Parliament. Despite this constitutional provision, Ghana has signed a number of treaties, including ECOWAS Protocols requiring provisional entry into force pending compliance with national constitutional procedures or legislative approval. Ghana endeavours to ratify such treaties as soon as possible after signature.

[36] Full text available at: https://www.un.org/en/ga/sixth/67/pdfs/statements/ilc/ghana.pdf.

18. Hungary

Statement made in the Sixth Committee, Sixty-seventh session (2012), 20th meeting, 2 November 2012:[37]

> [*Reference to the practice of the European Union:*]
>
> [D]uring the last decade the number of international treaties containing provisional application clauses has substantially increased. This also applies to Hungary which as a member of the European Union has become a party to numerous multilateral international treaties which were concluded between the EU, its member states and third countries. These treaties would usually enter into force after all parties have ratified them. This would normally require twenty-nine ratifications, but to reduce the time before the full application, these treaties in almost every case include a provisional application clause.

Statement made in the Sixth Committee, Sixty-eighth session (2013), 18th meeting, 29 October 2013:[38]

> In Hungary the relevant domestic law, namely Act 50 of 2005 on the conclusion of international treaties, contains detailed rules on the provisional application of international treaties. According to these rules the provisional application has to be decided by the same entity which is authorised to give Hungary's consent to be bound by a treaty. In Hungary only the Parliament and the Government has the power to express this consent. The Parliament gives its authorisation in the form of an act and the Government in the form of a government decree. In these very same laws, if necessary, the Parliament or the Government can decide on the provisional application of the treaty as well.
>
> In case the termination of such a provisional application is necessary it is done in the same manner, namely in the respective act or decree. Since the respective laws in which the Parliament or Government agrees to the provisional application of a treaty also contain the text of the international treaty, in the Hungarian legal system the provisional application of a treaty has the same effect as the entry into force of the said treaty, and therefore Hungary has to comply with the articles of the provisionally applied treaty.

[37] Full text available at: https://www.un.org/en/ga/sixth/67/pdfs/statements/ilc/hungary.pdf.

[38] Full text available at: https://www.un.org/en/ga/sixth/68/pdfs/statements/ilc/hungary.pdf.

19. India

Statement made in the Sixth Committee, Seventy-first session (2016), 30th meeting, 3 November 2016:[39]

> India being a dualistic State, a treaty will not automatically form part of the domestic law; it applies only as a result of their acceptance by internal procedures. Thus, resort to provisional application of treaties *i.e.*, treaties being applicable on the States before its entry into force, will go against the principle of dualism.

Statement made in the Sixth Committee, Seventy-second session (2017), 19th meeting, 24 October 2017:[40]

> India being a dualistic State, treaties do not automatically form part of the domestic law. Their provisions become applicable only as a result of their acceptance by internal procedures.

Statement made in the Sixth Committee, Seventy-sixth session (2021), 17th meeting, 26 October 2021:[41]

> In a dualist legal system like in India, where treaties must be transposed or incorporated into national law to become effective, it is a typical requirement of domestic law of certain States that the competent organ may only agree to provisional application of a treaty if national law is already in conformity with the treaty or is brought into conformity with it.

[39] Full text available at: https://www.un.org/en/ga/sixth/71/pdfs/statements/ilc/india_3.pdf.

[40] Full text available at: https://www.un.org/en/ga/sixth/72/pdfs/statements/ilc/india_1.pdf.

[41] Full text available at: https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/17mtg_india_1.pdf.

20. Indonesia

Statement made in the Sixth Committee, Seventy-fourth session (2019), 27th meeting, 31 October 2019:[42]

> In our case, we remain [of the view that there] require[s] further consideration concerning the guide on the provisional application, especially having the latest ruling made by the Indonesian Constitutional Court on the new interpretation towards the Law No. 24 of 2000 on Treaties.
>
> Through such ruling, the Court has expanded the classifications of treaties which requires the involvement of [the] Indonesian parliament, and consequently further extends the process to apply certain types of treaty.

Statement made in the Sixth Committee, Seventy-sixth session (2021), 19th meeting, 28 October 2021:[43]

> Even though Indonesia is not a party, we are of the view that the 1969 Vienna Convention on the Law of Treaties is certainly the basis on which the Commission should develop a mechanism or a set of guidelines that would provide States with guidance relating to the provisional application of treaties.

Communication transmitted to the Secretariat, 18 May 2022:[44]

> Indonesian Law is silent on the practice and regulation concerning provisional application of treaties matter.
>
> The relevant Law in Indonesia on international treaties is Law No. 24/2000 which contains, for example, provisions on the ratification of international treaties and its entry into force mechanism as follows:[45]
>
> > *Article 3*
> >
> > The Government of the Republic of Indonesia binds itself to a treaty through the following means:
> >
> > > *a*. signature;
> > >
> > > *b*. ratification;
> > >
> > > *c*. exchange of documents constituting a treaty diplomatic notes;
> > >
> > > *d*. other means as agreed upon by the parties to treaty.
>
> *[Explanation] of Article 3 (d):*
>
> "Other methods" as agreed upon by the parties (such as the simplified procedure) means automatic binding to a treaty if, after a certain given period, a written notification is not given with respect to their refusal to be bound.

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[42] Edited by the United Nations Secretariat. Full text available at: https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/indonesia_1.pdf.

[43] Full text available at: https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/19mtg_indonesia_1.pdf.

[44] Edited by the United Nations Secretariat.

[45] Unofficial translation (from Indonesian) provided by the delegation of Indonesia.

Chapter II
Implementation of Treaties[46]

Article 15

1. In addition to treaties which require the ratification by a law or presidential decree, the Government of the Republic of Indonesia may conclude a treaty, which, enters into force, on the date of its signing or on the exchange of the documents of treaties/diplomatic notes, or through other means as agreed upon by the parties to the treaty.

2. A treaty comes into force and binds the parties thereto after it fulfills all the conditions specified therein.

[Explanation of] Article 15 (1):

A treaty which does not require ratification in order to enter into force and which contains matters which are technical in nature or constitutes the implementation of an umbrella agreement, can immediately enter into force after the signature, exchange of documents/diplomatic notes or by way of other means as have been agreed upon by the parties to the treaty.

Treaties which fall into such category are, among others, treaties which govern the technical aspects of cooperation in the fields of education, social, culture, tourism, information, health, family planning, agriculture, forestry, and [cooperation with] sister provinces/cities.

[46] *Ibid.*

21. Iran (Islamic Republic of)

Statement made in the Sixth Committee, Seventieth session (2015), 25th meeting, 11 November 2015:[47]

> [T]here is no provision concerning the provisional application of treaties in the Constitution of the Islamic Republic of Iran.

[47] Full text available at: https://www.un.org/en/ga/sixth/70/pdfs/statements/ilc/iran_3.pdf.

22. Israel

Statement made in the Sixth Committee, Sixty-seventh session (2012), 23rd meeting, 6 November 2012:[48]

> [T]he practice in Israel is that, while there is a possibility for the use of provisional application of treaties, it is applied only in exceptional circumstances.

Statement made in the Sixth Committee, Sixty-eighth session (2013), 25th meeting, 5 November 2013:[49]

> [T]he practice in Israel is that, while there is a possibility for the use of provisional application of treaties, it is applied only in exceptional circumstances. For example, provisional application may be relevant in cases of urgency or if exceptional flexibility is needed, or where a treaty is of great political significance or it is important not to wait for the completion of the lengthy process of compliance with States' constitutional requirements for the approval of a treaty. As a general policy, however, Israel does not provisionally apply treaties.

Statement made in the Sixth Committee, Sixty-ninth session (2014), 25th meeting, 3 November 2014:[50]

> As noted in previous meetings, the provisional application of treaties does not fall within Israel's general policy with regard to treaty law. However, in exceptional circumstances only, a treaty may be provisionally applied. Such exceptional circumstances may include cases of urgency and cases in which there would be a great political or financial significance for the prompt application.
>
> Any such provisional application would require prior approval by the Government of the State of Israel which would include a statement as to the extraordinary circumstances that would justify the provisional application of the treaty in the specific case. All treaties that were provisionally applied by Israel thus far were approved in advance by the Israeli Government. The Government of Israel's decision included the approval of the treaty itself and of its provisional application.

Statement made in the Sixth Committee, Seventieth session (2015), 25th meeting, 11 November 2015:[51]

> As noted in the past, Israel does not provisionally apply treaties. However, there are exceptional circumstances in which the provisional application of treaties may be permitted. These include situations in which there is a clear financial or political significance for the provisional application of a treaty; cases in which there is a need for exceptional flexibility; or instances in which it is important not to wait for the completion of the lengthy internal requirements for the approval of the treaty. This practice is not part of the written legal framework but is rather a matter of uncodified practice.
>
> In any case, the Government of the State of Israel must approve the treaty and its provisional application prior to the date in which the agreement is provisionally applied. The Government's decision must contain special approval for provisional application before the treaty enters into force. The explanatory note submitted to the Government prior to its decision, must include a statement that the approval of the provisional application deviates from the general practice, and states the reasons for the exceptional approval in the specific case.

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[48] Full text available at: https://www.un.org/en/ga/sixth/67/pdfs/statements/ilc/israel_3.pdf.

[49] Full text available at: https://www.un.org/en/ga/sixth/68/pdfs/statements/ilc/israel_3.pdf.

[50] Full text available at: https://www.un.org/en/ga/sixth/69/pdfs/statements/ilc/israel_3.pdf.

[51] Full text available at: https://www.un.org/en/ga/sixth/70/pdfs/statements/ilc/israel_3.pdf.

23. Italy

Statement made in the Sixth Committee, Seventy-first session (2016), 20th meeting, 24 October 2016:[52]

> Apart from the specific dimension of treaty-making within the EU, there is little doctrinal convergence within our own domestic legal system on the applicability of treaties before the Parliament's formal ratification—which in Italy also encompasses the execution phase. Our Constitution sets a very strict threshold on treaties that require parliamentary approval before gaining legal force.

[52] Full text available at: https://www.un.org/en/ga/sixth/71/pdfs/statements/ilc/italy.pdf.

24. Malaysia

Statement made in the Sixth Committee, Sixty-eighth session (2013), 25th meeting, 5 November 2013:[53]

> [T]here exists a number of States, like Malaysia, that have established, almost rigid procedures on the internalization and application of treaties.

Statement made in the Sixth Committee, Sixty-ninth session (2014), 27th meeting, 5 November 2014:[54]

> In the context of Malaysia's experience and practice, the signing of a treaty does not necessarily create a legal obligation when the treaty further requires ratification, accession, approval or acceptance processes, unless the treaty otherwise provides. The effect of signing in this regard means a State is not yet a Party albeit being a signatory to the treaty, pending its subsequent act of ratification, accession, approval or acceptance of the treaty. The effect emanating from this process is subject to the understanding as enshrined under Article 18 of the [Vienna Convention on the Law of Treaties] whereby the State must refrain from acts which may defeat the object and purpose of the treaty. Malaysia opines that the effect expounded from this context is confined to moral and political outcomes without giving rise to any legal consequences. Be that as it may, prior to signing or becoming a Party to a treaty, Malaysia will usually ensure that its domestic legal framework is in place and ready in order to implement the treaty.

Statement made in the Sixth Committee, Seventieth session (2015), 25th meeting, 11 November 2015:[55]

> It is to be highlighted that in Malaysia, Article 39 of the Federal Constitution provides that "The executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable by him or by the Cabinet or any Minister authorized by the Cabinet". Further, under Article 80(1), the executive authority of the Federation extends to all matters with respect to which Parliament may make laws "[b]y virtue of the 'Federal List'", matters with respect to which Parliament may make laws include "external affairs" which in turn include "treaties, agreements and conventions with other countries". The executive authority of the Federation thus extends to the making or concluding of treaties, agreements and conventions with other countries.
>
> Malaysia's domestic law does not provide for any express provision that prohibits or allows for the provisional application of treaties. In this regard, Malaysia has been very conscientious in ensuring obligations in the treaty are carried out accordingly once Malaysia ratifies a treaty by ensuring that its domestic legal framework is in place before the treaty is binding upon Malaysia.
>
> …
>
> The effect emanating from this process is subject to the understanding as enshrined under Article 18 of the [Vienna Convention on the Law of Treaties], whereby the State must refrain from acts which may defeat the object and purpose of the treaty. Malaysia opines that the effect expounded from this context is confined to moral and political outcomes without giving rise to any legal consequences. Be that as it may, prior to signing or becom-

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[53] Full text available at: https://www.un.org/en/ga/sixth/68/pdfs/statements/ilc/malaysia_3.pdf.

[54] Full text available at: https://www.un.org/en/ga/sixth/69/pdfs/statements/ilc/malaysia_3.pdf.

[55] Full text available at: https://www.un.org/en/ga/sixth/70/pdfs/statements/ilc/malaysia_3.pdf.

> ing a Party to a treaty, Malaysia will ensure that its domestic legal framework is in place and ready in order to implement the treaty.

Statement made in the Sixth Committee, Seventy-sixth session (2021), 18th meeting, 27 October 2021:[56]

> Malaysia's domestic law does not provide for any express provision that prohibits or allows for the provisional application of treaties. Nevertheless, in preparation of ratifying or acceding to any treaty, Malaysia as a dualist State will ensure that its domestic laws are in place to be in line with the requirements under the international law. This is to ensure that Malaysia will be able to fulfil its obligations made under the treaty and devoid from any breach of international legal principles. Thus, Malaysia has been very conscientious in ensuring obligations in the treaty are carried out accordingly once Malaysia ratifies a treaty, by ensuring domestic legal framework to be in place before the treaty is binding upon Malaysia.

[56] Full text available at: https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/18mtg_malaysia_1.pdf.

25. Mexico

Statement made in the Sixth Committee, Sixty-eighth session (2013), 25th meeting, 5 November 2013:[57]

> Suffice it to say that Mexico made a declaration of provisional application to give immediate effect to certain provisions of the Arms Trade Treaty (ATT), so that they are implemented in our country on a voluntary basis until its entry into force. Indeed, in accordance with article 23 of the ATT, Mexico undertakes to provisionally apply until its entry into force, articles 6 and 7, relative to the prohibited exports and the risk assessment mechanism.

[57] Unofficial translation (from Spanish) by the United Nations Secretariat. Full text available at: https://www.un.org/en/ga/sixth/68/pdfs/statements/ilc/mexico_3.pdf.

26. Micronesia (Federated States of)

Statement made in the Sixth Committee, Sixty-ninth session (2014), 25th meeting, 3 November 2014:[58]

> Micronesia has a long history with the mechanism of provisional application. When Micronesia emerged from the trusteeship system, Micronesia made sure to notify the United Nations that it intended to provisionally apply a number of treaties that the United States had extended to Micronesia as its administering power during the trusteeship, until such time that Micronesia had completed a thorough review of whether to formally enter into those treaties as an independent sovereign. The provisional application of treaties was therefore one of the first acts undertaken by Micronesia under international law and as part of the international community, and it remains a matter of great interest for Micronesia.
>
> Micronesia is not a Party to the 1969 *Vienna Convention on the Law of Treaties* … Nevertheless, Micronesia asserts that article 25 of the Convention is now part of customary international law, even though its specific content and parameters remain to be established in an authoritative manner.

[58] Full text available at: https://www.un.org/en/ga/sixth/69/pdfs/statements/ilc/micronesia_3.pdf.

27. The Netherlands (Kingdom of)

Communication transmitted to the Secretariat, 20 April 2016:

The decision to provisionally apply a treaty

With respect to the provisional application of treaties, the point of departure under the *Constitution of the Kingdom of the Netherlands* is that it shall not be bound by treaties without prior parliamentary approval (Article 91 of the Constitution).[59] The exceptions to this rule are stipulated in the *Kingdom Act on the Approval and Publication of Treaties* of 7 July 1994 (the Kingdom Act),[60] which recognises the provisional application of treaties as one such exception to the requirement of parliamentary approval. It should be noted that when no prior parliamentary approval is required for a treaty, due for instance to the nature or duration of the treaty, provisional application is possible and not subject to the rules described below, they only apply to provisional application of treaties that are in principle subject to prior parliamentary approval. In addition to the Kingdom Act, the explanatory memorandum to the bill approving the *Vienna Convention on the Law of Treaties* (VCLT), passed in 1985 (Explanatory Memorandum to the VCLT),[61] provides further information on the implementation of the issue of provisional application of treaties in the Dutch legal order.

The Government may decide to apply a treaty provisionally in accordance with the terms of Section 15 of the Kingdom Act. Paragraph 1 of this Section contains the general rule that provisional application of treaties is permitted if the interests of the Kingdom so require and provided the treaty to be applied provisionally does not conflict with the Constitution or results in such conflict. Provisional application is thus subject to two conditions. First, the phrase "if the interests of the Kingdom so require" limits provisional application to situations in which the interests of the Kingdom in applying the treaty provisionally outweigh the interests of parliament in exercising its constitutional rights with respect to the prior approval of treaties. Under the applicable approval procedures, the Government is required to justify its decision to apply a treaty provisionally in the explanatory memorandum accompanying the bill approving a treaty. The practice of the Council of State, consultation of which is a mandatory phase for the approval of treaties by parliament, shows that this Council requires the Government to provide specific justification for its decision to deviate from the constitutional powers of parliament. Failing such justification, the Government will be requested to complete its explanatory memorandum accordingly.[62] Secondly, provisional application of a treaty will be prohibited in case of conflict between the relevant treaty and the Dutch Constitution. This constitutes an absolute bar to the provisional application of a treaty.

Section 15, paragraph 2 of the Kingdom Act provides that provisional application is also not permitted for provisions contained in a treaty requiring the prior approval of parliament which conflict with statute law or result in such conflict.

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[59] https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.

[60] http://wetten.overheid.nl/BWBR0006799/geldigheidsdatum_27-01-2015.

[61] Kamerstukken (Parliamentary Papers) II, 1982/83, 17798 (R 1227), nr. 3.

[62] For example, Opinion of the Council of State in respect of the provisional application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part and the Ancillary Agreement to that Agreement.

In exercising its advisory functions in respect of the approval of treaties, the Council of State pays particular attention to the constitutional requirements concerning the provisional application of treaties and requires the Government to account for any omission in violation of the Constitution.[63] Thus, the Council of State requires the Government to abide strictly by the rule contained in Section 15, paragraph 4 of the Kingdom Act, which provides that if a treaty is to be applied provisionally, parliament[64] shall be notified of this without delay. The Council has indicated that it considers a period of almost two months between signature of a treaty and notification to parliament not in conformity with this requirement.[65] Similarly, the Government is required to submit to parliament without delay the bill approving the treaty concerned.

The termination of such provisional application

In the Explanatory Memorandum to the VCLT[66], the Government indicated that the provisional application of a treaty terminates when the treaty enters into force for the State concerned or when that State issues a notification that it will not become a party to the treaty.

In addition, the explanatory memorandum describes the situation in which the treaty concerned provides for possibility for States to declare, on an individual basis, to apply the treaty provisionally. In such a situation, it is the view of the Government that in addition to the grounds for termination mentioned above, the State concerned may also end the provisional application by withdrawing its declaration to that effect. However, it was also pointed out that (unconditional) withdrawal may not be possible under all circumstances, particularly in relation to third parties acting in good faith that would be adversely affected by such withdrawal. Obligations owed to third parties derived from the provisional application of the treaty before withdrawal of the declaration must be respected.[67] Recent practice of the Kingdom of the Netherlands has not revealed any situations giving rise to such issues.

In recent years, the Kingdom of the Netherlands has terminated provisional application of a number of bilateral social security agreements following the introduction of new legislation policies in the field of social security in 2011 This concerned, amongst others, its bilateral agreements with Botswana, Brazil and Mali, respectively. With respect to Botswana the agreement had already been ratified by the Kingdom of the Netherlands (but not yet by Botswana) and Botswana was therefore informed of the withdrawal of the ratification of the agreement by the Kingdom of the Netherlands, thus terminating provisional application of Article 5 of the agreement.[68] In the case of Brazil, neither party had ratified the agreement and the Brazilian authorities were therefore informed of the termination of provisional application in accordance with the terms of Article 25, paragraph 2, of the VCLT.[69] In respect of Mali, the agreement had already been ratified by Mali, but not by the Netherlands which informed Mali of the termination of provisional application in accordance with the terms of Article 25, paragraph 2, of the VCLT as the Netherlands no longer intended to ratify the agreement and, consequently.[70]

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[63] *Idem*.

[64] Parliament meaning the respective parliaments of the four countries making up the Kingdom of the Netherlands, *i.e.* the parliaments of the Netherlands (States General), Aruba, Curaçao and Sint Maarten.

[65] See footnote 60.

[66] Kamerstukken (Parliamentary Papers) II, 1982/83, 17798 (R 1227), nr. 3.

[67] *Idem*.

[68] Trb. (Tractatenblad; Netherlands Treaty Series) 2011, 260.

[69] Trb. (Tractatenblad; Netherlands Treaty Series) 2012, 32.

[70] Trb. (Tractatenblad, Netherlands Treaty Series) 2011, 249.

The legal effect of provisional application

According to the Netherlands, a distinction must be made between the international and the national level as regards the legal effects of provisional application of treaties. Provisional application of a treaty has legal effects under international law. In its Explanatory Memorandum to the VCLT,[71] the Government indicated that the provisional application of a treaty gives rise to an (international) obligation to perform all treaty provisions, unless it is expressly stated that limitations apply. It added that this is a provisional obligation which ceases to exist upon termination of provisional application.

At the national level reference must be made to Section 15, paragraph 3 of the Kingdom Act. This section deals with the specific situation in which the Government wishes to apply provisions of a treaty which it considers binding on all persons (self-executing treaty provisions) provisionally. The section is based on Article 93 of the Dutch Constitution providing that "Provisions of treaties … which may be binding on all persons by virtue of their contents shall become binding after they have been published." In such instances, both the text of the treaty and the fact that it is to be applied provisionally must be published in the Netherlands Treaty Series before the provisional application may take effect. In accordance with the terms of Section 19, paragraph 1, of the Kingdom Act, provisional application of provisions "binding on all persons" would only be possible on the first day of the second month following publication of the treaty in the Netherlands Treaty Series but the Minister of Foreign Affairs (responsible under the Kingdom Act for the publication of treaties) may decide, in accordance with Section 19, paragraph 2 of the Kingdom Act, to shorten that period to the (one) day after publication in the Netherlands Treaty Series. Timely publication of the treaty in the Netherlands Treaty Series is also an aspect taken into account by the Council of State in reviewing the constitutionality of the provisional application of a treaty.

During the parliamentary examination of the bill approving the VCLT the situation in which the notification of provisional application of (provisions of) a treaty at the international level had been given in violation of the required constitutional procedures was also discussed. With reference to Article 46 of the VCLT, the Government stated that failure to comply with constitutional procedures could not be invoked as a ground invalidating the State's entering into a legal obligation at the international level.[72]

[*Reference to the practice of the European Union*:]

[A]s a Member State of the European Union (EU), the Kingdom of the Netherlands participates in the so-called "mixed agreements" concluded by the EU and its Member States and another (third) State. Such agreements may also provide for provisional application by the EU (and the third State) pending completion of the national approval procedures in each individual Member State, which may take considerable time. Provisional application of mixed agreements by the EU is necessarily limited to the topics falling under EU competence.[73] Such provisional application by the EU also binds the Kingdom of the Netherlands as a Member State of the European Union, which takes effect upon notification by the EU of the completion of its internal procedures (relevant EU Council Decisions allowing for provisional application), indicating the parts of the agreement that will be provisionally applied and the deposit of the instrument of ratification by the other (third) State.

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[71] Kamerstukken (Parliamentary Papers) II, 1982/83, 17798 (R 1227), nr. 3.

[72] Kamerstukken (Parliamentary Papers) I, 1983/84, 17798 (R 1227), nr. 44a, p. 5.

[73] Since mixed agreements largely cover subject matter falling under EU competence, in practice this means that a vast majority of its provisions are applied provisionally.

28. Nicaragua

Statement made in the Sixth Committee, Seventy-third session (2018), 28th meeting, 30 October 2018:[74]

> In the case of Nicaragua, the Constitution states that international treaties must be approved by the National Assembly so that they […] acquire legal effects inside and outside Nicaragua "once they have entered into force internationally, by deposit or exchange of ratifications or compliance with the requirements or deadlines, provided for in the text of the international treaty or instrument". In Nicaragua the provisional application of a treaty would require that the instrument be approved by the National Assembly in order for it to have legal effects inside and outside of Nicaragua.
>
> A recent example that evidences the practice of Nicaragua in this regard is the 2010 International Cocoa Agreement, which entered into force provisionally on July 15, 2013, the date on which the instrument of accession was deposited with the Secretary General of the United Nations, having undergone the normal process of adhesion before the National Assembly, regardless of whether the instrument was destined to be applied provisionally.
>
> In a context that is not the same but similar, the *Association Agreement of the European Union with Central America* is provisionally applied partially on the understanding that only the provisions relating to commercial aspects are applied. At this point, it is worth clarifying that this type of partial provisional application must be differentiated from a total provisional entry into force of an instrument such as the first example. In any case, both modalities require the approval of the National Assembly.

[74] Unofficial translation (from Spanish) by the United Nations Secretariat. Full text available at: https://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/nicaragua_2.pdf.

29. Nordic Countries (Denmark, Finland,[75] Iceland, Norway and Sweden)

Finland (on behalf of the Nordic Countries)

Statement made in the Sixth Committee, Sixty-eighth session (2013), 23rd meeting, 4 November 2013:[76]

> As far as the treaties among the Nordic countries are concerned, provisional application has not been resorted to very frequently, but I wish to mention one example. In 2010 the Nordic countries concluded a General Security Agreement on the Mutual Protection and Exchange of Classified Information which provides that
>
> > [u]ntil the entry into force of this Agreement, each Party may notify at the time of the deposit of the instrument of ratification, acceptance or approval, or any other subsequent time, that it shall consider itself bound by the Agreement in its relations with any other Party having made the same notification. These notifications shall take effect thirty days after the date of receipt of the notification.
>
> That example illustrates that provisional application may also be based on a provision avoiding such terminology.

Norway (on behalf of the Nordic countries)

Statement made in the Sixth Committee, Sixty-ninth session (2014), 25th meeting, 3 November 2014:[77]

> The Nordic countries have previously mentioned examples of agreements where provisional application has been resorted to, such as the 2010 *General Security Agreement on the Mutual Protection and exchange of Classified Information between the Nordic countries* and the 2013 *Arms Trade Treaty*.
>
> One model of provisional application is the adoption of the decision 1/CMP.8, where the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol recognized that Parties may provisionally apply the Doha Amendment pending its entry into force in accordance with Articles 20 and 21 of the Kyoto Protocol. The Parties intending to provisionally apply the Doha Amendment pending its entry into force in accordance with Articles 20 and 21 of the Protocol may provide notification to the Depositary of their intention to provisionally apply the Amendment. The Nordic countries implement the above-mentioned treaties provisionally with the same legal effects as if they had formally been in force.

Norway (on behalf of the Nordic countries)

Statement made in the Sixth Committee, Seventieth session (2015), 23rd meeting, 9 November 2015:[78]

> As has been stated before, when the Nordic countries agree to apply treaties provisionally, we are of the view that they produce the same legal effects as if they were formally in force.

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[75] See separate submission by Finland, above at p. 29.

[76] Full text available at: https://www.un.org/en/ga/sixth/68/pdfs/statements/ilc/nordic_3.pdf.

[77] Full text available at: https://www.un.org/en/ga/sixth/69/pdfs/statements/ilc/nordic_3.pdf.

[78] Full text available at: https://www.un.org/en/ga/sixth/70/pdfs/statements/ilc/nordic_3.pdf.

30. Paraguay

Communication transmitted to the Secretariat, 29 January 2015:[79]

> The provisional application of treaties takes place only very rarely in the Republic of Paraguay. There is no law or statute governing the provisional application of international treaties, other than the *Vienna Convention on the Law of Treaties* of 23 May 1969, article 25 of which provides for provisional application. The Vienna Convention was approved in Paraguay through Act No. 289/71 of 4 November 1971.
>
> In recent years, the Republic of Paraguay has signed only one bilateral treaty that provides for provisional application: the *Agreement between the Republic of Paraguay and the European Community on Certain Aspects of Air Services*, done at Brussels on 22 February 2007, and approved by Paraguay through Act No. 4648/12 of 20 July 2012.
>
> Article 9 of the aforementioned instrument, entitled "Entry into force and provisional application", provides as follows:
>
> > 1. This Agreement shall enter in force when the Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed.
> >
> > 2. Notwithstanding paragraph 1, the Parties agree to apply this Agreement provisionally from the first day of the month following the date on which the Parties have notified each other of the completion of the procedures necessary for this purpose.
> >
> > 3. Agreements and other arrangements between Member States and the Republic of Paraguay which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally are listed in Annex I(*b*). This Agreement shall apply to all such agreements and arrangements upon their entry into force or provisional application.

[79] Unofficial translation (from Spanish) by the United Nations Secretariat. The original submission is available at: https://legal.un.org/legislativeseries/pdfs/chapters/book26/paraguay_s.pdf.

31. Peru

Statement (on behalf of CELAC) made in the Sixth Committee, Seventy-second session (2017), 19th meeting, 24 October 2017:[80]

> [I]n Peru there is no internal norm that refers directly to the provisional application of treaties, with the exception of Article 25 of the *Vienna Convention on the Law of Treaties*—as it is part of domestic law according to the 1993 Political Constitution of Peru. Peru, at the time of expressing its consent to said Convention, entered a reservation, subjecting the possibility of provisional application of the treaties to prior compliance with the provisions of the Constitution of Peru regarding the approval and ratification of treaties.
>
> We have been able to identify cases in the practice of Peru of instances in which the decision has been made to provisionally apply a treaty, although such decision is not made by a single body or authority but rather a series of State bodies and authorities that participate in different stages of the treaty-making process.
>
> As an example of provisional application of a treaty we have the *Multiparty Trade Agreement between Peru and Colombia, on the one hand, and the European Union and its Member States, on the other*, signed in Brussels on June 26, 2012, to which Ecuador has recently been added ("Trade Agreement of 2012"), whose article 330, paragraph 3, makes Provisional Application possible. It should be noted that the said Agreement continues to be provisionally applied to date.
>
> As for the termination of the provisional application of a treaty, it normally ends with the entry into force. In this regard, Peru wishes to cite certain examples:
>
> i. *Agreement between Peru and the Netherlands on the Establishment of Training Workshops*, Article VI (December 9, 1965);
>
> ii. Protocol, 1979, for the Fifth Extension of the *Wheat Trade Agreement*, 1971, Article 8 (March 21, 1979);
>
> iii. Agreement for the exchange of notes between Peru and Argentina (June 17, 1979);
>
> iv. *International Sugar Agreement*, article 37 (July 5, 1984).

[80] Unofficial translation (from Spanish) by the United Nations Secretariat. Full text available at: https://www.un.org/en/ga/sixth/72/pdfs/statements/ilc/peru_1.pdf.

32. The Philippines

Communication transmitted to the Secretariat, 28 July 2022:

> Executive Order No. 459[81] provides the guidelines on the negotiation and conclusion of international agreements by the Philippines, including the determination of the date of entry into force of such agreements.
>
> Sec. 6(*a*) provides that, as a general rule, an international agreement enters into force only upon compliance with the domestic requirements stated in EO No. 459. By way of exception, an international agreement may be given provisional effect, provided that certain conditions are satisfied.
>
> Sec. 2(*f*) defines "provisional effect" as the "recognition by one or both sides of the negotiation process that an agreement be considered in force pending compliance with domestic requirements for the effectivity of the agreement."
>
> Sec. 6(*b*) provides that in order for an international agreement to be given provisional effect, there must be a showing that a pressing national interest will be upheld thereby.
>
> "National interest" is defined under Sec. 2(*e*) as an "advantage or enhanced prestige or benefit to the country as defined by its political and/or administrative leadership."
>
> The conclusion of any international agreement by the Philippines presupposes the fulfillment of an underlying national interest. However, mere national interest is insufficient to justify the application of provisional effect to an international agreement. The national interest to be upheld by the application of provisional effect should be "pressing."
>
> The determination of what is a pressing national interest is a function reposed in the Department of Foreign Affairs, which, pursuant to Sec. 6(*b*), shall determine, in coordination with the concerned agencies, whether a treaty or an executive agreement, or any amendment thereto, shall be given provisional effect.
>
> EO No. 459 has to be construed alongside relevant provisions of the *1987 Constitution*. In particular, Sec. 21 of Art. VII of the *Constitution* provides that "[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate." Further, Sec. 25 of Art. XVIII of the *Constitution* provides that "foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State."
>
> The above Constitutional provisions make Senate concurrence as a legal imperative prior to the entry into force of a treaty, precluding the grant of provisional effect thereon.
>
> Treaties are defined under Sec. 2(*b*) of EO No. 459 as "international agreements entered into by the Philippines which require legislative concurrence after executive ratification."
>
> Within the domestic legal sphere, they are considered superior to executive agreements, which are defined under Sec. 2(*c*) of EO No. 459 as international agreements that are "similar to treaties except that they do not require legislative concurrence."

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[81] *Providing for the Guidelines in the Negotiation of International Agreements and [Their] Ratification*, 25 November 1997.

In *Pangilinan* v. *Cayetano,*[82] the Supreme Court expounded on the scope of international agreements that will require Senate concurrence, *viz*:

Article VII, Section 21 [of the 1987 Constitution] does not limit the requirement of [S]enate concurrence to treaties alone. It may cover other international agreements, including those classified as executive agreements, if: (1) they are more permanent in nature; (2) their purposes go beyond the executive function of carrying out national policies and traditions; and (3) they amend existing treaties or statutes.

In *Saguisag* v. *Ochoa,*[83] the Supreme Court stated that "under international law, the distinction between a treaty and an international agreement or even an executive agreement is irrelevant for purposes of determining international rights and obligations."

In Philippine treaty practice, multilateral or bilateral treaties negotiated by the Bureau of Investments and international legal cooperation agreements negotiated by the Department of Justice, such as extradition, mutual legal assistance, and transfer of sentenced persons agreements, have not been given provisional application.

In view of the above-cited laws and jurisprudence, the provisional application of international agreements may only be given:

1. to those that do not require Senate concurrence;

2. that a national interest of a pressing character will be upheld by such provisional application; and

3. such determination shall be made by the Department of Foreign Affairs, through an inter-agency mechanism.

[82] G.R. Nos. 238875, 239483, and 240954, 16 March 2021.

[83] G.R. Nos. 212426 and 212444, 12 January 2016.

33. Poland

Statement made in the Sixth Committee, Sixty-ninth session (2014), 26th meeting, 3 November 2014:[84]

> Our delegation fully concurs with the Commission's conclusion that the provisional application of the treaty shall have the same effect as its entry into force, unless otherwise agreed. This view is clearly supported by Polish treaty practice. Poland does not have a specific domestic law on the provisional application of treaties. The Polish practice in this regard is based on Article 25 of the 1969 *Vienna Convention on the Law of Treaties* and the general rules of domestic law regarding the conclusion of the treaties. Under our constitutional order, we consider as optimal to apply a treaty temporarily only when we complete our domestic procedures necessary for its entry into force.

Statement made in the Sixth Committee, Seventy-sixth session (2021), 19th meeting, 28 October 2021:[85]

> The Republic of Poland uses provisional application on an exceptional basis, particularly because it cannot be used as a means of bypassing parliamentary procedures.

[84] Full text available at: https://www.un.org/en/ga/sixth/69/pdfs/statements/ilc/poland_3.pdf.

[85] Full text available at: https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/19mtg_poland_1.pdf.

34. Portugal

Statement made in the Sixth Committee, Sixty-seventh session (2012), 21st meeting, 5 November 2012:[86]

> In what concerns Portugal, practice is based on a restrictive interpretation of Article 8(2) of the Portuguese Constitution. According to such interpretation, Portugal is only bound by a treaty after it has been internally approved and published in the official gazette, and the treaty itself enters into force in the international legal order. Hence, in the case of Portugal, the provisional application of a treaty is not admissible.

Statement made in the Sixth Committee, Seventy-sixth session (2021), 16th meeting, 25 October 2021:[87]

> For my delegation, the special relevance of this Guide also stems from the fact that Portugal, in accordance with its constitutional framework, is prevented from applying treaties provisionally.
>
> Therefore, Portugal welcomes the acknowledgement that States, and international organizations retain the right (i) to submit a reservation concerning the provisional application of the treaties which they have signed; and (ii) to oppose the provisional application of a treaty by another State or international organization, by means of a unilateral declaration.

[86] Full text available at: https://www.un.org/en/ga/sixth/67/pdfs/statements/ilc/portugal_3.pdf.

[87] Edited by the United Nations Secretariat. Full text available at: https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/16mtg_portugal_1.pdf.

35. Republic of Korea

Statement made in the Sixth Committee, Sixty-seventh session (2012), 21st meeting, 5 November 2012:[88]

> For the provisional application of the *Free Trade Agreement between the Republic of Korea and the EU*, the consent of the National Assembly of Korea was required, as in case of its entry into force. Since the agreement was provisionally applied with the consent of the Assembly, additional measures have not been taken for its entry into force.

Statement made in the Sixth Committee, Sixty-eighth session (2013) 24th meeting, 4 November 2013:[89]

> The *Free Trade Agreement between the [Republic of Korea] and the EU*, signed in 2010 and applied provisionally from 1st July 2011, is an example.

[88] Full text available at: https://www.un.org/en/ga/sixth/67/pdfs/statements/ilc/rok_3.pdf.

[89] Full text available at: https://www.un.org/en/ga/sixth/68/pdfs/statements/ilc/rok_3.pdf.

36. Romania

Communication transmitted to the Secretariat, 22 July 2022:[90]

Relevant national legislation

With regard to the particular issue of provisional application of treaties, in its *Law no. 590 of 22 December 2003 on treaties* Romania has relevant provisions concerning specifically the matter of provisional application. At a national level, international treaties are categorized by the level at which they were concluded, resulting in three categories: state level, governmental level and department level treaties.

Article 27 of the said law states that Treaties signed at [the] governmental level that do not require ratification according to Article 19 para. (1) and, respectively, at departmental level may be applied provisionally from the date of signature, either in full or in respect of some of their provisions, provided that an express provision to that effect is included in the treaty.

Paragraph 2 of article 27 states that treaties concluded at state level, as well as the treaties at governmental level which, according to Article 19 para. (1) must be ratified cannot enter into force at the date of the signing and may not be applied provisionally from the date of signature.

This rule has only one exception, which is stipulated in *Law no. 276 of December 7, 2011 on the procedure by which Romania becomes a party to the treaties concluded between the European Union and the Member States, on the one hand, and third countries or international organizations, on the other hand*. Article 7, par. (1) of the said law states that treaties (even those requiring ratification by Parliament) between the European Union and its Member States, on the one side and third States, on the other side, can be applied provisionally before their entry into force if the treaty expressly provides so.

It is worth mentioning that the rules mentioned above did not exist in previous national laws that regulated the matter of international treaties.

Procedures

The national procedure for concluding international treaties that will be provisionally applied does not differ substantially from the procedure used for other types of treaties. However, *Law no. 590/2003* does provide that the procedure for approving the signing of such treaties must be completed in an expeditious manner and that the signing of the document can take place only after it has been approved by the competent authorities, and full powers have been awarded.

Relevant practice

Bilateral treaties

On a bilateral level, Romania has applied some treaties provisionally, although practice on this subject is quite scarce, given the extraordinary nature of provisional application of treaties in Romania under the current national law.

Because the national law forbids provisional application of treaties at a date sooner than the date of signature and since there is no regulation on how late after the date of signature a treaty can be provisionally applied, the practice on this matter varies. For example, in one case[91], the parties agreed that the treaty will be applied provisionally starting [from]

[90] Edited by the United Nations Secretariat.

[91] *Agreement between the Government of Romania and the Government of the Republic of Hungary on cooperation in the field of natural gas transmission pipelines and transmission power lines intersecting*

the 45th day from the date of signature. In other cases[92], treaties were applied provisionally starting [from] the 15th day from the [date] of signature.

However, today the usual practice for Romania is that whenever the parties agree on provisional application of bilateral treaties, the treaty is provisionally applied starting [from] the date of its signature.

For reference it is worth mentioning that, even if there was no regulation on provisional application under the laws that preceded the current national law in effect, Romania has still applied some treaties or parts of the treaties it has concluded, starting [from] the date of signature or later.

Multilateral Treaties

Multilateral treaties are very rarely applied provisionally in Romania due to the fact that these treaties are usually concluded at state level and, as stated before, the national law forbids the provisional application of treaties concluded at this level.

However, multilateral treaties concluded at governmental level that do not require ratification can be applied provisionally, for example the *Memorandum of Understanding concerning cooperation in fighting corruption through the South Eastern European anti-corruption initiative* was applied provisionally in Romania as of the day of the signature by the Romanian party on 31 August 2007.

Even if the national law does provide strict rules on which treaties can be applied provisionally, there are some instances where multilateral treaties concluded at state level were applied in Romania before their entry into force.

One such case is the *Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the Establishment of a European Common Aviation Area (ECAA).* This Agreement states that "the European Community and its Member States and at least one Associated Party, may decide to apply provisionally this Agreement among themselves from the date of signature, in accordance with the application of domestic law".

Because in order for this treaty to be applied in Romania, it had to be ratified, the Romanian delegation presented a declaration stating that:

> Romania declares that it can provisionally apply this Agreement pursuant to paragraph 3 of Article 29 only from the date on which it has notified the European Community as the Depository of this Agreement of the completion of its internal procedures necessary for the entry into force of this Agreement.

As such, from the national Romanian law viewpoint, the Agreement was applied fully (following the usual procedure), but from the viewpoint of the other participants to the treaty, it was applied provisionally.

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the Romanian-Hungarian border, signed at Budapest, on 12 May 2010.

[92] *Agreement between Romania and Spain on the readmission of persons in an illegal situation*, signed at Bucharest, on 29 April 1996 and the *Agreement, by exchange of verbal notes, between the Government of Romania and the Government of Spain regarding the movement regime of the citizens of the 2 countries, holders of diplomatic passports*, signed at Bucharest, on 29 April 1996.

37. Russian Federation

Communication transmitted to the Secretariat, 9 April 2014:[93]

The provisional application of a treaty is vigorously used by the Russian Federation in the practices of inter-State intercourse.

As a rule, the Russian Federation resorts to provisional application of a treaty in exceptional cases in which the subject of a treaty is of particular interest both to the Russian Federation and to its counterparty, as a result of which both are interested in "jump-starting" the mechanism of the treaty without waiting for it to enter into force.

At present, the Russian Federation is provisionally applying more than 120 treaties pertaining to, by and large, questions of trade, power engineering, and customs tariffs regulation.

The question of the provisional application of treaties in the Russian Federation at the national level is governed by the Federal Law on Russian Federation Treaties, paragraph 1 of article 23 of which essentially reproduces paragraph 1 of article 25 of the *Vienna Convention on the Law of Treaties*:

> A treaty or part of a treaty, before its entry into force, may be applied by the Russian Federation provisionally if the treaty provides so or if agreement to that end has been reached by the treaty signatories.

The provision on provisional application of a treaty is, in most cases, included in the text itself of a draft treaty. As a rule, the following formulation is used:

> "This Agreement shall be provisionally applied as of the date of signature" (*Agreement between the Government of the Russian Federation and the Government of the Republic of Serbia on Deliveries of Natural Gas from the Russian Federation to the Republic of Serbia*, 13 October 2012);
>
> "This Agreement shall commence to be provisionally applied 30 days after the date of signature" (*Agreement between the Government of the Russian Federation and the Government of the Republic of Azerbaijan on the Construction of an Automobile Bridge across the Samur River in the Vicinity of the Yarag-Kazmalyar (Russian Federation) and Samur (Republic of Azerbaijan) Checkpoints on the Russian–Azerbaijan State Border*, 13 August 2013).

Sometimes, in order to prevent excessive delays in the completion of the internal procedures necessary for the entry into force of a treaty, the treaty specifies the period of provisional application. For example, the *Agreement between the Russian Federation and the Republic of Tajikistan on Cooperation on Border Matters*, of 2 September 2011, contains the following clause:

This Agreement shall be provisionally applied as of the date of signature for a period of 6 months and shall enter into force as of the date of receipt of the final written notification of the completion by the Parties of the internal procedures necessary for its entry into force. If, within that 6-month period, the Parties have not completed the internal procedures necessary for the entry into force of this Agreement, the Agreement shall terminate its provisional application.

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[93] Unofficial translation (from Russian) by the United Nations Secretariat. The original submission is available at: https://legal.un.org/legislativeseries/pdfs/chapters/book26/russia_r.pdf.

Cases of the provisional application of only part or parts of a treaty (*Protocol to the Treaty between the Russian Federation and the United States of American on Measures for the Further Reduction and Limitation of Strategic Offensive Arms*, 8 April 2010) and cases of the resumption of provisional application (*Agreement on the Resumption of the Provisional Application of the Agreement between the Government of the Russian Federation and the Government of the Kingdom of Morocco on Cooperation in the Field of Marine Fisheries*, 3 June 2010) are also not unknown to Russian practice.

Under the above-mentioned federal law, the decision on the provisional application by the Russian Federation of a treaty is taken by the Government of the Russian Federation or the President of the Russian Federation (depending on within whose competence the questions constituting the subject of the treaty reside). If a provision on the treaty's provisional application is included in the draft treaty, it is approved by the Government or by the President when the decision is made to sign the treaty. See, for example, the *Order of the Russian Government No. 2315-r, of 10 December 2013, on the Signature of the Protocol between the Government of the Russian Federation and the Government of the Republic of Belarus on the Extension of the Term of the Agreement on the Arrangements for the Payment and Remittance of Export Customs Duties (and Other Duties, Taxes, and Fees of Equivalent Effect) in the Export of Crude Oil and Certain Categories of Petroleum Derivatives from the Territory of the Republic of Belarus to Points Outside the Customs Territory of the Customs Union*, 9 December 2010).

In all other cases (when a provision on a treaty's provisional application is not included in the draft treaty), the Government of the Russian Federation and the President of the Russian Federation take separate decisions. Such cases include, for example, the *Order of the President of the Russian Federation No. 767-rp, of 17 December 1993, on the Provisional Application of the Agreement Establishing an International Science and Technology Centre; the Decree of the Government of the Russian Federation No. 324, of 17 March 1997, on the Provisional Application of the Protocol to the Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and their Member States, on the One Part, and the Russian Federation, on the Other Part.*

The Federal Law on Russian Federation Treaties establishes specific limitations on the provisional application of a treaty the decision on the consent to be bound by which is, for the Russian Federation, taken in the form of a federal law (as a rule, ratification). Such treaties must be submitted to the State Duma of the Federal Assembly of the Russian Federation within a period of no more than six months after the date of the commencement of its provisional application (second paragraph of article 23 (2) of the Law).

It is important to bear in mind that the failure to submit the treaty to the State Duma within the period indicated does not automatically result in consequences in international law that take the form of the termination of its provisional application. That would contravene both article 23 of the Law and article 18 of the *Vienna Convention on the Law of Treaties*, 1969, according to which, for the termination to result, the intention to not become a party to the treaty must be clearly expressed. A decision to that effect, taken in the same manner as a decision to commence the provisional application, would serve as the legal basis for the Russian Federation's expression of such an intention.

The Russian Federation's consent to the provisional application of a treaty means that the treaty becomes part of the legal system of the Russian Federation and is subject to application on an equal basis with treaties that have entered into force.

The question of the provisional application of treaties has also been the subject of consideration in the Constitutional Court of the Russian Federation, to which in 2012, citizen I. D. Ushakov applied with a request that article 23 (1) of the Law, which provides for the

possibility of the provisional application by the Russian Federation of a treaty or part of it, be declared inconsistent with the Constitution of the Russian Federation. The reason for applying to the Constitutional Court was that Russian customs authorities had ordered that citizen to pay customs duties not on the basis of the Russian Federation Customs Code, but on the basis of a provisionally applied treaty that set higher rates for customs charges.[94] The claimant asserted that the treaty was not subject to application because it had not been officially published (under the above-mentioned Federal Law, only treaties that had entered into force were subject to official publication at that time).

In its decision (ruling No. 8-P of 27 March 2012), the Constitutional Court declared, *inter alia*, that the provisional application of treaties by Russia did not contravene the Constitution of the Russian Federation. The Constitutional Court pointed to the fact that:

> deeming article 23 (1) of the Federal Law on Russian Federation Treaties as not contravening the Constitution of the Russian Federation … does not call into question the Russian Federation's obligation to comply in good faith in inter-State relations with the universally recognized principle of international law *pacta sunt servanda* (articles 26 and 27 of the Vienna Convention on the Law of Treaties) and, as a general rule, cannot serve as justification for the failure of the Russian Federation to perform the obligations arising from treaties it is provisionally applying in its relations with other States parties.

At the same time, the Constitutional Court ordered the federal legislature to establish rules for the official publication of provisionally applied treaties of the Russian Federation that affect human and civil rights, freedoms, and duties and that set rules other than those specified by the law. Pursuant to the decision of the Court the *Federal Law on the Amendment of Article 30 of the Federal Law on Russian Federation Treaties and of Article 9.1 of the Federal Law on Rules for the Publication and Entry into Force of Federal Constitutional Laws, Federal Laws, and Acts of the Houses of the Federal Assembly*, was adopted. It stipulates the following rules for the publication of provisionally applied treaties:

A treaty that makes provision for the Russian Federation's provisional application, before entry into force, of all or parts of the treaty or an agreement on the provisional application of which that is reached in some other manner (with the exception of treaties of an interdepartmental nature) shall, at the request of the Ministry of Foreign Affairs of the Russian Federation, be subject to immediate publication in the Bulletin of Treaties and to placement (publication) on the Official Internet Portal of Legal Information (www.pravo.gov.ru).

Statement made in the Sixth Committee, Seventy-third session (2018), 26th meeting, 26 October 2018:[95]

> The Russian legislation on treaties is based on the provisions of the Vienna Convention on the Law of Treaties and allows for provisional application. The total number of treaties provisionally applied by the Russian Federation remains relatively unchanged—there are about one hundred such treaties. We believe however, that this concept is exceptional and should be used only when there is a real necessity to begin implementation of a treaty before its entry into force. The Legal Department of the Russian MFA is trying to maintain this policy. Nevertheless, we regularly confront practical issues of various natures.

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[94] *Agreement on the Rules for the Movement of Goods by Individuals across the Customs Border of the Customs Union and for the Performance of Customs Operations Associated with Their Release*, 18 June 2010 (between the Russian Federation, Belarus, and Kazakhstan).

[95] Unofficial translation (from Russian) provided by the Russian Federation. Text in Russian available at: https://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/russia_2.pdf.

…

Recently we witnessed another interesting incident. The Russian Federation terminated its provisional application of a multilateral treaty by notifying the depositary on its intent not to become a party to it. At the same time the depositary of the treaty is interpreting the situation in such a way that Russia terminated the provisional application of the treaty but remains bound by the obligations deriving from the signing of the treaty. On our part, we proceed from the understanding that the sending of notification of intention not to become a party to the treaty does not only terminate its provisional application but also lifts all obligations of the State deriving from its signature. Nevertheless, there is a subject for research on that issue as well.

38. Serbia

Communication transmitted to the Secretariat, 29 January 2016:

The relevant laws of the Republic of Serbia provide that the Government may, exceptionally and upon agreement of the competent Committee of the National Assembly, authorize a delegation of the Republic of Serbia to accept that an international treaty to be ratified be provisionally applied either in its entirety or in parts until its entry into force. The procedure to ratify the treaty must be initiated with 30 days of the date of its signature.

The provisional application of a treaty will be terminated if the Republic of Serbia decides not to become a party to the treaty and after it informs the other parties among which the treaty is provisionally applied of the decision, in accordance with the provisions of the treaty and generally accepted rules of international law.

A treaty applied provisionally is considered to be in force in the sense of international law just like any other treaty that is in force.

The Republic of Serbia concludes the treaties that provide for provisional application rarely. In the last four years only three such treaties, out of 468 concluded, have been signed.

39. Sierra Leone

Statement made in the Sixth Committee, Seventy-sixth session (2021), 16th meeting, 25 October 2021:[96]

> Sierra Leone acknowledges that provisional application of treaties, contemplated by the *Vienna Convention on the Law of Treaties*, 1969, in Article 25, has become more common as a tool in State practice to give effect to all or some provisions of a treaty pending the completion of formalities for their entry into force, including for African States. Sierra Leone's constitutional law, however, still requires internal approval for provisional application, that is completion of the required formalities internally, in the same way for a treaty that has entered into force.

[96] Full text available at: https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/16mtg_sierraleone_1.pdf.

40. Singapore

Statement made in the Sixth Committee, Sixty-seventh session (2012), 22nd meeting, 6 November 2012:[97]

> [T]he "provisional" application of treaties is well-used in the area of bilateral and multilateral civil aviation treaties. As an aviation hub, these are matters which are not just of academic interest to Singapore, but also practical application. Interestingly, there are even instances where some provisional bilateral aviation treaties, which although [they] have never entered into force, are subsequently replaced by updated but nevertheless still "provisional" treaties.

[97] Full text available at: https://www.un.org/en/ga/sixth/67/pdfs/statements/ilc/singapore_3.pdf.

41. Slovenia

Statement made in the Sixth Committee, Seventy-fourth session (2019), 25th meeting, 30 October 2019:[98]

> [*Reference to the practice of the European Union:*]
>
> Slovenia is ready to submit a written proposal on draft model clause 1[99] and thus allow the states to complete the relevant internal treaty-making procedures before provisionally applying [the treaty]. The latter is of particular interest to those states that have internal limitations on the use of provisional application. Such a provisional application mechanism is applied by the European Union in the field of air transport agreements, which partly fall under the competence of EU Member States.

[98] Full text available at: https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/slovenia_1.pdf.

[99] Editorial note: See document A/74/10, annex A, for the text of draft model clause 1, as proposed by the Special Rapporteur for consideration by the International Law Commission).

42. South Africa

Statement made in the Sixth Committee, Sixty-ninth session (2014), 26th meeting, 3 November 2014:[100]

> In South Africa, new procedures for the conclusion of treaties were introduced in democratic South Africa, first by the *Interim Constitution of the Republic of South Africa, 1993, and finally by the Constitution of the Republic of South Africa*, 1966. In view of the enhanced status the 1996 Constitution accords to international law, it may be of particular relevance to … consider South African law with respect to the formation and domestic effect of provisional applicable treaties.
>
> The customary right of the State to enter into provisionally [applied] treaties is recognised in Section 232 of the 1996 Constitution. Unless the agreement on provisional application itself requires ratification, the power of the Executive to agree to the provisional application of a treaty without prior Parliamentary approval is established by the following sub-Sections of the Constitution:
>
> > Sub-Section 231 (1) authorises the executive to negotiate and sign international agreements, which includes the power to negotiate and sign agreements on provisional application; and it can be inferred from sub-Section 231 (3) that the provisional application may commence without Parliamentary consent in three circumstances:
> >
> > (*a*) Where the treaty that is provisionally applied is of a technical, administrative or executive nature;
> >
> > (*b*) Where the agreement on provisional application of a treaty is itself an agreement of a technical, administrative or executive nature; and
> >
> > (*c*) Where the agreement on provisional application of a treaty is one that requires neither ratification nor accession.
>
> Arguably these approaches encompass almost, if not all, of the methods by which a State may agree to apply a treaty provisionally. This may be done by the inclusion of a provision to this effect in the treaty itself, an agreement in simplified form, a resolution of a conference, or a notification or declaration of provisional application. In the South African context, whatever form it takes, an agreement on provisional application must be tabled in the National Assembly and the National Council of Provinces, the two Houses of Parliament, within a reasonable time—failure to do so may constitute a breach of the Constitution.
>
> The Executive in South Africa may decline to ratify a treaty approved by Parliament should the other party/parties delay or refuse to ratify, the entire treaty has become obsolete, or there is a need to renegotiate some terms. If the South African Government decides not to ratify a provisionally applied treaty, the Executive could choose to terminate the provisional application (provided the agreement on provisional application does not prohibit this).
>
> Section 233 of the 1996 Constitution commands that, when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law—it is believed that 'international law' in this context would include treaties that have entered into force for the Republic of South Africa and also those that it applies provisionally.

[100] Full text available at: https://www.un.org/en/ga/sixth/69/pdfs/statements/ilc/south_africa_3.pdf.

43. Spain

Statement made in the Sixth Committee, Sixty-seventh session (2012), 22nd meeting, 6 November 2012:[101]

> [*Reference to the practice of the European Union*:]
>
> Thus, among the wide variety of legal issues that arise, the use of provisional application that States and international organizations such as the European Union are doing in the agreements mixed of a commercial nature concluded with third States could be highlighted. Thus, through the mechanism of provisional application, within the framework of the European Union, it is possible to advance the application of that part of the treaty that falls under the exclusive competence of the Union.

Statement made in the Sixth Committee, Sixty-ninth session (2014), 26th meeting, 3 November 2014:[102]

> After all, once a treaty is being provisionally applied, States abide by the rule set out in article 27 of the Vienna Convention [on the Law of Treaties, 1969,] according to which they may not invoke the provisions of their internal law as justification for their failure to comply with their international obligations even those provisionally undertaken. And that is precisely the reason why the Bill on Treaties and other international agreements that the Spanish Senate approved last Wednesday and that will enter into force in a matter of weeks contains specific safeguards and limits regarding provisional application.
>
> …
>
> [*Reference to the practice of the European Union*:]
>
> We would also like to draw attention to the importance of the practice of International Organizations on this issue, namely the European Union which has made extensive and quite interesting use of the provisional application of treaties as provided for in article 218.5 of the *Treaty on the Functioning of the European Union*. This is the case, for example, of some mixed agreements (between the Union and its member States, on the one hand, and a third party on the other hand) in which only the parts affecting matters within the Union's competence are provisionally applied.

Statement made in the Sixth Committee, Seventieth session (2015), 25th meeting, 11 November 2015:[103]

> [*Reference to the practice of the European Union*:]
>
> Regarding the provisional application of treaties concluded by international organizations, it may be appropriate to take into account the practice, common within the European Union, of mixed agreements (that is, agreements concluded jointly by the European Union and its Member States, on the one hand, and one or more third States, on the other). Such practice restricts provisional application to provisions that fall within the scope of European Union competence and in which, therefore, the decision concerning provisional application is adopted by the European Union, without the Member States

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[101] Unofficial translation (from Spanish) by the United Nations Secretariat. Full text available at: https://www.un.org/en/ga/sixth/67/pdfs/statements/ilc/spain_3.pdf.

[102] Unofficial translation (from Spanish) by the United Nations Secretariat. Full text available at: https://www.un.org/en/ga/sixth/69/pdfs/statements/ilc/spain_3.pdf.

[103] Unofficial translation (from Spanish) by the delegation of Spain. Full text available at: https://www.un.org/en/ga/sixth/70/pdfs/statements/ilc/spain_3e.pdf.

qua talis having to intervene (beyond their presence as members in the Council of the European Union, a body to which Article 218.5 of the *Treaty on the Functioning of the European Union* entrusts the decision on the application of the international agreements of the European Union).

44. Switzerland

Communication transmitted to the Secretariat, 27 January 2014:[104]

1. The decision to provisionally apply a treaty

(a) Swiss legal bases and practice

In Switzerland, the Federal Assembly (Parliament) approves international treaties, with the exception of those whose conclusion falls within the sole competence of the Federal Council (Government) by virtue of a law or an international treaty.[105] In principle, the Parliament approves, before their entry into force, the treaties which have been negotiated and signed by the government. But the latter can, when a law or an international treaty approved by the Parliament authorizes it, conclude the treaties alone, without parliamentary approval.

The competence to decide on the provisional application of a treaty rests in Switzerland with the government. This competence of the Federal Council has always been implicitly deduced from its constitutional competence in the field of foreign affairs in general.[106] Thus a "customary constitutional law"[107] has emerged. In accordance with a practice which for a long time hardly was contested,[108] the Federal Council decided on such a provisional application when it was required to safeguard essential Swiss interests or a particular emergency situation.[109]

Under domestic law, these conditions must of course only be met for treaties submitted for approval by the Federal Assembly. For treaties whose approval falls within its sole competence, the Federal Council may decide to have them enter into force upon signature; *a fortiori* it may also thus decide to apply them provisionally.[110] However, even in the case of treaties which come under its own approval competence, the Federal Council makes relatively limited use of provisional application, since it prefers entry into force of the treaty upon signature when the partners can also do so.[111]

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[104] Unofficial translation (from French) by the United Nations Secretariat. The original submission is available at: https://legal.un.org/legislativeseries/pdfs/chapters/book26/switzerland_2014_f.pdf.

[105] Art. 166 (2) of the Federal Constitution of the Swiss Confederation of April 18, 1999 (Cst., Recueil systématic [RS] 101).

[106] Art. 184 (1) Cst. provides that "the Federal Council is responsible for foreign affairs subject to the participation rights of the Federal Assembly; he represents Switzerland abroad". Art. 102, ch. 8, of the old Federal Constitution of 29 May 1874 (RS 1 3) provided for its part that "[the Federal Council] oversees the interests of the Confederation abroad, in particular the observance of its international relations, and it is, in general, in charge of external relations ".

[107] Communication from the Department of Public International Law DDIP and the Federal Office of Justice of 14 December 1987, JAAC/VPB 51.58, ch. 8.

[108] However see Valentin Zellweger, Die demokratische Legitimation staatsvertraglichen Rechts, in Der Staatsvertrag in Schweizerischen Verfassurgsrecht, Stampfli Verlag AG, Beme 2001, pp. 251–416, 395–400.

[109] See, *e.g.*, Opinion of the Federal Council of 18 February 2004 on the report of 18 November 2003 of the Committee on Political Institutions of the Council of States on the parliamentary initiative "Provisional application of international treaties", Federal Bulletin (FF) 2004 939, 942; Message from the Federal Council of 4 July 2012 concerning the federal law on the competence to conclude International Treaties of Minor Scope and on the Provisional Application of International Treaties (Amendment of the Law on the Organization of Government and Administration and the Law on Parliament), FF 2012 6959, 6970. See also FF 1995 iV 749, 755 and 1999 IV 4471, 4492.

[110] See Opinion of the Federal Council of 18 February 2004, *ibid.*, FF 2004 939, p. 940, footnote 4.

[111] Claude Schenker, Guide to Practice in International Treaties, Federal Department of Foreign Affairs, Berne 2010, p. 14, ch. 55.

The practice of considering these two conditions as alternatives (essential interests or particular urgency) for the treaties submitted for the approval of the Federal Assembly changed however after the end of 2001.

The Federal Council had decided to provisionally apply the *Agreement of 18 October 2001 between Switzerland and Germany relating to the provision of air navigation services over part of German territory by Switzerland and to the effects of the operation of Zurich airport on the territory of Germany*. However, the Federal Assembly refused to approve the treaty.[112]

Following a parliamentary intervention, the establishment of an explicit legal basis to allow provisional application was therefore required for the first time.[113] Such a legal basis seemed necessary because "the provisional application may, *de facto*, undermine the competence of the Parliament in matters of approval of treaties, to the extent that the provisional application risks creating a *de facto* situation, from which it is difficult to return"[114]. Secondly, it was provided that the two abovementioned conditions (essential interests and special urgency) had to be cumulatively fulfilled so that a treaty could be applied provisionally.[115] The debates relating to this parliamentary intervention made it appear that it was undeniable that the provisional application of an international treaty is, under certain conditions, adequate and necessary. The very nature of international relations sometimes requires prompt action to protect Switzerland's interests. This may be the case, for example, for economic treaties, where it is important to avoid the Swiss economy being placed at a disadvantage owing to the fact that it cannot yet benefit from the effects of a new treaty which has not been applied immediately."[116]

Since 1 April 2005, a legal provision in Switzerland has explicitly governed the "provisional application of international treaties by the Federal Council".[117] It provides in substance that the two aforementioned conditions must be fulfilled cumulatively in order to be able to decide on the provisional application of a treaty whose approval is the responsibility of the Federal Assembly. In addition, the Federal Council is obliged to submit the treaty to the Federal Assembly for approval within six months from the commencement of provisional application. Finally, according to another provision which entered into force at the same time, "the Federal Council consults the competent [parliamentary] committees before provisionally applying an international treaty whose approval is the responsibility

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[112] FF 2002 3171. For a summary of the history of this agreement, cf. the Message of the Federal Council of July 4, 2012 cited in footnote 109 above (FE 2012 6959), p. 6965.

[113] Spoerry parliamentary initiative of 3 October 2002: make impossible the provisional application of international treaties leading to negative effects (02.456; Official Bulletin of the Federal Assembly [BO] 2003 E 75ff).

[114] Report of 18 November 2003 of the Committee on Political Institutions of the Council of States, 03.459, FF 2004 703, 706. In its opinion of the Federal Council of 18 February 2004 cited in footnote 109 above (FF 2004 939), the Federal Council responded to this report by being favorable, for reasons of clarity, to the creation of a legal basis regulating the material conditions for the provisional application of treaties and expressing their preferences regarding the formulation of the legal basis.

[115] *Idem*., p. 709.

[116] *Ibid*. It is in particular with these arguments that, when the eventual removal of any provisional application has been mentioned, the maintenance of this possibility was then decided.

[117] Art. 7*b* (1), of the law of 21 March 1997 on the organization of government and administration (LOGA; RS 172.010), the following content: "If the approval of an international treaty is the responsibility of the Federal Assembly, the Federal Council may decide or agree to its application on a provisional basis if the safeguard of essential interests of Switzerland and a particular emergency so require."

of the Federal Assembly".[118] In cases where the Federal Council decides to provisionally apply such a treaty, the Federal Assembly remains competent for the approval of the said treaty. However, this takes place *a posteriori*.[119]

There are other legal provisions concerning the provisional application of treaties that have yet to be pointed out. Thus, the Swiss law on external economic measures provides that,

> [in] order to safeguard essential Swiss economic interests, the Federal Council may provisionally apply agreements not subject to a referendum which affect the traffic of goods, services and payments. In urgent cases, the provisional application of agreements providing for membership of an international organization is also possible.[120]

Likewise, the law on customs tariffs provides that,

> [w]hen the interests of the Swiss economy require, the Federal Council may provisionally apply agreements relating to customs duties and provisionally put into force the resulting tariffs. It can also provisionally bring into force the tariff rates resulting from agreements that the Federal Council can apply provisionally according to [the law] on external economic measures.[121]

These two provisions permit provisional application if (essential) economic interests so require, the condition of urgency having to be cumulatively satisfied only for agreements which provide for membership in an international organization. As *lex specialis*, these rules take precedence over the aforementioned provision which in all cases provides for a combination of the two conditions.

The number of treaties provisionally applied by Switzerland is relatively small. In recent years, they have amounted to less than half a dozen treaties per year. This number nevertheless testifies to the necessity, or at least the usefulness, of the institution. The provisional application of treaties has in the vast majority of cases not been a problem.

A single treaty provisionally applied by the Federal Council has not been approved by the Federal Assembly.[122]

Another provisionally applied agreement was initially rejected by Parliament for other reasons. Parliament then confirmed the provisional application notwithstanding its refusal of the agreement. This was finally adopted after the presentation of an additional message from the Federal Council. This is the Agreement of 11 October 2007 between Switzerland and the European Community in the audiovisual field, establishing the firm and conditions for Switzerland's participation in the MEDIA 2007 community program.[123]

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[118] Art. 152(3*bis*) of the law of 13 December 2002 on the Parliament (LParl; RS 177.10). Note the rejection of a parliamentary proposal by a minority who wanted to grant Parliament, or even in an emergency to its competent committees, real competence for the approval of the provisional application (Report of 18 November 2003 cited in footnote 109 above (FF 2004 703), p. 713ff).

[119] Message from the Federal Council of 4 July 2012 cited in footnote 109 above (FF 2012 6959), p. 6972.

[120] Art. 2 (provisional application of agreements) of the federal law of 25 June 1982 on external economic measures (RS 946.201).

[121] Art. 4 (1) of the law of October 9, 1986 on the customs tariff (LTaD; RS 632.10). See also Zellweger, *op. cit.* footnote 108 above, p. 396s.

[122] See above section 1 (*a*) and footnote 112.

[123] RS 0.784.405.226.8. The chairpersons of the competent parliamentary committees, consulted as a matter of urgency, had issued a positive opinion concerning the provisional application. See Message from the Federal Council of November 26, 2008 additional to the message of September 21, 2007

(b) Recent developments

The Swiss legal provisions that entered into force in 2005 were next considered on 31 March 2010. On that date, the Federal Council decided to provisionally apply the *Protocol of 31 March 2010,* amending the *Agreement of August 19, 2009 between the Swiss Confederation and the United States of America concerning the request for information from the Internal Revenue Service of the United States of America relating to the Swiss company UBS SA*[124] despite the negative advice of the Parliamentary Committees consulted.[125]

Parliament subsequently requested a modification of the existing legal bases, so that provisional application could no longer be decided without the approval of the competent Parliamentary Committees.[126]

In response, the Federal Council, recognizing that the current situation was not entirely satisfactory, introduced a bill. This provides that the Federal Council would be bound, in matters of provisional application of a treaty, by a negative notice from the competent committees if such notice was decided by a qualified majority of two thirds in the Committees of the two chambers of Parliament. The government considers it justified to strengthen the involvement of Parliament to some extent in this way. However, it did not propose approval by the Parliamentary Committees of the provisional application, but rather the possibility of them vetoing such provisional application in the event of a qualified majority. Such position was motivated by:

> 1) its [the Federal Council's] desire to avoid provisional application when there exists a "considerable risk" that the treaty in question will not subsequently be approved by Parliament;
>
> 2) the wish to guarantee a certain leeway "necessary for an active foreign policy adapted to the circumstances";
>
> 3) its [the Federal Council's] desire not to modify in principle the distribution of powers between the legislature and the executive, with the decision on the provisional application of a treaty remaining within the remit of the Federal Council.[127]

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approving this agreement, FF 2008 8165, 8170; Message from the Federal Council of 4 July 2012 cited in footnote 109 above (FF 2012 6959), p. 6972 and references.

[124] See RS 0.672.933.612 and the Message from the Federal Council of 14 April 2010 relating to the approval of this agreement, FF 2010 2693, 2714ff.

[125] However, this treaty was subsequently approved by Parliament. For a summary of the history of this agreement, see FF 2012 6959, 6964.

[126] Motion of the Foreign Policy Commission of the Council of States of 27 May 2010: legal basis for the conclusion of international treaties by the Federal Council (10.3354, BO 2010 E 435); Motion by the Council's Committee on Economy and Royalties National Council of 2 June 2010: revision of the legal bases governing the conclusion of an international treaty by the Federal Council (10.3366, BO 2010 N 830); see also Joder parliamentary initiative of 17 June 2010: conclusion and approval of international treaties, review of the respective competences of Parliament and government (10.457, BO 2013 N 635). It should be noted that a comparable proposal providing for the approval of the provisional application by the parliamentary committees was not retained during the adoption of Art. 7*b* LOGA and 152 (3), LParl entered into force on 1 April 2005, reasons taken in particular that the Federal Council must always be able to choose to provisionally apply a treaty in order to assume its responsibilities in terms of the conduct of foreign policy and that, since the Federal Council is competent in foreign affairs (art. 184 (1), Cst.), it is advisable not to dilute the responsibilities in this area (see Report of 18 November 2003 cited in footnote 114 above (FF 2004 703), p. 712 and 714 and Message from Federal Council of 4 July 2012 cited in footnote 109 above (FF 2012 6959), p. 6971).

[127] Message of 4 July 2012 cited in footnote 109 above (FF 2012 6959), p. 6976.

(c) Tensions between international law and domestic law

As this bill is currently being debated in the Federal Assembly, it is not yet possible to express an opinion on the precise contours of the legal provisions which will, over the next few years, regulate the provisional application of the treaties in Switzerland. The debates are continuing and it remains to be seen whether the approval of provisional application could in Switzerland be transformed, from a government measure of emergency and necessity, into a parliamentary prerogative[128] of provisional approval with an accelerated procedure.

In any event, it is possible and it seems desirable to anchor provisions in domestic law to determine the competences and conditions for the provisional application of a treaty. A deviation may thus be made in the regime relating to the approval and ratification of treaties,[129] but it is fully justified by the undeniable utility, even the necessity, of the institution of provisional application in the law of international treaties.

2. Termination of provisional application

(a) Legal bases and Swiss practice

Swiss law provides that

> the provisional application of an international treaty terminates if, within six months from the start of the provisional application, the Federal Council has not submitted to the Federal Assembly the draft Federal decree approving the treaty concerned. The Federal Council notifies the Contracting States of the end of the provisional application.[130]

Commenting on this provision before it was adopted, the Federal Council indicated that in the vast majority of cases it would meet such deadline. In the event of delay, the rule will not pose a problem if the provisional application results from a unilateral act of Switzerland: when the Federal Council decides on the provisional application, it can also decide on the end of such provisional application by notification to the Contracting States. On the other hand, where provisional application results from an agreement between the parties, the provision will have only a limited scope.[131]

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[128] According to Anthony Aust, Modern Treaty Law and Practice, 2nd ed., University Press, Cambridge 2007, p. 173, footnote 47, parliamentary approval of the provisional application is required in several states.

[129] See, *e.g.*, Denise Mathy, Article 25, in Olivier Corten and Pierre Klein (eds), The Vienna Conventions on the Law of Treaties: A Commentary, vol. I, University Press, Oxford 2011, p. 653, chp. 8.

[130] Art. 7*b*, al. 2 and 3, LOGA.

[131] The Federal Council continued as follows: "In particular, Switzerland will not be able, in all cases, to terminate provisional application without at the same time notifying the co-contracting States of its wish to renounce the ratification of the treaty. However, any delay by the Federal Council in presenting a message to the Federal Assembly relating to a provisionally applied treaty does not necessarily mean that Switzerland does not intend to ratify the agreement. However, in order to be able to terminate provisional application, such possibility should have been provided for in the agreement itself or the co-contractors should consent to the termination of the provisional application. To avoid problems of public international law, the Federal Council should only accept a clause providing for provisional application if the clause reserves the possibility of terminating such application by means of a unilateral act. Such a policy is in principle possible, yet it has the consequence of further limiting the scope for negotiation. In addition, the other Parties to the treaty would not understand if Switzerland were to reserve the possibility of terminating the provisional application of a treaty while ratifying it anyway thereafter (following approval by Parliament) and bringing it into force definitively …". (Opinion of the Federal Council of February 18, 2004 cited in footnote 109 above (FF 2004 939), p. 943ff.).

This legal provision, however, only covers the hypothesis of failure by the Federal Council to comply with the deadline imposed on it to submit the treaty in question for parliamentary approval. Such outcome has never arisen. The scenario of a refusal of approval by the Federal Assembly of a treaty provisionally applied and submitted to it within the time limit is not mentioned in the law. However, also in such case, the Federal Council must notify the other signatory states of Switzerland's intention not to become a party to the treaty, thus automatically terminating the provisional application, in accordance with Article 25, paragraph 2, of the Vienna Convention on the Law of Treaties (Vienna Convention).[132]

As already indicated, only one bilateral treaty provisionally applied by the Federal Council has been rejected by the "Federal Assembly"[133] in recent years. This was on 18 March 2003, *i.e.* before the aforementioned legal provisions came into force. The Federal Council then informed the partner on 28 March 2003 of the parliamentary refusal and, therefore, of Switzerland's intention not to become party to the treaty.

(b) Time limits

Switzerland wishes to address the issue of possible time limits to be observed by a State which, in the absence of any provision in a treaty, unilaterally wishes to terminate its provisional application. As a general rule, the termination of provisional application should be possible with immediate effect, at least in cases where notification is made within a reasonable time after the start of provisional application.

Thus, in the case of the aforementioned bilateral treaty, concluded on 18 October 2001 but rejected by the Swiss Parliament on 10 March 2003, Switzerland notified this information to its partner on 28 March 2003, on which date provisional application ended, immediately.

This immediate effect may be necessary from the point of view of internal procedures and law, as a Parliament can expect the provisional application of a treaty which it rejects under the terms of the treaty to be terminated very quickly in accordance with a regular procedure of reasonable duration.

In some situations, however, the longer the effective provisional application has lasted, the more difficult it will be to claim an immediate end. In the event of a long duration of a provisional application, the principle of good faith may require a reasonable period for the end of the provisional application and thus prevent such application from being terminated with immediate effect. In Switzerland's view, such principle may even require, depending on the circumstances, that the termination of provisional application be subject to the terms and time limits relating to the denunciation of the treaty in question. Therefore, the possibility for a State to unilaterally end the provisional application at any time must be qualified, in particular with regard to the principle of good faith.[134]

For example, Switzerland signed a bilateral treaty in 1997 with a view to avoiding double taxation in terms of taxes on income and on capital, and subsequently notified the partner in 1998 of the completion of its procedures allowing for definitive entry into force. In the absence of a corresponding notification from the partner, the signatory governments

[132] See Message from the Federal Council of 4 July 2012 cited in footnote 109 above (FF 2012 6959), p. 6972.

[133] The bilateral agreement concluded with Germany on October 18, 2001, see above at footnote 112.

[134] See in this regard the considerations of the Memorandum of 1 March 2013 of the Secretariat (A/CN.4/658), reproduced below at p. 266 at footnote 48 and paras. 74–79, according to which, notwithstanding the words "in force" of art. 26 of the Vienna Convention, the *pacta sunt servanda* principle [and thus 'good faith performance requirement] also apply to provisionally applied treaties; see also Mark E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, Martinus Nijhoff, Leiden and Boston 2009, p. 357, c. 11; Mathy, *op. cit.* footnote 129, p. 652.

amended the treaty at the end of 2000 and further agreed to apply provisionally from 1 January 2001 the 1997 treaty as amended in 2000. In January 2012, the partner notified Switzerland of its intention not to become party to the amended 1997 treaty, which was nevertheless applied in practice. It indicated that the provisional application was terminated with immediate effect. In February 2012, Switzerland informed the partner that it did not share its approach regarding the modalities for terminating the provisional application of the amended 1997 treaty. It argued that, with regard to a double taxation agreement—the application of which had started on January 1 to fully cover each fiscal year—and after eleven years of effective provisional application, the principle of good faith required a *mutatis mutandis* application of the period for denunciation provided for by the treaty, by providing a written notice of denunciation of at least six months prior to the end of the calendar year.

(c) Termination of provisional application under the treaty or agreement

It is likely rare for treaties to contain explicit provisions relating to the modalities and time limits for the termination of provisional application. Switzerland wonders, however, whether doing so might not be a way of bringing greater legal certainty to contractual relations in general and greater credibility to the institution of provisional application in particular. It seems in practice that, when a treaty is applied provisionally, some of the parties who are bound by such provisional application sometimes tend to neglect the steps still necessary for the treaty to come into force definitively. As the agreement is already applied in practice, the urgency or importance of a definitive entry into force may indeed tend to disappear, for example when the objectives of the treaty are achieved before provisional application has ended. Parties may, of course, agree to terminate provisional application, but such an agreement is often illusory in the circumstances described.

Switzerland wishes to point out the possible difficulties of domestic law, of a constitutional or even procedural nature, as examples of other grounds that may be invoked when provisional application is prolonged.

Switzerland has concluded a bilateral agreement which has been formally applied provisionally since its signature in 1989, then it notified the partner in 1990 of the completion of its procedures allowing final entry into force. But such agreement has never been materially implemented and the partner informed Switzerland, as late as 2005, that its Parliament had not yet ratified it. However, it seems in fact that following the result of constitutional changes granting international powers in the field of treaties to the decentralized entities of the partner state, the central government no longer has the power to ratify this agreement itself. Neither state, however, has notified its intention not to become party to the treaty.

The provisional application should by definition be terminated relatively quickly. The two main hypotheses are then either the final entry into force of the treaty or, exceptionally, announcement of the end of the provisional application according to Article 25, paragraph 2, of the Vienna Convention. In this regard, however, an alternative which seems to constitute one of the best solutions could also be to provide from the outset, in the treaties subject to provisional application, that such application will have a predetermined maximum duration.[135]

By way of examples which do not require any act or declaration from States, two multilateral treaties of which Switzerland is depositary and which provide for the possibility of

[135] In particular art. 7 (3), of the Agreement of 28 July 1994 relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea, RS 0.747.305.1517, UNTS No. 31364, vol. 1836, p. 3.

provisional application furthermore stipulate that "[t]he period of provisional application cannot not exceed five years " (*Convention on the use of the Platform of the International Commission on Civil Status for the international communication of civil status data by electronic means*, done in Rome on 19 September 2012 (art. 15, para. 1, i.f.); and *Convention on the issue of multilingual and coded extracts and certificates of civil status documents*, adopted in Bern on September 26, 2013 (art. 13, para. 1, i.f.)).[136]

Switzerland further considers that, for treaties without such a clause, which are formally applied provisionally but which are not or have not been so for some time, a presumption as to the end of provisional application would be desirable after a specified reasonable period of time, for States which have applied a treaty provisionally without (succeeding in) ratifying it. Such a presumption should, of course, be limited to treaties of which the signatory States do not make use. Conversely, the presumption of a definitive entry into force, since the essential act of ratification is lacking, and the presumption of an application of indefinite duration, which could be even more so, would be more difficult to imagine. definitive that it lasts. This would indeed contradict the character of provisional application, by definition temporary, also by virtue of domestic law requirements.

Switzerland therefore considers that a bilateral trade and investment protection agreement is still being provisionally applied, since its signature in 1963, despite not having been ratified. The partner, which recalled this fact on several occasions, notably in 1973 and 1974, limited itself to imprecise oral declarations followed by neither facts nor written submission, according to which it purported to declare that it no longer intended to be bound by such agreements but was still considering the matter.

3. Legal effects of provisional application

(a) Swiss legal bases and practice

For Switzerland, the provisional application of an international treaty is aimed at permitting the full legal consequences of the treaty to arise prior to the treaty's approval by the Federal Assembly. Provisional application makes it possible lawfully to implement the provisions of the treaty. This is, however, subject to the resolutive power of a possible negative decision by Parliament. Such an interpretation follows from the intention of the Swiss legislator when it drew up the aforementioned legal bases.[137]

Swiss law logically provides that "[treaties] provisionally applied before their entry into force are published in the Official Digest as soon as possible once the decision on provisional application has been made"; since legal obligations arise as soon as the texts in question have been duly published.[138]

One of the main differences between provisional application and final entry into force is precisely that it is in principle possible to terminate the provisional application of a treaty more easily than a treaty that has entered into force definitively and which would then be subject to deadlines, or even conditions, for denunciation often provided for in its final provisions. In Switzerland's view, however, certain cases should be reserved, such as that mentioned

[136] See www.dfae.admin.ch/depositaire. These two treaties are not yet in force or provisionally applied. It is likely that the depositary will announce notifications relating to 4 decisions of provisional application that it will produce effects at most for 5 years, specifying the end of this maximum period. This solution seems in fact preferable to that requiring a new notification *proprio motu* of the depositary at the end of the five-year period.

[137] FF 2010 2693, 2717; see above section 1 (*a*), at footnotes 117 and 118.

[138] Art. 8 (1) of the law of 18 June 2004 on official publications (LPubl; RS 170.512) and art. 33 (6) of the order of 17 November 2004 on official publications (OPubl; RS 170.512. 1).

above,[139] in which it would be justified to apply at the end of the provisional application the same time limits as those which are provided for by the treaty for denunciation.

(b) Partial provisional application

Partial provisional application of a treaty, also provided for in Article 25, paragraph 1, of the Vienna Convention, may in practice raise interesting questions, for example in relation to the necessary balance to be maintained between all the provisions of the treaty. Thus, partial provisional application appears difficult in the case of a so-called "integral" treaty.[140]

Just as, unless otherwise agreed or if the treaty so provides, parties cannot unilaterally bring into force or partially denounce a treaty, nor can they provisionally apply it only partially. And even where a treaty provides for (full) provisional application, a state cannot, unless otherwise agreed, provisionally apply only part of it. It is in fact necessary to prevent this State from applying temporarily the only provisions which would be favorable to it, for example.

Switzerland concluded with the European Union (EU) on August 14, 2013 an Agreement in the form of an exchange of notes concerning the adoption of EU Regulation No. 604/2013 of the European Parliament and of the Council of June 26, 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.[141] This regulation is applied by the Member States of the EU from January 1, 2014.[142] However, Switzerland has also undertaken[143] to "apply provisionally, as far as possible" the content of such acts from the date set for their entry into force and until it notifies [the EU of] the fulfillment of its constitutional requirements. Switzerland has therefore decided to apply this regulation provisionally from 1 January 2014, with the exception, however—which the partner does not oppose—of the provisions of this regulation which require legislative changes in Switzerland, because the entry into effect of such provisions takes longer.

Statement made in the Sixth Committee, Seventy-sixth session (2021), 17th meeting, 26 October 2021:[144]

Three cumulative conditions must be met for the Swiss government to be able to consent to the provisional application of treaties whose approval is a matter for Parliament: first, the essential interests of the country must be at stake and, second, there must be a particular emergency. Third, the relevant parliamentary committees must be consulted and not oppose the application.

It should also be noted that this procedure has to be undertaken within a predetermined time frame: if the government has not submitted the said treaty for approval to Parliament within 6 months of the start of the provisional application, the latter ceases.

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[139] See section 2 (*b*), *supra*.

[140] Villiger, *op. cit.* footnote 134, p. 355.

[141] RS 0.142.392.680.01, see also Official Journal of the European Union (OJ) L 180 of 29 June 2013, p. 31.

[142] *Idem*., see art. 49.

[143] In application of art. 4 (3), in *fine*, of the Agreement of 26 October 2004 between the Swiss Confederation and the European Community on the criteria and mechanisms for determining the State responsible for examining an asylum application lodged in a member state or in Switzerland (RS 0.142.392.68).

[144] Unofficial translation (from French) by the United Nations Secretariat.

Communication transmitted to the Secretariat, 22 July 2022:[145]

> Switzerland refers to the information already transmitted on 27 January 2014 and wishes to point out two developments that have taken place since then:
>
> First, in its contribution of 27 January 2014, Switzerland made reference to a proposed piece of legislation (para. 1.*b*, p. 4 *in initio*), which aimed to grant the competent committees of both houses of the Swiss Parliament the right to oppose the provisional application of treaties. The Parliament then passed the legislation, which went into effect on 1 May 2015 and stipulates that the Swiss Government, the Federal Council, "shall renounce the provisional application if the competent committees of the two councils oppose it".[146]
>
> Secondly, the Parliament considered that it might be urgent not only to apply a treaty falling within its authority, but also to terminate it, concluding that the Federal Council should be given the authority to urgently terminate a treaty if dictated by the need to protect the vital interests of Switzerland or to address a specific emergency. In such a case, the Federal Council must also consult the competent parliamentary committees beforehand. The piece of legislation also stipulates that "the Federal Council shall renounce the urgent termination of a treaty if the competent committees of the two councils opposed it".[147] This new urgent termination regulation went into effect on 2 December 2019. It does, in a way, mirror the regulation concerning provisional application.
>
> Furthermore, the number of treaties provisionally applied by Switzerland has remained stable and relatively modest: from 2014 to date, 33 treaties have been provisionally applied (cf. annex), an average of just over four per year. The introduction of the right of opposition of the competent parliamentary committees has therefore not led to a statistically significant change compared to the previous period, for which we reported a provisional application rate of six treaties per year.
>
> There is no particular problem with these provisional applications. During the reporting period, there was never any opposition from the parliamentary committees, such that the Federal Council was always able to confirm to contractual partners the provisional application of the treaties desired and contemplated in negotiations.
>
> There were two cases of treaties applied provisionally that did not contain a provisional application clause:
>
> The first case involves two exchanges of notes dated 20 December 2018 between Switzerland and the European Union (EU; see Nos. 22 and 23 of the annex), following which certain provisions of two European Union regulations were provisionally applied, from 28 December 2019 to 11 May 2021. Without such partial provisional application, cooperation under the Schengen Information System would have been considerably hampered and the regulations would not have been adopted as rapidly as expected by the European Union. The Federal Council determined that the partial provisional application was dictated by the need to protect the vital interests of Switzerland and to address a specific emergency, such

[145] Unofficial translation (from French) by the United Nations Secretariat. The original submission is available at: https://legal.un.org/legislativeseries/pdfs/chapters/book26/switzerland_2022_f.pdf.

[146] Art. 7(*b*) (1 *bis*) of the Organization of Government and Administration Act of 21 March 1997 (RS 172.010) and art. 152 (3 *bis*) (3 *ter*) of the Parliament Act (RS 171.10); see also RO 2015 969; FF 2012 6959.

[147] Art. 7(*b*) (1 *bis*) of the Organization of Government and Administration Act and art. 152 (3 *bis*) (3 *ter*) of the Parliament Act; see also RO 2019 3119; FF 2018 3591 5405.

that the conditions of Swiss law for provisional application were met.[148] After consulting with the relevant parliamentary committees, which shared its opinion, the Federal Council approved the partial provisional application of the provisions concerned.[149]

The second case involves the 9 December 2019 *Agreement in the form of an exchange of letters between Switzerland and the European Union in the context of negotiations under article XXVIII of the General Agreement on Tariffs and Trade (GATT)* 1994 (No. 27 of the annex). On 26 August 2020, the Federal Council decided to apply the Agreement provisionally beginning on 1 January 2021, for the following reason: in 2015, the Parliament had amended the customs tariffs set in the *Swiss Customs Tariff Act*. Switzerland then had to renegotiate with the World Trade Organization (WTO) members concerned those tariffs, which were set in an annex to the GATT. It presented the result of the negotiations to WTO on 12 February 2020. In accordance with existing WTO procedures, the legal effects of the modification went into force on 3 June 2020.[150] The content of the Agreement in the form of an exchange of letters is identical to the result of the negotiations presented to WTO; Switzerland concluded it at the request of the European Union, whose internal law requires such an act for the conclusion of negotiations. In this case too, the provisional application was dictated by the need to fulfil the international obligations of Switzerland as quickly as possible, which was expected by partners, while at the domestic level, these agreements still had to be approved by the Parliament and, in the event of a referendum, by the people.[151]

This shows that with provisional application, in cases specified by law, it is possible to mitigate the effects of sometimes longer entry-into-force timeframes, since the Parliament and the people have the power to approve treaties.

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[148] See art. 7(*b*) (1) of the Organization of Government and Administration Act, *supra*.

[149] See the message on the approval and implementation of the exchange of notes between Switzerland and the European Union concerning the adoption of the legal basis for the establishment, operation and use of the Schengen Information System (SIS) (developments of the Schengen *acquis*) and the amendment of the Federal Joint Foreigners and Asylum Information System Act of 6 March 2020, FF 2020 3361, 3371, 3450.

[150] According to the GATT decision of 26 March 1980 on procedures for modification and rectification of tariff concessions, in the absence of comments or reservations, the modifications provided are deemed certified, meaning that they are definitively approved, and have legal effect; see the message concerning the approval of the modification of Schedule LIX-Switzerland-Liechtenstein for seasoned meat of 20 January 2021, FF 2021 348, 5.

[151] See message, p. 10. Due to domestic law, the modification of the schedule could only enter into force following the approval by the Parliament of 19 March 2021 and the expiry of the referendum timeframe (8 July 2021); see the Federal Order of 19 March 2021, FF 2021 679. The European Union notified the completion of the internal approval procedures by note verbale dated 13 July 2020, and Switzerland did so by note verbale dated 12 May 2022. It is stipulated in the Agreement that it shall enter into force on the date of receipt of the last notification. Switzerland also informed the WTO of the completion of its internal procedures by letter received from the latter on 24 March 2022, such that, in keeping with WTO practice, the Schedule entered into force on that date.

45. Thailand

Statement made in the Sixth Committee, Seventy-third session (2018), 26th meeting, 26 October 2018:[152]

> With regard to the commencement of provisional application, Thailand is a country with a dualist system. Therefore, the application of a treaty or the provisional application of a treaty or a part of a treaty will not automatically form part of Thai law unless properly legislated domestically through internal procedures.

[152] Full text available at: https://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/thailand_2.pdf.

46. Türkiye

Statement made in the Sixth Committee, Seventy-first session (2016), 29th meeting, 2 November 2016:[153]

> Turkish law doesn't allow for provisional application of treaties
>
> …
>
> [The] internal law of many countries, including [Türkiye], does not provide for provisional application of treaties.

Statement made in the Sixth Committee, Seventy-second session (2017), 20th meeting, 25 October 2017:[154]

> In this regard, the Commission should continue to bear in mind that some States, including [Türkiye], are not in a legal position to provisionally apply treaties due to their Constitutional provisions on treaties.

Statement made in the Sixth Committee, Seventy-sixth session (2021), 18th meeting, 27 October 2021:[155]

> In order for [Türkiye] to be legally bound by any international agreement, such agreement has to be approved in accordance with the relevant domestic procedures. In this regard, [the] mere signing of the agreement does not suffice. I also note that [Türkiye] is not party to the *Vienna Convention on the Law of Treaties*, 1969.

[153] Full text available at: https://www.un.org/en/ga/sixth/71/pdfs/statements/ilc/turkey_23.pdf.

[154] Full text available at: https://www.un.org/en/ga/sixth/72/pdfs/statements/ilc/turkey_1.pdf.

[155] Full text available at: https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/18mtg_turkey_1.pdf.

47. United Kingdom of Great Britain and Northern Ireland

Communication transmitted to the Secretariat, 22 July 2022:

Policies and procedures

The Foreign, Commonwealth and Development Office's *Treaties and Memoranda of Understanding (MOUs) Guidance on Practice and Procedures* (March 2022) sets out the United Kingdom's policy and procedures in respect of provisional application of treaties.[156] The relevant section of the Guidance reads:

> *Provisional Application*
>
> 12. Treaties which are subject to ratification can contain an Article which provides for them to be applied provisionally pending their ratification and entry into force ("provisional application"). Provisional application may be either from signature or following notification of the parties' intent to provisionally apply the treaty. The United Kingdom uses provisional application on an exceptional basis. Provisional application is not, and cannot be used as, a means of bypassing Parliamentary procedures (nor is it a substitute for the application of the standard international rules and processes for securing full legal entry into force of treaties). As with ratification, a Letter of Legal Assurance will need to be provided to the FCDO confirming that all legislative steps will have been completed before the United Kingdom agrees to provisionally apply a treaty. It is essential that departments consult FCDO legal advisers and/or International Agreements policy team at the earliest possible opportunity when considering the inclusion of provisions allowing for provisional application in a treaty.

Treaty actions

A survey of United Kingdom practice in respect of provisional application of treaties over the last 5 years (2017–2022) shows that in total the United Kingdom has signed or acceded to 63 treaties which contain provisional application clauses. Provisional application was agreed in respect of one other treaty by way of an exchange of notes. In total the United Kingdom has used provisional application in respect of 29 treaties. Of these, 17 are currently being provisionally applied. Further detail is contained in the [following] four documents, the contents of which are summarised as follows:

> *Annex 1: United Kingdom Treaties Provisional Application Practice 2017–2022*: This annex contains a table listing all United Kingdom treaties in respect of which there are provisional application provisions. The table indicates whether provisional application was used, and if so the date of provisional application, as well as the date of entry into force of the treaty for the UK, if applicable.
>
> *Annex 2: United Kingdom Treaty Series 2017–2022 Provisional Application Terms*: This annex contains a list of 2 treaties not published in either the United Kingdom Country or Miscellaneous Series between 2017 and 2022 which contain provisional application clauses, including the terms of those clauses. We have also included in the list a treaty which was provisionally applied pursuant to an exchange of notes. The exchange has been published on gov.uk but not in *United Kingdom Treaty Series*.
>
> *Annex 3: United Kingdom Country Series 2017–2022 Provisional Application Terms:* This annex contains a list of all treaties published in the United Kingdom Country

[156] The Guidance can be accessed at: https://www.gov.uk/government/publications/treaties-and-mous-guidance-on-practice-and-procedures.

Series between 2017 and 2022 which contain provisional application clauses, including the terms of those clauses.

Annex 4: United Kingdom Miscellaneous Series 2017–2022 Provisional Application Terms: This annex contains a list of all treaties published in *United Kingdom Miscellaneous Series* between 2017 and 2022 which contain provisional application clauses, including the terms of those clauses.

Annex 1: *United Kingdom Treaties Provisional Application Practice 2017–2022*

Treaty title	*Has it been provisionally applied by the UK, either in whole or part? (Yes/No)*	*If Yes, from what date was it provisionally applied by the UK? (DD/MM/YYYY)*	*Has the treaty entered into force for the UK? (Yes/No)*	*If Yes, on what date did it enter into force for the UK? (DD/MM/YYYY)*
UK Treaty Series 2017–2022 and other				
1. UK/EU: Agreement concerning Security Procedures for Exchanging and Protecting Classified Information [TS No.9/2021]	Y	01/01/2021	Y	01/05/2021
2. UK/EU and EAEC: Trade and Cooperation Agreement [TS No.8/2021]	Y	01/01/2021	Y	01/05/2021
3. Exchange of letters on the provisional application of the Agreement between the European Atomic Energy Community and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation on the Safe and Peaceful Uses of Nuclear Energy	Y	01/01/2021	Y	01/05/2021
UK Country Series 2017–2022				
1. UK/Albania: Partnership, Trade and Cooperation Agreement [CS Albania No.1/2021]	N		Y	03/05/2021
2. UK/Ghana: Interim Trade Partnership Agreement [CS Ghana No.1/2021]	Y	05/03/2021	N	

Treaty title	*Has it been provisionally applied by the UK, either in whole or part? (Yes/No)*	*If Yes, from what date was it provisionally applied by the UK? (DD/MM/YYYY)*	*Has the treaty entered into force for the UK? (Yes/No)*	*If Yes, on what date did it enter into force for the UK? (DD/MM/YYYY)*
3. UK/Italy: Agreement concerning the Protection of Classified Information [CS Italy No.1/2021]	Y	22/09/2020	N	
4. UK/Mexico: Trade Continuity Agreement [CS Mexico No.1/2021]	Y	01/01/2021	Y	01/06/2021
5. UK/Moldova: Strategic Partnership, Trade and Cooperation Agreement [CS Moldova No.1/2021]	Y	01/01/2021	N	
6. UK/Serbia: Partnership, Trade and Cooperation Agreement [CS Serbia No.1/2021]	Y	20/05/2021	Y	15/07/2021
7. UK/Switzerland: Temporary Agreement on Services Mobility [CS Switzerland No.2/2021]	Y	31/12/2020	N	
8. UK/Switzerland: Convention on Social Security Coordination [CS Switzerland No.4/2021]	Y	01/11/2021	N	
9. UK/Turkey: Free Trade Agreement [CS Turkey No.1/2021]	Y	01/01/2021	Y	20/04/2021
10. UK/Viet Nam: Free Trade Agreement [CS Viet Nam No.1/2021]	Y	31/12/2020	N	
11. UK/Canada: Agreement on Trade Continuity [CS Canada No.1/2020]	N		Y	01/04/2021
12. UK/Cote d'Ivoire: Stepping Stone Economic Partnership Agreement [CS Cote d'Ivoire No.1/2020]	N		Y	31/12/2020

Treaty title	*Has it been provisionally applied by the UK, either in whole or part? (Yes/No)*	*If Yes, from what date was it provisionally applied by the UK? (DD/MM/YYYY)*	*Has the treaty entered into force for the UK? (Yes/No)*	*If Yes, on what date did it enter into force for the UK? (DD/MM/YYYY)*
13. UK/Netherlands: Agreement concerning Border Controls on Rail Traffic between the Netherlands and the United Kingdom using the Channel Fixed Link [CS Netherlands No.1/2020]	Y	16/10/2020	N	
14. UK/Norway: Agreement on the Continued Application and Amendment of the Convention Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters signed at London on 12 June 1961 [CS Norway No.2/2020]	N		Y	31/12/2020
15. UK/Norway: Framework Agreement on Fisheries [CS Norway No.1/2020]	N		Y	01/01/2021
16. UK/North Macedonia: Partnership, Trade and Cooperation Agreement [CS North Macedonia No.1/2020]	Y	31/12/2020	N	
17. UK/Singapore: Free Trade Agreement [CS Singapore No.1/2020]	Y	31/12/2020	N	
18. UK/Chile: Agreement establishing an Association [CS Chile No.2/2019]	N		Y	31/12/2020
19. UK/Chile: Agreement on Trade in Organic Products [CS Chile No.1/2019]	N		Y	31/12/2020

Treaty title	*Has it been provisionally applied by the UK, either in whole or part? (Yes/No)*	*If Yes, from what date was it provisionally applied by the UK? (DD/MM/YYYY)*	*Has the treaty entered into force for the UK? (Yes/No)*	*If Yes, on what date did it enter into force for the UK? (DD/MM/YYYY)*
20. UK/Denmark: Free Trade Agreement in respect of the Faroe Islands [CS Denmark No.1/2019]	N		Y	31/12/2020
21. UK/Georgia: Strategic Partnership and Cooperation Agreement [CS Georgia No.1/2019]	N		Y	31/12/2020
22. UK/Indonesia: Voluntary Partnership Agreement on Forest Law Enforcement, Governance and Trade in Timber Products [CS Indonesia No.1/2019]	Y	04/01/2021	N	
23. UK/Israel: Trade and Partnership Agreement [CS Israel No.1/2019]	N		Y	31/12/2020
24. UK/Korea: Free Trade Agreement (with Exchange of Notes) [CS Korea No.1/2019]	N		Y	31/12/2020
25. UK/Lebanon: Agreement establishing an Association [CS Lebanon No.1/2019]	N		Y	31/12/2020
26. UK/Liechtenstein: Additional Agreement extending certain provisions of UK/Swiss Trade Agreement to Liechtenstein [CS Liechtenstein No.1/2019]	N		Y	31/12/2020
27. UK/Morocco: Agreement regarding the System of British Schools in Morocco [CS Morocco No.1/2019]	Y	05/07/2018	Y	07/04/2022

Treaty title	*Has it been provisionally applied by the UK, either in whole or part? (Yes/No)*	*If Yes, from what date was it provisionally applied by the UK? (DD/MM/YYYY)*	*Has the treaty entered into force for the UK? (Yes/No)*	*If Yes, on what date did it enter into force for the UK? (DD/MM/YYYY)*
28. UK/Morocco: Agreement establishing an Association [CS Morocco No.2/2019]	Y	01/01/2021	N	
29. UK/Montenegro: Agreement concerning Air Services [CS Montenegro No.3/2019]	Y	01/01/2021	Y	09/06/2021
30. UK/New Zealand: Agreement on Sanitary Measures Applicable to Trade in Live Animals and Animal Product [CS New Zealand No.1/2019]	N		Y	01/01/2021
31. UK/New Zealand: Agreement on Mutual Recognition in Relation to Conformity Assessment [CS New Zealand No.2/2019]	N		Y	01/01/2021
32. UK/Norway: Agreement on International Road Transport, with Protocol [CS Norway No.1/2019]	N		Y	30/12/2020
33. UK/Spain: Agreement on the Participation in Certain Elections of Nationals of each Country Resident in the territory of the other [CS Spain No.2/2019]	Y	31/12/2020	N	
34. UK/Switzerland: Agreement on the International Carriage of Passengers and Goods by Road [CS Switzerland No.1/2019]	N		Y	31/12/2020
35. UK/Switzerland: Agreement relating to Scheduled Air Services [CS Switzerland No.2/2019]	N		Y	31/12/2020

Treaty title	*Has it been provisionally applied by the UK, either in whole or part? (Yes/No)*	*If Yes, from what date was it provisionally applied by the UK? (DD/MM/YYYY)*	*Has the treaty entered into force for the UK? (Yes/No)*	*If Yes, on what date did it enter into force for the UK? (DD/MM/YYYY)*
36. UK/Switzerland: Agreement on Direct Insurance other than Life Insurance and Decision [CS Switzerland No.3/2019]	N		Y	31/12/2020
37. UK/Switzerland: Trade Agreement [CS Switzerland No.4/2019]	N		Y	31/12/2020
38. UK/Switzerland: Agreement on Citizens' Rights following Withdrawal of UK from the EU and Free Movement of Persons Agreement [CS Switzerland No.5/2019]	Y	31/12/2020	Y	01/03/2021
39. UK/Switzerland: Agreement on Admission to the Labour Market for a Temporary Transitional Period following the withdrawal of the UK from the EU and the Free Movement of Persons Agreement [CS Switzerland No.6/2019]	N		N	
40. UK/Switzerland: Transitional Agreement on Social Security for a Temporary Period following the Withdrawal of the UK [CS Switzerland No.7/2019]	N		N	
41. UK/Uzbekistan: Partnership and Cooperation Agreement [CS Uzbekistan No.1/2019]	N		Y	01/05/2021

Treaty title	*Has it been provisionally applied by the UK, either in whole or part? (Yes/No)*	*If Yes, from what date was it provisionally applied by the UK? (DD/MM/YYYY)*	*Has the treaty entered into force for the UK? (Yes/No)*	*If Yes, on what date did it enter into force for the UK? (DD/MM/YYYY)*
UK Miscellaneous Series 2017–2022				
1. UK/Cameroon: Interim Agreement establishing an Economic Partnership [MS No.2/2021]	Y	30/04/2021	Y	09/07/2021
2. Free Trade Agreement between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland [MS No.3/2021]	Y	UK & Norway: 01/12/2021 UK & Liechtenstein: 01/01/2022	N	
3. Special Arrangement between the Governments of France, Belgium, the Netherlands and the UK concerning Security Matters relating to Trains using the Channel Fixed Link [MS No.3/2020]	Y	07/07/2020	N	
4. Agreement between France, Belgium, Netherlands and UK amending the Agreement between Belgium, France and UK concerning Rail Traffic between Belgium and UK using Channel Fixed Link with Protocol, done at Brussels on 15 December 1993 [MS No.4/2020]	N (other States have)		N	
5. Final Act of the International Conference and Decision by the Energy Charter Conference in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty [MS No.5/2020]	Y	31/12/2020	N	

Treaty title	*Has it been provisionally applied by the UK, either in whole or part? (Yes/No)*	*If Yes, from what date was it provisionally applied by the UK? (DD/MM/YYYY)*	*Has the treaty entered into force for the UK? (Yes/No)*	*If Yes, on what date did it enter into force for the UK? (DD/MM/YYYY)*
6. Agreement on Trade in Goods between the United Kingdom of Great Britain and Northern Ireland, Iceland and the Kingdom of Norway [MS No.8/2020]	Y	31/12/2020	Y	22/02/2021
7. Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Kenya, a Member of the East African Community, of the other part [MS No.9/2020]	N		Y	22/03/2021
8. Agreement establishing an Economic Partnership Agreement between the Eastern and Southern Africa States and the UK [MS No.4/2019]	N		Y	01/01/2021
9. Interim Political, Trade and Partnership Agreement between UK and PLO for the benefit of the Palestinian Authority [MS No.14/2019]	N		Y	31/12/2020
10. Interim Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland and the Pacific States [MS No.15/2019]	Y	31/12/2020	N	
11. Agreement between the United Kingdom of Great Britain and Northern Ireland, Iceland and the Kingdom of Norway on Trade in Goods [MS No.17/2019]	N		N	

Treaty title	*Has it been provisionally applied by the UK, either in whole or part? (Yes/No)*	*If Yes, from what date was it provisionally applied by the UK? (DD/MM/YYYY)*	*Has the treaty entered into force for the UK? (Yes/No)*	*If Yes, on what date did it enter into force for the UK? (DD/MM/YYYY)*
12. Economic Partnership Agreement between the CARIFORUM States, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [MS No.18/2019]	Y	31/12/2020	N	
13. Trade Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Colombia, the Republic of Ecuador and the Republic of Peru, of the other part [MS No.22/2019]	N		Y	31/12/2020
14. International Coffee Agreement, 2007 [MS No.28/2019]	N		Y	14/12/2020
15. International Sugar Agreement, 1992 [MS No.30/2019]	N		Y	01/01/2021
16. Grains Trade Convention, 1995 [MS No.31/2019]	N		Y	01/01/2021
17. Agreement Establishing an Association between the UK and Central America [MS No.32/2019]	N		Y	31/12/2020
18. Protocol to the Convention concerning the Construction and Operation of a European X-Ray Free-Electron Laser Facility on the Accession of the UK [MS No.33/2019]	Y	19/03/2018	Y	18/06/2021

Treaty title	*Has it been provisionally applied by the UK, either in whole or part? (Yes/No)*	*If Yes, from what date was it provisionally applied by the UK? (DD/MM/YYYY)*	*Has the treaty entered into force for the UK? (Yes/No)*	*If Yes, on what date did it enter into force for the UK? (DD/MM/YYYY)*
19. UK/SACU and Mozambique: Economic Partnership Agreement [MS No.34/2019]	N		Y	31/12/2020
20. Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer [MS No.2/2017]	N		Y	01/01/2019

Annex 2: *United Kingdom Treaty Series 2017–2022 Provisional Application Terms*

UK/EU: Agreement concerning Security Procedures for Exchanging and Protecting Classified Information [TS No.9/2021]

Article 19

1. This Agreement shall enter into force on the same date as the date on which the Trade and Cooperation Agreement enters into force, provided that, prior to that date, the Parties have notified each other that they have completed their respective internal requirements and procedures for establishing their consent to be bound.

2. This Agreement shall apply as from the date of application of the Trade and Cooperation Agreement or from the date the Parties have notified each other that they have completed their respective internal requirements and procedures to release classified information under this Agreement, whichever is the later. If the Parties have not notified each other that they have completed their respective internal requirements and procedures for establishing their consent to be bound by this Agreement by the date on which provisional application of the Trade and Cooperation Agreement ceases, this Agreement shall cease to apply.

3. This Agreement may be reviewed for consideration of possible amendments at the request of either Party.

4. Any amendment to this Agreement shall be made in writing only and by mutual agreement of the Parties.

UK/EU and EAEC: Trade and Cooperation Agreement [TS No.8/2021]

Article 783
Entry into force and provisional application

1. This Agreement shall enter into force on the first day of the month following that in which both Parties have notified each other that they have completed their respective internal requirements and procedures for establishing their consent to be bound.

2. The Parties agree to provisionally apply this Agreement from 1 January 2021 provided that prior to that date they have notified each other that their respective internal requirements and procedures necessary for provisional application have been completed. Provisional application shall cease on one of the following dates, whichever is the earliest:

(*a*) 28 February 2021 or another date as decided by the Partnership Council; or

(*b*) the day referred to in paragraph 1.

3. As from the date from which this Agreement is provisionally applied, the Parties shall understand references in this Agreement to "the date of entry into force of this Agreement" or to "the entry into force of this Agreement" as references to the date from which this Agreement is provisionally applied.

Exchange of letters on the provisional application of the Agreement between the European Atomic Energy Community and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation on the Safe and Peaceful Uses of Nuclear Energy

A. Letter from the European Atomic Energy Community

HE. Tim Barrow
UK Ambassador to the EU
UK Mission to the European Union

Brussels, 30 December 2020

Dear Ambassador,

Reference is made to the *Agreement between the European Atomic Energy Community and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation on the Safe and Peaceful Uses of Nuclear Energy* ('the Agreement').

I have the honour to inform you that the European Atomic Energy Community is prepared to apply the Agreement on a provisional basis with effect from 1 January 2021, pending its entry into force and the completion of the final legal-linguistic revision process of all language versions of the Agreement, provided that the Government of the United Kingdom of Great Britain and Northern Ireland is prepared to do the same and has further notified the European Atomic Energy Community prior to 1 January 2021 of the completion of its internal requirements and procedures necessary for provisional application.

If the Agreement is provisionally applied, the Parties shall understand references in the Agreement to the entry into force of the Agreement as references to the date from which the Agreement is provisionally applied, namely 1 January 2021. For greater certainty, Article 24(3) of the Agreement shall be understood to apply where provisional application ceases without the Agreement being concluded.

The European Atomic Energy Community proposes that Article 25 of the Agreement is replaced by the following: 'This Agreement shall be drawn up in duplicate in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages. All language versions of the Agreement shall be subject to final legal-linguistic revision, which shall be completed by 30 April 2021. The language versions resulting from this legal-linguistic revision shall replace ab initio the signed versions of the Agreement and shall be established as authentic and definitive by an exchange of diplomatic notes between the Parties.'

I should be obliged if you would confirm the agreement to the foregoing by the Government of the United Kingdom of Great Britain and Northern Ireland on the conditions specified in this letter.

Please accept, Sir, the assurance of my highest consideration.

On behalf of the European Atomic Energy Community
Ilze Juhansone

B. Letter from the United Kingdom of Great Britain and Northern Ireland

Ms. Ilze Juhansone
Secretariat-General
European Commission

30th December 2020

Dear Secretary-General,

I have the honour to acknowledge receipt of your letter of today's date, which reads as follows:

> Reference is made to the *Agreement between the European Atomic Energy Community and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation on the Safe and Peaceful Uses of Nuclear Energy* ("the Agreement").

I have the honour to inform you that the European Atomic Energy Community is prepared to apply the Agreement on a provisional basis with effect from 1 January 2021, pending its entry into force and the completion of the final legal-linguistic revision process of all language versions of the Agreement, provided that the Government of the United Kingdom of Great Britain and Northern Ireland is prepared to do the same and has further notified the European Atomic Energy Community prior to 1 January 2021 of the completion of its internal requirements and procedures necessary for provisional application.

If the Agreement is provisionally applied, the Parties shall understand references in the Agreement to the entry into force of the Agreement as references to the date from which the Agreement is provisionally applied, namely 1 January 2021. For greater certainty, Article 24(3) of the Agreement shall be understood to apply where provisional application ceases without the Agreement being concluded.

The European Atomic Energy Community proposes that Article 25 of the Agreement is replaced by the following: "This Agreement shall be drawn up in duplicate in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages. All language versions of the Agreement shall be subject to final legal-linguistic revision, which shall be completed by 30 April 2021. The language versions resulting from this legal-linguistic revision shall replace *ab initio* the signed versions of the Agreement and shall be established as authentic and definitive by an exchange of diplomatic notes between the Parties.»

I have the honour to confirm the agreement of the Government of the United Kingdom of Great Britain and Northern Ireland to provisional application of the Agreement on the conditions specified in your letter, including further notification of completion of its internal requirements and procedures necessary for provisional application.

Please accept, Madam, the assurance of my highest consideration.

On behalf of the Government of the United Kingdom of Great Britain and Northern Ireland
Lindsay Croisdale-Appleby, CMG

Annex 3: *United Kingdom Country Series 2017–2022 (Provisional Application Terms)*

UK/Albania: Partnership, Trade and Cooperation Agreement [CS Albania No.1/2021]

Article 12
Entry into force and provisional application

1. Articles 135 and 136 of the *EU-Albania Agreement* shall not be incorporated into this Agreement.

2. Each of the Parties shall notify the other in writing, through diplomatic channels, of the completion of the procedures required by its law for the entry into force of this Agreement.

3. This Agreement shall enter into force on the later of:

(*a*) the date on which the *EU-Albania Agreement* ceases to apply to the United Kingdom; and

(*b*) the date of the later of the Parties' notifications that they have completed their internal procedures.

4. Pending entry into force of this Agreement, the negotiating States may agree to provisionally apply this Agreement, or specific provisions thereof, by an exchange of notifications signifying the completion of ratification or such other domestic procedures as are required for provisional application. Such provisional application shall take effect on the later of:

(*a*) the date on which the *EU-Albania Agreement* ceases to apply to the United Kingdom; and

(*b*) the date of the later of the negotiating States' notifications.

5. A negotiating State may terminate the provisional application of this Agreement by giving written notice to the other negotiating State. Such termination shall take effect one month following the date of notification.

6. Where this Agreement is, or certain provisions of this Agreement are, provisionally applied, the term 'entry into force of this Agreement' in any provisionally applied provisions shall be deemed to refer to the date that such provisional application takes effect.

7. The United Kingdom shall submit notifications under this Article to Albania's Ministry of Foreign Affairs or its successor. Albania shall submit notifications under this Article to the United Kingdom's Foreign, Commonwealth and Development Office or its successor.

UK/Ghana: Interim Trade Partnership Agreement [CS Ghana No.1/2021]

Article 83
Ratification and entry into force

1. This Agreement shall be ratified or approved by each Party in accordance with their respective constitutional rules and procedures.

2. Each of the Parties shall notify the other in writing, through diplomatic channels, of the completion of the procedures required by its law for the entry into force, or provisional application, of this Agreement.

3. This Agreement shall enter into force on the first day of the first month, or on such other date as the Parties may otherwise agree, following the date on which Ghana and the UK have notified each other of the completion of the procedures for this purpose.

4. Pending the entry into force of this Agreement, Ghana and the UK may agree to provisionally apply the Agreement, in whole or in part. Such provisional application shall take effect from the date of the later notification by which the Parties notify each other that they have completed their respective legal requirements and procedures for provisional application.

5. A Party may terminate the provisional application of this Agreement by giving written notice to the other Party. Such termination shall take effect on the first day of the first month following notification.

6. If, pending the entry into force of this Agreement, the Parties decide to apply it provisionally, all references to the date of entry into force shall be deemed to refer to the date such provisional application takes effect.

7. Notwithstanding paragraph 4 of this Article, Ghana and the UK may take measures to apply this Agreement, in whole or in part, before provisional application, to the extent feasible.

8. This Agreement shall be superseded by a free trade agreement concluded at the regional level between West Africa and the UK from the date of entry into force of that agreement. In this case, the Parties will endeavour to ensure that the free trade agreement at a regional level preserves most of the benefits obtained by Ghana through this Agreement.

UK/Italy: Agreement concerning the Protection of Classified Information [CS Italy No.1/2021]

Article 15
Final Provisions

(1) Each Party shall notify the other Party by the exchange of diplomatic notes once the internal legal procedures necessary for entry into force of this Agreement have been completed. This Agreement shall enter into force on the first day of the second month following the receipt of the later notification.

(2) This Agreement shall be applied provisionally from the date of signature.

(3) This Agreement may be amended at any time at the request of either Party. Agreed amendments shall enter into force on the first day of the second month following the exchange of diplomatic notes.

(4) The NSAs or CSAs may conclude implementing arrangements pursuant to this Agreement.

(5) This Agreement shall remain in force until further notice. Either Party may terminate this Agreement by submitting a diplomatic note to the other Party. In that case, this Agreement shall terminate six months after the notification is received by the other Party.

(6) In case of termination of this Agreement, all Classified Information generated and/or provided by the Parties shall continue to be protected in accordance with the provisions set forth herein. If requested, such Classified Information shall be securely returned by the Receiving Party to the Providing Party.

(7) After the entry into force of this Agreement, the Party in whose territory the Agreement is concluded shall take immediate measures so as to have this Agreement registered by the Secretariat of the United Nations in accordance with Article 102 of the UN Charter. That Party shall notify the other Party of the registration and of the registration number in the UN Treaty Series as soon as the UN Secretariat has issued it.

(8) Upon the entry into force of this Agreement, the General Security Arrangement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Italian Republic concerning the protection of classified infor-

mation exchanged for the purposes of research, development, production and procurement between the two countries, dated 16 February 2004 as amended, shall be terminated. Any Classified Information generated and/or provided previously under that Arrangement shall be protected in accordance with the provisions of this Agreement.

UK/Mexico: Trade Continuity Agreement [CS Mexico No.1/2021]

Article 12
Entry into force and provisional application

1. Articles 59 and 60 of the EU-Mexico EPPCCA shall not be incorporated into this Agreement.

2. Each Party shall notify the other Party in writing, through diplomatic channels, of the completion of its domestic procedures required for the entry into force of this Agreement.

3. This Agreement shall enter into force on the later of:

(*a*) the date of receipt of the later of the Parties' notifications that they have completed their domestic procedures; or

(*b*) the date on which the EU-Mexico EPPCCA ceases to apply to the UK.

4. Notwithstanding paragraph 3 and pending its entry into force, the Parties may apply this Agreement provisionally, in accordance with their respective internal procedures, as applicable.

5. The provisional application shall begin on the later of:

(*a*) the date on which both: i. the UK has notified Mexico of the completion of its internal procedures for such purpose; and ii. Mexico has notified the UK of the completion of its internal procedures; or

(*b*) the date on which the EU-Mexico EPPCCA ceases to apply to the UK.

6. If this Agreement is provisionally applied in accordance with paragraph 5, the Parties shall understand the term "entry into force of this Agreement" as meaning the date of provisional application.

UK/Moldova: Strategic Partnership, Trade and Cooperation Agreement [CS Moldova No.1/2021]

Article 392
Entry into force and provisional application

1. This Agreement shall be ratified or approved in accordance with each of the Parties' own internal procedures. Each Party shall notify the other Party of the completion of those procedures.

2. This Agreement shall enter into force on the date of receipt of the later of the Parties' notifications that they have completed their internal procedures.

3. Pending entry into force of this Agreement, the Parties agree to provisionally apply this Agreement in accordance with each of the Parties' own internal procedures.

4. This Agreement shall be applied provisionally between the Parties on the later of:

(*a*) the date on which the EU-Moldova Agreement ceases to apply to the United Kingdom; and

(*b*) the date of receipt of the later notification of provisional application from the United Kingdom or from the Republic of Moldova.

5. Notifications under paragraphs 2 and 4 of this Article shall be submitted by the United Kingdom to the Republic of Moldova's Ministry of Foreign Affairs and European Integration or its successor and by the Republic of Moldova to the United Kingdom's Foreign, Commonwealth and Development Office or its successor.

6. If pending the entry into force of this Agreement it is provisionally applied pursuant to paragraphs 3 and 4, unless this Agreement provides otherwise, all references in this Agreement to the date of entry into force shall be deemed to refer to the date such provisional application takes effect.

7. Either Party may give written notification, through diplomatic channels, to the other Party of its intention to terminate the provisional application of this Agreement. Termination of provisional application shall take effect two months after receipt of the notification by the other Party of this Agreement.

UK/Serbia: Partnership, Trade and Cooperation Agreement [CS Serbia No.1/2021]

Article 12
Entry into force and provisional application

1. Articles 138 and 139 of the *EU-Serbia Agreement* shall not be incorporated into this Agreement.

2. Each of the Parties shall notify the other in writing, through diplomatic channels, of the completion of the procedures required by its law for the entry into force of this Agreement.

3. This Agreement shall enter into force on the date of the later of the Parties' notifications that they have completed their internal procedures.

4. Pending entry into force of this Agreement, the negotiating States may agree to apply this Agreement provisionally. Such provisional application shall take effect on the date of the later of the negotiating States' notifications that they have completed their internal procedures for provisional application.

5. A negotiating State may terminate the provisional application of this Agreement by giving written notice to the other negotiating State. Such termination shall take effect one month following the date of notification.

6. Where this Agreement is provisionally applied, the term 'entry into force of this Agreement' shall be deemed to refer to the date that such provisional application takes effect.

7. The United Kingdom shall submit notifications under this Article to Serbia's Ministry of Foreign Affairs or its successor. Serbia shall submit notifications under this Article to the United Kingdom's Foreign, Commonwealth and Development Office or its successor.

UK/Switzerland: Temporary Agreement on Services Mobility [CS Switzerland No.2/2021]

Article 19
Entry into force, provisional application and duration

1. The Parties shall ratify or approve this Agreement in accordance with their domestic procedures. Each Party shall notify the other Party of the completion of those procedures.

2. This Agreement shall enter into force when the FMOPA ceases to apply to the United Kingdom, provided that the Parties have notified each other pursuant to paragraph 1 by that date. Otherwise, this Agreement shall enter into force on the first day of the second month following the later of the Parties' notifications pursuant to paragraph 1.

3. Pending entry into force of this Agreement, the Parties may, in accordance with their respective internal requirements and procedures, provisionally apply this Agreement. A Party intending to provisionally apply this Agreement shall notify the other Party of the completion of its internal requirements and procedures in this regard. Such provisional application shall take effect on the later of:

(*a*) the date on which the FMOPA ceases to apply to the United Kingdom; and

(*b*) the date of the later of the Parties' notification of the completion of its internal requirements and procedures for provisional application.

4. A Party may terminate the provisional application of this Agreement by written notice to the other Party. Such termination shall take effect on the first day of the second month following that notification. Where this Agreement is provisionally applied, the term "entry into force of this Agreement" shall be deemed to refer to the date on which such provisional application takes effect.

5. A Party may terminate this Agreement by notification to the other Party of its intention to do so. It shall cease to be in force six months after receipt of that notification.

6. This Agreement shall end two years from its entry into force, unless the Parties agree otherwise.

UK/Switzerland: Convention on Social Security Coordination [CS Switzerland No.4/2021]

Article 73
Provisional application

(1) Pending its entry into force, the States may agree to provisionally apply this Convention by an exchange of notes through diplomatic channels. Provisional application shall take effect on the day following the later of the States' notes.

(2) Either State may terminate the provisional application of this Convention by giving written notice to the other State. Such termination shall take effect on the first day of the second month following notification.

(3) Where this Convention is provisionally applied, the term "entry into force of this Convention" in any provisionally applied provisions shall be deemed to refer to the date that such provisional application takes effect.

UK/Turkey: Free Trade Agreement [CS Turkey No.1/2021]

Article 13.3
Entry into force and termination

1. This Agreement is subject to ratification. The Parties shall notify each other in writing, through diplomatic channels, of the completion of their respective legal requirements for the entry into force of this Agreement.

2. This Agreement shall enter into force on the date of the receipt of the later of the notifications between the Parties pursuant to the first paragraph.

3. Pending entry into force, this Agreement or specific provisions thereof shall apply as of 1 January 2021 for both Parties, on the condition that the Parties notify each other to that effect through diplomatic channels before that date.

4. Either Party may terminate this Agreement after it has entered into force by providing written notice through diplomatic channels of its intent to terminate the Agreement to the

other Party. Termination shall take effect six months after the date on which a Party has provided that written notice to the other Party, or on such other date as the Parties may agree.

UK/Viet Nam: Free Trade Agreement [CS Viet Nam No.1/2021]

Article 9
Final provisions

1. Each Party shall notify the other Party of the completion of its applicable internal legal procedures required for the entry into force of this Agreement.

2. Unless the Parties agree to such other date, this Agreement enters into force on the later of:

(*a*) the first day of the second month following the date of receipt of the latter of the Parties' notifications that they have completed their applicable internal legal procedures; or

(*b*) the date on which the EU-Viet Nam FTA ceases to apply to the United Kingdom.

3. (*a*) Pending entry into force of this Agreement, the Parties may provisionally apply this Agreement by an exchange of written notifications. Such provisional application shall take effect from the date of receipt of the later of the Parties' notifications.

(*b*) A Party may terminate the provisional application of this Agreement by giving written notice to the other Party. Such termination shall take effect on the first day of the second month following the date of receipt of the notification.

4. Where this Agreement is provisionally applied, the term 'entry into force of this Agreement' in any provisionally applied provisions shall be deemed to refer to the date that such provisional application takes effect.

5. The United Kingdom shall submit notifications under this Article to the Ministry of Foreign Affairs of Viet Nam or its successor. Viet Nam shall submit notifications under this Article to the United Kingdom's Foreign, Commonwealth and Development Office or its successor.

6. This Agreement is drawn up in the English and Vietnamese languages, each of these texts being equally authentic.

UK/Canada: Agreement on Trade Continuity [CS Canada No.1/2020]

Article VII
Entry into force and provisional application

1. This Agreement shall be approved by the Parties in accordance with their domestic procedures.

2. This Agreement shall enter into force on:

(*a*) the later of:

(i) the date on which CETA ceases to apply to the United Kingdom; or

(ii) the date of the later of the Parties' notifications that they have completed their domestic procedures; or

(*b*) such other date as the Parties may otherwise agree.

3. Pending the entry into force of this Agreement, the Parties may provisionally apply this Agreement or provisions thereof by an exchange of written notifications. Such provisional application shall take effect on the later of:

(*a*) the date on which CETA ceases to apply to the United Kingdom; or

(*b*) the date of the later of the Parties' notifications that they have completed their respective internal requirements and procedures necessary for provisional application of this Agreement.

4. A Party may terminate the provisional application of this Agreement by written notice to the other Party. Such termination shall take effect on the first day of the second month following the date the notification is received, unless the notification provides for a later date.

5. If the Parties provisionally apply this Agreement, or certain provisions of it, the term "entry into force of this Agreement" in this Agreement, or in those provisions, shall be deemed to refer to the date that such provisional application takes effect.

6. The United Kingdom shall submit notifications under this Article to Canada's Department of Foreign Affairs, Trade and Development or its successor. Canada shall submit notifications under this Article to the United Kingdom's Foreign, Commonwealth and Development Office or its successor.

7. The Canada-UK Joint Committee and other bodies established under this Agreement may exercise their functions during the provisional application of this Agreement. Any decisions adopted in the exercise of their functions will cease to be effective if the provisional application of this Agreement is terminated under paragraph 4.

UK/Cote d'Ivoire: Stepping Stone Economic Partnership Agreement [CS Cote d'Ivoire No.1/2020]

Article 74
Entry into force and denunciation

1) This Agreement shall be signed, ratified or approved in accordance with the constitutional rules specific to each Party.

2) Each of the Parties shall notify the other in writing, through diplomatic channels, of the completion of the procedures required by its law for the entry into force of this Agreement.

3) This Agreement shall enter into force on the later of:

a) the date on which the EU-Côte d'Ivoire Stepping Stone EPA ceases to apply to the United Kingdom; or

b) the date of the later notification by which the Parties notify each other that they have completed their respective legal requirements and procedures; or

c) from such other date as the Parties agree.

4) Pending entry into force of the Agreement, the Parties may agree to apply it provisionally, in accordance with their respective laws or by ratification of the Agreement.

a) Such provisional application shall take effect from the later of: i. the date on which the EU-Côte d'Ivoire Stepping Stone EPA ceases to apply to the United Kingdom; ii. the date of the later notification by which the Parties notify each other that they have completed their respective legal requirements and procedures for provisional application; or iii. from such other date as the Parties agree.

b) A Party may terminate the provisional application of the Agreement by giving written notice to the other Party. Such termination shall take effect on the first day of the first month following notification.

c) If a Party intends not to provisionally apply a provision of this Agreement, it shall first notify the other Party of the provisions that it will not provisionally apply, and the Parties shall enter consultations promptly to reach an agreement in writing of those provisions exempt from provisional application. The provisions that are not subject to a notification by a Party and agreement by the other Party shall provisionally apply from the date provisional application of this Agreement comes into effect under subparagraph (*a*).

5) If this Agreement or certain provisions of this Agreement are provisionally applied pending its entry into force, unless this instrument provides otherwise, all references in this Agreement to the date of entry into force shall be deemed to refer to the date that such provisional application takes effect.

6) The United Kingdom shall submit notifications under this Article to Côte d'Ivoire's Ministry of African Integration and Ivorians Abroad or its successor. Côte d'Ivoire shall submit notifications under this Article to the United Kingdom's Department for International Trade or its successor.

7) Notwithstanding paragraph 4, the UK and Côte d'Ivoire may apply the agreement, in whole or in part, before its provisional application, to the extent that this is possible under their national legislation.

8) Either Party may give written notice to the other of its intention to denounce this Agreement. Denunciation shall take effect six months after notification to the other Party.

9) This Agreement shall be superseded by a global EPA concluded at regional level with the UK on the date of its entry into force. In this case, the Parties shall endeavour to ensure that the global EPA at regional level preserves most of the benefits obtained by Côte d'Ivoire under this Agreement.

UK/Netherlands: Agreement concerning Border Controls on Rail Traffic between the Netherlands and the United Kingdom using the Channel Fixed Link [CS Netherlands No.1/2020]

Article 21
Provisional Application

1. Either Contracting Party may, at the time of its signature or at any time thereafter, notify the other Contracting Party in writing that it will provisionally apply this Agreement and its Protocol, in full or limited to certain provisions, pending its entry into force in accordance with Article 20. Such provisional application shall take effect on the date of the later Contracting Party's notification.

2. A Contracting Party may terminate the provisional application of this Agreement and its Protocol by giving written notice to the other Contracting Party. Such termination shall take effect on the first day following the expiry of a two month period after the date upon which the notification is received, unless the Contracting Parties mutually agree for the termination to take effect sooner.

UK/Norway: Agreement on the Continued Application and Amendment of the Convention Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters signed at London on 12 June 1961 [CS Norway No.2/2020]

Article 3

1. Each of the Parties to this Amendment Agreement shall notify the other Party of the completion of the procedures required by its law for the entry into force of this Amendment Agreement.

2. This Amendment Agreement shall enter into force on the later of:

(i) the date on which the *Lugano Convention* 2007 ceases to apply to the United Kingdom; and

(ii) the date on which both the Parties have notified each other in accordance with paragraph (1).

3. Pending entry into force of this Amendment Agreement the Parties may agree to provisionally apply this Amendment Agreement, by an exchange of notifications through diplomatic channels. Such provisional application shall take effect on the later of:

(i) the date on which the *Lugano Convention* of 2007 ceases to apply to the United Kingdom;

(ii) the date of the later of the Parties' notifications.

4. A Party may terminate the provisional application of this Amendment Agreement by written notification to the other Party. Such termination shall take effect on the first day of the second month following that notification.

UK/Norway: Framework Agreement on Fisheries [CS Norway No.1/2020]

Article 11
Entry into Force, Duration and Termination

1. This Agreement shall enter into force on:

(*a*) 1 January 2021, provided that, prior to that date, the Parties have notified each other in writing through the diplomatic channel of the completion of their respective domestic requirements necessary for the entry into force of this Agreement; or

(*b*) the date of receipt of the latter of the written notifications referred to in the previous sub-paragraph in the event that this is later than 1 January 2021.

2. This Agreement shall remain in force for an initial period ending on 31 December 2026 and thereafter for subsequent, consecutive periods of 4 years unless terminated in accordance with paragraph 3 of this Article.

3. Either Party may terminate this Agreement by giving notice to the other Party at least one year before the expiry of the initial period referred to in paragraph 2 of this Article, or at least one year before the expiry of each subsequent 4 year period. Where notice is given under this paragraph the Agreement shall cease to have effect at the end of the period in question.

4. Pending its entry into force in accordance with paragraph 1(*b*), this Agreement shall be provisionally applied from 1 January 2021, unless the Parties otherwise agree by exchange of diplomatic notes.

5. Provisional application of this Agreement shall be terminated upon entry into force of the Agreement, or upon receipt of notice given by one Party to the other.

6. Notice under paragraphs 3 and 5 shall be given in writing through the diplomatic channel.

UK/North Macedonia: Partnership, Trade and Cooperation Agreement [CS North Macedonia No.1/2020]

Article 12
Entry into Force and Provisional Application

1. Articles 127 and 128 of the *EU-North Macedonia Agreement* shall not be incorporated into this Agreement.

2. Each of the Parties shall notify the other in writing, through diplomatic channels, of the completion of the procedures required by its law for the entry into force of this Agreement.

3. This Agreement shall enter into force on the later of:

(*a*) the date on which the *EU-North Macedonia Agreement* ceases to apply to the United Kingdom; or

(*b*) the date of the later of the Parties' notifications that they have completed their internal procedures.

4. Pending entry into force of this Agreement, the negotiating States may agree to provisionally apply this Agreement, or specific provisions thereof, by an exchange of notifications signifying the completion of ratification or such other domestic procedures as are required for provisional application. Such provisional application shall take effect on the later of:

(*a*) the date on which the *EU-North Macedonia Agreement* ceases to apply to the United Kingdom; or

(*b*) the date of the later of the negotiating States' notifications.

5. A negotiating State may terminate the provisional application of this Agreement by giving written notice to the other negotiating State. Such termination shall take effect one month following the date of notification.

6. Where this Agreement is, or certain provisions of this Agreement are, provisionally applied, the term 'entry into force of this Agreement' in any provisionally applied provisions shall be deemed to refer to the date that such provisional application takes effect.

7. The United Kingdom shall submit notifications under this Article to North Macedonia's Ministry of Foreign Affairs or its successor. North Macedonia shall submit notifications under this Article to the United Kingdom's Foreign, Commonwealth and Development Office or its successor.

UK/Singapore: Free Trade Agreement [CS Singapore No.1/2020]

Article 9
Final provisions

1. This Agreement shall enter into force on the first day of the second month following the later of the Parties' written notifications certifying that they have completed their respective applicable legal requirements and procedures for the entry into force of this Agreement. The Parties may agree on another date, provided such date occurs after the completion of the exchange of notifications referred to above.

2. Pending entry into force of this Agreement, this Agreement shall be provisionally applied on the date on which the *EU-Singapore FTA* ceases to apply to the United Kingdom, provided that the Parties have exchanged notifications signifying completion of such domestic procedures as are required for provisional application. Otherwise, such provisional application shall take effect on such date as the Parties may agree.

3. During the period of such provisional application, the term "entry into force" in this Agreement means the date on which such provisional application takes effect.

4. A Party may terminate the provisional application of this Agreement by written notification to the other Party. Such termination shall take effect on the first day of the second month following such notification.

5. The provisional application of this Agreement terminates upon the earlier of its entry into force in accordance with paragraph 1 or the date of effect for termination in accordance with paragraph 4.

6. The United Kingdom shall submit notifications under this Article to the Director, North America and Europe Division, Singapore Ministry of Trade and Industry or its successor. Singapore shall submit notifications under this Article to the United Kingdom's Foreign, Commonwealth and Development Office or its successor.

7. English shall be the sole authentic text of this Agreement.

UK/Chile: Agreement establishing an Association [CS Chile No.2/2019]

Article 10
Entry into Force and Provisional Application

1. Article 198 of the EU-Chile Agreement shall not be incorporated into this Agreement.

2. Each Party shall notify the other Party of the completion of its domestic procedures required for the entry into force of this Agreement.

3. This Agreement shall enter into force on:

(*a*) the later of: (i) the date on which the *EU-Chile Agreement* ceases to apply to the United Kingdom;[157] or (ii) the first day of the second month following the date of the later of the notifications by which the Parties notify each other that they have completed their respective legal requirements and procedures; or

(*b*) such date as the Parties may otherwise agree.

4. Notwithstanding paragraph 3, the negotiating States agree to apply this Agreement, or specific provisions thereof, from the later of:

(*a*) the date on which the *EU-Chile Agreement* ceases to apply to the United Kingdom; or

(*b*) the date of the later of the negotiating States' notifications signifying the completion of such domestic procedures as are required for provisional application.

5. A negotiating State may terminate the application of the Agreement, or specific provisions thereof, as agreed under paragraph 4, by giving written notice to the other negotiating State. Such termination shall take effect on the first day of the second month following the date of such notification.

6. Where this Agreement is, or certain provisions of this Agreement are, applied under paragraph 4, any reference to the term 'entry into force of this Agreement' in such provisions shall be deemed to refer to the date from which the negotiating States agree to apply those provisions in accordance with paragraph 4.

7. The United Kingdom shall submit notifications under this Article to the General Directorate of International Economic Relations (DIRECON) of the Ministry of Foreign Affairs of Chile or its successor. Chile shall submit notifications under this Article to the United Kingdom's Department for International Trade or its successor.

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[157] For certainty, Chile will be notified of the date referred to in this paragraph and paragraph (4)(*a*) either by the United Kingdom or through other means.

UK/Chile: Agreement on Trade in Organic Products [CS Chile No.1/2019]

Article 9
Entry into Force and Provisional Application

1. Paragraph 1 of Article 15 of the *EU-Chile Organics Agreement* shall not be incorporated into this Agreement.

2. Each Party shall notify the other Party of the completion of its domestic procedures required for the entry into force of this Agreement.

3. This Agreement shall enter into force on:

(*a*) the later of: (i) the date on which the *EU-Chile Organics Agreement* ceases to apply to the United Kingdom;[158] or (ii) the first day of the second month following the date of the later of the notifications by which the Parties notify each other that they have completed their respective legal requirements and procedures; or

(*b*) such date as the Parties may otherwise agree.

4. Notwithstanding paragraph 3, the negotiating States agree to apply this Agreement, or specific provisions thereof, from the later of:

(*a*) the date on which the *EU-Chile Organics Agreement* ceases to apply to the United Kingdom; or

(*b*) the date of the later of the negotiating States' notification signifying the completion of such domestic procedures as are required for provisional application.

5. A negotiating State may terminate the application of this Agreement, or specific provisions thereof, as agreed under paragraph 4, by giving written notice to the other negotiating State. Such termination shall take effect on the first day of the second month following the date of such notification.

6. Where this Agreement is, or certain provisions of this Agreement are, applied under paragraph 4, any reference to the term 'entry into force of this Agreement' in such provisions shall be deemed to refer to the date from which the negotiating States agree to apply those provisions in accordance with paragraph 4.

7. The United Kingdom shall submit notifications under this Article to the General Directorate of International Economic Relations (DIRECON) of the Ministry of Foreign Affairs of Chile or its successor. Chile shall submit notifications under this Article to the United Kingdom's Department for International Trade or its successor.

UK/Denmark: Free Trade Agreement in respect of the Faroe Islands [CS Denmark No.1/2019]

Article 10
Entry into Force and Provisional Application

1. Article 40 of the *EU-Faroe Islands Agreement* shall not be incorporated into this Agreement.

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[158] 3 For certainty, Chile will be notified of the date referred to in this paragraph and paragraph (4)(*a*) either by the United Kingdom or through other means.

2. Each of the Parties shall notify the other in writing of the completion of the procedures required by its law for the entry into force of this Agreement.

3. This Agreement shall enter into force on the later of:

(*a*) the date on which the *EU-Faroe Islands Agreement* ceases to apply to the United Kingdom; or

(*b*) the date of receipt of the later of the Parties' notifications that they have completed their domestic procedures required for entry into force.

4. (*a*) Pending entry into force of this Agreement, the Parties may agree to provisionally applying this Agreement in accordance with such domestic procedures as are required for provisional application. Such provisional application shall take effect on the later of: (i) the date on which the *EU-Faroe Islands Agreement* ceases to apply to the United Kingdom; or (ii) the date of the later of the negotiating States' notifications that they have completed their domestic procedures for allowing provisional application pending the entry into force of this Agreement.

(*b*) A Party may terminate the provisional application of this Agreement by written notice to the other Party. Such termination shall take effect on the first day of the second month following notification.

(*c*) If a Party intends not to provisionally apply a provision of this Agreement, it shall first notify the other Party of the provisions that it will not provisionally apply, and the Parties shall enter consultations promptly to agree those provisions exempt from provisional application. The provisions that are not subject to a notification by a Party under this subparagraph, shall provisionally apply from the date the provisional application of this Agreement comes into effect under subparagraph (*a*).

5. If this Agreement or certain provisions of this Agreement are provisionally applied pending its entry into force, unless this Instrument provides otherwise, all references in this Agreement to the date of entry into force shall be deemed to refer to the date that such provisional application takes effect.

6. The United Kingdom shall submit notifications under this Article to the Ministry of Foreign Affairs and Trade of the Faroe Islands or its successor. The Faroe Islands shall submit notifications under this Article to the United Kingdom's Department for International Trade or its successor.

UK/Georgia: Strategic Partnership and Cooperation Agreement [CS Georgia No.1/2019]

Article 366
Entry into force and provisional application

1. This Agreement shall be ratified or approved in accordance with each of the Parties' own internal procedures. Each Party shall notify the other Party of the completion of those procedures.

2. This Agreement shall enter into force on the later of:

(*a*) the date on which the *EU-Georgia Agreement* ceases to apply to the United Kingdom, or

(*b*) The date of receipt of the later of the Parties' notifications that they have completed their internal procedures.

3. Pending entry into force of this Agreement, the Parties may agree to provisionally apply this Agreement in accordance with each of the Parties' own internal legislation and procedures.

4. Where agreed pursuant to Article 366(3), this Agreement shall be applied provisionally between the Parties on the later of:

(*a*) the date on which the *EU-Georgia Agreement* ceases to apply to the United Kingdom, or

(*b*) the date of receipt of the later of the notification of provisional application from the United Kingdom or of the ratification or provisional application from Georgia.

5. Notifications regarding completion of internal procedures under paragraphs 1 and 3 of this Article shall be submitted by the United Kingdom to Georgia's Ministry of Foreign Affairs or its successor and by Georgia to the United Kingdom's Foreign and Commonwealth Office or its successor.

6. If pending the entry into force of this Agreement it is provisionally applied pursuant to paragraphs 3 and 4, unless this instrument provides otherwise, all references in this Agreement to the date of entry into force shall be deemed to refer to the date such provisional application takes effect, to the extent permitted by national legislation.

7. Either Party may give written notification to the other Party of its intention to terminate the provisional application of this Agreement. Notwithstanding Article 364(2), termination of provisional application shall take effect two months after receipt of the notification by the other Party.

UK/Indonesia: Voluntary Partnership Agreement on Forest Law Enforcement, Governance and Trade in Timber Products [CS Indonesia No.1/2019]

Article 24
Provisional Application

1. Pending entry into force of this Agreement, the Parties may agree to provisionally apply this Agreement by an exchange of notifications. Such provisional application shall take effect on the later of:

(*a*) the date on which the *Voluntary Partnership Agreement between the European Union and Indonesia* ceases to apply to the United Kingdom; and

(*b*) the date of the later of the Parties' notifications.

2. A Party may terminate the provisional application of the Agreement by giving written notice to the other Party. Such termination shall take effect one month following notification.

3. Notification, for the purpose of this Article, shall be made through diplomatic channels.

UK/Israel: Trade and Partnership Agreement [CS Israel No.1/2019]

Article 9
Entry into Force and Provisional Application

1. Each Party shall notify the other Party of the completion of its domestic procedures required for the entry into force of this Agreement.

2. This Agreement shall enter into force on the later of:

(*a*) the date on which the EU-Israel Trade Agreements cease to apply to the United Kingdom; or

(*b*) the date of the second of the Diplomatic Notes by which the Parties notify each other that they have completed their respective legal requirements and procedures.

3. Pending entry into force of this Agreement, the Parties shall provisionally apply this Agreement, or provisions of it, in accordance with Article 9(4).

4. This Agreement, or provisions of it, shall be provisionally applied from the later of: (*a*) the date on which the EU-Israel Trade Agreements cease to apply to the United Kingdom; or (*b*) the date of the later of either the receipt of notification of provisional application by the United Kingdom, or of receipt of the Diplomatic Note by which Israel notifies ratification and provisional application.

5. A Party may terminate the provisional application of this Agreement, or provisions of it, by written notification to the other Party. Such termination shall take effect on the first day of the third month following the notification.

6. The provisional application of this Agreement shall terminate upon its entry into force.

7. If, pending the entry into force of this Agreement, this Agreement is applied provisionally, unless this Instrument provides otherwise, all references in this Agreement to the date of entry into force shall be deemed to refer to the date such provisional application takes effect.

UK/Korea: Free Trade Agreement (with Exchange of Notes) [CS Korea No.1/2019]

Article 15.10
Entry into Force

1. This Agreement shall enter into force when the Korea-EU FTA ceases to apply to the United Kingdom, provided that the Parties have notified each other that they have completed their domestic procedures by that date. Otherwise, this Agreement shall enter into force on such date as the Parties may agree.

2. (*a*) This Agreement shall be provisionally applied from the first day of the month following the date on which the United Kingdom and Korea have notified each other of the completion of their respective relevant procedures or from such other date as the Parties agree.

(*b*) A Party may terminate provisional application by written notice to the other Party. Such termination shall take effect on the first day of the month following notification.

(*c*) Where this Agreement is provisionally applied, the term "entry into force of this Agreement" shall be understood to mean the date of provisional application.

UK/Lebanon: Agreement establishing an Association [CS Lebanon No.1/2019]

Article 11
Entry into force and provisional application

1. Articles 92 and 93 of the *EU-Lebanon Association Agreement* and Article 23 of the *EU-Lebanon Dispute Settlement Mechanism Protocol* shall not be incorporated into this Agreement.

2. Each of the Parties shall notify the other in writing of the completion of the procedures required by its law for the entry into force of this Agreement.

3. This Agreement shall enter into force on the later of:

(*a*) the date on which the EU-Lebanon Agreements cease to apply to the United Kingdom; and

(*b*) the date of the later of the notifications by which the Parties notify each other that they have completed their respective legal procedures.

4. Pending entry into force of this Agreement, the Parties may agree to provisionally apply this Agreement, or provisions of it, by an exchange of notifications signifying the completion of ratification or such other domestic procedures as are required for provisional application. Such provisional application shall take effect on the later of:

(*a*) the date on which the EU-Lebanon Agreements cease to apply to the United Kingdom; and

(*b*) the date of the later of the Parties' notifications.

5. A Party may terminate the provisional application of this Agreement, or provisions of it, by written notification to the other Party. Such termination shall take effect on the first day of the second month following notification.

6. Where this Agreement is, or certain provisions of this Agreement are, provisionally applied, the term "entry into force of this Agreement" in any provisionally applied provisions shall be deemed to refer to the date that such provisional application takes effect.

7. The United Kingdom shall submit notifications under this Article to the Ministry of Foreign Affairs and Emigrants of Lebanon. Lebanon shall submit notifications under this Article to the United Kingdom's Foreign and Commonwealth Office or its successor.

UK/Liechtenstein: Additional Agreement extending certain provisions of UK/Swiss Trade Agreement to Liechtenstein [CS Liechtenstein No.1/2019]

Article 3

1. This Additional Agreement shall be approved by the Parties in accordance with their domestic procedures.

2. This Additional Agreement shall enter into force when the *United Kingdom-Switzerland Trade Agreement* enters into force.

3. Pending entry into force of this Additional Agreement, the Parties shall in accordance with their respective internal requirements and procedures, provisionally apply this Additional Agreement when the *United Kingdom-Switzerland Trade Agreement* is provisionally applied. A Party may terminate the provisional application of this Agreement by written notice to the other Parties. Such termination shall take effect on the first day of the second month following that notification.

4. This Additional Agreement:

(*a*) may be terminated by written notification to the other Parties. It shall cease to be in force twelve months after the receipt of that notification;

(*b*) shall, unless otherwise agreed between the Parties, cease to apply upon termination of: (i) the Customs Treaty; (ii) the *United Kingdom-Switzerland Trade Agreement*; or (iii) both the Incorporated *Free Trade Agreement and the Incorporated Agriculture Agreement*.

5. If the *Incorporated Agriculture Agreement*, or a part of that agreement, is suspended by the United Kingdom or Switzerland, the corresponding provisions of the Annex to this Additional Agreement shall simultaneously be suspended, unless otherwise agreed between the Parties.

6. If the Incorporated Agriculture Agreement ceases to apply between the United Kingdom and Switzerland, the Annex to this Additional Agreement shall simultaneously cease to apply, unless otherwise agreed between the Parties.

UK/Morocco: Agreement regarding the System of British Schools in Morocco [CS Morocco No.1/2019]

Article 15

1. This Agreement shall be applied provisionally from the date of its signature and shall enter into force on the date of receipt of the last notification by which one Party shall inform the other, through diplomatic channels, of the completion of the necessary procedures required for entry into force of this Agreement.

2. This Agreement will remain in effect for an indefinite period of time.

3. This Agreement may be amended by a joint decision of the Parties. Any amendments will enter into force in accordance with article 15 (1).

4. Either Party may, at any time, terminate this Agreement by written notification to the other Party through diplomatic channels. The termination will become effective two (2) years after the date of such notification.

UK/Morocco: Agreement establishing an Association [CS Morocco No.2/2019]

Article 11
Entry into force and provisional application

1. Article 96 of the *EU-Morocco Association Agreement* and Article 23 of the *EU-Morocco Dispute Settlement Mechanism Agreement* shall not be incorporated into this Agreement.

2. Each of the Parties shall notify the other in writing of the completion of the procedures required by its law for the entry into force of this Agreement.

3. This Agreement shall enter into force on the later of:

(*a*) the date on which the EU-Morocco Agreements cease to apply to the United Kingdom; and

(*b*) the date of the later of the notifications by which the Parties notify each other that they have completed their respective legal procedures.

4. Pending entry into force of this Agreement, the Parties may agree to provisionally apply this Agreement, or provisions of it, by an exchange of notifications. Such provisional application shall take effect on the later of:

(*a*) the date on which the EU-Morocco Agreements cease to apply to the United Kingdom; and

(*b*) the date of the later of the Parties' notifications.

5. A Party may terminate the provisional application of this Agreement, or provisions of it, by written notification to the other Party. Such termination shall take effect on the first day of the second month following notification.

6. Where this Agreement is, or certain provisions of this Agreement are, provisionally applied, the term "entry into force of this Agreement" in any provisionally applied provisions shall be deemed to refer to the date that such provisional application takes effect.

7. The United Kingdom shall submit notifications under this Article to the Ministry of Foreign Affairs and International Cooperation of Morocco or its successor. Morocco

shall submit notifications under this Article to the United Kingdom's Foreign and Commonwealth Office or its successor.

UK/Montenegro: Agreement concerning Air Services [CS Montenegro No.3/2019]

Article 24
Entry into Force

(1) This Agreement shall enter into force on the later of:

(*a*) the time at which the *Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area* ("the ECAA Agreement"),[159] ceases to apply to the United Kingdom; and

(*b*) the time of the later notification by which the Contracting Parties notify each other that they have completed their respective legal requirements and procedures

(2) Pending its entry into force, this Agreement shall be provisionally applied from the time at which the ECAA Agreement ceases to apply to the UK.

(3) Any bilateral air services agreement and/or arrangement, which was in force between the Contracting Parties immediately before the entry into force of this Agreement, shall terminate from the date of entry into force of this Agreement.

UK/New Zealand: Agreement on Sanitary Measures Applicable to Trade in Live Animals and Animal Product [CS New Zealand No.1/2019]

Article 8
Entry into Force and Provisional Application

1. Each Party shall notify the other Party of the completion of its domestic procedures required for the entry into force of this Agreement.

2. This Agreement shall enter into force on the later of:

(*a*) the date of receipt of the later of the Parties' notifications that they have completed their domestic procedures required for entry into force; or

(*b*) the date on which the 1996 Agreement ceases to apply to the UK.

3. Pending entry into force of this Agreement, the Parties may agree to provisionally apply this Agreement, or provisions of it, subject to the completion of the Parties' domestic procedures.

4. Where agreed pursuant to Article 8(3), this Agreement, or provisions of it, shall be applied provisionally between the Parties on the later of: (*a*) the date on which the 1996 Agreement ceases to apply to the United Kingdom; or (*b*) the date of receipt of notification of provisional application or ratification from the United Kingdom and New Zealand.

5. A Party may terminate the provisional application of this Agreement, or provisions of it, by written notification to the other Party. Such termination shall take effect on the first day of the second month following the notification.

[159] EC Series No. 005 Cm 7782.

6. Where this Agreement is, or certain provisions of this Agreement are, provisionally applied, the term "entry into force of this Agreement" in any provisionally applied provisions shall be deemed to refer to the date that such provisional application takes effect.

7. The United Kingdom shall submit notifications under this Article to the Ministry of Foreign Affairs and Trade of the Government of New Zealand or its successor. New Zealand shall submit notifications under this Article to the United Kingdom's Foreign and Commonwealth Office or its successor.

UK/New Zealand: Agreement on Mutual Recognition in Relation to Conformity Assessment [CS New Zealand No.2/2019]

Article 9
Entry into Force

1. Article 14(1) of the EC—New Zealand MRA shall not be incorporated into this Agreement.

2. Each Party shall notify the other Party of the completion of its domestic procedures required for the entry into force of this Agreement.

3. This Agreement shall enter into force on the later of:

(*a*) the date on which the EC—New Zealand MRA ceases to apply to the United Kingdom; or

(*b*) the date of receipt of the later of the Parties' notifications that they have completed their domestic procedures required for entry into force.

4. Pending entry into force of this Agreement, the Parties may agree to provisionally apply this Agreement, or provisions of it, subject to the completion of the Parties' domestic procedures.

5. Where agreed pursuant to Article 9(4), this Agreement, or provisions of it, shall be applied provisionally between the Parties on the later of:

(*a*) the date on which the EC—New Zealand MRA ceases to apply to the United Kingdom; or

(*b*) the date of receipt of notification of provisional application or ratification from the United Kingdom and New Zealand.

6. A Party may terminate the provisional application of this Agreement, or provisions of it, by written notification to the other Party. Such termination shall take effect on the first day of the second month following the notification.

7. Where this Agreement is, or certain provisions of this Agreement are, provisionally applied, the term "entry into force of this Agreement" in any provisionally applied provisions shall be deemed to refer to the date that such provisional application takes effect.

8. The United Kingdom shall submit notifications under this Article to the Ministry of Foreign Affairs and Trade of the Government of New Zealand or its successor. New Zealand shall submit notifications under this Article to the United Kingdom's Foreign and Commonwealth Office or its successor.

UK/Norway: Agreement on International Road Transport, with Protocol [CS Norway No.1/2019]

Article 15
Provisional Application

1. Pending entry into force of this Agreement and subject to paragraph 2, the Contracting Parties shall provisionally apply this Agreement from the point in time when the EEA

agreement ceases to apply to the UK. During the period of provisional application, the *Agreement on the International Carriage of Goods by Road* signed in Oslo on 11th June 1970 shall be suspended.

2. This Agreement shall only be provisionally applied pending its entry into force if there is, at the point of United Kingdom's departure from the European Union, no withdrawal agreement, with relevance to road transport, between the European Union and the United Kingdom.

3. A Contracting Party may terminate the provisional application of the Agreement by giving written notice to the other Contracting Party. Such termination shall take effect on the first day of the second month following notification.

UK/Spain: Agreement on the Participation in Certain Elections of Nationals of each Country Resident in the territory of the other [CS Spain No.2/2019]

Article 8
Provisional Application

1. Notwithstanding Article 6 of the Agreement the Parties agree to provisionally apply the Agreement from the date on which the United Kingdom leaves the European Union.

2. Either Party may terminate the provisional application of the Agreement by written notification to the other Party through diplomatic channels. The provisional application of the Agreement shall continue during thirty natural days from the date that the other Party receives the written notification.

UK/Switzerland: Agreement on the International Carriage of Passengers and Goods by Road [CS Switzerland No.1/2019]

Article 13
Entry into Force, Duration and Termination of this Agreement

1. The Parties shall ratify or approve this Agreement in accordance with their internal procedures. Each Party shall notify the other Party of the completion of those procedures.

2. This Agreement shall enter into force on the later of:

(*a*) the date on which the *Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road* signed in Luxembourg on 21st June 1999 ceases to apply to the UK; or

(*b*) the first day of the second month following the date of receipt of the later of the Parties' notifications that they have completed their internal procedures.

3. (*a*) Pending entry into force of this Agreement, the Parties shall provisionally apply this Agreement from the date on which the *Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road* signed in Luxembourg on 21st June 1999 ceases to apply to the UK. During the period of provisional application, the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Swiss Federal Council on the International Carriage of Goods by Road, signed in London on 20th December 1974, shall be suspended.

(*b*) A Party may terminate the provisional application of the Agreement by giving written notice to the other Party. Such termination shall take effect on the first day of the second month following notification.

4. From the date of its entry into force, this Agreement shall supersede the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland*

and the Swiss Federal Council on the International Carriage of Goods by Road, signed in London on 20th December 1974.

5. This Agreement shall remain in force unless one Party gives notice to terminate it in writing to the other Party. In that case this Agreement shall terminate six months after the date of receipt of the notice to the other Party, unless a different period is agreed.

UK/Switzerland: Agreement relating to Scheduled Air Services [CS Switzerland No.2/2019]

Article 29
Entry into Force

1. This Agreement shall enter into force when the Contracting Parties have notified each other by the exchange of diplomatic notes the fulfilment of their legal formalities with regard to the conclusion and the entering into force of international agreements.

2. Notwithstanding paragraph 1 of this Article, the Contracting Parties agree to provisionally apply this Agreement from the date on which the *Agreement between the European Community and the Swiss Confederation on Air Transport*, signed on 21 June 1999, ceases to apply to the United Kingdom. During the period of provisional application the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Swiss Federal Council for Air Services between and beyond their respective territories*, dated 5 April 1950 shall be suspended.

3. Upon entry into force, this Agreement shall supersede the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Swiss Federal Council for Air Services between and beyond their respective territories*, dated 5 April 1950.

UK/Switzerland: Agreement on Direct Insurance other than Life Insurance and Decision [CS Switzerland No.3/2019]

Article 44
Entry into Force

44.1. This Agreement was negotiated in English and drawn up in duplicate in German. Both of these texts are equally authentic.

44.2. The Contracting Parties shall ratify or approve this Agreement in accordance with their internal procedures. Each Contracting Party shall notify the other Contracting Party of the completion of those procedures.

44.3. This Agreement shall enter into force on the later of:

(*a*) the date on which the *Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance* ceases to apply to the United Kingdom of Great Britain and Northern Ireland; or

(*b*) the first day of the second month following the date of receipt of the later of the Contracting Parties' notifications that they have completed their internal procedures.

44.4. (*a*) Pending entry into force of this Agreement, the Contracting Parties shall provisionally apply this Agreement from the date on which the *Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance* ceases to apply to the United Kingdom of Great Britain and Northern Ireland.

(*b*) A Contracting Party may terminate the provisional application of the Agreement by giving written notice to the other Contracting Party. Such termination shall take effect on the first day of the second month following notification.

UK/Switzerland: Trade Agreement [CS Switzerland No.4/2019]

Article 9
Entry into force, provisional application and termination

1. Except insofar as, and only to the extent that, they provide for a notice period before termination or denunciation, the provisions of the Switzerland-EU Trade Agreements which allow for the authentication of texts, entry into force, provisional application, duration, denunciation or termination shall not be incorporated into this Agreement.

2. This Agreement shall be approved by the Parties in accordance with their domestic procedures.

3. This Agreement shall enter into force when the Switzerland-EU Trade Agreements cease to apply to the United Kingdom, provided that the Parties have notified each other that they have completed their domestic procedures by that date. Otherwise, this Agreement shall enter into force on the first day of the second month following the later of the Parties' notifications that they have completed their domestic procedures.

4. Pending entry into force of this Agreement, the Parties shall, in accordance with their respective internal requirements and procedures, provisionally apply this Agreement when the Switzerland-EU Trade Agreements cease to apply to the United Kingdom. A Party may terminate the provisional application of this Agreement by written notice to the other Party. Such termination shall take effect on the first day of the second month following that notification. Where this Agreement is provisionally applied, the term "entry into force of this Agreement" shall be deemed to refer to the date on which such provisional application takes effect.

5. A Party may terminate this Agreement, or any Incorporated Agreement, by notification to the other Party of its intention to do so. This Agreement or the Incorporated Agreement that that Party intends to terminate shall cease to be in force twelve months after receipt of that notification, unless otherwise provided for in the Incorporated Agreement to be terminated.

UK/Switzerland: Agreement on Citizens' Rights following Withdrawal of UK from the EU and Free Movement of Persons Agreement [CS Switzerland No.5/2019]

Article 36
Entry into force and application

1. The Parties shall ratify or approve this Agreement in accordance with their internal procedures. Each Party shall notify the other Party of the completion of those procedures.

2. This Agreement shall enter into force on the later of:

(*a*) the specified date; or

(*b*) the first day of the second month following the date of receipt of the later of the Parties' notifications that they have completed their internal procedures.

3. (*a*) Pending entry into force of this Agreement, the Parties shall provisionally apply this Agreement from the specified date.

(*b*) A Party may terminate the provisional application of the Agreement by giving written notice to the other Party. Such termination shall take effect on the first day of the second month following notification.

UK/Switzerland: Agreement on Admission to the Labour Market for a Temporary Transitional Period following the withdrawal of the UK from the EU and the Free Movement of Persons Agreement [CS Switzerland No.6/2019]

Article 12
Entry into force and application

1. The Parties shall ratify or approve this Agreement in accordance with their internal procedures. Each Party shall notify the other Party in writing of the completion of those procedures.

2. This Agreement shall enter into force on the later of:

(*a*) the withdrawal date; or

(*b*) the first day of the second month following the date of receipt of the later of the Parties' notifications that they have completed their internal procedures.

3. Pending entry into force of this Agreement, the Parties shall provisionally apply this Agreement on the later of:

(*a*) the withdrawal date; or

(*b*) the first day of the first month following the signature of this Agreement.

4. A Party may terminate the provisional application of the Agreement by giving written notice to the other Party. Such termination shall take effect on the first day of the second month following notification.

UK/Switzerland: Transitional Agreement on Social Security for a Temporary Period following the Withdrawal of the UK [CS Switzerland No.7/2019]

Article 10
Provisional Application

Pending entry into force of this Agreement, the Parties shall provisionally apply this Agreement on the later of:

(*a*) UK exit; or

(*b*) the day of the signature of this Agreement,

save that this Agreement shall not be applied provisionally in the event that, prior to this Agreement being provisionally applied a relevant UK-EU Withdrawal Agreement comes into effect as notified in writing by the United Kingdom to Switzerland through diplomatic channels.

UK/Uzbekistan: Partnership and Cooperation Agreement [CS Uzbekistan No.1/2019]

Article 87

1. Each Party shall notify the other Party in writing of the completion of the internal procedures required by its law for entry into force of this Agreement.

2. This Agreement shall enter into force on the later of:

(*a*) the date on which the EU-Uzbekistan Agreement ceases to apply to the UK, and

(*b*) The first day of the next month following the date of receipt of the later of the Parties' notifications that they have completed their internal procedures for entry into force.

3. Pending entry into force of this Agreement, the Parties may agree to provisionally apply this Agreement by an exchange of notifications signifying the completion of such internal procedures as are required by each Party's law for provisional application.

4. Where agreed pursuant to Article 87(3), this Agreement shall be applied provisionally between the Parties from the later of:

(*a*) the date on which the EU-Uzbekistan Agreement ceases to apply to the UK, and

(*b*) the date of receipt of the later of the Parties' notifications that they have completed such internal procedures for provisional application as are required by each Party's law.

5. Notifications regarding completion of internal procedures under paragraphs 1 and 3 of this Article shall be submitted by the UK to the Ministry of Foreign Affairs of the Republic of Uzbekistan or its successor and by the Republic of Uzbekistan to the UK's Foreign and Commonwealth Office or its successor.

6. If pending the entry into force of this Agreement it is provisionally applied pursuant to paragraphs 3 and 4, unless this instrument provides otherwise, all references in this Agreement to the date of entry into force shall be deemed to refer to the date such provisional application takes effect.

7. Either Party may give written notification to the other Party of its intention to terminate the provisional application of this Agreement. Termination of provisional application shall take effect two months after receipt of the notification by the other Party.

Annex 4: *United Kingdom Miscellaneous Series 2017–2022 (Provisional Application Terms)*

UK/Cameroon: Interim Agreement establishing an Economic Partnership [MS No.2/2021]

Article 98
Entry into force

1. This Agreement shall be signed, ratified or approved in accordance with constitutional or domestic rules and applicable procedures.

2. Each of the Parties shall notify the other in writing, through diplomatic channels, of the completion of their internal procedures for entry into force of this Agreement.

3. Unless the Parties agree to such other date, this Agreement shall enter into force as between the UK and Cameroon on the date of the later of the Parties' notifications that they have completed their internal procedures.

4. Pending entry into force, the Parties may agree to provisionally apply this Agreement, or certain provisions thereof, in accordance with their respective internal procedures ('provisional application'). The Parties shall notify each other of the provisions of the Agreement which they intend to apply.

5. Unless the Parties agree to such other date, provisional application of this Agreement under paragraph 4 shall take effect from the date of the later of the Parties' notifications that they have completed their respective legal requirements and procedure for provisional application.

6. If this Agreement or certain provisions of this Agreement are provisionally applied pending its entry into force, unless this Agreement provides otherwise, all references in

this Agreement to the date of entry into force shall be deemed to refer to the date that such provisional application takes effect.

7. Notwithstanding paragraph 4, the Parties may unilaterally take measures to apply the Agreement, before provisional application, to the extent that this is possible.

8. Notifications under this Article shall be submitted by the UK to Cameroon's Ministry of External Relations, or its successor, and by Cameroon to the UK's Foreign, Commonwealth and Development Office or its successor, except that once the Government of Cameroon is assigned as the depositary under Article 101(3), all such notifications shall be sent by any Party, Central African regional organisation, or Central African Contracting State to the Depositary.

[…]

Article 101
Accession of States or of regional organisations in Central Africa

1. This Agreement shall be open to accession by any State or regional organisation in Central Africa. Any reference to 'accession' in this Agreement refers to an accession under this Article, unless explicitly stated otherwise. A request for accession shall be submitted to the EPA Committee. Any State which submits a request for accession shall attend the meetings of the EPA Committee as an observer.

2. On receipt of a request for accession: (*a*) the request shall be examined and negotiations begun in order to propose the necessary amendments to this Agreement, subject to sub-paragraph (*b*); (*b*) where this Agreement makes provision for amendments that will apply in the event of accession ('accession amendments'), those accession amendments shall be fully applied from the date this Agreement enters into force for the first state or regional organisation acceding to it; and (*c*) the accession protocol shall be submitted to the EPA Committee for approval.

3. Following the EPA Committee's approval of an application for accession, the acceding State or regional organisation may deposit an instrument of accession or a 60 notification confirming its provisional application of the Agreement with the Government of Cameroon, which shall be thereafter the depositary of this Agreement.

4. This Agreement shall enter into force or be provisionally applied in relation to the acceding State or regional organisation: (*a*) on the date its instrument of accession or note of provisional application is deposited; or (*b*) on such other date as the existing Parties and the acceding State shall agree.

Free Trade Agreement between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland [MS No.3/2021]

Article 17.5
Entry into Force

1. This Agreement shall enter into force, in relation to those Parties which by then have notified the Depositary certifying that they have completed their respective internal requirements and procedures, and provided that at least one EEA EFTA State and the United Kingdom are among the States that have notified the Depositary certifying that they have completed their respective internal requirements and procedures, on the first day of the month following the date the Parties have notified the Depositary their written notifications.

2. In relation to an EEA EFTA State notifying the Depositary certifying that they have completed their respective internal requirements and procedures for entry into force of this

Agreement after the date on which at least one EEA EFTA State and the United Kingdom have notified the Depositary, this Agreement shall enter into force in relation to such EEA EFTA State on the first day of the month following the date the Depositary received its notification.

3. Any Party may agree to the provisional application of this Agreement, subject to its internal requirements and procedures for provisional application. Provisional application of this Agreement shall be notified to the Depositary. Such provisional application shall take effect as between the United Kingdom and an EEA EFTA State on the date on which they have both deposited their respective notifications with the Depositary.

4. Any Party may terminate its provisional application of this Agreement by means of a written notification to the Depositary. Such termination shall take effect: (*a*) as between the United Kingdom and an EEA EFTA State on the first day of the second month following the date of such notification by an EEA EFTA State; or (*b*) as between all Parties who have provisionally applied the Agreement on the first day of the second month following such notification by the United Kingdom.

Special Arrangement between the Governments of France, Belgium, the Netherlands and the UK concerning Security Matters relating to Trains using the Channel Fixed Link [MS No.3/2020]

Article 9

Any Contracting Party may, at the time of its signature, deposit a declaration that it will apply provisionally this Special Arrangement pending its entry into force. The Depositary shall notify the Contracting Parties of such declaration.

Agreement between France, Belgium, Netherlands and UK amending the Agreement between Belgium, France and UK concerning Rail Traffic between Belgium and UK using Channel Fixed Link with Protocol, done at Brussels on 15 December 1993 [MS No.4/2020]

Article 34

Any Contracting Party may, at the time of its signature, deposit a declaration that it shall provisionally apply this Agreement and its Protocol, in full or limited to certain provisions, pending their entry into force, in accordance with Article 33. The Depositary shall notify the Contracting Parties of such declaration.

Final Act of the International Conference and Decision by the Energy Charter Conference in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty [MS No.5/2020]

Article 6
Provisional application

(1) Each signatory which applies the *Energy Charter Treaty* provisionally in accordance with Article 45(1) and each Contracting Party agrees to apply this Amendment provisionally pending its entry into force for such signatory or Contracting Party to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

(2) (*a*) Notwithstanding paragraph (1):

(i) any signatory which applies the *Energy Charter Treaty* provisionally or Contracting Party may deliver to the Depository within 90 days from the date of the adoption of this Amendment by the Charter Conference a declaration that it is not able to accept the provisional application of this Amendment;

(ii) any signatory which does not apply the Energy Charter Treaty provisionally in accordance with Article 45(2) may deliver to the Depository not later than the date

on which it becomes a Contracting Party or begins to apply the Treaty provisionally a declaration that it is not able to accept the provisional application of this Amendment.

The obligation contained in paragraph (1) shall not apply to a signatory or Contracting Party making such a declaration. Any such signatory or Contracting Party may at any time withdraw that declaration by written notification to the Depository.

(*b*) Neither a signatory or Contracting Party which makes a declaration in accordance with subparagraph (*a*) nor Investors of that signatory or Contracting Party may claim the benefits of provisional application under paragraph (1).

(3) Any signatory or Contracting Party may terminate its provisional application of this Amendment by written notification to the Depository of its intention not to ratify, accept or approve this Amendment. Termination of provisional application for any signatory or Contracting Party shall take effect upon the expiration of 60 days from the date on which such signatory's or Contracting Party's written notification is received by the Depository. Any signatory which terminates its provisional application of the *Energy Charter Treaty* in accordance with Article 45(3)(*a*) shall be considered as also having terminated its provisional application of this Amendment with the same date of effect.

Agreement on Trade in Goods between the United Kingdom of Great Britain and Northern Ireland, Iceland and the Kingdom of Norway [MS No.8/2020]

Article 17
Entry Into Force and Provisional Application

1. This Agreement is subject to approval in accordance with the respective legal requirements of the Parties. The instruments of approval shall be deposited with the Depositary.

2. This Agreement shall only enter into force between the United Kingdom and at least one other Party, in the event that no other agreement(s) governing the future trade relationships have entered into force or are provisionally applied between the United Kingdom and that other Party or Parties.

3. Subject to paragraph 2, this Agreement shall enter into force in relation to those Parties which have deposited their instruments of approval, on the later of:

a. the end of the coverage period; or

b. the date on which the United Kingdom and at least one other Party have deposited their instruments of approval with the Depositary.

4. In relation to a Party depositing its instrument of approval after this Agreement has entered into force according to paragraph 3, this Agreement shall enter into force on the day following the deposit of its instrument.

5. Any Party may agree to provisionally apply this Agreement, pending its entry into force, by notifying the Depositary. Such provisional application shall take effect on the later of:

a. the end of the coverage period, provided that the United Kingdom and at least one other Party have deposited such notification; or

b. the date on which the United Kingdom and at least one other Party have deposited their notifications.

6. Any Party may terminate the provisional application of this Agreement by means of a written notification to the Depositary. Such termination shall take effect on the first day of the second month following the date of that notification.

7. The provisional application of this Agreement may also be terminated between only the United Kingdom and Iceland or between the United Kingdom and Norway. Such termination shall only affect the application of this Agreement between those Parties.

Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Kenya, a Member of the East African Community, of the other part [MS No.9/2020]

Article 138
Entry into Force

1. This Agreement shall be signed and ratified, or approved in accordance with the applicable constitutional or internal rules and procedures of the respective Parties.

2. This Agreement shall enter into force the first day of the second month, or on such date as the Parties may otherwise agree, following notification from both of the Parties of the completion of the internal legal procedures referred to in paragraph 1.

3. Notifications under paragraph 2 shall be sent, in the case of the EAC Partner State(s) to the Government of Kenya and in the case of the UK to the Government of the UK[160], who shall be joint depositaries of this Agreement. Each depositary shall notify the other depositary upon receipt of the notification indicating the completion of the Parties' internal legal procedures for the purpose of entry into force.

4. The joint depositary arrangements above shall be reviewed as part of the review provided for in paragraph 2 of Article 143 (Accession of Contracting Parties to *The Treaty for the Establishment of the East African Community*).

5. Pending entry into force of this Agreement, the EAC Partner State(s) and the UK may provisionally apply the provisions of this Agreement.

6. Provisional application of this Agreement shall be notified to the depositaries. Such provisional application shall take effect ten (10) days, or on such date as the EAC Partner State(s) and the UK may otherwise agree, following the date on which the last notification is made to the depositaries of the completion of the internal legal procedures necessary for that purpose.

7. Where a provision of this Agreement is applied in accordance with paragraph 5, any reference in such provision to the date of entry into force of this Agreement shall be understood to refer to the date from which the EAC Partner State(s) and the UK agree to apply that provision in accordance with paragraph 6.

8. Notwithstanding paragraph 5, the EAC Partner State(s) and the UK may unilaterally take steps to apply this Agreement, before provisional application, to the extent feasible.

Agreement establishing an Economic Partnership Agreement between the Eastern and Southern Africa States and the UK [MS No.4/2019]

Article 59
Entry into force, denunciation and duration

1. This Agreement shall be signed, ratified or approved in accordance with the applicable constitutional or internal rules and procedures of the respective Parties.

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[160] Treaty Section, FCDO Legal Directorate, Foreign, Commonwealth and Development Office, WH.2.143, King Charles Street, London SW1A 2AH, United Kingdom.

2. This Agreement shall enter into force as between the UK and a Signatory ESA State either on the first day of the first month, or on such other date as the UK and that Signatory ESA State agree, following the deposit of the later of their respective instruments of ratification, acceptance or approval.

3. Notifications of ratification, acceptance or approval shall be sent to:

(*a*) the Authority designated by a Signatory ESA State; or

(*b*) the Secretary General of the Common Market of Eastern and Southern Africa, who shall be the depositories of this Agreement.

4. Pending entry into force of the Agreement, the UK and the Signatory ESA States agree to apply the provisions of this Agreement which fall within their respective competences ('provisional application'). This may be effected either by provisional application where possible or by ratification of this Agreement.

5. Provisional application shall be notified to the depositories. This Agreement shall be applied provisionally between the UK and a Signatory ESA State ten (10) days, or on such other date as the UK and that Signatory ESA State agree, after the later of either the receipt of notification of provisional application from the UK or of ratification or provisional application from the Signatory ESA State.

6. Notwithstanding paragraphs 2 and 4, the UK and Signatory ESA States may unilaterally take steps to apply the Agreement, before provisional application, to the extent feasible.

7. The UK or a Signatory ESA State(s) may give written notice to the other of its intention to denounce this Agreement.

8. Denunciation shall take effect one month after notification to the other Party.

Interim Political, Trade and Partnership Agreement between UK and PLO for the benefit of the Palestinian Authority [MS No.14/2019]

Article 10
Entry into Force and Provisional Application

1. Articles 75(1) and (2) of the amended EU-Palestinian Authority Interim Association Agreement shall not be incorporated into this Agreement.

2. Each Party shall notify the other Party of the completion of its domestic procedures required for the entry into force of this Agreement.

3. This Agreement shall enter into force on the later of:

(*a*) the date on which the amended EU-Palestinian Authority Interim Association Agreement ceases to apply to the United Kingdom; or

(*b*) the day following the date of receipt of the later of the Parties' notifications that they have completed their internal procedures.

4. Pending entry into force of this Agreement, the Parties may agree to provisionally apply this Agreement, or provisions of it, in accordance with the Parties' internal procedures.

5. Where agreed pursuant to Article 10(4), this Agreement, or provisions of it, shall be applied provisionally between the Parties on the later of:

(*a*) the date on which the amended EU-Palestinian Authority Interim Association Agreement ceases to apply to the United Kingdom; or

(*b*) the day following the later of either the receipt of notification of provisional application from the United Kingdom or of ratification, approval or provisional application from the Palestinian Authority. For the Government of the United For the Palestine Liberation Kingdom of Great Britain and Organization for the Northern Ireland: Palestinian Authority of the West Bank and the Gaza Strip:

(*c*) A Party may terminate the provisional application of this Agreement, or provisions of it, by written notification to the other Party. Such termination shall take effect on the first day of the third month following the notification.

6. Where this Agreement is, or certain provisions of this Agreement are, provisionally applied, the term "entry into force of this Agreement" in any provisionally applied provisions shall be deemed to refer to the date that such provisional application takes effect.

7. The United Kingdom shall submit notifications under this Article to the Palestinian Ministry for National Economy or its successor. The Palestinian Authority shall submit notifications under this Article to the United Kingdom's Department for International Trade or its successor.

Interim Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland and the Pacific States [MS No.15/2019]

Article 75
Entry into force and duration

1. This Agreement shall enter into force on the first day of the month following the date on which the Contracting Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed; or from such date as the Parties agree.

2. Pending entry into force of the Agreement, the UK and the Pacific States agree to provisionally apply the Agreement. Such application may be undertaken by provisional application pursuant to the laws of the UK and of the Pacific States or by ratification of the Agreement. The Agreement shall be applied provisionally 10 days after the Contracting Parties have notified each other in writing of the completion of the procedures necessary for this purpose; or from such date as the parties agree.

3. Where a Pacific State accedes to this Agreement, the Agreement shall be applied provisionally in the same manner as foreseen in paragraph 2, once the UK and that Pacific State have given notice accordingly.

4. Notwithstanding paragraph 2, the UK and the Pacific States may take steps to apply the Agreement, before provisional application, to the extent feasible.

5. Any Party may give written notice to the other of its intention to denounce this Agreement.

6. Denunciation shall take effect twelve months after notification to the other Party.

Agreement between the United Kingdom of Great Britain and Northern Ireland, Iceland and the Kingdom of Norway on Trade in Goods [MS No.17/2019]

Article 17
Entry into Force and Provisional Application

1. This Agreement is subject to approval in accordance with the respective legal requirements of the Parties. The instruments of approval shall be deposited with the Depositary.

2. This Agreement shall only enter into force in the event that the United Kingdom withdraws from the European Union without any agreement between the United Kingdom

and the European Union on the terms of the United Kingdom's withdrawal or if any such agreement does not provide for the continued application to the United Kingdom of the Trade-Related Agreements between the European Union and one or both of Iceland and Norway in respect of trade in goods.

3. Subject to paragraph 2, this Agreement shall enter into force in relation to those Parties which have deposited their instruments of approval, on the later of:

(*a*) the point in time at which the United Kingdom ceases to be a Member State of the European Union and the Trade-Related Agreements between the European Union and one or both of Iceland and Norway cease to apply to the United Kingdom; or

(*b*) the date on which the United Kingdom and at least one other Party have deposited their instruments of approval with the Depositary.

4. In relation to a Party depositing its instrument of approval after this Agreement has entered into force according to paragraph 3, this Agreement shall enter into force on the day following the deposit of its instrument.

5. Any Party may agree to provisionally apply this Agreement, pending its entry into force, by notifying the Depositary. Such provisional application shall take effect on the later of:

(*a*) the point in time at which the United Kingdom ceases to be a Member State of the European Union and the Trade-Related Agreements between the European Union and one or both of Iceland and Norway cease to apply to the United Kingdom, provided that the United Kingdom and at least one other Party have deposited such notification; or

(*b*) the date on which the United Kingdom and at least one other Party have deposited their notifications.

6. Any Party may terminate the provisional application of this Agreement by means of a written notification to the Depositary. Such termination shall take effect on the first day of the second month following the date of that notification.

7. The provisional application of this Agreement may also be terminated between only the United Kingdom and Iceland or between the United Kingdom and Norway. Such termination shall only affect the application of this Agreement between those Parties.

Economic Partnership Agreement between the CARIFORUM States, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [MS No.18/2019]

Article 242
Entry into force

1. This Agreement shall enter into force on the later of the date on which the CARIFORUM-EU EPA ceases to apply to the United Kingdom or the first day of the month following that in which the Parties have notified each other of the completion of the procedures necessary for this purpose, or from such other date as the Parties agree.

2. Instruments of ratification, acceptance or approval shall be deposited with the Government of the United Kingdom of Great Britain and Northern Ireland which is hereby designated the depository of this Agreement[161].

[161] Treaty Section, FCO Legal Directorate, Foreign and Commonwealth Office, WH.2.143, King Charles Street, London SW1A 2AH, United Kingdom.

3. Pending entry into force of the Agreement, the United Kingdom and the Signatory CARIFORUM States shall agree to provisionally apply the Agreement, in full or in part. This may be effected by provisional application pursuant to the laws of a signatory or by ratification of the Agreement. Provisional application shall be notified to the depositary. The Agreement shall be applied provisionally from the date on which the CARIFORUM-EU EPA ceases to apply to the United Kingdom; or otherwise if the United Kingdom and the Signatory CARIFORUM States so agree, ten (10) days after the latter of the receipt of notification of provisional application from the United Kingdom or from all the Signatory CARIFORUM States; or from such other date as the United Kingdom and the Signatory CARIFORUM States agree.

4. Notwithstanding paragraph 3, the United Kingdom and Signatory CARIFORUM States may take steps to apply the Agreement, before provisional application, to the extent feasible.

Trade Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Colombia, the Republic of Ecuador and the Republic of Peru, of the other part [MS No.22/2019]

Article 8
Entry into force and provisional application

1. Each Party shall notify in writing through diplomatic channels the completion of its internal procedures required for the entry into force or the provisional application of this Agreement to all other Parties and the Depositary.

2. This Agreement shall enter into force between the United Kingdom and each signatory Andean Country on:

(*a*) the later of:

(i) the first day of the month following the date of receipt by the Depositary of the later of the notifications that the United Kingdom and that signatory Andean Country have completed their internal procedures; or

(ii) the date on which the EU-Andean Countries Trade Agreement ceases to apply to the United Kingdom; or

(*b*) such other date as may be agreed between the United Kingdom and that signatory Andean Country.

3. Pending the entry into force of this Agreement, each of the Parties may, in accordance with their own internal procedures, provisionally apply this Agreement fully or partially.

4. If the United Kingdom and a signatory Andean Country have agreed the provisional application of this Agreement, it shall begin on:

(*a*) the later of:

(i) the first day of the month following the date of receipt by the Depositary of the later of the notifications that the United Kingdom and that signatory Andean Country have completed their internal procedures required for provisional application; or

(ii) the date on which the EU-Andean Countries Trade Agreement ceases to apply to the United Kingdom; or

(*b*) such other date as may be agreed between the United Kingdom and that signatory Andean Country.

5. A Party may terminate the provisional application of this Agreement by giving written notice to the other Parties. Such termination shall take effect on the first day of the second month following that notification.

6. If a Party intends not to provisionally apply a provision of this Agreement, it shall first notify the other Parties of the provisions that it will not provisionally apply, and the Parties shall enter consultations promptly to agree those provisions exempt from provisional application. The provisions that are not subject to a notification by a Party shall be provisionally applied from the date provisional application of this Agreement comes into effect between the United Kingdom and a signatory Andean Country under paragraph 4.

7. If this Agreement or certain provisions of this Agreement are provisionally applied pending its entry into force, unless this instrument provides otherwise, all references in this Agreement to the date of entry into force shall be deemed to refer to the date that such provisional application takes effect.

International Coffee Agreement, 2007 [MS No.28/2019]

Article 42
Entry into force

(1) This Agreement shall enter into force definitively when signatory Governments holding at least two-thirds of the votes of the exporting Members and signatory Governments holding at least two-thirds of the votes of the importing Members, calculated as at 28 September 2007, without reference to possible suspension under the terms of Article 21, have deposited instruments of ratification, acceptance or approval. Alternatively, it shall enter into force definitively at any time if it is provisionally in force in accordance with the provisions of paragraph (2) of this Article and these percentage requirements are satisfied by the deposit of instruments of ratification, acceptance or approval.

(2) If this Agreement has not entered into force definitively by 25 September 2008, it shall enter into force provisionally on that date, or on any date within twelve months thereafter, if signatory Governments holding votes as described in paragraph (1) of this Article, have deposited instruments of ratification, acceptance or approval, or have notified the Depositary in accordance with the provisions of Article 41.

(3) If this Agreement has entered into force provisionally but has not entered into force definitively by 25 September 2009, it shall cease to be in force provisionally unless those signatory Governments which have deposited instruments of ratification, acceptance or approval, or have notified the Depositary in accordance with the provisions of Article 41, decide, by mutual consent, that it shall continue in force provisionally for a specific period of time. Such signatory Governments may also decide, by mutual consent, that this Agreement shall enter into force definitively among themselves.

(4) If this Agreement has not entered into force definitively or provisionally by 25 September 2009 under the provisions of paragraph (1) or (2) of this Article, those signatory Governments which have deposited instruments of ratification, acceptance or approval, in accordance with their laws and regulations, may, by mutual consent, decide that it shall enter into force definitively among themselves.

International Sugar Agreement, 1992 [MS No.30/2019]

Article 39
Notification of Provisional Application

1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government for which the Council has established conditions for accession but which

has not yet been able to deposit its instrument may, at any time, notify the depositary that it will apply this Agreement provisionally either when it enters into force in accordance with article 40 or, if it is already in force, at a specified date.

2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or, if it is already in force, at a specified date shall, from that time, be a provisional Member until it deposits its instrument of ratification, acceptance, approval or accession and thus becomes a Member.

Article 40
Entry into Force

1. This Agreement shall enter into force definitively on 1 January 1993, or on any date thereafter if, by that date instalments of ratification, acceptance, approval or accession have been deposited on behalf of Governments holding 60 per cent of the votes in accordance with the distribution established in the annex to this Agreement.

2. If, by 1 January 1993, this Agreement has not entered into force in accordance with paragraph 1 of this article, it shall enter into force provisionally if by that date instruments of ratification, acceptance or approval or notifications of provisional application have been deposited on behalf of Governments satisfying the percentage requirements of paragraph 1 of this article.

3. If, by 1 January 1993, the required percentages for entry into force of this Agreement in accordance with paragraph 1 or paragraph 2 of this article are not met, the Secretary—General of the United Nations shall invite the Governments on whose behalf instruments of ratification, acceptance or approval or notifications of provisional application have been deposited to decide whether this Agreement shall enter into force definitively or provisionally among themselves, in whole or in part, on such date as they may determine. If this Agreement has entered into force provisionally in accordance with this paragraph, it shall subsequently enter into force definitively upon fulfilment of the conditions set out in paragraph 1 of this article without the necessity of a further decision.

4. For a Government on whose behalf an instrument of ratification, acceptance, approval or accession or a notification of provisional application is deposited after the entry into force of this Agreement in accordance with paragraph 1, 2 or 3 of this article, the instrument or notification shall take effect on the date of deposit and, with regard to notification of provisional application, in accordance with the provisions of article 39, paragraph 1.

Grains Trade Convention, 1995 [MS No.31/2019]

Article 26
Provisional Application

Any signatory Government and any other Government eligible to sign this Convention, or whose application for accession is approved by the Council, may deposit with the depositary a declaration of provisional application. 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.

Agreement Establishing an Association between the UK and Central America [MS No.32/2019]

Article 10
Entry into Force

1. This Agreement shall be approved by the Parties in accordance with their own internal procedures. The Parties shall notify each other of the completion of those procedures, in accordance with paragraph 7.

2. This Agreement shall enter into force between the United Kingdom and each of the Republics of the CA Party from the later of:

(*a*) the date on which the EU-Central America Agreement ceases to apply to the United Kingdom; 2 or

(*b*) the date of the later of those Parties' notifications that they have completed their internal procedures.

3. Notwithstanding paragraph 2, this Agreement, or provisions of it, may be applied by the United Kingdom and each of the Republics of the CA Party from the later of:

(*a*) the date on which the EU-Central America Agreement ceases to apply to the United Kingdom; or

(*b*) the date of the later of those Parties' notifications that they have completed their internal procedures necessary for this purpose.

4. The United Kingdom and each of the Republics of the CA Party to which this Agreement, or provisions of it, is applied in accordance with paragraph 3 may terminate the application of this Agreement, or provisions of it, by written notification in accordance with paragraph 7. Such termination shall take effect on the first day of the second month following the notification.

5. Where a provision of this Agreement is applied in accordance with paragraph 3, any reference in such provision to the date of entry into force of this Agreement shall be understood to refer to the date from which those Parties agree to apply that provision in accordance with paragraph 3.

6. For the avoidance of doubt, the Parties for which this Agreement has entered into force in accordance with paragraph 2, or is applied pursuant to paragraph 3, may also use materials originating in the Republics of the CA Party for which this Agreement is not in force or applied.

7. Notifications under this Article shall be sent to the Secretaría General del Sistema de la Integración Centroamericana (SG-SICA), who shall be the depository of this Agreement. Certified copies of the notifications shall be lodged with the Government of the United Kingdom of Great Britain and Northern Ireland.

Protocol to the Convention concerning the Construction and Operation of a European X-Ray Free-Electron Laser Facility on the Accession of the UK [MS No.33/2019]

Article 3

This Protocol shall enter into force on the first day of the second month after all Governments stated in the preamble to this Protocol have notified the Government of the Federal Republic of Germany as depositary of the Convention that the national approval process for this Protocol has been completed.

The Governments stated in the preamble to this Protocol agree that from 19 March 2018 onwards the clauses of the Protocol be applied provisionally, it being understood that the entry into force of the Protocol is subject to the fulfilment of appropriate constitutional procedures in each of the Contracting and Signatory States and the entry into force of the Convention of 30 November 2009 concerning the Construction and Operation of a European X-Ray Free-Electron Laser Facility.

UK/SACU and Mozambique: Economic Partnership Agreement [MS No.34/2019]

Article 112
Entry into Force[162]

1. This Agreement shall be signed, ratified or approved in accordance with the applicable constitutional or internal rules and procedures of each Party.

2. This Agreement shall enter into force on the later date of the following:

(*a*) the date on which the EU-SADC EPA ceases to apply to the UK, and

(*b*) thirty (30) days or such dates as the Parties agree following the deposit of the last instrument of ratification or approval.

3. Pending entry into force of this Agreement, the SACU Member States and Mozambique and the UK agree to provisionally apply the provisions of this Agreement to the extent that internal requirements allow such application ("provisional application"). This may be effected either by provisional application, where possible, or by ratification of this Agreement.

4. This Agreement shall be applied provisionally between the UK and a SACU Member State or Mozambique on the later of the following:

(*a*) the date on which the EU-SADC EPA ceases to apply to the UK; and

(*b*) ten (10) days or such other date as the UK and that SACU Member State or Mozambique agree after the later of either the receipt of notification of provisional application from the UK or of ratification or provisional application from that SACU Member State or Mozambique.

5. Notifications regarding the provisional application or ratification shall be sent to the Executive Secretary of SACU, who shall be the depositary of this Agreement. Certified copies of the notifications shall be lodged with the Government of the UK.

6. If pending the entry into force of this Agreement, the Parties decide to apply it provisionally, all references in this Agreement to the date of entry into force shall be deemed to refer to the date such provisional application takes effect.

Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer [MS No.2/2017]

Article V
Provisional application

Any Party may, at any time before this Amendment enters into force for it, declare that it will apply provisionally any of the control measures set out in Article 2J, and the corresponding reporting obligations in Article 7, pending such entry into force.

[162] The Parties to the attached Protocol on Geographical indications and trade in wines and spirits shall implement the undertakings therein.

48. United States of America

Statement made in the Sixth Committee, Sixty-eighth session (2013), 23rd meeting, 4 November 2013:[163]

> In our own practice, we examine our ability under domestic law to implement a given provision or agreement pending entry into force before we agree to apply it provisionally and do so only consistent with our domestic law.

[163] Full text available at: https://www.un.org/en/ga/sixth/68/pdfs/statements/ilc/us_3.pdf.

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

1. United Nations

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

> The practice of the Secretariat of the United Nations in the provisional application of treaties draws from the registration of treaties under Article 102 of the *Charter of the United Nations*.
>
> Regarding the registration practice of the Secretariat, its origins can be traced back to the discussions of the Sixth Committee during the first session of the General Assembly.[164] Subsequent practice in relation to the provisional application of treaties can be found in the report of the Secretary-General entitled "Review of the regulations to give effect to Article 102 of the Charter of the United Nations"[165] and as later included in the Article I(2) of the *General Assembly Regulations to give effect to Article 102 of the Charter of the United Nations* annexed to General Assembly resolution 76/120 of 9 December 2021.
>
> The provisions of a treaty will set up the modalities by which it enters into force and whether it is applied provisionally. For multilateral treaties deposited with the Secretary-General, on behalf of which the Treaty Section performs depositary functions, when they provide for provisional application, the Treaty Section processes and circulates any notification of provisional application.
>
> *The Treaty Handbook* and the *Final Clauses of Multilateral Treaties Handbook* publications constitute additional resources on the matter.

The Treaty Handbook (Extracts)[166]

> *3.4 Provisional application*
>
> (See the *Summary of Practice*, para. 240.)
>
> Some treaties provide for provisional application, either before or after their entry into force. For example, article 7 (1) of the *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994*, provides
>
> > If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force.
>
> The *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995*, also provides for provisional application, ceasing upon its entry into force. Article 56 of the *International Cocoa Agreement, 2010*, also provides for provisional application with effect from the entry into force of the Agreement or, if it is already in force, at a specified date.

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

[165] See: Doc. A/75/136, para.12.

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

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

[…]

Glossary

[…]

provisional application of a treaty that has entered into force

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

See article 24 of the Vienna Convention 1969.

provisional application of a treaty that has not entered into force

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

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

See article 25 of the Vienna Convention 1969.

Final Clauses of Multilateral Treaties Handbook (Extracts)[167]

G. Provisional application of a treaty

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

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

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

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

> *Provisional application*
>
> A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (*a*) the treaty itself so provides; or
>
> (*b*) the negotiating States have in some other manner so agreed.

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

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

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

> *Provisional application*
>
> 1. If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force by:
>
> (*a*) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which before 16 November 1994 notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing;
>
> (*b*) States and entities which sign this Agreement, except any such State or entity which notifies the depositary in writing at the time of signature that it will not so apply this Agreement;
>
> (*c*) States and entities which consent to its provisional application by so notifying the depositary in writing;
>
> (*d*) States which accede to this Agreement.
>
> 2. All such States and entities shall apply this Agreement provisionally in accordance with their national or internal laws and regulations, with effect from 16 November 1994 or the date of signature, notification of consent or accession, if later.[168]

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

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

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

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

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

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

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

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

> 105. The International Court of Justice has held that the United Nations is the *supreme* type of international organization and could not carry out the intentions of its founders if it was devoid of international personality.[172] Indeed, the United Nations has a unique character that is projected in a very special relationship in respect of the law of treaties. In view of its legal capacity, the United Nations may sign treaties.
>
> 106. The Secretariat of the United Nations, for its part, performs the functions of registration and publication of treaties, under Article 102, paragraph 1, of the Charter of the United Nations, and carries out the functions of the Secretary-General as depositary of treaties, in the latter case when the treaty so provides.
>
> 107. With the valuable assistance of the Treaty Section of the Office of Legal Affairs, a description of how the Secretariat works with respect to the provisional application of treaties, in the framework of its registration functions and the depositary functions of the Secretary-General, is presented below.

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

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

[171] Doc. A/CN.4/699 (2016).

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

1. Registration functions

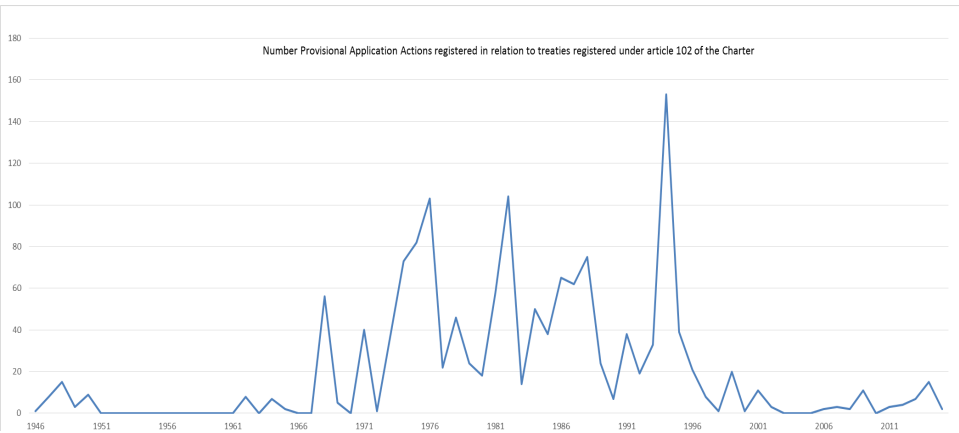
108. Article 102, paragraph 1, of the Charter of the United Nations stipulates the following:

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

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

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

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



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

[173] Registrations may be consulted at https://treaties.un.org.

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

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

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

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

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

> 32. Article 1 (2) of the regulations lays down the rule that registration cannot take place prior to the entry into force of an agreement between two or more parties. However, in adopting this rule at the first part of the first session of the General Assembly, Sub-Committee 1 generally agreed that the term "entry into force" was intended to be interpreted in its broadest sense. *It was the view of the Sub-Committee that, in practice, treaties which, by agreement, were being applied provisionally by two or more parties were, for the purpose of article 1 (2) of the regulations, in force.*
>
> 33. This point was stressed both in the report of Sub-Committee 1 to the Sixth Committee and in the report of the latter to the General Assembly at the second part of its first session. The following statement was made in both reports: "*It was recognized that, for the purpose of article 1 of the regulations, a treaty comes into force when, by agreement, it is applied provisionally by two or more of the parties thereto*".
>
> 34. *In a number of cases to which this interpretation applies, the registration of an agreement was effected prior to its definitive entry into force.* Apart from these instances, the Secretariat has, on several occasions, declined to proceed with the registration of an agreement submitted prior to its actual entry into force. On one occasion, the registering party, after having effected the registration of an agreement, informed the Secretary-General that the date of its entry into force had been postponed for one year. As a result, the registration took effect almost a year before its entry into force. However, the registration was not cancelled and the agreement was published in the chronological order of registration with an accompanying explanatory note.[177]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Depositary functions

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

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

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

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

[181] See: https://treaties.un.org/pages/searchActions.aspx.

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

[183] *Ibid.*, p. 928.

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

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

127. Without a doubt, the Secretary-General of the United Nations is the depositary *par excellence*. The transfer of this function in the transition from the League of Nations to the United Nations was determined by the General Assembly in 1946.[187] Currently, the Secretary-General is the depositary for more than 560 multilateral treaties.

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

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

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

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

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

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

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

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

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

Article 30.
Notification of provisional application

1. A signatory Government which intends to ratify, accept or approve this Agreement, or any Government for which the Council of Members has established conditions for accession but which has not yet been able to deposit its instrument may, at any time, notify the depositary that it will apply this Agreement provisionally when it enters into force in accordance with article 31, or, if it is already in force, at a specified date.

2. A Government which has submitted a notification of provisional application under paragraph 1 of this article will apply this Agreement when it enters into force, or, if it is already in force, at a specified date *and shall, from that time, be a Contracting Party*. It shall remain a Contracting Party until the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article 31.
Entry into force

1. This Agreement shall *enter into force definitively* on 1 January 2017, provided that at least five of the Contracting Parties among those mentioned in annex A to this Agreement and accounting for at least 80 per cent of the participation shares out of the total 1,000 participation shares have signed this Agreement definitively or have ratified, accepted or approved it, or acceded thereto.

2. If, on 1 January 2017, this Agreement has not entered into force in accordance with paragraph 1 of this article, it shall *enter into force provisionally* if by that date Contracting Parties satisfying the percentage requirements of paragraph 1 of this article have signed this Agreement definitively or have ratified, accepted or approved it, or have notified the depositary that they will apply this Agreement provisionally.

3. If, on 31 December 2016, the requirements for entry into force under paragraph 1 or paragraph 2 of this article have not been met, the depositary shall invite those Contracting Parties which have signed this Agreement definitively or have ratified, accepted or approved it, or have notified that they will apply this Agreement provisionally, to decide whether to bring this Agreement into force definitively or provisionally among themselves, in whole or in part, on such date as they may determine.

4. For any Contracting Party which deposits an instrument of ratification, acceptance, approval or accession after the entry into force of this Agreement, this Agreement shall enter into force on the date of such deposit.[189]

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

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

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

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

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

3. United Nations publications on treaties

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

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

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

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

[191] *Ibid.*, p. 840–841.

[192] FCCC/CP/2015/L.9, para. 5.

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

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

[195] *Ibid.*, p. iv.

Provisional application of a treaty that has entered into force

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

Provisional application of a treaty that has not entered into force

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

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

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

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

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

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[196] *Ibid.*, p. 65 (emphasis added).

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

[198] *Treaty Handbook*, p. 1.

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

> 3.4 Provisional application […]
>
> Some treaties provide for provisional application, either before or after their entry into force. For example, article 7 (1) of the *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea* of 10 December 1982, 1994, provides "If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force". The *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*,[200] of 1995, also provides for provisional application, ceasing upon its entry into force. Article 56 of the *International Cocoa Agreement*,[201] of 2010, also provides for provisional application with effect from the entry into force of the Agreement or, if it is already in force, at a specified date.
>
> A State provisionally applies a treaty that has entered into force *when it unilaterally undertakes*, in accordance with its provisions, to give effect to the treaty obligations provisionally, even though its domestic procedural requirements for international ratification, approval, acceptance or accession have not yet been completed. The intention of the State would generally be to ratify, approve, accept or accede to the treaty once its domestic procedural requirements have been met. The State may unilaterally terminate such provisional application at any time unless the treaty provides otherwise (see article 25 of the 1969 Vienna Convention). In contrast, a State that has consented to be bound by a treaty through ratification, approval, acceptance, accession or definitive signature is governed by the rules on withdrawal or denunciation specified in the treaty as discussed in section 4.5 (see articles 54 and 56 of the Vienna Convention 1969).[202]

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

143. Moreover, in response to regular requests from the General Assembly, the United Nations Secretariat prepared and published a *Handbook on Final Clauses of Multilateral Treaties*, most recently issued in 2003.[203] As the Secretary-General notes in his Foreword, the *Handbook* "incorporates recent developments in the practice of the Secretary-General as depositary of multilateral treaties with regard to matters normally included in the final clauses of these treaties".

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

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

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

[202] Emphasis added.

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

[204] *Ibid*., pp. 42–43.

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

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

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

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

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

2. World Food Programme (WFP)

Communication transmitted to the Secretariat, 4 August 2022:

> In general, WFP drafts treaties such so they enter into force upon signature of all parties involved.
>
> However, when the counterparty informs WFP that it is obligated by its own regulations to undertake additional internal processes in order for the treaty to enter into force, WFP may agree alternatively that entry into force takes place on the date of receipt by WFP of a notification from the other party that internal constitutional requirements have been met.
>
> In such case, the text of the agreement provides for its provisional application pending entry into force either at the date of signature or at another date as may be specifically set out in each case. Provisional application continues in general without limitation until the date of entry into force. However, in two previous cases, WFP has agreed with counterparties to limit the period of provisional application to a fixed duration of one year.
>
> Generally speaking, the provisional application of WFP's Basic Agreements has passed without incident. One exception concerned the *Basic Agreement between the Government of the Islamic Republic of Mauritania and the World Food Programme*. This agreement includes the following provisions:
>
> > The present Basic Agreement, and any amendment that may be made thereto, shall enter into force at the date on which the Executive Director of WFP receives a written notification sent by the Government by diplomatic means which indicates that it has completed its internal constitutional processes leading to ratification.
> >
> > […]
> >
> > The present Basic Agreement shall be provisionally applicable from the date of its signature and in the sense of Article 25 of the Vienna Convention on the Law of Treaties dated 23 May 1969, until the Government has completed its internal constitutional processes leading to ratification.[205]
>
> In accordance with the above provisions, the agreement became provisionally applicable on the date of its signature by both parties, *i.e.*, 19 December 2018. WFP has subsequently operated in Mauritania under the terms of the Basic Agreement while awaiting notification of formal ratification by the Mauritanian Government. In this context, in June 2021, the Government requested the amendment of the provisionally applicable agreement. With guidance from the Office of Legal Affairs, WFP and the Mauritanian Government then concluded an amendment to the agreement via an exchange of letters executed between January and April 2022. As of July 2022, ratification of the amended agreement remains pending before the National Assembly.
>
> For further reference, please find in annex hereto a compilation of relevant examples of provisions of treaties to which WFP is party that regulate the provisional application of such treaties.
>
> **Annex**
> **Compiled Provisions of Treaties to Which WFP is Party that Regulate Provisional Application**
>
> *Basic Agreement between the Government of the Lebanese Republic and the World Food Programme (WFP):*

[205] *Accord de base entre le Gouvernement de la République Islamique de Mauritanie et le Programme Alimentaire Mondial* (PAM) of 19 December 2018, at Article XXII(1) and (2).

Article 14
Entry into Force and Termination

Section 38

The Present Agreement shall enter into force after 30 days from the date in which WFP receives written notification from the Government of completing the conclusion of this Agreement in accordance with its internal constitutional procedures, however it shall come into effect provisionally on the date of its signature.

Agreement between the World Food Programme and the Government of the Federal Republic of Germany concerning the Office of the World Food Programme in the Federal Republic of Germany:

Article 5
Final Provisions

(1) This Agreement shall enter into force on the day following the date of receipt of the last of the notifications by which the Parties will have informed each other on the completion of their respective formal requirements. It shall be provisionally applied as might be necessary from the date of its signature until the formal requirements for entry into force mentioned in the first sentence above have been fulfilled.

[…]

Basic Agreement Between the World Food Programme (WFP) and the Government of the State of Kuwait on the Establishment of a Country Office in the State of Kuwait:

Article 23
Entry into Force and amendments and termination

(1) This Agreement shall enter into force on the date of receipt by the Executive Director of a written notification from the Government, to be conveyed through diplomatic channels, that the latter has fulfilled its internal constitutional procedures.

(2) The Basic Agreement will be applied provisionally after signature, in the spirit of Article 25 of the Vienna Convention on the Laws of the Treaties—1969, until the Government of the State of Kuwait has fulfilled its internal constitutional procedures.

Basic Agreement Between the Government of the Kingdom of the Netherlands and the UN/FAO World Food Programme Concerning Assistance from the World Food Programme to the Netherlands Antilles:[206]

Article 7
General Provisions

1) (*a*) After the approval constitutionally required in the Kingdom of the Netherlands has been obtained, this Agreement shall enter into force on the date of receipt by the World Food Programme of a relevant notification from the Government of the Kingdom.

(*b*) Nevertheless, the Government of the Kingdom and the World Food Programme shall provisionally apply the provisions of the present Agreement for a period not exceeding one year from the date in which the Agreement is signed.

[206] This treaty became provisionally applicable on 13 August 1971. It came into force on 1 February 1972, the date of receipt by WFP of the notification described in Article 7(*a*), which preceded the expiration of the one-year period of provisional application set forth in Article 7(*b*).

Basic Agreement Between the Government of the Kingdom of Spain and the World Food Programme for the Establishment of Offices of the World Food Programme in Spain:

Article 21
Entry into Force, Duration and Termination

(1) This Agreement and any amendments hereto shall enter into force as of the date on which the Parties notify each other, through an exchange of instruments, that the respective internal formal procedures have been completed. The provisions of this Agreement shall, as of the date of signature, be applied provisionally pending its entry into force.

[…]

Agreement Between the Government of the United Arab Emirates and the World Food Programme (WFP) Regarding the WFP Office Dubai:

Article 13
Entry into Force

(1) This Agreement shall be signed in both Arabic and English and both versions shall equal effect. The Agreement shall enter into force temporarily after signature until ratified by the UAE Government according to constitutional requirements.

[…]

Accord de base entre le Gouvernement de la République Islamique de Mauritanie et le Programme Alimentaire Mondial (PAM):[207]

Article 22
Entrée en vigueur et dénonciation

(1) Le présent Accord de base, et tout amendement qui y aura été apporté, entre en vigueur à la date à laquelle le Directeur exécutif du PAM reçoit une notification écrite transmise par le Gouvernement par voie diplomatique indiquant que ce dernier a accompli ses propres procédures constitutionnelles jusqu'à sa ratification. […]

(2) Le présent Accord de base s'applique à titre provisoire à partir de la date de sa signature et dans l'esprit de l'article 25 de la Convention de Vienne sur le droit des traités en date du 23 mai 1969, jusqu'à ce que le Gouvernement ait accompli ses propres procédures constitutionnelles jusqu'à sa ratification.

[207] Unofficial translation by the United Nations Secretariat:

Basic Agreement between the Government of the Islamic Republic of Mauritania and the World Food Programme (WFP)

Article 22
Entry into force and denunciation

(1) This Basic Agreement, and any amendments thereto, shall enter into force on the date on which the Executive Director of WFP receives a written notification from the Government, to be conveyed through diplomatic channels, that the latter has fulfilled its internal constitutional procedures. […]

(2) This Basic Agreement will be applied provisionally from the date of its signature and in the spirit of Article 25 of the *Vienna Convention on the Law of Treaties* of May 23, 1969, until the Government has completed its internal constitutional procedures for ratification.

3. Food and Agriculture Organization (FAO)

Communication transmitted to the Secretariat, 28 July 2022:

The Organization is pleased to provide the following examples of the Organization's practice in relation to the provisional application of treaties:

Multilateral Treaties

The *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* was approved by the FAO Conference at its Thirty-sixth Session (held in Rome, from 18 to 23 November 2009) pursuant paragraph 1 of Article XIV of the FAO Constitution, through Resolution No 12/2009 dated 22 November 2009 ("PSMA" or "Agreement"). The Agreement, for which the FAO Director-General is the Depositary, entered into force on 5 June 2016. Article 32 provides for provisional application as follows:

> 1. This Agreement shall be applied provisionally by States or regional economic integration organizations which consent 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.
>
> 2. Provisional application by a State or regional economic integration organization shall terminate upon the entry into force of this Agreement for that State or regional economic integration organization or upon notification by that State or regional economic integration organization to the Depositary in writing of its intention to terminate provisional application.

As reflected in the Circular State Letter ("CSL") issued on 21/I/2021, on 1 January 2021, the United Kingdom on Great Britain and Northern Ireland ("United Kingdom") deposited an instrument of accession to the PSMA. While, according to its Article 29, paragraph 3, the Agreement entered into force for the United Kingdom on 31 January 2021, the instrument of accession was accompanied by a notification from the United Kingdom of its consent to the provisional application of the Agreement, pursuant to its Article 32, paragraph 1, as from the date of receipt of that notification by FAO, *i.e.* 1 January 2021. This instrument and notification were transmitted following the expiry of the *Agreement concerning the withdrawal of the United Kingdom from the European Union and the European Atomic Energy Community*, as reflected in the CSL issued on 3 March 2020. As provided in Article 32, paragraph 2, provisional application terminated upon the entry into force of the Agreement for the United Kingdom on 31 January 2022.[208]

Bilateral treaties

FAO has concluded a number of bilateral agreements for the establishment of FAO representations and liaison offices, and the provision of related privileges, immunities and exemptions, which have been applied on a provisional basis pending the completion of internal procedures by the Member Nations concerned, such as ratification by parliamentary bodies.

[208] Relevant information and material can be accessed at: https://www.fao.org/port-state-measures/resources/detail/en/c/1111616/ and https://www.fao.org/treaties/results/details/en/c/TRE-000257.

4. International Labour Organization (ILO)

Extracts from the fifth report on the provisional application of treaties, by Juan Manuel Gómez-Robledo, Special Rapporteur: [209]

> 47. Among the conventions concluded under the auspices of ILO, only the *Seafarers' Identity Documents Convention* (No. 185)[210] provides for provisional application, in article 9.

[209] Doc. A/CN.4/718 (2018).

[210] *ILO Convention (No. 185) revising the Seafarers' Identity Documents Convention*, 1958 (Geneva, 19 June 2003), United Nations, *Treaty Series*, vol. 2304, No. 41069, p. 121. See also www.ilo.org/dyn/normlex/en/.

5. International Atomic Energy Agency (IAEA)

Communication transmitted to the Secretariat, 26 July 2022:

The work of the IAEA involves many treaties, including those for which the IAEA is the depositary, treaties to which the IAEA is a party, and treaties related to the work of the IAEA. Based on a survey of the relevant practice, those treaties that contain clauses on provisional application are included below.

Relevant treaties under IAEA auspices

Convention on Early Notification of a Nuclear Accident, 1986

> *Article 13*
> *Provisional application*
>
> A State may, upon signature or at any later date before this Convention enters into force for it, declare that it will apply this Convention provisionally.

Relevant treaty actions:

Algeria, People's Democratic Republic of, ratified 15 January 2004, upon signature: "Article 13 […] The People's Democratic Republic of Algeria declares that it will apply the Convention provisionally in accordance with Article 13".

Belarus, Republic of, ratified 26 January 1987, upon signature: "The Byelorussian SSR […] declares that it accepts provisionally the obligations under the conventions in question from the time of their signature and until their ratification. […]".

China, People's Republic of, ratified 10 September 1987, upon signature: "[…] In view of the urgency of the question of nuclear safety, China accepts article 13, the provisionally applicable clause of the Convention before the Convention's entry into force for China."

Democratic People's Republic of Korea (not ratified yet), upon signature: "[…] In view of the urgency of the question of nuclear safety the Democratic People's Republic of Korea will apply [the Convention] provisionally."

Germany, Federal Republic of, ratified 14 September 1989, upon signature: "1. With reference to article 13 of the aforementioned Convention, the Federal Republic of Germany will as of today, in accordance with the law applicable in the Federal Republic of Germany, apply the Convention provisionally. […]"

Greece (Hellenic Republic), ratified 6 June 1991, upon signature: "According to [Article 13 thereof, the Convention] will be provisionally applied in Greece within the framework of the existing internal legislation."

Netherlands, Kingdom of the, accepted 23 September 1991, upon signature: "[…] in accordance with article 13 of that Convention, [the] Government, anticipating the entry into force of the Convention for the Kingdom of the Netherlands, will apply its provisions provisionally. This provisional application will come into effect thirty days from today, or, in case the Convention will not be in force for at least one other State at that time, on the date on which the Convention will have become applicable to one other State either by means of entry into force or by means of a declaration of provisional application."

Russian Federation, ratified 23 December 1986, upon signature by the USSR: "From the time of signature and until the [convention] enter[s] into force for the USSR, the latter will apply [the convention] provisionally."

Ukraine, ratified 26 January 1987, upon signature: "The Ukrainian SSR […] declares that it accepts provisionally the obligations under the Conventions in question from the time of their signature and until their ratification. […]"

United Kingdom of Great Britain and Northern Ireland, ratified 9 February 1990, upon signature: "The United Kingdom will apply this Convention provisionally from today's date to the extent permitted by its existing laws, regulations and administrative arrangements […]"

Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 1986

> *Article 15*
> *Provisional application*
>
> A State may, upon signature or at any later date before this Convention enters into force for it, declare that it will apply this Convention provisionally.

Relevant treaty actions:

Algeria, People's Democratic Republic of, ratified 15 January 2004, upon signature: […] "The People's Democratic Republic of Algeria declares that it will apply the Convention provisionally in accordance with Article 15."

Belarus, Republic of, ratified 26 January 1987, upon signature: "The Byelorussian SSR also declares that it accepts provisionally the obligations under the convention […] from the time of their signature and until their ratification. […]"

China, People's Republic of, ratified 10 September 1987: "In view of the urgency of the question of nuclear safety, China accepts article 15, the provisionally applicable clause of the Convention before the Convention's entry into force for China."

Democratic People's Republic of Korea (not ratified yet), upon signature: "[…] 2. In view of the urgency of the question of nuclear safety the Democratic People's Republic of Korea will apply [the Convention] provisionally."

Germany, Federal Republic of, ratified 14 September 1989, upon signature: "[…] with reference to article 15 of the aforementioned Convention, that the Federal Republic of Germany will as of today, in accordance with the law applicable in the Federal Republic of Germany, apply the Convention provisionally."

Greece (Hellenic Republic) ratified 6 June 1991, upon signature: "According to their respective articles 13 and 15, the above two conventions will be provisionally applied in Greece within the framework of the existing internal legislation."

Netherlands, Kingdom of the, accepted 23 September 1991, upon signature: "[…] in accordance with Article 15 of that Convention, [the] Government, anticipating the entry into force of the Convention for the Kingdom of the Netherlands, will apply its provisions provisionally. This provisional application will come into effect thirty days from today, or, in case the Convention will not be in force for at least one other State at that time, on the date on which the Convention will have become applicable to one other State either by means of entry into force or by means of a declaration of provisional application. The provisions of article 10, second paragraph, are being excluded from this provisional application."

Russian Federation, ratified 23 December 1986, upon signature by the USSR: "From the time of signature and until [the convention] come[s] into force for the USSR, the latter will apply [the convention] provisionally."

Ukraine, ratified 26 January 1987, upon signature: "The Ukrainian SSR […] declares that it accepts provisionally the obligations under the Conventions in question from the time of their signature and until their ratification."

United Kingdom of Great Britain and Northern Ireland, ratified 9 February 1990, upon signature: "The United Kingdom will apply this Convention provisionally from today's date to the extent permitted by its existing laws, regulations and administrative arrangements."

Relevant agreements to which the IAEA is a party

Safeguards agreements

Safeguards agreements concluded by the IAEA do not contain provisions for provisional application.

Additional protocols to safeguards agreements concluded by the IAEA on the basis of the '*Model Protocol Additional to the Agreement(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards*' (INFCIRC/540 (Corrected)) may be applied provisionally at any time before they enter into force in accordance with Article 17.b. of INFCIRC/540 (Corrected).

While the provision set out in Article 17.*b.* of INFCIRC/540 (Corrected) on provisional application has been included in all additional protocols concluded by the IAEA, only four States have decided to apply their additional protocol provisionally and informed the IAEA accordingly. Three of these States have brought into force their additional protocol and one State has no longer provisionally applied the additional protocol in accordance with Article 17.*b.*

> *Article 17*
> *Entry into force*
>
> *a.* This Protocol shall enter into force on the date on which the Agency receives from … written notification that …'s statutory and/or constitutional requirements for entry into force have been met.
>
> OR
>
> upon signature by the representatives of … and the Agency.
>
> *b.* … may, at any date before this Protocol enters into force, declare that it will apply this Protocol provisionally.
>
> *c.* The Director General shall promptly inform all Member States of the Agency of any declaration of provisional application of, and of the entry into force of, this Protocol'.

Technical co-operation

The legal basis for implementing technical cooperation is the *Revised Supplementary Agreement Concerning the Provision of Technical Assistance by the IAEA* (RSA). The RSA expressly incorporates the provisions of the Standard Basic Assistance Agreement (SBAA), as concluded between the relevant Member State and United Nations Development Programme.

> *Article XIII*
> *General Provisions*
>
> 1. This Agreement shall [enter into force upon signature, and] [be subject to ratification by the Government, and shall come into force upon receipt by UNDP of notification from the Government of its ratification. Pending such ratification, it shall be given provisional effect by the Parties.] It shall continue in force until terminated under

paragraph 3, below. Upon the entry into force of this Agreement, it shall supersede existing Agreements concerning the provision of assistance to the Government out of UNDP resources and concerning the UNDP office in the country, and it shall apply to all assistance provided to the Government and to the UNDP office established in the country under the provisions of the Agreements now superseded.

6. International Civil Aviation Organization (ICAO)

Communication transmitted to the Secretariat, 27 July 2022:

Precedents concerning the provisional application of treaties concluded under the auspices of ICAO

There has been one occasion when the provisional application of treaties has occurred at ICAO. The *Protocol for the amendment of the 1956 Agreement on the Joint Financing of Certain Air Navigation Services in Iceland and the Protocol for the amendment of the Agreement on the Joint Financing of Certain Air Navigation Services in Greenland and the Faroe Islands*, both done at Montreal on 3 November 1982, provide, at their respective Articles 13 and 14, for their provisional application from 1 January 1983. However, these Protocols of amendment formally entered into force on 17 November 1989. It should be noted that the *Iceland Joint Financing Agreement* as well as the *Greenland Joint Financing Agreement* have 25 and 24 Contracting States, respectively.

Consideration by ICAO bodies of the provisional application of treaties

Consideration by the ICAO Assembly of a proposal for provisional application of an amendment to the Convention on International Civil Aviation (1989)

During the 27th Session of the ICAO Assembly (Montreal, 19 September—6 October 1989) which adopted an amendment to Article 56 of the *Convention on International Civil Aviation*, signed at Chicago on 7 December 1944 (Chicago Convention) to increase the membership from 15 to 19 of the Air Navigation Commission (ANC), 21 delegations co-sponsored a working paper (A27-WP/67) inviting the Assembly "to express unanimous consent that the amended Article 56 of the Convention should be provisionally applied from 1 January 1990 pending its entry into force". Article 94 of the Chicago Convention provides that the number of ratifications required for the entry into force of any proposed amendment shall not be less than two-thirds of the total number of Contracting States. Provisional application was proposed in this case, given the length of time anticipated until the formal entry into force of the amendment. A27-WP/67 took the position that the consent of all Contracting States, and not just those represented at the Assembly, was necessary for provisional entry into force of the amendment, and that States not represented at the Assembly would also have to signify their consent. It was also asserted that such a procedure was legally permissible under the general international law of treaties as expressly confirmed in Article 25 of the *Vienna Convention on the Law of Treaties*, 1969 (VCLT). During the consideration of the working paper by the Executive Committee of the 27th Session of the ICAO Assembly, concern was expressed that such an action would strongly affect the manner in which any future amendment of the Chicago Convention was approached. Questions were also raised concerning the form in which unanimous consensus would have to be sought in order to have true force and effect. For example, it was questioned whether delegates to the Assembly were empowered to take such action. One delegation, suggesting that the action proposed should only be used in exceptional circumstances and questioning whether increase in the membership of the ANC could be considered such a circumstance, indicated that it would not participate in any consensus. In view of the reservations that had been expressed, the Executive Committee agreed not to recommend to the Assembly the action proposed concerning provisional application (A27-WP/220).

Consideration by the ICAO Assembly of the problem of the slow progress of ratification of air law instruments (1994)

At the Twenty-Second Meeting of its 143rd Session (16 December 1994), the ICAO Council requested the Secretary General to

> "present a paper dealing with the problem of the slow progress of ratification of ICAO international instruments, and the fact that such air law instruments only came into force in respect of the parties which ratified them."

During its consideration of C-WP/10197 at the Fourth Meeting of its 145th Session (31 May 1995), the Council decided that a paper would be presented to the Legal Commission of the 31st Session of the Assembly held later that year which would include possible solutions to the slow progress of ratification (A31-WP/26).[211]

A31-WP/26 differentiated between amendments to the *Chicago Convention*, since these are governed principally by Article 94 of the *Chicago Convention*, and the other international air law instruments adopted under the auspices of the Organization. The paper outlined action taken by the Organization to enhance ratification of international air law instruments, including amendments to the *Chicago Convention*. It examined the level and speed of ratification of these instruments, the procedures for amending the Chicago Convention and for the adoption of other international air law instruments, and certain possible legal solutions such as the provisional application of treaties under Article 25, VCLT, entry into force by signature, modification under Article 41, VCLT, and in specific reference to the *Chicago Convention*, an amendment to Article 94 thereto. It further examined possible administrative action to enhance ratification, such as an increase in the number of regional legal seminars and specific missions to States by Legal Bureau staff. A few delegations expressed concern about the slow progress in the ratification of international air law instruments, and suggested that the Legal Committee should be invited to consider the possible solutions envisaged in A31-WP/26.[212] It was pointed out, *inter alia*, that the constitutional and legislative procedures of some member States sometimes posed difficulties for the provisional application of treaties. The Assembly requested the Council to explore ways and means to expedite the ratification of international instruments taking into account the suggestions made by the Legal Commission.

Consideration by the ICAO Council of the problem of the slow progress of ratification of air law instruments (1996)

Pursuant to the aforementioned Assembly's decision, the Council, at the Fifth Meeting of its 147th Session (28 February 1996), considered C-WP/10360. Noting the slow pace of ratification and the entry into force of various air law instruments described in the working paper and the necessity of remedying the situation, the Council requested the Secretary General to present another paper at its next session identifying the various options available for expediting the entry into force of amendments to the *Chicago Convention* as well as other international air law instruments and, in doing so, to recommend which of

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[211] The Legal Commission is a subsidiary body of the ICAO Assembly established at each Assembly Session pursuant to Rule 18 of the *Standing Rules of Procedure of the Assembly of the International Civil Aviation Organization* (Doc. 7600), which states that "[t]he Assembly may establish such commissions as it may consider to be necessary or desirable". The Legal Commission has responsibility in legal matters and, similarly to the other subsidiary bodies of the Assembly, reports to the Plenary.

[212] Pursuant to its Constitution (Assembly Resolution A7–5), the Legal Committee is a permanent Committee of the Organization, constituted by the ICAO Assembly and responsible to the ICAO Council. It is composed of legal experts designated as representatives of and by Contracting States, and shall be open to participation by all Contracting States. Among its duties and functions, the Legal Committee advises the Council on matters relating to the interpretation and amendment of the *Chicago Convention*, referred to it by the Council; and, by direction of the Assembly or the Council, or on the initiative of the Committee and subject to the prior approval of the Council, to study problems relating to private air law affecting international civil aviation, to prepare drafts of international air law conventions and to submit reports and recommendations thereon.

the issues should be referred to the Legal Committee for consideration. Accordingly, the Council considered C-WP/10418 at the Seventh Meeting of its 148th Session (5 June 1996).

Measures proposed regarding air law instruments in general

C-WP/10418 proposed a number of possible measures to be considered by the Legal Committee to accelerate the rate of ratification and entry into force of international air law instruments, other than amendments to the *Chicago Convention*, namely: *a*) incorporating a new formula for final clauses; *b*) provisional application; *c*) modification between certain States only; and *d*) improving communication between ICAO and Governments in relation to Diplomatic Conferences. These proposals were referred to the Legal Committee. The Council directed the Legal Bureau to prepare a plan of administrative action to accelerate the entry into force of amendments to the *Chicago Convention* and other air law instruments. It was indicated in C-WP/10418 that the elements of such a plan would include, *inter alia*, the preparation of a package of ratification material.

Measures proposed specific to the Chicago Convention

As regards amendments to the *Chicago Convention*, C-WP/10418 also proposed further measures as follows: an amendment of Article 94(*a*) of the Convention; the provisional application of future amendments to the Convention; the provisional application of existing amendments to the Convention; and a modification of the Convention between certain like minded Contracting States only, in conformity with Article 41, VCLT. The proposals in relation to *Chicago Convention* amendments were referred to the Legal Bureau for further study as to their viability. The Council subsequently, at the Third Meeting of its 149th Session (12 November 1996), examined the further analysis made by the Secretariat concerning certain specific legal options to accelerate the application of amendments to the *Chicago Convention* (C-WP/10505). The Council was invited to refer two of these legal solutions for further consideration by the Legal Committee, *i.e.* the provisional application of Protocols of amendment to the *Chicago Convention*, and the modification of the Convention among a group of interested States, in conformity with Article 41, VCLT. The Council also decided that the matter should be documented for consideration by the Legal Commission of the next ordinary session of the Assembly in 1998, as a follow up to A31-WP/26; the Assembly would be the most appropriate body for establishing a legal and political approach with the objective of finding an acceptable solution for the provisional application of such amendments to air law instruments and to the *Chicago Convention*.

Preference shown in the ICAO Legal Committee for practical rather than legal solutions (1997)

At its 30th Session in April/May 1997, the Legal Committee considered the non-*Chicago Convention* instruments on the basis of LC/30-WP/4–5. A large number of delegations expressed the view that the principal motivation for a State to become bound by an international instrument was the interest in the matter, and that practical measures were preferable to the legal solutions contemplated in the paper, such as provisional application to accelerate ratification and entry into force (Doc. 9693-LC/190, para. 4–26). Solutions of a legal nature were less likely to be effective means of expediting the ratification of international air law instruments than measures of a practical nature relating to administrative action.

Legal Commission of the ICAO Assembly notes administrative action to accelerate ratification of air law instruments (1998)

When the Council considered *Chicago Convention* amendments at the Eighth and Ninth Meetings of its 153rd Session (9 and 11 March 1998) on the basis of a draft Assembly working paper contained in C-WP/10769, it expressed a clear preference for administrative action, as opposed to legal measures, to accelerate ratification and entry into force.

In this regard, A32-WP/10 presented to the Legal Commission of the 32nd Session of the Assembly in September/October 1998, stated that the provisional application of a treaty

> "could be used for future amendments (sic) [to the *Chicago Convention*] by having the amendment expressly provide for the possibility of its provisional application, and setting out the conditions related thereto such as the number of provisional consents necessary."

It further recognized that

> "[i]f an Assembly would make a positive determination in a particular case, then delegates possessing appropriate full powers could sign at the Assembly a document expressing the consent of their Government to the provisional application of the Protocol. For those delegations unable to do so during the Assembly, a subsequent letter expressing such consent could be addressed to ICAO as depositary."

Further to its consideration of the paper, the Legal Commission noted only the administrative action to accelerate the ratification and entry into force of air law instruments presented therein.[213]

ICAO Council not in favour of fast-tracking an amendment of the Chicago Convention (2015)

The Council, at the Ninth Meeting of its 206th Session (20 November 2015), considered C-WP/14345 concerning, *inter alia*, the possibility of examining alternatives to facilitate the entry into force as early as possible of the amendment to Article 50 (*a*) (increasing the size of the Council). The President of the Council noted that the majority of the Representatives was clearly not in favour of fast-tracking the entry into force of an amendment to Article 50 (*a*) (or to Article 56 which would increase the size of the ANC) and considered that it was necessary to respect the provisions of the *Chicago Convention*, in particular Article 94.

[213] See: Doc. 9728, A32-LE, pages 10–11.

7. International Maritime Organization (IMO)

Communication transmitted to the Secretariat, 26 July 2022:

Provisional application of the 2006/2008 amendments to the Convention on the International Mobile Satellite Organization (IMSO)

Introduction

The *Convention on the International Mobile Satellite Organization* (IMSO), of which the IMO is the Depositary, was adopted on 3 September 1976 and entered into force on 16 July 1979.[214] It does not include a provision on provisional application. However, there have been a few instances of provisional application of amendments to the IMSO Convention. These largely allow for administrative arrangements to be undertaken in anticipation of expanded organizational responsibilities, as follows:

the 2006 amendments, adopted by the IMSO Assembly at its 18th session on 29 September 2006, and whose provisional application was decided by the IMSO Assembly at its 19th (extraordinary) session, in March 2007; and

the 2008 amendments, adopted by the IMSO Assembly at its 20th session, on 2 October 2008, and whose provisional application was decided at that same session.

The procedure for amendments to enter in force is enshrined in Article 20 of the IMSO Convention, which provides that the instrument of acceptance of the amendments should be deposited with the Depositary of the Convention, the Secretary-General of the International Maritime Organization (IMO). The amendments shall enter into force 120 days after the Depositary has received notices of acceptance from two-thirds of those States which, at the time of their adoption by the IMSO Assembly, were Parties to the IMSO Convention.

The 2006 amendments and the decision on their provisional application

The 2006 amendments to the IMSO Convention were adopted at the Eighteenth Session of the IMSO Assembly.[215] The amendments regulate the *Global Maritime Distress and Safety System* (GMDSS) and the *Long Range Identification and Tracking of Ships* (LRIT).[216] In short, these amendments aim to extend the oversight functions of IMSO to all GMDSS providers in the future, and to give IMSO the task of overseeing LRIT. The amendments were adopted in accordance with Article 18 of the IMSO Convention, therefore, they would enter into force

[214] The *International Maritime Satellite organization* (INMARSAT) was established in 1979 at the behest of the IMO as a non-profit intergovernmental organization pursuant to the *Convention on the International Maritime Satellite Organization*, 1976. The objective of the Organization was to establish a satellite communications network for the maritime community, with the main aim of improving the safety of life at sea and the management of distress situations, particularly through the Global Maritime Distress and Safety System (GMDSS). The mission of the Organization was further extended to land mobile and aeronautical communications. INMARSAT was privatized in 1999 and was divided into two entities, both based in London: the *International Mobile Satellite Organization* (IMSO) as an intergovernmental regulatory body for satellite communications, and the UK-based company *Inmarsat Ltd* managing the INMARSAT's operational unit. This privatization was established through amendments to the INMARSAT Convention and the Operating Agreement between telecommunications entities public or private, which were adopted by the INMARSAT Assembly in 1998. In 1999, the Assembly and Council of INMARSAT decided to implement the amendments pending their formal entry into force which happened in 2001.

[215] See: Doc. ASSEMBLY/18/16/RD, paras. 4.1.2 and 4.2.7.

[216] Set out in Annexes IV to VII of Doc. ASSEMBLY/18/16/RD.

> "one hundred and twenty days after the Depositary has received notices of acceptance from two-thirds of those States which, at the time of adoption by the Assembly, were Parties."

The IMO Maritime Safety Committee (MSC), at its 82nd session, decided to appoint IMSO as the LRIT Co-ordinator and invited IMSO to take whatever action it could in order to ensure the timely implementation of the LRIT system (document MSC 82/24, paragraph 8.49). MSC was informed by IMSO that the IMSO Assembly would be convened in 2007 to consider the measures to fulfil the LRIT Co-ordinator functions through provisional application of the amendments. At its 82nd session, MSC noted that:

> "the IMSO Assembly had yet to make a decision on the provisional implementation of these adopted amendments and an extraordinary session of the IMSO Assembly would be convened in March 2007 to consider the measures required".[217]

At 19th extraordinary session, held from 5 to 6 March 2007, the IMSO Assembly

> "decided that the amendments to the IMSO Convention adopted at the Eighteenth Session of the Assembly should enter into force on the basis of provisional application from 7 March 2007, pending their formal entry into force in accordance with Article 18 of the IMSO Convention".[218]

Thus, the implementation of the provisional application of the 2006 amendments was formulated through a decision of the IMSO Assembly contained in the Record of Decisions (document A 19/8/RD). This agreement therefore takes the form of a "resolution, decision or other act adopted by an international organization or at an intergovernmental conference, in accordance with the rules of such organization or conference, reflecting the agreement of the States or international organizations concerned" as envisaged by Guideline 4, paragraph (*b*)(i) of the *Guide to Provisional Application of Treaties* of the ILC providing for the form that the agreement on provisional application may take.[219]

The decision of the Assembly provides that the amendments should be provisionally applied from 7 March 2007.[220] The decision also provides that the end date of provisional application should coincide with the entry into force of the amendments. In this sense, it is in line with Guideline 9, paragraph 1 which states that

> "the provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned."

The need for provisional application to follow a formal entry into force in accordance with the Convention's procedure is recalled in the decision, where the Assembly

> "urge[s] all Parties to use their best endeavours to accept the amendments in accordance with Article 18 of the IMSO Convention as soon as possible so as to expedite their formal entry into force".[221]

In the case of IMSO, the States adopted a clause subordinating the decision to national law requirements:

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[217] See: Doc. MSC 82/24, para. 8.11.

[218] See: Doc. ASSEMBLY/19/8, para. 7.5.

[219] See: Part Two, Sec. A, below, at p. 218..

[220] See: Doc. ASSEMBLY 19/8, para. 7.5.

[221] See: Doc. ASSEMBLY 19/8/RD, para.7.7.

> "The Assembly noted that such provisional application would mean that Parties will conduct themselves, in their relationships with each other and the Organization, within the limits allowed by their national constitutions, laws and regulations, as if the amendments were in force with effect from such date."[222]

This seems to echo Guideline 12 of the Guide of the ILC which guarantees

> "the right of the States […] to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of States."[223]

The 2008 amendments

After the decision on provisional application of the amendments was taken at the 19th extraordinary session of the IMO Assembly, several State Parties led by the United States objected to that decision. They also considered that the decision to provisionally apply the amendments "was flawed because it was not taken by consensus".[224] The United States proposed revision of the 2006 amendments and provisional application of the new version.[225]

In its proposal, the United States set out reasons for establishing provisional application of the new amendments as follows:

> "formal entry into force of the amendments […] may take years and is unlikely to occur quickly enough to meet the need to promptly establish a firm legal foundation upon which IMSO can perform its duties and functions as LRIT Coordinator".[226]

Provisional application would be "a way forward to allow the Organization to promptly and properly perform its role as LRIT Coordinator".[227] The US explained that they wanted to modify the amendments adopted by the IMSO Assembly at its 18th session because

> "it believed that the one sentence amendment adopted at the Eighteenth Session of the IMSO Assembly was substantively deficient and did not provide the necessary legal framework for IMSO to undertake the necessary functions and duties of the LRIT Coordinator".[228]

The 20th Assembly adopted, by consensus, the new amendments and decided, at that same session, that they should be applied provisionally from 6 October 2008, pending their formal entry into force in accordance with Article 18 of the IMSO Convention.[229] In order to give way to the provisional application of the 2008 amendments, which incorporate the 2006 amendments while modifying their content, the Assembly decided at its 20th session to terminate its decision to apply the 2006 amendments on a provisional basis.[230]

Provisional application of the amendments to the 2009 London Protocol

The *1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972* (London Protocol) was adopted in 1996 in order to

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[222] See: Doc. ASSEMBLY/19/8, para. 7.6.

[223] Guideline 12, reproduced below, at p. 210.

[224] See: Doc. ASSEMBLY/20/13.2, para. 1.1.

[225] See: Doc. ASSEMBLY/20/13.2.

[226] See: Doc. ASSEMBLY/20/13.2, para. 1.5.

[227] *Ibid.*

[228] See: Doc. ASSEMBLY/20/13.1, annex 1, page 1.

[229] See: Doc. ASSEMBLY/20/16/RD, paras. 13.2.8 and 13.2.9.

[230] See: Doc. ASSEMBLY/20/Record, para. 13.2.13.

modernize and eventually replace the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972* (the "London Convention"). The London Protocol entered into force in 2006 and established more restrictive provisions than the London Convention by prohibiting all dumping of wastes at sea unless explicitly permitted. Annex 1 to the Protocol provides a list of wastes and other matter which may be considered for dumping at sea, subject to permit.

Article 21 of the Protocol provides for the amendment procedure and requires explicit acceptance by two thirds of the Contracting Parties for the amendment to enter into force. The Protocol does not provide for its provisional application.

In 2009, the Meeting of Contracting Parties adopted resolution LP.3(4) amending Article 6 of London Protocol. The amendment added a second paragraph to Article 6 providing that "the export of carbon dioxide streams for disposal in accordance with annex 1 may occur, provided that an agreement or arrangement has been entered into by the countries concerned".

By October 2019, the London Protocol had 53 Contracting Parties but only six States accepted the amendment. To remedy this situation, the Contracting Parties to the London Protocol, at the 14th Meeting on 11 October 2019, adopted resolution LP.5(14) on provisional application of the 2009 amendment, pending its entry into force. The resolution requires those Contracting Parties who want to provisionally apply the amendment (and therefore enter into agreements to export carbon dioxide streams for disposal) to deposit a declaration to that effect.

The 2021 *Guide to Provisional Application of Treaties* of the International Law Commission (ILC) provides, in its Guideline 4 ("Form of agreement", paragraph *b*), that provisional application of treaties can be agreed by "any other means or arrangements [than a separate treaty], including: (i) a resolution, decision or other act adopted by an international organization or at an intergovernmental conference …". Thus, Resolution LP. 5(14) providing for provisional application of the amendment to article 6 complies with the Guide.

There are currently 9 acceptances of the 2009 amendment, out of which Norway, the Netherlands, Denmark and the Republic of Korea have declared its provisional application.

International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM Convention)

The *International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM)* was adopted in February 2004 and entered into force in September 2017. The Convention contains standards with which the ships of the States Parties must comply and sets a fixed date for compliance with those standards. In 2013, the compliance dates provided in the Convention were approaching, however the treaty was not yet in force. Therefore, IMO Member States embarked on a discussion on how to amend the compliance dates in a treaty that has not yet entered into force. It was of an utmost importance for the shipping industry to have clarity about the compliance dates and uncertainty concerning this issue delayed the ratification process.

A Correspondence Group on the application of the BWM Convention was established to consider options to relax the implementation schedule of regulations included in the Convention. It submitted its report at the 65th session of the Marine Environment Protection Committee (MEPC). Among the proposed options was the provisional application of Article 19 of the Convention (Option C) which provides for the amendment procedure of the treaty.[231]

Article 19 allows a classical amendment procedure and a tacit acceptance procedure. The proposal suggested that the tacit acceptance procedure of Article 19 should be provision-

[231] See: Doc. MEPC 65/2/11, paras. 31 to 33 and annex 7.

ally applied in order to amend the Convention and to change the dates of implementations of specific standards of the Convention which were too close in time.

The proposal referred to Article 25(1)(*b*) of the *Vienna Convention of Law on Treaties* (VCLT) which allows negotiating States, when the treaty does not provide for provisional application, as in the case of the BWM Convention, to enter into an agreement "in some other manner" to bring the treaty into force provisionally. Thus, it was proposed that the negotiating States to the BWM Convention should agree on the provisional application of Article 19 through an Assembly resolution allowing [the opening of] the amendment procedure. According to the proposal, provided that such a resolution embodied the intent of the Member States represented in the Assembly to adopt a binding agreement concerning the provisional application of Article 19 of the BWM Convention, it would qualify as an agreement in terms of Art. 25(1)(*b*) of the VCLT. The agreement (adopted by way of IMO Assembly resolution) to apply certain parts of the treaty would provisionally constitute a separate binding ("subsidiary") agreement and the proposal suggested that the negotiating States that agree on provisional application would subsequently be treated as "States Parties" to the Convention.

Following the work of the Correspondence Group and its proposal for an Assembly resolution on the provisional application of Article 19 of the BWM Convention, the IMO Secretariat provided legal advice to the 65th session of MEPC[232] in which it did not recommend the option of provisional application.[233]

Issues raised by this proposal

Whereas provisional application usually concerns substantive provisions, in this case the proposal was to provisionally apply an article regulating the amendment procedure of the Convention. Article 25 of the VCLT does not limit provisional application to substantive articles only. However, as the legal advice of the Secretariat states, the use of Article 25 of the VCLT to provisionally apply a procedural provision would be "untested and without precedent".[234]

The proposal was also problematic from the point of view of the status of States who would have concluded the agreement on provisional application. In accordance with the VCLT, only negotiating States can agree on provisional application, that is States which took part in drawing up and adopting the text of the treaty. In the case of the BWM Convention, those States would have been those present at the diplomatic conference in 2004, not the MEPC Members or the Assembly (both composed of all Members of the IMO). Furthermore, it was unclear whether Article 25(1)(*b*) requires all of the negotiating States to agree on the provisional application or whether only some may so agree.

The proposal suggested also that the negotiating States that would agree on provisional application of Article 19 would subsequently be treated as "States Parties" to the Convention.[235] Thus, a State which would have participated in the negotiation of the BWM Convention, but which would not be a contracting State having expressed its consent to be bound by the Convention, could have agreed on provisional application of Article 19 and would have the right to amend the Convention, without being bound by the whole treaty. It would enable States that had not ratified the Convention itself to participate in amending its substantive provisions such as, *e.g.* those contained in the regulations. Conversely, a contracting State that would have not agreed on the provisional application of Article 19

[232] See: Doc. MEPC 65/2/18.

[233] *Ibid*., para. 20.

[234] *Ibid*., para. 20.1.

[235] See: Doc. MEPC 65/2/11, annex 6, para. 3.

of the BWMC would have no right to amend the treaty. The right of negotiating States to provisionally apply a treaty should not be confused with the right of States Parties to amend that treaty.[236]

Another problem was that the amendment procedure could not be applied while the Convention was not in force. Indeed, such provisional application would infringe Article 39 of the VCLT, whereby only parties can amend a treaty. Pursuant to Article 2(1) of the VCLT, a "party" is a "State which has consented to be bound by the treaty and for which the treaty is in force". As long as the treaty is not in force, there are no "parties". Thus, the amendment procedure of Article 19 of the BWM Convention could not be applied before the Convention entered into force. The legal advice of the Secretariat argued that:

> "So long as the BWM Convention does not enter into force, there are no Parties (as opposed to negotiating States or Contracting States), so that no one can utilize the procedure set out in the article".[237]

The proposal on provisional application of Article 19 on amendment procedure of the BWM Convention was not supported by the Marine Environment Protection Committee. In any case, the provisional application of the amendment procedure would also not resolve the problem of the compliance dates as the amendments adopted by virtue of the tacit acceptance take around 24 months to enter into force which would be already beyond the compliance dates.

[236] See: Doc. MEPC 65/2/18, para. 20.5.

[237] *Ibid.*, para. 20.4.

8. Universal Postal Union (UPU)

Communication transmitted to the Secretariat, 28 July 2022:

> The Acts of the UPU[238] consist of the *Constitution of the UPU, the General Regulations of the UPU, the Universal Postal Convention* (and its Final Protocol), the optional *Postal Payment Services Agreement* (and its Final Protocol), as well as any Additional Protocols thereto; such a definition also comprises the *Regulations to the Universal Postal Convention* (and their Final Protocol) as well as the *Regulations to Postal Payment Services Agreement* (and their Final Protocol).
>
> Insofar as the Acts of the UPU are concerned, it is important to emphasize that these Acts do not require a minimum number of approvals, acceptations, ratifications or accessions. Accordingly, they enter into force on the date specified therein as decided by the relevant UPU body (*i.e.* the Congress or, in the case of the aforementioned Regulations, the Postal Operations Council) adopting such Acts.
>
> The UPU has not, to date, resorted to the provisional application of those Acts in the manner contemplated in article 25 of the *Vienna Convention on the Law of Treaties*. This is also the case for treaties to which the UPU is a party.

[238] As defined in article 21 of the Constitution of the UPU.

9. International Organization for Migration

Communication transmitted to the Secretariat, 17 December 2019:

> [The International Organization for Migration (IOM)] is a non-normative organization that does not engage itself in setting and enforcing binding rules upon its Member States and other states; however, it can develop non-normative instruments for States, such as declarations, guidelines, non-binding frameworks and similar instruments, and can advise and support States in the development of binding instruments. Nevertheless, IOM would like to share some comments from its own experience in concluding international instruments.
>
> IOM is a related organization in the United Nations system; consequently, it is not covered by neither the *Convention on the Privileges and Immunities of the United Nations*, 1946, nor the *Convention on the Privileges and Immunities of the Specialized Agencies*, 1947. To define the applicable level of privileges and immunities applicable to it, IOM has thus to negotiate and conclude bilateral agreements with Member States and States where it operates, aiming for standards in line with the 1947 and 1946 Conventions. As a consequence, IOM has a wide variety of agreements and, therefore, very different situations across many States, some of them including provisional application of the agreement. As an example of this, in one particular country, IOM is provisionally granted the privileges and immunities of the 1947 Convention, pending the negotiation and conclusion of a bilateral cooperation agreement establishing the modalities of cooperation between IOM and such State in its territory. Such provisional application of the 1947 Convention, notably, is granted in a Note Verbale sent to the IOM by the Ministry of Foreign Affairs.
>
> In concluding bilateral agreements with States, IOM strives for entry into force upon signature. When not possible, IOM aims to include a reference to provisional application of the agreement until the necessary internal procedures for entry into force are completed and the Government notifies IOM of such completion. It has become IOM's practice to include such a reference for provisional application in its cooperation agreements, for clarity regarding the scope, start and end of the provisional application. While this provisional application allows for operability until entry into force, it often results in both parties relying on such provisional application and not making any further efforts to go beyond provisional application towards actual entry into force.

10. International Tribunal for the Law of the Sea (ITLOS)

Communication transmitted to the Secretariat, 21 February 2022

The International Tribunal for the Law of the Sea has concluded agreements containing clauses concerning their provisional application.

Article 11, paragraph 2, of the *Agreement between the International Tribunal for the Law of the Sea and the Government of the Federal Republic of Germany 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* (Additional Agreement in accordance with article 3 of the Headquarters Agreement) provides:

> 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.

Article 14, paragraph 2, of the *Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea* provides:

> Pending such approval the present Agreement shall be applied provisionally from the date of its signature by the Secretary-General of the United Nations and the President of the International Tribunal.

Prior to the entry into force of the *Agreement between the International Tribunal for the Law of the Sea and the Government of the Federal Republic of Germany regarding the Headquarters of the Tribunal* ("Headquarters Agreement"), relations with the host country were governed by a provisional ordinance adopted by the latter in 1996, which applied, *mutatis mutandis*, the relevant provisions of the *Convention on the Privileges and Immunities of the Specialized Agencies*, 21 November 1947.[239] Pursuant to article 35 of the Headquarters Agreement, it entered into force on 1 May 2007.

[239] See: ITLOS Yearbook, 2006, p. 76.

11. United Nations Framework Convention on Climate Change (UNFCCC)

Communication by the Secretariat of the UNFCCC transmitted to the United Nations Secretariat, 29 July 2022:

Voluntary provisional application of the Doha Amendment to the Kyoto Protocol to the United Nations Framework Convention on Climate Change

The *Doha Amendment* to the Kyoto Protocol was adopted by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) on 8 December 2012 through Decision 1/CMP.8. It sets out obligations for the second commitment period of the Kyoto Protocol, running from 2013 to 2020, for Parties included in Annex I that have quantified emission limitation and reduction commitments (QELRCs) inscribed in the third column of the table contained in Annex B to the Kyoto Protocol.

Decision 1/CMP.8 provides for the voluntary provisional application of the *Doha Amendment* pending its entry into force, as follows:

> …
>
> 5. Recognizes that Parties may provisionally apply the amendment pending its entry into force in accordance with Articles 20 and 21 of the Kyoto Protocol, and decides that Parties will provide notification of any such provisional application to the Depositary;
>
> 6. Decides also that Parties that do not provisionally apply the amendment under paragraph 5 will implement their commitments and other responsibilities in relation to the second commitment period, in a manner consistent with their national legislation or domestic processes, as of 1 January 2013 and pending the entry into force of the amendment in accordance with Articles 20 and 21 of the Kyoto Protocol.

The *Doha Amendment* entered into force on 31 December 2020, the ninetieth day after the receipt by the Depositary of 144 instruments of acceptance representing three-quarters of the Parties to the Kyoto Protocol, in accordance with Article 20, paragraph 4, and Article 21, paragraph 7, of the Kyoto Protocol.

The period of voluntary implementation of the *Doha Amendment*, as provided for in paragraph 6 of decision 1/CMP.8, expired on 31 December 2020, following its entry into force.

Authoritative information on acceptance and entry into force of the *Doha Amendment*, as well as information on corrections, is available from its Depositary, the Secretary-General of the United Nations.

12. World Trade Organization (WTO)

Extracts from the fifth report on the provisional application of treaties, by Juan Manuel Gómez-Robledo, Special Rapporteur: [240]

> 56. With respect to WTO, it is well known that the *General Agreement on Tariffs and Trade* (GATT)[241] is undoubtedly the multilateral treaty that was applied provisionally for the longest period of time (from 1947 to 1994), as noted in the third report.[242] The Special Rapporteur has identified a number of decisions taken by WTO dispute settlement mechanisms that concern the provisional application of the General Agreement; these are noted as examples of case law that were not included in the previous reports.[243]

[240] Doc. A/CN.4/718 (2018).

[241] General Agreement on Tariffs and Trade (Geneva, 30 October 1947), United Nations, *Treaty Series*, vol. 55, No. 814, p. 187.

[242] A/CN.4/687, para. 99.

[243] See: GATT, Report of the Panel, *United States—Measures affecting alcoholic and malt beverages*, DS23/R-39S/206, adopted on 19 June 1992; GATT, Report by the Panel, *Canada—Import, distribution and sale of certain alcoholic drinks by provincial marketing agencies*, DS17/R-39S/27, adopted on 18 February 1992; GATT, Report of the Panel, *Thailand—Restrictions on importation of and internal taxes on cigarettes*, DS10/R-37S/200, adopted on 7 November 1990; GATT, Report of the Panel, *Norway—Restrictions on imports of apples and pears*, L/6474–36S/306, adopted on 22 June 1989.

13. European Union[244]

Extracts from statements delivered by the representatives of the Observer delegation of the European Union

Statement made in the Sixth Committee, Sixty-eighth session (2013), 23rd meeting, 4 November 2013:

> Over the years the European Union has concluded, alone or along[side] its [Member States], a large number of agreements which provide for provisional application of the agreement or part of it. The Union makes use of provisional application primarily in sectors such as trade, fisheries, and aviation, but there are cases of provisional application in other areas as well.
>
> The possibility for provisional application of international agreements is envisaged in the EU's founding treaties, namely Article 218(5) of the *Treaty on the Functioning of the European Union* and the Council of the European Union may, in the context of signature, adopt a decision authorising provisional application of a treaty prior to its entry into force.

Statement made in the Sixth Committee, Sixty-ninth session (2014), 25th meeting, 3 November 2014:[245]

> [T]he Union would like to point out that the possibility for provisional application of international agreements with third countries is explicitly envisaged in the Union's Founding Treaties (Article 218(5) TFEU) and this possibility is often used in practice by the EU.

Statement made in the Sixth Committee, Seventieth session (2015), 23rd meeting, 9 November 2015:[246]

> [T]he European Union makes regular use of the possibility of provisional application of treaties in various fields of law and the topic is of particular interest for the Union. Some part of the EU practice, more specifically relating to multilateral agreements, is well reflected in the Annex to the Third Report[247] and, as it could be noted, in almost half of the fifty agreements identified by the Secretariat[248] the European Union is a contracting party.
>
> The European Union would like to point out that, in addition to multilateral agreements, it uses provisional application also in its bilateral relations with third States, including in the case of Association Agreements and Partnership and Cooperation Agreements that the Union concluded with other countries. These kinds of agreements establish broad frameworks for cooperation and integration. These agreements can be very complex and wide-ranging agreements and their entry into force entails a long process of ratification. Provisional application offers a useful way to bring the practical application of such agreements to an early start.
>
> Recent examples include for instance the association agreements that the European Union has signed in 2014 with Ukraine, Georgia and the Republic of Moldova. As reflected in these agreements the provisional application covers not only provisions relating to trade, but also provisions relating to political dialogue, as well as institutional provisions. The

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[244] Editorial Note: For examples of European Union practice on provisional application of agreements with third States, see: Doc. A/CN.4/699/Add.1.

[245] Full text available at: https://www.un.org/en/ga/sixth/69/pdfs/statements/ilc/eu_3.pdf.

[246] Full text available at: https://www.un.org/en/ga/sixth/70/pdfs/statements/ilc/eu_3e.pdf.

[247] Editorial note: see A/CN.4/687.

[248] Editorial note: see A/CN.4/658 and A/CN.4/676 (and subsequently A/CN.4/707), reproduced in Part Three, at pp. 266–346, below.

Association agreement between the EU and its Member States and Ukraine is also an example of an agreement that provides explicitly for certain legal effects of provisional application as its Article 486 (5) states that:

> For the purpose of the relevant provisions of this Agreement, including its respective Annexes and Protocols, any reference in such provisions to the "date of entry into force of this Agreement" shall be understood to the "date from which this Agreement is provisionally applied" in accordance with paragraph 3 of this Article.

Furthermore, this agreement requires a six-month prior notification for both the termination of the Agreement and the termination of provisional application (see Articles 486(7) and 481(2) thereof).

The above examples demonstrate, on the one hand, that with respect to provisional application of treaties the Union acts in the same way as the other actors concerned. On the other hand, it shows that the European Union is an actor who is, in fact, actively contributing to shaping the practice in the field of provisional application of treaties. It should be noted, however, that when recourse is had to provisional application of a treaty where the Union and its Member States together are party to the agreement (the so called 'mixed agreements', as in the case of the agreements mentioned above), the provisional application may concern only matters falling within the competences of the Union and, from international law point of view, the agreement is applied provisionally only between the Union and the respective third State. In such cases, the Member States of the Union are bound to apply provisionally the agreement not as a matter of international law, but as a matter of EU law, in accordance with Article 216 (2) of the *Treaty on the Functioning of the European Union*.

Extracts from statements delivered by the representatives of Member States of the European Union referencing the practice of the European Union

Czech Republic

Communication transmitted to the Secretariat, 31 January 2014:

> [P]rovisional application is quite common for the treaties negotiated in the framework of the European Union (EU). The legal basis for the provisional application of international agreements concluded between the EU and third countries (or international organisations) is enshrined in Article 218(5) of the *Treaty on the Functioning of the European Union*.
>
> In practice, the EU regularly makes use of the provisional application especially in the case of the so-called mixed agreements which require ratification by all Member States and thus can be very time-consuming. As the provisional application of provisions falling within Member States' legal systems, only those matters covered by the agreements coming within the EU's competence are provisionally applied by the Union or the scope of the provisional application by the member States is limited by the requirement of conformity with internal procedures (or domestic legislation).
>
> Thus, the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, is being applied on a provisional basis by the Union, pending the competition of the procedures for its conclusion, and the same time provisions falling within the member States' competences are excluded from the provisional application [see Art. 3 of the Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the *Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part* (2011/265/EU)].
>
> As another example, Art. 3 of the Decision of the Council and of the Representatives of the Governments of the Member States, meeting within Council of 15 October 2010 on the

signature and provisional application of the *Common Aviation Area Agreement ("CAAA") between European Union and its Member States, of the one part, and Georgia, of the other part* (2012/708/EU) and Art. 29 of the CAAA itself establish that pending its entry into force, the CAAA shall be applied on a provisional basis by the Union and by the Member States, in accordance with their internal procedures and/or domestic legislation as applicable.

Hungary

Statement made in the Sixth Committee, Sixty-seventh session (2012), 20th meeting, 2 November 2012:[249]

[*Reference to the practice of the European Union*:]

[D]uring the last decade the number of international treaties containing provisional application clauses has substantially increased. This also applies to Hungary which as a member of the European Union has become a party to numerous multilateral international treaties which were concluded between the EU, its member states and third countries. These treaties would usually enter into force after all parties have ratified them. This would normally require twenty-nine ratifications, but to reduce the time before the full application, these treaties in almost every case include a provisional application clause.

The Netherlands

Communication transmitted to the Secretariat, 20 April 2016:

[*Reference to the practice of the European Union*:]

[T]he Kingdom of the Netherlands would like to add that, as a Member State of the European Union (EU), the Kingdom of the Netherlands participates in the so-called 'mixed agreements' concluded by the EU and its Member States and another (third) State. Such agreements may also provide for provisional application by the EU (and the third State) pending completion of the national approval procedures in each individual Member State, which may take considerable time. Provisional application of mixed agreements by the EU is necessarily limited to the topics falling under EU competence.[250] Such provisional application by the EU also binds the Kingdom of the Netherlands as a Member State of the European Union, which takes effect upon notification by the EU of the completion of its internal procedures (relevant EU Council Decisions allowing for provisional application), indicating the parts of the agreement that will be provisionally applied and the deposit of the instrument of ratification by the other (third) State.

Romania

Statement made in the Sixth Committee, Sixty-eighth session (2013), 24th meeting, 4 November 2013:[251]

[*Reference to the practice of the European Union*:]

One exception from the above-mentioned rule exists, however: treaties (even requiring ratification by Parliament) between the European Union and its Member States (Romania being an EU Member State), on the one side, and third States (the so-called "mixed treaties"), on the other side, can be applied provisionally before their entry into force if the treaty expressly provides so.

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[249] Full text available at: https://www.un.org/en/ga/sixth/67/pdfs/statements/ilc/hungary.pdf.

[250] Since mixed agreements largely cover subject matter falling under EU competence, in practice this means that a vast majority of its provisions are applied provisionally.

[251] Full text available at: https://www.un.org/en/ga/sixth/68/pdfs/statements/ilc/romania_3.pdf.

Slovenia

Statement made in the Sixth Committee, Seventy-fourth session (2019), 25th meeting, 30 October 2019:[252]

> [*Reference to the practice of the European Union*:]
>
> Slovenia is ready to submit a written proposal on draft model clause 1[253] and thus allow the states to complete the relevant internal treaty-making procedures before provisionally applying [the treaty]. The latter is of particular interest to those states that have internal limitations on the use of provisional application. Such a provisional application mechanism is applied by the European Union in the field of air transport agreements, which partly fall under the competence of EU Member States.

Spain

Statement made in the Sixth Committee, Sixty-seventh session (2012), 22nd meeting, 6 November 2012:[254]

> [*Reference to the practice of the European Union*:]
>
> Thus, among the wide variety of legal issues that arise, the use of provisional application that States and international organizations such as the European Union are doing in the agreements mixed of a commercial nature concluded with third States could be highlighted. Thus, through the mechanism of provisional application, within the framework of the European Union, it is possible to advance the application of that part of the treaty that falls under the exclusive competence of the Union.

Statement made in the Sixth Committee, Sixty-ninth session (2014), 26th meeting, 3 November 2014:[255]

> [*Reference to the practice of the European Union*:]
>
> We would also like to draw attention to the importance of the practice of International Organizations on this issue, namely the European Union which has made extensive and quite interesting use of the provisional application of treaties as provided for in article 218.5 of the Treaty on the Functioning of the European Union. This is the case, for example, of some mixed agreements (between the Union and its member States, on the one hand, and a third party on the other hand) in which only the parts affecting matters within the Union's competence are provisionally applied.

Statement made in the Sixth Committee, Seventieth session (2015), 25th meeting, 11 November 2015:[256]

> [*Reference to the practice of the European Union*:]
>
> Regarding the provisional application of treaties concluded by international organizations, it may be appropriate to take into account the practice, common within the Euro-

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[252] Full text available at: https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/slovenia_1.pdf.

[253] Editorial note: See document A/74/10, annex A, for the text of draft model clause 1, as proposed by the Special Rapporteur for consideration by the International Law Commission).

[254] Unofficial translation (from Spanish) by the United Nations Secretariat. Full text available at: https://www.un.org/en/ga/sixth/67/pdfs/statements/ilc/spain_3.pdf.

[255] Unofficial translation (from Spanish) by the United Nations Secretariat. Full text available at: https://www.un.org/en/ga/sixth/69/pdfs/statements/ilc/spain_3.pdf.

[256] Unofficial translation (from Spanish) by the delegation of Spain. Full text available at: https://www.un.org/en/ga/sixth/70/pdfs/statements/ilc/spain_3e.pdf.

pean Union, of mixed agreements (that is, agreements concluded jointly by the European Union and its Member States, on the one hand, and one or more third States, on the other). Such practice restricts provisional application to provisions that fall within the scope of EU competence and in which, therefore, the decision concerning provisional application is adopted by the EU, without the Member States *qua talis* having to intervene (beyond their presence as members in the Council of the European Union, a body to which Article 218.5 of the *Treaty on the Functioning of the EU* entrusts the decision on the application of the international agreements of the European Union).

Extracts from the fourth report on the provisional application of treaties, by Juan Manuel Gómez-Robledo, Special Rapporteur:[257]

156. The European Union submitted a document to the Special Rapporteur containing a list of examples of recent practice in relation to provisional application of agreements with third States. This document, which lists a total of 24 referenced treaties, specifies the name of the agreement, the article of the instrument that deals with provisional application and the corresponding reference of the decision by the Council of the European Union in that respect. Given the usefulness of this list, the Special Rapporteur has included it as a document annexed to the present report.

157. A recent example illustrating the constant practice of the European Union is the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part.[258] Article 486 of this treaty refers to "entry into force and provisional application" as follows:

1. The Parties shall ratify or approve this Agreement in accordance with their own procedures. The instruments of ratification or approval shall be deposited with the General Secretariat of the Council of the European Union.

2. This Agreement shall enter into force on the first day of the second month following the date of deposit of the last instrument of ratification or approval.

3. Notwithstanding paragraph 2, the Union and Ukraine agree to provisionally apply this Agreement in part, as specified by the Union, as set out in paragraph 4 of this Article, and in accordance with their respective internal procedures and legislation as applicable.

4. The provisional application shall be effective from the first day of the second month following the date of receipt by the Depositary of the following:

— the Union's notification on the completion of the procedures necessary for this purpose, indicating the parts of the Agreement that shall be provisionally applied; and

— Ukraine's deposit of the instrument of ratification in accordance with its procedures and applicable legislation.

5. For the purpose of the relevant provisions of this Agreement, including its respective Annexes and Protocols, any reference in such provisions to the "date of entry into force of this Agreement" shall be understood to be the "date from which this Agreement is provisionally applied" in accordance with paragraph 3 of this Article.

6. During the period of the provisional application, in so far as the provisions of the Partnership and Cooperation Agreement between the European Communities and their Member States, on the one hand, and Ukraine, on the other hand, signed

[257] Doc. A/CN.4/699 (2016).

[258] *Official Journal of the European Union*, L 161, 29.5.2014.

in Luxembourg on 14 June 1994 and which entered into force on 1 March 1998, are not covered by the provisional application of this Agreement, they continue to apply.

7. Either Party may give written notification to the Depositary of its intention to terminate the provisional application of this Agreement. Termination of provisional application shall take effect six months after receipt of the notification by the Depositary.

158. This provision is relevant for the purposes of the present report because, despite the fact that entry into force is, of course, subject to compliance with the requirements of the internal law of each member of the European Union, paragraph 5 expressly states that the date of entry into force of the Agreement is understood to be the date from which the Agreement is provisionally applied; this bears witness to the negotiating States' desire to confer on provisional application all the weight and legal effects that arise out of the entry into force of the treaty, without prejudice to the ability of any State, at any moment, to terminate the provisional application.

159. Once again, provisional application seems to be an attractive possibility in view of the uncertainty produced by the necessarily different ratification procedures in each of the 28 member States, some of which, as in the case of Belgium, require passage through three national parliaments.

160. One interesting case has been the discussion in European Union institutions—the Council, Commission and Parliament—about the advisability of putting an end to provisional application of treaties concluded with the so-called ACP States (Africa, the Caribbean and the Pacific) which deal with trade preferences, not because the Union has reached the conclusion that it will not eventually become a party to such treaties, in conformity with a strict reading of article 25, paragraph 2, of the 1969 Vienna Convention, but on the contrary because it wishes to put pressure on the other negotiating States to complete the necessary requirements for entry into force.[259]

161. This suggests that the wording of article 15, paragraph 2, has been interpreted in a broad sense to include situations that go beyond those expressly provided for in this provision, and this interpretation may imply an explicit preference in favour of provisional application in European Union practice.

[259] Lorand Bartels, "Withdrawing Provisional Application of Treaties: Has the EU made a mistake?", *Cambridge Journal of International and Comparative Law*, vol. 1, No. 1 (2012), pp. 112–118.

Examples of recent European Union practice on provisional application of agreements with third States, reflected in the Fourth report on the provisional application of treaties, by Juan Manuel Gómez-Robledo, Special Rapporteur[260]

Agreement	*Article in Agreement*	*Article in Council Decision*
Association Agreements		
Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other (*Official Journal of the European Union,* No. L 346, 15 December 2012, p. 3)	Article 353 (Entry into force), paragraphs 4–7 4. Notwithstanding paragraph 2, Part IV [Trade] of this Agreement may be applied by the European Union and each of the Republics of the CA [Central America] Party from the first day of the month following the date on which they have notified each other of the completion of the internal legal procedures necessary for this purpose. In this case, the institutional bodies necessary for the functioning of the Agreement shall exercise their functions. 5. By the date of entry into force as provided in paragraph 2, or by the date of application of this Agreement, if applied pursuant to paragraph 4, each Party shall have fulfilled the requirements established in Article 244 [System of Protection] and Article 245 [Established Geographical Applications], paragraph 1(*a*) and (*b*) of Title VI (Intellectual Property) of Part IV of this Agreement. If a Republic of the CA Party has not fulfilled such requirements, the Agreement shall not enter into force in accordance with paragraph 2 or shall not be applied in accordance with paragraph 4 between the EU [European Union] Party and such non-compliant Republic of the CA Party, until those requirements have been fulfilled. 6. Where a provision of this Agreement is applied in accordance with paragraph 4, any reference in such provision to the date of entry into force of this Agreement shall be understood to refer to the date from which the Parties agree to apply that provision in accordance with paragraph 4.	Article 3, Council Decision of 25 June 2012 on the signing, on behalf of the European Union, of the *Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other*, and the provisional application of Part IV thereof concerning trade matters (2012/734/EU) (*Official Journal of the European Union*, No. L 346, 15 December 2012, p. 1) Part IV of the Agreement shall be applied on a provisional basis by the European Union in accordance with Article 353(4) of the Agreement, pending the completion of the procedures for its conclusion. Article 271 shall not be provisionally applied. In order to determine the date of provisional application the Council shall fix the date by which the notification referred to in Article 353(4) of the Agreement is to be sent to the Republics of Central America. That notification shall include reference to the provision which is not to be provisionally applied. The date from which Part IV of the Agreement will be provisionally applied shall be published in the Official Journal of the European Union by the General Secretariat of the Council.

[260] Doc. A/CN.4/699/Add.1 (2016).

Agreement	*Article in Agreement*	*Article in Council Decision*
	7. The Parties for which Part IV of this Agreement has entered into force in accordance with paragraph 2 or 4 of this Article may also use materials originating in the Republics of the CA Party for which the Agreement is not in force.	
Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (*Official Journal of the European Union*, No. L 352, 30 December 2002, p. 3)	Article 198 (Entry into force) 1. This Agreement shall enter into force the first day of the month following that in which the Parties have notified each other of the completion of the procedures necessary for this purpose. 2. Notifications shall be sent to the Secretary General of the Council of the European Union, who shall be the depository of this Agreement. 3. Notwithstanding paragraph 1, the Community and Chile agree to apply Articles 3 to 11 [Title II (Institutional framework) of Part I (General and institutional provisions)], Article 18 [Cooperation on standards, technical regulations and conformity assessment procedures], Articles 24 to 27 [Cooperation on agriculture and rural sectors and sanitary and phytosanitary measures; Fisheries; Customs cooperation; Cooperation on statistics], Articles 48 to 54 [Title VII (General Provisions) of Part III (Cooperation)], Article 55 (*a*), (*b*), (*f*), (*h*), (*i*) [some of the Objectives of Part IV (Trade and trade-related matters)], Articles 56 [Customs unions and free trade areas] to 93 [Articles 57 to 93 compose Title II (Free movement of Goods) of Part IV], Articles 136 to 162 [Title IV (Government procurement) of Part IV], and Articles 172 to 206 [Title VII (Competition), Title VIII (Dispute settlement), Title IX (Transparency), Title X (Specific tasks in trade matters of the bodies established under this Agreement) and Title XI (Exceptions in the area of trade) of Part IV, and Part V (Final provisions)], from the first day of the month following the date on which the Community and Chile have notified each other of the completion of the procedures necessary for this purpose.	Article 2, Council Decision of 18 November 2002 on the signature and provisional application of certain provisions of an *Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile*, of the other part (2002/979/EC) (*Official Journal of the European Union*, No. L 352, 30 December 2002, p. 1) The following provisions of the Association Agreement shall be applied on a provisional basis pending its entry into force: Articles 3 to 11, Article 18, Articles 24 to 27, Articles 48 to 54, Article 55(*a*), (*b*), (*f*), (*h*), (*i*), Articles 56 to 93, Articles 136 to 162, and Articles 172 to 206.

Agreement	*Article in Agreement*	*Article in Council Decision*
	4. Where a provision of this Agreement is applied by the Parties pending its entry into force, any reference in such provision to the date of entry into force of this Agreement shall be understood to be made to the date from which the Parties agree to apply that provision in accordance with paragraph 3. 5. From the date of its entry into force in accordance with paragraph 1, this Agreement shall replace the Framework Cooperation Agreement. By way of exception, the Protocol on Mutual Assistance in Customs Matters to the Framework Cooperation Agreement of 13 June 2001, shall remain in force and become an integral part of this Agreement.	
Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (*Official Journal of the European Union*, No. L 161, 29 May 2014, p. 3)	Article 486 (Entry into force and provisional application) 1. The Parties shall ratify or approve this Agreement in accordance with their own procedures. The instruments of ratification or approval shall be deposited with the General Secretariat of the Council of the European Union. 2. This Agreement shall enter into force on the first day of the second month following the date of deposit of the last instrument of ratification or approval. 3. Notwithstanding paragraph 2, the Union and Ukraine agree to provisionally apply this Agreement in part, as specified by the Union, as set out in paragraph 4 of this Article, and in accordance with their respective internal procedures and legislation as applicable. 4. The provisional application shall be effective from the first day of the second month following the date of receipt by the Depositary of the following:—the Union's notification on the completion of the procedures necessary for this purpose, indicating the parts of the Agreement that shall be provisionally applied; and—Ukraine's deposit of the instrument of ratification in accordance with its procedures and applicable legislation.	Article 4, Council Decision of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the *Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine*, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII thereof, as well as the related Annexes and Protocols (2014/668/EU) (*Official Journal of the European Union*, No. L 278, 20 September 2014, p. 1) Pending its entry into force, in accordance with Article 486 of the Agreement and subject to the notifications provided for therein, the following parts of the Agreement shall be applied provisionally between the Union and Ukraine, but only to the extent that they cover matters falling within the Union's competence: – Title III: Articles 14 and 19;

Agreement	*Article in Agreement*	*Article in Council Decision*
	5. For the purpose of the relevant provisions of this Agreement, including its respective Annexes and Protocols, any reference in such provisions to the "date of entry into force of this Agreement" shall be understood to the "date from which this Agreement is provisionally applied" in accordance with paragraph 3 of this Article. 6. During the period of the provisional application, in so far as the provisions of the *Partnership and Cooperation Agreement between the European Communities and their Member States, on the one hand, and Ukraine, on the other hand*, signed in Luxembourg on 14 June 1994 and which entered into force on 1 March 1998, are not covered by the provisional application of this Agreement, they continue to apply. 7. Either Party may give written notification to the Depositary of its intention to terminate the provisional application of this Agreement. Termination of provisional application shall take effect six months after receipt of the notification by the Depositary.	– Title IV (with the exception of Article 158, to the extent that it concerns criminal enforcement of intellectual property rights; and Articles 285 and 286, to the extent that those Articles apply to administrative proceedings, review and appeal at Member State level). The provisional application of Article 279 shall not affect the sovereign rights of the Member States over their hydrocarbon resources in accordance with international law, including their rights and obligations as Parties to the 1982 United Nations Convention on the Law of the Sea. Provisional application of Article 280(3) by the Union shall not affect the existing delineation of competences between the Union and its Member States in respect of the granting of authorisations for the prospection, exploration and production of hydrocarbon, – Title V: Chapter 1(with the exception of Articles 338(*k*), 339 and 342), Chapter 6 (with the exception of Articles 361, Article 362(1)(*c*), Article 364, and points (*a*) and (*c*) of Article 365), Chapter 7 (with the exception of Article 368(3) and point (*a*) and (*d*) of Article 369), Chapters 12 and 17 (with the exception of Article 404(*h*)), Chapter 18 (with the exception of Articles 410 (*b*) and Article 411), Chapters 20, 26 and 28, as well as Articles 353 and 428, – Title VI, – Title VII (with the exception of Article 479(1)), to the extent that the provisions of this Title are limited to the purpose of ensuring the provisional application of the Agreement in accordance with this Article,

Agreement	*Article in Agreement*	*Article in Council Decision*
		– Annexes I to XXVI, Annex XXVII (with the exception of nuclear issues), Annexes XXVIII to XXXVI (with the exception of point 3 in Annex XXXII), – Annexes XXXVIII to XLI, Annexes XLIII and XLIV, as well as Protocols I to III.
Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (*Official Journal of the European Union*, No. L 260, 30 August 2014, p. 4)	Article 464 (Entry into force and provisional application) 1. The Parties shall ratify or approve this Agreement in accordance with their internal procedures. The instruments of ratification or approval shall be deposited with the General Secretariat of the Council of the European Union. 2. This Agreement shall enter into force on the first day of the second month following the date of the deposit of the last instrument of ratification or approval. 3. Notwithstanding paragraph 2 of this Article, the Union and the Republic of Moldova agree to provisionally apply this Agreement in part, as specified by the Union, as set out in paragraph 4 of this Article, and in accordance with their respective internal procedures and legislation, as applicable. 4. The provisional application shall be effective from the first day of the second month following the date of receipt by the depositary of this Agreement of the following: (*a*) the Union's notification on the completion of the procedures necessary for this purpose, indicating the parts of the Agreement that shall be provisionally applied; and (*b*) the Republic of Moldova's notification of the completion of the procedures necessary for the provisional application of this Agreement.	Article 3, Council Decision of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the *Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part* (2014/492/EU) (*Official Journal of the European Union*, No. L 260, 30 August 2014, p. 1) 1. Pending its entry into force, in accordance with Article 464 of the Agreement and subject to the notifications provided for therein, the following parts of the Agreement shall be applied provisionally between the Union and the Republic of Moldova, but only to the extent that they cover matters falling within the Union's competence, including matters falling within the Union's competence to define and implement a common foreign and security policy: (*a*) Title I; (*b*) Title II: Articles 3, 4, 7 and 8; (*c*) Title Ill: Articles 12 and 15;

Agreement	*Article in Agreement*	*Article in Council Decision*
	5. For the purposes of the relevant provisions of this Agreement, including its respective Annexes and Protocols, as laid down in Article 459, any reference in such provisions to the 'date of entry into force of this Agreement' shall be understood to the 'date from which this Agreement is provisionally applied' in accordance with paragraph 3 of this Article. 6. During the period of provisional application, in so far as the provisions of the *Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Moldova, of the other part*, signed in Luxembourg on 28 November 1994 and which entered into force on 1 July 1998, are not covered by the provisional application of this Agreement, those provisions shall continue to apply. 7. Either Party may give written notification to the depositary of this Agreement of its intention to terminate the provisional application of this Agreement. Termination of provisional application shall take effect six months after receipt of the notification by the depositary of this Agreement.	(*d*) Title IV: Chapters 5, 9 and 12 (with the exception of point (*h*) of Article 68), Chapter 13 (with the exception of Article 71 to the extent that it concerns maritime governance and with the exception of points (*b*) and (*e*) of Article 73 and Article 74), Chapter 14 (with the exception of point (*i*) of Article 77), Chapter 15 (with the exception of points (*a*) and (*e*) of Article 81 and Article 82(2)), Chapter 16 (with the exception of Article 87, point (*c*) of Article 88 and points (*a*) and (*b*) of Article 89, to the extent that that point (*b*) concerns soil protection), Chapters 26 and 28, as well as Articles 30, 37, 46, 57, 97, 102 and 116; (*e*) Title V (with the exception of Article 278 to the extent that it concerns criminal enforcement of intellectual property rights, and with the exception of Articles 359 and 360 to the extent that they apply to administrative proceedings and review and appeal at Member State level); (*f*) Title VI; (*g*) Title VII (with the exception of Article 456(*1*), to the extent that the provisions of that Title are limited to the purpose of ensuring the provisional application of the Agreement as defined in this paragraph); (*h*) Annexes II to XIII, Annexes XV to XXXV, as well as Protocols I to IV. 2. The date from which the Agreement will be provisionally applied will be published in the Official Journal of the European Union by the General Secretariat of the Council.

Agreement	*Article in Agreement*	*Article in Council Decision*
Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (*Official Journal of the European Union*, No. L 261, 30 August 2014, p. 4)	Article 431 (Entry into force and provisional application) 1. The Parties shall ratify or approve this Agreement in accordance with their own procedures. The instruments of ratification or approval shall be deposited with the General Secretariat of the Council of the European Union. 2. This Agreement shall enter into force on the first day of the second month following the date of the deposit of the last instrument of ratification or approval. 3. Notwithstanding paragraph 2 of this Article, the Union and Georgia agree to provisionally apply this Agreement in part, as specified by the Union, as set out in paragraph 4 of this Article, and in accordance with their respective internal procedures and legislation as applicable. 4. The provisional application shall be effective from the first day of the second month following the date of receipt by the depositary of this Agreement of the following: (*a*) the Union's notification on the completion of the procedures necessary for this purpose, indicating the parts of this Agreement that shall be provisionally applied; and (*b*) Georgia's deposit of the instrument of ratification in accordance with its procedures and applicable legislation. 5. For the purpose of the relevant provisions of this Agreement, including the respective Annexes and Protocols hereto, any reference in such provisions to the 'date of entry into force of this Agreement' shall be understood to the 'date from which this Agreement is provisionally applied' in accordance with paragraph 3 of this Article.	Article 3, Council Decision of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the *Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part* (2014/494/EU) (*Official Journal of the European Union*, No. L 261, 30 August 2014, p. 1) 1. Pending its entry into force, in accordance with Article 431 of the Agreement and subject to the notifications provided for therein, the following parts of the Agreement shall be applied provisionally between the Union and Georgia, but only to the extent that they cover matters falling within the Union's competence, including matters falling within the Union's competence to define and implement a common foreign and security policy: (*a*) Title I; (*b*) Title II: Articles 3 and 4 and Articles 7 to 9; (*c*) Title Ill: Articles 13 and 16; (*d*) Title IV (with the exception of Article 151, to the extent that it concerns criminal enforcement of intellectual property rights; and with the exception of Articles 223 and 224, to the extent that they apply to administrative proceedings and review and appeal at Member State level); (*e*) Title V: Articles 285 and 291;

Agreement	*Article in Agreement*	*Article in Council Decision*
	6. During the period of the provisional application, in so far as the provisions of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part, signed in Luxembourg on 22 April 1996 and which entered into effect on 1 July 1999, are not covered by the provisional application of this Agreement, they continue to apply. 7. Either Party may give written notification to the depositary of this Agreement of its intention to terminate the provisional application of this Agreement. Termination of provisional application shall take effect six months after receipt of the notification by the depositary of this Agreement.	(*f*) Title VI: Chapter 1 (with the exception of point (*a*) of Article 293, point (*e*) of Article 293, points (*a*) and (*b*) of Article 294(2)), Chapter 2 (with the exception of point (*k*) of Article 298), Chapter 3 (with the exception of Article 302(1)), Chapters 7 and 10 (with the exception of point (*i*) of Article 333), Chapter 11 (with the exception of point (*b*) of Article 338 and Article 339), Chapters 13, 20 and 23, as well as Articles 312, 319, 327, 354 and 357; (*g*) Title VII; (*h*) Title VIII (with the exception of Article 423(1), to the extent that the provisions of that Title are limited to the purpose of ensuring the provisional application of the Agreement as defined in this paragraph); (*i*) Annexes II to XXXI and Annex XXXIV, as well as Protocols I to IV. 2. The date from which the Agreement will be provisionally applied will be published in the *Official Journal of the European Union* by the General Secretariat of the Council.
Framework Agreements/Partnership and Cooperation Agreements		
Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part (*Official Journal of the European Union*, No. L 20, 23 January 2013, p. 2)	Article 49 (Entry into force, duration and termination) 1. This Agreement shall enter into force on the first day of the month following the date on which the Parties have notified each other of the completion of the legal procedures necessary for that purpose.	Article 2, Council Decision of 10 May 2010 on the signing, on behalf of the European Union, and provisional application of the *Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part* (2013/40/EU) (*Official Journal of the European Union*, No. L 20, 23 January 2013, p. 1)

Agreement	*Article in Agreement*	*Article in Council Decision*
	2. Notwithstanding paragraph 1, this Agreement shall be applied on a provisional basis pending its entry into force. The provisional application begins on the first day of the first month following the date on which the Parties have notified each other of the completion of the necessary procedures. 3. This Agreement shall be valid indefinitely. Either Party may notify in writing the other Party of its intention to denounce this Agreement. The denunciation shall take effect six months after the notification.	Pending the completion of the necessary procedures for its entry into force, the Agreement shall be applied on a provisional basis. The provisional application begins on the first day of the first month following the date on which the Parties have notified each other of the completion of the necessary procedures for provisional application.
Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations (*Official Journal of the European Union*, No. L 143, 31 May 2011, p. 2)	Article 10 (Entry into force and termination) 1. This Agreement shall enter into force on the first day of the first month after the Parties have notified each other of the completion of the internal procedures necessary for that purpose. 2. This Agreement shall be provisionally applied from the date of signature. 3. This Agreement shall be subject to regular review by the Parties. 4. This Agreement may be amended on the basis of a mutual written agreement between the Parties. 5. Either Party may terminate this Agreement upon six months' written notice to the other Party.	Article 3, Council Decision 2011/318/CFSP of 31 March 2011 on the signing and conclusion of the *Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations* (*Official Journal of the European Union*, No. L 143, 31 May 2011, p. 1) The Agreement shall be applied on a provisional basis as from the date of signature thereof, pending the completion of the procedures for its conclusion.
Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part (*Official Journal of the European Union*, No. L 204, 31 July 2012, p. 20)	Article 117 (Provisional Application) 1. Notwithstanding Article 116, the Union and Iraq agree to apply Article 2 [Basis], and Titles II [Trade and investments], III [Areas of cooperation] and V [Institutional, general and final provisions] of this Agreement from the first day of the third month following the date on which the Union and Iraq have notified each other of the completion of the procedures necessary for this purpose. Notifications shall be sent to the Secretary-General of the Council of the European Union, who shall be the depository of this agreement.	Article 3, Council Decision of 21 December 2011 on the signing, on behalf of the European Union, and provisional application of certain provisions of the *Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part* (2012/418/EU) (*Official Journal of the European Union*, No. L 204, 31 July 2012, p. 18)

Agreement	*Article in Agreement*	*Article in Council Decision*
	2. Where in accordance with paragraph 1, a provision of this Agreement is applied by the Parties pending its entry into force, any reference in such provision to the date of entry into force of this Agreement shall be understood to be made to the date from which the Parties agree to apply that provision in accordance with paragraph 1.	Pending the completion of the necessary procedures for its entry into force, Article 2 and Titles II, III, and V of the Agreement shall be applied provisionally, in accordance with Article 117 of the Agreement only in so far as it concerns matters falling within the Union's competence, from the first day of the third month following the date on which the Union and Iraq have notified each other of the completion of the necessary procedures for provisional application.
Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part (*Official Journal of the European Union*, No. L 29, 4 February 2016, p. 3)	Article 281 (Entry into force, provisional application, duration and termination) 1. This Agreement shall enter into force on the first day of the month following the date on which the Parties notify the General Secretariat of the Council of the European Union through diplomatic channels of the completion of the procedures necessary for this purpose. 2. Title III (Trade and Business), unless otherwise specified therein, shall apply as of the date of the entry into force referred to in paragraph 1, provided that the Republic of Kazakhstan has become a Member of the WTO by that date. In case the Republic of Kazakhstan becomes a Member of the WTO after the date of entry into force of this Agreement, Title III (Trade and Business), unless otherwise specified therein, shall apply as of the date the Republic of Kazakhstan has become a Member of the WTO. 3. Notwithstanding paragraphs 1 and 2, the European Union and the Republic of Kazakhstan may apply this Agreement provisionally in whole or in part, in accordance with their respective internal procedures and legislation, as applicable.	

Agreement	*Article in Agreement*	*Article in Council Decision*
	4. The provisional application begins on the first day of the first month following the date on which: (*a*) the European Union has notified the Republic of Kazakhstan of the completion of the necessary procedures, indicating, where relevant, the parts of this Agreement that shall be provisionally applied; and (*b*) the Republic of Kazakhstan has notified the European Union of the ratification of this Agreement. 5. Title III (Trade and Business), unless otherwise specified therein, shall apply provisionally as of the date of provisional application referred to in paragraph 4, provided that the Republic of Kazakhstan has become a Member of the WTO by that date. In case the Republic of Kazakhstan becomes a Member of the WTO after the date of the provisional application of this Agreement but before its entry into force, Title III (Trade and Business), unless otherwise specified therein, shall apply provisionally as of the date the Republic of Kazakhstan has become a Member of the WTO. 6. For the purposes of the relevant provisions of this Agreement, including the Annexes and Protocols hereto, any reference in such provisions to the 'date of entry into force of this Agreement' shall be understood to also refer to the date from which this Agreement is provisionally applied in accordance with paragraphs 4 and 5. 7. Upon the entry into force of this Agreement, the *Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Kazakhstan, of the other part*, signed on 23 January 1995 and in force from 1 July 1999, shall be terminated.	

Agreement	*Article in Agreement*	*Article in Council Decision*
	During the period of the provisional application, in so far as the provisions of the *Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Kazakhstan, of the other part*, signed in Brussels on 23 January 1995 and which entered into force on 1 July 1999, are not covered by the provisional application of this Agreement, they continue to apply. 8. This Agreement replaces the Agreement referred to in paragraph 7. References to that Agreement in all other agreements between the Parties shall be construed as referring to this Agreement. 9. This Agreement is concluded for an unlimited period, with the possibility of termination by either Party by means of a written notification delivered to the other Party through diplomatic channels. The termination shall take effect six months after receipt by a Party of the notification to terminate this Agreement. Such termination shall not affect ongoing projects commenced under this Agreement prior to the receipt of the notification. 10. Either Party may terminate the provisional application by means of a written notification delivered to the other Party through diplomatic channels. The termination shall take effect six months after receipt by a Party of the notification to terminate the provisional application of this Agreement. Such termination shall not affect ongoing projects commenced under this Agreement prior to the receipt of the notification.	

Agreement	*Article in Agreement*	*Article in Council Decision*
Other Agreements (services, etc.)		
Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (*Official Journal of the European Union*, No. L 127, 14 May 2011, p. 6)	Article 15.10 (Entry into force), paragraph 5 5. (*a*) This Agreement shall be provisionally applied from the first day of the month following the date on which the EU Party and Korea have notified each other of the completion of their respective relevant procedures. (*b*) In the event that certain provisions of this Agreement cannot be provisionally applied, the Party which cannot undertake such provisional application shall notify the other Party of the provisions which cannot be provisionally applied. Notwithstanding subparagraph (*a*), provided the other Party has completed the necessary procedures and does not object to provisional application within 10 days of the notification that certain provisions cannot be provisionally applied, the provisions of this Agreement which have not been notified shall be provisionally applied the first day of the month following the notification. (*c*) A Party may terminate provisional application by written notice to the other Party. Such termination shall take effect on the first day of the month following notification. (*d*) Where this Agreement, or certain provisions thereof, is provisionally applied, the term 'entry into force of this Agreement' shall be understood to mean the date of provisional application.	Article 3, Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the *Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part* (2011/265/EU) (*Official Journal of the European Union*, No. L 127, 14 May 2011, p. 1). 1. The Agreement shall be applied on a provisional basis by the Union as provided for in Article 15.10.5 of the Agreement, pending the completion of the procedures for its conclusion. The following provisions shall not be provisionally applied: – Articles 10.54 to 10.61 (criminal enforcement of intellectual property rights), – Articles 4(3), 5(2), 6(1), 6(2), 6(4), 6(5), 8, 9 and 10 of the Protocol on cultural cooperation 2. In order to determine the date of provisional application the Council shall fix the date by which the notification referred to in Article 15.10.5 of the Agreement is to be sent to Korea. That notification shall include references to those provisions which cannot be provisionally applied. The Council shall coordinate the effective date of provisional application with the date of the entry into force of the proposed Regulation of the European Parliament and of the Council implementing the bilateral safeguard clause of the EU-Korea Free Trade Agreement.

Agreement	*Article in Agreement*	*Article in Council Decision*
		3. The date from which the Agreement will be provisionally applied will be published in the *Official Journal of the European Union* by the General Secretariat of the Council.
Agreement between the European Community and the Government of Australia on certain aspects of air services (*Official Journal of the European Union*, No. L 149, 7 June 2008, p. 65)	Article 7 (Entry into force) 1. This Agreement shall enter in force when the Contracting Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed. 2. Notwithstanding paragraph 1, the Contracting Parties agree to provisionally apply this Agreement from the first day of the month following the date on which the Contracting Parties have notified each other of the completion of the procedures necessary for this purpose. 3. Agreements and other arrangements between Member States and Australia which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally are listed in Annex I(*b*) [Air services agreements and other arrangements initialled or signed between the Commonwealth of Australia and Member States of the European Community which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally]. This Agreement shall apply to all such Agreements and arrangements upon their entry into force or provisional application.	Article 3, Council Decision of 7 April 2008 on the signing and provisional application of the *Agreement between the European Community and the Government of Australia on certain aspects of air services* (2008/420/EC) (*Official Journal of the European Union*, No. L 149, 7 June 2008, p. 63) Pending its entry into force, the Agreement shall be applied provisionally from the first day of the first month following the date on which the Parties have notified each other of the completion of the necessary procedures for this purpose.
Agreement between the European Community and the Hashemite Kingdom of Jordan on certain aspects of air services (*Official Journal of the European Union*, No. L 68, 12 March 2008, p. 15)	Article 9 (Entry into force and provisional application) 1. This Agreement shall enter in force when the Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed.	Article 3, Council Decision of 25 June 2007 on the signing and provisional application of the *Agreement between the European Community and the Hashemite Kingdom of Jordan on certain aspects of air services* (2008/216/EC) (*Official Journal of the European Union*, No. L 68, 12 March 2008, p. 14)

Agreement	*Article in Agreement*	*Article in Council Decision*
	2. Notwithstanding paragraph 1, the Parties agree to provisionally apply this Agreement from the first day of the month following the date on which the Parties have notified each other of the completion of the procedures necessary for this purpose. 3. Agreements and other arrangements between Member States and the Hashemite Kingdom of Jordan which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally are listed in Annex I(*b*) [Air service agreements and other arrangements initialled or signed between Jordan and Member States of the European Community which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally]. This Agreement shall apply to all such Agreements and arrangements upon their entry into force or provisional application.	Pending its entry into force, the Agreement shall be applied provisionally from the first day of the first month following the date on which the parties have notified each other of the completion of the necessary procedures for this purpose.
Agreement between the European Community and the United Arab Emirates on certain aspects of air services (*Official Journal of the European Union*, No. L 28, 1 February 2008, p. 21)	Article 9 (Entry into force and provisional application) 1. This Agreement shall enter into force when the Contracting Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed. 2. Notwithstanding paragraph 1, the Contracting Parties agree to provisionally apply this Agreement from the first day of the month following the date on which the Contracting Parties have notified each other of the completion of the procedures necessary for this purpose.	Article 3, Council Decision of 30 October 2007 on the signing and provisional application of the *Agreement between the European Community and the United Arab Emirates on certain aspects of air services* (2008/87/EC) (*Official Journal of the European Union*, No. L 28, 1 February 2008, p. 20) Pending its entry into force, the Agreement shall be applied provisionally from the first day of the first month following the date on which the Contracting Parties have notified each other of the completion of the necessary procedures for this purpose.

Agreement	*Article in Agreement*	*Article in Council Decision*
	3. Agreements and other arrangements between Member States and the United Arab Emirates which, at the date of the signature of this Agreement, have not yet entered into force and are not being applied provisionally are listed in Annex I(*b*) [Air services agreements and other arrangements initialled or signed between the United Arab Emirates and Member States of the European Community which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally.—*Agreement between the Government of Romania and the Government of the United Arab Emirates relating to civil air transport* initialled at Abu Dhabi on 8 March 1989, hereinafter referred to as 'the United Arab Emirates-Romania Agreement' in Annex II; To be read together with the Confidential Memorandum of Understanding done at Abu Dhabi on 8 March 1989]. This Agreement shall apply to all such Agreements and arrangements upon their entry into force or provisional application.	
Agreement between the European Community and the Government of the Kyrgyz Republic on certain aspects of air services (*Official Journal of the European Union*, No. L 179, 7 July 2007, p. 20)	Article 9 (Entry into force and provisional application) 1. This Agreement shall enter into force when the Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed. 2. Notwithstanding paragraph 1, the Parties agree to provisionally apply this Agreement from the first day of the month following the date on which the Parties have notified each other of the completion of the procedures necessary for this purpose. 3. This Agreement shall apply to all Agreements and other arrangements between Member States and the Kyrgyz Republic listed in Annex I which, at the date of signature of this Agreement, have not yet entered into force, upon their entry into force or provisional application.	Article 3, Council Decision of 30 May 2007 on the signing and provisional application of the *Agreement between the European Community and the Government of the Kyrgyz Republic on certain aspects of air services* (2007/470/EC) (*Official Journal of the European Union*, No. L 179, 7 July 2007, p. 20) Pending its entry into force, the Agreement shall be applied provisionally from the first day of the month following the date on which the Parties have notified each other of the completion of the procedures necessary for this purpose.

Agreement	*Article in Agreement*	*Article in Council Decision*
Agreement between the European Community and New Zealand on certain aspects of air services (*Official Journal of the European Union*, No. L 184, 6 July 2006, p. 26)	Article 8 (Entry into force) 1. This Agreement shall enter into force when the Contracting Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed. 2. Notwithstanding paragraph 1, the Contracting Parties agree to apply this Agreement provisionally from the first day of the month following the date on which the Contracting Parties have notified each other of the completion of the procedures necessary for this purpose. 3. Agreements and other arrangements between Member States and New Zealand which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally are listed in Annex I(*b*) [Air services agreements and other arrangements initialled or signed between New Zealand and Member States of the European Community which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally]. This Agreement shall apply to all such Agreements and arrangements upon their entry into force or provisional application.	Article 3, Council Decision of 5 May 2006 on the signing and provisional application of the Agreement between the European Community and New Zealand on certain aspects of air services (2006/466/EC) (Official Journal of the European Union, No. L 184, 6 July 2006, p. 25) Pending its entry into force, the Agreement shall be applied provisionally from the first day of the first month following the date on which the Parties have notified each other of the completion of the necessary procedures for this purpose.
Agreement between the European Community and the Government of the Republic of Singapore on certain aspects of air services (*Official Journal of the European Union*, No. L 243, 6 September 2006, p. 22)	Article 7 (Entry into force) 1. This Agreement shall enter into force when the Contracting Parties have notified each other in writing that their respective internal procedures necessary for its entry into force have been completed. 2. Notwithstanding paragraph 1, the Contracting Parties agree to provisionally apply this Agreement from the first day of the month following the date on which the Contracting Parties have notified each other of the completion of the procedures necessary for this purpose.	Article 3, Council Decision of 5 May 2006 on the signing and provisional application of the *Agreement between the European Community and the Government of the Republic of Singapore on certain aspects of air services* (2006/592/EC) (*Official Journal of the European Union*, No. L 243, 6 September 2006, p. 21) Pending its entry into force, the Agreement shall be applied provisionally from the first day of the first month following the date on which the Parties have notified each other of the completion of the necessary procedures for this purpose.

Agreement	*Article in Agreement*	*Article in Council Decision*
	3. Agreements and other arrangements between Member States and Singapore which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally are listed in Annex I(*b*) [Air services agreements and other arrangements initialled or signed between the Republic of Singapore and Member States of the European Community which, at the date of signature of this Agreement, have not yet entered into force and are not being applied provisionally]. This Agreement shall apply to all such Agreements and arrangements upon their entry into force or provisional application.	
Euro-Mediterranean Aviation Agreement between the European Community and its Member States, of the one part and the Kingdom of Morocco, of the other part (*Official Journal of the European Union*, No. L 386, 29 December 2006, p. 57)	Article 30 (Entry into force) 1. This Agreement shall be applied provisionally, in accordance with the national laws of the Contracting Parties, from the date of signature. 2. This Agreement shall enter into force one month after the date of the last note in an exchange of diplomatic notes between the Contracting Parties confirming that all necessary procedures for entry into force of this Agreement have been completed. For purposes of this exchange, the Kingdom of Morocco shall deliver to the General Secretariat of the Council of the European Union its diplomatic note to the European Community and its Member States, and the General Secretariat of the Council of the European Union shall deliver to the Kingdom of Morocco the diplomatic note from the European Community and its Member States. The diplomatic note from the European Community and its Member States shall contain communications from each Member State confirming that its necessary procedures for entry into force of this Agreement have been completed.	Article 1, Decision of the Council and of the representatives of the Governments of the Member States, meeting within the Council of 4 December 2006 (2006/959/EC) (*Official Journal of the European Union*, No. L 386, 29 December 2006, p. 55) Signature and provisional application 1. The signing of the *Euro-Mediterranean Aviation Agreement between the European Community and its Member States, of the one part, and the Kingdom of Morocco, of the other part*, hereinafter 'the Agreement', is hereby approved on behalf of the Community, subject to the conclusion of the Agreement. 2. The President of the Council is hereby authorised to designate the person(s) empowered to sign the Agreement on behalf of the Community, subject to its conclusion. 3. Pending its entry into force, the Agreement shall be applied in accordance with Article 30(1) thereof. 4. The text of the Agreement is attached to this Decision.

Agreement	*Article in Agreement*	*Article in Council Decision*
Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part (*Official Journal of the European Union*, No. L 143, 30 May 2006, p. 2)	Article 93 (Interim Agreement) In the event that, pending the completion of the procedures necessary for the entry into force of this Agreement, the provisions of certain parts of this Agreement, in particular those relating to the free movement of goods, are put into effect by means of an Interim Agreement between the Community and Lebanon, the parties agree that, in such circumstances, for the purposes of Titles II and IV of this Agreement and Annexes 1 and 2 and Protocols 1 to 5 thereto, the terms 'date of entry into force of this Agreement' mean the date of entry into force of the Interim Agreement in relation to obligations contained in these Articles, Annexes and Protocols.	Council Decision of 14 February 2006 concerning the conclusion of the *Euro-Mediterranean Agreement establishing an association between the European Community and its Member States of the one part, and the Republic of Lebanon, of the other part* (2006/356/EC) (*Official Journal of the European Union*, No. L 143, 30 May 2006, p. 1)
Protocol for the accession of Bulgaria, Croatia and Romania		
Protocol to the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, to take account of the accession of the Republic of Croatia to the European Union (*Official Journal of the European Union*, No. L 373, 1 December 2014, p. 3)	Article 4 1. This Protocol shall be approved by the Parties, in accordance with their own procedures. The Parties shall notify each other of the completion of the procedures necessary for that purpose. The instruments of approval shall be deposited with the General Secretariat of the Council of the European Union. 2. This Protocol shall enter into force on the first day of the first month following the date of deposit of the last instrument of approval. 3. This Protocol shall apply provisionally after 15 days from the date of its signature. 4. This Protocol shall apply to the relations between the Parties within the framework of the Agreement as of the date of accession of the Republic of Croatia to the European Union.	Article 3, Council Decision of 23 July 2014 on the signing, on behalf of the European Union and its Member States, and provisional application, of the *Protocol to the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, to take account of the accession of the Republic of Croatia to the European Union* (2014/956/EU) (*Official Journal of the European Union*, No. L 373, 31 December 2014, p. 1) The Protocol shall be applied on a provisional basis, as from 1 July 2013, pending the completion of the procedures for its conclusion.

Agreement	*Article in Agreement*	*Article in Council Decision*
	Article 14 1. This Protocol shall enter into force on the first day of the first month following the date of the deposit of the last instrument of approval. 2. If not all the instruments of approval of this Protocol have been deposited before the first day of the second month following the date of signature, this Protocol shall apply provisionally. The date of provisional application shall be the first day of the second month following the date of signature.	Article 3, Council Decision of 14 April 2014 on the signing, on behalf of the European Union and its Member States, and provisional application of the *Protocol to the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part, to take account of the accession of the Republic of Croatia to the European Union* (2014/517/EU) (*Official Journal of the European Union*, No. L 233, 6 August 2014, p. 1) The Protocol shall be applied on a provisional basis, in accordance with its Article 14, as from the first day of the second month following the date of its signature, pending the completion of the procedures for its conclusion.

14. Council of Europe

Extracts from statements delivered by the representatives of the Observer delegation of the Council of Europe

Statement made in the Sixth Committee, Seventy-second session (2017), 22nd meeting, 26 October 2017:[261]

> [T]he Council of Europe suggests including some examples of provisional application of specific treaty provisions from our long-standing Council of Europe practice in this field.
>
> The Memorandum [of the Secretariat[262]], at paragraphs 20 and 33, makes reference to the provisional applicability of certain provisions of *Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (CETS No. 194) by separate agreement, the so-called "Madrid Agreement", and Protocol 14bis to the *Convention for the Protection of Human Rights and Fundamental Freedoms* (CETS No. 204) including an express clause on provisional application.
>
> Apart from these examples with regard to the *European Convention on Human Rights* we would like to draw your attention to other examples of provisional application included in conventions and protocols concluded within the framework of the Council of Europe: the provisional application of the *General Agreement on Privileges and Immunities of the Council of Europe* (ETS No. 2) (Article 22) and the *Convention on the Elaboration of a European Pharmacopoeia* (ETS No. 50) (Article 17).
>
> Another unusual and peculiar example took place in 2016 in relation to the *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism* (CETS No. 217) which has entered into force recently (1 July 2017). Article 7 of that Protocol, provides for the setting up of a network of 24-hour-a-day national contact points facilitating the rapid exchange of information concerning persons travelling abroad for the purpose of terrorism. With a view to applying this article provisionally, the Committee of Ministers at its 126th Ministerial session on 18 May 2016 "called for the expeditious designation of the 24/7 contact points to facilitate the timely exchange of information, as provided for by the *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism* (CETS No. 217), pending its entry into force." [emphasis added]
>
> As a most recent example, when the *Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons*[263] will be opened for signature on 22 November 2017 in Strasbourg (France) the signatories will have the possibility to declare under Article 5 of the Amending Protocol that they will apply the provisions of the Protocol on a provisional basis.

Communication transmitted to the Secretariat, 20 August 2019:

> [As regards] the provisional application of a "part" of a treaty, we propose to include … a reference to the *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism* (CETS No. 217), and the provisional application of its Article 7 (which provides for the setting up of a network of 24/7 national contact points to facilitate the rapid exchange of information concerning persons travelling abroad for the purpose of terrorism), which was decided by the Committee of Ministers of the Council of Europe, at

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[261] Full text available at: https://www.un.org/en/ga/sixth/72/pdfs/statements/ilc/council_of_europe_1.pdf.

[262] Editorial note: see A/CN.4/707, reproduced at p. 311, below.

[263] CM(2017)90.

its 126th Ministerial session on 18 May 2016, pending the entry into force of the Protocol (which took effect on 1 July 2017).

This example also illustrates the action of the Committee of Ministers of the Council of Europe as "[…] the competent organ of an international organisation […]" that agrees to provisionally apply a treaty obligation.

The [International Law Commission] acknowledges that provisional application of a treaty, "arising from contemporary practice", may be undertaken by States that are not negotiating States and/or are not connected to the treaty in question. In this respect:

> Article 36, paragraph 2, of the *Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (CETS No. 223) allows a State that is not a Party to the parent *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS No. 108) to "express its consent to be bound by this Protocol by accession", but only during the period from the opening for signature of the Protocol and its entry into force. This possibility would allow a third State to make a declaration about the provisional application of the Protocol (CETS No.223) without having been a Party to the Convention ETS No. 108 until that moment. Indeed, this provision establishes that a State "may not become a Party to the Convention without acceding simultaneously to this Protocol".
>
> Article 37, paragraph 3, of the Protocol amending the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (CETS No. 223), which opened for signature on 10 October 2018, allows the provisional application of this Protocol among signatories of the Protocol that are Parties to the parent Convention (*Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, ETS No. 108) and which make a declaration to this effect (see previous paragraph). The Protocol currently has 31 signatories, and two of them (Bulgaria and Norway) have made a declaration concerning the provisional application of the provisions of this Protocol.

[As regards the reference to] the fact that provisional application might not be possible under the internal law of States or the rules of international organisations], the Commission] provides examples [of] different clauses used in several Free Trade Agreements (*e.g.* "if its constitutional requirements permit", "if their domestic requirements permit"). We would like to propose to add an example concerning an international organisation, namely the *General Agreement on Privileges and Immunities of the Council of Europe* (ETS No. 2) and its Article 22 on the possible provisional application of this Agreement by its signatories (from the date of signature and pending its entry into force) "so far as it is possible to do so under their respective constitutional systems". A similar clause is found in Article 17 of the *Convention on the Elaboration of a European Pharmacopoeia* (ETS No. 50), whereby the signatories agree to provisionally apply the Convention "in conformity with their respective constitutional systems".

[A]s regards the latest developments in the Council of Europe in relation [to] the provisional application of treaties:

> Article 5 of the Protocol amending the *Additional Protocol to the Convention on the Transfer of Sentenced Persons* (CETS No. 222), not yet in force, provides that Parties to the Additional Protocol may declare (at the time of ratification, acceptance or approval of this Protocol or at any later moment) that they "will apply the provisions of this Protocol on a provisional basis". The Protocol has currently 13 signatories and one ratification by the Holy See, on 15 January 2019. The Holy See made a Declaration "acting in the name and on behalf of Vatican City State", stating that pending the entry into force of this Protocol, "it will apply its provisions on a provisional basis with respect to all other State Parties that make a declaration to the same effect".

Extracts from statements delivered by the representatives of Member States of the Council of Europe referencing the practice of the Council of Europe

Bulgaria

Communication transmitted to the Secretariat, 10 April 2020:

> [*Reference to the practice of the Council of Europe:*]
>
> In the process of negotiating the *Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of the Council of Europe* (CETS No 223) art 37 (3) was adopted at the suggestion of the Republic of Bulgaria. This article provides for declarations by States through which they may provisionally apply the provisions of the Protocol. At the time of ratification of the protocol, three states have made declarations to this effect.

Extracts from the fourth report on the provisional application of treaties, by Juan Manuel Gómez-Robledo, Special Rapporteur:[264]

> 162. As in other cases, the Special Rapporteur consulted the Council of Europe Treaty Office to inquire about the practice of that regional organization on the matter. As in the case of OAS, the preliminary view, subject to a pending final opinion, was that provisional application is infrequent in the practice of the Council of Europe.
>
> 163. The Special Rapporteur's attention was drawn to a document presented at the 51st meeting of the *Committee of Legal Advisers on Public International Law* (CAHDI), entitled Draft model final clauses for conventions, additional protocols and amending protocols concluded within the Council of Europe.[265] This document was distributed to the members of CAHDI on a restricted basis. Suffice it to say that no reference whatsoever is made in this set of model clauses to provisional application of treaties; this would appear to confirm the above-mentioned opinion.

Extracts from the fifth report on the provisional application of treaties, by Juan Manuel Gómez-Robledo, Special Rapporteur:[266]

> 49. The Council of Europe provided the following examples of provisional application, in addition to those contained in the memorandum by the Secretariat on the provisional application of treaties.[267]
>
> 50. The first is the General Agreement on Privileges and Immunities of the Council of Europe,[268] of which article 22, second paragraph, provides for the provisional application of the Agreement by the signatory States pending its entry into force.
>
> "*Article 22.*
> *Final provisions*
>
> […] pending the entry into force of the Agreement in accordance with the provisions of the preceding paragraph, the signatories agree, in order to avoid any delay in the efficient working of the Council, to apply it provisionally from the date of signature, so far as it is possible to do so under their respective constitutional systems."

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[264] Doc. A/CN.4/699 (2016).

[265] CAHDI (2016) 8, of 12 February 2016.

[266] Doc. A/CN.4/718 (2018).

[267] A/CN.4/707[, reproduced at p. 311, below].

[268] General Agreement on Privileges and Immunities of the Council of Europe (Paris, 2 September 1949), Council of Europe, *European Treaty Series*, No. 2; available at: https://rm.coe.int/1680063729.

51. Reference was also made to the *Convention on the Elaboration of a European Pharmacopoeia*,[269] which contains the following clause on provisional application:

> "*Article 17.*
> *Provisional application*
>
> Pending the entry into force of the present Convention in accordance with the provisions of Article 11, the signatory States agree, in order to avoid any delay in the implementation of the present Convention, to apply it provisionally from the date of signature, in conformity with their respective constitutional systems."

52. Another example is the *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism*,[270] which entered into force on 1 July 2017. The Protocol does not contain a provisional application clause. However, article 7 provides for the establishment of a network of national points of contact available on a 24-hour basis in order to strengthen the timely exchange of information concerning persons travelling abroad for the purpose of terrorism. In order to apply this article provisionally and set up the network as soon as possible, the Committee of Ministers of the Council of Europe adopted decision CM/PV(2016)126/2b-add1 at its 126th session, held in Sofia on 18 May 2016. In that decision, the Committee "called for the expeditious designation of the 24/7 contact points to facilitate the timely exchange of information, as provided for by the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism […], *pending its entry into force*".[271]

53. In this instance, it was the decision by the Committee of Ministers that led to the provisional application of article 7 of the Protocol.

54. Lastly, as the most recent example, the *Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons*[272] was cited. The Protocol contains the following clause on provisional application:

> "*Article 5.*
> *Provisional application*
>
> Pending the entry into force of this Protocol according to the conditions set under Article 4, a Party to the Additional Protocol may at the time of ratification, acceptance or approval of this Protocol or at any later moment, declare that it will apply the provisions of this Protocol on a provisional basis. In such cases, the provisions of this Protocol shall apply only with respect to the other Parties which have made a declaration to the same effect. Such a declaration shall take effect on the first day of the second month following the date of its receipt by the Secretary General of the Council of Europe."[273]

55. As at the time of submission of the present report, six States had signed the Protocol but none had made a declaration of provisional application.[274]

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[269] Convention on the Elaboration of a European Pharmacopoeia (Strasbourg, 22 July 1964), Council of Europe, *European Treaty Series*, No. 50; available at: https://rm.coe.int/168006ff4c.

[270] Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (Riga, 22 October 2015), *Council of Europe Treaty Series*, No. 217; available at: https://rm.coe.int/168047c5ea.

[271] Democratic security for all in Europe in challenging times. b. Tackling violent extremism and radicalisation leading to terrorism (CM/PV(2016)126-final), appendix 3, para. 3; available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806c9744. Emphasis added.

[272] Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons (Strasbourg, 22 November 2017), *Council of Europe Treaty Series*, No. 222; available at: https://rm.coe.int/1680730cff.

[273] [Footnote 273 is not applicable to the English version of the present report.]

[274] See https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/222.

15. Organization of American States (OAS)

Extracts from the fourth report on the provisional application of treaties, by Juan Manuel Gómez-Robledo, Special Rapporteur: [275]

> 150. The Special Rapporteur held an informal consultation with the Office of Legal Affairs of the OAS General Secretariat in relation to the Organization's practice in the use of provisional application of treaties concluded under its auspices or to which it is a party.
>
> 151. The unofficial response was that, with respect to OAS and the inter-American treaties deposited with the Secretary-General, in the past 20 years no treaty had been registered that provided for provisional application before its entry into force. It was also indicated that some provisions of the inter-American treaties might have been applied provisionally, but not under the treaty itself, but rather on the basis of some later agreement between the negotiating States.
>
> 152. A partial explanation of this absence of provisional application clauses in inter-American treaties might be the fact that these treaties usually contain provisions on entry into force which require a very small number of ratifications, frequently between 2 and 6, out of a total of 35 States members of OAS, in order for the treaty to enter into force; this practice makes it somewhat less attractive or desirable to resort to provisional application.
>
> 153. As an example, some inter-American treaties open to signature and ratification or accession in the 35 States members of OAS have been identified as having entry into force clauses like the one described above.
>
> 154. Thus, article X of the *Inter-American Convention on Transparency in Conventional Weapons Acquisitions* provides that six instruments of ratification acceptance approval or accession by the members of OAS are required to be deposited with the General Secretariat of the Organization in order for it to enter into force.[276] The same is true of the *Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities*[277] and the *Inter-American Convention against Terrorism*.[278]
>
> 155. In the case of the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*—"Convention of Belém do Pará", the number of ratifications necessary for entry into force is only two States.[279]

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[275] Doc. A/CN.4/699 (2016).

[276] Inter-American Convention on Transparency in Conventional Weapons Acquisitions (Guatemala City, 6 July 1999). Available at: http://www.oas.org/juridico/english/treaties/a-64.html.

[277] Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (Guatemala City, 6 July 1999). Available at: http://www.oas.org/juridico/english/treaties/a-65.html.

[278] Inter-American Convention against Terrorism (Bridgetown, 2 June 2002), OAS, *Acts and Documents*, OAS/Ser.P/XXXII-O/02), vol. 1, AG/RES.1840 (XXXII-O/02).

[279] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women—"Convention of Belém do Pará" (Belém do Pará, 6 September 1994). Available at http://www.oas.org/juridico/english/treaties/a-61.html.

16. Economic Community of West African States (ECOWAS)

Extracts from the fourth report on the provisional application of treaties, by Juan Manuel Gómez-Robledo, Special Rapporteur: [280]

168. As the Special Rapporteur mentioned in the oral presentation of his third report to the Commission on 14 July 2015, he had received, on a date subsequent to the preparation and submission of the third report to the Secretariat for processing, a publication from the Ministry of Foreign Affairs of Nigeria entitled "*The Treaty, Protocols, Conventions and Supplementary Acts of the Economic Community of West African States (ECOWAS)*".[281]

169. This publication is a collection of a total of 59 treaties concluded under the auspices of ECOWAS in the period 1975–2010. After an exhaustive review of the 59 treaties, it was observed that only 11 of them did not provide for provisional application. Moreover, it was particularly interesting that the formula generally used in the remaining instruments is as follows:

> The treaty shall enter into force provisionally upon the signature by Heads of State and Government and definitively upon ratification.

170. Clearly, the use of the phrase "enter into force provisionally" instead of "provisional application" confirms that States continue to draw a precise distinction between the two concepts of the law of treaties, and this has an impact subsequently on the way in which universal organizations like the United Nations perform their registration and depository functions, as we have seen above. However, the reiteration of this formula shows that the States of this region are interested in ensuring the full effectiveness of the treaties they conclude as soon as possible.

171. Only one instrument, *ECOWAS Protocol A/P4/1/03 on Energy,*[282] refers explicitly in article 40 to its provisional application. This provision, which is quite long, sets out *in extenso* the rights and obligations arising out of provisional application as they apply to a State or regional economic integration organization.

172. The following temporal observation may also be made: from the adoption of the treaty establishing ECOWAS in 1975 until the adoption of the revised treaty in 1993, all instruments contained the same clause on provisional application.

173. For some reason, starting in 1993, this clause stops appearing in treaties concluded under the auspices of ECOWAS. It has been only since 2001 that the provisional application clause has been reincorporated in a protocol (A/SP.2/12/01), which has since remained, except in three cases: *Protocol A/P.1/10/06, on the establishment of a Criminal Intelligence and Investigation Bureau; the Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials*; and *Protocol A/SP.1/06/06, amending the revised ECOWAS treaty*, all in 2006.

174. All these examples illustrate the importance of provisional application in regional commitments of States, the relationship of such application to international organizations and its vitality in the practice of the law of treaties.

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[280] Doc. A/CN.4/699 (2016).

[281] *The Treaty, Protocols, Conventions and Supplementary Acts of the Economic Community of West African States [1975–2010]*, Abuja, Ministry of Foreign Affairs, 2011.

[282] For the ECOWAS documents mentioned, see also https://ecowas.int/publication/treaty/.

17. North Atlantic Treaty Organization (NATO)

Extracts from the fourth report on the provisional application of treaties, by Juan Manuel Gómez-Robledo, Special Rapporteur: [283]

> 165. According to a note received from the NATO Office of Legal Affairs,[284] this international organization is party to approximately 180 treaties, only 5 of which contain provisional application clauses, 3 of them referring to transit arrangements between NATO and its partners.
>
> 166. The note also explains that there is no previously determined policy with respect to provisional application. In relation to agreements involving the establishment of NATO offices, the Organization has developed the practice by which it requests States to ensure that headquarters agreements enter into force at the time of signature.
>
> 167. However, if this is not possible under the provisions of the internal law of the State in question, the NATO resorts to provisional application from the time of signature until the entry into force of the agreement. In cases where this is unacceptable to the contracting State, NATO waits until the completion of the time periods established by the internal requirements of that State.

[283] Doc. A/CN.4/699 (2016).

[284] Note dated 28 January 2016, on file with the Codification Division.

18. Energy Charter Treaty

Communication from the Secretariat of the Energy Charter Treaty (ECT) transmitted to the Secretariat, 28 July 2022:[285]

Article 45
(Provisional Application)

(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

(2) (*a*) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.

(*b*) Neither a signatory which makes a declaration in accordance with subparagraph (*a*) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).

(*c*) Notwithstanding subparagraph (*a*), any signatory making a declaration referred to in subparagraph (*a*) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations.

(3) (*a*) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.

(*b*) In the event that a signatory terminates provisional application under subparagraph (*a*), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (*c*).

(*c*) Subparagraph (*b*) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor.

(4) Pending the entry into force of this Treaty the signatories shall meet periodically in the provisional Charter Conference, the first meeting of which shall be convened by the provisional Secretariat referred to in paragraph (5) not later than 180 days after the opening date for signature of the Treaty as specified in Article 38.

(5) The functions of the Secretariat shall be carried out on an interim basis by a provisional Secretariat until the entry into force of this Treaty pursuant to Article 44 and the establishment of a Secretariat.

(6) The signatories shall, in accordance with and subject to the provisions of paragraph (1) or subparagraph (2)(*c*) as appropriate, contribute to the costs of the provisional Secretariat as if the signatories were Contracting Parties under Article 37(3).

[285] Edited by the United Nations Secretariat.

> Any modifications made to Annex B by the signatories shall terminate upon the entry into force of this Treaty.
>
> (7) A state or Regional Economic Integration Organisation which, prior to this Treaty's entry into force, accedes to the Treaty in accordance with Article 41 shall, pending the Treaty's entry into force, have the rights and assume the obligations of a signatory under this Article.

Several signatories have provisionally applied the ECT, including the European Union and Euratom "to the extent that it has competence for the matters governed by the Treaty".[286]

An interesting notification is that of Liechtenstein (applying automatically, based on their Customs Union Agreement, the Swiss declaration in relation to trade matters).[287]

The Russian Federation terminated [its] provisional application of the ECT in 2009.[288] However, Article 45(3)(*b*) [provides] for a 20 year sunset clause (protection of existing investments). This was confirmed in the Yukos awards[289] and in later arbitration cases under the ECT.[290] Nevertheless, the Russian Federation continues to be involved in the activities of the Conference and its subsidiary bodies. In 2018, the Russian Federation sent a communication stating they were not to be considered as Signatories of the ECT as of 2009 and the Budget Committee decided to keep the question of the outstanding arrears of the Russian Federation under consideration.[291] On 19 October 2021, the Strategy Group took note of the country's status as no longer being an [Energy Charter Treaty] Signatory.[292] It was subsequently decided to remove the contributions of the Russian Federation from the budget.[293]

[The Energy Charter Conference at its Ad Hoc Meeting on 24 June 2022] decided to suspend Belarus' provisional application of the entire [Energy Charter Treaty].[294]

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[286] See: Council Decisions 94/998/EC and 94/1067/Euratom of 15.12.1994.

[287] See: https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Depository_documents/Liechtenstein/ECT___PEEREA.pdf.

[288] See: https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Founding_Docs/Letter_Russian_Federation_2009.pdf.

[289] See: https://www.energychartertreaty.org/details/article/yukos-universal-limited-v-russian-federation-pca-case-no-aa-227/.

[290] *Yukos Capital S.à.r.l* v. *Russian Federation, Final* Award, 2017, available at: https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/38_Yukos_Capital_SARL/2021.07.23_Final_Award.pdf; *Russian Federation* v. *Yukos Capital S.à.r.l*, Federal Court of Switzerland, Civil Law, Judgment of 20 July 2017, available at: https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/38_Yukos_Capital_SARL/Judgment_of_the_Swiss_Federal_Supreme_Court_on_Russia_s_Set-Aside_Application__French_.pdf; Financial Performance Holdings B.V. (discontinued in 2016); and *Luxtona Limited* v. *Russian Federation*, Interim award on Jurisdiction, 22 March 2017, available at: https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/65_Luxtona/2017.03.22_Interim_Award_on_Respondent_s_Objections_to_the_Jurisdiction_of_the_Tribunal.pdf.

[291] See: Document CCDEC/2018/14/NOT (27 November 2018), available at: https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201814_-_NOT_Report_of_the_Budget_Committee.pdf .

[292] See: Document CCDEC/2021/34/NOT (14 December 2021), available at: https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2021/CCDEC202134.pdf.

[293] See: Document CCDEC/2021/25/BUD (14 December 2021), available at: https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2021/CCDEC202125.pdf.

[294] See: Document CCDEC/2022/11/SGN (24 June 2022), available at: https://www.energychartertreaty.org/fileadmin/DocumentsMedia/CCDECS/CCDEC202211.pdf.

According to Article 45(2)(*c*) of the ECT, Signatories who sent a declaration not accepting provisional application of the Treaty still applied Part VII of the treaty. Those included Iceland (until ratification in 2015), Norway and Australia (until 2021)[295] see notification).

Amendment to the Trade-Related Provisions of the ECT (the Trade Amendment)

Article 6
Provisional Application

(1) Each signatory which applies the Energy Charter Treaty provisionally in accordance with Article 45(1) and each Contracting Party agrees to apply this Amendment provisionally pending its entry into force for such signatory or Contracting Party to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

(2) (*a*) Notwithstanding paragraph (1):

(i) any signatory which applies the Energy Charter Treaty provisionally or Contracting Party may deliver to the Depositary within 90 days from the date of the adoption of this Amendment by the Charter Conference a declaration that it is not able to accept the provisional application of this Amendment;

(ii) any signatory which does not apply the Energy Charter Treaty provisionally in accordance with Article 45(2) may deliver to the Depositary not later than the date on which it becomes a Contracting Party or begins to apply the Treaty provisionally a declaration that it is not able to accept the provisional application of this Amendment.

The obligation contained in paragraph (1) shall not apply to a signatory or Contracting Party making such a declaration. Any such signatory or Contracting Party may at any time withdraw that declaration by written notification to the Depositary.

(*b*) Neither a signatory or Contracting Party which makes a declaration in accordance with subparagraph (*a*) nor Investors of that signatory or Contracting Party may claim the benefits of provisional application under paragraph (1).

(3) Any signatory or Contracting Party may terminate its provisional application of this Amendment by written notification to the Depositary of its intention not to ratify, accept or approve this Amendment. Termination of provisional application for any signatory or Contracting Party shall take effect upon the expiration of 60 days from the date on which such signatory's or Contracting Party's written notification is received by the Depositary. Any signatory which terminates its provisional application of the *Energy Charter Treaty* in accordance with Article 45(3)(*a*) shall be considered as also having terminated its provisional application of this Amendment with the same date of effect.

Several Contracting Parties are provisionally applying the amendments.

The 2022 amendments to the ECT

It is anticipated that Contracting Parties will also agree on potential provisional application (using similar wording as in the Trade Amendment) in the decision of the Conference to be approved on 22 November 2022.

[295] See: https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Depository_documents/Australia_-_Notification_under_Article_45_3__a_.pdf.

19. European Free Trade Association (EFTA)

Extracts from the fifth report on the provisional application of treaties, by Juan Manuel Gómez-Robledo, Special Rapporteur:[296]

> 48. EFTA … has a wealth of practice on the subject, and in general the relevant provisions of the treaties concluded under its auspices are similarly worded. The annex to the present report contains a table reproducing the relevant articles and the titles of the treaties containing them.

Annex
Provisional application of treaties negotiated within the European Free Trade Association (EFTA)

Free Trade Agreement between the EFTA States and Israel, signed 17 September 1992	*Article 33 (Entry into force)* 1. This Agreement shall enter into force on 1 January 1993 in relation to those Signatory States which by then have deposited their instruments of ratification or acceptance with the Depositary, provided that Israel is among the States that have deposited their instruments of ratification or acceptance. 2. In relation to a Signatory State depositing its instrument of ratification or acceptance after 1 January 1993, this Agreement shall enter into force on the first day of the second month following the deposit of its instrument, provided that Israel is among the States that have deposited their instruments of ratification or acceptance. 3. Any Signatory State may already at the time of signature declare that, during an initial phase, it shall apply the Agreement provisionally, if the Agreement cannot enter into force in relation to that State by 1 January 1993, provided that in relation to Israel the Agreement has entered into force.
Interim Agreement between the EFTA States and the Palestine Liberation Organization for the benefit of the Palestinian Authority, signed 30 November 1998	*Article 39 (Entry into force)* 1. This Agreement shall enter into force on 1 July 1999 in relation to those Signatories which by then have deposited their instruments of ratification or acceptance with the Depositary, provided that the Palestinian Authority has deposited its instrument of ratification or acceptance. 2. In relation to a Signatory depositing its instrument of ratification or acceptance after 1 July 1999, this Agreement shall enter into force on the first day of the third month following the deposit of its instrument, provided that in relation to the Palestinian Authority this Agreement enters into force at the latest on the same date. 3. Any Signatory may already at the time of signature declare that, during an initial phase, it shall apply this Agreement provisionally if this Agreement cannot enter into force in relation to that Signatory by 1 July 1999. For an EFTA State provisional application is only possible provided that in relation to the Palestinian Authority this Agreement has entered into force, or that the Palestinian Authority is applying this Agreement provisionally.

[296] Doc. A/CN.4/718 (2018).

Free Trade Agreement between the EFTA States and the former Yugoslav Republic of Macedonia, signed 19 June 2000

Article 40 (Entry into force)

1. This Agreement shall enter into force on 1 January 2001 in relation to those Signatories which by then have deposited their instruments of ratification or acceptance with the Depositary, provided that Macedonia has deposited its instrument of ratification or acceptance.

2. In relation to a Signatory depositing its instrument of ratification or acceptance after 1 January 2001, this Agreement shall enter into force on the first day of the third month following the deposit of its instrument, provided that in relation to Macedonia this Agreement enters into force at the latest on the same date.

3. Any Party may, if its constitutional requirements permit, apply this Agreement provisionally during an initial period starting on 1 January 2001, provided that in relation to Macedonia this Agreement has entered into force or is provisionally applied at the latest as of the same date. Provisional application of this Agreement shall be notified to the Depositary.

Free Trade Agreement between the EFTA States and Mexico, signed 27 November 2000

Article 84 (Entry into force)

1. This Agreement is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. This Agreement shall enter into force on 1 July 2001 in relation to those Signatory States which by then have deposited their instruments of ratification or acceptance with the Depositary, provided that Mexico is among the States that have deposited their instruments of ratification or acceptance.

3. In relation to a Signatory State depositing its instrument of ratification or acceptance after 1 July 2001, this Agreement shall enter into force on the first day of the third month following the deposit of its instrument, provided that in relation to Mexico this Agreement enters into force at the latest on the same date.

4. Any Party may, if its constitutional requirements permit, apply this Agreement provisionally during an initial period starting on 1 July 2001. Provisional application of this Agreement shall be notified to the Depositary.

Free Trade Agreement between the EFTA States and Jordan, signed 21 June 2001

Article 40 (Entry into force)

1. This Agreement shall enter into force on 1 January 2002 in relation to those Signatories which by then have deposited their instruments of ratification or acceptance with the Depositary, provided that Jordan has deposited its instrument of ratification or acceptance.

2. In relation to a Signatory depositing its instrument of ratification or acceptance after 1 January 2002, this Agreement shall enter into force on the first day of the third month following the deposit of its instrument, provided that in relation to Jordan this Agreement enters into force at the latest on the same date.

3. Any Signatory may already at the time of signature declare that, during an initial phase, it shall apply this Agreement provisionally, if this Agreement cannot enter into force in relation to that Signatory by 1 January 2002. For an EFTA State provisional application is only possible provided that in relation to Jordan this Agreement has entered into force, or that Jordan is applying this Agreement provisionally.

Free Trade Agreement between the EFTA States and Singapore, signed 26 June 2002

Article 72 (Entry into force)

1. This Agreement is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. This Agreement shall enter into force on 1 January 2003 in relation to those Signatory States which by then have deposited their instruments of ratification, acceptance or approval with the Depositary, and provided that Singapore is among the States that have deposited their instruments of ratification, acceptance or approval.

3. In relation to a Signatory State depositing its instrument of ratification, acceptance or approval after 1 January 2003, this Agreement shall enter into force on the first day of the third month following the deposit of its instrument, provided that in relation to the Republic of Singapore this Agreement enters into force at the latest on the same date.

4. Any Party may, if its constitutional requirements permit, apply this Agreement provisionally during an initial period starting on 1 January 2003. Provisional application of this Agreement shall be notified to the Depositary.

Free Trade Agreement between the EFTA States and Chile, signed 26 June 2003

Article 106 (Entry into force)

1. This Agreement is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. This Agreement shall enter into force on 1 February 2004 in relation to those Signatory States which by then have ratified, accepted or approved the Agreement, provided they have deposited their instruments of ratification, acceptance or approval with the Depositary at least 30 days before the date of entry into force, and provided that Chile is among the States that have deposited their instruments of ratification, acceptance or approval.

3. In case this Agreement does not enter into force on 1 February 2004, it shall enter into force on the first day of the first month following the latter deposit of the instruments of ratification, acceptance or approval by Chile and at least one EFTA State.

4. In relation to an EFTA State depositing its instrument of ratification, acceptance or approval after this Agreement has entered into force, this Agreement shall enter into force on the first day of the third month following the deposit of its instrument.

5. If its constitutional requirements permit, any EFTA State may apply this Agreement provisionally. Provisional application of this Agreement under this paragraph shall be notified to the Depositary.

Free Trade Agreement between the EFTA States and Lebanon, signed 24 June 2004

Article 41 (Entry into force)

1. This Agreement is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. This Agreement shall enter into force on 1 January 2005 in relation to those Signatory States which by then have ratified the Agreement, provided they have deposited their instruments of ratification or acceptance with the Depositary at least two months before the entry into force, and provided that Lebanon is among the States that have deposited their instruments of ratification or acceptance.

3. In case this Agreement does not enter into force on 1 January 2005 it shall enter into force on the first day of the third month following the latter date on which Lebanon and at least one EFTA State have deposited their instruments of ratification.

4. In relation to an EFTA State depositing its instrument of ratification, after this Agreement has entered into force, the Agreement shall enter into force on the first day of the third month following the deposit of its instrument.

5. If its constitutional requirements permit, any EFTA State may apply this Agreement provisionally. Provisional application of this Agreement under this paragraph shall be notified to the Depositary.

Free Trade Agreement between the EFTA States and Tunisia, signed 17 December 2004

Article 45 (Entry into force)

1. This Agreement is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. This Agreement shall enter into force on 1 June 2005 in relation to those Signatory States which by then have deposited their instruments of ratification or acceptance with the Depositary, provided that Tunisia is among the States that have deposited their instruments of ratification or acceptance.

3. In case this Agreement does not enter into force on 1 June 2005 it shall enter into force on the first day of the second month following the latter date on which Tunisia and at least one EFTA State have deposited their instruments of ratification.

4. In relation to an EFTA State depositing its instrument of ratification, after this Agreement has entered into force, the Agreement shall enter into force on the first day of the second month following the deposit of its instrument.

5. If its constitutional requirements permit, any EFTA State may apply this Agreement provisionally. Provisional application of this Agreement under this paragraph shall be notified to the Depositary.

Free Trade Agreement between the EFTA States and the Republic of Korea, signed 15 December 2005

Article 10.6 (Entry into force)

1. This Agreement is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. This Agreement shall enter into force on 1 July 2006 in relation to those Signatory States which by then have ratified this Agreement, provided they have deposited their instruments of ratification, acceptance or approval with the Depositary at least one month before the entry into force, and provided that Korea is among the States that have deposited their instruments.

3. In case this Agreement does not enter into force on 1 July 2006, it shall enter into force on the first day of the second month following the latter date on which Korea and at least one EFTA State have deposited their instruments of ratification, acceptance, or approval with the Depositary.

4. In relation to an EFTA State depositing its instrument of ratification, acceptance or approval after this Agreement has entered into force, the Agreement shall enter into force on the first day of the second month following the deposit of its instrument.

5. If its constitutional requirements permit, any EFTA State may apply this Agreement provisionally. Provisional application of this Agreement under this paragraph shall be notified to the Depositary.

Free Trade Agreement between the EFTA States and the Southern African Customs Union States, signed 26 June 2006

Article 43 (Entry into Force)

1. This Agreement is subject to ratification, acceptance or approval in accordance with the respective constitutional requirements of the Parties. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. If its constitutional requirements permit, any EFTA State or SACU State may apply this Agreement provisionally. Provisional application of this Agreement under this paragraph shall be notified to the Depositary.

3. This Agreement shall enter into force on 1 July 2006, provided all the Parties have deposited their instruments of ratification, acceptance or approval with, or notified provisional application to, the Depositary at least one month before this date.

4. In case this Agreement does not enter into force on 1 July 2006 it shall enter into force on the first day of the second month following the date on which the last Party has deposited its instrument or notified provisional application.

Free Trade Agreement between the Arab Republic of Egypt and the EFTA States, signed 27 January 2007

Article 49 (Entry into force)

1. This Agreement shall enter into force in relation to those Signatory States which have ratified the Agreement on the first day of the second month following the exchange of their instruments of ratification or acceptance, provided that Egypt is among the States that have deposited their instruments of ratification or acceptance.

2. A Signatory State may, if constitutional requirements allow, apply this Agreement provisionally during an initial phase, provided that Egypt has ratified the Agreement. Provisional application of the Agreement shall be notified to the other Signatory States.

Free Trade Agreement between Canada and the EFTA States, signed 26 January 2008

Article 41 (Provisional application)

If their domestic requirements permit, Canada and any EFTA State may apply this Agreement and the bilateral Agreements on trade in agricultural products provisionally. Such provisional application shall commence as of the date of the entry into force of this Agreement between Canada and at least two EFTA States, in accordance with paragraph 2 of Article 42. Provisional application of such Agreements under this Article shall be notified to the Depositary.

Article 42 (Entry into force)

1. This Agreement is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. This Agreement shall enter into force on the first day of the third month following the deposit by Canada and at least two of the EFTA States of their respective instruments of ratification, acceptance or approval with the Depositary, provided that the same Parties have exchanged their instruments of ratification, acceptance or approval in respect of the bilateral Agreement on trade in agricultural products concerned.

3. This Agreement shall enter into force for the other EFTA States at the date of the deposit of their respective instruments of ratification, acceptance or approval with the Depositary, provided Canada and the EFTA States concerned have exchanged instruments of ratification, acceptance or approval in respect of the corresponding bilateral Agreements on trade in agricultural products.

4. Should Canada and Liechtenstein apply this Agreement provisionally between them, this Agreement shall enter into force on the same date as for Switzerland, following Liechtenstein's deposit of its instrument of ratification, acceptance or approval with the Depositary.

Free Trade Agreement between the EFTA States and the Gulf Cooperation Council member States, signed 22 June 2009

Article 9.9 (Entry into force)

1. This Agreement is subject to ratification, acceptance or approval in accordance with the respective constitutional requirements of the Parties. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. If its constitutional requirements permit, any Party may apply this Agreement provisionally. Provisional application of this Agreement under this paragraph shall be notified to the Depositary.

3. This Agreement shall not enter into force or be applied provisionally between an EFTA State and GCC unless the complementary agreement on trade in basic agricultural goods between the EFTA State and GCC enters into force or is applied provisionally simultaneously.

4. This Agreement shall enter into force on the first day of the third month after the GCC Member States and at least one EFTA State have deposited their respective instruments of ratification, acceptance or approval with the Depositary.

5. In relation to an EFTA State depositing its instrument of ratification, acceptance or approval after this Agreement has entered into force this Agreement shall enter into force on the first day of the third month following the deposit of its instrument with the Depositary.

Free Trade Agreement between Albania and the EFTA States, signed 17 December 2009

Article 42 (Entry into force)

1. This Agreement is subject to ratification, acceptance or approval in accordance with the respective constitutional requirements of the Parties. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. This Agreement shall enter into force on 1 April 2010 in relation to those Parties which have deposited their instruments of ratification, acceptance or approval, or notified provisional application to the Depositary, at least two months before that date, and provided that Albania is among those Parties.

3. In case this Agreement does not enter into force on 1 April 2010 it shall enter into force on the first day of the third month after Albania and at least one EFTA State have deposited their instruments of ratification, acceptance or approval, or notified provisional application to the Depositary.

4. In relation to an EFTA State depositing its instrument of ratification, acceptance or approval after this Agreement has entered into force, this Agreement shall enter into force on the first day of the third month following the deposit of its instrument of ratification, acceptance or approval.

5. If its constitutional requirements permit, Albania or any EFTA State may apply this Agreement provisionally pending ratification, acceptance or approval by that Party. Provisional application of this Agreement shall be notified to the Depositary.

6. This Agreement shall not enter into force or be applied provisionally between Albania and an EFTA State unless the complementary agreement on trade in agricultural products between Albania and that EFTA State enters into force or is applied provisionally simultaneously. It shall remain in force between Albania and that EFTA State as long as the complementary agreement remains in force between them.

Free Trade Agreement between the EFTA States and Serbia, signed 17 December 2009

Article 54 (Entry into force)

1. This Agreement is subject to ratification, acceptance or approval in accordance with the respective constitutional requirements of the Parties. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. This Agreement shall enter into force on 1 April 2010 in relation to those Parties which have deposited their instruments of ratification, acceptance or approval, or notified provisional application to the Depositary, at least two months before that date, and provided that Serbia is among those Parties.

3. In case this Agreement does not enter into force on 1 April 2010 it shall enter into force on the first day of the third month after at least one EFTA State and Serbia have deposited their instruments of ratification, acceptance or approval, or notified provisional application to the Depositary.

4. In relation to an EFTA State depositing its instrument of ratification, acceptance or approval after this Agreement has entered into force, this Agreement shall enter into force on the first day of the third month following the deposit of its instrument of ratification, acceptance or approval.

5. If its constitutional requirements permit, any EFTA State or Serbia may apply this Agreement provisionally pending ratification, acceptance or approval by that Party. Provisional application of this Agreement shall be notified to the Depositary.

6. This Agreement shall not enter into force or be applied provisionally between an EFTA State and Serbia unless the complementary agreement on trade in agricultural products between that EFTA State and Serbia enters into force or is applied provisionally simultaneously. It shall remain in force between that EFTA State and Serbia as long as the complementary agreement remains in force between them.

Free Trade Agreement between the EFTA States and Peru, signed 24 June 2010 (EFTA States), signed 14 July 2010 (Peru)

Article 13.2 (Entry into force)

1. This Agreement is subject to ratification, acceptance or approval in accordance with the respective legal and constitutional requirements of the Parties. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. This Agreement shall enter into force on 1 June 2011, provided that Peru and at least one EFTA State have deposited their instruments of ratification, acceptance or approval with, or notified provisional application to the Depositary at least two months prior to that date.

3. In case the Agreement does not enter into force on 1 June 2011, it shall enter into force on the first day of the third month following the latter date on which Peru and at least one EFTA State have deposited their instruments of ratification, acceptance or approval with, or notified provisional application to the Depositary.

4. If an EFTA State deposits its instrument of ratification, acceptance or approval after this Agreement has entered into force, the Agreement shall enter into force on the first day of the third month following the deposit of its instrument.

5. Where Peru has ratified this Agreement, an EFTA State may, if its legal and constitutional requirements so permit, apply this Agreement provisionally pending ratification, acceptance or approval by that State. Provisional application of this Agreement shall be notified to the Depositary, and shall apply from the first day of the third month following the notification.

6. If the Agreement is not ratified, accepted or approved by a Party, and it had been provisionally applied by that Party, paragraph 1 of Article 13.5 (Withdrawal) shall apply mutatis mutandis. Provisional application shall continue for a period of six months following the date of the receipt of the Party's notification by the Depositary regarding the non-ratification, non-acceptance or non-approval of the Agreement.

Article 13.5 (Withdrawal)

1. Any Party may withdraw from this Agreement after it provides written notification to the other Parties. Such withdrawal shall be effective six months after the date on which the notification is received by the Depositary, except otherwise agreed by the Parties.

2. If Peru withdraws, this Agreement shall expire when the withdrawal becomes effective.

3. In case any EFTA State withdraws from the Convention establishing the European Free Trade Association, it shall withdraw at the same time from this Agreement in accordance with paragraph 1.

Free Trade Agreement between the EFTA States and Montenegro, signed 14 November 2011

Article 51 (Entry into force)

1. This Agreement is subject to ratification, acceptance or approval in accordance with the respective constitutional requirements of the Parties. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. This Agreement shall enter into force on 1 July 2012 in relation to those Parties which have deposited their instruments of ratification, acceptance or approval, or notified provisional application to the Depositary, at least two months before that date, and provided that at least one EFTA State and Montenegro are among them.

3. In case this Agreement does not enter into force on 1 July 2012, it shall enter into force on the first day of the third month after at least one EFTA State and Montenegro have deposited their instruments of ratification, acceptance or approval, or notified provisional application to the Depositary.

4. In relation to an EFTA State depositing its instrument of ratification, acceptance or approval after this Agreement has entered into force, this Agreement shall enter into force on the first day of the third month following the deposit of its instrument of ratification, acceptance or approval.

5. If its constitutional requirements permit, a Party may apply this Agreement provisionally pending ratification, acceptance or approval by that Party. Provisional application of this Agreement shall be notified to the Depositary.

Free Trade Agreement between the EFTA States and Bosnia and Herzegovina, signed 24 June 2013

Article 53 (Entry into force)

1. This Agreement is subject to ratification, acceptance or approval in accordance with the respective constitutional requirements of the Parties. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. This Agreement shall enter into force, in relation to those Parties which have deposited their instruments of ratification, acceptance or approval, or notified provisional application to the Depositary, on the first day of the third month following the receipt of the latest deposit of instrument of ratification, acceptance or approval, or notification on provisional application, provided that at least one EFTA State and Bosnia and Herzegovina are among them.

3. In relation to an EFTA State depositing its instrument of ratification, acceptance or approval after this Agreement has entered into force, this Agreement shall enter into force on the first day of the third month following the deposit of its instrument of ratification, acceptance or approval.

4. If its constitutional requirements permit, any EFTA State or Bosnia and Herzegovina may apply this Agreement provisionally pending ratification, acceptance or approval by that Party. Provisional application of this Agreement shall be notified to the Depositary.

Free Trade Agreement between the EFTA States and the Central American States, signed 24 June 2013

Article 13.6 (Entry into force)

1. This Agreement is subject to ratification, acceptance or approval in accordance with the respective domestic legal procedures of the Parties. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. If its respective legal requirements permit, a Party may apply this Agreement provisionally. Provisional application of this Agreement under this paragraph shall be notified to the Depositary.

3. This Agreement shall enter into force 60 days after the date on which at least one Central American State and at least one EFTA State have deposited their instrument of ratification, acceptance or approval with the Depositary.

4. In relation to a Party depositing its instrument of ratification, acceptance or approval after this Agreement has entered into force, the Agreement shall enter into force 60 days following the deposit of its instrument.

Free Trade Agreement between the EFTA States and the Philippines, signed 28 April 2016

Article 14.5 (Entry into force)

1. This Agreement is subject to ratification, acceptance or approval in accordance with the respective legal requirements of the Parties. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. This Agreement shall enter into force on the first day of the third month following the date on which at least one EFTA State and the Philippines have deposited their instrument of ratification, acceptance or approval with the Depositary.

3. In relation to an EFTA State depositing its instrument of ratification, acceptance or approval after this Agreement has entered into force, this Agreement shall enter into force on the first day of the third month following the deposit of its instrument.

4. If its respective legal requirements permit, a Party may apply this Agreement provisionally, pending its entry into force for that Party. Provisional application of this Agreement shall be notified to the Depositary.

Free Trade Agreement between the EFTA States and Georgia, signed 27 June 2016

Article 13.5 (Entry into force)

1. This Agreement is subject to ratification, acceptance or approval in accordance with the respective legal requirements of the Parties. The instruments of ratification, acceptance or approval shall be deposited with the Depositary.

2. This Agreement shall enter into force on the first day of the third month following the date on which at least one EFTA State and Georgia have deposited their instrument of ratification, acceptance or approval with the Depositary.

3. In relation to an EFTA State depositing its instrument of ratification, acceptance or approval after this Agreement has entered into force, the Agreement shall enter into force on the first day of the third month following the deposit of its instrument.

4. If its respective legal requirements permit, a Party may apply this Agreement provisionally, pending its entry into force for that Party. Provisional application of this Agreement under this paragraph shall be notified to the Depositary.

Part Two—Guide to Provisional Application of Treaties, adopted by the International Law Commission (2021)

A. Draft guidelines and draft annex constituting the Guide to Provisional Application of Treaties, 2021*

Guide to Provisional Application of Treaties

Guideline 1
Scope

The present draft guidelines concern the provisional application of treaties by States or by international organizations.

Guideline 2
Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other relevant rules of international law.

Guideline 3
General rule

A treaty or a part of a treaty is applied provisionally pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

Guideline 4
Form of agreement

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed between the States or international organizations concerned through:

(*a*) a separate treaty; or

(*b*) any other means or arrangements, including:

(i) a resolution, decision or other act adopted by an international organization or at an intergovernmental conference, in accordance with the rules of such organization or conference, reflecting the agreement of the States or international organizations concerned;

(ii) a declaration by a State or by an international organization that is accepted by the other States or international organizations concerned.

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* Adopted by the International Law Commission at its seventy-second session, in 2021, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/76/10, para. 51, to be reproduced in *Yearbook of the International Law Commission, 2021*, vol. II, Part Two). The General Assembly, in resolution 76/113 of 9 December 2021 took note of the Guide to Provisional Application of Treaties. The footnote numbers reflected in the report of the International Law Commission have been retained.

Guideline 5
Commencement

The provisional application of a treaty or a part of a treaty takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as is otherwise agreed.

Guideline 6
Legal effect

The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof between the States or international organizations concerned, except to the extent that the treaty otherwise provides or it is otherwise agreed. Such treaty or part of a treaty that is being applied provisionally must be performed in good faith.

Guideline 7
Reservations

The present draft guidelines are without prejudice to any question concerning reservations relating to the provisional application of a treaty or a part of a treaty.

Guideline 8
Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is applied provisionally entails international responsibility in accordance with the applicable rules of international law.

Guideline 9
Termination

1. The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or international organization notifies the other States or international organizations concerned of its intention not to become a party to the treaty.

3. Unless the treaty otherwise provides or it is otherwise agreed, a State or an international organization may invoke other grounds for terminating provisional application, in which case it shall notify the other States or international organizations concerned.

4. Unless the treaty otherwise provides or it is otherwise agreed, the termination of the provisional application of a treaty or a part of a treaty does not affect any right, obligation or legal situation created through the execution of such provisional application prior to its termination.

Guideline 10
Internal law of States, rules of international organizations and observance of provisionally applied treaties

1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.

2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

Guideline 11
Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

Guideline 12
Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations

The present draft guidelines are without prejudice to the right of States or international organizations to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of States or from the rules of international organizations.

Annex
Examples of provisions on provisional application of treaties

The following examples of provisions are intended to assist States and international organizations in drafting an agreement to apply provisionally a treaty or a part of a treaty. They do not cover all possible situations and are not intended to prescribe any specific formulation. These examples providing for the provisional application of treaties, found in both bilateral and multilateral treaties,[201] are organized according to certain issues that typically arise, as set out in sections A to E. The examples listed come from recent

[201] For purposes of the present draft annex, so-called "mixed agreements", which are concluded between the European Union and its Member States, on the one part, and a third party, on the other part, are categorized as bilateral treaties.

practice,[202] and, to the extent possible, they reflect regional diversity. They are, however, not exhaustive.[203]

A. Commencement of provisional application

The examples of provisions on commencement of provisional application are as follow below.

1. From the date of signature

(a) Bilateral treaties

1. *Undertaking between the Kingdom of the Netherlands and the Republic of the Philippines on the recognition of certificates under regulation 1/10 of the STCW 1978 Convention [Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978]* (Manila, 31 May 2001):[204]

> **Article 11**
>
> Without prejudice to Article 9, this Undertaking shall apply provisionally from the date of its signature and shall enter into force on the first date of the second month after both Parties have notified each other in writing that the procedures required for the entry into force of the Undertaking in their respective countries have been complied with.

2. *Agreement between the Government of the Kingdom of Denmark and the Council of Ministers of Serbia and Montenegro on the Succession to the Treaties Concluded between the Kingdom of Denmark and the Socialist Federal Republic of Yugoslavia* (Copenhagen, 18 July 2003):[205]

> **Article 3**
>
> …
>
> (*b*) The provisions of this Agreement shall apply provisionally from the date of the signature of the Agreement.

3. *Agreement between the United Nations and the United Republic of Tanzania concerning the Headquarters of the International Residual Mechanism for Criminal Tribunals* (Dar es Salaam, 26 November 2013):[206]

> **Article 48**
> **Entry into force**
>
> 1. The provisions of this Agreement shall be applied provisionally as from the date of signature.

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[202] See, in particular, the memorandum by the Secretariat on provisional application of treaties, A/CN.4/707[, reproduced at p. 311, below].

[203] Non-inclusion of any example should not be interpreted as reflecting any position of the Commission with respect to said example.

[204] United Nations, *Treaty Series*, vol. 2385, No. 43056, p. 403.

[205] *Ibid.*, vol. 2420, No. 43679, p. 359.

[206] *Ibid.*, vol. 2968, No. 51602, p. 237.

(b) Multilateral treaties

4. *Agreement between the Government of the Federal Republic of Germany, the United Nations and the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals concerning the Headquarters of the Convention Secretariat* (Bonn, 18 September 2002):[207]

> **Article 7**
> **Final Provisions**
>
> …
>
> (7) The provisions of this Agreement shall be applied provisionally, as from the date of signature, as appropriate, until its entry into force referred to in paragraph 9 below.

5. *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* (Ljubljana, 2 April 2004):[208]

> **Article 3**
>
> …
>
> 5. This Agreement shall be provisionally applied from the date of its signature.

6. *Agreement on Collective Forces of Rapid Response of the Collective Security Treaty Organization* (Moscow, 14 June 2009):[209]

> **Article 17**
>
> This Agreement shall provisionally apply as of the date of signature, unless it contravenes the national laws of the Parties, and shall enter into force on the date of receipt by the depositary of the fourth notification of the completion of the internal procedures necessary for its entry into force by the Parties that have signed it. …

2. From a date other than the date of signature

(a) Bilateral treaties

7. *Exchange of notes constituting an agreement on the abolition of visas for holders of diplomatic passports* (Sofia, 16 December 1996):[210]

> **Note from Bulgaria**
>
> …
>
> 6. This Agreement shall enter into force 30 days after the last notification through the diplomatic channel that the relevant internal legal requirements have been met. Its provisional application shall begin 10 days after the date of exchange of these Notes.
>
> …

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[207] *Ibid.*, vol. 2306, No. 41136, p. 469.

[208] *Ibid.*, vol. 2367, No. 42662, p. 697.

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

[210] *Ibid.*, vol. 1996, No. 34151, p. 33.

Note from Spain

…

The Embassy of the Kingdom of Spain in Sofia has the honour to inform the Ministry of Foreign Affairs of the Republic of Bulgaria that the Government of the Kingdom of Spain accepts the proposal of the Government of Bulgaria and agrees that the aforementioned Note and this reply shall constitute an Agreement between the Governments, which shall enter into force and be applied provisionally in accordance with the provisions of paragraph 6.

…

8. *Treaty between the Federal Republic of Germany and the Kingdom of 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* (Berlin, 29 April 2003):[211]

Article 16
Ratification, entry into force, provisional application

…

3. This Treaty shall be applied provisionally with effect from 1 May 2003. …

9. *Protocol to the Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and their Member States, of the one part, and the Republic of Kazakhstan, of the other part, to Take Account of the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Hungary, the Republic of Latvia, the Republic of Lithuania, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic to the European Union* (Brussels, 30 April 2004):[212]

Article 5

…

3. Where not all the instruments of approval of this Protocol have been deposited before 1 May 2004, this Protocol shall apply provisionally with effect from 1 May 2004.

10. *Framework Agreement on Cooperation in the Field of Immigration between the Kingdom of Spain and the Republic of Mali* (Madrid, 23 January 2007):[213]

Article 16

…

2. This Framework Agreement shall apply provisionally after a period of thirty days from its signature.

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[211] *Ibid.*, vol. 2389, No. 43165, p. 117.

[212] *Ibid.*, vol. 2570, No. 45792, p. 254.

[213] *Ibid.*, vol. 2635, No. 46921, p. 3.

11. *Agreement between the Kingdom of the Netherlands and the Argentine Republic on Mutual Administrative Assistance in Customs Matters* (Buenos Aires, 26 September 2012):[214]

Article 23
Entry into force

…

2. This Agreement shall be applied provisionally from the first day of the second month after its signature.

(b) Multilateral treaties

12. *Document Agreed among the States Parties to the Treaty on Conventional Armed Forces in Europe of November 19, 1990* (Vienna, 31 May 1996):[215]

VI

1. 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.

3. Upon conclusion or notification

(a) Bilateral treaties

13. *Exchange of notes constituting an agreement concerning the abolition of visas for holders of diplomatic passports* (Madrid, 27 December 1996):[216]

Note from Spain

…

Should the Government of Tunisia accept the foregoing proposal, on the basis of reciprocity, this Note and the reply to it from the Embassy of Tunisia shall constitute an Agreement between the Kingdom of Spain and the Republic of Tunisia, which shall be applied provisionally from the date of exchange of these Notes and shall enter into force on the date of the last notification of completion of the respective domestic requirements.

…

Note from Tunisia

…

The Embassy of the Republic of Tunisia in Madrid has the honour to inform the Ministry of Foreign Affairs that the Government of the Republic of Tunisia accepts the proposal of the Government of the Kingdom of Spain and agrees that the aforementioned Note and this reply should constitute an Agreement.

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[214] *Ibid.*, vol. 2967, No. 51580, p. 123.

[215] *Ibid.*, vol. 2980, No. 44001, p. 195.

[216] *Ibid.*, vol. 1996, No. 34152, p. 45.

…

14. *Exchange of notes constituting an agreement amending the Agreement between the Kingdom of the Netherlands and the International Criminal Tribunal for the former Yugoslavia concerning the position of ICTY trainees in the Netherlands* (The Hague, 14 July 2010):[217]

Note from the Netherlands

…

If the abovementioned proposal is acceptable to the UN-ICTY, the Ministry has the honour to propose that this Note and the affirmative Note in reply of the UN-ICTY shall constitute an amendment to the Interns Agreement, that shall be provisionally applied as from the date of receipt of the affirmative Note in reply, and shall enter into force on the day after both Parties have notified each other in writing that the legal requirements for entry into force have been complied with.

…

Note from the International Criminal Tribunal for the former Yugoslavia (UN-ICTY)

…

The UN-ICTY has further the honour to inform the Ministry that the proposals set forth in the Ministry's note are acceptable to the UN-ICTY and to confirm that the Ministry's note and this note shall constitute an amendment to the Interns Agreement, that shall be provisionally applied as from the date of receipt of this affirmative Note in reply, and shall enter into force on the day after both Parties have notified each other in writing that the legal requirements for entry into force have been complied with.

…

15. *Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part* (Brussels, 6 October 2010):[218]

Article 15.10
Entry into force

…

5. (*a*) This Agreement shall be provisionally applied from the first day of the month following the date on which the EU Party and Korea have notified each other of the completion of their respective relevant procedures.

…

[217] *Ibid.*, vol. 2689, No. 41714, p. 93.

[218] *Official Journal of the European Union*, vol. 54, L 127, 14 May 2011, p. 6.

(b) Multilateral treaties

16. *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (New York, 4 August 1995):[219]

Article 41
Provisional application

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.

17. *International Cocoa Agreement, 2001* (Geneva, 2 March 2001):[220]

Article 57
Notification of provisional application

1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government which intends to accede to the Agreement, but which has not yet been able to deposit its instrument, may at any time notify the depositary that, in accordance with its constitutional procedures and/or its domestic laws and regulations, it will apply this Agreement provisionally either when it enters into force in accordance with article 58 or, if it is already in force, at a specified date. Each Government giving such notification shall at that time state whether it will be an exporting Member or an importing Member.

2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or at a specified date shall, from that time, be a provisional Member. It shall remain a provisional Member until the date of deposit of its instrument of ratification, acceptance, approval or accession.

18. *Convention on Cluster Munitions* (Dublin, 30 May 2008):[221]

Article 18
Provisional application

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.

19. *Arms Trade Treaty* (New York, 2 April 2013):[222]

Article 23
Provisional Application

Any State may at the time of signature or the deposit of its instrument 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.

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[219] United Nations, *Treaty Series*, vol. 2167, No. 37924, p. 3.

[220] *Ibid.*, vol. 2229, No. 39640, p. 2.

[221] *Ibid.*, vol. 2688, No. 47713, p. 39.

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

B. Form of agreement on provisional application

The examples concerning forms of agreement for provisional application are as follow below.

(a) Bilateral treaties

20. *Agreement on the Taxation of Savings Income and the Provisional Application Thereof* (Brussels, 26 May 2004, and The Hague, 9 November 2004):[223]

Letter from Germany

…

Pending the completion of these internal procedures and the entry into force of this "Convention concerning the automatic exchange of information regarding savings income in the form of interest payments", I have the honour to propose to you that the Federal Republic of Germany and the Kingdom of the Netherlands in respect of Aruba apply this Convention 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.

…

Letter from the Netherlands in respect of Aruba

…

I am able to confirm that the Kingdom of the Netherlands in respect of Aruba is in agreement with the contents of your letter.

…

(b) Multilateral treaties

21. *Protocol on the Provisional application of the Agreement Establishing the Caribbean Community Climate Change Centre* (Belize City, 5 February 2002):[224]

Recalling that Article 37 of the *Agreement Establishing the Caribbean Community Climate Change Centre* (CCCCC) provided for its entry into force upon the deposit of the seventh Instrument of Ratification with the Government of the host country,

Desiring to provide for the expeditious operationalisation of the Caribbean Community Climate Change Centre (CCCCC),

Have agreed as follows:

Article I
Provisional Application of the Agreement Establishing the Caribbean Community Climate Change Centre

The signatories of the *Agreement Establishing the Caribbean Community Climate Change Centre* have agreed, to apply the said Agreement among themselves provisionally, pending its definitive entry into force in accordance with Article 37 thereof.

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[223] *Ibid.*, vol. 2821, No. 49430, p. 3.

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

22. *Agreement on the Provisional Application of Certain Provisions of Protocol No. 14* [to the *Convention for the Protection of Human Rights and Fundamental Freedoms*] Pending its Entry into Force (Madrid, 12 May 2009):[225]

…

(*b*) 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;

23. Resolution 365 (XII) of the General Assembly of the United Nations World Tourism Organization entitled "Future of the Organization":[226]

…

Noting with regret that the amendment to Article 14 of the Statutes which it adopted by resolution 134(V), aimed at conferring on the host State a permanent seat on the Executive Council, together with the right to vote and not subject to the principle of geographical distribution of Council seats, has not yet received approval from the requisite number of States,

2. Decides that this amendment will be applied provisionally pending its ratification.

C. Opt in/Opt out of provisional application

The examples of provisions on opt in/opt out of provisional application are as follow below.

24. *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982* (New York, 28 July 1994):[227]

Article 7
Provisional application

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

(*a*) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which before 16 November 1994 notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing;

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[225] Council of Europe, *Treaty Series*, No. 194.

[226] United Nations World Tourism Organization, General Assembly resolution 365 (XII), adopted at its twelfth session in Istanbul, October 1997.

[227] United Nations, *Treaty Series*, vol. 1836, No. 31364, p. 3.

(*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.

25. *Arms Trade Treaty* (New York, 2 April 2013):[228]

Article 23
Provisional application

Any State may at the time of signature or the deposit of its instrument 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.

D. Limitations to provisional application deriving from internal law of States or rules of international organizations

The examples of provisions on limitations to provisional application deriving from internal law of the States or rules of international organizations are as follow below.

(a) Bilateral treaties

26. *Agreement between the Kingdom of Spain and the Republic of El Salvador on Air Transport* (Madrid, 10 March 1997):[229]

Article XXIV
Entry into Force and Denunciation

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. This Agreement shall enter into force when both Contracting Parties have notified each other through an exchange of diplomatic notes of the completion of their respective constitutional formalities.

27. *Agreement between the Government of the Kingdom of the Netherlands and the Cabinet of Ministers of Ukraine concerning Technical and Financial Cooperation* (Kiev, 11 May 1998):[230]

Article 7
Final Clauses

…

7.2. This Agreement shall be provisionally applied from the date of signing insofar as it does not contradict with existing legislation of both Parties.

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[228] See footnote 222 above.

[229] United Nations, *Treaty Series*, vol. 2023, No. 34927, p. 341.

[230] *Ibid.*, vol. 2386, No. 43066, p. 3.

28. *Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea* (Honolulu, 13 August 2004):[231]

> **Article 17**
> **Entry into Force and Duration**
>
> …
>
> 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 limitations on provisional application, of any changes to such constraints or limitations, and upon discontinuation of provisional application.

29. *Agreement between the Government of the Federal Republic of Germany and the Council of Ministers of Serbia and Montenegro regarding Technical Cooperation* (Belgrade, 13 October 2004):[232]

> **Article 7**
>
> …
>
> 3. After signature, this Agreement shall be provisionally implemented in accordance with the appropriate domestic law.

30. *Euro-Mediterranean Aviation Agreement between the European Community and its Member States, of the one part and the Kingdom of Morocco, of the other part* (Brussels, 12 December 2006):[233]

> **Article 30**
> **Entry into force**
>
> 1. This Agreement shall be applied provisionally, in accordance with the national laws of the Contracting Parties, from the date of signature.

31. *Agreement between the United States of America and the Kingdom of Spain on Cooperation in Science and Technology for Homeland Security Matters* (Madrid, 30 June 2011):[234]

> **Article 21**
> **Entry into Force, Amendment, Duration and Termination**
>
> 1. This Agreement shall apply provisionally upon signature of both Parties, consistent with each Party's domestic law. …

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[231] *Ibid*., vol. 2962, No. 51490, p. 339.

[232] *Ibid*., vol. 2424, No. 43752, p. 167.

[233] *Official Journal of the European Union*, vol. 49, L 386, 29 December 2006, p. 57.

[234] United Nations, *Treaty Series*, vol. 2951, No. 51275, p. 3.

(b) Multilateral treaties

32. *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982* (New York, 28 July 1994):[235]

Article 7
Provisional application

…

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.

33. *Grains Trade Convention, 1995* (London, 7 December 1994):[236]

Article 26
Provisional application

Any signatory Government and any other Government eligible to sign this Convention, or whose application for accession is approved by the Council, may deposit with the depositary a declaration of provisional application. 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.

34. *ECOWAS [Economic Community of West African States] Energy Protocol* (Dakar, 31 January 2003):[237]

Article 40
Provisional Application

(1) Each signatory agrees to apply this Protocol provisionally pending its entry into force for such signatory in accordance with Article 39, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

E. Termination of provisional application

The examples of provisions on termination of provisional application are as follow below.

1. Upon entry into force

(a) Bilateral treaties

35. *Free Trade Agreement between the Government of the Republic of Latvia and the Government of the Czech Republic* (Riga, 15 April 1996):[238]

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[235] See footnote 227 above.

[236] United Nations, *Treaty Series*, vol. 1882, No. 32022, p. 195.

[237] A/P4/1/03.

[238] United Nations, *Treaty Series*, vol. 2069, No. 35853, p. 225.

Article 41
Provisional Application

Pending the entry into force of this Agreement according to Article 40, the Czech Republic shall apply this Agreement provisionally from 1 July 1996, provided that the Republic of Latvia shall notify prior to 15 June 1996, that its internal legal requirements for entry into force of this Agreement are fulfilled and that the Republic of Latvia shall apply this Agreement from 1 July 1996.

36. *Agreement between the Government of the Federal Republic of Germany and the Government of the Republic of 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* (Ljubljana, 18 December 2000):[239]

Article 8

…

2. This Agreement shall be applied provisionally from the date of signature until its entry into force.

37. *Air Transport Agreement between the Government of the Republic of Paraguay and the Government of the United States of America* (Asunción, 2 May 2005):[240]

Article 17
Entry into Force

This Agreement and its Annexes shall be provisionally applied from the date of signature and shall enter into force on the date of the later note in an exchange of diplomatic notes between the Parties confirming that each Party has completed the necessary internal procedures for entry into force of this Agreement. …

38. *Agreement between the Kingdom of Spain and the International Air Transport Association (IATA) on the status of the IATA in Spain* (Madrid, 5 May 2009):[241]

Article 12
Entry into force

1. This Agreement shall apply provisionally from the time of its signature, pending its ratification by Spain and its approval by the IATA.

39. *Agreement between the United Nations and the Government of Sudan concerning the status of the United Nations Interim Security Force for Abyei* (New York, 1 October 2012):[242]

XI
Miscellaneous Provisions

…

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[239] *Ibid.*, vol. 2169, No. 38039, p. 287.

[240] *Ibid.*, vol. 2429, No. 43807, p. 301.

[241] *Ibid.*, vol. 2643, No. 47110, p. 91.

[242] *Ibid.*, vol. 2873, No. 50146, p. 125.

62. The present Agreement shall enter into force and shall be applied provisionally by the Government upon signature, pending the Government's notification that it has completed internal ratification procedures under the Constitution of Sudan.

(b) Multilateral treaties

40. *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982* (New York, 28 July 1994):[243]

Article 7
Provisional application

…

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.

41. *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* (Oslo, 18 September 1997):[244]

Article 18
Provisional Application

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

2. Upon notification not to become a party to the treaty

(a) Bilateral treaties

42. *Agreement between Spain and the International Oil Pollution Compensation Fund* (London, 2 June 2000):[245]

Note from Spain

…

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 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.

…

Note from the International Oil Pollution Compensation Fund 1992

…

[243] See footnote 227 above.

[244] United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211.

[245] *Ibid.*, vol. 2161, No. 37756, p. 45.

With regard to the Agreement signed by Spain and the Fund and your letter of today's date, I have the honour to inform you that the Fund is in agreement with the content of your letter, which should be considered as an instrument formulated by the two parties establishing the only possible interpretation of the Agreement.

…

43. *Treaty between the Federal Republic of Germany and the Kingdom of 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* (Berlin, 29 April 2003):[246]

Article 16
Ratification, entry into force, provisional application

…

3. 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.

44. *Agreement between the European Community and the Hashemite Kingdom of Jordan on Scientific and Technological Cooperation* (Brussels, 30 November 2009):[247]

Article 7
Final provisions

…

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.

(b) Multilateral treaties

45. *ECOWAS Energy Protocol* (Dakar, 31 January 2003):[248]

Article 40
Provisional Application

…

(3) (*a*) Any signatory may terminate its provisional application of this Protocol by written notification to the Depository of its intention not to become a Contracting Party to the Protocol. Termination of provisional application for any signatory shall take effect

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[246] *Ibid.*, vol. 2389, No. 43165, p. 117.

[247] *Ibid.*, vol. 2907, No. 50651, p. 51.

[248] See footnote 237 above.

upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.

3. Other grounds

(a) Bilateral treaties

46. *Agreement between the Government of the United States of America and the Government of the Republic of Liberia concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea* (Washington, 11 February 2004):[249]

Article 17
Entry into Force and Duration

…

2. Provisional Application. Beginning on the date of signature of this Agreement, the Parties shall, to the extent permitted by their respective national laws and regulations, apply it provisionally. Either Party may discontinue provisional application at any time. Each Party shall notify the other Party immediately of any constraints or limitations on provisional application, of any changes to such constraints or limitations, and upon discontinuation of provisional application.

47. *Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part* (Brussels, 6 October 2010):[250]

Article 15.10
Entry into force

5. …

(*c*) A Party may terminate provisional application by written notice to the other Party. Such termination shall take effect on the first day of the month following notification.

48. *Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part* (Brussels, 21 March 2014):[251]

Article 486
Entry into force and provisional application

…

7. Either Party may give written notification to the Depositary of its intention to terminate the provisional application of this Agreement. …

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[249] United Nations, *Treaty Series*, vol. 2963, No. 51492, p. 23.

[250] See footnote 218 above.

[251] *Official Journal of the European Union*, vol. 57, L 161, 29 May 2014, p. 3.

(b) Multilateral treaties

49. *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (New York, 4 August 1995):[252]

> **Article 41**
> **Provisional Application**
>
> …
>
> 2. 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.

50. *Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 [to the Convention for the Protection of Human Rights and Fundamental Freedoms] Pending its Entry into Force* (Madrid, 12 May 2009):[253]

> (*e*) 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.

[252] See footnote 219 above.

[253] Council of Europe, *Treaty Series*, No. 194.

B. Draft guidelines and draft annex constituting the Guide to Provisional Application of Treaties, with commentaries thereto*

Text of the draft guidelines of the Guide to Provisional Application of Treaties and commentaries thereto

The text of the draft guidelines of the Guide to Provisional Application of Treaties, adopted by the Commission on second reading, together with commentaries thereto, is reproduced below.

Guide to Provisional Application of Treaties

General commentary

(1) The purpose of the Guide to Provisional Application of Treaties is to provide assistance to States, international organizations and other users concerning the law and practice on the provisional application of treaties. States, international organizations and other users may encounter difficulties regarding, *inter alia*, the form of the agreement to apply provisionally a treaty or a part of a treaty, the commencement and termination of such provisional application, and its legal effect. The objective of the Guide is to direct States, international organizations and other users to answers that are consistent with existing rules or that seem most appropriate for contemporary practice. As is always the case with the Commission's output, the draft guidelines are to be read together with the commentaries.

(2) Provisional application is a mechanism available to States and international organizations to give immediate effect to all or some of the provisions of a treaty prior to the completion of all internal and international requirements for its entry into force.[254] Provisional application serves a practical purpose, and thus a useful one, for example, when the subject matter entails a certain degree of urgency or when the negotiating States or international organizations want to build trust in advance of entry into force,[255] among other objectives.[256] More generally, provisional application serves the overall purpose of

* Adopted by the International Law Commission at its seventy-second session, in 2021, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/76/10, para. 52, to be reproduced in *Yearbook of the International Law Commission, 2021*, vol. II, Part Two). The footnote numbers reflected in the report of the International Law Commission have been retained.

[254] See D. Mathy, "Article 25", in O. Corten and P. Klein, eds., *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. 1, (Oxford, Oxford University Press, 2011), p. 640; and A.Q. Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Leiden, Brill, 2012). The concept has been defined by writers as "the application of and binding adherence to a treaty's terms before its entry into force" (R. Lefeber, "Treaties, provisional application", in *The Max Planck Encyclopedia of Public International Law*, vol. 10, R. Wolfrum, ed. (Oxford, Oxford University Press, 2012), p. 1) or as "a simplified form of obtaining the application of a treaty, or of certain provisions, for a limited period of time" (M.E. Villager, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden and Boston, Martinus Nijhoff, 2009), p. 354).

[255] See H. Krieger, "Article 25", in *Vienna Convention on the Law of Treaties: A Commentary*, O. Dörr and K. Schmalenbach, eds. (Heidelberg and New York, Springer, 2012), p. 408.

[256] See first report of the Special Rapporteur on the provisional application of treaties, *Yearbook of the International Law Commission, 2013*, vol. II (Part One), document A/CN.4/664, paras. 25–35.

preparing for or facilitating the entry into force of the treaty. It must, however, be stressed that provisional application constitutes a voluntary mechanism which States and international organizations are free to resort to or not, and which may be subject to limitations deriving from the internal law of States and rules of international organizations.

(3) Although the Guide is not legally binding, it seeks to describe and clarify existing rules of international law in the light of contemporary practice. The Guide takes as a point of departure article 25 of both the *Vienna Convention on the Law of Treaties* of 1969 (hereinafter, "1969 Vienna Convention")[257] *and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* of 1986 (hereinafter, "1986 Vienna Convention"),[258] which it tries to clarify and explain, and on the practice of States and international organizations on the matter. The terms defined in article 2 of the 1969 and 1986 Vienna Conventions are used in the present Guide with the meaning given in those provisions. While the Guide is without prejudice to the application of other rules of the law of treaties, it relies on relevant provisions in the 1969 and 1986 Vienna Conventions where appropriate, without being intended to cover every possible application of all provisions of both Vienna Conventions, particularly where practice has not yet developed. In general, the Guide reflects the current *lex lata*, although some aspects of it are more recommendatory in nature. The Guide is thus a *vade mecum* in which practitioners should find answers to questions raised by the provisional application of treaties. It is to be underscored, however, that it is in no way claimed that the Guide creates any kind of presumption in favour of resorting to the provisional application of treaties. Provisional application is neither a substitute for securing entry into force of treaties, which remains the natural vocation of treaties, nor a means of bypassing domestic procedures.

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[257] Article 25 of the 1969 Vienna Convention reads as follows:

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

(United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331, at pp. 338–339.)

[258] Article 25 of the 1986 Vienna Convention reads as follows:

> Provisional application
>
> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (*a*) the treaty itself so provides; or
>
> (*b*) the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have in some other manner so agreed.
>
> 2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty. (A/CONF.129/15 (not yet in force).)

(4) It is of course impossible to address all the questions that may arise in practice or to cover the myriad of situations that may be faced by States and international organizations. Yet, a general approach is consistent with one of the main aims of the present Guide, which is to acknowledge the flexible nature of the provisional application of treaties[259] and to avoid any temptation to be overly prescriptive. In line with the essentially voluntary nature of provisional application, which always remains optional, the Guide recognizes that States and international organizations may agree on solutions not identified in the Guide that they consider more appropriate to the purposes of a given treaty. Another essential character of provisional application is its capacity to adapt to varying circumstances.[260]

(5) To provide additional assistance to States and international organizations in provisional application, the Guide also includes examples of provisions on the subject found in bilateral and multilateral treaties, which are reproduced in the draft annex hereto. Their inclusion is in no way intended to limit the flexible and voluntary nature of provisional application of treaties, and the examples do not seek to address the whole range of situations that may arise, nor are they characterized as anything more than examples.

Guideline 1
Scope

The present draft guidelines concern the provisional application of treaties by States or by international organizations.

Commentary

(1) Draft guideline 1 is concerned with the scope of application of the Guide. The provision should be read together with draft guideline 2, which sets out the purpose of the Guide.

(2) The Guide consistently uses the term "provisional application of treaties". In practice, the extensive use of other terms, such as "provisional entry into force" as opposed to *definitive*

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[259] See first report of the Special Rapporteur (A/CN.4/664), paras. 28–30.

[260] For example, provisional application was used recently in connection with the United Kingdom's withdrawal from the European Union. Three European Union-United Kingdom treaties were provisionally applied: the *Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part*, Brussels and London, 30 December 2020, *Official Journal of the European Union*, L 444, p. 14; the *Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information*, Brussels and London, 30 December 2020, *ibid.*, L 149, p. 2540; and the *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy*, Brussels and London, 30 December 2020, *ibid.*, L 150, p. 1. These were provisionally applied from 1 January 2021 to 30 April 2021, which dates included an extension agreed at the end of February 2021. The United Kingdom has also made use of provisional application in respect of other treaties in the context of withdrawal from the European Union, both bilateral and plurilateral (see, for example, www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries).

The flexibility provided in article 25, paragraph 1 (*b*), of the 1969 Vienna Convention was illustrated, for instance, by the fact that the treaty partners agreed, on some occasions, to provisional application by an exchange of notes: for example, the exchange of letters on the provisional application of the *Agreement between the European Atomic Energy Community and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation on the Safe and Peaceful Uses of Nuclear Energy, ibid.*, L 445, p. 23).

entry into force, has led to confusion regarding the scope and the legal effect of the concept of the provisional application of treaties.[261] In the same vein, quite frequently, treaties do not use the adjective "provisional", but speak instead of "temporary" or "interim" application.[262] Consequently, the framework of article 25 of the 1969 and 1986 Vienna Conventions, while constituting the legal basis for the exercise of provisional application,[263] lacks detail and precision and can thus benefit from further clarification.[264] The intention of the Guide is accordingly to provide greater clarity to the interpretation of article 25 of both Vienna Conventions.

(3) The Guide concerns the provisional application of treaties "by States or by international organizations". The reference to "States" and "international organizations", which is employed in a number of the draft guidelines, should not be understood as implying that the scope of the draft guidelines is limited to treaties concluded between States, between States and international organizations or between international organizations.

Guideline 2
Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other relevant rules of international law.

Commentary

(1) Draft guideline 2 sets forth the purpose of the Guide to provide guidance to States and international organizations regarding the law and practice on the provisional application of treaties.

(2) The draft guideline seeks to emphasize that the Guide is based on the 1969 Vienna Convention and other relevant rules of international law, including the 1986 Vienna

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[261] In this regard, reference can be made to the analysis contained in *The Treaty, Protocols, Conventions and Supplementary Acts of the Economic Community of West African States (ECOWAS), 1975–2010* (Abuja, Ministry of Foreign Affairs of Nigeria, 2011), which is a collection of a total of 59 treaties concluded under the auspices of the Community. There it can be observed that of those 59 treaties, only 11 did not provide for provisional application (see A/CN.4/699, paras. 168–174).

[262] See paragraph 33 of the letter from the Federal Republic of Yugoslavia in the *Exchange of Letters Constituting 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* (United Nations, *Treaty Series*, vol. 2042, No. 35283, p. 23, and *United Nations Juridical Yearbook 1998* (United Nations publication, Sales No. E.03.V.5), at p. 103); article 15 of the *Agreement between Belarus and Ireland on the Conditions of Recuperation of Minor Citizens from the Republic of Belarus in Ireland* (United Nations, *Treaty Series*, vol. 2679, No. 47597, p. 65, at p. 79); and article 16 of the *Agreement between the Government of Malaysia and the United Nations Development Programme concerning the Establishment of the UNDP Global Shared Service Centre* (*ibid*., vol. 2794, No. 49154, p. 67). See the memorandums by the Secretariat on the origins of article 25 of the 1969 and 1986 Vienna Conventions (*Yearbook of the International Law Commission, 2013*, vol. II (Part One), document A/CN.4/658, and A/CN.4/676), and the memorandum by the Secretariat on the practice of States and international organizations in respect of treaties that provide for provisional application (A/CN.4/707)[, reproduced in Part Three, at pp. 266–346, below].

[263] See Mertsch, *Provisionally Applied Treaties …* (see footnote 254 above), p. 22.

[264] See A. Geslin, *La mise en application provisoire des traités* (Paris, Editions A. Pedone, 2005), p. 111; M.A. Rogoff and B.E. Gauditz, "The provisional application of international agreements", *Maine Law Review*, vol. 39 (1987), p. 41.

Convention. The reference to "and other relevant rules of international law" is primarily meant to extend the scope of the provision to the provisional application of treaties by international organizations. It acknowledges that the 1986 Vienna Convention has not yet entered into force, and accordingly should not be referred to in the same manner as its 1969 counterpart.

(3) Draft guideline 2 serves to confirm the basic approach taken throughout the Guide, namely that article 25 of the 1969 and the 1986 Vienna Conventions does not reflect all aspects of contemporary practice on the provisional application of treaties. This is implicit in the reference to both "the law and practice" on the provisional application of treaties. Such an approach is further referred to in the reference to "other relevant rules of international law", which signifies that other rules of international law, including those of a customary nature, may also be applicable to the provisional application of treaties.

(4) At the same time, notwithstanding the possibility of the existence of other rules and practice relating to the provisional application of treaties, the Guide recognizes the central importance of article 25 of the 1969 and 1986 Vienna Conventions. The reference to "on the basis of", in conjunction with the express reference to article 25, is intended to indicate that this article serves as the point of departure of the Guide, even if it is to be supplemented by other rules of international law in order fully to reflect the law applicable to the provisional application of treaties.

Guideline 3
General rule

A treaty or a part of a treaty is applied provisionally, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

Commentary

(1) Draft guideline 3 states the general rule on the provisional application of treaties. The text of the draft guideline follows the formulation of article 25 of the 1969 Vienna Convention, so as to underscore that the starting point for the Guide is article 25. That premise is subject to the general understanding referred to in paragraph (3) of the commentary to draft guideline 2, namely that the 1969 and the 1986 Vienna Conventions do not reflect all aspects of contemporary practice on the provisional application of treaties.

(2) The opening phrase confirms the general possibility that a treaty, or a part of a treaty, may be applied provisionally. The formulation follows that found in the chapeau to paragraph 1 of article 25 of the 1969 and the 1986 Vienna Conventions.

(3) The distinction between provisional application of the entire treaty, as opposed to a "part" thereof, originates in article 25. The Commission, in its prior work on the law of treaties, specifically envisaged the possibility of what became referred to as provisional application of only a part of a treaty. In draft article 22, paragraph 2, of the 1966 draft articles on the law of treaties, the Commission confirmed that the "same rule" applied to "part of a treaty".[265] In the corresponding commentary, it was explained that: "[n]o less

[265] *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, pp. 177 ff., para. 38.

frequent today is the practice of bringing into force provisionally only a certain part of a treaty in order to meet the immediate needs of the situation".[266] The possibility of provisional application of only a part of a treaty also helps overcome the problems arising from certain types of provisions, such as operational clauses establishing treaty monitoring mechanisms that may exercise their functions during the stage of provisional application. Furthermore, parts of treaties containing trade provisions are frequently subject to provisional application.[267] The provisional application of a part of a treaty is accordingly reflected in the formula "provisional application of a treaty or a part of a treaty", which is used throughout the Guide.[268]

(4) The second phrase, namely "pending its entry into force between the States or international organizations concerned", is based on the chapeau of article 25. The reference to "pending its entry into force" underscores the role played by provisional application in preparing for or facilitating such entry into force, even if it may pursue other objectives. While the expression could be read as referring to the entry into force of a treaty itself,[269]

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[266] Paragraph (3) of the commentary to draft article 22, *ibid.*

[267] The provisional application of part of a treaty is also common in mixed agreements concluded between the European Union and its member States, on the one part, and a third party, on the other part, as a result of a distribution of competence between the European Union and its member States. See comments and observations received from Governments and international organizations (A/CN.4/737), comments of Germany on draft guideline 3, p. 14. See also M. Chamon, "Provisional application of treaties: the EU's contribution to the development of international law", *European Journal of International Law*, vol. 31, No. 3 (August 2020), pp. 883–915, and F. Castillo de la Torre, "El Tribunal de Justicia y las relaciones exteriores tras el Tratado de Lisboa", *Revista de Derecho Comunitario Europeo*, No. 60 (May–August 2018), pp. 491–512.

[268] An example of the practice regarding the provisional application of a part of a treaty in bilateral treaties can be found in the *Agreement between the Kingdom of the Netherlands and the Principality of Monaco on the Payment of Dutch Social Insurance Benefits in Monaco* (United Nations, *Treaty Series*, vol. 2205, No. 39160, p. 541, at p. 550, art. 13, para. 2); and examples of bilateral treaties expressly excluding a part of a treaty from provisional application can be found in the *Agreement between the Austrian Federal Government and the Government of the Federal Republic of Germany on the Cooperation of the Police Authorities and the Customs Administrations in the Border Areas* (*ibid.*, vol. 2170, No. 38115, p. 573, at p. 586) and the *Agreement between the Government of the Federal Republic of Germany and the Government of the Republic of Croatia regarding Technical Cooperation* (*ibid.*, vol. 2306, No. 41129, p. 439). With respect to multilateral treaties, practice can be found in: *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* (*ibid.*, vol. 2056, No. 35597, p. 211, at p. 252); *Convention on Cluster Munitions,* (*ibid.*, vol. 2688, No. 47713, p. 39, at p. 112); *Arms Trade Treaty* (United Nations, *Treaty Series*, vol. 3013, No. 52373) (art. 23); and the Document agreed among the States Parties to the *Treaty on Conventional Armed Forces in Europe (International Legal Materials*, vol. 36, p. 866, sect. VI, para. 1). Similarly, the *Protocol on the Provisional Application of the Revised Treaty of Chaguaramas* (*ibid.*, vol. 2259, No. 40269, p. 440) makes explicit which provisions of the Revised Treaty are not to be provisionally applied, while the *Trans-Pacific Strategic Economic Partnership Agreement* (*ibid.*, vol. 2592, No. 46151, p. 225) is an example of provisional application of a part of the treaty that applies only in respect of one party to the Agreement, namely Brunei Darussalam, according to article 20.5 of that Agreement.

[269] As in the case of the *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982* (*ibid.*, vol. 1836, No. 31364, p. 3) and in the *Agreement on the Provisional Application of Certain Provisions of Protocol No. 14* [to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, amending the control system of the Convention,] Pending its Entry into Force (Madrid, 12 May 2009, Council of Europe, *Treaty Series*, No. 194).

in the case of multilateral treaties provisional application normally continues for States or international organizations after the entry into force of a treaty itself, when the treaty had not yet entered into force for those States and international organizations.[270] The reference to "entry into force" in draft guideline 3 is therefore to be understood in accordance with article 24 of the 1969 and 1986 Vienna Conventions on the same subject. It deals with both the entry into force of the treaty itself and the entry into force for each State or international organization concerned, *i.e.*, those States or international organizations that had assumed rights and obligations pursuant to provisional application. The inclusion of the phrase "between the States or international organizations concerned" in the present draft guideline reflects the fact that provisional application may continue for those States or international organizations for which the treaty has not yet entered into force, after entry into force of the treaty itself.

(5) The third and fourth phrases "if the treaty itself so provides, or if in some other manner it has been so agreed" reflect the two possible bases for provisional application recognized in paragraph 1 (*a*) and (*b*) of article 25. The possibility of provisional application on the basis of a provision in the treaty in question is well established,[271] and hence the formulation follows that found in the 1969 and 1986 Vienna Conventions.

(6) Unlike in article 25 of the 1969 and 1986 Vienna Conventions, which refers, in paragraph 1 (*b*), to an agreement to apply provisionally a treaty or a part of a treaty among "negotiating States" or "negotiating States and negotiating organizations", draft guideline 3 does not use this formulation. In contemporary practice, provisional application may be undertaken by States or international organizations that are not negotiating States or negotiating organizations of the treaty in question but that have subsequently consented to provisional application of the treaty. Relevant practice may be identified by examining certain commodity agreements that had never entered into force but whose provisional

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[270] For example, the *Arms Trade Treaty*.

[271] Examples in the bilateral sphere include: *Agreement between the European Community and the Republic of Paraguay on Certain Aspects of Air Services* (*Official Journal of the European Union* L 122, 11 May 2007), art. 9; *Agreement between the Argentine Republic and the Republic of Suriname on Visa Waiver for Holders of Ordinary Passports* (United Nations, *Treaty Series*, vol. 2957, No. 51407, p. 213), art. 8; *Treaty between the Swiss Confederation and the Principality of Liechtenstein relating to Environmental Taxes in the Principality of Liechtenstein* (*ibid.*, vol. 2761, No. 48680, p. 23), art. 5; *Agreement between the Kingdom of Spain and the Principality of Andorra on the Transfer and Management of Waste* (*ibid.*, vol. 2881, No. 50313, p.165), art. 13; *Agreement between the Government of the Kingdom of Spain and the Government of the Slovak Republic on Cooperation to Combat Organized Crime* (*ibid.*, vol. 2098, No. 36475, p. 341), art. 14, para. 2; and *Treaty on the Formation of an Association between the Russian Federation and the Republic of Belarus* (*ibid.*, vol. 2120, No. 36926, p. 595), art. 19. Examples in the multilateral sphere include: *Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, art. 7; *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* (*ibid.*, vol. 2367, No. 42662, p. 697), art. 3, para. 5; *Framework Agreement on a Multilateral Nuclear Environmental Programme in the Russian Federation* (*ibid.*, vol. 2265, No. 40358, p. 5, at pp. 13–14), art. 18, para. 7, and its corresponding *Protocol on Claims, Legal Proceedings and Indemnification* (*ibid.*, p. 35), art. 4, para. 8; *Statutes of the Community of Portuguese-Speaking Countries* (*ibid.*, vol. 2233, No. 39756, p. 207), art. 21; and *Agreement establishing the "Karanta" Foundation for Support of Non-Formal Education Policies and Including in Annex the Statutes of the Foundation* (*ibid.*, vol. 2341, No. 41941, p. 3), arts. 8 and 49, respectively.

application was extended beyond their termination date.[272] In those cases, such an extension may be understood as applying to States that had acceded to the commodity agreement, thus demonstrating the belief that those States had also been provisionally applying the agreement. Furthermore, the need to distinguish between different groups of States or international organizations, by reference to their participation in the negotiation of the treaty, is less apposite in the context of bilateral treaties, which constitute the vast majority of treaties that have been applied provisionally. For these reasons, the draft guideline simply restates the basic rule without reference to "negotiating States" or "negotiating States and negotiating organizations".

(7) Draft guideline 3 should be read together with draft guideline 4, which provides further elaboration on provisional application by means of a separate agreement, thereby explaining the meaning of the agreement "in some other manner".

Guideline 4
Form of agreement

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed between the States or international organizations concerned through:

(*a*) a separate treaty; or

(*b*) any other means or arrangements, including:

(i) a resolution, decision or other act adopted by an international organization or at an intergovernmental conference, in accordance with the rules of such organization or conference, reflecting the agreement of the States or international organizations concerned;

(ii) a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

Commentary

(1) Draft guideline 4 deals with forms of agreement, on the basis of which a treaty, or a part of a treaty, may be applied provisionally, in addition to when the treaty itself so provides. The structure of the provision follows the sequence of article 25 of the 1969 and 1986 Vienna Conventions, which first envisages the possibility that the treaty in question might itself

[272] See, for example, the *International Tropical Timber Agreement*, 1994 (United Nations, *Treaty Series*, vol. 1955, No. 33484, p. 81), which was extended several times on the basis of article 46 of the Agreement, during which time some States (Guatemala, Mexico, Nigeria and Poland) acceded to it. See also the case of Montenegro regarding *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, amending the control system of the Convention (*ibid.*, vol. 2677, No. 2889, p. 3, at p. 34). Montenegro, which became independent in 2006 and was therefore not a negotiating State, succeeded to the aforementioned treaty and had the option of provisionally applying certain provisions in accordance with the Madrid Agreement (*Agreement on the Provisional Application of Certain Provisions of Protocol No. 14* [to the *European Convention on Human Rights*] Pending its Entry into Force). For the declarations of provisional applications made by Albania, Belgium, Estonia, Germany, Liechtenstein, Luxembourg, the Netherlands, Spain, Switzerland and the United Kingdom of Great Britain and Northern Ireland, see, *ibid.*, pp. 30–37.

provide for provisional application and, second, provides for the possibility of an alternative basis for provisional application, when the States or the international organizations have "in some other manner" so agreed, which typically occurs when the treaty is silent on the point.

(2) The first possibility is where the treaty being applied provisionally itself addresses provisional application, in which case the treaty may do so in different ways. For example, the treaty may require that the negotiating or signatory States apply the treaty provisionally. Alternatively, the treaty may allow such States, for example by filing a declaration or through notification to the depositary of the treaty, to opt into or opt out of provisional application.[273]

(3) The second possibility of States agreeing on provisional application in a manner other than that specified in the treaty itself is confirmed by the opening phrase "[i]n addition to the case where the treaty so provides", which is a direct reference to the phrase "if the treaty itself so provides" in draft guideline 3. That follows the formulation of article 25. The reference to "between the States or international organizations concerned" has the same meaning as in draft guideline 3. Two categories of additional methods for agreeing the provisional application are identified in the subparagraphs.

(4) Subparagraph (*a*) envisages the possibility of provisional application by means of a separate treaty, which is distinct from the treaty that is provisionally applied.[274] As is the case for the first possibility, and in accordance with article 2, paragraph 1 (*a*), of the 1969 and 1986 Vienna Conventions, the term "treaty" is to be interpreted as covering all instruments concluded under the law of treaties that constitute an agreement between States or international organizations, whatever the particular designation of that instrument may be. Such instruments may include exchanges of letters or notes, memorandums of understanding, declarations of intent, or protocols.[275]

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[273] See, for instance, article 23 of the *Arms Trade Treaty*. Another example of consent to be bound by the provisional application of a part of a treaty by means of a declaration, but which is expressly provided for in a parallel agreement to the treaty, is contained in the Protocol to the *Agreement on a Unified Patent Court on Provisional Application* (Brussels, 1 October 2015, see www.unified-patent-court.org/sites/default/files/Protocol_to_the_Agreement_on_Unified_Patent_Court_on_provisional_application.pdf). See also article 37, paragraph 2, of the *Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (Strasbourg, 10 October 2018, Council of Europe, *Treaty Series*, No. 223).

[274] Examples of bilateral treaties on provisional application that are separate from the treaty that is provisionally applied include: *Agreement on the Taxation of Savings Income and the Provisional Application Thereof between the Netherlands and Germany* (*ibid*., vol. 2821, No. 49430, p. 3) and the *Amendment to the Agreement on Air Services between the Kingdom of the Netherlands and the State of Qatar* (*ibid*., vol. 2265, No. 40360, p. 507, at p. 511). The Netherlands has concluded a number of similar treaties. Examples of multilateral treaties on provisional application that are separate from the treaty that is provisionally applied include: *Protocol on the Provisional Application of the Agreement establishing the Caribbean Community Climate Change Centre* (*ibid*., vol. 2953, No. 51181, p. 181); *Protocol on the Provisional Application of the Revised Treaty of Chaguaramas*; and the Madrid Agreement (*Agreement on the Provisional Application of Certain Provisions of Protocol No. 14* [to the *European Convention on Human Rights*] Pending its Entry into Force).

[275] See para. (2) of the commentary to draft article 22 of the draft articles on the law of treaties (footnote 265 above), p. 210; O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties. A Commentary*, 2nd ed. (Berlin, Springer, 2018), pp. 449–450; Mathy, "Article 25" (see footnote 254 above), pp. 649–651.

(5) Subparagraph (*b*) acknowledges the possibility that, in addition to a separate treaty, provisional application may also be agreed through "any other means or arrangements", which broadens the range of possibilities for reaching agreement on provisional application. Instruments not covered under subparagraph (*a*) may thus be included under subparagraph (*b*). This approach is in accordance with the inherently flexible nature of provisional application.[276] By way of providing further guidance, reference is made to two examples of such "means or arrangements" in subparagraph (*b*) (i) and (ii), which are not intended to constitute an exhaustive list.

(6) Subparagraph (*b*) (i) envisages the scenario of provisional application being agreed on by means of "a resolution, decision or other act adopted by an international organization or at an intergovernmental conference". The term "intergovernmental conference" is to be understood broadly and may include the diplomatic conference of plenipotentiaries convened to negotiate, or a meeting of the States parties to, a multilateral treaty. The phrase "reflecting the agreement of the States or international organizations concerned" refers to the "resolution, decision or other act" that was adopted by the international organization or conference providing for the possibility of provisional application of the treaty. The reference to "agreement" is intended to emphasize that the States or international organizations concerned must consent to provisional application. The mode of expressing agreement to provisional application of a treaty depends on the rules of the organization or the conference, which is made clear by the phrase "in accordance with the rules of such organization or conference". The phrase is to be understood in accordance with article 2, subparagraph (*b*), of the 2011 articles on responsibility of organizations, which provides that the term "rules of the organization":

> means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization.[277]

(7) Subparagraph (*b*) (ii) refers to the exceptional possibility of a State or an international organization making a declaration that it will apply provisionally a treaty or a part of a treaty in cases where the treaty remains silent or when it is not otherwise agreed.[278]

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[276] In practice, some treaties were registered with the United Nations as having been provisionally applied, but with no indication as to which other means or arrangements had been employed to agree upon provisional application. The following are examples of such treaties: *Agreement between the Kingdom of the Netherlands and the United States of America on the Status of United States Personnel in the Caribbean Part of the Kingdom* (*ibid.*, vol. 2967, No. 51578, p. 79); *Agreement between the Government of Latvia and the Government of the Republic of Azerbaijan on Cooperation in Combating Terrorism, Illicit Trafficking in Narcotic Drugs, Psychotropic Substances and Precursors and Organized Crime* (*ibid.*, vol. 2461, No. 44230, p. 205); and *Agreement between the United Nations and the Government of the Republic of 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* (*ibid.*, vol. 2761, No. 48688, p. 339). See R. Lefeber, "The provisional application of treaties", in *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*, J. Klabbers and R. Lefeber, eds. (The Hague, Martinus Nijhoff, 1998), p. 81.

[277] *Yearbook of the International Law Commission, 2011, vol. II (Part Two), paras. 87–88, subsequently annexed to General Assembly resolution 66/100 of 9 December 2011.*

[278] An example is the declaration by the Syrian Arab Republic of the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* (United Nations, *Treaty Series*, vol. 1974, No. 33757). When the Syrian Arab Republic unilaterally

However, the declaration must be expressly accepted by the other States or international organizations concerned, as opposed to mere non-objection, for the treaty to become provisionally applicable in relation to those States or international organizations. Such acceptance of provisional application should be in written form, but the draft guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that such acceptance is express. The term "declaration" is not meant to refer to the legal regime concerning unilateral declarations of States, which does not deal with the provisional application of treaties.[279]

Guideline 5
Commencement

The provisional application of a treaty or a part of a treaty takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as is otherwise agreed.

Commentary

(1) Draft guideline 5 deals with the commencement of provisional application. The draft guideline is modelled on article 24, paragraph 1, of the 1969 and 1986 Vienna Conventions, on entry into force.

(2) The first clause reflects the approach taken in the Guide of referring to the provisional application of the entire treaty or a part of a treaty. The phrase "takes effect on such date, and in accordance with such conditions and procedures" specifies the commencement of provisional application. The text is based on that adopted in article 68 of the 1969 Vienna Convention, which uses "takes effect". The phrase confirms that what is being referred to is the legal effect in relation to the State or international organization electing to apply the treaty provisionally.

(3) The reference to "on such date, and in accordance with such conditions and procedures" covers the various modes of commencement of provisional application of treaties as reflected in contemporary practice.[280] Such modes include commencement upon signature, on a certain date, upon notification, or, in the case of multilateral treaties, with adoption of a decision by an international organization.

(4) The concluding phrase "as the treaty provides or as are otherwise agreed" confirms that the agreement to apply provisionally a treaty or a part of a treaty is based on a provision set forth in the treaty that is applied provisionally, on a separate treaty, whatever its particular designation, or some other means or arrangements that establish an agreement

declared that it would provisionally apply the Convention, the Director-General of the Organization for the Prohibition of Chemical Weapons replied, informing the Syrian Arab Republic that its "request" to provisionally apply the Convention would be forwarded to the States parties through the Depositary. The Convention does not provide for provisional application of the Convention and such possibility was not discussed during its negotiation. Neither the States parties nor the Organization for the Prohibition of Chemical Weapons objected to the provisional application by the Syrian Arab Republic of the Convention, as expressed in its unilateral declaration (see the second report by the Special Rapporteur (A/CN.4/675), para. 35 (*c*), and the third report by the Special Rapporteur (A/CN.4/687), para. 120).

[279] *Yearbook of the International Law Commission, 2006*, vol. II (Part Two), paras. 173–177.

[280] See A/CN.4/707[, reproduced at p. 311, below], para. 104, subparas. (*d*)–(*g*).

for provisional application, as contemplated in draft guideline 4, and is subject to the conditions and procedures established in such instruments or processes.

(5) Draft guideline 5 is without prejudice to article 24, paragraph 4, of the 1969 and 1986 Vienna Conventions, which stipulates that certain provisions regarding matters arising necessarily before the entry into force of a treaty apply from the time of the adoption of its text. Such matters include the authentication of the text of the treaty, the establishment of consent to be bound by the treaty, the manner or date of its entry into force, reservations, or the functions of the depository. Those provisions thus apply automatically without the need to agree specifically on their provisional application and might be relevant to the commencement of the provisional application of a treaty.

Guideline 6
Legal effect

The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof between the States or international organizations concerned, except to the extent that the treaty provides otherwise or it is otherwise agreed. Such treaty or part of a treaty that is being applied provisionally must be performed in good faith.

Commentary

(1) Draft guideline 6 deals with the legal effect of provisional application. Two types of "legal effect" might be envisaged: the legal effect of the agreement to provisionally apply the treaty or a part of it, and the legal effect of the treaty or a part of it that is being applied provisionally.

(2) The first sentence of the draft guideline confirms that the legal effect of provisional application of a treaty or a part of a treaty is to produce a legally binding obligation to apply the treaty or part thereof between the States or international organizations concerned. In other words, a treaty or a part of a treaty that is applied provisionally is considered as binding on the parties provisionally applying it from the time at which the provisional application commenced between them. Such legal effect is derived from the agreement to provisionally apply the treaty (or acceptance thereof) by the States or the international organizations concerned, which may be expressed in the forms identified in draft guideline 4. In cases in which that agreement is silent on the legal effect of provisional application, which is common, the draft guideline clarifies that the legal effect of the provisional application is a legally binding obligation to apply the treaty or part thereof.[281]

(3) The opening phrase "[t]he provisional application of a treaty or a part of a treaty" follows draft guideline 5. The phrase "a legally binding obligation to apply the treaty or part thereof", which is central to the draft guideline, refers to the legal effect that the treaty produces for the State or the international organization concerned and to the conduct that is expected from States or international organizations that agree to resort to provisional application. The reference to "between the States or international organizations concerned" specifies between whom the obligation to apply the treaty or part thereof applies. This may include not only other States or international organizations applying the treaty provision-

[281] See Mathy, "Article 25" (see footnote 254 above), p. 651.

ally, but also States or international organizations for whom the treaty has entered into force in their relations with those who are still provisionally applying the treaty.

(4) The concluding phrase "except to the extent that the treaty provides otherwise or it is otherwise agreed" confirms that the basic rule is subject to the treaty or another agreement, which may provide an alternative legal outcome. Such an understanding, namely a presumption in favour of the creation of a legally binding obligation to apply the treaty or a part of the treaty, subject to the possibility that the parties may agree otherwise, is confirmed by State practice.[282]

(5) The second sentence of draft guideline 6 confirms that the treaty being applied provisionally must be performed in good faith. This sentence reflects the good faith obligation (*pacta sunt servanda*) stipulated in article 26 of the 1969 and 1986 Vienna Conventions. Article 26 of the Vienna Conventions refers to several legal effects. The first legal effect corresponds to the first sentence of draft guideline 6, *i.e.*, the binding obligation produced by provisional application. The second legal effect is that the treaty in force "must be performed in good faith". The word "[s]uch" in the draft guideline establishes the link between the first sentence (the legal effect of the binding obligation arising as a consequence of provisional application) and the second sentence (the legal effect arising from the requirement of performance in good faith), thereby confirming that both legal effects pertain to the same treaty.

(6) Nonetheless, an important distinction between provisional application and entry into force must be made. Provisional application is not intended to give rise to the whole range of rights and obligations that derive from the consent by a State or an international organization to be bound by a treaty or a part of a treaty. Provisional application of treaties remains different from their entry into force, insofar as it is not subject to all rules of the law of treaties. Therefore, the formulation that provisional application "produces a legally binding obligation to apply the treaty or a part thereof" does not imply that provisional application has exactly the same legal effect as entry into force. The reference to "a legally binding obligation" is intended to add more precision to the depiction of the legal effect of provisional application and avoid any interpretation aimed at equating provisional application with entry into force.[283]

(7) Implicit in the draft guideline is the understanding that the act of provisionally applying the treaty does not affect the rights and obligations of other States or international organizations.[284] Likewise, provisional application of a treaty cannot result in the modification of the treaty's content. This is because provisional application is limited to the obligation to apply the treaty or part thereof. Furthermore, draft guideline 6 should not be understood as limiting the freedom of States or international organizations to amend or

[282] See the examples of the practice of the European Free Trade Association (EFTA) referred to in the fifth report by the Special Rapporteur (A/CN.4/718).

[283] See para. (1) of the commentary to draft article 22 of the draft articles on the law of treaties (footnote 265 above), p. 210, and *Yearbook of the International Law Commission, 2013*, vol. II (Part One), the memorandum by the Secretariat on provisional application of treaties (A/CN.4/658)[, reproduced below, at p. 266], paras. 44–55. See also the first report of the Special Rapporteur (A/CN.4/664).

[284] However, the subsequent practice of one or more parties to a treaty may provide a means of interpretation of the treaty under articles 31 or 32 of the 1969 Vienna Convention. See chapter IV of A/73/10 on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

modify the treaty that is applied provisionally, in accordance with Part IV of the 1969 and the 1986 Vienna Conventions.

Guideline 7
Reservations

The present draft guidelines are without prejudice to any question concerning reservations relating to the provisional application of a treaty or a part of a treaty.

Commentary

(1) Draft guideline 7 concerns the possibility of the formulation of reservations, by a State or an international organization, purporting to exclude or modify the legal effect produced by certain provisions of a treaty that is subject to provisional application, either totally or partially.

(2) The reference to "any question concerning reservations relating to the provisional application of a treaty or a part of a treaty" includes, but is not limited to, questions regarding the provisions of Part II, Section 2, of the 1969 Vienna Convention.

(3) The draft guideline takes the form of a "without prejudice" clause. Given the lack of significant practice, and in the light of the comments and observations by States, it is not the purpose of the draft guidelines or this commentary to deal in any detail with the questions that may arise.[285] The Commission's Guide to Practice on Reservations to Treaties, while not expressly addressing reservations formulated in connection with provisional application, may nevertheless provide guidance.[286]

(4) As a matter of principle, the formulation of reservations related to provisional application is not excluded. Article 19 of the 1969 and 1986 Vienna Conventions allows States and international organizations to formulate a reservation when signing, ratifying, accepting, approving or acceding to a treaty. The decision to apply the treaty provisionally may take place at the moment of signature (prior to the entry into force of the treaty for the State or international organization in question) or during the period up to and including the time of ratification, acceptance, approval or accession (in cases where the treaty itself is not yet in force).

(5) As indicated above, the draft guideline is formulated as a "without prejudice" clause in recognition of the lack of significant practice concerning reservations relating to provisional application. In the case of a bilateral treaty, a unilateral statement, formulated by a State or an international organization after initialling or signing but prior to entry into force, by which that State or organization purports to obtain from the other party a modification of the provisions of the treaty, does not constitute a reservation.[287] In the case of multilateral treaties, although States have made interpretative declarations in conjunction with agreeing to provisional application, such declarations as well as declarations to opt

[285] See comments and observations received from Governments and international organizations (A/CN.4/737).

[286] *Yearbook of the International Law Commission, 2011*, vol. II (Part Three).

[287] See guideline 1.6.1 of the *Guide to Practice on Reservations to Treaties, Yearbook of the International Law Commission, 2011*, vol. II (Part Three), paras. 1–2.

out of provisional application must be distinguished from reservations,[288] in the sense of the law of treaties.[289] However, it remains to be ascertained in a given case to what extent such declarations or unilateral statements are comparable in their legal effect to that of reservations. It may also be relevant to distinguish between the case where a State or an international organization formulates a reservation limited to the phase of the provisional application, or formulates one or more reservations intended to produce their consequences beyond such phase.

Guideline 8
Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is applied provisionally entails international responsibility in accordance with the applicable rules of international law.

Commentary

(1) Draft guideline 8 deals with the question of responsibility for breach of an obligation arising under a treaty or a part of a treaty that is being applied provisionally. It follows from the legal effect of provisional application described in draft guideline 6, including with respect to *pacta sunt servanda*. Since the treaty or a part of a treaty being applied provisionally produces a legally binding obligation, then a breach of an obligation arising under the treaty or a part of a treaty being applied provisionally constitutes an internationally wrongful act giving rise to international responsibility. The State or international organization violating its obligation towards the other States or international organizations concerned incurs international responsibility. The inclusion of the present draft guideline was deemed necessary since it deals with a key legal consequence of the provisional application of a treaty or a part of a treaty. Article 73 of the 1969 Vienna Convention states that its provisions shall not prejudge any question that may arise in regard to a treaty from the international responsibility of a State and article 74 of the 1986 Vienna Convention provides similarly. The scope of the Guide is not limited to that of the two Vienna Conventions, as stated in draft guideline 2.

(2) The draft guideline should be read together with the articles on responsibility of States for internationally wrongful acts of 2001290 and with the articles on responsibility of international organizations for internationally wrongful acts of 2011,291 to the extent that they reflect customary international law. Accordingly, the reference to "an obligation arising under" and the word "entails" were consciously drawn from those articles.

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[288] See, in particular, guideline 1.3 of the *Guide to Practice on Reservations to Treaties, ibid.*

[289] See e.g. art. 45, para. 2 (*a*), of the *Energy Charter Treaty* (United Nations, *Treaty Series*, vol. 2080, No. 36116, p. 95); and art. 7, para. 1 (*a*), of the *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*.

[290] *Yearbook of the International Law Commission, 2001*, vol. II (Part Two) and corrigendum, para. 76, subsequently annexed to General Assembly resolution 56/83 of 12 December 2001.

[291] *Yearbook of the International Law Commission, 2011*, vol. II (Part Two), para. 87, subsequently annexed to General Assembly resolution 66/100 of 9 December 2011.

Likewise, the concluding phrase "in accordance with the applicable rules of international law" is intended as a reference, *inter alia*, to the applicable rules reflected in those articles.

Guideline 9
Termination

1. The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or international organization notifies the other States or international organizations concerned of its intention not to become a party to the treaty.

3. Unless the treaty otherwise provides or it is otherwise agreed, a State or an international organization may invoke other grounds for terminating provisional application, in which case it shall notify the other States or international organizations concerned.

4. Unless the treaty otherwise provides or it is otherwise agreed, the termination of the provisional application of a treaty or a part of a treaty does not affect any right, obligation or legal situation created through the execution of such provisional application prior to its termination.

Commentary

(1) Draft guideline 9 concerns the termination of provisional application. The provisional application of a treaty or a part of a treaty by a State or an international organization typically ceases in one of two instances: first, to the extent that the treaty enters into force between the States or international organizations concerned or, second, when the intention not to become a party to the treaty is communicated by the State or international organization provisionally applying the treaty or a part of a treaty to the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally. This does not exclude the possibility that the termination of provisional application may be invoked, by a State or an international organization, on other grounds.

(2) Paragraph 1 addresses termination of provisional application upon entry into force. Entry into force is the most frequent way in which provisional application is terminated.[292] That the provisional application of a treaty or a part of a treaty can be terminated by means of the entry into force of the treaty between the States and international organizations concerned is implicit in the reference in draft guideline 3 to "pending its entry into force", which is based on article 25 of the 1969 and 1986 Vienna Conventions.[293] In accordance

[292] See the memorandum by the Secretariat on provisional application of treaties (A/CN.4/707)[, reproduced at p. 311, below], para. 88.

[293] Most bilateral treaties state that the treaty shall be provisionally applied "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 Governments … 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" (see A/CN.4/707[, reproduced at p. 311, below], para. 90). That is also the case for multilateral treaties, such as the Madrid

with draft guideline 5, provisional application continues in respect of two or more States or international organizations applying the treaty or a part of a treaty provisionally until the treaty enters into force between them.[294]

(3) The phrase "in the relations between the States or international organizations concerned" seeks to distinguish the entry into force of the treaty from the provisional application by one or more parties to the treaty. This is particularly relevant in the relations between parties to a multilateral treaty, where the treaty might enter into force for a number of the parties but continues to be applied only provisionally in respect of others. This phrase is thus intended to capture all the possible legal situations that may exist in that regard.

(4) Paragraph 2 reflects the second instance mentioned in paragraph (1) of the commentary to the present draft guideline, namely the case in which the State or international organization gives notice of its intention not to become a party to a treaty. It follows closely the formulation of paragraph 2 of article 25 of the 1969 and 1986 Vienna Conventions.

(5) The opening phrase of paragraph 2 "[u]nless the treaty otherwise provides or it is otherwise agreed" avoids the reference to such an alternative agreement only being concluded between the "negotiating" States and international organizations, found in the 1969 and 1986 Vienna Conventions. The formulation "or it is otherwise agreed" also refers to the States or international organizations that had negotiated the treaty, but may also include States and international organizations that were not involved in the negotiation of the treaty but that are nevertheless participating in its provisional application. Given the complexity of concluding modern multilateral treaties, contemporary practice supports a broad reading of the language of both Vienna Conventions, in terms of treating all States or international organizations concerned as being on the same legal footing in relation to provisional application, out of recognition of the existence of other groups of States or international organizations whose agreement on matters related to the termination of provisional application might also be sought.[295]

(6) The final phrase in paragraph 2, "notifies the other States or international organizations concerned",[296] is a reference to the States and international organizations between

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Agreement (*Agreement on the Provisional Application of Certain Provisions of Protocol No. 14* [to the *European Convention on Human Rights*] Pending its Entry into Force), which provides in paragraph (*d*) that: "Such 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."

[294] See, e.g., the *Agreement between the Federal Republic of Germany and the Government of the Republic of 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* (United Nations, *Treaty Series*, vol. 2169, No. 38039, p. 287, at p. 302); and the case in the *Exchange of Notes Constituting an Agreement between the Government of Spain and the Government of Colombia on Free Visas* (*ibid.*, vol. 2253, No. 20662, p. 328, at pp. 333–334).

[295] Such an approach accords with that taken with regard to the position of negotiating States in draft guideline 3. See paragraph (6) of the commentary to draft guideline 3, above.

[296] A small number of bilateral treaties contain explicit clauses on termination of provisional application and in some cases provide also for its notification. An example could be the *Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea* (United Nations, *Treaty Series*, vol. 2962, No. 51490, p. 339), art. 17. Other examples include: *Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the Implementation of Air Traffic Controls by the Federal Republic of Ger-*

which a treaty or part of a treaty is being, or can be, provisionally applied, as well as all States that have expressed their consent to be bound to the treaty.

(7) The agreement on provisional application may provide for advance notice to facilitate termination of provisional application in an orderly manner. The Commission decided, however, not to introduce *mutatis mutandis* the rule found in paragraph 2 of article 56 of the 1969 and 1986 Vienna Conventions, which establishes a notice period, or alternatively a "reasonable period", for denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal. The Commission declined to do so out of concern for the flexibility inherent in article 25 and in view of insufficient practice in that regard.

(8) Paragraph 3 recognizes the possibility that grounds other than that anticipated in paragraph 2 may also be invoked by a State or an international organization for the termination of provisional application. Such additional possibility is implicit in the flexible nature of the termination of provisional application provided for in article 25, paragraph 2. For example, a State or international organization may seek to terminate provisional application of a multilateral treaty while still maintaining its intention to become a party to the treaty. Another scenario is that in situations of material breach, a State or international organization may only seek to terminate or suspend provisional application *vis-à-vis* the State or international organization that has committed the material breach, while still continuing to provisionally apply the treaty in relation to other parties. The State or international organization affected by the material breach may also wish to resume the suspended provisional application of the treaty after the material breach has been adequately remedied.

(9) The same considerations with the regard to the opening phrase "[u]nless the treaty otherwise provides or it is otherwise agreed" apply with regard to paragraph 3 as those described above in relation to paragraph 2. The phrase "may invoke" serves to confirm the optional nature of the invocation of other grounds as a basis for terminating provisional application, while conveying the need to specify the grounds on which termination of provisional application is said to be taking place. In addition, the State or international organization invoking such grounds would be required ("shall") to notify the other States or international organizations concerned, as they are understood under the present Guide. Given the variety of circumstances under which the termination of provisional application may occur, no general requirement on the timeframe for notification would be feasible. Nonetheless, the termination of the provisional application of some treaties, for example, those establishing institutional arrangements, warrants sufficient advance notice. In other

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many above Dutch Territory and concerning the Impact of the Civil Operations of Niederrhein Airport on the Territory of the Kingdom of the Netherlands (*ibid*., vol. 2389, No. 43165, p. 117, at p. 173); *Agreement between Spain and the International Oil Pollution Compensation Fund* (*ibid*., vol. 2161, No. 37756, p. 45, at p. 50); and *Treaty between the Kingdom of 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* (*ibid*., vol. 2156, No. 37662, p. 139, at p. 155). As for the termination of provisional application of multilateral treaties, 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* (*ibid*., vol. 2167, No. 37924, p. 3, at p. 126), includes a clause (art. 41) allowing for termination by notification reflecting the wording of article 25, paragraph 2, of the 1969 Vienna Convention. Furthermore, the practice with regard to commodity agreements illustrates that provisional application may be agreed to be terminated by withdrawal from the agreement, as is the case with *the International Agreement on Olive Oil and Table Olives.*

situations, termination of provisional application may take place immediately upon receipt of notification, as indicated in paragraph (7) of the present commentary.

(10) The procedural requirements stipulated in the 1969 Vienna Convention for the termination of treaties already in force do not apply generally to the termination of provisional application.[297] However, to ensure legal certainty, paragraph 4 of the draft guideline contains a saving clause that seeks to confirm that, in principle, the termination of the provisional application of a treaty does not affect any right, obligation or legal situation created through the execution of provisional application prior to its termination. The provision was modelled on article 70, paragraph 1 (*b*), of the 1969 Vienna Convention.

Guideline 10
Internal law of States, rules of international organizations and observance of provisionally applied treaties

1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.

2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

Commentary

(1) Draft guideline 10 deals with the observance of provisionally applied treaties and their relation to the internal law of States and the rules of international organizations. Specifically, it deals with the question of the invocation of internal law of States, or in the case of international organizations the rules of the organization, as justification for failure to perform an obligation arising under the provisional application of a treaty or a part of a treaty. The first paragraph concerns the rule applicable to States and the second the rule applicable to international organizations.

(2) The provision follows closely the formulation contained in article 27 of both the 1969[298] and 1986[299] Vienna Conventions. Therefore, it should be considered together with those articles and other applicable rules of international law.

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[297] See S. Talmon and A. Quast Mertsch, "Germany's position and practice on provisional application of treaties", GPIL—German Practice in International Law, 2021.

[298] Article 27 of the 1969 Vienna Convention provides as follows:

> Internal law and observance of treaties
>
> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

[299] Article 27 of the 1986 Vienna Convention provides as follows:

> Internal law of states, rules of international organizations and observance of treaties
>
> 1. A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.
>
> 2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.
>
> 3. The rules contained in the preceding paragraphs are without prejudice to article 46.

(3) The provisional application of a treaty or a part of a treaty is governed by international law. Like article 27,[300] draft guideline 10 states, as a general rule, that a State or an international organization may not invoke the provisions of its internal law or rules as a justification for its failure to perform an obligation arising under such provisional application. Likewise, such provisions or rules cannot be invoked so as to avoid the responsibility that may be incurred for the breach of such obligations.[301] However, as indicated in draft guideline 12, the States and international organizations concerned may agree to limitations deriving from such internal law or rules as a part of their agreement on provisional application.

(4) While each State or international organization may decide, under its internal law or rules, whether to agree to the provisional application of a treaty or a part of a treaty,[302] once a treaty or a part of a treaty is applied provisionally, an inconsistency with the internal law of a State or with the rules of an international organization cannot justify a failure to apply provisionally such a treaty or a part thereof. Consequently, the invocation of those internal provisions in an attempt to justify a failure to apply provisionally a treaty or a part thereof would not be in accordance with international law.

(5) A failure to comply with the obligations arising from the provisional application of a treaty or a part of a treaty with a justification based on the internal law of a State or rules of an international organization will engage the international responsibility of that State or international organization, in accordance with draft guideline 8.[303] Any other view would be contrary to the law on international responsibility, according to which the characterization of an act of a State or an international organization as internationally wrongful is governed by international law and such characterization is not affected by its characterization as lawful by internal law of a State or rules of an international organization.[304]

(6) The reference to the "internal law of States and rules of international organizations" includes any provision of such nature, and not only to the internal law or rules specifically concerning the provisional application of treaties.

(7) The phrase "obligation arising under such provisional application", in both paragraphs of the draft guideline, is broad enough to encompass situations where the obligation flows from the treaty itself or from a separate agreement to apply provisionally the treaty or a part of a treaty. This is in accordance with the general rule of draft guideline 6, which states that the provisional application of a treaty or a part of a treaty produces a legally

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[300] See A. Schaus, "1969 Vienna Convention. Article 27: internal law and observance of treaties", in Corten and Klein *The Vienna Conventions on the Law of Treaties. A Commentary*, vol. I (see footnote 254 above), pp. 688–701, at p. 689.

[301] See article 7, "Obligatory character of treaties: the principle of the supremacy of international law over domestic law" in the fourth report by Sir Gerald Fitzmaurice, Special Rapporteur (*Yearbook of the International Law Commission, 1959*, vol. II, document A/CN.4/120, p. 43).

[302] See Mertsch, *Provisionally Applied Treaties* … (see footnote 254 above), p. 64.

[303] See Mathy, "Article 25" (see footnote 254 above), p. 646.

[304] See article 3 of the articles on responsibility of States for internationally wrongful acts of 2001 (*Yearbook of the International Law Commission, 2001*, vol. II (Part Two) and corrigendum, para. 76, subsequently annexed to General Assembly resolution 56/83 of 12 December 2001); and article 5 of the articles on responsibility of international organizations of 2011 (*Yearbook of the International Law Commission, 2011*, vol. II (Part Two), para. 87, subsequently annexed to General Assembly resolution 66/100 of 9 December 2011).

binding obligation to apply the treaty or a part thereof between the States or international organizations concerned, except to the extent that the treaty otherwise provides or it is otherwise agreed. Such treaty or part of a treaty that is being applied provisionally must be performed in good faith.

Guideline 11
Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

Commentary

(1) Draft guideline 11 deals with the effects of the provisions of the internal law of States and the rules of international organizations on their competence to agree to the provisional application of treaties. The first paragraph concerns the internal law of States and the second the rules of international organizations.

(2) Draft guideline 11 follows closely the formulation of article 46 of both the 1969 and 1986 Vienna Conventions. Specifically, the first paragraph of the draft guideline follows paragraph 1 of article 46 of the 1969 Vienna Convention,[305] and the second, paragraph 2 of article 46 of the 1986 Vienna Convention.[306] Therefore, the draft guideline should be considered together with those articles and other applicable rules of international law.

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[305] Article 46 of the 1969 Vienna Convention provides as follows:

Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

[306] Article 46 of the 1986 Vienna Convention provides as follows:

Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding

(3) Draft guideline 11 provides that any claim that the consent to provisional application is invalid must be based on a manifest violation of the internal law of the State or the rules of the organization regarding their competence to agree to such provisional application and, additionally, must concern a rule of fundamental importance.

(4) A violation is "manifest" if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States or, as the case may be, of international organizations and in good faith.[307]

Guideline 12
Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations

The present draft guidelines are without prejudice to the right of States or international organizations to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of States or from the rules of international organizations.

Commentary

(1) Draft guideline 12 relates to the limitations of States and international organizations that could derive from their internal law and rules when agreeing to the provisional application of a treaty or a part of a treaty. Such limitations may be substantive or procedural, such as those for the expression of consent to be bound by a treaty, or a combination of both. States and international organizations may agree to provisional application subject to limitations that derive from internal law or rules of the organizations, which may be reflected in their consent to apply provisionally a treaty or a part of a treaty.

(2) The present draft guideline recognizes the right of States or international organizations to agree to the provisional application of a treaty or a part of a treaty in such a manner as to guarantee that such an agreement conforms with the limitations deriving from their respective internal provisions. For example, the present draft guideline provides for the possibility that the treaty may expressly refer to the internal law of the State or the rules of the international organization and make such provisional application conditional on the non-violation of the internal law of the State or the rules of the organization.[308]

(3) The title of the draft guideline reflects the consensual basis of the provisional application of treaties, as well as the fact that provisional application might not be possible at all under the internal law of States or the rules of international organizations.[309]

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competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

[307] According to art. 46, para. 2, of the 1969 Vienna Convention and art. 46, para. 3, of the 1986 Vienna Convention.

[308] See, for example, article 45 of the Energy Charter Treaty.

[309] See the several examples of Free Trade Agreements between the EFTA States and other numerous States (*i.e.* Albania, Bosnia and Herzegovina, Canada, Chile, Egypt, Georgia, Lebanon, Mexico, Montenegro, Peru, Philippines, Republic of Korea, Serbia, Singapore, the former Yugoslav Republic of

(4) The draft guideline should not be interpreted as implying the need for a separate agreement on the applicability of limitations deriving from the internal law of the States or the rules of the international organizations concerned. The existence of any such limitations deriving from internal law needs only to be sufficiently clear in the treaty itself, the separate treaty or in any other form of agreement to apply provisionally a treaty or a part of a treaty.

Annex to chapter V
Selected bibliography concerning provisional application of treaties

[*Reproduced in Part Three, Section D, at p. 347, below*]

Macedonia, Tunisia and the Central American States, the Gulf Cooperation Council Member States and the Southern African Custom Union States), where different clauses are used in this regard, such as: "if its constitutional requirements permit", "if its respective legal requirements permit" or "if their domestic requirements permit" (www.efta.int/free-trade/free-trade-agreements). For instance, article 43, paragraph 2, of the *Free Trade Agreement between the EFTA States and the Southern African Customs Union States*, reads as follows:

> Article 43 (Entry into force)
>
> […]
>
> 2. If its constitutional requirements permit, any EFTA State or SACU State may apply this Agreement provisionally. Provisional application of this Agreement under this paragraph shall be notified to the Depository.

See also article 22 of the *General Agreement on Privileges and Immunities of the Council of Europe* (Paris, 2 September 1949, *European Treaty Series*, No. 2) and article 17 of the *Convention on the Elaboration of a European Pharmacopeia* (Strasbourg, 22 July 1964, *ibid.*, No. 50).

C. General Assembly resolution 76/113 of 9 December 2021

Provisional application of treaties

The General Assembly,

Having considered chapter V of the report of the International Law Commission on the work of its seventy-second session,[1] which contains the Guide to Provisional Application of Treaties,

Taking note of the recommendation of the International Law Commission contained in paragraph 49 of its report,

Emphasizing the continuing importance of the codification and progressive development of international law, as referred to in Article 13, paragraph 1 (*a*), of the Charter of the United Nations,

Noting that the subject of the provisional application of treaties is of major importance in international relations,

Underlining the essentially voluntary and optional nature of the provisional application of treaties,

1. *Welcomes* the conclusion of the work of the International Law Commission on the provisional application of treaties, and its adoption of the draft guidelines and draft annex constituting the Guide to Provisional Application of Treaties, and the commentaries thereto;

2. *Expresses its appreciation* to the International Law Commission for its continuing contribution to the codification and progressive development of international law;

3. *Takes note* of the views and comments expressed in the debates of the Sixth Committee on the subject, including those made at the seventy-sixth session of the General Assembly,[2] after the International Law Commission had completed its consideration of this topic in accordance with its statute;

4. *Also takes note* of the Guide to Provisional Application of Treaties, including the guidelines, the text of which is annexed to the present resolution, brings the Guide to the attention of States and international organizations for their consideration, and encourages its widest possible dissemination;

5. *Requests* the Secretary-General to prepare a volume of the *United Nations Legislative Series* compiling the practice of States and international organizations in the provisional application of treaties, as furnished by the latter over the years, together with other materials relevant to the topic.

49th plenary meeting
9 December 2021

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[1] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10).

[2] See A/C.6/76/SR.16, A/C.6/76/SR.17, A/C.6/76/SR.18 and A/C.6/76/SR.19. The statements made in the Sixth Committee are available in full (in the original languages) on the website of the Sixth Committee, at www.un.org/en/ga/sixth/.

Annex
Text of the guidelines on provisional application of treaties

Guideline 1
Scope

The present guidelines concern the provisional application of treaties by States or by international organizations.

Guideline 2
Purpose

The purpose of the present guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other relevant rules of international law.

Guideline 3
General rule

A treaty or a part of a treaty is applied provisionally pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

Guideline 4
Form of agreement

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed between the States or international organizations concerned through:

(*a*) a separate treaty; or

(*b*) any other means or arrangements, including:

(i) a resolution, decision or other act adopted by an international organization or at an intergovernmental conference, in accordance with the rules of such organization or conference, reflecting the agreement of the States or international organizations concerned;

(ii) a declaration by a State or by an international organization that is accepted by the other States or international organizations concerned.

Guideline 5
Commencement

The provisional application of a treaty or a part of a treaty takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as is otherwise agreed.

Guideline 6
Legal effect

The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof between the States or international organizations concerned, except to the extent that the treaty otherwise provides or it is otherwise agreed. Such treaty or part of a treaty that is being applied provisionally must be performed in good faith.

Guideline 7
Reservations

The present guidelines are without prejudice to any question concerning reservations relating to the provisional application of a treaty or a part of a treaty.

Guideline 8
Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is applied provisionally entails international responsibility in accordance with the applicable rules of international law.

Guideline 9
Termination

1. The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or international organization notifies the other States or international organizations concerned of its intention not to become a party to the treaty.

3. Unless the treaty otherwise provides or it is otherwise agreed, a State or an international organization may invoke other grounds for terminating provisional application, in which case it shall notify the other States or international organizations concerned.

4. Unless the treaty otherwise provides or it is otherwise agreed, the termination of the provisional application of a treaty or a part of a treaty does not affect any right, obligation or legal situation created through the execution of such provisional application prior to its termination.

Guideline 10
Internal law of States, rules of international organizations and observance of provisionally applied treaties

1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.

2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

Guideline 11
Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

Guideline 12
Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations

The present guidelines are without prejudice to the right of States or international organizations to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of States or from the rules of international organizations.

Part Three—Miscellaneous documents

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

Contents

Summary

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

* Prepared by the Secretariat of the International Law Commission (Codification Division of the Office of Legal Affairs). UN Doc. A/CN.4/658 (2013), serving in its capacity as the Secretariat of the International Law Commission.

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

Introduction

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

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

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

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

Chapter I
Procedural history

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

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

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

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

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

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

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

A. International Law Commission, 1950 to 1966

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Consideration at the fourteenth session, 1962

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

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

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

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

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

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

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

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

[20] *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[31] See footnote 6 above.

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

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

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

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

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

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

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

[34] See footnote 6 above.

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

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

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

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

[39] *Ibid.*

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

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

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

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

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

6. Consideration at the eighteenth session, 1966

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

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

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

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

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

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

[45] See footnote 6 above.

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

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

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

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

B. General Assembly, 1966 and 1967

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

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

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

1. Consideration at the first session, 1968

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

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

> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (*a*) The treaty itself so provides; or
>
> (*b*) The negotiating States have in some other manner so agreed.

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

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

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

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

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

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

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

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

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

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

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

2. Consideration at the second session, 1969

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

Chapter II
Substantive issues discussed during the development of article 25

A. Raison d'être of provisional application of treaties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[69] *Ibid.*, pp. 112–113, para. 55.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[107] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

[115] *Ibid*., pp. 106–107, para. 83.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Legal basis for provisional application

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[151] *Ibid.*

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

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

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

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

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

D. Provisional application of part of a treaty

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Conditionality

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

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

F. Juridical nature of provisional application

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

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

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

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[164] See footnote 162 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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the purposes of article 1 of the regulations, a treaty comes into force when, by agreement, it is applied provisionally by two or more of the parties thereto") (*Yearbook … 1963*, vol. II, p. 29, para. 129).

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

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

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

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

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

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

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

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

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

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

[191] *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[207] See footnote 203 above.

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

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

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

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

G. Termination of provisional application

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Unilateral termination versus termination by agreement

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

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

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

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

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

[218] See footnote 212 above.

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

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

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

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

[223] *Ibid.*

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

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

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

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

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

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

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

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

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

[229] *Ibid*.

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

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

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

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

[234] See footnote 212 above.

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

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

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

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

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[235] See footnote 50 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[259] *Ibid*., pp. 179–180, para. 14.

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

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

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

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

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

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

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

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

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

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

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

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

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

[270] See footnote 212 above.

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

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

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

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

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

Contents

Multilateral instruments cited in the present document

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

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

Summary

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

Chapter I
Procedural history of the 1986 Vienna Convention

A. Developments prior to 1970

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

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

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

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

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

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

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

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

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

B. Consideration by the Commission, 1970 to 1982

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

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

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

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

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

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

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

[12] See footnote 4 above.

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

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

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

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

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

C. 1986 Vienna Conference

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

[13] *Ibid*., paras. 35–37 and 40–42.

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

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

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

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

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

Chapter II
Development of article 25

A. Consideration by the Commission

1. First reading of the draft articles

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

Article 25. Provisional application

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

(*a*) the treaty itself so provides; or

(*b*) the negotiating States or international organizations have in some other manner so agreed.

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

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

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

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

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

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

[21] *Ibid.*

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

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

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

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

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

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

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

He added that

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

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

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

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

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

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

20. In response, the Special Rapporteur pointed out that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Comments made in connection with the first reading

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

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

Czechoslovakia was of the view that

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

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

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

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

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

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

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

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

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

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

3. Second reading of the draft articles

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

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

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

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

In doing so, he explained that

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

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

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

[41] *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Consideration at the 1986 Vienna Conference

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[54] See para. 5 above.

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

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

[57] *Ibid*.

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

Summary

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

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.
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> 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.

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[1] Source: Doc. A/76/10, Chp. V, annex.

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