Chapter VII
Provisional application of treaties

A. Introduction

79. At its sixty-fourth session (2012), the Commission decided to include the topic "Provisional application of treaties" in its programme of work and appointed Mr. Juan Manuel Gómez Robledo as Special Rapporteur for the topic.[992] In its resolution 67/92 of 14 December 2012, the General Assembly subsequently noted with appreciation the decision of the Commission to include the topic in its programme of work.

80. The Special Rapporteur submitted four reports from 2013 to 2016,[993] which the Commission considered at its sixty-fifth to sixty-eighth sessions (2013–2016), respectively. The Commission also had before it three memorandums, prepared by the Secretariat, which were submitted at the sixty-fifth (2013), sixty-seventh (2015) and sixth-ninth sessions (2017), respectively.[994]

81. On the basis of the draft guidelines proposed by the Special Rapporteur in the third and fourth reports, the Commission, at its sixty-eighth session (2016), took note of draft guidelines 1 to 4 and 6 to 9, as provisionally adopted by the Drafting Committee. Owing to a lack of time, it was decided to consider draft guidelines 5 and 10 at the next session.

82. At its sixty-ninth session (2017), the Commission referred draft guidelines 1 to 4 and 6 to 9, provisionally adopted by the Drafting Committee in 2016, back to the Committee, with a view to finalizing a consolidated set of draft guidelines. The Commission subsequently provisionally adopted draft guidelines 1 to 11, as presented by the Drafting Committee at the same session, with commentaries thereto.

B. Consideration of the topic at the present session

83. At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/718), and an addendum to that report providing a bibliography on the topic (A/CN.4/718/Add.1). In his fifth report, the Special Rapporteur analysed the comments made by States and international organizations on the 11 draft guidelines provisionally adopted by the Commission at its sixty-ninth session, provided additional information on the practice of international organizations, and submitted two new draft guidelines, 5 *bis* and 8 *bis*, concerning reservations and termination or suspension, respectively, as well as eight draft model clauses.[995] The Commission also had before it the third memorandum prepared by the Secretariat (A/CN.4/707), reviewing 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.

84. At its 3402nd to 3406th and 3409th meetings, from 14 to 18 and on 22 May 2018, the Commission considered the fifth report of the Special Rapporteur and the third memorandum of the Secretariat. At its 3409th meeting, on 22 May 2018, the Commission decided to refer draft guidelines 5 *bis* and 8 *bis* and the eight draft model clauses to the Drafting Committee, and instructed it to complete the first reading of the entire set of draft guidelines, including those adopted provisionally at the sixty-ninth session (2017), taking into account the comments and observations of Governments and the debate in plenary on the Special Rapporteur's report.

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992 *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 267.

993 A/CN.4/664 (first report), A/CN.4/675 (second report), A/CN.4/687 (third report), and A/CN.4/699 and Add.1 (fourth report).

994 A/CN.4/658, A/CN.4/676 and A/CN.4/707. The consideration of document A/CN.4/707 was postponed to the present session.

995 For the text of the draft model clauses proposed by the Special Rapporteur in his fifth report (A/CN.4/718), see footnote 996 below.

85. The Commission considered the report of the Drafting Committee (A/CN.4/L.910) at its 3415th meeting, held on 31 May 2018, and adopted draft guidelines 6 [7], 7 [5 *bis*], 9, 10, 11 and 12. The Commission then proceeded to adopt the entire set of draft guidelines on provisional application of treaties, as the draft Guide to Provisional Application of Treaties, on first reading (see section C.1 below). The Commission further took note of the recommendation of the Drafting Committee that a reference be made in the commentaries to the possibility of including, during the second reading, a set of draft model clauses,[996] based on a revised proposal that the Special Rapporteur would make at an appropriate time, taking into account the comments and suggestions made during both the plenary debate and in the Drafting Committee.

86. At its 3435th, 3437th, 3440th and 3441st meetings, on 24, 27 and 31 July and 2 August 2018, the Commission adopted the commentaries to the aforementioned draft guidelines (see section C.2 below).

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[996] The text of the draft model clauses proposed by the Special Rapporteur, in his fifth report (A/CN.4/718), excluding footnotes, reads as follows:

A. Time frame for the provisional application of a treaty

1. Commencement

Draft model clause 1

The negotiating [contracting] States [international organizations] agree to apply this Treaty provisionally from the date of signature (or any subsequent date agreed upon).

Draft model clause 2

The negotiating [contracting] States [international organizations] agree to apply this Treaty provisionally from … [a specified date].

Draft model clause 3

The negotiating [contracting] States [international organizations] agree that the Treaty [articles … of the Treaty] shall be applied provisionally, except by any State [international organization] that notifies the Depositary in writing at the time of signature that it does not consent to such provisional application.

Draft model clause 4

This Treaty shall be applied provisionally from the date on which a State [an international organization] so notifies the other States [international organizations] concerned or deposits a declaration to that effect with the Depositary.

2. Termination

Draft model clause 5

The provisional application of this Treaty shall terminate upon its entry into force for a State [an international organization] that is applying it provisionally.

Draft model clause 6

The provisional application of this Treaty with respect to a State [an international organization] shall be terminated if that State [international organization] notifies the other States [international organizations] (or the Depositary) of its intention not to become a party to the Treaty.

B. Scope of provisional application

1. Treaty as a whole

Draft model clause 7

A State [An international organization] that has notified the other States [international organizations] (or the Depositary) that it will provisionally apply this Treaty shall be bound to observe all the provisions thereof as agreed with the States [international organizations] concerned.

2. Only a part of a treaty

Draft model clause 8

A State [An international organization] that has notified the other States [international organizations] (or the Depositary) that it will provisionally apply articles […] of this Treaty shall be bound to observe the provisions thereof as agreed with the States [international organizations] concerned.]

87. At its 3441st meeting, on 2 August 2018, the Commission further expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, which had enabled the Commission to bring to a successful conclusion its first reading of the draft Guide to Provisional Application of Treaties.

88. At its 3441st meeting, on 2 August 2018, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft guidelines (see section C below), through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 15 December 2019.

C. Text of the draft Guide to Provisional Application of Treaties, adopted by the Commission on first reading

1. Text of the draft Guide to Provisional Application of Treaties

89. The text of the draft Guide to Provisional Application of Treaties adopted by the Commission, on first reading, is reproduced below.

Guide to Provisional Application of Treaties

Guideline 1
Scope

The present draft guidelines concern the provisional application of treaties.

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 rules of international law.

Guideline 3
General rule

A treaty or a part of a treaty may be provisionally applied, 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 through:

(a) a separate treaty; or

(b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

Guideline 5
Commencement of provisional application

The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed.

Guideline 6
Legal effect of provisional application

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 as if the treaty were in force

between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

Guideline 7
Reservations

1. In accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied *mutatis mutandis*, a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

2. In accordance with the relevant rules of international law, an international organization may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

Guideline 8
Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied entails international responsibility in accordance with the applicable rules of international law.

Guideline 9
Termination and suspension of provisional application

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 international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.

3. The present draft guideline is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in part V, section 3, of the Vienna Convention on the Law of Treaties or other relevant rules of international law concerning termination and suspension.

Guideline 10
Internal law of States and rules of international organizations, and the 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 and rules of international organizations

The present draft guidelines are without prejudice to the right of a State or an international organization 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 the State or from the rules of the organization.

2. Text of the draft Guide to Provisional Application of Treaties and commentaries thereto

90. The text of the draft Guide to Provisional Application of Treaties adopted by the Commission, on first reading, together with commentaries thereto, is reproduced below.

Guide to Provisional Application of Treaties

General commentary

(1) As is always the case with the Commission's output, the draft guidelines are to be read together with the commentaries.

(2) 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 concerning, *inter alia*, the form of the agreement to provisionally apply 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 and most appropriate for contemporary practice.

(3) 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.[997] 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,[998] among other objectives.[999] More generally, provisional application serves the overall purpose of 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.

(4) Although the draft guidelines are not legally binding as such, they elaborate upon existing rules of international law in the light of contemporary practice. The draft guidelines are mainly based on article 25 of both the Vienna Convention on the Law of Treaties of 1969

[997] See D. Mathy, "Article 25", in *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. 1, O. Corten and P. Klein, eds. (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).

[998] 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.

[999] See A/CN.4/664, paras. 25–35.

(hereinafter, "1969 Vienna Convention")[1000] and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 (hereinafter, "1986 Vienna Convention"),[1001] which they try to clarify and explain, and on the practice of States and international organizations on the matter, without prejudice to other rules of international law.

(5) It is of course impossible to address all the questions that may arise in practice and 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 draft guidelines, which is to acknowledge the flexible nature of the provisional application of treaties[1002] 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 set aside, by mutual agreement, the solutions identified in the draft guidelines if they so decide.

(6) The Guide should also help to promote the consistent use of terms and therefore avoid confusion. The extensive use of certain terms, such as "provisional entry into force" as opposed to *definitive* entry into force, has led to confusion regarding the scope and the legal effect of the concept of the provisional application of treaties.[1003] In the same vein, quite frequently, treaties do not use the adjective "provisional", but speak instead of "temporary" or "interim" application.[1004] Consequently, the framework of article 25 of the 1969 and 1986

[1000] 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.)

[1001] 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).)

[1002] See A/CN.4/664, paras. 28–30.

[1003] 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).

[1004] 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

Vienna Conventions, while it constitutes the legal basis of the matter,[1005] has been criticized as difficult to understand[1006] and lacking legal precision.[1007] The intention of the present draft guidelines is to provide greater clarity in that regard.

(7) To provide assistance to States and international organizations in their practice on provisional application, it is anticipated that this Guide will also include draft model clauses, which are to be reproduced in an annex.[1008] Those draft model clauses would reflect best practice with regard to the provisional application of both bilateral and multilateral treaties. They are in no way intended to limit the flexible and voluntary nature of provisional application of treaties, and they do not pretend to address the whole range of situations that may arise.

Guideline 1
Scope

The present draft guidelines concern the provisional application of treaties.

Commentary

(1) Draft guideline 1 is concerned with the scope of application of the draft guidelines. The provision should be read together with draft guideline 2, which sets out the purpose of the draft guidelines.

(2) The word "concern" was considered more suitable for a text aimed at providing guidance to States and international organizations than other formulations, such as "applies to", which is more frequently found in texts laying down rules applicable to States and other subjects of international law.

(3) The Commission decided not to include a further qualification limiting the scope *ratione personae* of the draft guidelines to States. Instead, the draft guidelines also pertain to international organizations, as is evident from the references to both States and international organizations in draft guidelines 5 to 7 and 9 to 12.[1009] That accords with the fact that the provisional application of treaties is envisaged in article 25 of both the 1969 and the 1986 Vienna Conventions.

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 rules of international law.

Commentary

(1) Draft guideline 2 concerns the purpose of the draft guidelines and follows the practice of the Commission of including such a provision in its texts with a view to clarifying the purpose of the text in question. In the present case, the purpose of the draft guidelines is to

origins of article 25 of the 1969 and 1986 Vienna Conventions (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).

[1005] See Mertsch, *Provisionally Applied Treaties …* (see footnote 997 above), p. 22.

[1006] See A. Geslin, *La mise en application provisoire des traités* (Paris, Editions A. Pedone, 2005), p. 111.

[1007] See M.A. Rogoff and B.E. Gauditz, "The provisional application of international agreements", *Maine Law Review*, vol. 39 (1987), p. 41.

[1008] For the text of the draft model clauses as proposed by the Special Rapporteur in his fifth report, see footnote 996 above. The Commission was not able to conclude its consideration of draft model clauses because of a lack of time. It therefore intends to resume such consideration at its seventy-first session, to allow States and international organizations to assess the annex containing such draft model clauses before the second reading of the draft guidelines takes place during its seventy-second session.

[1009] The question of the potential role to be played by an international organization or an international conference in an agreement to provisionally apply a treaty or a part of a treaty is addressed in draft guideline 4.

provide guidance to States and international organizations regarding the law and practice on the provisional application of treaties.

(2) Draft guideline 2 is intended to underline that the guidelines are based on the 1969 Vienna Convention and other rules of international law, including the 1986 Vienna Convention. The reference to "or other relevant rules of international law" is primarily intended 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 draft guidelines, namely that article 25 of the 1969 and the 1986 Vienna Conventions does not necessarily reflect all aspects of contemporary practice on the provisional application of treaties. That is suggested by the decision to include a reference to both "the law and practice" on the provisional application of treaties. Such an approach is also alluded to in the reference to "other rules of international law", which reflects the understanding within the Commission 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 draft guidelines recognize the central importance of article 25 of the 1969 and the 1986 Vienna Conventions. The reference to "on the basis of", and the express reference to article 25, is intended to indicate that this article serves as the basic point of departure of the draft guidelines, even if it is to be supplemented by other rules of international law in order to obtain a full appreciation of the law applicable to the provisional application of treaties.

Guideline 3
General rule

A treaty or a part of a treaty may be provisionally applied, 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. In so doing, the Commission deliberately sought to follow the formulation of article 25 of the 1969 Vienna Convention, so as to underscore that the starting point for the draft guidelines is article 25. That 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 necessarily 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 provisionally applied. The formulation follows that found in the chapeau to paragraph 1 of article 25 of the 1969 and the 1986 Vienna Conventions, while it uses the word "may" to underline the optional character of provisional application.

(3) The Commission also considered how to best capture in the text the States or international organizations that could provisionally apply a treaty, and the States or international organizations whose agreement is required in order for such provisional application to take place, and therefore retained a more general formulation. Unlike in article 25, which alludes, in paragraph 1 (*b*), to an agreement to provisionally apply a treaty or a part of a treaty among "negotiating States" or "negotiating States and negotiating organizations", no reference is made in draft guideline 3 to which States or international organizations may provisionally apply a treaty. In the process of considering whether to align the present formulation with that found in article 25, by qualifying the applicability of the general rule to a particular group of States or international organizations, the Commission acknowledged the possibility, arising from contemporary practice, that provisional application may be undertaken by States or international organizations that are not negotiating States or negotiating organizations of the treaty in question. The question as to whether the term

"negotiating States" in article 25, paragraph 1 (*b*), would prevent non-negotiating States or non-negotiating international organizations from entering into an agreement on provisional application could not be clearly answered based on the multilateral treaties taken into consideration.[1010] Furthermore, the need to distinguish between different groups of States or international organizations, in terms of their connection with the treaty, was considered less apposite in the context of bilateral treaties, which constitute the vast majority of treaties that historically have been provisionally applied. However, relevant practice was identified by examining certain commodity agreements that had never entered into force but whose provisional application was extended beyond their termination date.[1011] In such cases, such an extension was also 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.

(4) The distinction between provisional application of the entire treaty, as opposed to a "part" thereof, originates in article 25. The Commission, in its 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" on what it then termed "provisional entry into force" applied to "part of a treaty".[1012] In the corresponding commentary, it was explained that: "[n]o 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".[1013] 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 be less amenable to provisional application. 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 draft guidelines.[1014]

[1010] See A/CN.4/707, para. 37.

[1011] 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 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.

[1012] *Yearbook … 1966*, vol. II, para. 38.

[1013] Paragraph (3) of the commentary to draft article 22, *ibid*.

[1014] 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 (A/CONF.217/2013/L.3, 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*.,

(5) 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 Commission considered the possible ambiguity in the reference to "entry into force". While the expression could be referring, on the one hand, to the entry into force of a treaty itself,[1015] examples exist of provisional application continuing for some 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, as is the case for multilateral treaties.[1016] 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. The reference at the outset to "pending its entry into force" is also meant to underscore the role played by provisional application in preparing for or facilitating such entry into force, even if it may pursue other objectives.

(6) The third and fourth phrases ("if the treaty 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,[1017] and hence the formulation follows that found in the 1969 and 1986 Vienna Conventions.

(7) A modified, more general formulation was adopted for the alternative scenario of provisional application on the basis of a separate agreement. Unlike in the 1969 and 1986 Vienna Conventions, no specific mention is made of a particular group of States or international organizations, acknowledging the contemporary practice that has included cases of provisional application being agreed to either by only some negotiating States or by non-negotiating States that subsequently signed or acceded to the treaty. Furthermore, the draft guideline envisages the possibility of a third State or international organization, completely unconnected to the treaty, provisionally applying it after having agreed in some other manner with one or more States or international organizations concerned. That explains the more neutral drafting of draft guideline 3, in the passive form, which simply restates the basic rule.

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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.

[1015] 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 Pending its Entry into Force.

[1016] For example, the Arms Trade Treaty.

[1017] 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. not published yet], No. 51407), 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. not published yet], No. 50313), 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.

(8) 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 through:

(a) a separate treaty; or

(b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or 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 provisionally applied, 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 expressly permit provisional application and, second, provides for the possibility of an alternative basis for provisional application, when the States or the international organizations "in some other manner" so agreed, which typically occurs when the treaty is silent on the point.

(2) As previously indicated, draft guideline 4 explains the reference to "in some other manner it has been so agreed" at the end of draft guideline 3, which is envisaged in article 25, paragraph 1 (*b*). That 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 language of article 25. Two categories of additional methods for agreeing the provisional application are identified in the subparagraphs.

(3) Subparagraph (*a*) envisages the possibility of provisional application by means of a separate treaty, which should be distinguished from the treaty that is provisionally applied.[1018]

(4) Subparagraph (*b*) acknowledges the possibility that, in addition to a separate treaty, provisional application may also be agreed through "other means or arrangements", which broadens the range of possibilities for reaching agreement on provisional application. The Commission viewed such an additional reference as confirmation of the inherently flexible nature of provisional application.[1019] By way of providing further guidance, reference is made

[1018] 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. not yet published], No. 49430) 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. not yet published], No. 51181); 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 Pending its Entry into Force).

[1019] 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. not yet published], No. 51578); 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

to two examples of such "means or arrangements", namely provisional application agreed by means of a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.[1020]

(5) While the practice is still quite exceptional,[1021] the Commission was of the view that it was useful to include a reference to the possibility that a State or an international

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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.

[1020] These are not agreements in which the international organization is a party to the treaty as such. Rather, these are agreements between States reached in meetings or conferences under the auspices of that international organization. Several such instances can be given. First, the amendments to the Convention on the International Maritime Satellite Organization (INMARSAT) and its Operating Agreement (United Nations, *Treaty Series*, vol. 1143, No. 17948, p. 105). See D. Sagar, "Provisional application in an international organization", *Journal of Space Law*, vol. 27 (1999), pp. 99–116. Second, there are a number of precedents in which the competent organs of international organizations provisionally applied amendments, without explicit power being provided for in their constitutions, namely the Congress of the Universal Postal Union, the Committee of Ministers of the Council of Europe, and the practice of the International Telecommunication Union. See Sagar, "Provisional application in an international organization", pp. 104–106. Third, the amendment adopted in 2012 by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 162), in which the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, in considering the gap in the operation of the clean development mechanism that might arise in relation to the entry into force of amendments to the Kyoto Protocol, recommended that those amendments could be provisionally applied. See "Legal considerations relating to a possible gap between the first and subsequent commitment periods" (FCCC/KP/AWG/2010/10), para. 18. Fourth, the Amendment to Article 14 of the Statutes of the World Tourism Organization (United Nations, *Treaty Series*, [vol. not published yet], No. 14403). Other examples, where Governments are given the possibility to bring the agreement provisionally into force by virtue of a collective decision, include: (a) International Agreement on Olive Oil and Table Olives (*ibid*., vol. 2684, No. 47662, p. 63); (b) International Tropical Timber Agreement; (c) International Cocoa Agreement, 1993 (*ibid*., vol. 1766, No. 30692, p. 3); and (d) International Cocoa Agreement, 2010 (*ibid*., vol. 2871, No. 50115, p. 3). Lastly, a case that two academic sources qualify as one of provisional application refers to the establishment of the Preparatory Commission of the Comprehensive Nuclear-Test Ban Treaty Organization, which was done through the adoption of a resolution by the Meeting of States Signatories (CTBT/MSS/RES/1) on 19 November 1996. Although in the negotiations that led to the Comprehensive Nuclear-Test Ban Treaty Organization a proposal for provisional application was rejected, although the Comprehensive Nuclear-Test Ban Treaty has no explicit provision for provisional application, and although no separate treaty has been concluded to that effect, these scholars argue that because the decisions of the Preparatory Commission are intended to implement core provisions of the Comprehensive Nuclear-Test Ban Treaty before its entry into force, the resolution of the Meeting of States Signatories can be interpreted as evidence of an agreement "in some other manner", or of an "implied provisional application" on the basis of article 25, paragraph1 (b), of the 1969 Vienna Convention. See A. Michie," The provisional application of arms control treaties", *Journal of Conflict and Security Law*, vol. 10, (2005), pp. 347–377, at pp. 369–370. See also, Y. Fukui, "CTBT: Legal questions arising from its non-entry into force revisited", *Journal of Conflict and Security Law*, vol. 22, pp. 183–200, at pp. 197–199. By contrast, another source, published under the auspices of the United Nations Institute for Disarmament Research and containing a preface by the Executive Secretary of the Preparatory Commission, maintains that the Comprehensive Nuclear-Test Ban Treaty is not currently being provisionally applied. See R. Johnson, *Unfinished Business: The Negotiation of the CTBT and the End of Nuclear Testing*, UNIDIR/2009/2 (2009), pp. 227–231.

[1021] There are cases in which the treaty does not require the negotiating or signatory States to apply it provisionally, but leaves open the possibility for each State to decide whether or not it wishes to apply the treaty or a part of the treaty, at any point in the process from the adoption of the text until or even after its entry into force. In these circumstances, the expression of intention that creates the obligation arising from provisional application may take the form of a unilateral declaration by the State. An example of this is the provisional application 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 declared that it would provisionally apply the Convention, the Director-General of the

organization could make a declaration to the effect of provisionally applying a treaty or a part of a treaty, in cases where the treaty remains silent or when it is not otherwise agreed. However, the declaration must be verifiably accepted by the other States or international organizations concerned, as opposed to mere non-objection. Most of the existing practice reflects the acceptance of provisional application in written form. The draft guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that it is expressed. The Commission avoided the use of the word "unilateral" before "declaration" in order not to confuse the rules governing the provisional application of treaties with the legal regime of the unilateral acts of States.

Guideline 5
Commencement of provisional application

The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are 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 draft guidelines of referring to the provisional application of the entire treaty or a part of a treaty.

(3) The second clause has two components. The reference to "pending its entry into force" follows the formulation found in draft guideline 3, whereby "entry into force" refers to the entry into force between the States or international organizations concerned. As indicated in the commentary to draft guideline 3, such considerations are pertinent primarily in the context of the provisional application of multilateral treaties. The Commission decided to retain the general reference to "entry into force", as already indicated in the commentary to draft guideline 3.[1022]

(4) The second component is the inclusion of the reference to both States and international organizations. That reflects the position taken by the Commission, referred to in paragraph (3) of the commentary to draft guideline 1, whereby the scope of the draft guidelines should include treaties between States and international organizations or between international organizations. The reference to entry into force "between" the States or international organizations was rendered in general terms in order to cover the variety of possible scenarios, including, for example, provisional application between a State or international organization for which the treaty has entered into force and another State or international organization for which the treaty has not yet entered into force.

(5) The phrase "takes effect on such date, and in accordance with such conditions and procedures" defines the commencement of provisional application. The text is based on that adopted in article 68 of the 1969 Vienna Convention, which refers to "takes effect". The

Organization for the Prohibition of Chemical Weapons (OPCW) replied neutrally, informing the Syrian Arab Republic that its "request" to provisionally apply the Convention would be forwarded to the States parties through the Depositary. Although 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 OPCW 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). Another example of consent to be bound by the provisional application of a part of a treaty by means of a unilateral 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 (see www.unified-patent-court.org/sites/default/files/Protocol_to_the_Agreement_on_Unified_Patent_Court_on_provisional_application.pdf).

[1022] See paragraph (5) of the commentary to draft guideline 3 above.

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. The Commission decided not to refer expressly to the various modes of expressing consent to be bound by a treaty, in order to retain a more streamlined provision.

(6) The concluding phrase "as the treaty provides or as are otherwise agreed" confirms that the agreement to provisionally apply a treaty or a part of a treaty is based on a provision set forth in the treaty that is provisionally applied, on a separate treaty, whatever its particular designation, or on other means or arrangements that establish an agreement for provisional application, and is subject to the conditions and procedures established in such instruments.

Guideline 6
Legal effect of provisional application

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 as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

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 provisionally applied.

(2) The draft guideline begins by stating 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 as if the treaty were in force between the States or international organizations concerned. In other words, a treaty or a part of a treaty that is provisionally applied is considered as binding on the parties provisionally applying it from the time at which the provisional application commenced. Such legal effect is derived from the agreement to provisionally apply the treaty 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 provides that the provisional application produces a legally binding obligation to apply the treaty or part thereof as if the treaty were in force.[1023]

(3) The general position is qualified by the concluding phrase "unless the treaty provides otherwise or it is otherwise agreed", which 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 as if it were in force, subject to the possibility that the parties may agree otherwise, is reflected in existing State practice.[1024]

(4) 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 as if the treaty were in force", which is central to the draft guideline, refers to the effect that the treaty would produce were it in force for the State or the international organization concerned and to the conduct that is expected from States or international organizations that decide to resort to provisional application. The reference to "between the States or international organizations concerned" was inserted in order to align the draft guideline with draft guideline 5. The concluding clause, "unless the treaty provides otherwise

[1023] See Mathy, "Article 25" (footnote 997 above), p. 651.

[1024] The memorandum by the Secretariat (A/CN.4/707) contains an analysis of more than 400 bilateral and 40 multilateral treaties and recognizes that in reality the number of both bilateral and multilateral treaties provisionally applied is higher than the number available in the United Nations *Treaty Series*; see also the examples contained in the reports submitted by the Special Rapporteur: A/CN.4/664, A/CN.4/675, A/CN.4/687 and A/CN.4/699 and Add.1. The latter contains an annex with examples of recent European Union practice on provisional application of agreements with third States. See also 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).

or it is otherwise agreed", indicates the condition on which the general rule is based, namely that the treaty does not provide otherwise.

(5) Nonetheless, an important distinction must be made. As a matter of principle, 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 part thereof as if the treaty were in force" does not imply that provisional application has the same legal effect as entry into force. The reference to a "a legally binding obligation" is intended to add more precision in the depiction of the legal effect of provisional application.

(6) The Commission considered the possibility of introducing an express safeguard so that the provisional application of a treaty could not result in the modification of the content of the treaty. However, the formulation adopted for draft guideline 6 was considered to be sufficiently comprehensive to deal with the point, since provisional application is limited to producing a legally binding obligation to apply the treaty or part thereof as if the treaty were in force. Implicit in the draft guideline, therefore, is the understanding that the act of provisionally applying the treaty does not affect the rights and obligations of other States or international organizations.[1025] Furthermore, draft guideline 6 should not be understood as limiting the freedom of States or international organizations to amend or modify the treaty that is provisionally applied, in accordance with part IV of the 1969 and the 1986 Vienna Conventions.

Guideline 7
Reservations

1. In accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied *mutatis mutandis*, a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

2. In accordance with the relevant rules of international law, an international organization may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

Commentary

(1) Draft guideline 7 deals with the formulation of reservations, by a State or an international organization, purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of a treaty.

(2) Owing to the relative lack of practice on the matter and the fact that reservations in the case of provisional application were not addressed in the 2011 Guide to Practice on Reservations to Treaties,[1026] the Commission is only at the initial stage of considering the question of reservations in relation to the provisional application of treaties. Different and quite divergent views were expressed in the Commission as to whether it was appropriate or necessary to include a provision on reservations in the context of provisional application of a treaty or a part thereof in the Guide, although it was generally believed that, as a matter of principle, nothing prohibits the possibility of formulating reservations related to provisional application.

[1025] 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 above on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

[1026] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1).

(3) Although States have made interpretative declarations in conjunction with agreeing to provisional application, such declarations must be distinguished from reservations.[1027] Nor do declarations to opt out of provisional application constitute reservations in the sense of the law of treaties.[1028]

(4) Paragraph 1 begins with the phrase "[i]n accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied *mutatis mutandis*". This phrase is meant to indicate the application of some, but not necessarily all, of the rules of the 1969 Vienna Convention applicable to reservations in case of provisional application. The phrase was placed at the beginning of the paragraph to clearly indicate that the relevant rules of the Vienna Convention being referred to are those that qualify the formulation of reservations, and not those that relate to the provisional application of certain provisions of the respective treaty.

(5) The phrase "a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty" is based on articles 2, paragraph 1 (*d*), and 19 of the Vienna Convention. The reference to the legal effect "produced by the provisional application" underlines the intrinsic link between draft guideline 6 and draft guideline 7. The formulation is considered to be neutral on the question as to whether reservations exclude or modify the legal effect arising from the provisional application of the treaty, or that of the agreement between the parties to provisionally apply the treaty as such.

(6) Paragraph 2 provides for the formulation of reservations by international organizations to parallel the situation of States envisaged in paragraph 1. Paragraph 2 replicates paragraph 1, with the necessary modifications. The opening phrase "[i]n accordance with the relevant rules of international law", is to be understood broadly to include primarily the rules of the law of treaties, but also those pertaining to the rules of international organizations.

Guideline 8
Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied 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 provisionally applied. It reflects the legal implication of draft guideline 6. Since the treaty or a part of a treaty being provisionally applied produces a legally binding obligation, then a breach of an obligation arising under the treaty or a part of a treaty being provisionally applied necessarily constitutes a wrongful act giving rise to international responsibility. The Commission considered whether it was necessary to have a provision on responsibility at all. 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 draft guidelines is not limited to that of the two Vienna Conventions, as stated in draft guideline 2.

(2) The Commission decided to retain the reference to "a part" of a treaty in order to specify that when a part of a treaty is being provisionally applied, it is only a breach of that part of the treaty that is susceptible to giving rise to international responsibility.

[1027] See, in particular, guideline 1.3 of the Guide to Practice on Reservations to Treaties (*ibid.*).

[1028] 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.

(3) The draft guideline was aligned with the articles on responsibility of States for internationally wrongful acts of 2001[1029] and with the articles on responsibility of international organizations of 2011,[1030] 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 draft articles. Likewise, the concluding phrase "in accordance with the applicable rules of international law" is intended as a reference, *inter alia*, to those draft articles.

Guideline 9
Termination and suspension of provisional application

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 international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.

3. The present draft guideline is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in Part V, Section 3, of the Vienna Convention on the Law of Treaties or other relevant rules of international law concerning termination and suspension.

Commentary

(1) Draft guideline 9 concerns the termination and suspension 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, when the treaty enters into force for the State or international organization 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 provisionally applied. The possibility of other, less common, means of terminating provisional application is not excluded.

(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.[1031] 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 itself is implicit in the reference in draft guidelines 3 and 5 to "pending its entry into force", which is based on article 25 of the 1969 and 1986 Vienna Conventions.[1032] In accordance with draft guideline 5, provisional application continues until the treaty enters into force for the State or international organization provisionally applying

[1029] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 76, subsequently annexed to General Assembly resolution 56/83 of 12 December 2001.

[1030] *Yearbook … 2011*, vol. II (Part Two), para. 87.

[1031] See A/CN.4/707, para. 88.

[1032] 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, para. 90). That is also the case for multilateral treaties, such as the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 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."

the treaty or a part of a treaty in relation to the other States or international organizations provisionally applying it or a part of it as well.[1033]

(3) The phrase "in the relations between the States or international organizations concerned" was included to distinguish the entry into force of the treaty from the provisional application by one or more parties to the treaty. This was viewed as being 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 continue to be applied only provisionally by 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" omits the reference to such an alternative agreement only being concluded between the "negotiating" States and international organizations, which can be found in the 1969 and 1986 Vienna Conventions. The formulation "or it is otherwise agreed" continues to refer to the States or international organizations that had negotiated the treaty, but it may also include States and international organizations that were not involved in the negotiation of the treaty. Given the complexity of concluding modern multilateral treaties, contemporary practice supports a broad reading of the language the Vienna Conventions, in terms of treating all negotiating States or international organizations 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.[1034]

(6) The Commission was also concerned with identifying which States or international organizations should be notified of another's intention to terminate the provisional application of a treaty or a part of a treaty. The final phrase in the draft guideline, "notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally", clarifies that point.[1035]

[1033] 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).

[1034] Such an approach accords with that taken with regard to the position of negotiating States in draft guideline 3. See paragraphs (2) and (5) of the commentary to draft guideline 3, above.

[1035] 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. not yet published], No. 51490, p. 14), 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 Germany 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 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

(7) The Commission decided not to introduce a safeguard in relation to unilateral termination of provisional application by, for example, applying *mutatis mutandis* the rule found in paragraph 2 of article 56 of the 1969 and 1986 Vienna Conventions, which establishes a notice 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 confirms that draft guideline 9 is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in part V, section 3, of the 1969 Vienna Convention or other relevant rules of international law concerning termination and suspension. Despite an apparent lack of relevant practice and notwithstanding the fact that article 25, paragraph 2, of the Vienna Convention provides a flexible way to terminate provisional application, the Commission considered it useful to include a provision relating to termination and suspension in the Guide to address a number of possible scenarios not covered by paragraphs 1 and 2. For example, a State or international organization may only wish to terminate provisional application, but still intend to become a party to the treaty. Another conceivable 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 formulation of paragraph 3 as a "without prejudice" clause is intended to preserve the possibility that provisions pertaining to termination and suspension in the 1969 Vienna Convention may be applicable to a provisionally applied treaty. However, the provision does not aspire to definitively determine which grounds in section 3 might serve as an additional basis for the termination of provisional application, or in which scenarios and to what extent those grounds would be applied. Instead, the rules of the Vienna Convention are to be "applied *mutatis mutandis*" depending on the circumstances.

(10) The reference to "or other relevant rules of international law" is primarily intended to extend the scope of the provision to the provisional application of treaties by international organizations, but the reference also makes clear that the provision is without prejudice to other methods of terminating provisional application more generally.[1036]

(11) The scope of the provision is limited to section 3 of part V of the 1969 Vienna Convention to avoid any legal uncertainty that might have resulted from a general reference to part V. Similarly, the specific reference to section 3 serves to exclude the applicability of section 2 of part V of the Vienna Convention, on invalidity. The Guide addresses invalidity in draft guideline 11.

Guideline 10
Internal law of States and rules of international organizations, and the 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.

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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.

[1036] See, for example, art. 29 of the 1978 Vienna Convention on Succession of States in Respect of Treaties (*ibid*., vol. 1946, No. 33356, p. 3), which envisages additional means of terminating provisional application of multilateral treaties that are in force with respect to the territory to which the succession of States relates.

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 with 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[1037] and 1986[1038] Vienna Conventions. Therefore, it should be considered together with those articles and other applicable rules of international law.

(3) The provisional application of a treaty or a part of a treaty is governed by international law. Like article 27,[1039] 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 internal law or rules cannot be invoked so as to avoid the responsibility that may be incurred for the breach of such obligations.[1040] 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 it is true that 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,[1041] once a treaty or a part of a treaty is provisionally applied, an inconsistency with the internal law of a State or of the rules of an international organization cannot justify a failure to provisionally apply such a treaty or a part thereof. Consequently, the invocation of those internal provisions in an attempt to justify a failure to provisionally apply 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.[1042] Any other view would be contrary to the law on State responsibility, according to which the characterization of an act of a State or an international

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[1037] 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.

[1038] 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.

[1039] See A. Schaus, "1969 Vienna Convention. Article 27: internal law and observance of treaties", in *The Vienna Conventions on the Law of Treaties. A Commentary*, vol. I, Corten and Klein (see footnote 997 above), pp. 688–701, at p. 689.

[1040] 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 … 1959*, vol. II, document A/CN.4/120, p. 43).

[1041] See Mertsch, *Provisionally Applied Treaties …* (see footnote 997 above), p. 64.

[1042] See Mathy, "Article 25", (footnote 997 above), p. 646.

organization as internationally wrongful is governed by international law and such characterization is not affected by its characterization as lawful by internal law.[1043]

(6) The reference in the draft guideline to the "internal law of States and rules of international organizations" stands for any provision of this 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 provisionally apply 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 binding obligation to apply the treaty or a part thereof as if the treaty were in force between the States and the international organizations concerned.

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,[1044] and the second, paragraph 2 of article 46 of the 1986 Vienna Convention.[1045] Therefore, the draft guideline should be considered together with those articles and other applicable rules of international law.

[1043] See article 3 of the draft articles on responsibility of States for internationally wrongful acts of 2001 (*Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 76, subsequently annexed to General Assembly resolution 56/83 of 12 December 2001); and draft article 5 of the draft articles on responsibility of international organizations of 2011 (*Yearbook … 2011*, vol. II (Part Two), para. 87, subsequently annexed to General Assembly resolution 66/100 of 9 December 2011).

[1044] 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.

[1045] 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

(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 of that type 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.[1046]

Guideline 12
Agreement to provisional application with limitations deriving from internal law of States and rules of international organizations

The present draft guidelines are without prejudice to the right of a State or an international organization 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 the State or from the rules of the organization.

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. It acknowledges that such limitations may exist and, consequently, recognizes the right of States and international organizations to agree to provisional application subject to limitations that derive from internal law or rules of the organizations, and reflecting them in their consent to provisionally apply a treaty or a part of a treaty.

(2) Notwithstanding the fact that the provisional application of a treaty or part of a treaty may be subject to limitations, the present draft guideline recognizes the flexibility of a State or an international organization 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.[1047]

(3) The word "agreement" in 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.[1048]

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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 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.

[1046] According to art. 46, para. 2, of the 1969 Vienna Convention and art. 46, para. 3, of the 1986 Vienna Convention.

[1047] See, for example, article 45 of the Energy Charter Treaty.

[1048] 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 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

(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 State or the rules of the international organization 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 provisionally apply a treaty or a part of a treaty.

43, paragraph 2, of the Free Trade Agreement between the EFTA States and the Southern African Custom 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.