

## Annexes

### Annex A

#### Draft model clauses on provisional application of treaties

(The following draft model clauses have been proposed by the Special Rapporteur for consideration by the Commission at its seventy-second session.)

##### Commencement and termination

###### *Draft model clause 1*

1. This Treaty [article (s)...] shall apply provisionally<sup>1</sup> from the date of signature<sup>2</sup> [or from X date<sup>3</sup>], unless<sup>4</sup> a State [an international organization] notifies the other State

<sup>1</sup> Protocol to the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other, to take account of the accession of the Republic of Croatia to the European Union, *Official Journal of the European Union*, No. L 373, p. 3, art. 4 (“This Protocol shall apply provisionally...”); Agreement between the European Community and the Government of the Kyrgyz Republic on certain aspects of air services, *Ibid.*, No. L 179, p. 20, art. 9 (“...the Parties agree to provisionally apply this Agreement...”); Exchange of notes between Switzerland and Liechtenstein relating to the distribution of the tax benefits on CO<sub>2</sub> and the reimbursement of the tax on CO<sub>2</sub> to enterprises under Liechtenstein’s law on the exchanges of rights, United Nations, *Treaty Series*, vol. 2763, p. 274, at 262, art. 12 (“...this Agreement shall apply provisionally...”); Council Decision of 18 November 2002 on the signature and provisional application of certain provisions of an Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (2002/979/EC), *Official Journal of the European Union*, No. L 352, 30 December 2002, p. 1, art. 2 (“The following provisions of the Association Agreement shall be applied on a provisional basis pending its entry into force ...”); ECOWAS Protocol A/P.1/12/99 relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security, art. 57 (“This Protocol shall enter into force provisionally upon signature...”); Supplementary Protocol A/SP.1/01/06 Amending Articles VI-C, VI-I, IX- 8, XI – 2 AND XII of Protocol A/P2/7/87 on the Establishment of the Western African Health Organization (WAHO), art. 2 (“This Protocol shall enter into force provisionally upon signature...”); Supplementary Protocol A/SP.1/06/06 amending the Revised ECOWAS Treaty, art. 4 (“The present Supplementary Protocol shall enter into force provisionally upon signature...”); ECOWAS Supplementary Protocol A/SP.2/06/06 amending Article 3 Paragraphs 1, 2 and 4, Article 4 Paragraphs 1, 3 and 7 and Article 7, Paragraph 3 of the Protocol on the Community Court of Justice, art. 8 (“This Supplementary Protocol shall come into force provisionally upon its signature...”).

<sup>2</sup> Treaty between the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan and the Kyrgyz Republic on the deepening of integration in economic and humanitarian fields (Moscow, 29 March 1996), United Nations, *Treaty Series*, vol. 2014, No. 34547, p. 15, art. 26; Statutes of the Community of Portuguese-Speaking Countries (Lisbon, 17 July 1996), *Ibid.*, vol. 2233, No. 39756, p. 207; Agreement concerning permission for the transit of Yugoslav nationals who are obliged to leave the country (Berlin, 21 March 2000), *Ibid.*, vol. 2307, No. 41137, p. 3, art. 7, para. 3; Agreement establishing the “Karanta” Foundation for support of non-formal education policies and including in annex the Statutes of the Foundation (Dakar, 15 December 2000), *ibid.*, vol. 2341, No. 41941, p. 3, art. 8; 1972 International Cocoa Agreement (Geneva, 21 October 1972), *ibid.*, vol. 882, No. 12652, p. 67, art. 66; Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea (Honolulu August 13, 2004), *ibid.*, [vol. not yet published], No. 51490, art. 17, para. 2.

<sup>3</sup> 1994 International Coffee Agreement, United Nations, *Treaty Series*, vol. 1827, No. 31252, p. 3, art. 40; 1994 International Tropical Timber Agreement, *Ibid.*, vol. 1955, No. 33484, p. 81, art. 41, para. 2; Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (Brussels, 21 March 2014), *Official Journal of the European Union*, L 161, p. 3; 1968 International Coffee Agreement (open for signature at New York from 18 to 31 March 1968), United Nations, *Treaty Series*, vol. 647, No. 9262, p. 3, art. 62, para. 2; 1976 International

[international organization] [Depository] at the time of signature [or any other time agreed upon] that it does not consent to be bound by such provisional application.<sup>5</sup>

2. The provisional application of this Treaty [or article (s)...] shall terminate upon its entry into force<sup>6</sup> for a State [an international organization] that is applying it provisionally or if that State [international organization] notifies the other State [international organization] [Depository] of its intention not to become a party to the Treaty.<sup>7</sup>

---

Coffee Agreement (London, 3 December 1975), *ibid.*, vol. 1024, No. 15034, p. 3, art. 61, para. 2; International Coffee Agreement, 1983 (London, 16 September 1982), *ibid.*, vol. 1333, No. 22376, p. 119, art. 61, para. 2. Exchange of notes between Switzerland and Liechtenstein relating to the distribution of the tax benefits on CO<sub>2</sub> and the reimbursement of the tax on CO<sub>2</sub> to enterprises under Liechtenstein's law on the exchanges of rights, United Nations, *Treaty Series*, vol. 2763, p. 274, at 262, No. 48680, art. 12 ("Like the Treaty, this Agreement shall apply provisionally as of...").

- <sup>4</sup> Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, *Official Journal of the European Union*, No. L 29, 4 February 2016, p. 3, art. 281, para. 5 ("unless otherwise specified therein, shall apply provisionally").
- <sup>5</sup> Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994), United Nations, *Treaty Series*, vol. 1836, p. 41, at p. 46, art. 7; Exchange of notes of 17 June 1979 constituting an agreement for the provisional application of the Convention on International Land Transport and the annexes thereto (Mar del Plata on 10 November 1977) (available on the website of the Ministry of Foreign Affairs of Peru, Directorate-General for Treaties: [https://apps.rree.gob.pe/portal/webtratados.nsf/Tratados\\_Bilateral.xsp?action=openDocument&documentId=E0F2](https://apps.rree.gob.pe/portal/webtratados.nsf/Tratados_Bilateral.xsp?action=openDocument&documentId=E0F2).); Protocol on the Provisional Application of the Agreement establishing the Caribbean Community Climate Change Centre (Belize City, 5 February 2002), United Nations, *Treaty Series*, [vol. not yet published], No. 51181 (text available at: <https://treaties.un.org>); Protocol on the Provisional Application of the Revised Treaty of Chaguaramas (Nassau, 5 July 2001), *ibid.*, vol. 2259, No. 40269, p. 440; Agreement on the provisional application of certain provisions of Protocol No. 14 [to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention] pending its entry into force (Agreement of Madrid) (Madrid, 12 May 2009), *Council of Europe Treaty Series*, No. 194; available at: <https://rm.coe.int/1680083718>.
- <sup>6</sup> Agreement of Madrid; Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 and the annex to the agreement, on costs to States parties and institutional arrangements; International Cocoa Agreement, 1986 (Geneva, 25 July 1986) United Nations, *Treaty Series*, vol. 1446, No. 24604, p. 104, art. 69 ("It shall remain a provisional member until the date of deposit of its instrument of ratification, acceptance, approval or accession."); Agreement on the provisional application of certain provisions of Protocol No. 14 pending its entry into force. Council of Europe, *Treaty Series*, No. 194, para. e ("the provisional application of the above-mentioned provisions of Protocol No. 14 will terminate upon entry into force of Protocol No. 14 or if the High Contracting Parties in some other manner so agree.").
- <sup>7</sup> Vienna Convention on the Law of Treaties (Vienna, 23 May 1969). United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331; Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the implementation of air traffic controls by the Federal Republic of Germany above Dutch territory and concerning the impact of the civil operations of Niederrhein Airport on the territory of the Kingdom of the Netherlands (Berlin, 29 April 2003), *ibid.*, vol. 2389, No. 43165, p. 117; Agreement between Spain and the International Oil Pollution Compensation Fund (London, 2 June 2000), *ibid.*, vol. 2161, No. 37756, p. 45; Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea (Honolulu, 13 August 2004), *ibid.*, vol. [not yet published], No. 51490 (text available at: <https://treaties.un.org>); 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, p. 3, at p. 126.; Energy Charter Treaty (Lisbon, 17 December 1994), *ibid.*, vol. 2080, No. 36116, p. 95; Final Act of the European Energy Charter Conference, Art. 45 (text available at: <https://www.italaw.com/sites/default/files/laws/italaw%206101%2833%29.pdf>) ("Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty"); Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (Brussels, 21 March 2014), *Official Journal of the European Union*, No. L 161, 29 May 2014, p. 3, art. 486, para. 7 ("Either Party may

## Form of agreement

### *Draft model clause 2*

This Treaty [or article (s)...] can be provisionally applied in accordance with the provisions of a separate agreement to that effect.<sup>8</sup>

---

give written notification to the Depository of its intention to terminate the provisional application of this Agreement.”); Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations, *ibid.*, No. L 143, 31 May 2011, p. 2, art. 2, para. 10 (“Either party may terminate this Agreement upon six month’s written notice to the other Party.”); Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, *ibid.*, No. L 29, 4 February 2016, p. 3, art. 281, para. 10 (“Either Party may terminate the provisional application by means of a written notification delivered to the other Party through diplomatic channels.”); ECOWS Energy Protocol A/P4/1/03, art. 40 (“Any signatory may terminate its provisional application of this Protocol by written notification to the Depository of its intention not to become a Contracting Party to the Protocol.”); Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, *Official Journal of the European Union*, No. L 127, 14 May 2011, p. 6, art. 15.10. para. c (“A Party may terminate provisional application by written notice to the other Party. Such termination shall take effect on the first day of the month following notification”); Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the implementation of air traffic controls by the Federal Republic of Germany above Dutch territory and concerning the impact of the civil operations of Niederrhein Airport on the territory of the Kingdom of the Netherlands (Berlin, 29 April 2003), United Nations, *Treaty Series*, vol. 2389, No. 43165, p. 117, art. 16 (“Its provisional application shall be terminated if one of the Contracting Parties declares its intention not to become a Contracting Party.”); 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, *Ibid.*, [vol. not yet published], No. 51490, art. 17, para. 3 (“This Agreement may be terminated by either Party upon written notification of such termination to the other Party through the diplomatic channel, termination to be effective one year from the date of such notification”); ECOWAS Energy Protocol A/P4/1/03, art. 40 (“Any signatory may terminate its provisional application of this Protocol by written notification to the Depository of its intention not to become a Contracting Party to the Protocol.”).

<sup>8</sup> Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994), United Nations, *Treaty Series*, vol. 1836, p. 41, at p. 46.; Agreement on the provisional application of certain provisions of Protocol No. 14 pending its entry into force; International Wheat Agreement 1986 (London, 14 March 1986), *ibid.*, vol. 1429, No. 24237, p. 85, art. 28 (Referencing a separate “mutual consent”); Havana Charter for an International Trade Organization (1947) (E/CONF.2/78) (text available at: [https://treaties.un.org/doc/source/docs/E\\_CONF.2\\_78-E.pdf](https://treaties.un.org/doc/source/docs/E_CONF.2_78-E.pdf) (“Any Member which before July 1, 1948 has signed the Protocol of Provisional Application...”).

**Opt in/Opt out<sup>9</sup>***Draft model clause 3*

A State [An international organization] that is not a negotiating State [international organization] of this Treaty may declare that it will provisionally apply it [or article (s)...], provided that the negotiating States [international organizations] accept such declaration.

*Draft model clause 4*

A State [An international organization] may declare that it will not provisionally apply a treaty [or article (s)...] when the decision to its [their] provisional application results from a resolution of [X international organization or X intergovernmental conference] to which that State [international organizations] does not agree.

<sup>9</sup> Draft Guideline 3 (General Rule) chose not to restrict the possibility of resorting to provisional application to the ‘negotiating States’ (and international organizations), thereby leaving open that possibility to ‘States (international organizations) concerned’. In order not to create a presumption that non-negotiating States and international organizations are generally permitted to be bound by the provisional application of a treaty or a part of a treaty, negotiating States should accept it as established in Draft Guideline 4 (Form of agreement), paragraph (b). This is what draft model clause 3 intends to address.

Draft Guideline 4 allows also for a resolution adopted by an international organization or at an intergovernmental conference, as a means to agree on the provisional application of a treaty or a part of a treaty. Some examples are the following: Article 3, Council Decision of 25 June 2012 on the signing, on behalf of the European Union, of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, and the provisional application of Part IV thereof concerning trade matters (2012/734/EU) (*Official Journal of the European Union*, No. L 346, 15 December 2012, p. 1); Article 2, Council Decision of 18 November 2002 on the signature and provisional application of certain provisions of an Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (2002/979/EC) (*Official Journal of the European Union*, No. L 352, 30 December 2002, p. 1); Article 4, Council Decision of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII thereof, as well as the related Annexes and Protocols (2014/668/EU) (*Official Journal of the European Union*, No. L 278, 20 September 2014, p. 1); Article 3, Council Decision of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (2014/494/EU) (*Official Journal of the European Union*, No. L 261, 30 August 2014, p. 1); Article 2, Council Decision of 10 May 2010 on the signing, on behalf of the European Union, and provisional application of the Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part (2013/40/EU) (*Official Journal of the European Union*, No. L 20, 23 January 2013, p. 1). Without prejudice to the rules of decision-making applicable to an international organization or intergovernmental conference in a concrete situation and to the question of whether a resolution has binding character, the voluntary nature of provisional application may call for an opt-out clause in case a State or international organization does not agree with such resolution. Draft model clause 4 addresses that situation.

## Limitations deriving from internal law of States or rules of international organizations<sup>10</sup>

### Draft model clause 5

A State [An international organization] may at the time of expressing its agreement to the provisional application of this Treaty [article (s)...] [or any other time agreed upon] notify the other State [international organization] [Depository] of any limitations deriving from its internal law<sup>11</sup> [the rules of the international organization] that would affect compliance by that State [international organization] of such provisional application.

<sup>10</sup> A number of multilateral treaties refer to the internal law of concerned States. Some examples are the following: Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea, article 7, paragraph 2; Agreement on collective forces of rapid response of the Collective Security Treaty Organization, art. 17; Trans-Pacific Strategic Economic Partnership Agreement, article 20.5, paragraph 3; Article 26 of the 1995 Grains Trade Convention; Article XXII (c) (signature and ratification) and article XXIII (c) (accession) of the 1999 Food Aid Convention; Article 40 (entry into force), paragraphs 2 and 3, of the 1994 International Coffee Agreement; Article 38 of the 2006 International Tropical Timber Agreement (notification of provisional application); and Article 45 (entry into force), paragraph 2, of the 2001 International Coffee Agreement.

<sup>11</sup> Energy Charter Treaty (Lisbon, 17 December 1994), United Nations, *Treaty Series*, vol. 2080, No. 36116, p. 95, art. 45 (“to the extent that such provisional application is not inconsistent with its constitution, laws or regulations”); Protocol Of Provisional Application of the General Agreement on Tariffs and Trade (Geneva, 30 October 1947), *ibid.*, vol. 55, No. 814, p. 308, art. 1 (“Undertake... to apply provisionally...to the fullest extent not inconsistent with existing legislation.”); International Natural Rubber Agreement (Geneva, 6 October 1979), *ibid.*, vol. 120, No. 19184, p. 191, art. 59 (“a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures.”); Sixth International Tin Agreement (Geneva, 26 June 1981), *ibid.*, vol. 1282, No. 21139 pg. 205, art. 53 (“will, within the limitations of its constitutional and/or legislative procedures, apply this Agreement provisionally...”); Agreement on Air Transport between Canada and the European Community and its Member States (available at: [https://www.icao.int/sustainability/Documents/Compendium\\_FairCompetition/Practices/EU-canada-OSA\\_final\\_text\\_agreement.pdf](https://www.icao.int/sustainability/Documents/Compendium_FairCompetition/Practices/EU-canada-OSA_final_text_agreement.pdf)) (“in accordance with the provisions of domestic law of the Parties...”); Common Aviation Area Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part (2010) (“ in accordance with their internal procedures and/or domestic legislation as applicable”); Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, *Official Journal of the European Union*, No. L 161, 29 May 2014, p. 3, art. 486, para. 3 (“ in accordance with their respective internal procedures and legislation as applicable.”); Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, *ibid.*, No. L 29, 4 February 2016, p. 3 (“ may apply this Agreement...in accordance with their respective internal procedures and legislation, as applicable”); EuroMediterranean Aviation Agreement between the European Community and its Member States, of the one part and the Kingdom of Morocco, of the other part, *ibid.*, No. L 386, 29 December 2006, p. 57, art. 30 (“in accordance with the national laws of the Contracting Parties, from the date of signature.”); ECOWAS Energy Protocol A/P4/1/03, art. 40 (“ to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.”); Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, *Official Journal of the European Union*, No. L 260, 30 August 2014, p. 4, art. 464 (“in accordance with their respective internal procedures and legislation, as applicable.”) Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, United Nations, *Treaty Series*, vol. 1836, p. 41, at p. 46, art. 7, para. 2 (“All such States and entities shall apply this Agreement provisionally in accordance with their national or internal laws and regulations...”).