

Chapter V

Provisional application of treaties

A. Introduction

41. 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.¹⁹⁶ 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.

42. The Commission considered the first report of the Special Rapporteur at its sixty-fifth session (2013); the second report at its sixty-sixth session (2014); the third report at its sixty-seventh session (2015); the fourth report at its sixty-eighth session (2016); and the fifth report at its seventieth session (2018).¹⁹⁷ 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).¹⁹⁸ At its seventieth session, on the basis of the draft guidelines proposed by the Special Rapporteur in the third, fourth and fifth reports, the Commission provisionally adopted 12 draft guidelines as the draft Guide to Provisional Application of Treaties, together with commentaries thereto, on first reading.¹⁹⁹

B. Consideration of the topic at the present session

43. At the present session, the Commission had before it the sixth report of the Special Rapporteur (A/CN.4/738), as well as comments and observations received from Governments and international organizations (A/CN.4/737). The Special Rapporteur, in his report, examined the comments and observations received from governments and international organizations on the draft Guide, as adopted on first reading, and on several draft model clauses, which he had proposed to Commission at its seventy-first session (2019).²⁰⁰ He made proposals for consideration on second reading, in the light of the comments and observations, and proposed a recommendation to the General Assembly.

44. At its 3514th meeting and its 3516th to 3522nd meetings, held from 4 to 14 May 2021, the Commission considered the sixth report of the Special Rapporteur.

non ultra petita rule). Given its judicial function, the Court needs to sufficiently understand the meaning of each related technical fact in the case at hand. See the statement by the President of International Court of Justice, Judge Yusuf, on “Le recours à des experts désignés par la Cour en vertu de l’article 50 du Statut”, made before the Sixth Committee of the General Assembly on 26 October 2018, available from www.icj-cij.org/en/statements-by-the-president. The line between “fact” and “law” is often obscured (M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (The Hague, Kluwer Law International, 1996), pp. 42–49). Scientific issues are described by commentators as “mixed questions of fact and law” (e.g., C.F. Amerasinghe, *Evidence in International Litigation*, (Leiden, Martinus Nijhoff Publishers, 2005), p. 58), which cannot be easily categorized into either a matter of law or fact. Judge Yusuf stated in his declaration in the *Pulp Mills* case that the experts’ role was to elucidate facts and to clarify the scientific validity of the methods used to establish facts or to collect data; whereas it is for the Court to weigh the probative value of the facts (*Pulp Mills* (see footnote 79 above), Declaration of Judge Yusuf, para. 10). See also Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (see footnote 193 above), pp. 145–147.

¹⁹⁶ *Yearbook ... 2012*, vol. II (Part Two), para. 267.

¹⁹⁷ A/CN.4/664 (first report), A/CN.4/675 (second report), A/CN.4/687 (third report), A/CN.4/699 and Add.1 (fourth report), and A/CN.4/718 and Add.1 (fifth report).

¹⁹⁸ A/CN.4/658, A/CN.4/676 and A/CN.4/707, respectively. The consideration of document A/CN.4/707 was postponed to the seventieth session.

¹⁹⁹ *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10 (A/73/10)*, paras. 85–86 and 89–90.

²⁰⁰ *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, annex A.

45. Following its debate on the report, the Commission, at its 3522nd meeting, held on 14 May 2021, decided to refer draft guidelines 1 to 12, together with five draft model clauses, as contained in the Special Rapporteur's sixth report, to the Drafting Committee, taking into account the debate in the Commission.

46. At its 3530th meeting, held on 3 June 2021, the Commission considered an interim report of the Drafting Committee. At its 3549th meeting, held on 26 July 2021, the Commission considered the final report of the Drafting Committee (A/CN.4/L.952/Rev.1), and adopted the Guide to Provisional Application of Treaties, including the draft guidelines and a draft annex containing examples of provisions on provisional application (see sect. E.1 below).

47. At its 3554th to 3557th meetings, held from 29 July to 3 August 2021, the Commission adopted the commentaries to the Guide (see sect. E.2 below).

48. In accordance with its statute, the Commission submits the Guide to the General Assembly, with the recommendation set out below (see sect. C below).

C. Recommendation of the Commission

49. At its 3557th meeting, held on 3 August 2021, the Commission decided, in accordance with article 23 of its statute, to recommend that the General Assembly:

(a) take note of the Guide to Provisional Application of Treaties of the International Law Commission in a resolution, and encourage its widest possible dissemination;

(b) commend the Guide, and the commentaries thereto, to the attention of States and international organizations;

(c) request the Secretary-General to prepare a volume of the *United Nations Legislative Series* compiling the practice of States and international organizations in the provisional application of treaties, as furnished by the latter over the years, together with other materials relevant to the topic.

D. Tribute to the Special Rapporteur

50. At its 3557th meeting, held on 3 August 2021, the Commission, after adopting the Guide to Provisional Application of Treaties, adopted the following resolution by acclamation:

“The International Law Commission,

Having adopted the Guide to Provisional Application of Treaties,

Expresses to the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, its deep appreciation and warm congratulations for the outstanding contribution he has made to the preparation of the Guide through his tireless efforts and devoted work, and for the results achieved in the elaboration of the Guide to Provisional Application of Treaties.”

E. Text of the Guide to Provisional Application of Treaties

1. Text of the draft guidelines and draft annex constituting the Guide to Provisional Application of Treaties

51. The text of the Guide to Provisional Application of Treaties adopted by the Commission, on second reading, at its seventy-second session is reproduced below.

Guide to Provisional Application of Treaties

Guideline 1

Scope

The present draft guidelines concern the provisional application of treaties by States or by international organizations.

Guideline 2

Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other relevant rules of international law.

Guideline 3

General rule

A treaty or a part of a treaty is applied provisionally pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

Guideline 4

Form of agreement

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed between the States or international organizations concerned through:

- (a) a separate treaty; or
- (b) any other means or arrangements, including:
 - (i) a resolution, decision or other act adopted by an international organization or at an intergovernmental conference, in accordance with the rules of such organization or conference, reflecting the agreement of the States or international organizations concerned;
 - (ii) a declaration by a State or by an international organization that is accepted by the other States or international organizations concerned.

Guideline 5

Commencement

The provisional application of a treaty or a part of a treaty takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as is otherwise agreed.

Guideline 6

Legal effect

The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof between the States or international organizations concerned, except to the extent that the treaty otherwise provides or it is otherwise agreed. Such treaty or part of a treaty that is being applied provisionally must be performed in good faith.

Guideline 7

Reservations

The present draft guidelines are without prejudice to any question concerning reservations relating to the provisional application of a treaty or a part of a treaty.

Guideline 8

Responsibility for breach

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

Guideline 9

Termination

1. The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.
2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or international organization notifies the other States or international organizations concerned of its intention not to become a party to the treaty.
3. Unless the treaty otherwise provides or it is otherwise agreed, a State or an international organization may invoke other grounds for terminating provisional application, in which case it shall notify the other States or international organizations concerned.
4. Unless the treaty otherwise provides or it is otherwise agreed, the termination of the provisional application of a treaty or a part of a treaty does not affect any right, obligation or legal situation created through the execution of such provisional application prior to its termination.

Guideline 10

Internal law of States, rules of international organizations and observance of provisionally applied treaties

1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.
2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

Guideline 11

Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

Guideline 12

Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations

The present draft guidelines are without prejudice to the right of States or international organizations to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of States or from the rules of international organizations.

Annex

Examples of provisions on provisional application of treaties

The following examples of provisions are intended to assist States and international organizations in drafting an agreement to apply provisionally a treaty or a part of a treaty. They do not cover all possible situations and are not intended to prescribe any specific formulation. These examples providing for the provisional application of treaties, found in

both bilateral and multilateral treaties,²⁰¹ are organized according to certain issues that typically arise, as set out in sections A to E. The examples listed come from recent practice,²⁰² and, to the extent possible, they reflect regional diversity. They are, however, not exhaustive.²⁰³

A. Commencement of provisional application

The examples of provisions on commencement of provisional application are as follow below.

1. From the date of signature

(a) Bilateral treaties

1. Undertaking between the Kingdom of the Netherlands and the Republic of the Philippines on the recognition of certificates under regulation 1/10 of the STCW 1978 Convention [Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978] (Manila, 31 May 2001):²⁰⁴

Article 11

Without prejudice to Article 9, this Undertaking shall apply provisionally from the date of its signature and shall enter into force on the first date of the second month after both Parties have notified each other in writing that the procedures required for the entry into force of the Undertaking in their respective countries have been complied with.

2. Agreement between the Government of the Kingdom of Denmark and the Council of Ministers of Serbia and Montenegro on the Succession to the Treaties Concluded between the Kingdom of Denmark and the Socialist Federal Republic of Yugoslavia (Copenhagen, 18 July 2003):²⁰⁵

Article 3

...

(b) The provisions of this Agreement shall apply provisionally from the date of the signature of the Agreement.

3. Agreement between the United Nations and the United Republic of Tanzania concerning the Headquarters of the International Residual Mechanism for Criminal Tribunals (Dar es Salaam, 26 November 2013):²⁰⁶

Article 48

Entry into force

1. The provisions of this Agreement shall be applied provisionally as from the date of signature.

(b) Multilateral treaties

4. Agreement between the Government of the Federal Republic of Germany, the United Nations and the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals concerning the Headquarters of the Convention Secretariat (Bonn, 18 September 2002):²⁰⁷

²⁰¹ For purposes of the present draft annex, so-called “mixed agreements”, which are concluded between the European Union and its Member States, on the one part, and a third party, on the other part, are categorized as bilateral treaties.

²⁰² See, in particular, the memorandum by the Secretariat on provisional application of treaties, [A/CN.4/707](#).

²⁰³ Non-inclusion of any example should not be interpreted as reflecting any position of the Commission with respect to said example.

²⁰⁴ United Nations, *Treaty Series*, vol. 2385, No. 43056, p. 403.

²⁰⁵ *Ibid.*, vol. 2420, No. 43679, p. 359.

²⁰⁶ *Ibid.*, vol. 2968, No. 51602, p. 237.

²⁰⁷ *Ibid.*, vol. 2306, No. 41136, p. 469.

Article 7
Final Provisions

...

(7) The provisions of this Agreement shall be applied provisionally, as from the date of signature, as appropriate, until its entry into force referred to in paragraph 9 below.

5. Agreement on the Amendments to the Framework Agreement on the Sava River Basin and the Protocol on the Navigation Regime to the Framework Agreement on the Sava River Basin (Ljubljana, 2 April 2004):²⁰⁸

Article 3

...

5. This Agreement shall be provisionally applied from the date of its signature.

6. Agreement on Collective Forces of Rapid Response of the Collective Security Treaty Organization (Moscow, 14 June 2009):²⁰⁹

Article 17

This Agreement shall provisionally apply as of the date of signature, unless it contravenes the national laws of the Parties, and shall enter into force on the date of receipt by the depositary of the fourth notification of the completion of the internal procedures necessary for its entry into force by the Parties that have signed it. ...

2. From a date other than the date of signature

(a) *Bilateral treaties*

7. Exchange of notes constituting an agreement on the abolition of visas for holders of diplomatic passports (Sofia, 16 December 1996):²¹⁰

Note from Bulgaria

...

6. This Agreement shall enter into force 30 days after the last notification through the diplomatic channel that the relevant internal legal requirements have been met. Its provisional application shall begin 10 days after the date of exchange of these Notes.

...

Note from Spain

...

The Embassy of the Kingdom of Spain in Sofia has the honour to inform the Ministry of Foreign Affairs of the Republic of Bulgaria that the Government of the Kingdom of Spain accepts the proposal of the Government of Bulgaria and agrees that the aforementioned Note and this reply shall constitute an Agreement between the Governments, which shall enter into force and be applied provisionally in accordance with the provisions of paragraph 6.

...

8. Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the Implementation of Air Traffic Controls by the Federal Republic of Germany above Dutch Territory and concerning the Impact of the Civil Operations of Niederrhein Airport on the Territory of the Kingdom of the Netherlands (Berlin, 29 April 2003):²¹¹

²⁰⁸ *Ibid.*, vol. 2367, No. 42662, p. 697.

²⁰⁹ *Ibid.*, vol. 2898, No. 50541, p. 277.

²¹⁰ *Ibid.*, vol. 1996, No. 34151, p. 33.

²¹¹ *Ibid.*, vol. 2389, No. 43165, p. 117.

Article 16**Ratification, entry into force, provisional application**

...

3. This Treaty shall be applied provisionally with effect from 1 May 2003. ...

9. Protocol to the Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and their Member States, of the one part, and the Republic of Kazakhstan, of the other part, to Take Account of the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Hungary, the Republic of Latvia, the Republic of Lithuania, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic to the European Union (Brussels, 30 April 2004).²¹²

Article 5

...

3. Where not all the instruments of approval of this Protocol have been deposited before 1 May 2004, this Protocol shall apply provisionally with effect from 1 May 2004.

10. Framework Agreement on Cooperation in the Field of Immigration between the Kingdom of Spain and the Republic of Mali (Madrid, 23 January 2007).²¹³

Article 16

...

2. This Framework Agreement shall apply provisionally after a period of thirty days from its signature.

11. Agreement between the Kingdom of the Netherlands and the Argentine Republic on Mutual Administrative Assistance in Customs Matters (Buenos Aires, 26 September 2012).²¹⁴

Article 23**Entry into force**

...

2. This Agreement shall be applied provisionally from the first day of the second month after its signature.

(b) *Multilateral treaties*

12. Document Agreed among the States Parties to the Treaty on Conventional Armed Forces in Europe of November 19, 1990 (Vienna, 31 May 1996).²¹⁵

VI

1. This Document shall enter into force upon receipt by the Depositary of notification of confirmation of approval by all States Parties. Section II, paragraphs 2 and 3, Section IV and Section V of this Document are hereby provisionally applied as of 31 May 1996 through 15 December 1996.

3. Upon conclusion or notification

(a) *Bilateral treaties*

13. Exchange of notes constituting an agreement concerning the abolition of visas for holders of diplomatic passports (Madrid, 27 December 1996).²¹⁶

²¹² *Ibid.*, vol. 2570, No. 45792, p. 254.

²¹³ *Ibid.*, vol. 2635, No. 46921, p. 3.

²¹⁴ *Ibid.*, vol. 2967, No. 51580, p. 123.

²¹⁵ *Ibid.*, vol. 2980, No. 44001, p. 195.

²¹⁶ *Ibid.*, vol. 1996, No. 34152, p. 45.

Note from Spain

...

Should the Government of Tunisia accept the foregoing proposal, on the basis of reciprocity, this Note and the reply to it from the Embassy of Tunisia shall constitute an Agreement between the Kingdom of Spain and the Republic of Tunisia, which shall be applied provisionally from the date of exchange of these Notes and shall enter into force on the date of the last notification of completion of the respective domestic requirements.

...

Note from Tunisia

...

The Embassy of the Republic of Tunisia in Madrid has the honour to inform the Ministry of Foreign Affairs that the Government of the Republic of Tunisia accepts the proposal of the Government of the Kingdom of Spain and agrees that the aforementioned Note and this reply should constitute an Agreement.

...

14. Exchange of notes constituting an agreement amending the Agreement between the Kingdom of the Netherlands and the International Criminal Tribunal for the former Yugoslavia concerning the position of ICTY trainees in the Netherlands (The Hague, 14 July 2010):²¹⁷

Note from the Netherlands

...

If the abovementioned proposal is acceptable to the UN-ICTY, the Ministry has the honour to propose that this Note and the affirmative Note in reply of the UN-ICTY shall constitute an amendment to the Interns Agreement, that shall be provisionally applied as from the date of receipt of the affirmative Note in reply, and shall enter into force on the day after both Parties have notified each other in writing that the legal requirements for entry into force have been complied with.

...

Note from the International Criminal Tribunal for the former Yugoslavia (UN-ICTY)

...

The UN-ICTY has further the honour to inform the Ministry that the proposals set forth in the Ministry's note are acceptable to the UN-ICTY and to confirm that the Ministry's note and this note shall constitute an amendment to the Interns Agreement, that shall be provisionally applied as from the date of receipt of this affirmative Note in reply, and shall enter into force on the day after both Parties have notified each other in writing that the legal requirements for entry into force have been complied with.

...

15. Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (Brussels, 6 October 2010):²¹⁸

**Article 15.10
Entry into force**

...

²¹⁷ *Ibid.*, vol. 2689, No. 41714, p. 93.

²¹⁸ *Official Journal of the European Union*, vol. 54, L 127, 14 May 2011, p. 6.

5. (a) This Agreement shall be provisionally applied from the first day of the month following the date on which the EU Party and Korea have notified each other of the completion of their respective relevant procedures.

...

(b) *Multilateral treaties*

16. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995):²¹⁹

Article 41
Provisional application

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

17. International Cocoa Agreement, 2001 (Geneva, 2 March 2001):²²⁰

Article 57
Notification of provisional application

1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government which intends to accede to the Agreement, but which has not yet been able to deposit its instrument, may at any time notify the depositary that, in accordance with its constitutional procedures and/or its domestic laws and regulations, it will apply this Agreement provisionally either when it enters into force in accordance with article 58 or, if it is already in force, at a specified date. Each Government giving such notification shall at that time state whether it will be an exporting Member or an importing Member.

2. A Government which has notified under paragraph 1 of this article that it will apply this Agreement either when it enters into force or at a specified date shall, from that time, be a provisional Member. It shall remain a provisional Member until the date of deposit of its instrument of ratification, acceptance, approval or accession.

18. Convention on Cluster Munitions (Dublin, 30 May 2008):²²¹

Article 18
Provisional application

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

19. Arms Trade Treaty (New York, 2 April 2013):²²²

Article 23
Provisional Application

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

²¹⁹ United Nations, *Treaty Series*, vol. 2167, No. 37924, p. 3.

²²⁰ *Ibid.*, vol. 2229, No. 39640, p. 2.

²²¹ *Ibid.*, vol. 2688, No. 47713, p. 39.

²²² *Ibid.*, vol. 3013, No. 52373, [not yet published].

B. Form of agreement on provisional application

The examples concerning forms of agreement for provisional application are as follow below.

(a) *Bilateral treaties*

20. Agreement on the Taxation of Savings Income and the Provisional Application Thereof (Brussels, 26 May 2004, and The Hague, 9 November 2004):²²³

Letter from Germany

...

Pending the completion of these internal procedures and the entry into force of this “Convention concerning the automatic exchange of information regarding savings income in the form of interest payments”, I have the honour to propose to you that the Federal Republic of Germany and the Kingdom of the Netherlands in respect of Aruba apply this Convention provisionally, within the framework of our respective domestic constitutional requirements, as from 1 January 2005, or the date of application of Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments, whichever is later.

...

Letter from the Netherlands in respect of Aruba

...

I am able to confirm that the Kingdom of the Netherlands in respect of Aruba is in agreement with the contents of your letter.

...

(b) *Multilateral treaties*

21. Protocol on the Provisional application of the Agreement Establishing the Caribbean Community Climate Change Centre (Belize City, 5 February 2002):²²⁴

Recalling that Article 37 of the Agreement Establishing the Caribbean Community Climate Change Centre (CCCCC) provided for its entry into force upon the deposit of the seventh Instrument of Ratification with the Government of the host country,

Desiring to provide for the expeditious operationalisation of the Caribbean Community Climate Change Centre (CCCCC),

Have agreed as follows:

Article I

Provisional Application of the Agreement Establishing the Caribbean Community Climate Change Centre

The signatories of the Agreement Establishing the Caribbean Community Climate Change Centre have agreed, to apply the said Agreement among themselves provisionally, pending its definitive entry into force in accordance with Article 37 thereof.

22. Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 [to the Convention for the Protection of Human Rights and Fundamental Freedoms] Pending its Entry into Force (Madrid, 12 May 2009):²²⁵

...

²²³ *Ibid.*, vol. 2821, No. 49430, p. 3.

²²⁴ *Ibid.*, vol. 2953, No. 51181, p. 181.

²²⁵ Council of Europe, *Treaty Series*, No. 194.

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

23. Resolution 365 (XII) of the General Assembly of the United Nations World Tourism Organization entitled "Future of the Organization":²²⁶

...

Noting with regret that the amendment to Article 14 of the Statutes which it adopted by resolution 134(V), aimed at conferring on the host State a permanent seat on the Executive Council, together with the right to vote and not subject to the principle of geographical distribution of Council seats, has not yet received approval from the requisite number of States,

2. Decides that this amendment will be applied provisionally pending its ratification.

C. Opt in/Opt out of provisional application

The examples of provisions on opt in/opt out of provisional application are as follow below.

24. Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994):²²⁷

Article 7

Provisional application

1. If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force by:

(a) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which before 16 November 1994 notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing;

(b) States and entities which sign this Agreement, except any such State or entity which notifies the depositary in writing at the time of signature that it will not so apply this Agreement;

(c) States and entities which consent to its provisional application by so notifying the depositary in writing;

(d) States which accede to this Agreement.

25. Arms Trade Treaty (New York, 2 April 2013):²²⁸

Article 23

Provisional application

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

²²⁶ United Nations World Tourism Organization, General Assembly resolution 365 (XII), adopted at its twelfth session in Istanbul, October 1997.

²²⁷ United Nations, *Treaty Series*, vol. 1836, No. 31364, p. 3.

²²⁸ See footnote 222 above.

D. Limitations to provisional application deriving from internal law of States or rules of international organizations

The examples of provisions on limitations to provisional application deriving from internal law of the States or rules of international organizations are as follow below.

(a) Bilateral treaties

26. Agreement between the Kingdom of Spain and the Republic of El Salvador on Air Transport (Madrid, 10 March 1997):²²⁹

Article XXIV

Entry into Force and Denunciation

1. The Contracting Parties shall provisionally apply the provisions of this Agreement from the time of its signature to the extent that they do not conflict with the law of either of the Contracting Parties. This Agreement shall enter into force when both Contracting Parties have notified each other through an exchange of diplomatic notes of the completion of their respective constitutional formalities.

27. Agreement between the Government of the Kingdom of the Netherlands and the Cabinet of Ministers of Ukraine concerning Technical and Financial Cooperation (Kiev, 11 May 1998):²³⁰

Article 7

Final Clauses

...

7.2. This Agreement shall be provisionally applied from the date of signing insofar as it does not contradict with existing legislation of both Parties.

28. Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea (Honolulu, 13 August 2004):²³¹

Article 17

Entry into Force and Duration

...

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

29. Agreement between the Government of the Federal Republic of Germany and the Council of Ministers of Serbia and Montenegro regarding Technical Cooperation (Belgrade, 13 October 2004):²³²

Article 7

...

3. After signature, this Agreement shall be provisionally implemented in accordance with the appropriate domestic law.

30. Euro-Mediterranean Aviation Agreement between the European Community and its Member States, of the one part and the Kingdom of Morocco, of the other part (Brussels, 12 December 2006):²³³

²²⁹ United Nations, *Treaty Series*, vol. 2023, No. 34927, p. 341.

²³⁰ *Ibid.*, vol. 2386, No. 43066, p. 3.

²³¹ *Ibid.*, vol. 2962, No. 51490, p. 339.

²³² *Ibid.*, vol. 2424, No. 43752, p. 167.

²³³ *Official Journal of the European Union*, vol. 49, L 386, 29 December 2006, p. 57.

Article 30
Entry into force

1. This Agreement shall be applied provisionally, in accordance with the national laws of the Contracting Parties, from the date of signature.
31. Agreement between the United States of America and the Kingdom of Spain on Cooperation in Science and Technology for Homeland Security Matters (Madrid, 30 June 2011).²³⁴

Article 21
Entry into Force, Amendment, Duration and Termination

1. This Agreement shall apply provisionally upon signature of both Parties, consistent with each Party's domestic law. ...
- (b) *Multilateral treaties*
32. Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994).²³⁵

Article 7
Provisional application

- ...
2. All such States and entities shall apply this Agreement provisionally in accordance with their national or internal laws and regulations, with effect from 16 November 1994 or the date of signature, notification of consent or accession, if later.
33. Grains Trade Convention, 1995 (London, 7 December 1994).²³⁶

Article 26
Provisional application

- Any signatory Government and any other Government eligible to sign this Convention, or whose application for accession is approved by the Council, may deposit with the depositary a declaration of provisional application. Any Government depositing such a declaration shall provisionally apply this Convention in accordance with its laws and regulations and be provisionally regarded as a party thereto.
34. ECOWAS [Economic Community of West African States] Energy Protocol (Dakar, 31 January 2003).²³⁷

Article 40
Provisional Application

- (1) Each signatory agrees to apply this Protocol provisionally pending its entry into force for such signatory in accordance with Article 39, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

E. Termination of provisional application

The examples of provisions on termination of provisional application are as follow below.

1. Upon entry into force

(a) *Bilateral treaties*

35. Free Trade Agreement between the Government of the Republic of Latvia and the Government of the Czech Republic (Riga, 15 April 1996).²³⁸

²³⁴ United Nations, *Treaty Series*, vol. 2951, No. 51275, p. 3.

²³⁵ See footnote 227 above.

²³⁶ United Nations, *Treaty Series*, vol. 1882, No. 32022, p. 195.

²³⁷ A/P4/1/03.

²³⁸ United Nations, *Treaty Series*, vol. 2069, No. 35853, p. 225.

Article 41
Provisional Application

Pending the entry into force of this Agreement according to Article 40, the Czech Republic shall apply this Agreement provisionally from 1 July 1996, provided that the Republic of Latvia shall notify prior to 15 June 1996, that its internal legal requirements for entry into force of this Agreement are fulfilled and that the Republic of Latvia shall apply this Agreement from 1 July 1996.

36. Agreement between the Government of the Federal Republic of Germany and the Government of the Republic of Slovenia concerning the inclusion in the reserves of the Slovenian Office for Minimum Reserves of Petroleum and Petroleum Products of supplies of petroleum and petroleum products stored in Germany on its behalf (Ljubljana, 18 December 2000):²³⁹

Article 8

...

2. This Agreement shall be applied provisionally from the date of signature until its entry into force.

37. Air Transport Agreement between the Government of the Republic of Paraguay and the Government of the United States of America (Asunción, 2 May 2005):²⁴⁰

Article 17
Entry into Force

This Agreement and its Annexes shall be provisionally applied from the date of signature and shall enter into force on the date of the later note in an exchange of diplomatic notes between the Parties confirming that each Party has completed the necessary internal procedures for entry into force of this Agreement. ...

38. Agreement between the Kingdom of Spain and the International Air Transport Association (IATA) on the status of the IATA in Spain (Madrid, 5 May 2009):²⁴¹

Article 12
Entry into force

1. This Agreement shall apply provisionally from the time of its signature, pending its ratification by Spain and its approval by the IATA.

39. Agreement between the United Nations and the Government of Sudan concerning the status of the United Nations Interim Security Force for Abyei (New York, 1 October 2012):²⁴²

XI
Miscellaneous Provisions

...

62. The present Agreement shall enter into force and shall be applied provisionally by the Government upon signature, pending the Government's notification that it has completed internal ratification procedures under the Constitution of Sudan.

(b) *Multilateral treaties*

40. Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994):²⁴³

²³⁹ *Ibid.*, vol. 2169, No. 38039, p. 287.

²⁴⁰ *Ibid.*, vol. 2429, No. 43807, p. 301.

²⁴¹ *Ibid.*, vol. 2643, No. 47110, p. 91.

²⁴² *Ibid.*, vol. 2873, No. 50146, p. 125.

²⁴³ See footnote 227 above.

Article 7
Provisional application

...

3. Provisional application shall terminate upon the date of entry into force of this Agreement. In any event, provisional application shall terminate on 16 November 1998 if at that date the requirement in article 6, paragraph 1, of consent to be bound by this Agreement by at least seven of the States (of which at least five must be developed States) referred to in paragraph 1 (a) of resolution II has not been fulfilled.

41. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997):²⁴⁴

Article 18
Provisional Application

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

2. Upon notification not to become a party to the treaty

(a) *Bilateral treaties*

42. Agreement between Spain and the International Oil Pollution Compensation Fund (London, 2 June 2000):²⁴⁵

Note from Spain

...

The provisional application of this Agreement shall terminate if Spain, through the Ambassador of Spain in London, notifies the Fund before 11 May 2001 that all the aforementioned procedures have been completed, or if prior to that date Spain notifies the Fund, through its Ambassador in London, that those procedures will not be completed.

...

Note from the International Oil Pollution Compensation Fund 1992

...

With regard to the Agreement signed by Spain and the Fund and your letter of today's date, I have the honour to inform you that the Fund is in agreement with the content of your letter, which should be considered as an instrument formulated by the two parties establishing the only possible interpretation of the Agreement.

...

43. Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the implementation of air traffic controls by the Federal Republic of Germany above Dutch territory and concerning the impact of the civil operations of Niederrhein Airport on the territory of the Kingdom of the Netherlands (Berlin, 29 April 2003):²⁴⁶

Article 16
Ratification, entry into force, provisional application

...

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

²⁴⁴ United Nations, *Treaty Series*, vol. 2056, No. 35597, p. 211.

²⁴⁵ *Ibid.*, vol. 2161, No. 37756, p. 45.

²⁴⁶ *Ibid.*, vol. 2389, No. 43165, p. 117.

44. Agreement between the European Community and the Hashemite Kingdom of Jordan on Scientific and Technological Cooperation (Brussels, 30 November 2009):²⁴⁷

Article 7

Final provisions

...

2. This Agreement shall enter into force when the Parties will have notified to each other the completion of their internal procedures for its conclusion. Pending the completion by the Parties of said procedures, the Parties shall provisionally apply this Agreement upon its signature. Should a Party notify the other that it shall not conclude the Agreement, it is hereby mutually agreed that projects and activities launched under this provisional application and that are still in progress at the time of the abovementioned notification shall continue until their completion under the conditions laid down in this Agreement.

(b) *Multilateral treaties*

45. ECOWAS Energy Protocol (Dakar, 31 January 2003):²⁴⁸

Article 40

Provisional Application

...

(3) (a) Any signatory may terminate its provisional application of this Protocol by written notification to the Depository of its intention not to become a Contracting Party to the Protocol. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.

3. Other grounds

(a) *Bilateral treaties*

46. Agreement between the Government of the United States of America and the Government of the Republic of Liberia concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea (Washington, 11 February 2004):²⁴⁹

Article 17

Entry into Force and Duration

...

2. Provisional Application. Beginning on the date of signature of this Agreement, the Parties shall, to the extent permitted by their respective national laws and regulations, apply it provisionally. Either Party may discontinue provisional application at any time. Each Party shall notify the other Party immediately of any constraints or limitations on provisional application, of any changes to such constraints or limitations, and upon discontinuation of provisional application.

47. Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (Brussels, 6 October 2010):²⁵⁰

²⁴⁷ *Ibid.*, vol. 2907, No. 50651, p. 51.

²⁴⁸ See footnote 237 above.

²⁴⁹ United Nations, *Treaty Series*, vol. 2963, No. 51492, p. 23.

²⁵⁰ See footnote 218 above.

Article 15.10
Entry into force

5. ...

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

48. Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (Brussels, 21 March 2014):²⁵¹

Article 486
Entry into force and provisional application

...

7. Either Party may give written notification to the Depositary of its intention to terminate the provisional application of this Agreement. ...

(b) *Multilateral treaties*

49. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995):²⁵²

Article 41
Provisional Application

...

2. Provisional application by a State or entity shall terminate upon the entry into force of this Agreement for that State or entity or upon notification by that State or entity to the depositary in writing of its intention to terminate provisional application.

50. Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 [to the Convention for the Protection of Human Rights and Fundamental Freedoms] Pending its Entry into Force (Madrid, 12 May 2009):²⁵³

(e) the provisional application of the above-mentioned provisions of Protocol No. 14 will terminate upon entry into force of Protocol No. 14 or if the High Contracting Parties in some other manner so agree.

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

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

Guide to Provisional Application of Treaties

General commentary

(1) The purpose of the Guide to Provisional Application of Treaties is to provide assistance to States, international organizations and other users concerning the law and practice on the provisional application of treaties. States, international organizations and other users may encounter difficulties regarding, *inter alia*, the form of the agreement to apply provisionally a treaty or a part of a treaty, the commencement and termination of such provisional application, and its legal effect. The objective of the Guide is to direct States, international organizations and other users to answers that are consistent with existing rules

²⁵¹ *Official Journal of the European Union*, vol. 57, L 161, 29 May 2014, p. 3.

²⁵² See footnote 219 above.

²⁵³ Council of Europe, *Treaty Series*, No. 194.

or that seem most appropriate for contemporary practice. As is always the case with the Commission's output, the draft guidelines are to be read together with the commentaries.

(2) Provisional application is a mechanism available to States and international organizations to give immediate effect to all or some of the provisions of a treaty prior to the completion of all internal and international requirements for its entry into force.²⁵⁴ Provisional application serves a practical purpose, and thus a useful one, for example, when the subject matter entails a certain degree of urgency or when the negotiating States or international organizations want to build trust in advance of entry into force,²⁵⁵ among other objectives.²⁵⁶ More generally, provisional application serves the overall purpose of preparing for or facilitating the entry into force of the treaty. It must, however, be stressed that provisional application constitutes a voluntary mechanism which States and international organizations are free to resort to or not, and which may be subject to limitations deriving from the internal law of States and rules of international organizations.

(3) Although the Guide is not legally binding, it seeks to describe and clarify existing rules of international law in the light of contemporary practice. The Guide takes as a point of departure article 25 of both the Vienna Convention on the Law of Treaties of 1969 (hereinafter, "1969 Vienna Convention")²⁵⁷ and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 (hereinafter, "1986 Vienna Convention"),²⁵⁸ which it tries to clarify and explain, and on the practice of States and international organizations on the matter. The terms defined in article 2 of the 1969 and 1986 Vienna Conventions are used in the present Guide with the meaning given in those provisions. While the Guide is without prejudice to

²⁵⁴ See D. Mathy, "Article 25", in O. Corten and P. Klein, eds., *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. 1, (Oxford, Oxford University Press, 2011), p. 640; and A.Q. Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Leiden, Brill, 2012). The concept has been defined by writers as "the application of and binding adherence to a treaty's terms before its entry into force" (R. Lefeber, "Treaties, provisional application", in *The Max Planck Encyclopedia of Public International Law*, vol. 10, R. Wolfrum, ed. (Oxford, Oxford University Press, 2012), p. 1) or as "a simplified form of obtaining the application of a treaty, or of certain provisions, for a limited period of time" (M.E. Villager, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden and Boston, Martinus Nijhoff, 2009), p. 354).

²⁵⁵ See H. Krieger, "Article 25", in *Vienna Convention on the Law of Treaties: A Commentary*, O. Dörr and K. Schmalenbach, eds. (Heidelberg and New York, Springer, 2012), p. 408.

²⁵⁶ See first report of the Special Rapporteur on the provisional application of treaties, *Yearbook ... 2013*, vol. II (Part One), document [A/CN.4/664](#), paras. 25–35.

²⁵⁷ Article 25 of the 1969 Vienna Convention reads as follows:

Provisional application

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

(United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331, at pp. 338–339.)

²⁵⁸ Article 25 of the 1986 Vienna Convention reads as follows:

Provisional application

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
 - (a) the treaty itself so provides; or
 - (b) the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have in some other manner so agreed.
2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty. ([A/CONF.129/15](#) (not yet in force).)

the application of other rules of the law of treaties, it relies on relevant provisions in the 1969 and 1986 Vienna Conventions where appropriate, without being intended to cover every possible application of all provisions of both Vienna Conventions, particularly where practice has not yet developed. In general, the Guide reflects the current *lex lata*, although some aspects of it are more recommendatory in nature. The Guide is thus a *vade mecum* in which practitioners should find answers to questions raised by the provisional application of treaties. It is to be underscored, however, that it is in no way claimed that the Guide creates any kind of presumption in favour of resorting to the provisional application of treaties. Provisional application is neither a substitute for securing entry into force of treaties, which remains the natural vocation of treaties, nor a means of bypassing domestic procedures.

(4) It is of course impossible to address all the questions that may arise in practice or to cover the myriad of situations that may be faced by States and international organizations. Yet, a general approach is consistent with one of the main aims of the present Guide, which is to acknowledge the flexible nature of the provisional application of treaties²⁵⁹ and to avoid any temptation to be overly prescriptive. In line with the essentially voluntary nature of provisional application, which always remains optional, the Guide recognizes that States and international organizations may agree on solutions not identified in the Guide that they consider more appropriate to the purposes of a given treaty. Another essential character of provisional application is its capacity to adapt to varying circumstances.²⁶⁰

(5) To provide additional assistance to States and international organizations in provisional application, the Guide also includes examples of provisions on the subject found in bilateral and multilateral treaties, which are reproduced in the draft annex hereto. Their inclusion is in no way intended to limit the flexible and voluntary nature of provisional application of treaties, and the examples do not seek to address the whole range of situations that may arise, nor are they characterized as anything more than examples.

Guideline 1 **Scope**

The present draft guidelines concern the provisional application of treaties by States or by international organizations.

²⁵⁹ See first report of the Special Rapporteur (A/CN.4/664), paras. 28–30.

²⁶⁰ For example, provisional application was used recently in connection with the United Kingdom's withdrawal from the European Union. Three European Union-United Kingdom treaties were provisionally applied: the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, Brussels and London, 30 December 2020, *Official Journal of the European Union*, L 444, p. 14; the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information, Brussels and London, 30 December 2020, *ibid.*, L 149, p. 2540; and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the European Atomic Energy Community for Cooperation on the Safe and Peaceful Uses of Nuclear Energy, Brussels and London, 30 December 2020, *ibid.*, L 150, p. 1. These were provisionally applied from 1 January 2021 to 30 April 2021, which dates included an extension agreed at the end of February 2021. The United Kingdom has also made use of provisional application in respect of other treaties in the context of withdrawal from the European Union, both bilateral and plurilateral (see, for example, www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries).

The flexibility provided in article 25, paragraph 1 (b), of the 1969 Vienna Convention was illustrated, for instance, by the fact that the treaty partners agreed, on some occasions, to provisional application by an exchange of notes: for example, the exchange of letters on the provisional application of the Agreement between the European Atomic Energy Community and the Government of the United Kingdom of Great Britain and Northern Ireland for Cooperation on the Safe and Peaceful Uses of Nuclear Energy, *ibid.*, L 445, p. 23).

Commentary

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

(2) The Guide consistently uses the term “provisional application of treaties”. In practice, the extensive use of other terms, such as “provisional entry into force” as opposed to *definitive* entry into force, has led to confusion regarding the scope and the legal effect of the concept of the provisional application of treaties.²⁶¹ In the same vein, quite frequently, treaties do not use the adjective “provisional”, but speak instead of “temporary” or “interim” application.²⁶² Consequently, the framework of article 25 of the 1969 and 1986 Vienna Conventions, while constituting the legal basis for the exercise of provisional application,²⁶³ lacks detail and precision and can thus benefit from further clarification.²⁶⁴ The intention of the Guide is accordingly to provide greater clarity to the interpretation of article 25 of both Vienna Conventions.

(3) The Guide concerns the provisional application of treaties “by States or by international organizations”. The reference to “States” and “international organizations”, which is employed in a number of the draft guidelines, should not be understood as implying that the scope of the draft guidelines is limited to treaties concluded between States, between States and international organizations or between international organizations.

Guideline 2

Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other relevant rules of international law.

Commentary

(1) Draft guideline 2 sets forth the purpose of the Guide to provide guidance to States and international organizations regarding the law and practice on the provisional application of treaties.

(2) The draft guideline seeks to emphasize that the Guide is based on the 1969 Vienna Convention and other relevant rules of international law, including the 1986 Vienna Convention. The reference to “and other relevant rules of international law” is primarily

²⁶¹ In this regard, reference can be made to the analysis contained in *The Treaty, Protocols, Conventions and Supplementary Acts of the Economic Community of West African States (ECOWAS), 1975–2010* (Abuja, Ministry of Foreign Affairs of Nigeria, 2011), which is a collection of a total of 59 treaties concluded under the auspices of the Community. There it can be observed that of those 59 treaties, only 11 did not provide for provisional application (see [A/CN.4/699](#), paras. 168–174).

²⁶² See paragraph 33 of the letter from the Federal Republic of Yugoslavia in the Exchange of Letters Constituting an Agreement between the United Nations and the Federal Republic of Yugoslavia on the Status of the Office of the United Nations High Commissioner for Human Rights in the Federal Republic of Yugoslavia (United Nations, *Treaty Series*, vol. 2042, No. 35283, p. 23, and *United Nations Juridical Yearbook 1998* (United Nations publication, Sales No. E.03.V.5), at p. 103); article 15 of the Agreement between Belarus and Ireland on the Conditions of Recuperation of Minor Citizens from the Republic of Belarus in Ireland (United Nations, *Treaty Series*, vol. 2679, No. 47597, p. 65, at p. 79); and article 16 of the Agreement between the Government of Malaysia and the United Nations Development Programme concerning the Establishment of the UNDP Global Shared Service Centre (*ibid.*, vol. 2794, No. 49154, p. 67). See the memorandums by the Secretariat on the origins of article 25 of the 1969 and 1986 Vienna Conventions (*Yearbook ... 2013*, vol. II (Part One), document [A/CN.4/658](#), and [A/CN.4/676](#)), and the memorandum by the Secretariat on the practice of States and international organizations in respect of treaties that provide for provisional application ([A/CN.4/707](#)).

²⁶³ See Mertsch, *Provisionally Applied Treaties ...* (see footnote 254 above), p. 22.

²⁶⁴ See A. Geslin, *La mise en application provisoire des traités* (Paris, Editions A. Pedone, 2005), p. 111; M.A. Rogoff and B.E. Gauditz, “The provisional application of international agreements”, *Maine Law Review*, vol. 39 (1987), p. 41.

meant to extend the scope of the provision to the provisional application of treaties by international organizations. It acknowledges that the 1986 Vienna Convention has not yet entered into force, and accordingly should not be referred to in the same manner as its 1969 counterpart.

(3) Draft guideline 2 serves to confirm the basic approach taken throughout the Guide, namely that article 25 of the 1969 and the 1986 Vienna Conventions does not reflect all aspects of contemporary practice on the provisional application of treaties. This is implicit in the reference to both “the law and practice” on the provisional application of treaties. Such an approach is further referred to in the reference to “other relevant rules of international law”, which signifies that other rules of international law, including those of a customary nature, may also be applicable to the provisional application of treaties.

(4) At the same time, notwithstanding the possibility of the existence of other rules and practice relating to the provisional application of treaties, the Guide recognizes the central importance of article 25 of the 1969 and 1986 Vienna Conventions. The reference to “on the basis of”, in conjunction with the express reference to article 25, is intended to indicate that this article serves as the point of departure of the Guide, even if it is to be supplemented by other rules of international law in order fully to reflect the law applicable to the provisional application of treaties.

Guideline 3

General rule

A treaty or a part of a treaty is applied provisionally, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

Commentary

(1) Draft guideline 3 states the general rule on the provisional application of treaties. The text of the draft guideline follows the formulation of article 25 of the 1969 Vienna Convention, so as to underscore that the starting point for the Guide is article 25. That premise is subject to the general understanding referred to in paragraph (3) of the commentary to draft guideline 2, namely that the 1969 and the 1986 Vienna Conventions do not reflect all aspects of contemporary practice on the provisional application of treaties.

(2) The opening phrase confirms the general possibility that a treaty, or a part of a treaty, may be applied provisionally. The formulation follows that found in the chapeau to paragraph 1 of article 25 of the 1969 and the 1986 Vienna Conventions.

(3) The distinction between provisional application of the entire treaty, as opposed to a “part” thereof, originates in article 25. The Commission, in its prior work on the law of treaties, specifically envisaged the possibility of what became referred to as provisional application of only a part of a treaty. In draft article 22, paragraph 2, of the 1966 draft articles on the law of treaties, the Commission confirmed that the “same rule” applied to “part of a treaty”.²⁶⁵ In the corresponding commentary, it was explained that: “[n]o less frequent today is the practice of bringing into force provisionally only a certain part of a treaty in order to meet the immediate needs of the situation”.²⁶⁶ The possibility of provisional application of only a part of a treaty also helps overcome the problems arising from certain types of provisions, such as operational clauses establishing treaty monitoring mechanisms that may exercise their functions during the stage of provisional application. Furthermore, parts of treaties containing trade provisions are frequently subject to provisional application.²⁶⁷ The

²⁶⁵ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 177 ff., para. 38.

²⁶⁶ Paragraph (3) of the commentary to draft article 22, *ibid.*

²⁶⁷ The provisional application of part of a treaty is also common in mixed agreements concluded between the European Union and its member States, on the one part, and a third party, on the other part, as a result of a distribution of competence between the European Union and its member States. See comments and observations received from Governments and international organizations (A/CN.4/737), comments of Germany on draft guideline 3, p. 14. See also M. Chamon, “Provisional

provisional application of a part of a treaty is accordingly reflected in the formula “provisional application of a treaty or a part of a treaty”, which is used throughout the Guide.²⁶⁸

(4) The second phrase, namely “pending its entry into force between the States or international organizations concerned”, is based on the chapeau of article 25. The reference to “pending its entry into force” underscores the role played by provisional application in preparing for or facilitating such entry into force, even if it may pursue other objectives. While the expression could be read as referring to the entry into force of a treaty itself,²⁶⁹ in the case of multilateral treaties provisional application normally continues for States or international organizations after the entry into force of a treaty itself, when the treaty had not yet entered into force for those States and international organizations.²⁷⁰ The reference to “entry into force” in draft guideline 3 is therefore to be understood in accordance with article 24 of the 1969 and 1986 Vienna Conventions on the same subject. It deals with both the entry into force of the treaty itself and the entry into force for each State or international organization concerned, i.e., those States or international organizations that had assumed rights and obligations pursuant to provisional application. The inclusion of the phrase “between the States or international organizations concerned” in the present draft guideline reflects the fact that provisional application may continue for those States or international organizations for which the treaty has not yet entered into force, after entry into force of the treaty itself.

(5) The third and fourth phrases “if the treaty itself so provides, or if in some other manner it has been so agreed” reflect the two possible bases for provisional application recognized in paragraph 1 (a) and (b) of article 25. The possibility of provisional application on the basis

application of treaties: the EU’s contribution to the development of international law”, *European Journal of International Law*, vol. 31, No. 3 (August 2020), pp. 883–915, and F. Castillo de la Torre, “El Tribunal de Justicia y las relaciones exteriores tras el Tratado de Lisboa”, *Revista de Derecho Comunitario Europeo*, No. 60 (May–August 2018), pp. 491–512.

²⁶⁸ An example of the practice regarding the provisional application of a part of a treaty in bilateral treaties can be found in the Agreement between the Kingdom of the Netherlands and the Principality of Monaco on the Payment of Dutch Social Insurance Benefits in Monaco (United Nations, *Treaty Series*, vol. 2205, No. 39160, p. 541, at p. 550, art. 13, para. 2); and examples of bilateral treaties expressly excluding a part of a treaty from provisional application can be found in the Agreement between the Austrian Federal Government and the Government of the Federal Republic of Germany on the Cooperation of the Police Authorities and the Customs Administrations in the Border Areas (*ibid.*, vol. 2170, No. 38115, p. 573, at p. 586) and the Agreement between the Government of the Federal Republic of Germany and the Government of the Republic of Croatia regarding Technical Cooperation (*ibid.*, vol. 2306, No. 41129, p. 439). With respect to multilateral treaties, practice can be found in: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (*ibid.*, vol. 2056, No. 35597, p. 211, at p. 252); Convention on Cluster Munitions, (*ibid.*, vol. 2688, No. 47713, p. 39, at p. 112); Arms Trade Treaty (United Nations, *Treaty Series*, vol. 3013, No. 52373) (art. 23); and the Document agreed among the States Parties to the Treaty on Conventional Armed Forces in Europe (*International Legal Materials*, vol. 36, p. 866, sect. VI, para. 1). Similarly, the Protocol on the Provisional Application of the Revised Treaty of Chaguaramas (*ibid.*, vol. 2259, No. 40269, p. 440) makes explicit which provisions of the Revised Treaty are not to be provisionally applied, while the Trans-Pacific Strategic Economic Partnership Agreement (*ibid.*, vol. 2592, No. 46151, p. 225) is an example of provisional application of a part of the treaty that applies only in respect of one party to the Agreement, namely Brunei Darussalam, according to article 20.5 of that Agreement.

²⁶⁹ As in the case of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (*ibid.*, vol. 1836, No. 31364, p. 3) and in the Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 [to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention,] Pending its Entry into Force (Madrid, 12 May 2009, Council of Europe, *Treaty Series*, No. 194).

²⁷⁰ For example, the Arms Trade Treaty.

of a provision in the treaty in question is well established,²⁷¹ and hence the formulation follows that found in the 1969 and 1986 Vienna Conventions.

(6) Unlike in article 25 of the 1969 and 1986 Vienna Conventions, which refers, in paragraph 1 (b), to an agreement to apply provisionally a treaty or a part of a treaty among “negotiating States” or “negotiating States and negotiating organizations”, draft guideline 3 does not use this formulation. In contemporary practice, provisional application may be undertaken by States or international organizations that are not negotiating States or negotiating organizations of the treaty in question but that have subsequently consented to provisional application of the treaty. Relevant practice may be identified by examining certain commodity agreements that had never entered into force but whose provisional application was extended beyond their termination date.²⁷² In those cases, such an extension may be understood as applying to States that had acceded to the commodity agreement, thus demonstrating the belief that those States had also been provisionally applying the agreement. Furthermore, the need to distinguish between different groups of States or international organizations, by reference to their participation in the negotiation of the treaty, is less apposite in the context of bilateral treaties, which constitute the vast majority of treaties that have been applied provisionally. For these reasons, the draft guideline simply restates the basic rule without reference to “negotiating States” or “negotiating States and negotiating organizations”.

(7) Draft guideline 3 should be read together with draft guideline 4, which provides further elaboration on provisional application by means of a separate agreement, thereby explaining the meaning of the agreement “in some other manner”.

²⁷¹ Examples in the bilateral sphere include: Agreement between the European Community and the Republic of Paraguay on Certain Aspects of Air Services (*Official Journal of the European Union* L 122, 11 May 2007), art. 9; Agreement between the Argentine Republic and the Republic of Suriname on Visa Waiver for Holders of Ordinary Passports (United Nations, *Treaty Series*, vol. 2957, No. 51407, p. 213), art. 8; Treaty between the Swiss Confederation and the Principality of Liechtenstein relating to Environmental Taxes in the Principality of Liechtenstein (*ibid.*, vol. 2761, No. 48680, p. 23), art. 5; Agreement between the Kingdom of Spain and the Principality of Andorra on the Transfer and Management of Waste (*ibid.*, vol. 2881, No. 50313, p.165), art. 13; Agreement between the Government of the Kingdom of Spain and the Government of the Slovak Republic on Cooperation to Combat Organized Crime (*ibid.*, vol. 2098, No. 36475, p. 341), art. 14, para. 2; and Treaty on the Formation of an Association between the Russian Federation and the Republic of Belarus (*ibid.*, vol. 2120, No. 36926, p. 595), art. 19. Examples in the multilateral sphere include: Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, art. 7; Agreement on the Amendments to the Framework Agreement on the Sava River Basin and the Protocol on the Navigation Regime to the Framework Agreement on the Sava River Basin (*ibid.*, vol. 2367, No. 42662, p. 697), art. 3, para. 5; Framework Agreement on a Multilateral Nuclear Environmental Programme in the Russian Federation (*ibid.*, vol. 2265, No. 40358, p. 5, at pp. 13–14), art. 18, para. 7, and its corresponding Protocol on Claims, Legal Proceedings and Indemnification (*ibid.*, p. 35), art. 4, para. 8; Statutes of the Community of Portuguese-Speaking Countries (*ibid.*, vol. 2233, No. 39756, p. 207), art. 21; and Agreement establishing the “Karanta” Foundation for Support of Non-Formal Education Policies and Including in Annex the Statutes of the Foundation (*ibid.*, vol. 2341, No. 41941, p. 3), arts. 8 and 49, respectively.

²⁷² See, for example, the International Tropical Timber Agreement, 1994 (United Nations, *Treaty Series*, vol. 1955, No. 33484, p. 81), which was extended several times on the basis of article 46 of the Agreement, during which time some States (Guatemala, Mexico, Nigeria and Poland) acceded to it. See also the case of Montenegro regarding Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (*ibid.*, vol. 2677, No. 2889, p. 3, at p. 34). Montenegro, which became independent in 2006 and was therefore not a negotiating State, succeeded to the aforementioned treaty and had the option of provisionally applying certain provisions in accordance with the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 [to the European Convention on Human Rights] Pending its Entry into Force). For the declarations of provisional applications made by Albania, Belgium, Estonia, Germany, Liechtenstein, Luxembourg, the Netherlands, Spain, Switzerland and the United Kingdom of Great Britain and Northern Ireland, see, *ibid.*, pp. 30–37.

Guideline 4

Form of agreement

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed between the States or international organizations concerned through:

- (a) a separate treaty; or
- (b) any other means or arrangements, including:
 - (i) a resolution, decision or other act adopted by an international organization or at an intergovernmental conference, in accordance with the rules of such organization or conference, reflecting the agreement of the States or international organizations concerned; H387
 - (ii) a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

Commentary

(1) Draft guideline 4 deals with forms of agreement, on the basis of which a treaty, or a part of a treaty, may be applied provisionally, in addition to when the treaty itself so provides. The structure of the provision follows the sequence of article 25 of the 1969 and 1986 Vienna Conventions, which first envisages the possibility that the treaty in question might itself provide for provisional application and, second, provides for the possibility of an alternative basis for provisional application, when the States or the international organizations have “in some other manner” so agreed, which typically occurs when the treaty is silent on the point.

(2) The first possibility is where the treaty being applied provisionally itself addresses provisional application, in which case the treaty may do so in different ways. For example, the treaty may require that the negotiating or signatory States apply the treaty provisionally. Alternatively, the treaty may allow such States, for example by filing a declaration or through notification to the depositary of the treaty, to opt into or opt out of provisional application.²⁷³

(3) The second possibility of States agreeing on provisional application in a manner other than that specified in the treaty itself is confirmed by the opening phrase “[i]n addition to the case where the treaty so provides”, which is a direct reference to the phrase “if the treaty itself so provides” in draft guideline 3. That follows the formulation of article 25. The reference to “between the States or international organizations concerned” has the same meaning as in draft guideline 3. Two categories of additional methods for agreeing the provisional application are identified in the subparagraphs.

(4) Subparagraph (a) envisages the possibility of provisional application by means of a separate treaty, which is distinct from the treaty that is provisionally applied.²⁷⁴ As is the case

²⁷³ See, for instance, article 23 of the Arms Trade Treaty. Another example of consent to be bound by the provisional application of a part of a treaty by means of a declaration, but which is expressly provided for in a parallel agreement to the treaty, is contained in the Protocol to the Agreement on a Unified Patent Court on Provisional Application (Brussels, 1 October 2015, see www.unified-patent-court.org/sites/default/files/Protocol_to_the_Agreement_on_Unified_Patent_Court_on_provisional_application.pdf). See also article 37, paragraph 2, of the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg, 10 October 2018, Council of Europe, *Treaty Series*, No. 223).

²⁷⁴ Examples of bilateral treaties on provisional application that are separate from the treaty that is provisionally applied include: Agreement on the Taxation of Savings Income and the Provisional Application Thereof between the Netherlands and Germany (*ibid.*, vol. 2821, No. 49430, p. 3) and the Amendment to the Agreement on Air Services between the Kingdom of the Netherlands and the State of Qatar (*ibid.*, vol. 2265, No. 40360, p. 507, at p. 511). The Netherlands has concluded a number of similar treaties. Examples of multilateral treaties on provisional application that are separate from the treaty that is provisionally applied include: Protocol on the Provisional Application of the Agreement establishing the Caribbean Community Climate Change Centre (*ibid.*, vol. 2953, No. 51181, p. 181); Protocol on the Provisional Application of the Revised Treaty of Chaguaramas; and the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 [to the European Convention on Human Rights] Pending its Entry into Force).

for the first possibility, and in accordance with article 2, paragraph 1 (a), of the 1969 and 1986 Vienna Conventions, the term “treaty” is to be interpreted as covering all instruments concluded under the law of treaties that constitute an agreement between States or international organizations, whatever the particular designation of that instrument may be. Such instruments may include exchanges of letters or notes, memorandums of understanding, declarations of intent, or protocols.²⁷⁵

(5) Subparagraph (b) acknowledges the possibility that, in addition to a separate treaty, provisional application may also be agreed through “any other means or arrangements”, which broadens the range of possibilities for reaching agreement on provisional application. Instruments not covered under subparagraph (a) may thus be included under subparagraph (b). This approach is in accordance with the inherently flexible nature of provisional application.²⁷⁶ By way of providing further guidance, reference is made to two examples of such “means or arrangements” in subparagraph (b) (i) and (ii), which are not intended to constitute an exhaustive list.

(6) Subparagraph (b) (i) envisages the scenario of provisional application being agreed on by means of “a resolution, decision or other act adopted by an international organization or at an intergovernmental conference”. The term “intergovernmental conference” is to be understood broadly and may include the diplomatic conference of plenipotentiaries convened to negotiate, or a meeting of the States parties to, a multilateral treaty. The phrase “reflecting the agreement of the States or international organizations concerned” refers to the “resolution, decision or other act” that was adopted by the international organization or conference providing for the possibility of provisional application of the treaty. The reference to “agreement” is intended to emphasize that the States or international organizations concerned must consent to provisional application. The mode of expressing agreement to provisional application of a treaty depends on the rules of the organization or the conference, which is made clear by the phrase “in accordance with the rules of such organization or conference”. The phrase is to be understood in accordance with article 2, subparagraph (b), of the 2011 articles on responsibility of organizations, which provides that the term “rules of the organization”:

means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization.²⁷⁷

(7) Subparagraph (b) (ii) refers to the exceptional possibility of a State or an international organization making a declaration that it will apply provisionally a treaty or a part of a treaty in cases where the treaty remains silent or when it is not otherwise agreed.²⁷⁸ However, the

²⁷⁵ See para. (2) of the commentary to draft article 22 of the draft articles on the law of treaties (footnote 265 above), p. 210; O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties. A Commentary*, 2nd ed. (Berlin, Springer, 2018), pp. 449–450; Mathy, “Article 25” (see footnote 254 above), pp. 649–651.

²⁷⁶ In practice, some treaties were registered with the United Nations as having been provisionally applied, but with no indication as to which other means or arrangements had been employed to agree upon provisional application. The following are examples of such treaties: Agreement between the Kingdom of the Netherlands and the United States of America on the Status of United States Personnel in the Caribbean Part of the Kingdom (*ibid.*, vol. 2967, No. 51578, p. 79); Agreement between the Government of Latvia and the Government of the Republic of Azerbaijan on Cooperation in Combating Terrorism, Illicit Trafficking in Narcotic Drugs, Psychotropic Substances and Precursors and Organized Crime (*ibid.*, vol. 2461, No. 44230, p. 205); and Agreement between the United Nations and the Government of the Republic of Kazakhstan relating to the Establishment of the Subregional Office for North and Central Asia of the United Nations Economic and Social Commission for Asia and the Pacific (*ibid.*, vol. 2761, No. 48688, p. 339). See R. Lefeber, “The provisional application of treaties”, in *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*, J. Klabbers and R. Lefeber, eds. (The Hague, Martinus Nijhoff, 1998), p. 81.

²⁷⁷ *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88, subsequently annexed to General Assembly resolution 66/100 of 9 December 2011.

²⁷⁸ An example is the declaration by the Syrian Arab Republic of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (United Nations, *Treaty Series*, vol. 1974, No. 33757). When the Syrian Arab Republic unilaterally

declaration must be expressly accepted by the other States or international organizations concerned, as opposed to mere non-objection, for the treaty to become provisionally applicable in relation to those States or international organizations. Such acceptance of provisional application should be in written form, but the draft guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that such acceptance is express. The term “declaration” is not meant to refer to the legal regime concerning unilateral declarations of States, which does not deal with the provisional application of treaties.²⁷⁹

Guideline 5 Commencement

The provisional application of a treaty or a part of a treaty takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as is otherwise agreed.

Commentary

(1) Draft guideline 5 deals with the commencement of provisional application. The draft guideline is modelled on article 24, paragraph 1, of the 1969 and 1986 Vienna Conventions, on entry into force.

(2) The first clause reflects the approach taken in the Guide of referring to the provisional application of the entire treaty or a part of a treaty. The phrase “takes effect on such date, and in accordance with such conditions and procedures” specifies the commencement of provisional application. The text is based on that adopted in article 68 of the 1969 Vienna Convention, which uses “takes effect”. The phrase confirms that what is being referred to is the legal effect in relation to the State or international organization electing to apply the treaty provisionally.

(3) The reference to “on such date, and in accordance with such conditions and procedures” covers the various modes of commencement of provisional application of treaties as reflected in contemporary practice.²⁸⁰ Such modes include commencement upon signature, on a certain date, upon notification, or, in the case of multilateral treaties, with adoption of a decision by an international organization.

(4) The concluding phrase “as the treaty provides or as are otherwise agreed” confirms that the agreement to apply provisionally a treaty or a part of a treaty is based on a provision set forth in the treaty that is applied provisionally, on a separate treaty, whatever its particular designation, or some other means or arrangements that establish an agreement for provisional application, as contemplated in draft guideline 4, and is subject to the conditions and procedures established in such instruments or processes.

(5) Draft guideline 5 is without prejudice to article 24, paragraph 4, of the 1969 and 1986 Vienna Conventions, which stipulates that certain provisions regarding matters arising necessarily before the entry into force of a treaty apply from the time of the adoption of its text. Such matters include the authentication of the text of the treaty, the establishment of consent to be bound by the treaty, the manner or date of its entry into force, reservations, or the functions of the depositary. Those provisions thus apply automatically without the need

declared that it would provisionally apply the Convention, the Director-General of the Organization for the Prohibition of Chemical Weapons replied, informing the Syrian Arab Republic that its “request” to provisionally apply the Convention would be forwarded to the States parties through the Depositary. The Convention does not provide for provisional application of the Convention and such possibility was not discussed during its negotiation. Neither the States parties nor the Organization for the Prohibition of Chemical Weapons objected to the provisional application by the Syrian Arab Republic of the Convention, as expressed in its unilateral declaration (see the second report by the Special Rapporteur (A/CN.4/675), para. 35 (c), and the third report by the Special Rapporteur (A/CN.4/687), para. 120).

²⁷⁹ *Yearbook ... 2006*, vol. II (Part Two), paras. 173–177.

²⁸⁰ See A/CN.4/707, para. 104, subparas. (d)–(g).

to agree specifically on their provisional application and might be relevant to the commencement of the provisional application of a treaty.

Guideline 6 **Legal effect**

The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof between the States or international organizations concerned, except to the extent that the treaty provides otherwise or it is otherwise agreed. Such treaty or part of a treaty that is being applied provisionally must be performed in good faith.

Commentary

(1) Draft guideline 6 deals with the legal effect of provisional application. Two types of “legal effect” might be envisaged: the legal effect of the agreement to provisionally apply the treaty or a part of it, and the legal effect of the treaty or a part of it that is being applied provisionally.

(2) The first sentence of the draft guideline confirms that the legal effect of provisional application of a treaty or a part of a treaty is to produce a legally binding obligation to apply the treaty or part thereof between the States or international organizations concerned. In other words, a treaty or a part of a treaty that is applied provisionally is considered as binding on the parties provisionally applying it from the time at which the provisional application commenced between them. Such legal effect is derived from the agreement to provisionally apply the treaty (or acceptance thereof) by the States or the international organizations concerned, which may be expressed in the forms identified in draft guideline 4. In cases in which that agreement is silent on the legal effect of provisional application, which is common, the draft guideline clarifies that the legal effect of the provisional application is a legally binding obligation to apply the treaty or part thereof.²⁸¹

(3) The opening phrase “[t]he provisional application of a treaty or a part of a treaty” follows draft guideline 5. The phrase “a legally binding obligation to apply the treaty or part thereof”, which is central to the draft guideline, refers to the legal effect that the treaty produces for the State or the international organization concerned and to the conduct that is expected from States or international organizations that agree to resort to provisional application. The reference to “between the States or international organizations concerned” specifies between whom the obligation to apply the treaty or part thereof applies. This may include not only other States or international organizations applying the treaty provisionally, but also States or international organizations for whom the treaty has entered into force in their relations with those who are still provisionally applying the treaty.

(4) The concluding phrase “except to the extent that the treaty provides otherwise or it is otherwise agreed” confirms that the basic rule is subject to the treaty or another agreement, which may provide an alternative legal outcome. Such an understanding, namely a presumption in favour of the creation of a legally binding obligation to apply the treaty or a part of the treaty, subject to the possibility that the parties may agree otherwise, is confirmed by State practice.²⁸²

(5) The second sentence of draft guideline 6 confirms that the treaty being applied provisionally must be performed in good faith. This sentence reflects the good faith obligation (*pacta sunt servanda*) stipulated in article 26 of the 1969 and 1986 Vienna Conventions. Article 26 of the Vienna Conventions refers to several legal effects. The first legal effect corresponds to the first sentence of draft guideline 6, i.e., the binding obligation produced by provisional application. The second legal effect is that the treaty in force “must be performed in good faith”. The word “[s]uch” in the draft guideline establishes the link between the first sentence (the legal effect of the binding obligation arising as a consequence of provisional application) and the second sentence (the legal effect arising from the

²⁸¹ See Mathy, “Article 25” (see footnote 254 above), p. 651.

²⁸² See the examples of the practice of the European Free Trade Association (EFTA) referred to in the fifth report by the Special Rapporteur (A/CN.4/718).

requirement of performance in good faith), thereby confirming that both legal effects pertain to the same treaty.

(6) Nonetheless, an important distinction between provisional application and entry into force must be made. Provisional application is not intended to give rise to the whole range of rights and obligations that derive from the consent by a State or an international organization to be bound by a treaty or a part of a treaty. Provisional application of treaties remains different from their entry into force, insofar as it is not subject to all rules of the law of treaties. Therefore, the formulation that provisional application “produces a legally binding obligation to apply the treaty or a part thereof” does not imply that provisional application has exactly the same legal effect as entry into force. The reference to “a legally binding obligation” is intended to add more precision to the depiction of the legal effect of provisional application and avoid any interpretation aimed at equating provisional application with entry into force.²⁸³

(7) Implicit in the draft guideline is the understanding that the act of provisionally applying the treaty does not affect the rights and obligations of other States or international organizations.²⁸⁴ Likewise, provisional application of a treaty cannot result in the modification of the treaty’s content. This is because provisional application is limited to the obligation to apply the treaty or part thereof. Furthermore, draft guideline 6 should not be understood as limiting the freedom of States or international organizations to amend or modify the treaty that is applied provisionally, in accordance with Part IV of the 1969 and the 1986 Vienna Conventions.

Guideline 7 Reservations

The present draft guidelines are without prejudice to any question concerning reservations relating to the provisional application of a treaty or a part of a treaty.

Commentary

(1) Draft guideline 7 concerns the possibility of the formulation of reservations, by a State or an international organization, purporting to exclude or modify the legal effect produced by certain provisions of a treaty that is subject to provisional application, either totally or partially.

(2) The reference to “any question concerning reservations relating to the provisional application of a treaty or a part of a treaty” includes, but is not limited to, questions regarding the provisions of Part II, Section 2, of the 1969 Vienna Convention.

(3) The draft guideline takes the form of a “without prejudice” clause. Given the lack of significant practice, and in the light of the comments and observations by States, it is not the purpose of the draft guidelines or this commentary to deal in any detail with the questions that may arise.²⁸⁵ The Commission’s Guide to Practice on Reservations to Treaties, while not expressly addressing reservations formulated in connection with provisional application, may nevertheless provide guidance.²⁸⁶

(4) As a matter of principle, the formulation of reservations related to provisional application is not excluded. Article 19 of the 1969 and 1986 Vienna Conventions allows States and international organizations to formulate a reservation when signing, ratifying, accepting, approving or acceding to a treaty. The decision to apply the treaty provisionally

²⁸³ See para. (1) of the commentary to draft article 22 of the draft articles on the law of treaties (footnote 265 above), p. 210, and *Yearbook ... 2013*, vol. II (Part One), the memorandum by the Secretariat on provisional application of treaties (A/CN.4/658), paras. 44–55. See also the first report of the Special Rapporteur (A/CN.4/664).

²⁸⁴ However, the subsequent practice of one or more parties to a treaty may provide a means of interpretation of the treaty under articles 31 or 32 of the 1969 Vienna Convention. See chapter IV of A/73/10 on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

²⁸⁵ See comments and observations received from Governments and international organizations (A/CN.4/737).

²⁸⁶ *Yearbook ... 2011*, vol. II (Part Three).

may take place at the moment of signature (prior to the entry into force of the treaty for the State or international organization in question) or during the period up to and including the time of ratification, acceptance, approval or accession (in cases where the treaty itself is not yet in force).

(5) As indicated above, the draft guideline is formulated as a “without prejudice” clause in recognition of the lack of significant practice concerning reservations relating to provisional application. In the case of a bilateral treaty, a unilateral statement, formulated by a State or an international organization after initialling or signing but prior to entry into force, by which that State or organization purports to obtain from the other party a modification of the provisions of the treaty, does not constitute a reservation.²⁸⁷ In the case of multilateral treaties, although States have made interpretative declarations in conjunction with agreeing to provisional application, such declarations as well as declarations to opt out of provisional application must be distinguished from reservations,²⁸⁸ in the sense of the law of treaties.²⁸⁹ However, it remains to be ascertained in a given case to what extent such declarations or unilateral statements are comparable in their legal effect to that of reservations. It may also be relevant to distinguish between the case where a State or an international organization formulates a reservation limited to the phase of the provisional application, or formulates one or more reservations intended to produce their consequences beyond such phase.

Guideline 8 **Responsibility for breach**

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

Commentary

(1) Draft guideline 8 deals with the question of responsibility for breach of an obligation arising under a treaty or a part of a treaty that is being applied provisionally. It follows from the legal effect of provisional application described in draft guideline 6, including with respect to *pacta sunt servanda*. Since the treaty or a part of a treaty being applied provisionally produces a legally binding obligation, then a breach of an obligation arising under the treaty or a part of a treaty being applied provisionally constitutes an internationally wrongful act giving rise to international responsibility. The State or international organization violating its obligation towards the other States or international organizations concerned incurs international responsibility. The inclusion of the present draft guideline was deemed necessary since it deals with a key legal consequence of the provisional application of a treaty or a part of a treaty. Article 73 of the 1969 Vienna Convention states that its provisions shall not prejudice any question that may arise in regard to a treaty from the international responsibility of a State and article 74 of the 1986 Vienna Convention provides similarly. The scope of the Guide is not limited to that of the two Vienna Conventions, as stated in draft guideline 2.

(2) The draft guideline should be read together with the articles on responsibility of States for internationally wrongful acts of 2001²⁹⁰ and with the articles on responsibility of international organizations for internationally wrongful acts of 2011,²⁹¹ to the extent that they reflect customary international law. Accordingly, the reference to “an obligation arising under” and the word “entails” were consciously drawn from those articles. Likewise, the

²⁸⁷ See guideline 1.6.1 of the Guide to Practice on Reservations to Treaties, *Yearbook ... 2011*, vol. II (Part Three), paras. 1–2.

²⁸⁸ See, in particular, guideline 1.3 of the Guide to Practice on Reservations to Treaties, *ibid.*

²⁸⁹ See e.g. art. 45, para. 2 (a), of the Energy Charter Treaty (United Nations, *Treaty Series*, vol. 2080, No. 36116, p. 95); and art. 7, para. 1 (a), of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

²⁹⁰ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 76, subsequently annexed to General Assembly resolution 56/83 of 12 December 2001.

²⁹¹ *Yearbook ... 2011*, vol. II (Part Two), para. 87, subsequently annexed to General Assembly resolution 66/100 of 9 December 2011.

concluding phrase “in accordance with the applicable rules of international law” is intended as a reference, *inter alia*, to the applicable rules reflected in those articles.

Guideline 9 Termination

1. The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.
2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization shall be terminated if that State or international organization notifies the other States or international organizations concerned of its intention not to become a party to the treaty.
3. Unless the treaty otherwise provides or it is otherwise agreed, a State or an international organization may invoke other grounds for terminating provisional application, in which case it shall notify the other States or international organizations concerned.
4. Unless the treaty otherwise provides or it is otherwise agreed, the termination of the provisional application of a treaty or a part of a treaty does not affect any right, obligation or legal situation created through the execution of such provisional application prior to its termination.

Commentary

(1) Draft guideline 9 concerns the termination of provisional application. The provisional application of a treaty or a part of a treaty by a State or an international organization typically ceases in one of two instances: first, to the extent that the treaty enters into force between the States or international organizations concerned or, second, when the intention not to become a party to the treaty is communicated by the State or international organization provisionally applying the treaty or a part of a treaty to the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally. This does not exclude the possibility that the termination of provisional application may be invoked, by a State or an international organization, on other grounds.

(2) Paragraph 1 addresses termination of provisional application upon entry into force. Entry into force is the most frequent way in which provisional application is terminated.²⁹² That the provisional application of a treaty or a part of a treaty can be terminated by means of the entry into force of the treaty between the States and international organizations concerned is implicit in the reference in draft guideline 3 to “pending its entry into force”, which is based on article 25 of the 1969 and 1986 Vienna Conventions.²⁹³ In accordance with draft guideline 5, provisional application continues in respect of two or more States or

²⁹² See the memorandum by the Secretariat on provisional application of treaties (A/CN.4/707), para. 88.

²⁹³ Most bilateral treaties state that the treaty shall be provisionally applied “pending its entry into force”, “pending its ratification”, “pending the fulfilment of the formal requirements for its entry into force”, “pending the completion of these internal procedures and the entry into force of this Convention”, “pending the Governments ... informing each other in writing that the formalities constitutionally required in their respective countries have been complied with”, “until the fulfilment of all the procedures mentioned in paragraph 1 of this article” or “until its entry into force” (see A/CN.4/707, 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 [to the European Convention on Human Rights] Pending its Entry into Force), which provides in paragraph (d) that: “Such a declaration [of provisional application] will cease to be effective upon the entry into force of Protocol No. 14 *bis* to the Convention in respect of the High Contracting Party concerned.”

international organizations applying the treaty or a part of a treaty provisionally until the treaty enters into force between them.²⁹⁴

(3) The phrase “in the relations between the States or international organizations concerned” seeks to distinguish the entry into force of the treaty from the provisional application by one or more parties to the treaty. This is particularly relevant in the relations between parties to a multilateral treaty, where the treaty might enter into force for a number of the parties but continues to be applied only provisionally in respect of others. This phrase is thus intended to capture all the possible legal situations that may exist in that regard.

(4) Paragraph 2 reflects the second instance mentioned in paragraph (1) of the commentary to the present draft guideline, namely the case in which the State or international organization gives notice of its intention not to become a party to a treaty. It follows closely the formulation of paragraph 2 of article 25 of the 1969 and 1986 Vienna Conventions.

(5) The opening phrase of paragraph 2 “[u]nless the treaty otherwise provides or it is otherwise agreed” avoids the reference to such an alternative agreement only being concluded between the “negotiating” States and international organizations, found in the 1969 and 1986 Vienna Conventions. The formulation “or it is otherwise agreed” also refers to the States or international organizations that had negotiated the treaty, but may also include States and international organizations that were not involved in the negotiation of the treaty but that are nevertheless participating in its provisional application. Given the complexity of concluding modern multilateral treaties, contemporary practice supports a broad reading of the language of both Vienna Conventions, in terms of treating all States or international organizations concerned as being on the same legal footing in relation to provisional application, out of recognition of the existence of other groups of States or international organizations whose agreement on matters related to the termination of provisional application might also be sought.²⁹⁵

(6) The final phrase in paragraph 2, “notifies the other States or international organizations concerned”,²⁹⁶ is a reference to the States and international organizations

²⁹⁴ See, e.g., the Agreement between the Federal Republic of Germany and the Government of the Republic of Slovenia concerning the Inclusion in the Reserves of the Slovenian Office for Minimum Reserves of Petroleum and Petroleum Products of Supplies of Petroleum and Petroleum Products Stored in Germany on its Behalf (United Nations, *Treaty Series*, vol. 2169, No. 38039, p. 287, at p. 302); and the case in the Exchange of Notes Constituting an Agreement between the Government of Spain and the Government of Colombia on Free Visas (*ibid.*, vol. 2253, No. 20662, p. 328, at pp. 333–334).

²⁹⁵ Such an approach accords with that taken with regard to the position of negotiating States in draft guideline 3. See paragraph (6) of the commentary to draft guideline 3, above.

²⁹⁶ A small number of bilateral treaties contain explicit clauses on termination of provisional application and in some cases provide also for its notification. An example could be the Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea (United Nations, *Treaty Series*, vol. 2962, No. 51490, p. 339), art. 17. Other examples include: Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the Implementation of Air Traffic Controls by the Federal Republic of 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 provisional application of multilateral treaties, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (*ibid.*, vol. 2167, No. 37924, p. 3, at p. 126), includes a clause (art. 41) allowing for termination by notification reflecting the wording of article 25, paragraph 2, of the 1969 Vienna Convention. Furthermore, the practice with regard to commodity agreements illustrates that provisional application may be agreed to be terminated by withdrawal from the agreement, as is the case with the International Agreement on Olive Oil and Table Olives.

between which a treaty or part of a treaty is being, or can be, provisionally applied, as well as all States that have expressed their consent to be bound to the treaty.

(7) The agreement on provisional application may provide for advance notice to facilitate termination of provisional application in an orderly manner. The Commission decided, however, not to introduce *mutatis mutandis* the rule found in paragraph 2 of article 56 of the 1969 and 1986 Vienna Conventions, which establishes a notice period, or alternatively a “reasonable period”, for denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal. The Commission declined to do so out of concern for the flexibility inherent in article 25 and in view of insufficient practice in that regard.

(8) Paragraph 3 recognizes the possibility that grounds other than that anticipated in paragraph 2 may also be invoked by a State or an international organization for the termination of provisional application. Such additional possibility is implicit in the flexible nature of the termination of provisional application provided for in article 25, paragraph 2. For example, a State or international organization may seek to terminate provisional application of a multilateral treaty while still maintaining its intention to become a party to the treaty. Another scenario is that in situations of material breach, a State or international organization may only seek to terminate or suspend provisional application *vis-à-vis* the State or international organization that has committed the material breach, while still continuing to provisionally apply the treaty in relation to other parties. The State or international organization affected by the material breach may also wish to resume the suspended provisional application of the treaty after the material breach has been adequately remedied.

(9) The same considerations with the regard to the opening phrase “[u]nless the treaty otherwise provides or it is otherwise agreed” apply with regard to paragraph 3 as those described above in relation to paragraph 2. The phrase “may invoke” serves to confirm the optional nature of the invocation of other grounds as a basis for terminating provisional application, while conveying the need to specify the grounds on which termination of provisional application is said to be taking place. In addition, the State or international organization invoking such grounds would be required (“shall”) to notify the other States or international organizations concerned, as they are understood under the present Guide. Given the variety of circumstances under which the termination of provisional application may occur, no general requirement on the timeframe for notification would be feasible. Nonetheless, the termination of the provisional application of some treaties, for example, those establishing institutional arrangements, warrants sufficient advance notice. In other situations, termination of provisional application may take place immediately upon receipt of notification, as indicated in paragraph (7) of the present commentary.

(10) The procedural requirements stipulated in the 1969 Vienna Convention for the termination of treaties already in force do not apply generally to the termination of provisional application.²⁹⁷ However, to ensure legal certainty, paragraph 4 of the draft guideline contains a saving clause that seeks to confirm that, in principle, the termination of the provisional application of a treaty does not affect any right, obligation or legal situation created through the execution of provisional application prior to its termination. The provision was modelled on article 70, paragraph 1 (b), of the 1969 Vienna Convention.

Guideline 10

Internal law of States, rules of international organizations and observance of provisionally applied treaties

1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.

²⁹⁷ See S. Talmon and A. Quast Mertsch, “Germany’s position and practice on provisional application of treaties”, GPIL – German Practice in International Law, 2021.

2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

Commentary

(1) Draft guideline 10 deals with the observance of provisionally applied treaties and their relation to the internal law of States and the rules of international organizations. Specifically, it deals with the question of the invocation of internal law of States, or in the case of international organizations the rules of the organization, as justification for failure to perform an obligation arising under the provisional application of a treaty or a part of a treaty. The first paragraph concerns the rule applicable to States and the second the rule applicable to international organizations.

(2) The provision follows closely the formulation contained in article 27 of both the 1969²⁹⁸ and 1986²⁹⁹ 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 27,³⁰⁰ draft guideline 10 states, as a general rule, that a State or an international organization may not invoke the provisions of its internal law or rules as a justification for its failure to perform an obligation arising under such provisional application. Likewise, such provisions or rules cannot be invoked so as to avoid the responsibility that may be incurred for the breach of such obligations.³⁰¹ However, as indicated in draft guideline 12, the States and international organizations concerned may agree to limitations deriving from such internal law or rules as a part of their agreement on provisional application.

(4) While each State or international organization may decide, under its internal law or rules, whether to agree to the provisional application of a treaty or a part of a treaty,³⁰² once a treaty or a part of a treaty is applied provisionally, an inconsistency with the internal law of a State or with the rules of an international organization cannot justify a failure to apply provisionally such a treaty or a part thereof. Consequently, the invocation of those internal provisions in an attempt to justify a failure to apply provisionally a treaty or a part thereof would not be in accordance with international law.

(5) A failure to comply with the obligations arising from the provisional application of a treaty or a part of a treaty with a justification based on the internal law of a State or rules of an international organization will engage the international responsibility of that State or international organization, in accordance with draft guideline 8.³⁰³ Any other view would be contrary to the law on international responsibility, according to which the characterization of an act of a State or an international organization as internationally wrongful is governed by

²⁹⁸ Article 27 of the 1969 Vienna Convention provides as follows:

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

²⁹⁹ Article 27 of the 1986 Vienna Convention provides as follows:

Internal law of states, rules of international organizations and observance of treaties

1. A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.

3. The rules contained in the preceding paragraphs are without prejudice to article 46.

³⁰⁰ See A. Schaus, "1969 Vienna Convention. Article 27: internal law and observance of treaties", in Corten and Klein *The Vienna Conventions on the Law of Treaties. A Commentary*, vol. I (see footnote 254 above), pp. 688–701, at p. 689.

³⁰¹ See article 7, "Obligatory character of treaties: the principle of the supremacy of international law over domestic law" in the fourth report by Sir Gerald Fitzmaurice, Special Rapporteur (*Yearbook ... 1959*, vol. II, document A/CN.4/120, p. 43).

³⁰² See Mertsch, *Provisionally Applied Treaties ...* (see footnote 254 above), p. 64.

³⁰³ See Mathy, "Article 25" (see footnote 254 above), p. 646.

international law and such characterization is not affected by its characterization as lawful by internal law of a State or rules of an international organization.³⁰⁴

(6) The reference to the “internal law of States and rules of international organizations” includes any provision of such nature, and not only to the internal law or rules specifically concerning the provisional application of treaties.

(7) The phrase “obligation arising under such provisional application”, in both paragraphs of the draft guideline, is broad enough to encompass situations where the obligation flows from the treaty itself or from a separate agreement to apply provisionally the treaty or a part of a treaty. This is in accordance with the general rule of draft guideline 6, which states that the provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof between the States or international organizations concerned, except to the extent that the treaty otherwise provides or it is otherwise agreed. Such treaty or part of a treaty that is being applied provisionally must be performed in good faith.

Guideline 11

Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

Commentary

(1) Draft guideline 11 deals with the effects of the provisions of the internal law of States and the rules of international organizations on their competence to agree to the provisional application of treaties. The first paragraph concerns the internal law of States and the second the rules of international organizations.

(2) Draft guideline 11 follows closely the formulation of article 46 of both the 1969 and 1986 Vienna Conventions. Specifically, the first paragraph of the draft guideline follows paragraph 1 of article 46 of the 1969 Vienna Convention,³⁰⁵ and the second, paragraph 2 of article 46 of the 1986 Vienna Convention.³⁰⁶ Therefore, the draft guideline should be considered together with those articles and other applicable rules of international law.

³⁰⁴ See article 3 of the 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 article 5 of the 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).

³⁰⁵ Article 46 of the 1969 Vienna Convention provides as follows:

Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

³⁰⁶ Article 46 of the 1986 Vienna Convention provides as follows:

(3) Draft guideline 11 provides that any claim that the consent to provisional application is invalid must be based on a manifest violation of the internal law of the State or the rules of the organization regarding their competence to agree to such provisional application and, additionally, must concern a rule of fundamental importance.

(4) A violation is “manifest” if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States or, as the case may be, of international organizations and in good faith.³⁰⁷

Guideline 12

Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations

The present draft guidelines are without prejudice to the right of States or international organizations to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of States or from the rules of international organizations.

Commentary

(1) Draft guideline 12 relates to the limitations of States and international organizations that could derive from their internal law and rules when agreeing to the provisional application of a treaty or a part of a treaty. Such limitations may be substantive or procedural, such as those for the expression of consent to be bound by a treaty, or a combination of both. States and international organizations may agree to provisional application subject to limitations that derive from internal law or rules of the organizations, which may be reflected in their consent to apply provisionally a treaty or a part of a treaty.

(2) The present draft guideline recognizes the right of States or international organizations to agree to the provisional application of a treaty or a part of a treaty in such a manner as to guarantee that such an agreement conforms with the limitations deriving from their respective internal provisions. For example, the present draft guideline provides for the possibility that the treaty may expressly refer to the internal law of the State or the rules of the international organization and make such provisional application conditional on the non-violation of the internal law of the State or the rules of the organization.³⁰⁸

(3) The title of the draft guideline reflects the consensual basis of the provisional application of treaties, as well as the fact that provisional application might not be possible at all under the internal law of States or the rules of international organizations.³⁰⁹

Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

³⁰⁷ According to art. 46, para. 2, of the 1969 Vienna Convention and art. 46, para. 3, of the 1986 Vienna Convention.

³⁰⁸ See, for example, article 45 of the Energy Charter Treaty.

³⁰⁹ See the several examples of Free Trade Agreements between the EFTA States and other numerous States (i.e. Albania, Bosnia and Herzegovina, Canada, Chile, Egypt, Georgia, Lebanon, Mexico, Montenegro, Peru, Philippines, Republic of Korea, Serbia, Singapore, the former Yugoslav Republic of 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

(4) The draft guideline should not be interpreted as implying the need for a separate agreement on the applicability of limitations deriving from the internal law of the States or the rules of the international organizations concerned. The existence of any such limitations deriving from internal law needs only to be sufficiently clear in the treaty itself, the separate treaty or in any other form of agreement to apply provisionally a treaty or a part of a treaty.

Annex to chapter V

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as: “if its constitutional requirements permit”, “if its respective legal requirements permit” or “if their domestic requirements permit” (www.efta.int/free-trade/free-trade-agreements). For instance, article 43, paragraph 2, of the Free Trade Agreement between the EFTA States and the Southern African 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.

See also article 22 of the General Agreement on Privileges and Immunities of the Council of Europe (Paris, 2 September 1949, *European Treaty Series*, No.2) and article 17 of the Convention on the Elaboration of a European Pharmacopeia (Strasbourg, 22 July 1964, *ibid.*, No. 50).

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