

FAO COMMENTS ON THE DRAFT GUIDE TO PROVISIONAL APPLICATION OF TREATIES

Guideline 6

Legal effect of provisional application

The provisional application of a treaty or a part of a treaty produces a legally binding obligation ~~[to apply the treaty or a part thereof]~~ as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

COMMENTARY:

As indicated in comment 5 on Guideline 6: *“Two types of “legal effect” might be envisaged: the legal effect of the agreement to provisionally apply the treaty or a part of it, and the legal effect of the treaty or a part of it that is being provisionally applied”*. However, Guideline 6 may be interpreted as referring only to the legal obligation to apply the treaty and not to the legal effect that produces its application. With the removal from the text of *“to apply the treaty or a part thereof”*, the guideline would cover this matter in general terms and refer to both types of *“legal effects”*.

Guideline 8

Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied ~~[in the terms the treaty provides or as are otherwise agreed]~~ entails international responsibility in accordance with the applicable rules of international law.

COMMENTARY:

The proposed addition is to emphasise that the breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied may give rise to international responsibility only in accordance with the terms agreed for the provisional application of a treaty; this is in line with comment 5 on Guideline 6.

Since responsibility for breach is addressed, consideration could be given as to whether there is a need to develop a guideline with respect to the settlement of disputes in this context.

Guideline 9

Termination and suspension of provisional application

1. [Unless the treaty otherwise provides or it is otherwise agreed,] [t]he provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.
2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.
3. The present draft guideline is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in part V, section 3, of the Vienna Convention on the Law of Treaties or other relevant rules of international law concerning termination and suspension.

COMMENTARY:

Although the 1969 and 1986 Vienna Conventions provide that “A treaty or a part of a treaty is applied provisionally pending its entry into force”, the parties concerned may agree, through the treaty itself or any other means or arrangements, to termination of provisional application before entry into force. For example, parties may agree to provisionally apply a treaty or a part of a treaty for a specific purpose or activity and/or for a specific period of time. Once the specific activity has been completed, the specific purpose has been fulfilled, or the period expired, provisional application would terminate and, consequently, the treaty cease to have any effect until its entry into force. This comment is also in line with Guideline 12. FAO has no practice in that regard but it is a point to be taken into consideration.