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Provisional application of treaties

Memorandum by the Secretariat

Summary

Article 25 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, of 1986, provides for the application of treaties on a provisional basis by negotiating States and negotiating international organizations. In undertaking the preparatory work for the Convention, the International Law Commission modelled the provision on article 25 of the Vienna Convention on the Law of Treaties, of 1969. The present memorandum traces the negotiating history of the provision both in the Commission and at the 1986 Vienna Conference.

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Contents

I. Introduction

1. At its sixty-fourth session, held in 2012, the International Law Commission included the topic "provisional application of treaties" in its programme of work.[1]

2. At the sixty-sixth session, held in 2014, the Commission "decided to request from the Secretariat a memorandum on the previous work undertaken by the Commission on this subject in the *travaux préparatoires* of the relevant provisions of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986".[2]

3. The present memorandum provides, in section II below, a brief procedural history of the origins and subsequent preparation and negotiation of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, of 1986.[3]

4. Section III contains a description of the *travaux préparatoires* of article 25 of the Convention, in terms of the work undertaken by the Commission, in preparing the draft articles on the law of treaties between States and international organizations or between international organizations, adopted in 1982, as well as in the context of the subsequent negotiation and adoption of the Convention at the diplomatic conference of plenipotentiaries, held in 1986.

5. Article 25 of the 1986 Vienna Convention reads as follows:

> Provisional application
>
> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (a) the treaty itself so provides; or
>
> (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.

[1] A/67/10, para. 141.

[2] A/69/10, para. 227. This memorandum supplements an earlier study (A/CN.4/658), also undertaken by the Secretariat at the request of the Commission, on the previous work undertaken by the Commission on the subject in the context of its work on the law of treaties, and on the *travaux préparatoires* of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties.

[3] A/CONF.129/15. Not yet in force, as of 21 November 2014.

II. Procedural history of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, of 1986

A. Developments prior to 1970

6. During the consideration of the draft articles on the law of treaties from 1950 to 1966, the Commission discussed on several occasions the question of whether the draft articles should apply not only to treaties between States but also to treaties concluded by other entities,[4] and in particular by international organizations. However, the Commission subsequently decided to confine the study to treaties between States.[5]

7. At the United Nations Conference on the Law of Treaties, held in Vienna in 1968 and 1969, the United States of America proposed an amendment which would have extended the scope of the future convention to treaties concluded by international organizations.[6] It subsequently withdrew its proposal[7] in the face of concerns that it would serve to delay the work of the Conference.

8. Instead, the Conference adopted a resolution in which, inter alia, it

> *[r]ecommend[ed]* to the General Assembly of the United Nations that it refer to the International Law Commission the study, in consultation with the principal international organizations, of the question of treaties concluded between States and international organizations or between two or more international organizations.[8]

B. Consideration by the International Law Commission, 1970 to 1982

9. The General Assembly, in its resolution 2501 (XXIV) of 12 November 1969, acting on the resolution of the conference,

> *[r]ecommend[ed]* that the International Law Commission should study, in consultation with the principal international organizations, as it may consider

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[4] See the first report of the Special Rapporteur on the law of treaties (*Yearbook of the International Law Commission*, 1972, vol. II (United Nations publication, Sales No. E.73.V.5), p. 171, document A/CN.4/258) and the historical survey prepared by the Secretariat (A/CN.4/L.161 and Add.l and 2).

[5] Draft article 1 of the draft articles on the law of treaties, adopted by the Commission in 1966, reads: "The present articles relate to treaties concluded between States." *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. E.67.V.2), p. 177, document A/6309/Rev.l, part II, chap. II.

[6] Document A/CONF.39/C.1/L.15. ("…or other subjects of international law"), see *Official Records of the United Nations Conference on the Law of Treaties, First session, Vienna, 26 March-24 May 1969: Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), Committee of the Whole, 2nd meeting, paras. 3-5.

[7] Ibid., 3rd meeting, para. 64.

[8] *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969: Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), resolution relating to article 1 of the Vienna Convention on the Law of Treaties, p. 285.

> appropriate in accordance with its practice, the question of treaties concluded between States and international organizations or between two or more international organizations, as an important question.

10. The following year (1970), the International Law Commission decided to include the question in its programme of work and established a subcommittee to undertake a preliminary study. Paul Reuter (France) was appointed Special Rapporteur for the topic at the twenty-third session, in 1971. On the basis of 11 reports submitted by the Special Rapporteur between 1972 and 1982, the Commission prepared a set of 80 draft articles, and an annex, on the law of treaties between States and international organizations or between international organizations, which it adopted in 1982, together with commentaries.

11. At the time of adoption, the Commission commented on the relationship of the draft articles to the Vienna Convention on the Law of Treaties, of 1969, and provided some explanations of the methodological approach undertaken during the preparation of the draft articles. In particular, it indicated that

> 35. By comparison with others, the present codification possesses some distinctive characteristics owing to the extremely close relationship between the draft articles and the Vienna Convention.
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> 36. Historically speaking, the provisions which constitute the draft articles now under consideration would have found a place in the Vienna Convention had the Conference not decided that it would confine its attention to the law of treaties between States. Consequently, the further stage in the codification of the law of treaties represented by the preparation of draft articles on the law of treaties between States and international organizations or between international organizations cannot be divorced from the basic text on the subject, namely the Vienna Convention.
>
> 37. That Convention has provided the general framework for the present draft articles. This means, firstly, that the draft articles deal with the same questions as formed the substance of the Vienna Convention. The Commission has had no better guide than to take the text of each of the articles of that Convention in turn and consider what changes of drafting or of substance are needed in formulating a similar article dealing with the same problem in the case of treaties between States and international organizations or between international organizations.
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> …
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> 40. Treaties are based essentially on the equality of the contracting parties, and this premise leads naturally to the assimilation, wherever possible, of the treaty situation of international organizations to that of States. The Commission has largely followed this principle in deciding generally to follow as far as possible the articles of the Vienna Convention referring to treaties between States for treaties between States and international organizations, and for treaties between international organizations. The increasing number of treaties in which international organizations participate is evidence of the value of treaties to international organizations as well as to States.
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> 41. However, even when limited to the field of the law of treaties, the comparison involved in the assimilation of international organizations to States

> is quickly seen to be far from exact. While all States are equal before international law, international organizations are the result of an act of will on the part of States, an act which stamps their juridical features by conferring on each of them strongly marked individual characteristics which limit its resemblance to any other international organization. As a composite structure, an international organization remains bound by close ties to the States which are its members; admittedly, analysis will reveal its separate personality and show that it is "detached" from them, but it still remains closely tied to its component States. Being endowed with a competence more limited than that of a State and often somewhat ill-defined (especially in the matter of external relations), for an international organization to become party to a treaty occasionally required an adaptation of some of the rules laid down for treaties between States.
>
> 42. The source of many of the substantive problems encountered in dealing with this subject lies in the contradictions which may arise as between consensuality based on the equality of the contracting parties and the differences between States and international organizations. Since one of the main purposes of the draft articles, like that of the Vienna Convention itself, is to provide residuary rules which will settle matters in the absence of agreement between the parties, the draft must set forth general rules to cover situations which may be more varied than those involving States alone. For international organizations differ not only from States but also from one another. They vary in legal form, functions, powers and structure, a fact which applies above all to their competence to conclude treaties…[9]

12. The Commission explained further that it had followed a methodology intended to establish the draft articles as being

> independent of the Vienna Convention in the sense that the text as a whole represents a complete entity that can be given a form which would enable it to produce legal effects irrespective of the legal effects of the Vienna Convention. If, as recommended, the set of draft articles becomes a convention, the latter will bind parties other than those to the Vienna Convention and will have legal effects whatever befalls the Vienna Convention.[10]

C. United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, 1986

13. Pursuant to the Commission's recommendation that a conference be convoked to conclude a convention,[11] the General Assembly subsequently decided[12] to convene the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations in Vienna from

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[9] *Yearbook of the International Law Commission, 1982*, vol. II, Part Two (United Nations publication, Sales No. E.83.V.3 (Part II)), document A/37/10, paras. 35-37 and 40-42.

[10] Ibid., para. 46.

[11] Ibid., para. 57.

[12] General Assembly resolutions 37/112 of 16 December 1982, 38/139 of 19 December 1983, 39/86 of 13 December 1984 and 40/76 of 11 December 1985.

18 February to 21 March 1986.[13] In resolution 39/86, the Assembly "*refer[red]* to the Conference, as the basic proposal for its consideration, the draft articles on the law of treaties between States and international organizations or between international organizations adopted by the International Law Commission at its thirty-fourth session". Ninety-seven States participated in the Conference, which culminated in the adoption of the Convention.[14]

III. Development of article 25

A. Consideration by the International Law Commission

1. First reading of the draft articles

14. The Commission undertook the first reading of the draft articles from 1970 to 1980, on the basis of the first nine reports of the Special Rapporteur. The question of the provisional application of treaties was considered for the first time[15] in his fourth report,[16] submitted at the twenty-seventh session in 1975, which included the following proposal for draft article 25:

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

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[13] The Assembly had before it several reports by the Secretary-General containing the written comments and observations of Member States and intergovernmental organizations. See A/38/145 and Corr.1 and Add.1 and A/39/491; see also the statement by the Administrative Committee on Co-ordination (A/C.6/38/4, annex).

[14] Following a request by the representative of Bulgaria, the Convention as a whole was adopted by a vote of 67 votes to 1, with 23 abstentions, at the 7th plenary meeting, held on 20 March 1986 (*Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February-21 March 1986, vol. I, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.5), 7th plenary meeting, para. 52.

[15] An earlier reference to the provisional application of treaties is to be found in the comments of José Sette Câmara, of 14 January 1971, made in response to a questionnaire addressed to Commission members, in which he, inter alia, suggested that articles 24 and 25 of the Vienna Convention of 1969 "should also be explored for adaptation to the new articles in the pertinent provisions". *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), document A/CN.4/250, annex II, p. 197.

[16] *Yearbook of the International Law Commission, 1975*, vol. II (United Nations publication, Sales No. E.76.V.4)…1975, vol. II, document A/CN.4/285.

15. In the report, the Special Rapporteur indicated simply that the text "…differ[ed] from article 25 of the 1969 Convention only with respect to the drafting changes needed in order to take into account of international organizations".[17]

16. The Commission considered the proposal for draft article 25 at its twenty-ninth session in 1977. In introducing the draft article, together with the proposal for draft article 24 (on entry into force), the Special Rapporteur indicated, inter alia, that

> [s]ince the text of article 24 of the Vienna Convention was extremely flexible, it could be adapted to any situation which might result from agreements concluded by international organizations. That was why he had not distinguished between treaties concluded between organizations and treaties concluded between States and international organizations. *He had not made that distinction in draft article 25 either*.[18] (emphasis added)

17. During the ensuing debate, the primary concern of the members who spoke was that the proposed draft article envisaged States and international organizations being placed on an equal footing. Laurel B. Francis observed that

> the provisions of article 25, paragraph 1 (a), would give international organizations a voice in determining whether a treaty in the negotiation of which they had participated with States could apply provisionally. Article 25, paragraph 1(b), however, seemed to imply that, where both international organizations and States had negotiated a treaty, only the latter could determine whether or not it should apply provisionally. Difficulties would also arise from article 25, paragraph 2, since an international organization would not be able to give the notice to which that provision referred to "other" States because it was not itself a State. If the intention was that international organizations should have the same rights with respect to the entry into force and the provisional application of treaties as the States with which they had negotiated those treaties, paragraph 1 (b), and paragraph 2 of article 25 would have to be amended.[19]

18. Mr. Reuter, the Special Rapporteur, confirmed that "[h]is intention had been to place States and international organizations on an equal footing, as that could not cause any difficulties".[20]

19. Nikolai A. Ushakov, in turn, stated that

> he was convinced that the same formula could not be applied to States and to international organizations and that there must be one provision for treaties concluded between international organizations and another for treaties concluded between States and international organizations… It was not a question of agreements between "parties", … but of agreements between "negotiating" States and international organizations. Article 3 (c) of the Vienna Convention reserved the application of that Convention to the relations of States as between themselves under international agreements to which other

[17] Ibid.

[18] *Yearbook of the International Law Commission*, 1977, vol. I (United Nations publication, Sales No. E.78.V.1), document A/CN.4/SR.1435, para. 4.

[19] Ibid., para. 6.

[20] Ibid., para. 7.

subjects of international law were also parties, and he did not see how the articles under consideration would make it possible to apply that provision to treaties to which a large number of States and a single international organization were parties. According to article 25, for example, it would be necessary for the negotiating international organization to agree to the provisional application of the treaty. If the future convention on the law of the sea provided for the participation of the United Nations and did not contain any provisions on entry into force or provisional application, the agreement of the United Nations would be necessary for the entry into force or provisional application of that instrument.[21]

20. In response, the Special Rapporteur pointed out that

> Mr. Ushakov was calling in question the notion of a party to a treaty. He (the Special Rapporteur) believed that the agreement of the single State was essential if, for example, the treaty related to assistance to be provided to that State by a number of international organizations. Similarly, it was inconceivable that a treaty concluded between a large number of States and an international organization, which made that organization responsible for nuclear monitoring, could enter into force or be applied provisionally without the organization's consent. If the Commission decided to give international organizations a special status, it would be necessary to amend … [the] articles so that restrictive rules would apply to international organizations. If the Commission chose that course, he would defer to its wishes, although he held a different view. In the circumstances, he thought that articles 24 and 25 could be referred to the Drafting Committee for consideration …[22]

21. The Drafting Committee subsequently prepared both a draft article 25 and draft article 25 bis, as follows:

> Article 25. Provisional application of treaties between international organizations
>
> 1. A treaty between international organizations or a part of such a treaty is applied provisionally pending its entry into force if:
>
> (a) the treaty itself so provides; or

[21] Ibid., paras. 8 and 18.

[22] Ibid., para. 17. See also the views of Milan Sahovic ("…it might be advisable to adopt Mr. Ushakov's suggestion and subdivide the articles under consideration, so as to make them easier to understand"), ibid., para. 14, and Stephan Verosta ("[a]ccording to draft article 1, the draft articles did not apply to treaties in general but to two particular kinds of treaty, namely, treaties between one or more States and one or more international organizations and treaties between international organizations. Those were therefore the two categories of treaties which the Commission should take into account in formulating the draft articles"), ibid., para. 27. A different view was expressed by Juan José Calle y Calle ("[w]hile he agreed with Mr. Ushakov that it was essential to make a distinction between States and international organizations in certain articles, he did not think that was necessary in articles 24 and 25"), ibid., para. 13, and Stephen M. Schwebel ("[t]he point concerning the differences between international organizations and States was certainly a valid one, to which all the members of the Commission subscribed, but it should not be pressed too far...He was not convinced that an attempt to categorize treaties according to the preponderant type of party would be a productive endeavour."), ibid., paras. 29 and 30).

(b) the negotiating international organizations have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating international organizations have otherwise agreed, the provisional application of a treaty between international organizations or a part of such a treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Article 25 bis. Provisional application of treaties between one or more States and one or more international organizations

1. A treaty between one or more States and one or more international organizations or a part of such a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating State or States and international organization or organizations have in some other manner so agreed.

2. Unless a treaty between one or more States and one or more international organizations otherwise provides or the negotiating State or States and international organization or organizations have otherwise agreed:

(a) the provisional application of the treaty or a part of the treaty with respect to a State shall be terminated if that State notifies the other States, the international organization or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty;

(b) the provisional application of the treaty or a part of the treaty with respect to an international organization shall be terminated if that organization notifies the other international organizations, the State or States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

22. In introducing the report of the Drafting Committee, its Chairman indicated that "the Drafting Committee had kept to the basic distinction between two different types of treaties, namely, treaties between international organizations and treaties between States and international organizations" and that "[i]n consequence of the basic distinction between the two types of treaties…the Drafting Committee had prepared separate but parallel articles when that had seemed necessary for the purposes of clarity and precision, namely, with respect to…the provisional application of treaties (articles 25 and 25 bis)".[23] Both draft articles were adopted at that session, on first reading, without comment or objection, in the form proposed by the Drafting Committee.[24]

23. The commentary to draft article 25, also adopted that year (1977), simply indicated that "[f]or reasons of clarity, the provisions which correspond to article 25 of the Vienna Convention are set out in two separate symmetrical articles, 25 and 25 bis, the texts of which differ from the Vienna Convention only by the drafting

[23] Ibid., document A/CN.4/SR.1451, paras. 14 and 15.

[24] Ibid., para. 45.

changes needed to adapt them to cover the two categories of treaties with which the present draft articles are concerned."[25]

24. The Commission's report included a further explanation that

> [i]n accordance with the method adopted from the outset, the Commission endeavoured to follow the provisions of the Vienna Convention as closely as possible, but in doing so it met with problems of both drafting and substance… The source of these substantive problems … lies in the contradictions which may arise as between consensus based on the equality of the contracting parties and the differences between States and international organizations. Since one of the main purposes of the draft articles, like that of the Vienna Convention itself, is to provide residuary rules which will settle matters in the absence of agreement between the parties, the draft must set forth general rules to cover situations which may be more varied than those involving States alone. For international organizations differ not only from States but also from one another. They vary in legal form, functions, powers and structure, a fact which applies above all to their competence to conclude treaties… Moreover, although the number and variety of international agreements to which one or more international organizations are parties have continued to increase, international practice concerning certain basic questions … is almost non-existent. ... The articles of the Vienna Convention relating to the … provisional application … of treaties were adapted to the treaties to which the present draft articles relate. This raised no problems of substance…[26]

2. Comments made in connection with the first reading

25. The only relevant comments by Governments were made in the Sixth Committee at the thirty-second session of the General Assembly, in 1977. Peru agreed with the articles formulated by the Special Rapporteur on, inter alia, the provisional application of treaties.[27] The German Democratic Republic suggested that "a rule should be established providing that the failure of any international organization to become a party to an international treaty should not be regarded as an obstacle to the entry into force or provisional application of the treaty unless the participation of that international organization was essential to the object and purpose of the treaty."[28] Czechoslovakia was of the view that

> the method adopted by the Commission in following the provisions of the Vienna Convention while keeping in mind the specific position of international organizations was the only possible way to proceed… It would also be appropriate to follow the Vienna Convention with regard to entry into force and provisional application. That method would make it possible to arrive at a

[25] *Yearbook of the International Law Commission, 1977*, vol. II (Part Two) (United Nations publication, Sales No. E.78.V.2 (Part II)), document A/32/10, para. 76 (p. 117). The commentary to article 25 bis stated that the comments made on article 25 also applied to article 25 bis (p. 118).

[26] Ibid., paras. 65, 66 and 75.

[27] *Official Records of the General Assembly, Thirty-second Session, Sixth Committee, Legal Questions*, document A/C.6/32/SR.35, para. 21.

[28] Ibid., para. 32.

certain unification and stabilization of the legal rules, which was one of the main conditions for successful codification.[29]

26. In the written comments on the draft articles, as adopted on first reading, the Federal Republic of Germany, while welcoming the fact that the Commission had adhered closely to the wording of the Vienna Convention, nonetheless expressed the view that

> the Commission's draft of a new parallel convention has certain shortcomings where the requisite adaptations are too cumbersome and perfectionistic in drafting. The intelligibility and transparency of numerous articles suffer as a result (see arts. 1, 3, 10 to 25 bis, …). The Commission should examine whether the extensive subdivision of rules and terms relating to the peculiarities of international organizations could not be avoided.[30]

Accordingly, it proposed combining draft articles 25 and 25 bis, since, in its view, it did not seem necessary to divide the subject matter into two articles.[31]

3. Second reading of the draft articles

27. The second reading of the draft articles was commenced in 1981 and concluded the following year, on the basis of the tenth and eleventh reports of the Special Rapporteur. A key focus of the second reading was the simplification of the text. The Commission explained this process as follows:

> 51. As the Commission's work progressed, views were expressed to the effect that the wording of the draft articles as adopted in first reading was too cumbersome and too complex. Almost all such criticisms levelled against these draft articles stemmed from the dual position of principle that was responsible for the nature of some articles:
>
> > on the one hand, it was held that there are sufficient differences between States and international organizations to rule out in some cases the application of a single rule to both;
> >
> > on the other hand, it was held that a distinction must be made between treaties between States and international organizations and treaties between international organizations and that different provisions should govern each.
>
> There is no doubt that these two principles were responsible for the drafting complexities which were so apparent in the draft articles as adopted in first reading.
>
> 52. Throughout the second reading of the draft articles … the Commission considered whether in concrete instances it was possible to consolidate certain articles which dealt with the same subject-matter, as well as the text within individual articles … it proceeded in certain cases to combine two articles into a more simplified single one (arts… 25 and 25 bis).[32]

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[29] Ibid., document A/C.6/32/SR.38, para. 9.

[30] *Yearbook of the International Law Commission, 1981*, vol. II (Part Two) (United Nations publication, Sales No. E.82.V.4 (Part II)), p. 186.

[31] Ibid., p. 187.

[32] Ibid., *1982*, vol. II (Part Two) (United Nations publication, Sales No. E.83.V.3 (Part II)), document A/37/10, paras. 51 and 52.

28. The consolidation of draft articles 25 and 25 bis was recommended by the Special Rapporteur in his tenth report, in 1981, in a proposal for a new draft article 25,[33] formulated 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 participants in the negotiation have in some other manner so agreed.
>
> 2. Unless the treaty otherwise provides or the participants in the negotiation have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization shall be terminated if that State or organization notifies the other States or organizations between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

In doing so, he explained that "[n]o substantive observations were made with regard to articles … 25 and 25 bis. The wording of these articles and of their titles may be simplified, and … articles 25 and 25 bis may … be combined in a single article."[34]

29. No substantive comments on the proposal were made during the plenary debate on the tenth report, held at that session (1981), prior to the referral of the draft article to the Drafting Committee.[35]

30. Subsequently, the Chairman of the Drafting Committee, in introducing a reformulated version of draft article 25, explained that the text of the article "had been prepared following the pattern … of aligning the regime of international organizations on that of States. Accordingly, … article 25 replaced articles 25 and 25 bis", and observed that the new formulation "corresponded more closely to [article 25] of the Vienna Convention, with the necessary drafting adjustments".[36]

31. The Commission proceeded to adopt, on second reading,[37] the following formulation for draft article 25, as proposed by the Drafting Committee, without any comments:

> Provisional application
>
> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (a) the treaty itself so provides; or
>
> (b) the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations have in some other manner so agreed.

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[33] Ibid., *1981*, vol. II (Part One) (United Nations publication, Sales No. E.82.V.4 (Part I)), document A/CN.4/341 and Add.1, para. 85.

[34] Ibid.

[35] Ibid., vol. I (United Nations publication, Sales No. E.82.V.3), 1652nd meeting, paras. 30 and 31.

[36] Ibid., 1692nd meeting, para. 44.

[37] Ibid., para. 43.

> 2. Unless the treaty otherwise provides or the negotiating organizations or, as the case may be, the negotiating States and negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or organization shall be terminated if that State or that organization notifies the other States and the organizations or, as the case may be, the other organizations and the States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

32. In the joint commentary on article 24 and 25, also adopted at the thirty-third session in 1981, it was explained that

> [n]o substantive changes were made to these two articles after their second reading. Their wording is, however, considerably lighter than that of the corresponding provisions as adopted in first reading, articles 24 and 24 bis and articles 25 and 25 bis respectively having been merged to form single articles. Articles 24 and 25 as now drafted differ from the corresponding articles of the Vienna Convention only in so far as is necessary to cater for the distinction between treaties between international organizations and treaties between States and international organizations (art. 24, paras. 1 and 3; art. 25, subpara. 1 (b) and para. 2).[38]

33. Draft article 25 was included among the draft articles on the law of treaties between States and international organizations or between international organizations transmitted to the General Assembly the following year.[39]

4. Comments on the draft articles, as adopted on second reading

34. Among the written comments before the Commission during the second reading, the only observation relating to draft article 25 was received from the Council of Europe, which indicated that "[p]rovisional application has already been provided for in a number of instruments drawn up within the Council of Europe, all of which, however, were treaties concluded between States only".[40]

35. The only comment[41] on the draft article, in the debate in the Sixth Committee, held at the thirty-sixth session of the General Assembly in 1981, came from Zaire, which observed that

> [t]he idea of provisional application of treaties, dealt with in article 25, had already been resisted at the Ministerial Conference held at Banjul in 1981 for the purpose of elaborating the African Charter on Human and Peoples' Rights. Several delegations had taken the view that the arbitration and mediation commission referred to in the draft Charter should not be established before the Charter entered into force.[42]

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[38] Ibid., vol. II (Part Two) (United Nations publication, Sales No. E.82.V.4 (Part II), para. 129.

[39] Ibid., *1982*, vol. II, Part Two (United Nations publication, Sales No. E.83.V.3 (Part II)), para. 63.

[40] Ibid., annex II, para. 38.

[41] None of the comments by Governments and international organizations, submitted in writing after the conclusion of the second reading in 1982 (see note 13 above), addressed article 25.

[42] *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee, Legal Questions*, document A/C.6/36/SR.47, para. 41.

B. Consideration at the 1986 Vienna Conference

36. In preparing for the 1986 Conference, the General Assembly, at its thirty-ninth session in 1984, called on the prospective participants to hold informal consultations on, inter alia, the rules of procedure and "on major issues of substance", in order to facilitate a successful conclusion of its work through the promotion of general agreement.[43] The ensuing negotiations resulted in agreement on a set of rules of procedure, which were subsequently referred to the conference,[44] and which had been "drafted for the specific use of that Conference in view of its particular nature and the subject-matter to be considered by it".[45] In particular, a distinction was made in the rules of procedure between those articles in the text formulated by the Commission, as listed in annex II to resolution 40/76, which required substantive consideration, and all the other articles. Under rule 28 of the rules of procedure, the Conference, inter alia, referred to the Committee of the Whole only those draft articles which required substantive consideration. All other articles were referred directly to the Drafting Committee. In addition, in order to expedite its work, the Conference decided that the Drafting Committee would report directly to the plenary of the Conference.[46]

37. Article 25 was among the articles referred directly to the Drafting Committee, i.e., without substantive consideration in the plenary of the conference.

38. The Chairman of the Drafting Committee subsequently introduced a revised formulation for the article — which became article 25 of the Convention[47] — at the fifth meeting of the plenary, held on 18 March 1986. In his report to the plenary, he explained that

> [t]he text of paragraph 1 of article 25 remained unchanged. Paragraph 2, however, had been adjusted… The introduction in the basic proposal of the complexities required by the attempt to cover all "other" treaty partner permutations had led to a heavy text which had not, in fact, covered all possible situations. As the text referred to treaty partners being notified, the clear and obvious meaning was that it referred to notifying "other" treaty partners. Thus, the original phrase in paragraph 2, "the other States and the organizations or, as the case may be, the other organizations and the States between which" had been changed to read simply "the States and organizations with regard to which".[48]

39. The only substantive comment on the provision, in plenary, was made by the Brazil, which stated that

> for the record and for the purpose of interpretation, … article[…] 25 … of both the 1969 Vienna Convention on the Law of Treaties and the present draft articles adopted by the Drafting Committee … should in its view be

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[43] General Assembly resolution 39/86 of 13 December 1984, para. 8.

[44] General Assembly resolution 40/76 of 11 December 1985.

[45] Ibid., para. 4.

[46] *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.5), 4th plenary meeting, para. 4.

[47] See para. 5 above.

[48] *Official Records* (see footnote 46 above), 5th plenary meeting, para. 65.

considered, in respect of States, against the background of the general principle of parliamentary approval of treaties and of the practice ensuing therefrom; but that his delegation also recognized the residuary nature of those provisions of both the 1969 Convention and the present draft articles as adopted by the Drafting Committee.[49]

40. Article 25 was adopted without a vote at the same meeting.[50]

[49] Ibid., para. 67.
[50] Ibid.