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Chapter V
Provisional application of treaties

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1. The text of the draft Guide to Provisional Application of Treaties, adopted by the Commission on second reading, together with commentaries thereto, followed by an annex containing examples of clauses found in treaties, 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 or to solutions that seem most appropriate for contemporary practice. The commentaries are an integral part of the Guide and as such they supplement the draft guidelines, which they expand and explain.

(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.[1] 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,[2] among other objectives.[3] 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 draft Guide is not legally binding as such, it elaborates upon existing rules of international law in the light of contemporary practice. The draft Guide is mainly based on article 25 of both the Vienna Convention on the Law of Treaties of 1969 (hereinafter, "1969 Vienna Convention")[4] and the Vienna Convention on the Law of Treaties

[1] 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).

[2] 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.

[3] See A/CN.4/664, paras. 25–35.

[4] 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

between States and International Organizations or between International Organizations of 1986 (hereinafter, "1986 Vienna Convention"),[5] 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 in the meaning given in those provisions. While the draft Guide is without prejudice to 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 draft Guide reflects the current *lex lata*, although some aspects of it are more recommendatory in nature. The draft 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, given its exceptional nature. Provisional application is not supposed to be either a substitute for securing entry into force of treaties, which remains the natural vocation of treaties, or 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 draft Guide, which is to acknowledge the flexible nature of the provisional application of treaties[6] 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 draft 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.[7]

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.)

[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. (A/CONF.129/15 (not yet in force).)

[6] See A/CN.4/664, paras. 28–30.

[7] Recent practice by the United Kingdom of Great Britain and Northern Ireland is particularly relevant. The highest profile case of the use of provisional application in the context of the State's exit from the European Union was that of the three new European Union-United Kingdom treaties: the Trade and Cooperation Agreement (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 Security of Information Agreement (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 Nuclear Cooperation Agreement (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 extensive use of provisional application in respect of the "continuity" agreements, both bilateral and plurilateral (see www.gov.uk/guidance/uk-trade-agreements-with-non-

(5) To provide additional assistance to States and international organizations in provisional application, the Guide also includes examples of clauses on the subject found in bilateral and multilateral treaties, which are reproduced in the annex hereto. Their inclusion is in no way intended to limit the flexible and voluntary nature of provisional application of

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eu-countries). The reasons for the use of provisional application have been essentially that the parties have wished to ensure a seamless transition of the terms under the predecessor European Union agreements to the new United Kingdom-"third country" agreements. The need for constitutional procedures to be completed by either side has often prevented entry into force of those agreements. So, if constitutionally possible, the parties have resorted to provisional application. In so doing, the United Kingdom informally set the following parameters in practice:

(a) the treaty would be laid before Parliament as soon as possible after signature, so that there was no delay in starting the period for parliamentary scrutiny;

(b) the United Kingdom would often seek to negotiate a clear provision on provisional application in the treaty, which specified that it could be terminated by either party on a short period of notice;

(c) all necessary United Kingdom domestic implementing legislation would need to be in place and in force before the United Kingdom provisionally applied the treaty;

(d) provisional application would not be unilateral: it required the agreement of both parties (or all parties in the case of a plurilateral treaty).

It was not always possible for the relevant "third country" to satisfy the last of these conditions. Sometimes, the third country was able to bring the agreement into force, but not to provisionally apply it. As a result, the United Kingdom sought ways to ensure seamless continuity without provisional application as such, mostly through "bridging mechanisms". This was a term used to describe a non-binding agreement (e.g. memorandum of understanding) with the relevant third country, by which the preferences under European Union or United Kingdom-third country "continuity" agreements were applied for a bridging period until the latter entered into force. In at least one case, where the third country was able to complete all its procedures and bring the treaty into force but not able to refer expressly to provisional application, the United Kingdom was able in effect to provisionally apply the treaty for a short period but without express reference to provisional application. The flexibility provided in article 25, paragraph 1 (a), of the 1969 Vienna Convention has proved helpful. This has meant that, in a few instances, the United Kingdom has been able to agree to provisional application with a third country by an exchange of notes at almost the last minute (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). This was so in the case of the aforementioned Nuclear Cooperation Agreement, which did not include an express provision on provisional application.

Provisional application does not amount to entry into force. But it will often be advisable to agree, for example, that references in the treaty to "entry into force" should be read as references to provisional application, that time periods should be treated as commencing at the time of provisional application, and that certain provisions might continue in effect even if entry into force is not achieved. So, the Exchange of Notes on provisional application of the aforementioned Nuclear Cooperation Agreement included the following paragraph:

> "If the Agreement is provisionally applied, the Parties shall understand references in the Agreement to the entry into force of the Agreement as references to the date from which the Agreement is provisionally applied, namely 1 January 2021. For greater certainty, Article 24(3) of the Agreement shall be understood to apply where provisional application ceases without the Agreement being concluded."

Outside the context of its exit from the European Union, in the last year the United Kingdom has provisionally applied two treaties relating to the extension of a direct Eurostar service between the Netherlands and the United Kingdom: one bilateral and one multilateral. In respect of the bilateral treaty, provisional application provided flexibility and certainty that the treaty could be applied from the date the service commenced. That date was subject to multiple changes as a result of the Covid-19 pandemic. In the end, the Parliamentary scrutiny of the treaty was completed before the service began, but the treaty was provisionally applied anyway due to requirements of the treaty partner of the United Kingdom. Similarly, the multilateral treaty was provisionally applied due to the requirements of a treaty partner. These examples demonstrate that, even if the United Kingdom is ready and willing to bring a treaty into force, the choice may be between provisional application or waiting until a treaty partner is ready to bring the treaty into force. Information based on a note prepared by Sir Michael Wood on 12 May 2021 and provided to the Special Rapporteur.

treaties, and the examples do not pretend 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.

Commentary

(1) Draft guideline 1 is concerned with the scope of application of the draft Guide. The provision should be read together with draft guideline 2, which sets out the purpose of the draft 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.[8] In the same vein, quite frequently, treaties do not use the adjective "provisional", but speak instead of "temporary" or "interim" application.[9] Consequently, the framework of article 25 of the 1969 and 1986 Vienna Conventions, while constituting the legal basis for the exercise of provisional application,[10] nonetheless lacks legal precision.[11] 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. For example, in international humanitarian law, agreements between States and non-State actors could also be applied provisionally if it is so agreed.

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.

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[8] 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).

[9] 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).

[10] See Mertsch, *Provisionally Applied Treaties …* (see footnote 1 above), p. 22.

[11] 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.

Commentary

(1) Draft guideline 2 sets forth the purpose of the draft 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 draft 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 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 draft Guide, namely that article 25 of the 1969 and the 1986 Vienna Conventions does not necessarily reflect all aspects of contemporary practice on the provisional application of treaties. This is implicit in the reference to both "the law and practice" on the provisional application of treaties. Such an approach is further alluded 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 draft 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 basic point of departure of the draft Guide, even if it is to be supplemented by other rules of international law in order to obtain a full appreciation of the law applicable to the provisional application of treaties.

Guideline 3
General rule

A treaty or a part of a treaty 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 draft 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 necessarily reflect all aspects of contemporary practice on the provisional application of treaties.

(2) The opening phrase confirms the general possibility that a treaty, or a part of a treaty, may be 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 work on the law of treaties, specifically envisaged the possibility of what became referred to as provisional application of only a part of a treaty. In draft article 22, paragraph 2, of the 1966 draft articles on the law of treaties, the Commission confirmed that the "same rule" on what it then termed "provisional entry into force" applied to "part of a treaty".[12] 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

[12] *Yearbook … 1966*, vol. II, document A/6309/Rev.1, pp. 177 ff., para. 38.

situation".[13] 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, trade treaties are frequently subject to provisional application.[14] The provisional application of a part of a treaty is accordingly reflected in the formula "provisional application of a treaty or a part of a treaty", which is used throughout the draft Guide.[15]

(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 referring, on the one hand, to the entry into force of a treaty itself,[16] examples exist of provisional application continuing for some States or international organizations after the entry into force of a treaty itself, when the treaty had not yet entered into force for those States and international organizations, as is the case for multilateral treaties.[17] 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 also implies 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.

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

[14] 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 A/CN.4/737, comments of Germany on draft guideline 3, p. 14. See also M. Chamon, "Provisional 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.

[15] 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.

[16] As in the case of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (*ibid*., vol. 1836, No. 31364, p. 3) and in the Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 Pending its Entry into Force.

[17] For example, the Arms Trade Treaty.

(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 of a provision in the treaty in question is well established,[18] 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 specify which States or international organizations may provisionally apply a treaty. 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 signed or acceded to 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.[19] 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, in terms of their connection to the treaty, is less apposite in the context of bilateral treaties, which constitute the vast majority of treaties that historically have been applied provisionally. Lastly, the draft guideline envisages the possibility of a third State or international organization, completely unconnected to the treaty, provisionally applying it after having agreed in some other manner with one or more States or international organizations concerned.[20] For these reasons, the draft guideline simply restates the basic rule in a neutral form in the passive voice.

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[18] 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.

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

[20] In this regard, see also draft guideline 4, paragraph (b) (ii), and commentary thereto.

(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".

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) or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

Commentary

(1) Draft guideline 4 deals with forms of agreement, on the basis of which a treaty, or a part of a treaty, may be 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 expressly permit provisional application and, second, provides for the possibility of an alternative basis for provisional application, when the States or the international organizations "in some other manner" so agreed, which typically occurs when the treaty is silent on the point.

(2) The possibility of States agreeing on an alternative basis for 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 broad meaning as in draft guideline 3. Two categories of additional methods for agreeing the provisional application are identified in the subparagraphs.

(3) Subparagraph (a) envisages the possibility of provisional application by means of a separate treaty, which should be distinguished from the treaty that is provisionally applied.[21] In accordance with article 2, paragraph 1 (a), of the 1969 and 1986 Vienna Conventions, the term "treaty" is to be interpreted generically as embracing 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 exchange of letters or notes, memorandums of understanding, declarations of intent, or protocols or notification to the depositary of the treaty if it has been so agreed.[22]

[21] 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 Pending its Entry into Force).

[22] See para. (2) of the commentary to draft article 22 of the draft articles on the law of treaties (footnote 12 above), p. 210; O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties. A*

(4) Subparagraph (b) acknowledges the possibility that, in addition to a separate treaty, provisional application may also be agreed through "other means or arrangements", which broadens the range of possibilities for reaching agreement on provisional application. 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.[23] 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.

(5) 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 necessarily 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.[24]

(6) Subparagraph (b) (ii) refers to the exceptional practice of a State or an international organization purporting to make a declaration to the effect of applying provisionally a treaty or a part of a treaty in cases where the treaty remains silent or when it is not otherwise agreed.[25] However, the declaration must be verifiably accepted by the other States or

Commentary, 2nd ed. (Berlin, Springer, 2018), pp. 449–450; Mathy, "Article 25" (see footnote 1 above), pp. 649–651.

[23] 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.

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

[25] There are cases in which the treaty does not require the negotiating or signatory States to apply it provisionally, but leaves open the possibility for each State to decide whether or not it wishes to apply the treaty or a part of the treaty, at any point in the process from the adoption of the text until or even after its entry into force. In such circumstances, the expression of intention that creates the obligation arising from provisional application may take the form of a unilateral declaration by the State. An example of this is the provisional application by the Syrian Arab Republic of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (United Nations, *Treaty Series*, vol. 1974, No. 33757). When the Syrian Arab Republic unilaterally declared that it would provisionally apply the Convention, the Director-General of the Organization for the Prohibition of Chemical Weapons replied neutrally, informing the Syrian Arab Republic that its "request" to provisionally apply the Convention would be forwarded to the States

international organizations concerned, as opposed to mere non-objection, for the treaty to become provisionally applicable in relation to those States or international organizations. Most of the existing practice reflects the acceptance of provisional application in written form. The draft guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that such acceptance is verifiable. The term "declaration" is not meant to refer to the rules of unilateral declarations, which are different from the rules applicable to the provisional application of treaties.[26]

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 draft 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" defines the commencement of provisional application. The text is based on that adopted in article 68 of the 1969 Vienna Convention, which refers to "takes effect". The 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.[27] 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 on 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 common 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 depository. Those provisions thus apply automatically without the

parties through the Depositary. Although the Convention does not provide for provisional application of the Convention and such possibility was not discussed during its negotiation, neither the States parties nor OPCW objected to the provisional application by the Syrian Arab Republic of the Convention, as expressed in its unilateral declaration (see the second report by the Special Rapporteur (A/CN.4/675), para. 35 (c), and the third report by the Special Rapporteur (A/CN.4/687), para. 120). Another example of consent to be bound by the provisional application of a part of a treaty by means of a declaration, but which is expressly provided for in a parallel agreement to the treaty, is contained in the Protocol to the Agreement on a Unified Patent Court on Provisional Application (see www.unified-patent-court.org/sites/default/files/Protocol_to_the_Agreement_on_Unified_Patent_Court_on_provisional_application.pdf).

[26] *Yearbook … 2006*, vol. II (Part Two), paras. 173–177.

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

need 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. 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.[28]

(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 would produce for the State or the international organization concerned and to the conduct that is expected from States or international organizations that decide to resort to provisional application. The reference to "between the States or international organizations concerned" specifies to whom the obligation to apply the treaty or part thereof applies. This includes 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, subject to the possibility that the parties may agree otherwise, is confirmed by existing State practice.[29]

(5) The second sentence of draft guideline 6 confirms the expectation 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

[28] See Mathy, "Article 25" (see footnote 1 above), p. 651.

[29] 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 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.[30]

(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.[31] 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 deals with the formulation of reservations, by a State or an international organization, purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of a treaty.

(2) As a matter of principle, the formulation of reservations related to provisional application is not prohibited. Article 19 of the 1969 and 1986 Vienna Conventions allows States to formulate a reservation when signing, ratifying, accepting, approving or acceding to a treaty. The decision to apply the treaty provisionally may also 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). As such, in principle, article 19 also applies to article 25, to the extent that a reservation may be formulated at the same moment that the decision to provisionally apply the treaty is made. Therefore, the draft guideline leaves open the possibility of formulating reservations to the provisional application of the treaty.

(3) At the same time, the draft guideline is formulated as a "without prejudice" clause in recognition of the limited availability of relevant practice concerning reservations relating to provisional application. A unilateral statement, formulated by a State or an international organization after initialling or signature but prior to entry into force of a bilateral treaty 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.[32] Although States have made interpretative declarations in conjunction with agreeing to provisional application of

[30] See para. (1) of the commentary to draft article 22 of the draft articles on the law of treaties (footnote 12 above), p. 210, and *Yearbook … 2013*, vol. II (Part One), document A/CN.4/658, paras. 44–55.

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

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

multilateral treaties, such declarations must be distinguished from reservations.[33] Nor are declarations to opt out of provisional application reservations in the sense of the law of treaties.[34] However, it remains to be ascertained in a given case to what extent such declarations or unilateral statements aimed at opting out with respect to the provisional application of a treaty are comparable in their legal effect to that of formal reservations. It may also be relevant to distinguish between the case where a State or an international organization formulates a reservation to the provisional application as such, or formulates one or more reservations intended to produce their consequences only during the phase of provisional application or beyond.

(4) 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. While the 2011 Guide to Practice on Reservations to Treaties does not specifically address reservations formulated at the time of provisional application of a treaty, it may, nonetheless, provide general guidance on such questions.[35]

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 reflects the legal implication of draft guideline 6, including the *pacta sunt servanda* principle. 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 necessarily constitutes a 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 prejudge any question that may arise in regard to a treaty from the international responsibility of a State and article 74 of the 1986 Vienna Convention provides similarly. The scope of the draft Guide is not limited to that of the two Vienna Conventions, as stated in draft guideline 2.

(2) When "a part" of a treaty is being provisionally applied, it is only a breach of that part of the treaty that is susceptible to giving rise to international responsibility.

(3) The draft guideline should be read together with the articles on responsibility of States for internationally wrongful acts of 2001[36] and with the articles on responsibility of international organizations of 2011,[37] to the extent that they reflect customary international law. Accordingly, the reference to "an obligation arising under" and the word "entails" were consciously drawn from those draft articles. Likewise, the concluding phrase "in accordance with the applicable rules of international law" is intended as a reference, *inter alia*, to those draft articles.

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

[34] 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.

[35] *Yearbook … 2011*, vol. II (Part Three).

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

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

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 and suspension of provisional application. The provisional application of a treaty or a part of a treaty by a State or an international organization typically ceases in one of two instances: first, when the treaty enters into force for the State or international organization concerned or, second, when the intention not to become a party to the treaty is communicated by the State or international organization provisionally applying the treaty or a part of a treaty to the other States or international organizations between which the treaty or a part of a treaty is being 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.[38] 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.[39] In accordance with draft guideline 5, provisional application continues in respect of two or more States or international organizations applying the treaty or a part of a treaty provisionally until the treaty enters into force between them.[40]

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

[39] Most bilateral treaties state that the treaty shall be provisionally applied "pending its entry into force", "pending its ratification", "pending the fulfilment of the formal requirements for its entry into force", "pending the completion of these internal procedures and the entry into force of this Convention", "pending the Governments … informing each other in writing that the formalities constitutionally required in their respective countries have been complied with", "until the fulfilment of all the procedures mentioned in paragraph 1 of this article" or "until its entry into force" (see A/CN.4/707, para. 90). That is also the case for multilateral treaties, such as the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 Pending its Entry into Force), which provides in paragraph (*d*) that: "Such a declaration [of provisional application] will cease to be effective upon the entry into force of Protocol No. 14 *bis* to the Convention in respect of the High Contracting Party concerned."

[40] 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

(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 continue to be applied only provisionally by others. This phrase is thus intended to capture all the possible legal situations that may exist in that regard.

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

(5) The opening phrase of paragraph 2 "[u]nless the treaty otherwise provides or it is otherwise agreed" omits the reference to such an alternative agreement only being concluded between the "negotiating" States and international organizations, 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.[41]

(6) The final phrase in paragraph 2, "notifies the other States or international organizations concerned",[42] is a reference to the States and international organizations between which a treaty or part of a treaty is being 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 include an option for its termination on 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

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Spain and the Government of Colombia on Free Visas (*ibid*., vol. 2253, No. 20662, p. 328, at pp. 333–334).

[41] 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.

[42] 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 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.

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 those anticipated in paragraphs 1 and 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 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 decision to invoke 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 draft 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. [43] 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.

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

[43] See S. Talmon and A. Quast Mertsch, "Germany's position and practice on provisional application of treaties", GPIL – German Practice in International Law, 2021.

first paragraph concerns the rule applicable to States and the second the rule applicable to international organizations.

(2) The provision follows closely the formulation contained in article 27 of both the 1969[44] and 1986[45] 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,[46] draft guideline 10 states, as a general rule, that a State or an international organization may not invoke the provisions of its internal law or rules as a justification for its failure to perform an obligation arising under such provisional application. Likewise, such internal law or rules cannot be invoked so as to avoid the responsibility that may be incurred for the breach of such obligations.[47] 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,[48] once a treaty or a part of a treaty is applied provisionally, an inconsistency with the internal law of a State or of 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.[49] Any other view would be contrary to the law on State responsibility, according to which the characterization of an act of a State or an international organization as internationally wrongful is governed by international law and such characterization is not affected by its characterization as lawful by internal law.[50]

(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.

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[44] 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.

[45] 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.

[46] 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 1 above), pp. 688–701, at p. 689.

[47] 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).

[48] See Mertsch, *Provisionally Applied Treaties …* (see footnote 1 above), p. 64.

[49] See Mathy, "Article 25" (see footnote 1 above), p. 646.

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

(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,[51] and the second, paragraph 2 of article 46 of the 1986 Vienna Convention.[52] Therefore, the draft guideline should be considered together with those articles and other applicable rules of international law.

[51] 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.

[52] Article 46 of the 1986 Vienna Convention provides as follows:

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

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as 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) 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.[53]

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 relate to substantive or procedural requirements, such as those for the expression of consent to be bound by a treaty, or a combination of both. The provision acknowledges that such limitations may exist and, consequently, recognizes the right of States and international organizations to agree to provisional application subject to limitations that derive from internal law or rules of the organizations, and reflecting them in their consent to apply provisionally a treaty or a part of a treaty.

(2) Notwithstanding the fact that the provisional application of a treaty or part of a treaty may be subject to limitations, the present draft guideline recognizes the flexibility of 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.[54]

(3) The word "agreement" in the title of the draft guideline reflects the consensual basis of the provisional application of treaties, as well as the fact that provisional application might not be possible at all under the internal law of States or the rules of international organizations.[55]

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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.

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

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

[55] See the several examples of Free Trade Agreements between the EFTA States and other numerous States (i.e. Albania, Bosnia and Herzegovina, Canada, Chile, Egypt, Georgia, Lebanon, Mexico, Montenegro, Peru, Philippines, Republic of Korea, Serbia, Singapore, the former Yugoslav Republic of Macedonia, Tunisia and the Central American States, the Gulf Cooperation Council Member States and the Southern African Custom Union States), where different clauses are used in this regard, such as: "if its constitutional requirements permit", "if its respective legal requirements permit" or "if their domestic requirements permit" (www.efta.int/free-trade/free-trade-agreements). For instance, article 43, paragraph 2, of the Free Trade Agreement between the EFTA States and the Southern African Custom Union States, reads as follows:

(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.

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.