ADVISORY COMMITTEE ON ISSUES OF PUBLIC INTERNATIONAL LAW

ADVISORY REPORT ON

The ILC draft Guide to Provisional Application of Treaties

CAVV ADVISORY REPORT NO. 33

THE HAGUE

MAY 2019

Members of the Advisory Committee on Issues of Public International Law

Professor L.J. van den Herik (Chair)
Dr C.M. Brölmann (Vice-Chair)

Dr R. van Alebeek

Dr G.R. den Dekker

Dr B. van Ginkel

Dr A.J.J. de Hoogh

Professor J.G. Lammers

A.E. Rosenboom

Professor C. Ryngaert

Civil service adviser: Professor R.J.M. Lefeber

Executive secretaries:

V.J. de Graaf LLM and F. Arichi

CAVV Secretariat:
P.O. Box 20061
2500 EB The Hague
Tel.: 070 348 4889
E-mail: djz-ir@minbuza.nl

1. INTRODUCTION

In August 2018 the International Law Commission (ILC)[1] adopted the 'Draft Guide to Provisional Application of Treaties' (Draft Guide) on first reading.[2] In his letter of 9 April 2019 the Minister of Foreign Affairs requested the Advisory Committee on Issues of Public International Law (CAVV) to prepare an advisory report on the Draft Guide.

Dr Den Dekker prepared a draft advisory report, which was then the subject of consultations and discussions among the CAVV members, conducted in a shared email environment and at the CAVV meeting of 9 May 2019. The advisory report was adopted on 20 May 2019.

The provisional application of treaties is a regular occurrence in practice. As the ILC's Special Rapporteur on this subject, Juan Manuel Gómez-Robledo, noted in his fifth report,[3] States and international organisations may resort to the provisional application of treaties due to a variety of factors, such as urgency, flexibility, precaution and, of course, transition to imminent entry into force of the treaty in question. The provisional application of treaties usually takes place in a bilateral context, but can also occur in the case of multilateral treaties.[4] In the practice of the European Union in particular, the provisional application of treaties is sometimes used as an instrument on account of the effects it produces in the national legal orders. Generally speaking, most examples of State practice in this regard concern the provisional application of treaties on matters such as trade and raw materials.

The Netherlands also applies treaties provisionally in a variety of policy-related and other areas, such as transport and development cooperation. In some bilateral cases, for instance in relation to social security, the Netherlands makes unilateral use of provisional application.[5]

---

[1] The International Law Commission (ILC) was established by the United Nations in 1948. Based in Geneva, the ILC is formally a subsidiary organ of the United Nations General Assembly and currently has 34 members. The ILC assists the General Assembly in discharging its obligations under article 13 of the Charter of the United Nations, on the basis of which the General Assembly makes recommendations on the development of international law and its codification.

[2] *Report of the International Law Commission, seventieth session (30 April – 1 June and 2 July – 10 August 2018), A/73/10, Chapter VII*.

[3] See *Special Rapporteur's Fifth Report on the provisional application of treaties*, 20 February 2018, A/CN.4/718, para. 79.

[4] A few well known examples are GATT, which was provisionally applied from 1947 until 1994, as well as the Agreement of 1994 relating to the implementation of Part XI of UNCLOS and the Doha Amendment of 2012 to the Kyoto Protocol.

[5] See for example article 35, paragraph 2 of the Agreement on Social Security between the Government of the Kingdom of the Netherlands and the Government of New Zealand, 30 June 2000, *Dutch Treaty Series* 2001, 102.

The Draft Guide adopted on first reading consists of 12draft guidelines and accompanying commentaries. After setting out its scope and purpose (draft guidelines 1 and 2), the Draft Guide contains a number of substantive guidelines on the manner in which a treaty or a part of a treaty may be provisionally applied by States and international organisations (draft guidelines 3 and 4), the commencement and legal effect of provisional application (draft guidelines 5 and 6), reservations (draft guideline 7), responsibility for breach (draft guideline 8), termination and suspension of provisional application (draft guideline 9) and the relationship between provisional application and the internal law of States, both generally and in relation to the competence to conclude treaties, as well as in relation to limitations derived from internal law in the context of consent (draft guidelines 10, 11 and 12).

2. Comments

The CAVV wishes to make the following general comments on the Draft Guide as well as a few more specific comments.

2.1. Purpose of the Draft Guide

The main reasons for preparing the Draft Guide were to provide assistance in establishing a way to provisionally apply treaties or parts of treaties that is consistent with the existing rules of international law and is most commensurate with contemporary practice, while also promoting the consistent use of terms in relation to provisional application and its legal consequences (general commentary, 2 and 6). These objectives do not strike the CAVV as overly ambitious. The Draft Guide seems unlikely to provoke much controversy.

The draft guidelines are not legally binding (general commentary, 4). Nor does the Draft Guide take the form of a traditional ILC codification project intended to culminate in a legally binding instrument. Nevertheless, the ILC's idea to use the draft guidelines to build on existing rules of international law in the light of contemporary practice, viewed in conjunction with the practical examples referred to in the commentaries, undeniably reflects a certain aspiration to present international customary law (as it currently stands). With respect to State practice, the Draft Guide could also be understood to reflect subsequent practice in the application of article 25 of the Vienna Convention on the Law of Treaties, making it relevant to the interpretation of that treaty article (see art. 31(1.b) of the Vienna Convention on the Law of Treaties).[6]

[6] For more on this subject see the CAVV's advisory report on 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties', advisory report no. 30, November 2017.

In addition to the draft guidelines, draft model clauses reflecting best practice in this field have also been prepared for possible inclusion in an Annex to the Draft Guide. The draft model clauses (included in footnote 996 of the ILC report) are rather predictable and undetailed, but the CAVV considers that, like the Draft Guide itself, they do already have certain value in that they can help prevent confusion over terminology in the future. In particular, the previously used designation 'provisional entry into force', as well as designations such as 'temporary' or 'interim' treaty application, have sown confusion about the scope and legal effects of provisional treaty application. It is significant in this respect that the draft guidelines also aim to encourage uniform practice among international organisations.

It is also noteworthy that the ILC intends that the Draft Guide should offer assistance not only to States and international organisations, but also to 'other users' (general commentary, 2). The commentary provides no further explanation of what this term means. Presumably 'other users' includes those involved in the application of the law, such as judges and arbiters in domestic and international courts and arbitration tribunals.

2.2. Alignment of Draft Guide with existing rules of international law

The provisional application of treaties is the subject of international law and is already regulated, albeit not exhaustively, in article 25 of the Vienna Convention on the Law of Treaties of 1969 (entered into force on 27 January 1980)[7] and in article 25 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986.[8] The Vienna Convention of 1986 has not yet entered into force and is therefore covered in neutral terms in the draft guidelines by the miscellaneous category 'other rules of international law'. The Draft Guide explicitly seeks to align itself with existing law (see in particular draft guidelines 2 and 9(1,2)). In addition, the Draft Guide elaborates on existing rules of international law in the light of contemporary practice (general commentary, 4). In some cases the draft guidelines refer explicitly to the application, *mutatis mutandis*, of the Vienna Convention on the Law of Treaties or relevant rules of international law (see for example draft guidelines 7 and 9(3)).

From the commentary to the draft guidelines, it is apparent that contemporary practice does not differ greatly from codified international law. Whereas article 25 of the Vienna Convention on the Law of Treaties seemed to limit the provisional application of a treaty to relations between or with the negotiating states – although this was not interpreted very strictly in practice – the Draft Guide proposes broadening its scope to extend to all States

[7] Vienna Convention on the Law of Treaties, 23 May 1969; entered into force for the Netherlands on 9 May 1985, *Dutch Treaty Series* 1985, 79.

[8] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, *Dutch Treaty Series* 1987, 136.

and international organisations that explicitly indicate at any point that they will provisionally apply the treaty in question or a part of the treaty, irrespective of whether they were involved in the negotiations that led to the conclusion of the treaty.[9]

The provision allowing 'a part' of a treaty to be provisionally applied corresponds with the wording of article 25 of the Vienna Conventions (see commentary, 3:4).

2.3. Characteristics: scope and flexibility

The Draft Guide's approach to the scope of the subject of the provisional application of treaties can be described as comprehensive. For instance, the draft guidelines use broad formulations in relation to entry into force, encompassing not only the provisional application of a treaty or a part of a treaty pending its entry into force, but also the provisional application of a treaty by a State or international organisation for which that treaty has not yet entered into force. By using the formulation 'entry into force' in this way, the Draft Guide seeks alignment with article 24 of the Vienna Conventions of 1969 and 1986, concerning both the entry into force of the treaty itself and entry into force for each State or international organisation concerned (see commentary, 3:5). The formulation '*may be* provisionally applied' as used in draft guideline 3 seems in this connection to be more flexible than '*is* provisionally applied' as appears in article 25 of the Vienna Conventions. In addition, international organisations are referred to consistently throughout the Guide as parties that apply treaties provisionally. The Draft Guide also regulates the legal implications of a treaty breach in the case of provisional application (draft guideline 8), whereas the subject of responsibility for breaches was explicitly excluded from the scope of the Vienna Conventions (article 73 of the Vienna Convention on the Law of Treaties; article 74 of the Vienna Convention of 1986).

While the Draft Guide is comprehensive, it is also very flexible and offers few 'hard' guidelines. The core legal concepts that prevail in the Draft Guide are, logically enough, the voluntary nature of the mechanism – free consent of States and international organisations to provisional application – and the supplementary nature of the Draft Guide; the qualification 'unless the treaty otherwise provides or it is otherwise agreed' recurs regularly. Even the in itself 'hard' principle that the provisional application of a treaty or a part of a treaty produces 'a legally binding obligation' to apply that treaty or part of the treaty as if the treaty were in force (draft guideline 6) applies 'unless the treaty provides otherwise or it is otherwise agreed'. The Draft Guide assumes in this connection that there is no obligation upon States or international organisations to apply a treaty or a part of a treaty provisionally, even if the treaty permits provisional application or this has been

[9] This concerns agreed provisional application ('agreed through'; 'accepted by') and does not therefore include unilateral declarations; see also the discussion of draft guideline 4 below.

otherwise agreed (see the use of 'may' in draft guideline 3, as well as general commentary, 3). All of this corresponds with the prevailing conception of the voluntary nature of treaty law and ties in with the subsidiary character of the rules contained in the Vienna Conventions of 1969 and 1986.

It is similarly in line with existing law that maximum flexibility is provided for regarding the possible ways in which provisional application can be agreed. According to draft guideline 4, agreement is possible in the provisionally applied treaty itself, by separate treaty or by 'any other means or arrangements', for example resolutions adopted by an international organisation or at an intergovernmental conference, or a declaration by a State or international organisation that is accepted by the other States or international organisations concerned.[10] The Draft Guide does not address any possible legal effects of unilateral declarations by subjects of international law, but (in line with article 25 of the Vienna Conventions of 1969 and 1986) assumes agreement on provisional application between States and/or international organisations. Taking the same flexible approach (and in the absence of guidance from State practice), the guideline on termination and suspension of provisional application (draft guideline 9) makes no provision for a standard notice period in the case of termination (unlike article 56(2) of the Vienna Conventions of 1969 and 1986, in which such a provision is included).

A downside of attempting to comprehensively address the subject covered and the situations envisaged, while at the same time aiming to retain great flexibility in the application of the Draft Guide, is that some of the draft guidelines are formulated in very basic or vague terms.

See for instance draft guideline 7, which provides in relation to reservations that a State or international organisation '[…] may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.' Although provisional application mainly arises in relation to bilateral treaties, it is certainly conceivable that in a multilateral context and in relation to treaties to which both States and international organisations may be party (for example, mixed agreements in an EU context) a patchwork of reservations to provisional application of the treaty or parts of it could in theory develop, as a result of which flexibility could in practice verge on

[10] See for example Decision 1/CP.21 on Adoption of the Paris Agreement of 2015 by the Parties to the United Nations Framework Convention on Climate Change, in which the possibility of provisional application of the Paris Agreement was accepted by the Parties. The government of Tuvalu stated in a declaration that it would provisionally apply the Agreement.
(https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVII/XXVII-7-d.en.pdf).

impracticability.[11] In addition, it is not entirely clear to what extent draft guideline 7 is also intended to 'incorporate' the rules on the acceptance of objections to reservations contained in article 20 of the Vienna Conventions. It remains to be seen whether these issues will give rise to problems in practice; the Special Rapporteur has not yet been able to identify any pertinent examples.[12]

Another relevant example in this connection is draft guideline 5: '[T]he provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed'. The main point here is that there is no default rule to fall back on if a treaty says nothing about the date on which or the manner in which provisional application between the relevant States or international organisations commences. However, there appears to be little need for such a rule either, since it seems rather obvious that it will not 'slip the minds' of States and international organisations to make provision for how and when provisional application commences. Nevertheless, it would be possible to opt for a default rule in any case, for instance by referring to the date on which the treaty is signed (within the meaning of article 14 of the Vienna Conventions of 1969 and 1986).

2.4. Core obligations

Draft guideline 6 (in conjunction with 8) and draft guideline 9 can be said to contain core obligations for which a default rule has been formulated.

Draft guideline 6 makes clear that – unless the treaty provides otherwise or it is otherwise agreed (cf. draft guideline 4) – provisional application produces a legally binding obligation for the State or international organisation concerned to apply the treaty (or a part thereof) as if it were already in force. This principle informs both the legal effect of provisional application and the conduct expected of the State or international organisation (commentary, 6:4). This (standard) legal effect of provisional application was not incorporated in the Vienna Conventions of 1969 and 1986. Whereas the commentary to the draft guideline makes clear that provisional application does not affect the content of the treaty itself (commentary, 6:6), it is rather vague when it comes to the difference between the legal effects of provisional application and of entry into force of the treaty. The commentary notes that provisional application is, as a matter of principle, different from

[11] The issue of reservations to treaties is extremely complex, even without taking account of the additional complication of provisional application, as evidenced by the attempts made within the ILC over many years to agree on a 'Guide to practice on reservations to Treaties'.

[12] See *Special Rapporteur's Fifth Report on the provisional application of treaties*, 20 February 2018, A/CN.4/718, para. 67.

entry into force and is not subject to 'all' rules of the law of treaties (commentary, 6:5). A couple of specific examples to clarify this point would have been helpful.

Draft guideline 8 makes clear that a breach of an obligation under a treaty or a part of a treaty that is provisionally applied entails international responsibility in accordance with the applicable rules of international law. This reflects a rule of customary international law and is aligned with the well-known Articles on Responsibility of States for Internationally Wrongful Acts (2001) and their 2011 equivalent for international organisations (see commentary, 8:3), and as such can be described as uncontroversial. Yet this draft guideline sends out a signal that is not unimportant: it reflects the legal implication of draft guideline 6 (commentary, 8:1) and in doing so underlines the legally binding nature of provisional application.

Draft guideline 9 confirms once more that that the provisional application of a treaty does not entail or imply freedom from obligation. Suspension or termination of provisional application requires a legal basis.

Paragraphs 1 and 2 of draft guideline 9 reiterate in this respect the substance and purport of article 25 of the Vienna Convention on the Law of Treaties (and article 25 of the Vienna Convention of 1986), adding the clarification that provisional application terminates with the entry into force of the treaty 'in the relations between the States or international organizations concerned' (paragraph 1), and if the State or international organisation concerned notifies the other States or international organisations 'between which the treaty or a part of a treaty is being applied provisionally' of its intention not to become a party to the treaty (paragraph 2; the commentary (9:6) describes this as a clarification, but it may be noted that this same formulation is already contained in article 25, paragraph 2 of the Vienna Convention of 1986).

Paragraph 3 states that draft guideline 9 is without prejudice to the application, *mutatis mutandis*, of Part V, Section 3 of the Vienna Convention of the Law of Treaties and any other relevant rules of international law concerning termination and suspension. This addition can be deemed useful because it clarifies that provisional application can also be halted (on a temporary basis or otherwise) in relation to one particular party, for instance if a breach can be attributed to that party ('material breach', see article 60 of the Vienna Convention on the Law of Treaties)[13] or on the grounds of a fundamental change of

[13] The Special Rapporteur's proposal to adopt a draft guideline specifically addressing material breach ('draft guideline 8 *bis*') was not included in the Draft Guide in this specific form. See *Special Rapporteur's Fifth Report on the provisional application of treaties*, 20 February 2018, A/CN.4/718, paras. 63 ff.

circumstances (*rebus sic stantibus*, see article 62 of the Vienna Convention on the Law of Treaties).[14] An intention not to become a party to the treaty is not required in that case.

In a note verbale to the ILC[15] the Netherlands pointed out that, at least in a bilateral context, the State concerned may also end the provisional application by withdrawing its declaration of provisional application, although obligations owed to third parties acting in good faith must be respected.

2.5. Relationship with internal law

One of the key subjects in the Draft Guide is the relationship between the provisional application of treaties and the internal law of States and rules of international organisations. As is the case with respect to the conclusion and entry into force of treaties, the provisional application of treaties in the internal legal order is largely governed by the relevant provisions of States' internal law and the rules of international organisations. The Draft Guide uses internal law and rules as an umbrella term applicable to States and international organisations, respectively.

In the aforementioned note verbale to the ILC[16] the Netherlands noted *inter alia* that the provisional application of treaties in the Dutch legal order can in principle take place without the prior parliamentary approval required by article 91 of the Dutch Constitution, but is subject to the conditions laid down by section 15 of the Kingdom Act on the Approval and Publication of Treaties (*Bulletin of Acts and Decrees,* 1994, 542). Article 93 of the Constitution may also give rise to a duty to publish where treaty provisions have direct effect – 'provisions of treaties (…) which may be binding on all persons by virtue of their contents' – before the provisional application (of such treaty provisions) may take effect.

The relationship between provisional application and internal law and rules is regulated by draft guidelines 10, 11 and 12.

Draft guidelines 10 and 11 correspond with article 27 and article 46 of the Vienna Conventions of 1969 and 1986. In summary, the purport of these draft guidelines is, respectively, that the internal law of States and rules of international organisations cannot be invoked as justification for failure to comply with treaty obligations, and that a State or

[14] For instance, the Netherlands once suspended the provisional application of a bilateral treaty on development cooperation for a number of years and with immediate effect due to a fundamental change of circumstances (see *Dutch Treaty Series* 1983, 6 and *Dutch Treaty Series* 1988, 68).

[15] NYV/2016/391, 20 April 2016.

[16] NYV/2016/391, 20 April 2016.

international organisation cannot subsequently invoke its internal law or rules to invalidate its consent to provisional application, unless the provision violated concerned the competence to agree to provisional application and that violation was manifest and concerned a rule of the State's internal law or a rule of the international organisation that is of fundamental importance.[17]

The wording of draft guideline 12 does, however, leave room for the State or international organisation to *incorporate* the limitations deriving from its internal law or rules in its consent to provisionally apply the treaty, by mentioning those limitations in the treaty itself or elsewhere (for example in a separate agreement on the provisional application of the treaty; what matters is that the existence of such limitations needs to be sufficiently clear, see commentary, 12:4). This would therefore appear not to concern 'unilateral' declarations or requests, but agreed limitations. These are more likely to be necessary in relation to the provisional application of treaties because in many cases the national constitutional procedures for binding the State concerned to the treaty will not yet have been completed.

As an example of a situation envisaged by draft guideline 12, the commentary (12:2) states that a treaty may explicitly refer to the internal law of a State or the rules of an international organisation and make provisional application dependent on non-violation of that internal law or those rules. As a specific example of such a situation, the commentary refers to article 45 of the Energy Charter Treaty (commentary, footnote 1047).[18]

3. Evaluation

Generally speaking, the CAVV considers the Draft Guide in its current form as a useful aid in applying existing international law on the provisional application of treaties. It is possible that the draft guidelines will have a harmonising effect by promoting the use of consistent and coherent terminology, and as a result, on the intended legal effect of provisional application of treaties and parts of treaties by States and international organisations.

[17] As is the case with respect to the 'ordinary' application of treaties, the latter situation is likely to be very rare in practice, in particular due to the strict condition that the violation of the competence rule must have been 'manifest'.

[18] In this respect the commentary seems – indirectly – to offer support for a ruling by The Hague District Court, which by judgment of 20 April 2016 (ECLI:NL:RBDHA:2016:4229) quashed six arbitral decisions (in which Russia had been ordered to pay 50 billion dollars to shareholders of the bankrupt company Yukos) owing to the absence of approval by the Russian Parliament of statutory rules on arbitration implementing article 26 of the Energy Charter, since (contrary to the interpretation by the arbiters) the District Court's interpretation of the wording on provisional application of the Energy Charter in article 45 of that charter made it necessary to examine, with respect to each individual article of the Energy Charter, whether or not the rules contained in it were compatible with the constitution or other legislation of the State in question.

The great flexibility pursued in the Draft Guide, in alignment with the existing law on treaties, means that the practicability and/or added value for specific application in practice may not be very substantial in the case of each particular draft guideline. The core obligations incorporated in the draft guidelines – that provisional application means application as if the treaty has entered into force (in connection with international responsibility for breach of provisionally applied treaty provisions) and that a legal basis is required for suspending or terminating provisional application (see draft guidelines 6 (in conjunction with 8) and 9 respectively) – can be deemed sufficiently clear and robust to (continue to) be adhered to in practice by States and international organisations (as well as 'other users').

Annexe:

Text of Chapter VII – *Provisional Application of Treaties, A/73/10 (2018).*

Chapter VII
Provisional application of treaties

[…]

C.Text of the draft Guide to Provisional Application of Treaties, adopted by the Commission on first reading

1.Text of the draft Guide to Provisional Application of Treaties

89. The text of the draft Guide to Provisional Application of Treaties adopted by the Commission, on first reading, is reproduced below.

Guide to Provisional Application of Treaties

Guideline 1
Scope

The present draft guidelines concern the provisional application of treaties.

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 rules of international law.

Guideline 3
General rule

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

Guideline 4
Form of agreement

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

(a) a separate treaty; or

(b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

Guideline 5
Commencement of provisional application

The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed.

Guideline 6
Legal effect of provisional application

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

Guideline 7
Reservations

1. In accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied *mutatis mutandis*, a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

2. In accordance with the relevant rules of international law, an international organization may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

Guideline 8
Responsibility for breach

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

Guideline 9
Termination and suspension of provisional application

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 international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.

3. The present draft guideline is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in part V, section 3, of the Vienna Convention on the Law of Treaties or other relevant rules of international law concerning termination and suspension.

Guideline 10
Internal law of States and rules of international organizations, and the observance of provisionally applied treaties

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

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

Guideline 11
Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

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

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

Guideline 12
Agreement to provisional application with limitations deriving from internal law of States and rules of international organizations

The present draft guidelines are without prejudice to the right of a State or an international organization 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 the State or from the rules of the organization.