

## Summary

This study analyzes the rule of the law of treaties permitting the provisional application of treaties or parts thereof, which usually occurs between signature and ratification (article 25 of the 1969 Vienna Convention). Chapter 1 reviews the negotiating record of article 25. Chapter 2 examines the reasons for provisional application, which include the urgency of the treaty and preparation for a new international organization. Chapter 3 considers article 25 in detail, while chapter 4 explores provisional application under customary international law, including the origins of the custom. The constitutionality of provisional application and the municipal effect of provisionally applied treaties are examined in chapter 5, along with provisional application in South African law and treaty practice. Chapter 6 considers the special role of provisional application in the field of arms control instruments. The main conclusion reached is that the principle of *pacta sunt servanda* applies during the provisional period.

Research for this study has been greatly facilitated by the electronic availability of the *United Nations Treaty Series*, the *Treaty Series* of the League of Nations, the *Australian Treaty Series* and the treaties of the European Community. Liberal use is made of material from these sources as well as of information on the Internet sites of many governments and other international organizations. Any inaccuracies in reproduction are those of the author of this study. References to Internet sources in the footnotes were accurate as of 31 October 2004.

## ABBREVIATIONS

ABM	Treaty on the Limitation of Anti-Ballistic Missile Systems
<i>AJIL</i>	<i>American Journal of International Law</i>
<i>ATS</i>	<i>Australian Treaty Series</i>
<i>BYIL</i>	<i>British Yearbook of International Law</i>
CSCE	Conference on Security and Cooperation in Europe
CTBT	Comprehensive Nuclear-Test-Ban Treaty
CTBTO	Comprehensive Nuclear-Test-Ban Treaty Organization
CWC	Chemical Weapons Convention
EC	European Community
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
<i>EJIL</i>	<i>European Journal of International Law</i>
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICITO	Interim Commission of the International Trade Organization
ICJ	International Court of Justice
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
IFAD	International Fund for Agricultural Development
ILC	International Law Commission
<i>ILM</i>	<i>International Legal Materials</i>
ILO	International Labour Organization
IMCO	International Maritime Consultative Organization
IMO	International Maritime Organization
IRO	International Refugee Organization
ITO	International Trade Organization
ITU	International Telecommunication Union
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OIC	Organization of the Islamic Conference
<i>OJ</i>	<i>Official Journal of the European Union</i>
OPANAL	Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean

OPCW	Organisation for the Prohibition of Chemical Weapons
OSCE	Organization for Security and Cooperation in Europe
PCIJ	Permanent Court of International Justice
RC	<i>Recueil des Cours</i>
RSFSR	Russian Soviet Federated Socialist Republic
SAJHR	<i>South African Journal on Human Rights</i>
SALJ	<i>South African Law Journal</i>
SALT I	Interim Agreement on certain measures with respect to the limitation of strategic offensive arms
SAYIL	<i>South African Yearbook of International Law</i>
SORT	Strategic Offensive Reductions Treaty
START (I)	Treaty on the Reduction and Limitation of Strategic Offensive Arms
START II	Treaty on Further Reduction and Limitation of Strategic Offensive Arms
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNDY	<i>The United Nations Disarmament Yearbook</i>
UNECE	United Nations Economic Commission for Europe
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNJSPF	United Nations Joint Staff Pension Fund
UNJY	<i>United Nations Juridical Yearbook</i>
UNTS	<i>United Nations Treaty Series</i>
US	United States of America
USSR	Union of Soviet Socialist Republics
VERTIC	The Verification Research, Training and Information Centre
VJTL	<i>Vanderbilt Journal of Transnational Law</i>
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization
YILC	<i>Yearbook of the International Law Commission</i>

In addition, generally accepted abbreviations are used.

## Permanent Court of International Justice

*Legal Status of Eastern Greenland* 1933 PCIJ A/B53 22..... 71

*Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory* 1937 PCIJ A/B44 24..... 109

## International Court of Justice

*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* 1984 ICJ Rep 246..... 56

*Fisheries case (UK v Norway)* 1951 ICJ Rep 116..... 88

*Land and Maritime Boundary Between Cameroon and Nigeria* 2002 ICJ Rep [forthcoming]..... 72, 123

*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* 1971 ICJ Rep 16..... 43, 86

*Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ Rep 226..... 134, 169

*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* 1969 ICJ Rep 3..... 9, 87

*Nuclear Tests (Australia v France)* 1974 ICJ Rep 268..... 69

*Reparation for Injuries Suffered in the Service of the United Nations* 1949 ICJ Rep 174..... 43, 46

*Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* 2002 ICJ Rep [forthcoming]..... 9

*Temple of Préah Vihear (Cambodia v Thailand)* 1962 ICJ Rep 6..... 70

## The Netherlands

*Asylum Seeker 'X'*..... 119

## South Africa

*Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC)..... 129

*Harksen v President of the Republic of South Africa and Others* 2000 (5) BCLR 478 (CC)..... 123-4, 127

*Kaunda and others v President of the Republic of South Africa* CCT23/04..... 124

*Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A)..... 121, 128

## **South Africa**

Constitution of the Republic of South Africa, Act 110 of 1983

Section 6(3)(e): 121, 125

Constitution of the Republic of South Africa, Act 200 of 1993

Section 82(1)(i): 122, 127

Section 231(2): 122-3, 127

Section 231(3): 122, 128-9

Section 231(4): 125-7

Constitution of the Republic of South Africa, Act 108 of 1996

Section 2: 125

Section 39(1): 125, 130

Section 231: 122

Section 231(1): 123, 127

Section 231(2): 123-4

Section 231(3): 123-4, 127

Section 231 (4): 124, 129

Section 232: 127

Section 233: 125, 130

Anti-Personnel Mines Prohibition Act (No 36 of 2003): 132

## **The Netherlands**

1994 State Act on the Approval and Publication of Treaties

Section 15(1)&(2): 114

Section 15(3): 119

Summary.....	i
Forword.....	ii
Abbreviations.....	iii
Cases cited.....	v
Table of Statutes.....	vi
Contents.....	vii
 <b>Introduction.....</b>	 <b>1</b>
 <b>Chapter 1     The negotiating history of article 25.....</b>	 <b>5</b>
1.1     Three Vienna Conventions.....	5
1.2 <i>Travaux préparatoires</i> of the 1969 Vienna Convention.....	8
1.3     Negotiating history of article 25 of the 1969 Vienna Convention.....	9
1.3.1     Work of the ILC.....	9
1.3.1.1     1956 session of the ILC.....	9
1.3.1.2     1962 session of the ILC.....	10
1.3.1.3     1965 session of the ILC.....	12
1.3.1.4     1966 session of the ILC.....	15
1.3.2     Vienna conference on the law of treaties.....	16
1.3.2.1     Committee of the whole (1968).....	17
1.3.2.2     Plenary.....	19
 <b>Chapter 2     The purpose of provisional application.....</b>	 <b>23</b>
2.1     Urgency.....	24
2.1.1     International economic agreements.....	26
2.1.2     Transportation treaties.....	27
2.1.3     Treaties of a political character.....	28
2.1.4     Agreements for the prevention of drug trafficking and crime.....	28
2.1.5     Headquarters and host country agreements.....	29
2.1.6     Environmental treaties.....	29
2.2     Certainty of ratification.....	30
2.3     Legal continuity.....	32
2.4     Legal consistency.....	34
2.5     Circumvention of obstacles to entry into force.....	35
2.6     Preparatory arrangements for new international institutions.....	36
2.6.1     Establishing a new international organization or treaty regime.....	36
2.6.2     View of the United Nations.....	38
2.6.3     View of the United States.....	39
2.6.4     Examples of preparatory organizational arrangements.....	40
2.6.4.1     World Health Organization.....	41
2.6.4.2     International Trade Organization.....	41
2.6.5     Excursus: the status of preparatory commissions.....	42
 <b>Chapter 3     Article 25 of the 1969 and 1986 Vienna Conventions .....</b>	 <b>47</b>
3.1     Source and nature of the obligation to apply a treaty provisionally.....	48
3.1.1     Provisional application in terms of the treaty itself.....	48
3.1.1.1     Final provisions.....	48

3.1.1.2	Protocol or annex forming part of the treaty.....	47
3.1.1.3	Notification or declaration of provisional application.....	49
3.1.1.4	Implied provisional application.....	51
3.1.1.5	Treaty amendments and modifications.....	52
3.1.1.6	Legal character of a treaty clause on provisional application....	54
3.1.2	Provisional application by some other manner.....	54
3.1.2.1	Separate or collateral agreement.....	54
3.1.2.2	Practice constituting tacit agreement or tacit acquiescence.....	56
3.1.2.3	Legal character of a separate or collateral agreement.....	57
3.2	Authority to agree to provisional application.....	58
3.3	Date of commencement of provisional application.....	60
3.4	Parties obliged to apply the treaty provisionally.....	62
3.5	Legal effect of an obligation under article 25 .....	65
3.5.1	<i>Pacta sunt servanda</i> .....	65
3.5.2	Possible theoretical difficulties.....	67
3.5.2.1	Unilateral notification of termination.....	67
3.5.2.2	Non-treaty basis of provisional application.....	69
3.5.3	Estoppel and provisional application.....	69
3.5.4	Article 46 and the <i>pacta sunt servanda</i> rule.....	72
3.5.5	Limiting provisions.....	73
3.5.6	'Reservations' in respect of provisional application.....	75
3.6	Provisional application <i>versus</i> entry into force provisionally.....	77
3.7	Ending provisional application.....	79
3.7.1	By entry into force of the treaty.....	79
3.7.2	By agreement.....	80
3.7.3	By unilateral notification of termination.....	81
3.7.4	By termination of the treaty for material breach.....	84
3.8	Period of provisional application.....	84
<b>Chapter 4</b>	<b>Provisional application under customary international law.....</b>	<b>86</b>
4.1	Establishing the existence of a rule of customary international law.....	87
4.2	The custom of provisional application prior to 1969.....	89
4.2.1	Origins of provisional application: state practice prior to 1919.....	89
4.2.1.1	1840 Treaty for the Pacification of the Levant.....	90
4.2.1.2	1875 Convention for the Establishment of an International Bureau of Weights and Measures.....	91
4.2.1.3	1880 International Convention on Morocco.....	91
4.2.1.4	1897 Treaty between Great Britain and Ethiopia.....	92
4.2.2	State practice from 1919 to 1945.....	92
4.2.2.1	1919 Treaty of Versailles.....	92
4.2.2.2	1924 Convention concerning the Territory of Memel.....	93
4.2.2.3	1931 Protocol concerning the suspension of payments by Germany.....	94
4.2.2.4	1936 Convention regarding the Régime of the Straits between the Mediterranean and the Black Sea.....	94
4.2.2.5	1937 International Agreement for the Regulation of Whaling.....	95
4.2.2.6	Commercial agreements.....	95
4.2.2.7	Concluding observations on state practice from 1919 to 1945...	99
4.2.3	Practice from 1946 to 1969.....	99
4.2.4	<i>Opinio iuris</i> prior to 1969.....	100
4.2.5	Guatemala as a possible 'persistent objector'.....	104
4.3	Provisional application under contemporary customary international law.....	105



4.4	Latin American reservations to article 25.....	107
<b>Chapter 5</b>	<b>Provisional application under municipal law.....</b>	<b>112</b>
5.1	Treaty-making power and provisional application.....	113
5.1.1	Constitutional authority to agree to provisional application.....	113
5.1.2	Potential abuse of provisional application.....	115
5.2	Effect of provisionally applied treaties under municipal law.....	116
5.2.1	Domestic effect of treaties in force.....	116
5.2.2	Domestic effect of provisionally applied treaties.....	118
5.3	Provisional application under South African law.....	121
5.3.1	Treaties under South African law.....	121
5.3.2	Constitutionality of provisional application in South Africa.....	125
5.3.2.1	Prior to 1994.....	125
5.3.2.2	1993 Constitution.....	125
5.3.2.3	1996 Constitution.....	127
5.3.3	Effect of provisional applied treaties under South African law.....	128
5.3.4	Provisional application in South African treaty practice.....	130
<b>Chapter 6</b>	<b>The provisional application of arms control, disarmament and non-proliferation instruments.....</b>	<b>134</b>
6.1	Characteristics of arms control treaties.....	135
6.1.1	General.....	136
6.1.2	Requirements for entry into force.....	137
6.2	Role of provisional application in the context of arms control, disarmament and non-proliferation instruments.....	142
6.3	Provisional application of arms control treaties where the treaty itself so provides.....	145
6.3.1	1990 Treaty on Conventional Armed Forces in Europe (CFE Treaty)	145
6.3.2	1992 Treaty on Open Skies.....	148
6.3.3	1993 Treaty on Further Reduction and Limitation of Strategic Offensive Arms (START II).....	150
6.3.4	1997 Convention on the Prohibition of Anti-Personnel Mines (Ottawa Convention).....	153
6.3.5	Subsidiary arms control agreements.....	156
6.4	Provisional application of arms control treaties where the negotiating states have in some other manner so agreed.....	157
6.4.1	1992 Chemical Weapons Convention.....	157
6.4.2	1996 Comprehensive Nuclear-Test-Ban Treaty.....	161
6.4.3	Status of the Preparatory Commissions for the OPCW and the CTBTO.....	170
6.5	Concluding remarks.....	172
	<b>Conclusions.....</b>	<b>174</b>
	<b>Annex</b>	
	Treaties provisionally applied by Latin American states making reservations to article 25 of the 1969 Vienna Convention (Colombia, Costa Rica, Guatemala and Peru).....	176
	<b>Bibliography.....</b>	<b>181</b>
	<b>Index.....</b>	<b>191</b>