

FORTY-FIFTH CONSULTATIVE MEETING  
OF CONTRACTING PARTIES TO THE  
LONDON CONVENTION  
&  
EIGHTEENTH MEETING OF CONTRACTING  
PARTIES TO THE LONDON PROTOCOL  
2 - 6 October 2023  
Agenda item 5

LC 45/5/4  
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## MARINE GEOENGINEERING INCLUDING OCEAN FERTILIZATION

### Draft background paper on provisional application of the 2013 LP amendment (resolution LP.4(8)) from the Legal Intersessional Correspondence Group on Marine Geoengineering

Submitted by the Co-Chairs of the Correspondence Group

#### SUMMARY

*Executive summary:* This document presents a draft background document on the provisional application of the 2013 LP amendment (resolution LP.4(8)) prepared by the Legal Intersessional Correspondence Group on Marine Geoengineering as outlined in document LC 45/5/1.

*Action to be taken:* Paragraph 4

*Related documents:* LC 45/5/1; LC 44/17 and LC 44/WP.6

#### Introduction

1 The Legal Intersessional Correspondence Group (LICG) on Marine Geoengineering was established by the governing bodies in 2022 under the lead of Canada and Germany\* (LC 44/17, paragraph 5.17.3). A report on progress made by the LICG during the intersessional period is presented in document LC 45/5/1. The document contains the terms of reference (ToR) assigned to the LICG, which includes for the Group to consider whether a mechanism for provisional application of the 2013 LP amendment before its entry into force is needed for implementation, or whether domestic implementation could proceed without a mechanism for provisional application.

2 Progress by the LICG to complete this task is described in paragraph 4 of LC 45/5/1, which describes the Group's efforts to develop a background document outlining preliminary considerations of how a mechanism for provisional application of the 2013 LP amendment (resolution LP.4(8)) could be used and which legal requirements would have to be met to apply the mechanism.

\* The coordinators, Ms. Suzanne Agius (Canada) and Dr. Harald Ginzky (Germany) can be contacted at [Suzanne.Agius@ec.gc.ca](mailto:Suzanne.Agius@ec.gc.ca) and [harald.ginzky@uba.de](mailto:harald.ginzky@uba.de), respectively.

3 Since the progress report (LC 45/5/1) was submitted, the Group added an additional section specifically addressing the latter part of the ToR, namely, whether domestic implementation could proceed without a mechanism for provisional application. The resulting draft background document on provisional application of the 2013 LP amendment is presented in the annex and reflects the preliminary views of LICG members. Additional discussion is needed to reach consensus.

**Action requested of the governing bodies**

4 The governing bodies are invited to note the information provided and comment or take action, as they deem appropriate.

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**PRELIMINARY DRAFT BACKGROUND ON THE PROVISIONAL APPLICATION OF THE RESOLUTION  
LP.4(8) (FURTHER DISCUSSION NEEDED TO ACHIEVE CONSENSUS)<sup>2</sup>**

**2013 Amendment to the London Protocol to regulate the placement of matter for ocean fertilization and other marine geoengineering activities**

**Result (1)** From the perspective of international law, ~~deciding~~ agreeing that the provisional application of the 2013 Amendment seems to be possible.

Result (2): At the same time, the LICG was asked to consider whether domestic implementation could proceed without a mechanism for provisional application. While the group has started discussing this point and presents results thus far below, no conclusions have yet been reached.

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**JUSTIFICATION FOR RESULT (1) ABOVE:**

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- **Article 25 of the Vienna Convention of the Law of Treaties (VCLT)**

Provisional application of international treaties is addressed in Article 25 of the Vienna Convention of the Law of Treaties (VCLT).

**Article 25 VCLT**

1. A treaty or 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 State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

According to Article 25 Para. 1 of the VCLT, the provisional application of a treaty or part of a treaty is possible if the treaty itself so provides or the negotiating states have in some other manner so agreed. Article 25 of the VCLT also applies to treaty amendments such as the 2013 Amendment to the LP, according to the second sentence of Article 39 of the VCLT. The LP does not provide for provisional application but does not exclude it either.

Article 25 VCLT does not specify when the negotiating States must agree on provisional application and therefore does not preclude the negotiating States from agreeing to provisional application at a date following the amendment's adoption.

Such ~~[an agreement]~~ ~~[a decision]~~ to provisionally apply the 2013 Amendment would therefore be in accordance with Article 25 para. 1 ~~(b)~~ VLCT. ~~In the LP context, Resolution LP.5(14) provided for the provisional application of the 2009 Amendment to Article 6 of the LP.~~

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Commented [SJA6R5]: CANADA: This was saying the LP Parties have in the past considered that they could provisionally apply an amendment. Presumably someone at the time would have raised a treaty law issue if the proposed resolution was contrary to Article 25. So it doesn't seem far-fetched to say this was done in accordance with the VCLT. That said, in case other countries have different views, we can live with the proposed US changes here or keep the original text.

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- **Draft Guidelines by the International Law Commission**

In 2021 the International Law Commission issued "Draft guidelines and draft annex constituting the Guide to Provisional Application of Treaties" (hereinafter "draft guidelines"), which further clarifies the scope and meaning of Article 25 VCLT.

**(1) How could LP Parties decide on provisional application?**

<sup>2</sup> At the request of the Co-Chairs the draft background document is shown with track changes and comments.



The provisional application of the amendment to a multilateral treaty can unfold in two steps. First, all States concerned ~~[decide]~~**[must agree]** on the general possibility of provisional application. In the case of the 2013 amendment, that is the State parties to the LP. Then, individual State parties can decide to provisionally apply the 2013 amendment or not.

Thus, the parties to the LP could ~~[agree]~~**[decide]** on the general possibility of the provisional application of the 2013 amendment, even though not all of them intend to provisionally apply the amendment.

Furthermore, a party to the LP could accept the provisional application of an amendment for itself, although it has not yet ratified the amendment **[if their domestic requirements permit it]** (See Article 25 para. 2 VCLT. However, national constitutional provisions may not make this possible for some parties.)

## **(2) Provisional application only in "exceptional" conditions and for time-pressing issues?**

In the VCLT and in the draft guidelines of the International Law Commission on provisional application, provisional application is not limited to circumstances when it is necessary to obtain an interim solution for time-pressing issues. States are free to ~~[agree]~~**[decide]** to provisional application when they see fit.

That said, the resolution on the provisional application of the 2009 amendment to article 6 of the London Protocol (Resolution LP 5.(14), in particular its recitals (preambular paragraphs) 12-14, demonstrate that provisional application can be a useful interim solution for the fulfilment of the aim of the treaty in the case of delayed entry into force (Article 24 VCLT). The recitals also provide that the London Protocol should not constitute a barrier to [the transboundary movement of carbon dioxide streams to other States for disposal as] a climate change mitigation measure[s].

A similar line of arguments is also valid for the provisional application of the 2013 amendment as the 2013 amendment is to ensure that the objectives of LP are complied with by MGE research projects and by the "prohibition" of MGE projects which are not legitimate scientific research. Furthermore, by ensuring a high standard with regard to scientific research the 2013 amendment is also linked to the fight against climate change, and ensures compliance with the objectives of the LP.

However, these "exceptional" conditions inter alia due to the urgency are not a necessary precondition for a provisional application.

### **BACKGROUND ARGUMENTS FOR RESULT (2) ABOVE:**

[In the resolution deciding on the provisional application of the 2009 amendment and the records of discussions preceding it, the following references can be found (bold emphasis added).

#### **RESOLUTION LP.5(14) ON THE PROVISIONAL APPLICATION OF THE 2009 AMENDMENT TO ARTICLE 6 OF THE LONDON PROTOCOL**

**"4 AFFIRMS that** the export of carbon dioxide under the provisional application of article 6 of the London Protocol (as amended by resolution LP.3(4)), and in compliance with the requirements of paragraph 2 of the article (as amended by resolution LP.3(4)) **will not be in breach of article 6 as in force at the time of the export;** "

LC 41/6 CO2 SEQUESTRATION IN SUB-SEABED GEOLOGICAL FORMATIONS Proposed resolution on the provisional application of the 2009 amendment to article 6 of the London Protocol Submitted by the Netherlands and Norway

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**Commented [SJA8R7]:** CANADA: Given the "can unfold in two steps" we prefer not to use "have to" or "must" language.

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**Commented [SJA11R10]:** CANADA: The reference to Article 25(2) is to address the issue that provisional application is not only for Parties that have ratified/accepted, before entry into force, but also for those who have not yet accepted or ratified. We think Article 25(2) indeed supports this point. See emphasis added below, which clearly demonstrates that a State could have provisionally applied the treaty before the acceptance/ratification point:

*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 State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.*

That said, the reference is not crucial of course if others find it confusing.

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**Commented [SJA16R15]:** CANADA: The original was faithful to the LP.5(14) text, and we should ensure that we continue to be faithful to that text even if we reference a different part of it (as the US has suggested).

... [1]

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"4 Pending sufficient acceptance by Contracting Parties, provisional application is proposed as an interim solution. This would allow States to give their consent to cross-border transport of carbon dioxide for the purpose of geological storage **without entering into non-compliance with international commitments.**"

LC 41/17 Report of the [Governing Bodies]

"6.10 The co-sponsors proposed that provisional application be an interim solution, pending entry into force of the 2009 amendment. **The rationale** for provisional application **was to allow** states to give their consent to cross-border transport of carbon dioxide for the purpose of geological storage **without being non-compliant with international commitments.**"

The above shows that, in the case of the 2009 amendment, provisional application was necessary and indeed essential, because the 2009 amendment was about allowing actions that were otherwise prohibited in the existing Protocol in force, and Parties starting to act in line with the Amendment before its entry into force would be in violation of the existing Protocol in force. So a solution to enable Parties to act without making them non-compliant (provisional application, in this case) was necessary and essential.

The 2013 Amendment, on the other hand, is about newly regulating actions that are hitherto not regulated under the existing Protocol in force. The actions that will be newly required under the 2013 Amendment are not prohibited under the existing Protocol in force, so starting to act in line with them before their entry into force will not create a situation of non-compliance with the Protocol.]

Even though a mechanism for provisional application may not be legally required for Parties to the London Protocol to implement the Amendment domestically before its entry into force and remain in compliance with the Protocol, the Governing Bodies may still wish to consider the potential benefits and disadvantages of adopting such a mechanism.

In terms of benefits, a provisional application mechanism would provide a clear incentive for Parties to apply the permit regime provided by the Amendment, and thus take stringent measures to protect the marine environment. It would also raise awareness of the Amendment and would change its legal status - if the Amendment was provisionally applied, it would be legally binding for those who have agreed to provisionally apply it. Its character as a "standard" with respect to UNCLOS would also be clearer.

On the other hand, it could inadvertently delay the entry into force of the Amendment should Parties consider that provisional application was enough and fail to take the additional step needed to accept it. To mitigate this, Parties could be reminded of the need to accept the Amendment when ready to do so, even if they have been applying it provisionally. In addition, negotiating a provisional application mechanism could take time away from negotiations on other topics at the LP meetings.

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**Page 4: [1] Commented [SJA16R15] Agius,Suzanne (ECCC) 07/07/2023 10:37:00**

CANADA: The original was faithful to the LP.5(14) text, and we should ensure that we continue to be faithful to that text even if we reference a different part of it (as the US has suggested).

The US suggestion is mostly faithful to the text, with the exception that the resolution talked about the transboundary movement of CO<sub>2</sub> as a mitigation measure. As this paper is about MGE, we should not let this paragraph imply that the LP shouldn't constitute a barrier to climate change mitigation measures in general, because the LP made that statement on CCS, but not on MGE, and I'm not sure Canada would yet agree to such a statement on MGE and the LP. Our suggested edits (in square brackets to make them identifiable] would help ... they result in a full quote of recital 12 from LP.4(14).

**Page 4: [2] Commented [SJA17] Agius,Suzanne (ECCC) 07/07/2023 11:31:00**

All text in square brackets below suggested by JAPAN. It does not appear in track changes so that subsequent suggestions from others will be easy to identify.