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Provisional application of treaties

Comments and observations received from Governments and international organizations

Contents

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I. Introduction

1. At its seventieth session (2018), the International Law Commission adopted, on first reading, the draft Guide to Provisional Application of Treaties.[1] In accordance with articles 16 to 21 of its statute, the Commission decided to transmit the draft guidelines, through the Secretary-General, to Governments and international organizations for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 15 December 2019.[2] The Secretary-General circulated a note dated 24 September 2018 to Governments transmitting the draft Guide to Provisional Application of Treaties, with commentaries thereto, and inviting them to submit comments and observations in accordance with the request of the Commission. The draft Guide and commentaries thereto were also sent to international organizations by letters dated 15 and 26 November 2018, inviting them to provide comments and observations. By its resolution 74/186 of 18 December 2019, the General Assembly drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft Guide adopted on first reading by the Commission at its seventieth session, including comments and observations on the draft model clauses on provisional application of treaties, contained in annex A to the report of the Commission on the work of its seventy-first session.

2. As of 31 January 2020, written comments had been received from Argentina (27 November 2019), Austria (16 December 2019), Bahrain (13 December 2019), Belarus (10 January 2020), the Czech Republic (19 December 2019), Estonia (18 December 2019), Finland (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden) (11 December 2019), Germany (13 December 2019), the Netherlands (11 December 2019), the Republic of Korea (30 December 2019), Singapore (19 December 2019), Slovenia (20 December 2019), Turkey (17 December 2019), the United Kingdom of Great Britain and Northern Ireland (20 December 2019), and the United States of America (13 December 2019).

3. As of 31 January 2020, written comments had also been received from the following international organizations: the Council of Europe (20 August 2019), the European Union (4 December 2019), the Food and Agriculture Organization of the United Nations (3 December 2018), the International Civil Aviation Organization (19 December 2019),[3] the International Fund for Agricultural Development (17 December 2018),[3] the International Organization for Migration (17 December 2019), and the United Nations Industrial Development Organization (18 December 2018).

4. The comments and observations received from Governments are reproduced in chapter II below, while the comments and observations from international organizations are reproduced in chapter III. The comments and observations are organized thematically as follows: general comments and observations and specific comments on the draft guidelines and the draft model clauses.[4]

[1] Report of the International Law Commission on the work of its seventieth session, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 86. The revised draft model clauses are contained in the report of the International Law Commission on the work of its seventy-first session, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), annex A.

[2] A/73/10, para. 88.

[3] The comments only expressed general appreciation for the draft guidelines and are not reflected in the present report.

[4] In each of the chapters below, comments and observations received are arranged by States and international organizations, which are listed in English alphabetical order.

II. Comments and observations received from Governments

A. General comments and observations

Argentina

[Original: Spanish]

Argentina welcomes the ongoing work of the Commission on the development of the draft guidelines on provisional application of treaties, since the topic represents a fundamental element of treaty law and is of particular practical relevance to States.

With regard to methodology, Argentina notes with appreciation that current practice concerning provisional application of treaties has been taken into account in the draft guidelines. It also welcomes the fact that commentaries to each draft guideline have been included to explain their basis.

With regard to the content of the draft guidelines, Argentina is pleased that the fact that provisional application is not intended to give rise to the whole range of rights and obligations that derive from the consent by a State to be bound by a treaty or a part of a treaty has been reflected. However, it is worth highlighting that this aspect continues to give rise to practical questions.

Argentina does not consider article 25 to comprise an autonomous regime within the 1969 Vienna Convention on the Law of Treaties.[5] While the particular issues arising from provisional application should be considered, it must be borne in mind that a treaty applied provisionally has legal effects just as if it were in force, and consequently the other provisions of the Vienna Convention are applicable *mutatis mutandis*. It is therefore important to take into consideration the relationship between provisional application and other provisions of the Vienna Convention.

Argentina considers that the relationship between articles 27 (Internal law and observance of treaties) and 46 (concerning the invalidity of treaties) of the 1969 Vienna Convention as it relates to provisional application is adequately reflected in the draft guidelines. The draft guidelines also help provide legal certainty, as they reflect the obligation to perform treaties in good faith.

The recognition that provisional application constitutes a voluntary mechanism which may be subject to limitations deriving from the internal law of States is also very important.

Argentina is grateful for the guidance that the guidelines will provide to States, which will, without limiting the flexibility of States to come to their own agreements concerning aspects of provisional application, provide a better understanding of this tool available under treaty law.

Czech Republic

[Original: English]

The draft Guide does not contain a provision on definitions. The terms used throughout the draft Guide are supposed to be given the same meaning as the terms defined in article 2 of the 1969 Vienna Convention on the Law of Treaties and article 2 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[6] It might be

[5] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[6] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986), A/CONF.129/15.

useful to clarify this aspect, e.g. by including a short guideline on "Use of terms" stating simply that "the terms defined in articles 2 of Vienna Conventions of 1969 and 1986 are used in the present Guide in the meaning given to them in the mentioned provisions of the two conventions". This would also make it clear that the draft Guide deals with the identical subject matter to that to which these provisions of Vienna Conventions apply.

Estonia

[Original: English]

Estonia stresses the high value of the draft guidelines, commentaries thereto and model clauses as a practical tool, which gives answers to questions arising in practice. They provide very good guidance regarding the law and practice on the provisional application and wisely direct States, international organizations and other users to answers on relevant issues that are consistent with existing rules and contemporary practice.

Finland (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries are very pleased about the progress made at the seventieth session with the adoption on first reading by the Commission of the draft Guide to Provisional Application of Treaties, which includes 12 draft guidelines and commentaries thereto, as well as at the seventy-first session when the revised draft model clauses were annexed to the Commission's annual report. The Nordic countries continue to support the efforts of the Special Rapporteur and the Commission on this subject.

Germany

[Original: English]

Germany wishes to express appreciation for the Commission's work on the complex matter of provisional application of treaties and the draft guidelines, which will form a comprehensive manual for the practice of States and international organizations.

While it is indisputable that provisional application of treaties is a long-established legal instrument and often used by States and international organizations, several legal questions merit an in-depth analysis. Germany therefore considers a guide on handling provisional application of treaties to be a useful tool in treaty practice; as a compact set of rules applied by the majority of States helping to achieve greater legal certainty and predictability.

Article 25 of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (not yet in force) forms the basic rule for provisional application of treaties. This remains so even once the guidelines are adopted. The draft guidelines are mainly based on that article, and the central importance of article 25 of the 1969 and the 1986 Vienna Conventions is also recognized in the commentary to draft guideline 2.[7] While this provision constitutes a provision of customary law[8] and provides clear instructions, it remains

[7] Para. (4) of the commentary to draft guideline 2, A/73/10, para. 90, at p. 208.

[8] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden/Boston, Martinus Nijhoff, 2009), p. 357, sect. 12.

silent on several important matters. For example, the decision on the scope and conditions of provisional application is left with the contracting parties.[9] This is, given the intended flexible nature of provisional application, entirely acceptable. Consistent standards might, however, provide valuable support to contracting parties.

Germany would like to point out that a provision on provisional application is not considered a routine clause to be included in every treaty, and to underline the importance of carefully assessing international needs of urgency in regulating a certain situation as a prime reason necessitating provisional application and national limits thereto emanating from domestic legislation.[10] In a dualist legal system like in Germany, where treaties must be transposed or incorporated into national law to become effective, it is a typical requirement of constitutional law that the competent organ may only agree to provisional application of a treaty if national law is already in conformity with the treaty or is brought into conformity with it first.[11]

This plays an important role, especially against the background of the legal effects of provisional application at the level of international law. The principles of *pacta sunt servanda* and State responsibility apply also to the provisional application of treaties.

Due to the principle, enshrined in the article 25 of the German Basic Law, that general rules of international law shall be an integral part of federal law, Germany supports the possibility of applying treaties provisionally because the course of actions facilitated by the provisional application of a treaty usually helps to build confidence between the contracting parties, creates an incentive to ratify the treaty and enables the parties to take preparatory measures,[12] and thereby serves the further development of international relations.

Germany, in particular as a member State of the European Union, would like to underline the importance of further exploring the interaction of international and domestic law, especially in the context with the so-called mixed agreements, i.e. agreements between the European Union and a third party which touch both on powers or competencies exclusive to the European Union and on competencies exclusive to member States of the European Union. This should be reflected in the draft guidelines in a more detailed manner.

With regard to increasing appearance, and importance, of other subjects of international law than States, most notably of international organizations, the issue of provisional applications of treaties has become more complex.[13] The system of multiple levels poses new challenges to this particular issue of treaty law.[14] Only recently this became clear to Germany in the course of the negotiations of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the

[9] Heike Krieger, “Article 25 – Provisional application” in Oliver Dörr and Kirsten Schmalenbach (eds.), *Vienna Convention on the Law of Treaties. A Commentary* (Berlin, Springer, 2018) (2nd ed.), p. 441, sect. 2.

[10] Bernhard Kempen and Björn Schiffbauer, “Die vorläufige Anwendung völkerrechtlicher Verträge im internationalen Mehrebenensystem”, *Heidelberg Journal of International Law*, vol. 77 (2017), pp. 95–124, at p. 100. See also Lyra Jakulevičienė, *Tarptautinių sutarčių teisė* (Vilnius, Registrų centras, 2011), pp. 171–172.

[11] *Cf.* Frank Schorkopf, *Staatsrecht der internationalen Beziehungen* (Munich, C.H. Beck, 2017), pp. 189–190, sects. 111–112.

[12] First report on the provisional application of treaties prepared by Mr. Juan Manuel Gómez-Robledo (A/CN.4/664), paras. 31 and 34. See also Kempen and Schiffbauer, “Die vorläufige Anwendung völkerrechtlicher Verträge im internationalen Mehrebenensystem” (footnote 10 above), p. 99.

[13] Kempen and Schiffbauer, “Die vorläufige Anwendung völkerrechtlicher Verträge im internationalen Mehrebenensystem” (see footnote 10 above), p. 96.

[14] *Ibid.*

European Union.[15] As the draft guidelines aim to include treaties between States and international organizations or between international organizations, special issues arising in the course of concluding international agreements with those organizations (e.g. the aforementioned mixed agreements) should be taken into account.

In the report of the Commission to the General Assembly on the work of its sixty-fifth session (2013), the Special Rapporteur stated that he would take limitations under domestic law into account, without considering those limitations themselves.[16] While this approach is plausible to Germany, it is important to note that, despite this methodological choice, the effects of domestic law could also affect the international level. Germany would, therefore, welcome the aspect of the relationship between established domestic procedures and treaty law not being left out completely.

Germany is aware that the draft guidelines are conceived as general recommendations that shall facilitate treaty operations at international level. Therefore, it would be considered beneficial if the Commission decided to offer further guidance on dealing with provisional application of mixed agreements. Practice shows that free trade agreements especially tend to be applied provisionally. In this area, the legislative power rests partially with international organizations, such as the European Union, and partially with its member States, which makes mixed agreements a more frequently used type of treaty. In the interest of all, problems concerning mixed agreements should be taken into consideration because, even if a State cannot invoke the provisions of its internal law as a justification for its failure to perform obligations arising under such provisional application,[17] conflicts may arise that affect the trust among the contracting parties and the will to carry out the provisional application of the respective treaty. For Germany, this is a pending issue of great importance meriting broader attention in the draft guidelines for the reason that the mixed agreement type of treaty may modify the residual character of article 25 of the 1969 Vienna Convention on the Law of Treaties as a default rule by taking, in part, the provisional application tool from the hands of the negotiating States.

In the case of Germany, the prime relevance of the international law on provisional application emanates from multilateral treaties. Provisional application does not play an important role for bilateral agreements.[18]

The Netherlands

[Original: English]

The Kingdom of the Netherlands notes that the stated objective of the draft Guide and the specific guidelines it contains is to assist States, international organizations and other users concerning the law and practice on the provisional application of treaties and to direct them to answers that are consistent with existing rules and most appropriate contemporary practice.

The Kingdom of the Netherlands endorses this general approach to the topic. As it has expressed on earlier occasions, the study on provisional application of treaties should give guidance to States on how to use the instrument - if they so choose and to the extent their internal law permits - and, in such cases, should inform them of the

[15] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (Brussels, 30 October 2016), *Official Journal of the European Union*, vol. 60, L 11, 14 January 2017, p. 23.

[16] *Yearbook of the International Law Commission 2013*, vol. II (Part Two), p. 70, para. 119.

[17] Paras. (1)–(7) of the commentary to draft guideline 10 and (1)–(4) of the commentary to draft guideline 11, A/73/10, para. 90, at pp. 220–222.

[18] Germany, information regarding the topic "Provisional application of treaties" (March 2014), available under the analytical guide to the topic on the Commission's website, http://legal.un.org/ilc.

legal implications thereof, without imposing a particular course action that might prejudice the flexibility of the instrument. The Kingdom of the Netherlands is also in agreement with the Commission that article 25 of the Vienna Convention on the Law of Treaties should be the primary reference point for the draft guidelines, since provisional application is an instrument available under the law of treaties.

Republic of Korea

[Original: English]

The present set of draft guidelines on this topic contains provisions of different normative value, some of which appear to reflect customary international law, while others have a somewhat recommendatory nature. In this sense, the Republic of Korea questions whether those which have a recommendatory nature have the appropriate substance or structure to form an actual guideline.

The Republic of Korea believes that the elaboration of this topic will contribute to the development of the law of treaties. It will continue to take a keen interest in the discussions on this topic and their final outcome.

Turkey

[Original: English]

According to Turkish legislation, in order for Turkey to be legally bound by any international agreement, such agreement has to be approved in accordance with the relevant domestic procedures. In this regard, mere signing of the agreement does not suffice. Also, the Constitution and domestic laws of the Republic of Turkey do not contain any clause that expressly regulates or allows provisional application of international agreements. Furthermore, Turkey is not party to the Vienna Convention on the Law of Treaties (1969).

In view of the foregoing, Turkey would like to reiterate the importance of the consent of States as regards "provisional application of treaties". Turkey maintains the view that treaties should be applied after their entry into force, as a rule, and that provisional application before entry into force should be regarded as an exception that would be applied at the discretion of States.

In this regard, the draft guidelines and the draft model clauses should only aim to guide those States and international organizations that wish to apply certain bilateral or multilateral treaties provisionally, and should not prejudice the flexible and voluntary nature of this legal concept. Based on this understanding, Turkey also considers that it would be more suitable for the concept of provisional application to be included in treaties as a voluntary option which States can choose to apply by making a declaration to that end, and not as a legal obligation which States would have to opt out of or make reservations to. Article 15 of the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency[19] and article 13 of the Convention on Early Notification of a Nuclear Accident[20] would be useful examples in this context.

[19] Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency (Vienna, 26 September 1986), United Nations, *Treaty Series*, vol. 1457, No. 24643, p. 133.

[20] Convention on Early Notification of a Nuclear Accident (Vienna, 26 September 1986), *ibid*., vol. 1439, No. 24404, p. 275.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The general commentary at paragraphs (1) to (7)[21] introduces the draft Guide and its overall purpose.

The United Kingdom welcomes the statement of overall objectives in paragraph (2) and commends the Special Rapporteur and the Commission for their pragmatic approach, which firmly roots the draft Guide within contemporary practice. The United Kingdom considers the draft Guide can make a significant contribution to the clarification of existing rules.

The United Kingdom uses provisional application, on an exceptional basis, to apply a treaty prior to the completion of Parliamentary procedures. However, it does so with caution: provisional application is not, and cannot be used as a means of bypassing Parliamentary procedures (and nor is it a substitute for the application of the standard international rules and processes for securing full legal entry into force of treaties). In the view of the United Kingdom, retaining the flexibility of the provisional application mechanism is key to managing the tension between bringing into effect a treaty at the international level, and the need ultimately to complete domestic constitutional procedures. On this basis, the United Kingdom agrees that it is helpful to emphasize the voluntary nature of provisional application, and considers that it would also be helpful, for the same reason, to emphasize that article 25 of the 1969 Vienna Convention and the 1986 Vienna Convention envisages a flexible approach to the termination of provisional application.

The United Kingdom commends the Commission for its valuable work in analysing contemporary practice. This work identifies important differences in practice relating to bilateral and multilateral treaties – particularly in relation to how provisional application is brought into effect. The United Kingdom notes that the 1969 Vienna Convention does not generally distinguish between bilateral and multilateral treaties. Nonetheless, practice is important in understanding how the rules apply in each context. The United Kingdom considers that it might be helpful to draw out further the distinctions in practice relating to bilateral and multilateral treaties, referenced in paragraph (7), throughout the draft Guide and draft model clauses.

United States of America

[Original: English]

According to the Commission, the purpose of the draft guidelines is “to provide assistance to States, international organizations and other users concerning the law and practice on the provisional application of treaties”.[22]

[21] A/73/10, para. 90, at pp. 205–207.

[22] Para. (2) of general commentary, A/73/10, para. 90, at p. 205. The Commission further states that the objective of the draft guidelines is to “direct States, international organizations and other users to answers that are consistent with existing rules and most appropriate for contemporary practice.” *Ibid*.

The United States considers the meaning of "provisional application" to be clear, settled, and generally well understood.[23] At its core, provisional application means that a State[24] agrees to apply the treaty, or certain provisions thereof, on a legally binding basis prior to the treaty's entry into force for that State. It differs from entry into force of a treaty in one seminal respect: as a general matter, a State or international organization may terminate obligations arising from the provisional application of a treaty more easily than terminating the treaty after its entry into force.

The United States is pleased that the draft guidelines are in general accord with this view of provisional application. While it believes that the draft guidelines helpfully confirm the basic features of the legal regime regarding provisional application of treaties, it has concerns that, in some areas, the draft guidelines and accompanying commentary make claims that are not supported by State practice. In these areas, the United States has concerns that the draft guidelines risk creating confusion about the state of the law and undermining the draft guidelines' purpose. Its observations focus on those draft guidelines and accompanying commentary that most implicate those concerns.

As with any Commission project, a threshold question arises regarding the character of the draft guidelines. The Commission has not proposed the draft guidelines as draft articles for a treaty on the provisional application of treaties, which might entail a corresponding recommendation to States that they consider adopting such a treaty. Rather, the draft guidelines appear to reflect observations by the Commission on questions related to provisional application. In some instances, the Commission finds support for these observations in examples of State practice with regard to provisional application. In other instances, as acknowledged by the Commission in the commentary to particular draft guidelines, the draft guidelines address topics on which the Commission has identified little or no relevant State practice.

Against this background, aspects of the Commission's commentary raise questions about the character of the draft guidelines. On the one hand, paragraph (4) of the general commentary states that "[a]lthough the draft guidelines are not legally binding as such, they elaborate upon existing rules of international law in the light of contemporary practice".[25] On the other hand, paragraph (5) goes on to state that, in elaborating the guidelines, the Commission sought to "avoid any temptation to be overly prescriptive" and observes that "in line with the essentially voluntary nature of provisional application … the Guide recognizes that States ... may set aside, *by mutual agreement*, the solutions identified in the draft guidelines if they so decide" (emphasis added).[26]

The United States agrees that the guidelines cannot be legally binding as such. There is therefore no basis for the suggestion that States would need specifically to

[23] Article 25 of the 1969 Vienna Convention, which the United States considers to reflect customary international law, provides that:

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

[24] The comments of the United States generally refer to States rather than States and international organizations. The United States intend for them to apply to both States and international organizations, unless the context dictates otherwise.

[25] A/73/10, para. 90, at p. 205.

[26] *Ibid.*, p. 206.

agree to set aside the solutions identified in the draft guidelines in order to avoid those solutions applying. Except to the extent that the Commission's observations on a particular point reflect extensive and virtually uniform State practice such that States should regard the matter as having a customary character, States and the Commission should regard the observations contained in the Commission's draft guidelines as reflecting only the Commission's own views. While States may consider the guidelines as they see fit, they do not represent default rules that should be understood to apply unless States opt out of them.

More generally, the United States notes that the value of the draft guidelines depends principally on the extent to which the Commission has compiled examples of State practice to support them. Where the Commission has compiled such examples, the guidelines can usefully illustrate how States have approached particular issues. For clarity, it would be helpful for the Commission to indicate any instances in which it believes such State practice and accompanying *opinio juris* meets the standard required to establish a customary law rule, and to distinguish those from instances in which there is insufficient practice and/or *opinio juris* to establish a customary rule. Even where no customary rule exists, the Commission's work to compile relevant practice in the area may nonetheless be helpful to States, as such practice may prove persuasive as they make their own decisions about how to handle analogous circumstances. Draft guidelines that are supported by limited or no State practice have much less utility, and the United States encourages the Commission to consider carefully whether they merit inclusion in the project at all. Guidelines not supported by significant State practice can only be understood as reflecting the Commission's own views for the progressive development of the law, and should be clearly identified as such if the Commission decides to include them.

B. Specific comments on the draft guidelines

1. Draft guideline 1 – Scope

Czech Republic

[Original: English]

The Czech Republic does not consider this draft guideline necessary. All elements it contains are contained also in draft guideline 2 on "Purpose". It notes that the Guide to Practice on Reservations to Treaties[27] does not contain an analogous guideline.

Slovenia

[Original: English]

Since this draft guideline relates to scope, Slovenia believes that it would be relevant to address either in the draft guideline itself or in its commentary the relations between "provisional application" and "provisional entry into force", in particular since the latter concept appears alongside "provisional application" in certain treaties (e.g. commodity agreements), and it would thus be useful to understand whether there are and, if so, what are the differences between the legal regimes of both concepts. For example, it appears from the *travaux préparatoires* with regard to the Vienna Convention on the Law of Treaties, in particular that on the draft article concerning *pacta sunt servanda* and on what is now article 25, that the *pacta sunt servanda* rule applies to both concepts, which would mean in turn that from the perspective of this

[27] *Yearbook of the International Law Commission 2011*, vol. II (Part Three).

rule at least there is no difference between the two concepts. On the other hand, why would they both be included in a treaty if there is no difference between them?

2. Draft guideline 2 – Purpose

Czech Republic

[Original: English]

The Czech Republic agrees with the key element of this guideline, namely that "The purpose of the present draft guidelines is to provide guidance regarding *the law and practice* on the provisional application of treaties" (emphasis added). In view of the actual content of the draft Guide, it is justified to spell out both elements. It wonders, however, whether the second part of the text, namely the reference to "article 25 of the Vienna Convention on the Law of Treaties" (as well as missing reference to article 25 of the 1986 Vienna Convention), should not be moved to the introductory part of the next draft guideline 3 (General rule). The mentioned provisions are indeed the key components of the "law of provisional application of treaties" and should therefore be highlighted in connection with the "General rule" – which in fact they constitute – rather than in connection with the "Purpose".

3. Draft guideline 3 – General rule

Bahrain

[Original: English]

Bahrain has observed through the relevant documents on the topic that the provisional application of treaties ought to be voluntary in nature. ln this regard, the Government of Bahrain would like to draw to the Commission's attention the approach undertaken in draft guideline 3, which implies that non-negotiating States and international organizations may have the same role as negotiating States or international organizations and are thereby enabled to provisionally apply a treaty. As such, draft guideline 3 reads as follows: "A treaty or a part of a treaty may be provisionally applied, pending its entry into force between the States or international organizations concerned". The formulation referred to above as suggested by the Commission may sometimes be relevant to multilateral treaties, but one cannot preclude how such formulation may otherwise become less relevant to the existing practice with bilateral treaties that solely concern the negotiating States or international organization for a specified purpose. Thus Bahrain recommends that the Commission considers aligning the wording of draft guideline 3 with article 25 of 1969 Vienna Convention on the Law of Treaties, at least insofar as bilateral treaties are in question.

Belarus

[Original: Russian]

With regard to the "general rule" cited in draft guideline 3, Belarus supports the Commission's approach as reflected in paragraph (3) of the commentary.[28] Like the Commission, it considers that a treaty may also be applied on a bilateral basis by States that did not take part in its drafting. At the same time, it believes that the basis for such application must be an appropriate international legal agreement between the States that, in all likelihood, will have the hallmarks of a separate treaty.

It could be noted in paragraph (3) of the commentary to the draft guideline that an agreement to apply a treaty or a part of a treaty provisionally will be applied not

[28] A/73/10, para. 90, at pp. 208–209.

only between States for which the treaty has not yet entered into force, but also between those States and States for which it has entered into force.

To ensure consistency in the use of terminology and the way in which the draft guidelines are understood by States and international organizations, it would be advisable to incorporate in the draft guideline a provision stating that provisional application of a treaty terminates not only with the entry into force of the treaty, but also with notification of the intention not to become a party to the treaty, notification of the termination of provisional application or notification of the termination of the agreement on provisional application, or a provision to the effect that the date on which provisional application of a treaty terminates may be determined by the agreement on provisional application itself. From a technical point of view, that could be done by referring to draft guideline 9 (Termination and suspension of provisional application); for example, the words "its entry into force" in draft guideline 3 could be replaced with "its termination in accordance with draft guideline 9".

Czech Republic

[Original: English]

The Czech Republic agrees with draft guidelines 3 (with the above suggestion), 4 and 5.

[See comment under draft guideline 2.]

Estonia

[Original: English]

Estonia welcomes that, in draft guideline 3, it is stated clearly, that the provisional application of a treaty can be mentioned in the treaty itself or can be expressed in other manner if so agreed. It is laudable that draft guideline 4 explains that such agreement can be reached through a separate treaty or through any other means or arrangements, for example by a resolution adopted by an international organization or at an international conference or even by a declaration of States or an international organization, if accepted by other States or international organization concerned.

However, as mentioned already in its oral comments in 2018 regarding draft guidelines 3 and 4, Estonia finds the wording and distinction between the general rule (draft guideline 3) and form of agreement (draft guideline 4) confusing and partly repetitive. It understands that the general rule of the form of the agreement is already presented in draft guideline 3, and draft guideline 4 only elaborates this rule further and does not present a separate substantive issue. It therefore suggests rewording draft guidelines 3 and 4, either by combining the two or enabling clear distinction in the essence.

Finland (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries draw attention to article 24, paragraph 4, of the Vienna Convention and invite the Commission to reflect in the commentary to draft guideline 3 on the legal basis of provisional application. The view of the Nordic countries is that the provision for provisional application is a matter arising necessarily before the entry into force of the treaty and hence applies from the time of the adoption of the text of the treaty, thereby giving a legal basis for the provisional application.

Germany

[Original: English]

Germany concurs with the approach of draft guideline 3.

As stated by Germany at the Commission's sixty-sixth session (2014),

> the decision to include a provision on provisional application in a treaty will depend on a legal evaluation of the treaty clauses. The question is whether compliance with the treaty requires an adaptation of national rules and regulations or whether national rules and regulations are already in keeping with the treaty obligations. In Germany, provisional application of a treaty is possible only if and to the extent national laws and regulations are compatible with treaty obligations so that the national legal situation permits fulfilment of the treaty.[29]

Article 59, paragraph 2, of the Basic Law of the Federal Republic of Germany provides that a treaty requires parliamentary approval if it touches upon matters that, under the constitutional distribution of powers, are to be decided by the legislature. Hence, in cases where parliamentary approval is required, Germany will be reluctant to agree to unlimited provisional application, even if compliance technically would not pose a problem. Instead, clauses providing for "the provisional application in accordance with domestic legislation" will be included, the respective clause both indicating that provisional application might be limited and, in fact, limiting provisional application to those provisions of the treaty with which the German legal framework is compatible or for which parliamentary approval is not required (*cf.* the Agreement on the International Tracing Service of 9 December 2011). Article 59, paragraph 2, of the Basic Law addresses, on the one hand, treaties of outstanding political or legal importance that govern the political relations of the Federal Republic of Germany by being of significant and immediate meaning for the existence of the State, its territorial integrity, or its independence,[30] and, on the other hand, treaties that concern matters of federal legislation.

The possibility provided for in draft guideline 3 to apply merely a part of the treaty provisionally complies with article 25 of the 1969 and 1986 Vienna Conventions and also reflects common practice. The importance of this provision for Germany results from its domestic legal requirements, particularly with regard to its membership in the European Union. Limited provisional application occurs frequently in so-called mixed agreements between the European Union and its member States on the one hand and a third party on the other hand. Those agreements have a dual nature. Article 23 of the Basic Law of the Federal Republic of Germany provides for the transfer of sovereign powers from the Federation to the European Union. Accordingly, the European Union can only act within the jurisdiction conferred to it, e.g. in the context of association agreements or agreements of partnership/friendship and cooperation. The process leading to the insertion of such a clause on the partial provisional application includes defining which of the treaty provisions fall under the competence of the European Union, whose provisional application is to be authorized by a Council Decision under article 218, paragraph 5, of the Treaty on the Functioning of the European Union.[31] In this process, it is also determined which of the treaty provisions remain under national competence and

[29] Germany, information regarding the topic "Provisional application of treaties" (March 2014) (see footnote 18 above).

[30] Stefan Ulrich Pieper, "Artikel 59: Völkerrechtliche Vertretungsmacht" in Volker Epping and Christian Hillgruber (eds.), *Beck'scher Online-Kommentar Grundgesetz* (Munich, C.H. Beck, 2019) (41st ed.), para. 29.

[31] Consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, vol. 55, C 326, 26 October 2012, p. 47.

which of those are open to provisional application under the various constitutional requirements of the member States. The aim is to ensure maximum clarity as to which parts of the agreement are subject to provisional application.

In order to implement mixed agreements, the treaty-concluding procedures of the European Union and of the member States have to be followed. As this requires a considerable amount of time, the question arises if, and in the affirmative which, parts of the mixed agreement may be applied provisionally without advance participation of the national parliaments. As those parts that remain under domestic jurisdiction are governed by national law as described above, the case may occur that those selected parts of a mixed agreement which fall under the competence of the European Union will become provisionally applicable, while those clauses of the mixed agreement subjecting the provisional application to the requirements of national law do not.

The use of the word "may" in draft guideline 3 in contrast to the wording chosen in article 25 of the 1969 and 1986 Vienna Conventions, which state that a treaty "is applied provisionally", is not self-explanatory. While it appears to be clear that the Special Rapporteur intends to underline the optional character of provisional application, the reason for choosing terminology that differs from the Conventions' provision is not apparent.

Opening up provisional application to non-negotiating States and international organizations is a reasonable approach as it is already contemporary practice. As René Lefeber rightly points out in his commentary in the *Max Planck Encyclopedia of Public International Law*, from practice, it appears that the negotiating States

> usually stipulate in a treaty that that treaty shall be applied provisionally by all its signatory States pending its entry into force. If so provided, a treaty is thus not necessarily applied provisionally by all negotiating States, but only by those negotiating States that actually sign the treaty and by other signatories.

Such signature is to be interpreted as consent to be bound by signature subject to ratification in accordance with article 14, paragraph 1 (c), of the 1969 and 1986 Vienna Conventions. A signature is, however, not an absolute necessity for a treaty to be applied provisionally. A treaty may, for instance, also provide for its provisional application by States that have consented to the adoption of the text of a treaty.[32]

The question of applying a treaty provisionally normally arises during its negotiation so that a corresponding provision will be included in the treaty itself[33] because, in general, the interest of rendering the treaty effective as soon as possible becomes apparent at this stage. In some cases, however, the need for provisional application is not foreseen while the text of the treaty is being negotiated but is felt at a later stage. A prominent example for this is the case of Protocol No. 14 (CETS 194) of 13 May 2004 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the Control System of the Convention.[34] The considerations regarding compatibility with national law will be the same. Determining the possibility of starting provisional application "in some other manner" appears to be a useful addition in this context.

[32] René Lefeber, "Treaty, Provisional application"; in Rüdiger Wolfrum (ed.): *Max Planck Encyclopedia of Public International Law*, vol. X (Oxford, Oxford University Press, 2012), p. 2, sect. 5.

[33] Germany, information regarding the topic "Provisional application of treaties" (March 2014) (see footnote 18 above).

[34] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the Control System of the Convention (Strasbourg, 13 May 2004), United Nations, *Treaty Series*, vol. 2677–2678, No. 2889, p. 3.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

Draft guideline 3 and related commentary sets out and explains the general rule on the provisional application of treaties.

The United Kingdom welcomes the broad application of draft guideline 3 (and draft model clause 3), which does not qualify the applicability of the general rule on the provisional application of treaties by reference to negotiating States or organizations.

In a bilateral context, the United Kingdom considers that it is clear that the terms "negotiating States" and "negotiating organizations", as used in article 25, paragraph 1 (b), of the 1969 and 1986 Vienna Conventions, respectively, apply to the two parties negotiating the treaty. In a multilateral context, however, the United Kingdom considers that these terms are wide enough to include both the negotiating States or organizations and those intending to accede to the treaty at a later stage. Consequently, the United Kingdom considers that draft guideline 3 aligns with a broad interpretation of the formulation used in article 25, paragraph 1 (b), and suggests that this might be reflected in paragraph (3) of the commentary.

United States of America

[Original: English]

The Commission's approach to draft guideline 3 raises two principal matters of concern: the necessary parties to an agreement for a treaty to be provisionally applied and whether a State may provisionally apply a treaty pending its entry into force for that State after the treaty has entered into force for other States.

First, the United States addresses the "necessary parties" concern. As expressed in article 25, paragraph 1, of the 1969 Vienna Convention, a treaty is applied provisionally if the treaty itself so provides or if "the negotiating States have in some other manner so agreed". Draft guideline 3 omits the reference to "the negotiating States" and in so doing creates uncertainty and potential confusion about the necessary parties to an agreement regarding provisional application of a treaty. The United States understands the reference to "the negotiating States" to be designed to ensure that all those States that would have rights or obligations under the provisional application of a treaty have consented to such provisional application. The issue of the necessary parties to an agreement for the provisional application of a treaty is a fundamental one, and the United States regards it as essential that the Commission accurately address it in a draft guideline purporting to articulate the "general rule" with regard to provisional application.

Second, the draft guideline does not make clear that a State may provisionally apply a treaty pending the treaty's entry into force for that State, even if the treaty has entered into force for other States. Draft guideline 3 does not address this particular circumstance. Yet there is ample support for States provisionally applying treaties that are in force for other States, and the Commission acknowledges as much in paragraph

(5) of the commentary.[35] That acknowledgement, without addressing in the guideline itself the matter described in the first sentence of this paragraph, is not sufficient.

In order to address these concerns, the United States recommends that the Commission revise the draft guideline to read as follows, and delete paragraph (5) of the commentary in its entirety:

> "A treaty or part of a treaty may be provisionally applied by a State or international organization, pending its entry into force for that State ~~between the States~~ or international organizations ~~concerned~~, if the treaty itself so provides, or if in some other manner ~~it has been~~ so agreed~~.~~ by all States or international organizations incurring rights and obligations pursuant to the provisional application of the treaty."

Third, it has concerns about the following observation contained in paragraph (7) of the commentary that accompanies this draft guideline:

> Furthermore, 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.[36] (Emphasis added.)

It is unclear what this sentence means, and the commentary cites no examples of State practice involving the provisional application of a treaty in the manner described.[37] What does it mean to have a State "unconnected to the treaty" provisionally apply the treaty? What does "having agreed in some other manner with one or more States or international organizations concerned" mean in this context? Would it be legally sufficient for a third State completely unconnected to the treaty to provisionally apply the treaty with the agreement of one, but not all, other States that are incurring rights and obligations pursuant to such provisional application? These are but few of the questions raised and left unanswered by paragraph (7) of the Commission's commentary. Accordingly, in the absence of language in the commentary that adequately addresses these questions, or otherwise clarifies the Commission's thinking in a manner that treaty law and practice support, the United States strongly urges the deletion of this sentence.

Slovenia

[Original: English]

As Slovenia has expressed during consideration of this draft guideline in the Sixth Committee, it remains concerned by the Commission's departure from the terminology of the 1969 Vienna Convention in this draft guideline. The use of the word "may" might be misunderstood even if read in conjunction with the

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[35] Para. (5) of the commentary to draft guideline 3, A/73/10, para. 90, at p. 210:

> "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 Commission considered the possible ambiguity in the reference to 'entry into force'. While the expression could be referring, on the one hand, to the entry into force of a treaty itself, *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*." (Emphasis added.)

[36] *Ibid.*

[37] To the extent that it is intended to address a situation like the 2013 unilateral statement of the Syrian Arab Republic in respect of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, for the reasons discussed below in comments on draft guideline 4, the United States does not regard that statement as involving provisional application of a treaty.

commentary, which itself is not very clear. In particular, the wording in the commentary "optional character of provisional application"[38] does not clearly indicate that it is the agreement to provisionally apply that is optional and not provisional application itself once agreed via that agreement. The concern of Slovenia is also based on the fact that this issue was discussed already during the United Nations Conference on the Law of Treaties, where the Drafting Committee replaced the word "may" with the word "is" precisely because the former might imply a non-binding effect. The reappearance of the word "may" can be understood as reversing the developments arising from the *travaux préparatoires*, and might call into question whether draft guideline 6 on legal effect of provisional application implies *a fortiori* that a State terminating provisional application made clear its intention to terminate the interim obligation under article 18 as well.

4. Draft guideline 4 – Form of agreement

Austria

[Original: English]

Austria welcomes draft guideline 4 on "Form of agreement" indicating the various ways in which provisional application may be agreed. However, agreement on provisional application by way of a separate treaty may have more stringent consequences than other forms of agreement on provisional application, in particular concerning the termination of provisional application. Moreover, a separate treaty could give rise to different effects for States parties to the main treaty (that is to be applied provisionally) who are not parties to the separate treaty. Austria would appreciate further explanation in this respect in the commentary. Concerning the possibility to agree on provisional application through a resolution, it is in its view necessary that such a resolution is supported by all States that should be entitled to apply a treaty provisionally. Moreover, the commentary should clarify the relation between this draft guideline and draft guideline 11 on provisions of internal law regarding competence to agree on provisional application, which is modelled on article 46 of the Vienna Convention on the Law of Treaties regarding non-compliance with national procedures.

Belarus

[Original: Russian]

The Act of Belarus on international treaties to which Belarus is a party provides that the parties may agree to apply a treaty provisionally (where the treaty itself does not so provide) "by some other means", without specifying the forms of such agreement. It would therefore be useful, for treaty-making practice, to list in draft guideline 4 a greater number of forms that the agreement on provisional application may take; these could include, for example, a bilateral document (agreement) not containing binding international obligations.[39]

The decision of the Council of Heads of Government of the Commonwealth of Independent States of 15 April 1994 to apply provisionally the Agreement on the General Conditions and Support Mechanism for the Development of Manufacturing

[38] Para. (2) of the commentary to draft guideline 3, A/73/10, para. 90, at p. 208.

[39] A rare example of such a document in Belarusian practice is the Joint Declaration in connection with the signing of the Agreement on Trade and Economic Cooperation between the Republic of Belarus and the Swiss Confederation of 28 May 1993, which provides for the provisional application of the Agreement from 1 July 1993 until the date of its entry into force. At present, agreements on the provisional application of treaties by Belarus are contained exclusively in treaties.

Cooperation among Businesses and Economic Sectors of the States Members of the Commonwealth of Independent States of 23 December 1993 could be included in footnote 1020 to the commentary to draft guideline 4 as an example of another form of agreement on provisional application of a treaty, namely, a collective decision reached under the auspices of an international organization.[40]

Regarding paragraph (5) of the commentary,[41] Belarus takes the view that acceptance of an agreement on provisional application of a treaty must be exclusively in writing.

At the same time, it agrees that a (unilateral) declaration on provisional application of a treaty must be clearly accepted by other States or international organizations, as opposed to merely not being objected to.

Clearly, if the agreement on provisional application of a treaty is included in the treaty itself, it will be subject to the provisions of article 24, paragraph 4, of the Vienna Convention on the Law of Treaties of 23 May 1969 and will apply from the time of the adoption of the text of the treaty.

Czech Republic

[Original: English]

[See the comment under draft guideline 4.]

Estonia

[Original: English]

With regard to draft guideline 4, subparagraph (b) – provisional application can be agreed through a declaration by a State that is accepted by the other States – Estonia suggests further elaborating in the commentaries and explaining if there is a certain timeline for acceptance of declarations on provisional application. Furthermore, the commentaries state that most of the existing practice reflects the acceptance in written form.[42] Could then theoretically a tacit acceptance be assumed? Could the acceptance be valid after certain amount of time if no clear acceptance is given or no reservation/objection is expressed?

Concerning the legal effects of provisional application, Estonia would be grateful if the draft Guide or commentaries could be clearer about the legal effects of such application in the case that it is expressed unilaterally. Draft guideline 4 states: "provisional application … *may be agreed through … a declaration*" (emphasis added); draft guideline 6 states: provisional application … produces [*legal effects*] *between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed*" (emphasis added). The aspect Estonia would like to see reflected in the commentaries is whether the unilateral declaration to apply the treaty provisionally could be issued to a bilateral treaty. If yes, the question arises about its legal effects. In the opinion of Estonia, such a unilateral declaration (accepted or not by another party) could not bring any obligation to the other party which is not willing to apply the treaty provisionally; it could only bring rights to the other party. In addition, a question arises whether clear written acceptance of such a declaration of unilateral provisional application of a bilateral treaty should follow from the other party, in order to enable the use of rights agreed in the treaty.

[40] For more details, see http://cis.minsk.by/reestr/ru/index.html#reestr/view/text?doc=316.

[41] Para. (5) of the commentary to draft guideline 4, A/73/10, para. 90, at pp. 212–213.

[42] *Ibid.*

Estonia welcomes that the draft Guide recognizes that States may set aside, by mutual agreement, the solutions identified in the draft guidelines if they so decide. It concurs with the idea of the sovereign States, who have the right to choose necessary measures, as far as these do not contravene the rules of international law.

Germany

[Original: English]

Germany concurs with draft guideline 4.

Singapore

[Original: English]

Singapore agrees with the overarching principle that "the provisional application of a treaty or party of a treaty may be agreed through: (a) a separate treaty; or (b) any other means or arrangements". The commentaries clarify that the structure of this guideline is intended to follow the sequence of article 25 of the 1969 Vienna Convention and the 1986 Vienna Convention.

The Commission has chosen two examples of such "means or arrangements": namely, 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. Footnote 1020 of the commentaries clarifies that the examples do not refer to agreements in which the international organization is party to the treaty as such, but to "agreements between States reached in meetings or conferences under the auspices of that international organization".[43]

Singapore is of the view that this important clarification is not apparent on the face of draft guideline 4. The draft guidelines or the commentaries should clarify the types of treaties that the examples in subparagraph (b) are intended to address. In addition, article 25 of the 1969 and 1986 Vienna Conventions of refers to the requirement of consent on the part of the negotiating States. Accordingly, the Commission should emphasize that the consent of the negotiating parties is required in all instances.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

Draft guideline 4 deals with the forms an agreement that gives rise to provisional application can take, in addition to when the treaty itself so provides.

The United Kingdom welcomes the emphasis in draft guideline 4 and the accompanying commentary on the concept of "agreement", as the basis on which a treaty, or part of it, may be provisionally applied.

In general, the United Kingdom does not consider that a treaty can be provisionally applied on the basis of a unilateral act, and that examples of what might constitute "agreement" or "acceptance" might help to provide clarity and certainty in this context. That said, whilst the United Kingdom acknowledges that a unilateral declaration of intention to apply a treaty might in certain circumstances have legal effect, in the view of the United Kingdom this practice should generally be analysed through the legal regime of the unilateral acts of States rather than through the law of

[43] *Ibid.*

treaties. The United Kingdom considers that this might usefully be clarified in footnote 1021.[44]

On the question of the form of agreement, the United Kingdom notes that a declaration that is accepted by other States or international organizations is acknowledged in paragraph (5) of the commentary to be an exceptional practice.[45] To ensure consistency between the draft guideline and the related commentary, the United Kingdom considers that there might be merit in drawing attention in the guidelines to the exceptional nature of the declaration example used.

The United Kingdom understands that the examples set out in draft guideline 4, subparagraph (b), relate to multilateral treaties. Consequently, the United Kingdom considers that it might be beneficial to expand upon the examples listed so that examples from the bilateral context are also given.

United States of America

[Original: English]

The United States has several concerns regarding draft guideline 4, which is intended to address the form of agreement that could effectuate the provisional application of a treaty or parts thereof.[46] This draft guideline attempts to explain the reference to "in some other manner it has been so agreed" as it appears in draft guideline 3 and relating to article 25, paragraph 1 (b), of the 1969 Vienna Convention.

The principal substance of the draft guideline is contained in subparagraph (b), which makes the assertion that two specific forms of "means or arrangements" may satisfy the Vienna Convention standard:

- "a resolution adopted by an international organization or at an intergovernmental conference"; and
- "a declaration by a State or an international organization that is accepted by the other States or international organizations concerned."

The United States is concerned about the draft guideline's treatment of each of these elements.

First, the discussion of resolutions adopted by an international organization or at an intergovernmental conference risks creating confusion as to the applicable standard for an agreement to apply a treaty provisionally. In particular, the draft guideline suggests that there is some particular significance to resolutions adopted at international conferences for the purposes of establishing valid agreements for provisional application of treaties. An agreement to apply a treaty provisionally requires the consent of all States (and international organizations) assuming rights and obligations pursuant to that provisional application. A resolution adopted at an international conference can establish provisional application obligations only if all such States express their consent to its adoption. Resolutions adopted by an international conference that do not reflect the consent of all States assuming rights

[44] *Ibid.*

[45] *Ibid.*

[46] Draft guideline 4 provides that:

"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." (Emphasis added.)

and obligations pursuant to provisional application – such as those adopted without the participation of or without the consent of all relevant States – would not establish a valid agreement for provisional application in respect of those States. The key consideration is not the mechanism through which States reach an agreement to apply a treaty provisionally, but rather whether all the necessary parties have consented to the agreement.

In this regard, the United States does not regard many of the examples cited in the commentary as meeting this condition. The commentary does not discuss whether all States among whom provisional application rights and obligations are asserted to have been created participated in the adoption of the resolutions discussed. Moreover, the commentary does not identify instances in which States – as opposed to international organizations – have sought to rely on provisional application rights or obligations asserted to have been created in the instances it cites, and thus the effectiveness of the resolutions in establishing such rights and obligations has not been demonstrated.

In a number of other instances, the examples cited in footnote 1020 to the commentary[47] do not support the view that States have used resolutions as means of establishing provisional application where not otherwise provided for in the treaty. For example:

- The agreements on olive oil and table olives, tropical timber, and cocoa, all provide for provisional application in the terms of the treaties themselves, rather than provisional application being established by resolution outside the treaty.
- The commentary misattributes views expressed in a working paper prepared by the Secretariat of the United Nations Framework Convention on Climate Change[48] as representing the views of the parties to the Kyoto Protocol. The Secretariat paper was prepared two years prior to the adoption of the amendments to the Kyoto Protocol[49] and does not represent views or language adopted by the Parties, nor does it reflect what Parties decided to do two years later when they adopted the amendment at issue. Moreover, as noted above, there is no evidence that all States that would potentially incur rights or obligations under the provisional application regime actually consented to the adoption of the resolution. In any case, it appears that no State has, in fact, submitted a declaration claiming to apply the amendment provisionally, so there is no practice to illustrate whether and to what extent legally effective provisional application obligations would be created through this mechanism.
- The Comprehensive Nuclear-Test-Ban Treaty[50] example does not involve provisional application based on agreement reached “in some other manner”, or support the proposition of “implied provisional application”. As footnote 1020 of the commentary acknowledges, there is no consensus that the 1996 resolution of the signatory States that founded the Preparatory Commission of the Comprehensive Nuclear-Test Ban Treaty Organization in fact provisionally applied the treaty, such that treaty obligations became binding on signatories prior to entry into force of the treaty. No such intention to provisionally apply the treaty’s provisions is clearly stated in the resolution itself, and it would be surprising if such an intention *was* stated, given that the negotiating States had

[47] Para. (5) of the commentary to draft guideline 4, A/73/10, para. 90, at pp. 212–213.
[48] United Nations Framework Convention on Climate Change (New York, 9 May 1992), United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107.
[49] Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997), *ibid.*, vol. 2303, No. 30822, p. 162.
[50] Comprehensive Nuclear-Test-Ban Treaty (New York, 10 September 1996), A/50/1027, annex.

affirmatively decided against including a mechanism for provisional application in the treaty.

- The Inmarsat example similarly does not involve "provisional application" based on agreement reached "in some other manner". In 1998, the twelfth session of the Inmarsat Assembly of Parties, adopted amendments to the Convention deemed necessary to effect Inmarsat's privatization. Recognizing that the time involved to formally bring the amendments into force would substantially delay the privatization, the Parties reached a separate legally binding agreement to "rapidly implement" amendments deemed necessary to effect Inmarsat's privatization, to the extent permitted by their respective national constitutions, laws and regulations. In the lead up to the Assembly, the Parties had debated whether "provisional application" was the means through which privatization would be effected. The United States, among others, argued against use of that term to characterize what the Parties were contemplating. Implicit in the concept of provisional application is the notion that a Party may at any point, prior to the entry into force of a treaty, express its intent not to be bound by the treaty or amendments thereto. In the case of Inmarsat, it would have been difficult, if not impossible, for a Party that had agreed to Inmarsat's privatization at the Assembly thereafter to express its intent not to be bound to that agreement without there being a fundamental change to the pre-privatization status quo. There was nothing provisional about what was agreed at the Assembly.

In sum, the United States believes that the examples cited in footnotes to this draft guideline should be reviewed carefully and maintained only to the extent that they support the proposition for which they are cited. If the Commission cannot establish that they are reflective of provisional application as understood under current law or State practice, it should omit them altogether.

The draft guideline's assertion with respect to the second alternative form for establishing a provisional application agreement – a declaration by a State or international organization that is accepted by the other States or international organizations concerned – is not grounded in law or practice. The commentary to the draft guideline acknowledges the lack of support for this claim by noting that practice relating to provisional application through such declarations "is still quite exceptional".[51] The commentary cites only one example of practice to support this assertion. However, the example it cites – related to a declaration of the Syrian Arab Republic in respect of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction[52] – does not involve the provisional application of a treaty. The Convention does not contain a provision on provisional application. In the example cited by the Commission, the Syrian Arab Republic deposited an instrument of accession stating that it "shall comply with the stipulations contained [in the Convention] and observe them faithfully and sincerely, applying the Convention provisionally pending its entry into force for the Syrian Arab Republic".[53] In the view of the United States, the Syrian statement constituted a unilateral undertaking on the part of Syria that did not afford it rights *vis-à-vis* the States parties to the Convention, nor impose obligations on them. As noted in the commentary itself, this is a case "in which the treaty does not require the negotiating or signatory States to apply it provisionally, but leaves open the

[51] Para. (5) of the commentary to draft guideline 4, A/73/10, para. 90, at pp. 211–212.

[52] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Paris, 13 January 1993), United Nations, *Treaty Series*, vol. 1974, No. 33757, p. 45.

[53] United Nations, Treaty Collection, *Status of Treaties*, chap. XXVI, No. 3.

possibility for each State to decide whether or not it wishes to apply the treaty".[54] Whatever set of legal relationships are established by such an arrangement, they are not those of provisional application as that term is understood in the context of article 25 of the 1969 Vienna Convention and customary international law.

For these reasons, the United States does not support inclusion of specific reference in draft guideline 4 to resolutions adopted by international organizations or conferences or to declarations made by States. It believes that, at a minimum, subparagraph (b) should be revised to make the limited statement that provisional application may be agreed through any means or arrangements other than a separate treaty that are accepted by *all* States or international organizations assuming rights or obligations in connection with the provisional application of the treaty. It recognizes, however, that if limited in this way, the draft guideline would add little to the material already addressed in draft guideline 3. For this reason, the Commission may find it more appropriate to omit this draft guideline altogether.

5. Draft guideline 5 – Commencement of provisional application

Czech Republic

[Original: English]

[See the comment under draft guideline 4.]

Germany

[Original: English]

Germany concurs with the approach in draft guideline 5.

In many cases provisional application takes effect with a signature according to article 14, paragraph 1 (c), of the Vienna Conventions.[55] If so provided, a treaty is thus not necessarily applied provisionally by all negotiating States, but only by those negotiating States that actually sign the treaty and by other signatories.[56]

Furthermore, a treaty may provide for its provisional application by States that have consented to the adoption of the text of a treaty.[57] Another option was chosen in the context of the Comprehensive Economic and Trade Agreement: pursuant to article 30.7, paragraph 3 (a), the starting point of provisional application depends on the Parties notifying each other that their respective internal requirements and procedures necessary for the provisional application of this agreement have been completed or on such other date as the Parties may agree.

It emerges that the commencement of provisional application can be agreed upon in many different ways to meet divergent requirements. Draft guideline 5 determines no specific date and operates with a general reference to conditions and procedure, which leaves agreeing on the details to the contracting parties and enables them to react with flexibility to particular situations.

[54] Para. (5) of the commentary to draft guideline 4, A/73/10, para. 90, at p. 212, footnote 1021.
[55] *Cf.* comment to draft guideline 3 above.
[56] Lefeber, "Treaty, Provisional application" (see footnote 32 above), at p. 2, sect. 5.
[57] *Ibid.*

6. Draft guideline 6 – Legal effect of provisional application

Austria

[Original: English]

Draft guideline 6 on "Legal effect of provisional application" states that provisional application produces the same legal effects "as if the treaty were in force". As a principle, this is acceptable, but it is not a principle without exceptions. The commentary itself states that "provisional application is not intended to give rise to the whole range of … 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",[58] and that "termination and suspension" are not subject to the same rules as those applicable to treaties in force. Therefore, the generality in which draft guideline 6 refers to "the same legal effects" is misleading. The commentary does not determine which obligations would not become effective under the provisional application, for instance, whether this could only encompass provisions concerning questions of treaty law or also substantive provisions of the treaty in question. It is the understanding of Austria that "the same legal effects" would also comprise the application of the rules and principles dealing with the treaty's relation to other treaties, such as the *lex specialis* and *lex posterior* principles. In the same vein, it appears necessary to explain that a State that applies a treaty provisionally is entitled to participate in bodies created by this treaty unless the treaty provides otherwise. It should be further explained whether a State is entitled to invoke a provisionally applied treaty before the organs of the United Nations if the treaty has not yet entered into force and has not been registered with the United Nations.

Czech Republic

[Original: English]

[See the comment under draft guideline 8.]

Finland (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The wording of draft guideline 6 takes into account the distinction made in the Vienna Convention on the Law of Treaties between provisional application and entry into force. The Nordic countries can agree with this solution and the fact that the wording allows for the termination and suspension of provisional application in line with Part V, Section 3, of the Convention (*mutatis mutandis*).

Germany

[Original: English]

Germany concurs with the approach in draft guideline 6.

While there are several necessary differences between provisional application of a treaty and its entry into force, there are also similarities, namely that a treaty provisionally applied is binding and enforceable. The principles of *pacta sunt servanda* and of good faith shall apply to provisional application[59] as much as the principle of holding a State or an international organization accountable in case of a

[58] Para. (5) of the commentary to draft guideline 6, A/73/10, para. 90, p. 215.

[59] Krieger, "Article 25 – Provisional application" (see footnote 9 above), p. 455, sect. 32. See also Kempen and Schiffbauer, "Die vorläufige Anwendung völkerrechtlicher Verträge im internationalen Mehrebenensystem" (footnote 10 above), p. 101.

breach of an obligation arising under the treaty or a part thereof being provisionally applied.[60] These legal effects are inherent to provisional application so as to flank the unfolding of the legal effects of the treaty as early as possible.[61]

The Netherlands

[Original: English]

The Kingdom of the Netherlands wishes to highlight the residual character of the draft guidelines and the need to retain flexibility. The Kingdom of the Netherlands refers to draft guideline 6 concerning the legal effect of provisional application as an example. The rule applies "unless the treaty provides otherwise or it is otherwise agreed". Thus, as recognized by the Commission, States can agree that the legal obligations arising from the provisional application of a treaty are limited by the internal law of States or the internal rules of international organizations. With regard to the provisional application of treaties by the Kingdom of the Netherlands such a restriction follows from article 15, paragraph 2, of the Kingdom Act on the Approval and Publication of Treaties. That paragraph provides that "if a treaty requiring the approval of the States General [Dutch Parliament] before it can enter into force contains provisions which conflict with statute law or result in such conflict, such provisions may not be applied provisionally".

United Kingdom of Great Britain and Northern Ireland

[Original: English]

Draft guideline 6 deals with the legal effect of provisional application.

As the United Kingdom has previously commented, further clarity on the distinction between the legal effect of a provisionally applied treaty and one in full force would be useful. Although the draft guideline indicates that the legal effect of provisional application is the same as entry into force, paragraph (5) of the commentary makes it clear that 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" and that "it is not subject to all rules of the law of treaties".[62] The United Kingdom believes that it would be useful to expand this analysis, in particular by providing greater clarity on the rules which do not apply (for example the rules relating to entry into force).

United States of America

[Original: English]

The United States appreciates the Commission's efforts to clarify the text of draft guideline 6, especially with regard to whether the provisional application of a treaty is the same as its entry into force. It concurs with the Commission's view that these are separate concepts. However, it continues to have concerns about two aspects of the commentary accompanying this draft guideline.

First, for the reasons discussed above, the United States has concerns about the reference to draft guideline 4 that appears in the third sentence of paragraph (2) of the commentary. That sentence states, in relevant part, that the agreement to apply provisionally a treaty "may be expressed in the forms identified in draft guideline

[60] Krieger, "Article 25 – Provisional application" (see footnote 9 above), p. 455, sect. 32.
[61] Kempen and Schiffbauer, "Die vorläufige Anwendung völkerrechtlicher Verträge im internationalen Mehrebenensystem" (see footnote 10 above), p. 101.
[62] Para. (5) of the commentary to draft guideline 6, A/73/10, para. 90, p. 215.

4".[63] In light of its concerns regarding draft guideline 4, the United States recommend deletion of the clause "which may be expressed in the forms identified in draft guideline 4".

Second, the United States doubts the necessity and utility of paragraph (6) of the commentary.[64] As the Commission itself notes the "formulation adopted for draft guideline 6 was considered to be sufficiently comprehensive to deal" with the point whether provisional application can result in the modification of the content of a treaty. It is therefore difficult to understand the purpose that paragraph (6) serves and the United States therefore recommend its deletion.

7. Draft guideline 7 – Reservations

Austria

[Original: English]

With regard to the possibility to make reservations when agreeing to the provisional application of treaties, as provided for in draft guideline 7 on "Reservations", Austria concurs with the underlying idea that such modification of legal effects between parties should be possible. However, it would appreciate further elaboration on the legal effect of such reservations, which has not been sufficiently dealt with in the 2011 Guide to Practice on Reservations to Treaties.[65]

Czech Republic

[Original: English]

As it was rightly underlined in connection with the elaboration of the Guide to Practice on Reservations, the regime of reservations is a single and uniform regime applicable to all reservations, irrespective of the material content of a treaty provision in respect of which the reservation is formulated, and – in the view of the Czech Republic – also irrespective of whether such provision will or will not be applied provisionally. Reservations are usually formulated either before or at the time when the consent to provisional application may also be given, and without making distinction between the stage of "provisional application" and "application" of the treaty provision affected by the reservation. There is no reason to believe that the text of article 19 of the Vienna Convention concerning formulation of reservations was intended to not apply to reservations to provisions which may be applied provisionally.

This is however confused by the inclusion of words "*mutatis mutandis*" in paragraph 1 of the draft guideline 7. These words imply that relevant provisions of the Vienna Convention are not directly applicable to reservations to treaty provisions that may be provisionally applied. Even in the case when the reservation is formulated only for the period of the provisional application, there is no reason to assume that the provisions of the Vienna Convention concerning reservations do not apply directly, but "*mutatis mutandis*". The Latin phrase should be deleted.

[63] Para. (2), *ibid.*, p. 214.
[64] *Ibid.*, p. 215.
[65] *Yearbook of the International Law Commission 2011*, vol. II (Part Three).

Finland (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries welcome the Commission's work on the use of reservations in relation to provisional application. Any reservation in relation to provisional application should be made in accordance with the relevant rules of the Vienna Convention. The possibility of making a reservation to exclude or modify the legal effect produced by the provisional application of a treaty might increase the willingness to apply the treaty provisionally by States that would make a reservation to the treaty when expressing consent to be bound. A review of the practical impacts of draft guideline 7 might however be useful in the further work on the subject.

Germany

[Original: English]

Germany concurs with the inclusion of draft guideline 7 in the draft Guide.

In several reports by the Special Rapporteur, the concept of including a provision on reservations purporting to exclude or modify the legal effect produced by the provisional application was deliberated.[66] In spite of a lack of practice the Commission decided on that matter in favour of inclusion. The scope of draft guideline 7 and especially its delimitation to draft guideline 3, which already provides for a provisional application of merely a part of the treaty, require clarification. Draft guideline 3 enables the contracting States to exclude parts thereof. Draft guideline 7 can be understood as being applicable only to multilateral agreements *mutatis mutandis* in accordance with the relevant rules of the Vienna Convention on the Law of Treaties. As the Special Rapporteur could not identify relevant State practice concerning reservations in the context of provisional application,[67] the Commission might consider it beneficial to examine in greater detail if this draft guideline does not, in fact, have a role to play in the context of mixed agreements.

Particular reference shall be made here to article 30.7, paragraph 3 (b), of the Comprehensive Economic and Trade Agreement, which states:

> If a Party intends not to provisionally apply a provision of this Agreement, it shall first notify the other Party of the provisions that it will not provisionally apply and shall offer to enter into consultations promptly. Within 30 days of the notification, the other Party may either object, in which case this Agreement shall not be provisionally applied, or provide its own notification of equivalent provisions of this Agreement, if any, that it does not intend to provisionally apply. If within 30 days of the second notification, an objection is made by the other Party, this Agreement shall not be provisionally applied.

It is contended here that mixed agreements—especially those including the European Union and its member States—will probably be the main area of application of draft guideline 7. Due to partially complex provisions on the division of competences and different proceedings of domestic legitimation within the States concerned, some States might want to exclude or condition certain provisions, while others are prepared to consent to them. As has been explained in the comment to draft guideline 3 above, mixed agreements including the European Union and its member States, from a German point of view, can be applied provisionally without involvement of

[66] Third report on the provisional application of treaties, prepared by Mr. Juan Manuel Gómez-Robledo (A/CN.4/687), para. 137; and fourth report on the provisional application of treaties prepared by Mr. Juan Manuel Gómez-Robledo (A/CN.4/699), paras. 22–39.

[67] Para. (2) of the commentary to draft guideline 7, A/73/10, para. 90, at p. 215.

the Federal Parliament only with regard to subject-matters which are under the legislative competence of the European Union. As the Second Senate of the Federal Constitutional Court held in its Order dated 7 December 2016, it might be disputable whether a particular subject-matter is under this legislative competence.[68] Moreover, even if there is no issue of jurisdiction, there can be differences in the constitutional processes of legitimation in the respective member States. Therefore, the possibility of making reservations purporting to exclude or modify the legal effect produced by the provisional application is well-grounded. The Federal Constitutional Court held that the Federal Government had employed adequate legal instruments in order to terminate provisional application or exclude critical provisions in cases in which *ultra vires* actions or the impairment of the federal constitutional system seemed possible. In spite of the constitutional permissibility of transferring sovereign powers from the Federation to the European Union, the fundamental structure of the Basic Law functions as an absolute limitation to that authority. Tasks and power of substantial weight are supposed to remain with the federal legislator as long as democratic legitimation on the European Union level is not equated with the German one.[69]

The Netherlands

[Original: English]

With respect to draft guideline 7 concerning reservations, the Kingdom of the Netherlands notes that the Commission is still at the initial stage of considering the question of reservations in relation to the provisional application of treaties. Given the lack of practice, the inclusion, for the time being, of a draft guideline on this question seems to be motivated primarily by the consideration that, as a matter of principle, nothing prohibits the possibility of formulating reservations related to provisional application.

The Kingdom of the Netherlands would like to invite the Commission to further clarify and reflect on the added value of including this draft guideline in light of the stated objective of the draft Guide, which is to assist States and direct them to appropriate answers. A question which the Commission may wish to consider is how a reservation related to the provisional application of a treaty, or a part of it, relates to the (prior) agreement of States to provide for provisional application in the first place.

Singapore

[Original: English|

Singapore agrees with views expressed in the Commission that further work is required in this regard. With respect to draft guideline 7, paragraph 1, the Commission might state expressly that the relevant rules in the 1969 Vienna Convention are those relating to the formulation of reservations. This is consistent with the commentary and will provide the correct reference point for users when the draft guidelines are eventually finalized. In a similar vein, the Commission should consider clarifying which rules of international law apply in the case of a reservation by an international organization.

[68] Germany, Federal Constitutional Court, Order of the Second Senate of 7 December 2016 in the case 2 BvR 1444/16, sects. 21–31.

[69] Wolff Heintschel von Heinegg, "Artikel 23: Mitwirkung bei Entwicklung der EU" in Epping and Hillgruber (eds.), *Beck'scher Online-Kommentar Grundgesetz* (see footnote 30 above), para. 29.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom welcomes the inclusion of draft guideline 7, which considers the effect of reservations on the provisional application of a treaty. The United Kingdom acknowledges that there is relatively little practice in the area, and welcomes the Commission's further consideration of the topic in order to provide greater clarity, including on the question as to whether a reservation continues in effect upon the entry into force of the treaty. In any event, the United Kingdom considers that it would be beneficial for the parties to confirm their intentions relating to any reservation upon both provisional application and entry into force of the treaty.

United States of America

[Original: English]

The United States does not support including this draft guideline and urges its deletion. As reflected in its associated commentary, the Commission has not identified any State practice with respect to the making of reservations in the context of provisional application of treaties.[70] This calls into question the relevance of the draft guideline, as it addresses an issue that States do not appear to encounter in practice. It also highlights that the draft guideline and accompanying commentary are not grounded in any actual legal authority, but instead represent the Commission's speculative thoughts on essentially academic questions.

Even if taken only as the Commission's own views, the Commission's draft guideline is not particularly helpful. It is premised on the unexplained and unsupported assertion that particular rules of the 1969 Vienna Convention should be understood to apply *mutatis mutandis* to the provisional application of treaties. The commentary states that this is "meant to indicate the application of some, but not necessarily all, of the rules of the 1969 Vienna Convention applicable to reservations in case of provisional application".[71] However, the commentary does little to explain what criteria should be used to determine which of those rules should be understood to apply and which should not. This approach does little to provide States a reasoned basis for assessing the value of the Commission's proposals on these points. Moreover, the Commission leaves unanswered how a hypothetical regime for reservations to provisional application would work in practice, including how such reservations might be filed, what rights other States might have to comment or object to them, and how those might be exercised.

For these reasons, the United States strongly shares the views of those members of the Commission who have argued that a draft guideline and accompanying commentary on these issues are neither appropriate nor necessary, and it urges that they be deleted in their entirety.

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[70] Para. (2) of the commentary to draft guideline 7, A/73/10, para. 90, at p. 215, noting the "lack of practice" involving reservations made in connection with provisional application of treaties. This point was underscored in an earlier report of the Special Rapporteur, in which he noted that he:

> has not yet encountered a treaty that provides for the formulation of reservations as from the time of provisional application, nor has he encountered provisional application provisions that refer to the possibility of formulating reservations. Furthermore, the memorandum by the Secretariat likewise does not identify any cases where a treaty has provided for the formulation of reservations in relation to its provisional application, or cases where a State has formulated reservations to a treaty that is being applied provisionally.

Fifth report on the provisional application of treaties (A/CN.4/718), para. 67.

[71] Para. (4) of the commentary to draft guideline 7, A/73/10, para. 90, at p. 216.

8. Draft guideline 8 – Responsibility for breach

Bahrain

[Original: English]

Bahrain notes that the Commission considered whether it was necessary to have a provision on responsibility, and how the inclusion of draft guideline 8 was thereby deemed necessary by the Commission in order to address legal consequences of the provisional application of a treaty or a part of a treaty. In a similar context, the Commission also noted in paragraph (5) of its commentary on draft guideline 6 that reference to a "legally binding obligation" is intended to add more precision in the depiction of the legal effect of provisional application and that the formulation suggested does not imply that provisional application has the same legal effect as entry into force.[72]

While the Kingdom of Bahrain, nonetheless acknowledges the importance of the legal consequences that may arise in case of breach of an obligation under a treaty that is being provisionally applied, it considers it necessary that draft guideline 8 reflects any legal consequences of breach as provided in the treaty itself or as otherwise agreed between the parties and that is before resorting to "other applicable rules of international law".

Belarus

[Original: Russian]

International responsibility may arise for a State or international organization not only in the period during which it provisionally applies a treaty, but also after the termination of provisional application.

An example of a provision on the continuation of obligations after the termination of provisional application of a treaty may be found in article 45, paragraph 3 (b), of the Energy Charter Treaty of 17 December 1994:[73]

> In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c).

In the light of the above, it is proposed to insert in draft guideline 8 the words "or was" after "is" in the phrase "that is provisionally applied".

Czech Republic

[Original: English]

The Czech Republic agrees with draft guideline 6 (Legal effect of provisional application), as well as with draft guideline 8 (Responsibility for breach). In this respect it recalls its position expressed earlier, namely that the provisional application of a treaty or some of its provisions is above all an "application" of the treaty. The obligations in question are real legal obligations, even if the basis for their implementation is "provisional". The provisional application of a treaty is not just an option available for unilateral choice by States or a courtesy that the States simply

[72] Para. (5) of the commentary to draft guideline 6, A/73/10, para. 90, at p. 215.

[73] Energy Charter Treaty (Lisbon, 17 December 1994), United Nations, *Treaty Series*, vol. 2080, No. 36116, p. 95.

reciprocate, but a firm legal obligation within the realm of the principle *pacta sunt servanda*. These obligations acquire their binding character at the latest in the moment when the provisional application is supposed to start. As a consequence, the breach of a treaty obligation in course of its provisional application is subject to rules governing international responsibility. Accordingly, unilateral termination of provisional application, in violation of conditions for such termination, would also amount to a breach of an international obligation which would entail international responsibility.

Germany

[Original: English]

With reference to the comment under draft guideline 6, Germany concurs with draft guideline 8.

9. Draft guideline 9 – Termination and suspension of provisional application

Austria

[Original: English]

Concerning draft guideline 9 on "Termination and suspension of provisional application", Austria notes that the current wording restates the provisions of the two Vienna Conventions on the Law of Treaties regarding termination of provisional application as a result of a treaty's entry into force as well as of a State's or international organization's notification that it no longer intends to become a party to the treaty. While Austria appreciates adherence to the rules of the Vienna Conventions, it would welcome an additional provision on other forms of termination and/or suspension, including for instance on unilateral termination of provisional application. States and international organizations may have to terminate or suspend the provisional application of a treaty as a result of internal democratic decision-making procedures or other legal or political reasons, without necessarily expressing their will not to become a party to the treaty at all in the future.

Furthermore, according to paragraph 2 of draft guideline 9, the notification of the intention not to become a party to the treaty has to be addressed only to the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally. Such a restriction is too narrow since the provisional application applies also in the relations between these States and States already parties to the treaty. Accordingly, such notification must also be addressed to States parties. The commentary should indicate whether such a notification is to be considered as having a binding effect. Austria doubts such interpretation since a State only notifies about its intention, but is not precluded from changing such intention at a later stage.

Belarus

[Original: Russian]

Notification of the intention of a State or international organization not to become a party to a treaty, which is provided for in paragraph 2 of the draft guideline, not only terminates the provisional application of the treaty with respect to that State or international organization, but also releases it from the obligation to refrain from acts that would defeat the object and purpose of the treaty, in accordance with article 18, subparagraph (a), of the Vienna Convention.

Belarus would consider it desirable to conduct a more detailed analysis of the issues relating to suspension of provisional application and of the various scenarios for termination. For example, it would be useful to examine situations in which the

provisional application of a State's bilateral treaties is suspended while another treaty is in force.

Regarding termination of provisional application, in the opinion of Belarus, paragraph 2 of the draft guideline is lacking a reference to another possible scenario, in which a State or international organization wishes to terminate the provisional application of a treaty but still intends to become a party to the treaty.[74] Provisional application may also be terminated through termination of the agreement on provisional application (if that agreement was reached by other means and is not included in the treaty itself). This issue is more accurately set out in paragraph (8) of the commentary to the draft guideline.[75]

Czech Republic

[Original: English]

The Czech Republic agrees with provisions of paragraphs 1 and 2, but it has some problems with the drafting of paragraph 3.

The reference to provisions of Part V, Section 3, of the Vienna Convention concerning termination and suspension of the operation of treaties brings some questions: The "without prejudice clause" in combination with the phrase "*mutatis mutandis*" makes it difficult to understand both the exact meaning and the purpose of this paragraph. Unlike the "termination of a treaty" which according to the above-mentioned provisions of the Vienna Convention implies *ending of a binding force* of the treaty, the "termination of the provisional application" does not affect legal force of the treaty, but means only the ending of the *provisional mode of its application*. In other words, it seems that the term "termination" is not used in these two situations in a manner allowing an analogy. Similarly, the Czech Republic is not convinced that the "suspension of the provisional application" is necessarily an equivalent of the "suspension of the operation of the treaty or some of its provisions". Paragraph 3, as currently drafted, seems to raise more questions than it was intended to answer.

Finland (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

Although the practice on termination and suspension of provisional application is scarce, the Nordic countries note with interest draft guideline 9 and, in particular, its paragraph 3 on termination and suspension not only in the case of a material breach but with a *mutatis mutandis* reference to Part V, Section 3, of the Vienna Convention. The reference will guide future practice in the area, and clarifies the relationship between article 25 and Part V, Section 3, of the Convention. The specific reference to Part V, Section 3, also complies with the principle of legal certainty.

[74] Example: art. 41, para. 2, of 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 (New York, 4 August 1995), United Nations, *Treaty Series*, vol. 2167, No. 37924, p. 3 ("Provisional application by a State or entity shall terminate ... or upon notification by that State or entity to the depositary in writing of its intention to terminate provisional application.").

[75] Para. (8) of the commentary to draft guideline 9, A/73/10, para. 90, at p. 219.

Germany

[Original: English]

Germany concurs with the inclusion of draft guideline 9 in the draft Guide.

In many cases, the provisional application of treaties to which Germany is a contracting party is terminated as a consequence of the entry into force of the treaty in question. This does not require an exchange of notes with the other party or parties to the treaty. It ends with the events announced in official bulletins of Germany.[76] For multilateral treaties, provisional application ends among parties for which the treaty enters into force. However, it continues to apply among States that have not become parties unless they choose to terminate such application.[77]

In one case, a bilateral agreement that never entered into force but has been applied provisionally for almost 20 years is now in the process of being replaced by a new agreement. The new draft includes a provision on the termination of the provisional application of the old agreement. Apart from this case, there are no other examples of treaties that were provisionally applied by Germany and the provisional application of which was terminated without the treaty actually entering into force.[78]

On similarities between provisional application and the entry into force of the treaty, reference is made to the comments made on draft guideline 6 above. However, provisional application and entry into force of a treaty must not be equated. The provisional nature is secured by the possibility of unilaterally withdrawing a declaration of provisional application. In this respect, draft guideline 9, paragraph 2, complies with article 25, paragraph 2, of the 1969 and 1986 Vienna Conventions. This provision is necessary since otherwise the stricter regulations regarding the termination and suspension of the operations of treaties in Part V, Section 3, of the 1969 and 1986 Vienna Conventions would apply.[79] The notification on not becoming a party to the treaty has only an *ex nunc* effect.[80]

Germany notes that the meaning and purpose of draft guideline 9, paragraph 3, requires clarification beyond the paragraphs (8)–(11) of the commentary to draft guideline 9:[81]

– While the Commission considered it useful to include a provision relating to termination and suspension in the draft guidelines to address a number of situations not covered by paragraphs 1 and 2– as, for instance, the situation in which a State or an international organization may only wish to terminate provisional application, but still intend to become a party to the treaty or in situations of material breach, when 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 and when 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–, this case is already covered by

[76] Germany, information regarding the topic “Provisional application of treaties” (March 2014) (see footnote 18 above).

[77] Robert E. Dalton, “Provisional application of treaties”; in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford, Oxford University Press, 2012), p. 232.

[78] Germany, information regarding the topic “Provisional application of treaties” (March 2014) (see footnote 18 above).

[79] Kempen and Schiffbauer, “Die vorläufige Anwendung völkerrechtlicher Verträge im internationalen Mehrebenensystem” (see footnote 10 above), p. 102.

[80] *Ibid.*

[81] Paras. (8)–(11) of the commentary to draft guideline 9, A/73/10, para. 90, at p. 219.

the introductory proviso in draft guideline 9, paragraph 2 ("unless the treaty otherwise provides or it is otherwise agreed"). This formulation permits the contracting parties to agree upon modifications of provisional application, as was done, for example, in article 30.7, paragraph 3 (c), of the Comprehensive Economic and Trade Agreement, providing that "[a] Party may terminate the provisional application of this Agreement by written notice to the other Party". Germany holds that a notification of the intention not to become a party to the treaty is not required for the termination of the provisional application.

– With regard to mixed agreements, the retention of the right to terminate provisional application without having recourse to the conditions of Part V, Section 3, of the 1969 and 1986 Vienna Conventions, or other relevant rules of international law concerning termination and suspension, supports member States' discretion unilaterally to withdraw their authorization in the Council of the European Union to provisional application. As the Second Senate of the Federal Constitutional Court held in its Order of 7 December 2016 in the case 2 BvR 1444/16, this right must not to be curtailed, in particular if it is controversial whether a certain area of legislation falls within the jurisdiction of the European Union or one of its member States. This is contextualized in the case when, after an authorization by a Council Decision under article 218, paragraph 5, of the Treaty on the Functioning of the European Union to apply a treaty or a part thereof provisionally, assuming it belonged to the exclusive jurisdiction of the European Union, it turns out that in fact it lies within the competence of the member States.[82]

With particular regard to mixed agreements, Germany attaches great importance to the possibility of terminating provisional application without having to abide to the stricter conditions of Part V, Section 3, of the 1969 and 1986 Vienna Conventions or other relevant rules of international law concerning termination and suspension. The Federal Constitutional Court ruled in the case 2 BvR 1444/16 that the Federal Government is obliged to ensure that it can withdraw its authorization in the European Council to provisional application unilaterally[83] if it is disputed whether a certain area of legislation falls within the jurisdiction of the European Union or of its member States. Furthermore, in cases in which the German constitutional identity could possibly be affected, it is essential for Germany to be able to withdraw from provisional application unilaterally without needing to state expressly that it does not intend to be become a party to the treaty.

The application of draft guideline 9, paragraph 3, can result in a *de facto* equal status of provisional application and entry into force of a treaty. A binding effect of such kind, which may have been materialized as a consequence of an *ultra vires* act or which touches upon the constitutional identity of Germany, is hardly agreeable.

The Netherlands

[Original: English]

The Kingdom of the Netherlands refers to the view expressed by the Commission – which the Kingdom shares - that "[p]rovisional application of treaties remains different from their entry into force, insofar as it is not subject to all rules of the law of treaties".[84] It would be helpful if the Commission could further clarify this distinction, including in respect of the termination and suspension of provisional application in the light of relevant State practice. In this respect, the Kingdom of the

[82] Germany, Federal Constitutional Court, Order of the Second Senate of 7 December 2016 in the case 2 BvR 1444/16, sects. 21–31.

[83] *Ibid.*

[84] Para. (5) of the commentary to draft guideline 6, A/73/10, para. 90, p. 215.

Netherlands reiterates its earlier words of caution not to blur the conceptual distinction between the rules applicable to termination of treaties that have entered into force and those that are applied on a provisional basis.

Republic of Korea

[Original: English]

Regarding paragraph 3 of draft guideline 9, the Republic of Korea notes that the Commission only refers to hypothetical situations regarding this issue in the commentary in the report. As pointed out in the 2018 report of the Commission, there is a "lack of relevant practice" by States and international organizations on the termination of the provisional application of a treaty.[85] Therefore, more research on State practices is needed to make this draft guideline more fully reflect the current state of international law on the topic.

In the case of the Republic of Korea, for example, the free trade agreement with the European Union has been applied provisionally.[86] Since there is no separate domestic law on the provisional application of treaties, it has followed the same procedure as that needed for the formal conclusion and entry into force of treaties, which, under the Korean Constitution, require promulgation and, in some cases, the consent of the National Assembly for ratification. The Republic of Korea recalls that it previously presented this information to the Commission in 2015.

This demonstrates that domestic laws on the procedures for the provisional application of treaties vary by State. To make the guidelines more practical, States may want to be informed of more examples or cases and given some guidance on domestic procedures for the provisional application of treaties.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

Draft guideline 9 concerns the termination and suspension of provisional application.

The United Kingdom welcomes the statement, in paragraph (8) of the commentary to draft guideline 9, that article 25, paragraph 2, of the 1969 Vienna Convention provides a flexible means by which to terminate provisional application, in particular to enable a State or international organization to terminate provisional application without affecting its ability to become a party to the treaty.[87]

One option to which the United Kingdom wishes to draw attention is the ability to terminate provisional application on notice, which can provide a pragmatic way to manage provisional application in practice. The United Kingdom has agreed to articles that provide for termination of provisional application on notice in a number

[85] Para. (8) of the commentary to draft guideline 9, *ibid.*, at p. 219.

[86] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (Brussels, 6 October 2010), *Official Journal of the European Union*, vol. 54, L 127, 14 May 2011, p. 6.

[87] Para. (8) of the commentary to draft guideline 9, A/73/10, para. 90, at p. 219.

of recent treaties[88] and proposes that it might be helpful to reflect this practice within draft guideline 9 and/or the accompanying commentary.

United States of America

[Original: English]

The United States has concerns with paragraph 3 of this draft guideline, and paragraphs (7), (8), (9) and (10) of the accompanying commentary.

Paragraph 3 provides in relevant part that "[t]he 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."[89]

The Commission in this instance states that its "without prejudice" formulation is:

> intended to preserve the possibility that provisions pertaining to termination and suspension in the 1969 Vienna Convention may be applicable to a provisionally applied treaty. However, the provision does not aspire to definitively determine which grounds in section 3 might serve as an additional basis for the termination of provisional application, or in which scenarios and to what extent those grounds would be applied. Instead, the rules of the Vienna Convention are to be "applied *mutatis mutandis*" depending on the circumstances.[90]

The Commission itself acknowledges, however, an "apparent lack of relevant practice" with regard to these issues.[91] Accordingly, as with draft guideline 7, paragraph 3 and its accompanying commentary, draft guideline 9, paragraph 3, appears not to be grounded in any actual legal authority or practice.

In any case, the United States doubts whether it is necessary to "preserve the possibility that provisions pertaining to termination and suspension in the 1969 Vienna Convention may be applicable to [provisional application]".[92] Article 25,

[88] For example: article 11, paragraph 5, of the Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Republic of Lebanon (London, 19 September 2019), which provides:

> "5. A Party may terminate the provisional application of this Agreement, or provisions of it, by written notification to the other Party. Such termination shall take effect on the first day of the second month following notification."

The full agreement is available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840961/CS_Lebanon_1.2019_Agreement_establishing_an_Association_between_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_and_the_Republic_of_Lebanon.pdf.

Article 366, paragraph 7, of the Strategic Partnership and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and Georgia (London, 21 October 2019), which provides:

> "7. Either Party may give written notification to the other Party of its intention to terminate the provisional application of this Agreement. Notwithstanding Article 364(2), termination of provisional application shall take effect two months after receipt of the notification by the other Party."

The full agreement is available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844167/CS_Georgia_1.2019_UK_Georgia_Strategic_Partnership_and_Cooperation_Agreement.pdf.

[89] A/73/10, para. 90, at p. 204.

[90] Para. (9) of the commentary to draft guideline 9, A/73/10, para. 90, at p. 219.

[91] Para. (8), *ibid.*

[92] Para. (9), *ibid.*

paragraph 2, of the Vienna Convention on the Law of Treaties, which the United States considers to be reflective of customary international law, expressly addresses the circumstances under which States may terminate provisional application. A State may terminate provisional application by notifying the other States that are provisionally applying the treaty of its intent not to become a party to the treaty. There is no need for additional rules for termination of provisional application and, in fact, State practice appears to support the proposition that these rules are unnecessary.

Furthermore, paragraph 3 and the accompanying commentary contain little in the way of analysis or explanation to give States a basis for understanding the Commission's proposal. The draft guideline makes a blanket assertion that the provisions Part V, section 3, of the Vienna Convention may apply generally to the termination and suspension of provisional application, but makes little attempt to explain why this should be so, or what application of these provisions would entail in practice. Rather than providing useful guidance or suggestions on how States might approach these issues, paragraph 3 would create substantial confusion by suggesting the application of a set of legal rules that the Commission is unwilling or unable to explain.

For these reasons, the United States urges that the Commission delete paragraph 3 of the draft guideline, and paragraphs (7), (8), (9) and (10) of the accompanying commentary, in their entirety.

10. Draft guideline 10 – Internal law of States and rules of international organizations, and the observance of provisionally applied treaties

Czech Republic

[Original: English]

The Czech Republic agrees with draft guidelines 10, 11 and 12.

Germany

[Original: English]

Germany concurs with the approach in draft guideline 10.

Once a State or an international organization has declared that it will apply a treaty provisionally according to international law, it may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application unless a limitation deriving from the internal law of the State or from the rules of the organization in the meaning of draft guideline 12 applies.

However, international law in many instances leaves it to the States and international organizations to decide upon a conflict of laws internally. Thus, national law may be prioritized over international law. Conflicting rules are certainly undesirable, not least in view of potential issues of international liability that may be raised as a result of the choices of application made in such a conflict. Applying rules that are inconsistent with international law will in general violate the principle, enshrined in article 25 of the German Basic Law, that general rules of international law shall be an integral part of federal law. According to the jurisprudence of the German Constitutional Court, this principle serves as a guideline for the interpretation of the Basic Law and other national law.[93] Although the principle has constitutional rank, it does not entail an unreserved constitutional duty to comply with all rules of

[93] Germany, Federal Constitutional Court, Order of the Second Senate of 15 December 2015 in the case 2 BvL 1/12, sect. 64.

international law.[94] Article 59, paragraph 2, of the Basic Law determines that domestically, international treaties enjoy only the rank of an ordinary federal statute. The principle of openness to international law changes neither this classification in terms of rank nor the resulting applicability of the principle of *lex posterior*.[95]

Given the generally temporary nature of provisional application, the provisional effect has to be assessed, on a case-by-case basis, as to its potential to interfere with constitutional principles apart from the possible lack of transformation into national law.

Singapore

[Original: English]

Singapore notes the Commission's explanation that this draft guideline is intended to follow closely the formulation contained in article 27 of both the 1969 and 1986 Vienna Conventions. It also notes that draft guideline 11 (Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties) closely follows the formulation of the parallel article 46 of the 1969 and 1986 Vienna Conventions. However, unlike draft guideline 10, its parallel article – article 27 of the 1969 Vienna Convention and article 27, paragraph 3, of the 1986 Vienna Convention – states that "This rule is without prejudice to article 46."

Given the relationship between articles 27 and 46 in the Vienna Conventions, it is the view of Singapore is that draft guideline 10 should similarly clarify its relationship with draft guideline 11. In particular, draft guideline 10 should state that it is "without prejudice" to draft guideline 11.

United States of America

[Original: English]

The United States does not have substantive concerns with the statements contained in draft guidelines 10 and 11. It notes, however, that the Commission cites no State practice or other authority to support either guideline. Thus, while the positions reflected in these draft guidelines are sensible, it understands them to reflect the Commission's observations based on abstract reasoning rather than rules reflecting settled law.

11. Draft guideline 11 – Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

Czech Republic

[Original: English]

[See comment on draft guideline 10.]

Germany

[Original: English]

Germany concurs with the approach of draft guideline 11.

This draft guideline is modelled on article 46 of the 1969 and 1986 Vienna Conventions, which also applies to provisional application. As the Commission

[94] *Ibid.*, sects. 67 and 69.
[95] *Ibid.*, sect. 74.

explains, "[d]raft 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". If an organ expresses consent without having the competence to do so, the State or international organization will either have to comply with the treaty or have to face liability.[96] With reference to mixed agreements, Germany notes that potential conflicts and unsettled legal qualifications with respect to the issue of whether legislative power has been transferred to the European Union might render the application of the constituent element "manifest violation" in draft guideline 11 problematic as it does not rule out the possible legal effect for member States of being bound by an *ultra vires* act of the European Union that does not manifestly violate internal rules.

The standard defining a violation as 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",[97] is not *per se* rejectable. In the context of mixed agreements, it will often ensue that the risk of legal conflicts and unsettled legal qualifications with respect to the issue of whether legislative power has been transferred to the European Union will shift towards the member States due to the fact that a third party will hold that it is objectively non-evident whether the rules of the European Union—although constituting international law themselves—have been violated or not.

United States of America

[Original: English]

[See comment under draft guideline 10.]

12. Draft guideline 12 – Agreement to provisional application with limitations deriving from internal law of States and rules of international organizations

Austria

[Original: English]

In the understanding of Austria, draft guideline 12 referring to provisional application with limitations deriving from internal law of States and rules of international organizations foresees that the right to limit provisional application in accordance with internal law or rules requires either a respective clause in the treaty or another form of agreement. The commentary is not very clear in this respect since it refers only to a consensual basis of provisional application without clarifying with whom this consensual basis has to be achieved. Clarification should be provided whether agreement among all States parties or only those States applying the treaty provisionally is required.

Belarus

[Original: Russian]

A State or international organization that limits the provisional application of a treaty on the basis of its legislation or rules is obliged to indicate which specific provisions of the treaty will not apply pending its entry into force (that is, to state not only that limitations exist, but also what they are). To do otherwise would create a

[96] Para. (3) of the commentary to draft guideline 11, A/73/10, para. 90, at p. 222.
[97] Para. (4), *ibid.*

situation of legal uncertainty, forcing the remaining contracting parties to ask to be provided with all the norms limiting the application of the treaty.

As an additional argument, a similar case should be considered in which a reservation of like nature is entered to a treaty (for example, stating that the provisions of the treaty will apply to the extent that they do not conflict with a State's constitution, laws and rules). Such a reservation could be declared inadmissible as incompatible with the object and purpose of the treaty (Vienna Convention, art. 19, subpara. (c)).

It would also contradict the rule according to which a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty (Vienna Convention, art. 27).

Czech Republic

[Original: English]

[See comment on draft guideline 10.]

Germany

[Original: English]

Germany welcomes the approach of draft guideline 12.

This draft guideline clarifies that provisional application can be made dependent upon the fulfilment of requirements of internal law of the State or of the rules of an international organization. As mentioned in the comment on draft guideline 3 above, article 59, paragraph 2, of the Basic Law of the Federal Republic of Germany provides that a treaty requires parliamentary approval if it touches upon matters that, under the constitutional distribution of powers, are to be decided by the legislature. Hence, in cases where parliamentary approval is required, Germany will be reluctant to agree to unlimited provisional application, even if compliance technically would not pose a problem. Instead, clauses providing for "provisional application in accordance with domestic legislation" will be included, the respective clause both indicating that provisional application might be limited and, in fact, limiting provisional application to those provisions of the treaty with which the German legal framework is compatible or for which parliamentary approval is not required.

Draft guideline 12 refers to treaties that concern matters of federal legislation.[98] It states that, draft guidelines 10 and 11 notwithstanding, it is possible to opt out of provisional application as was done in the case of the 1994 Energy Charter Treaty. In case of conflict, national law will thus prevail.[99]

[98] *Cf.* sect. 12 (9) of the Federal Foreign Office Guidelines for Processing International Agreements, an administrative regulation binding upon the authorities of the Federal Government (Auswärtiges Amt: *Richtlinien für die Behandlung völkerrechtlicher Verträge (RvV) gemäß § 72 Absatz 6 der Gemeinsamen Geschäftsordnung der Bundesministerien* (Berlin, Auswärtiges Amt, 2019), p. 29).

[99] Krieger, "Article 25 – Provisional application" (see footnote 9 above), pp. 441–442, sect. 2, and p. 457, sect. 37; and Lefeber, "Treaty, Provisional application" (see footnote 32 above), p. 3, sect. 13.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

Draft guideline 12 relates to the limitations that could derive from the internal law of States and the rules of international organizations when agreeing to the provisional application of a treaty or part of it.

The United Kingdom would welcome further clarity on how such limitations might operate in practice, particularly against the backdrop of draft guidelines 10 and 11.

C. Comments on the draft model clauses[100]

Austria

[Original: English]

As to the draft model clauses, Austria considers it necessary to include a model clause providing for provisional application from the date a State or international organization notifies that its internal procedures necessary for provisional application have been complied with. Moreover, the draft model clauses should also provide for the possibility for a State or international organization to terminate or suspend provisional application, even if a State or international organization does not declare its intention not to become a party to the treaty, since other reasons may require termination or suspension of provisional application as well.

Belarus

[Original: Russian]

Draft model clause 1

Belarus draws attention to the incorrect rendering in footnote 2 of the country's official name (in the Russian language) in the official title of a treaty to which Belarus is a party, namely, the Treaty between the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan and the Kyrgyz Republic on the deepening of integration in economic and humanitarian fields.

Draft model clause 5

By way of an addition to its comments on draft guideline 12, Belarus proposes that, in draft model clause 5, the words "having indicated the nature of such limitations" should be inserted after "such provisional application".

Estonia

[Original: English]

Estonia finds the draft model clauses to be a useful toolbox, which however could include even more possible draft texts (for example, how a resolution foreseeing the provisional application or a unilateral declaration could be formulated etc.).

[100] The draft model clauses on provisional application of treaties are contained in annex A to A/74/10 (see footnote 1 above).

Finland (on behalf of the Nordic countries: Denmark, Finland, Iceland, Norway and Sweden)

[Original: English]

The Nordic countries welcome the Special Rapporteur's proposal for draft model clauses on provisional application. They believe that such clauses would be of practical assistance when formulating final provisions of treaties.

The Nordic countries note that the draft model clauses do not include a provision that would provide for provisional application not only from the date foreseen in the treaty, but also from a later date once the State concerned notifies that its internal procedures necessary for provisional application have been complied with. The Nordic countries invite the Commission to reflect on including a clause to this effect in relation to draft model clause 1.

Slovenia

[Original: English]

With regard to the draft Guide and draft model clauses, Slovenia would first like to express its general support for comments made by the European Union with regard thereto, and would like to add the following comments.

As announced by the Slovenian delegation at the Sixth Committee in 2019 and in line with the written contribution of the European Union, Slovenia would like to suggest adding to draft model clause 1 after "[or from X date]" the text "[or from the date of notification of completion of the relevant internal procedures to provisionally apply it]" (*cf.* art. 23 of the Agreement on Air Transport between Canada and the European Community and its Member States).[101] This possibility enables States to complete the relevant internal treaty-making procedures before provisionally applying it, which is of particular interest to those States that have internal limitations on the use of provisional application. Such a mechanism of provisional application is applied by the European Union, e.g. in the field of air transport agreements that partly fall under member States' competences. Such a solution would in the view of Slovenia also serve to encourage the participation of States in the provisional application of multilateral treaties where internal law aspects of provisional application are often invoked as a reason not to participate at that stage of its application.

United Kingdom of Great Britain and Northern Ireland

[Original: English]

The United Kingdom welcomes the inclusion of model clauses as a practical and helpful tool to which States and international organizations might refer. As stated in the comments on draft guideline 4 above, the United Kingdom suggests that it might be helpful to distinguish, where necessary, between clauses that may be appropriate in the context of multilateral treaties, and those that may be appropriate in the context of bilateral treaties.

In addition, the United Kingdom considers that it may be useful to explore the inclusion of additional model clauses to establish the date on which provisional application might come into effect and to allow for termination on notice. To the

[101] Agreement on Air Transport between Canada and the European Community and its Member States (Brussels, 17 December 2009), *Official Journal of the European Union*, vol. 53, L 2017, 6 August 2010, p. 32.

extent that it might be helpful, illustrative clauses recently agreed by the United Kingdom are referenced in the note below.[102]

Draft model clause 1

The United Kingdom notes that draft model clause 1, paragraph 1, provides for automatic provisional application on the date of signature. In a dualist system such as the United Kingdom, implementing legislation must be in place prior to the entry into force of the treaty, and prior to the treaty having legal effect through provisional application. When drafting model clauses, the United Kingdom would encourage the Special Rapporteur to take into account practice in both monist and dualist systems.

In addition the United Kingdom considers that a third subparagraph, or alternative model language in paragraph 2, to provide an ability to terminate provisional application on notice, might be a helpful way of reflecting State practice as has been further discussed in the comments on draft guideline 9 above.

Draft model clause 2

The United Kingdom welcomes draft model clause 2, which illustrates a form which an agreement to provisionally apply might take. The United Kingdom draws attention to its recent practice, in a bilateral context, of allowing for provisional application to be activated by way of an exchange of notifications,[103] and invites the Special Rapporteur to take this practice into account in his work.

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[102] For example:

Article 11, paragraphs 4 and 5, of the Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Republic of Lebanon, which provides:

> "4. Pending entry into force of this Agreement, the Parties may agree to provisionally apply this Agreement, or provisions of it, by an exchange of notifications signifying the completion of ratification or such other domestic procedures as are required for provisional application. Such provisional application shall take effect on the later of:
>
> (a) the date on which the EU-Lebanon Agreements cease to apply to the United Kingdom; and
> (b) the date of the later of the Parties' notifications.
>
> 5. A Party may terminate the provisional application of this Agreement, or provisions of it, by written notification to the other Party. Such termination shall take effect on the first day of the second month following notification."

(See footnote 88 above.)

Article 366, paragraphs 4 and 7, of the Strategic Partnership and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and Georgia, which provides:

> "4. Where agreed pursuant to Article 366(3), this Agreement shall be applied provisionally between the Parties on the later of:
>
> (a) the date on which the EU-Georgia Agreement ceases to apply to the United Kingdom, or
> (b) the date of receipt of the later of the notification of provisional application from the United Kingdom or of the ratification or provisional application from Georgia.
>
> …
>
> 7. Either Party may give written notification to the other Party of its intention to terminate the provisional application of this Agreement. Notwithstanding Article 364(2), termination of provisional application shall take effect two months after receipt of the notification by the other Party."

(See footnote 88 above.)

[103] See article 11, paragraph 4, of the Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Republic of Lebanon; and article 366, paragraph 4 (b), of the Strategic Partnership and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and Georgia (see footnote 88 above).

Draft model clause 3

The United Kingdom considers that it might be useful, for the purposes of providing certainty, to set out how a declaration "opting in" to provisional application might be accepted.

Draft model clause 5

For reasons of certainty, and in line with draft guidelines 10 and 11, the preference of the United Kingdom is to minimize the possibility of restrictions on provisional application arising from domestic legislation. The United Kingdom is concerned that draft model clause 5 might operate in a manner which would undermine the legal effectiveness of provisional application.

United States of America

[Original: English]

Separately from the draft guidelines adopted by the Commission on first reading, the Special Rapporteur has also proposed in the Commission's 2019 annual report, for the Commission's consideration in 2020, draft model clauses on the provisional application of treaties. The United States does not find the proposed draft clauses particularly useful. They appear designed to serve as one size-fits-all formulations to address scenarios with multiple potential variations, and to apply uniformly to bilateral and multilateral treaties. The resulting clauses would require further adaptation and elaboration in just about any case in which they were to be used, substantially limiting their value as drafting models.

If the Commission wished to provide assistance to States in drafting provisional application clauses, a more useful approach would be to identify key elements that are frequently part of provisional application clauses, and to list examples of ways in which those elements have been addressed in actual treaties, including both bilateral and multilateral treaties. Such an exercise could be further enhanced by commentary that provides insight on whether particular formulations have proven more effective than others, and identifies particular interpretive difficulties States might wish to keep in mind when drafting clauses addressing such elements.

III. Comments and observations received from international organizations and others

A. General comments and observations

European Union

[Original: English]

A first general comment to start with: in its previous oral contribution, the European Union noted with appreciation that the Special Rapporteur and the Commission, with the support of the Secretariat, had embarked on an extensive study of States and international organizations' practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application. While the European Union commends the Commission for this essential study, it notes that this study does not analyse States and international organizations' rules/legislations and case law on provisional application, which are key in supplementing the rules contained in the 1969 Vienna Convention and in addressing the meaning and sources of provisional application. The European Union is conscious of the complexity of undertaking such thorough analysis but it would encourage the Special Rapporteur to consider examining the

practice of a few States, from the main legal systems, and of the most relevant international organizations. This work will undoubtedly help elucidate some of the outstanding issues, including the ones raised below.

International Organization for Migration

[Original: English]

In concluding bilateral agreements with States, the International Organization for Migration strives for entry into force upon signature. When not possible, it aims to include a reference to provisional application of the agreement until the necessary internal procedures for entry into force are completed and the Government notifies it of such completion. It has become the practice of the International Organization for Migration to include such a reference on provisional application in its cooperation agreements, for clarity regarding the scope, start and end of the provisional application. While this provisional application allows for operability until entry into force, it often results in both parties relying on such provisional application and not making any further efforts to go beyond provisional application towards actual entry into force.

B. Specific comments on the draft guidelines

1. Draft guideline 1 – Scope

International Organization for Migration

[Original: English]

Another comment, though not of a legal nature, regards the use of verbs in paragraph (2), second line *in fine*, of the commentary to draft guideline 1.[104] The International Organization for Migration noticed that the word “concern”, used as a verb, is compared to “applies to”. Since both verbs are being discussed as possible options to explain the scope of the draft guidelines, and since “draft guidelines” is the subject of the sentence in draft guideline 1, it believes it may be clearer to say instead “apply to”, in plural.

2. Draft guideline 3 – General rule

Council of Europe

[Original: English]

Paragraph (4) of the commentary to draft guideline 3 addresses the provisional application of a “part” of a treaty.[105] In this respect, the Council of Europe proposes to include in the examples listed in footnote 1014 a reference to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217),[106] and the provisional application of its article 7 (which provides for the setting up of a network of 24/7 national contact points to facilitate the rapid exchange of information concerning persons travelling abroad for the purpose of terrorism), which was decided by the Committee of Ministers of the Council of Europe, at its 126th Ministerial session on 18 May 2016, pending the entry into force of the Protocol (which took effect on 1 July 2017).

[104] A/73/10, para. 90, at p. 207.

[105] *Ibid.*, pp. 209–210.

[106] Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (Riga, 22 October 2015), United Nations, *Multilateral Instruments Deposited with the Secretary-General*, No. 44655.

This example also illustrates the action of the Committee of Ministers of the Council of Europe as "the competent organ[] of [an] international organization[]" that agrees to provisionally apply a treaty obligation, as mentioned in footnote 1020 under paragraph (4) of the commentary to draft guideline 4.[107]

Paragraphs (3) and (7) of the commentary to draft guideline 3 refer to the provisional application of a treaty by a third State.[108] The Commission acknowledges that provisional application of a treaty, "arising from contemporary practice", may be undertaken by States that are not negotiating States and/or are not connected to the treaty in question.

In this respect, article 36, paragraph 2, of the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223)[109] allows a State that is not a Party to the parent Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)[110] to "express its consent to be bound by this Protocol by accession", but only during the period from the opening for signature of the Protocol and its entry into force. This possibility would allow a third State to make a declaration about the provisional application of the Protocol (CETS No. 223) without having been a Party to the Convention (ETS No. 108) until that moment. Indeed, this provision establishes that a State "may not become a Party to the Convention without acceding simultaneously to this Protocol".

Article 37, paragraph 3, of the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223), which opened for signature on 10 October 2018, allows the provisional application of this Protocol among signatories of the Protocol that are Parties to the parent Convention (Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108) and which make a declaration to this effect (see previous paragraph). The Protocol currently has 31 signatories, and two of them (Bulgaria and Norway) have made a declaration concerning the provisional application of the provisions of this Protocol.

3. Draft guideline 4 – Form of agreement

Council of Europe

[Original: English]

Concerning draft guidelines 4 and 9, the Council of Europe would be very grateful if the two references to the Madrid Agreement in relation to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the control system of the Convention (CETS No. 194), which appear in footnotes 1018 and 1032,[111] respectively, could mention that this is a Protocol to the European Convention on Human Rights,[112] for the sake of clarity, even if it is not included in the official title of the Madrid Agreement. The text could therefore read as follows: "the Madrid Agreement (Agreement on the Provisional Application of

[107] A/73/10, para. 90, at p. 212.
[108] *Ibid.*, pp. 208–210.
[109] Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg, 10 October 2018), *Council of Europe Treaty Series*, No. 223.
[110] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg, 28, January 1981), United Nations, *Treaty Series*, vol. 1496, No. 25702, p. 65.
[111] A/73/10, pp. 211 and 217.
[112] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221.

Certain Provisions of Protocol No. 14 [to the European Convention on Human Rights] Pending its Entry into Force)".

4. Draft guideline 6 – Legal effect of provisional application

Food and Agriculture Organization of the United Nations

[Original: English]

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 apart 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.

Commentary: As indicated in paragraph (1) of the commentary to draft guideline 6: "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 provisionally applied".[113] However, draft guideline 6 may be interpreted as referring only to the legal obligation to apply the treaty and not to the legal effect that produces its application. With the removal from the text of "to apply the treaty or a part thereof", the draft guideline would cover this matter in general terms and refer to both types of "legal effects"

United Nations Industrial Development Organization

[Original: English]

The draft guidelines are a lucid, accurate and comprehensive reflection of the custom of provisional application. The United Nations Industrial Development Organization would have no hesitation in using the draft guidelines in practice. It is particularly gratified to see that draft guideline 6 adopts the position 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 as if the treaty were in force, unless the treaty provides otherwise or it is otherwise agreed. The legal effect of provisional application has probably been the most controversial aspect of the procedure and the United Nations Industrial Development Organization trusts that the work of the Commission will settle any remaining doubt in this regard.

5. Draft guideline 8 – Responsibility for breach

Food and Agriculture Organization of the United Nations

[Original: English]

Draft guideline 8

Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied [in the terms the treaty provides or as are otherwise agreed] entails international responsibility in accordance with the applicable rules of international law.

Commentary: The proposed addition is to emphasize that the breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied may

[113] A/73/10, para. 90, at p. 214.

give rise to international responsibility only in accordance with the terms agreed for the provisional application of a treaty; this is in line with its comment on draft guideline 6.

Since responsibility for breach is addressed, consideration could be given as to whether there is a need to develop a guideline with respect to the settlement of disputes in this context.

6. Draft guideline 9 – Termination and suspension of provisional application

Council of Europe

[Original: English]

[See the comment under draft guideline 4.]

Food and Agriculture Organization of the United Nations

[Original: English]

Guideline 9

Termination and suspension of provisional application

1. [Unless the treaty otherwise provides or it is otherwise agreed,] [t]he 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. […]

3. […]

Commentary: Although the 1969 and 1986 Vienna Conventions provide that "[a] treaty or a part of a treaty is applied provisionally pending its entry into force", the parties concerned may agree, through the treaty itself or any other means or arrangements, to termination of provisional application before entry into force. For example, parties may agree to provisionally apply a treaty or a part of a treaty for a specific purpose or activity and/or for a specific period of time. Once the specific activity has been completed, the specific purpose has been fulfilled, or the period expired, provisional application would terminate and, consequently, the treaty cease to have any effect until its entry into force. This comment is also in line with draft guideline 12. The Food and Agriculture Organization of the United Nations has no practice in that regard but it is a point to be taken into consideration.

7. Draft guideline 12 – Agreement to provisional application with limitations deriving from internal law of States and rules of international organizations

Council of Europe

[Original: English]

Paragraph (3) of the commentary to draft guideline 12 focuses on the fact that provisional application might not be possible under the internal law of States or the rules of international organizations. Footnote 1048 provides examples as regards the different clauses used in several free trade agreements (e.g. "if its constitutional requirements permit", "if their domestic requirements permit"). The Council of Europe would like to propose to add an example concerning an international organization, namely the General Agreement on Privileges and Immunities of the

Council of Europe (ETS No. 2)[114] and its article 22 on the possible provisional application of this agreement by its signatories (from the date of signature and pending its entry into force) "so far as it is possible to do so under their respective constitutional systems". A similar clause is found in article 17 of the Convention on the Elaboration of a European Pharmacopoeia (ETS No. 50),[115] whereby the signatories agree to provisionally apply the Convention "in conformity with their respective constitutional systems".

C. Comments on the draft model clauses

European Union

[Original: English]

Turning now to the five draft model clauses, the European Union notes with appreciation that by inserting them the "Commission would seek to reflect the best practice with regard to the provisional application of both bilateral and multilateral treaties" and that these model clauses would in no way "be intended to limit the flexible and voluntary nature of provisional application of treaties". While the commentaries already provide for extensive references to treaty provisions, the European Union shares the view that draft model clauses may constitute a useful tool for treaty negotiators. However, if the ambition is to have a practical tool, a certain degree of completeness is needed. For instance, the current draft model clauses do not contain any provision reflecting the situation where provisional application is agreed through a resolution adopted by an international organization or at an intergovernmental conference. Furthermore, the draft model clauses should include a provision providing for provisional application not only from the date foreseen in the treaty, but also from a later date once the State concerned notifies that its internal procedures necessary for provisional application have been complied with. This should apply to non-negotiating States and to negotiating States alike.

More generally, and with a view to provide a complete and easy-to-use tool for negotiators, it could be envisaged to structure the draft model clauses into three categories: (i) provisional application where the treaty so provides; (ii) provisional application agreed through a separate treaty; (iii) provisional application agreed through any other means or arrangements.

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[114] General Agreement on Privileges and Immunities of the Council of Europe (Paris, 2 September 1949), United Nations, *Treaty Series*, vol. 250, No. 3515, p. 12.

[115] Convention on the Elaboration of a European Pharmacopoeia (Strasbourg, 22 July 1964), United Nations, *Treaty Series*, vol. 1286, No. 21200, p. 69.