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Sixth report on the provisional application of treaties

By Juan Manuel Gómez-Robledo, Special Rapporteur**,*****

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Introduction

A. Consideration of the topic by the Commission

1. At its sixty-fourth session,[1] in 2012, the International Law Commission included the topic "Provisional application of treaties" in its programme of work and appointed Mr. Juan Manuel Gómez-Robledo as Special Rapporteur. At the same session, the Special Rapporteur presented to the Commission an oral report on the informal consultations he had held on the topic.

2. At its sixty-fifth session,[2] in 2013, the Commission had before it the first report of the Special Rapporteur,[3] which considered, in general terms, the principal legal issues relating to the provisional application of treaties. The Commission also had before it a memorandum by the Secretariat[4] on the negotiating history of article 25 of the Vienna Convention on the Law of Treaties of 1969[5] (hereinafter the "1969 Vienna Convention").

3. At its sixty-sixth session,[6] in 2014, the Commission considered the second report of the Special Rapporteur,[7] which provided a substantive analysis of the legal effects of the provisional application of treaties. At that session, the Commission decided to request from the Secretariat a second memorandum, on the *travaux préparatoires* of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986[8] (hereinafter the "1986 Vienna Convention").

4. At its sixty-seventh session,[9] in 2015, the Commission had before it the third report of the Special Rapporteur,[10] which continued the analysis of the legal effects of the provisional application of treaties and considered the relationship of provisional application to certain provisions of the 1969 Vienna Convention. In addition, the Special Rapporteur proposed six draft guidelines, which were referred to the Drafting Committee. The Drafting Committee provisionally adopted draft guidelines 1 to 3. The Commission also had before it the memorandum on the 1986 Vienna Convention[11] that it had requested at the previous session.

5. At its sixty-eighth session,[12] in 2016, the Commission had before it the fourth report of the Special Rapporteur,[13] which continued the examination of the effects of the provisional application of treaties in the light of certain provisions of the 1969 Vienna Convention and included an analysis of the practice of international organizations in relation to the provisional application of treaties. In addition, the Drafting Committee considered six draft guidelines (draft guidelines 4–9) referred to

[1] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 267.
[2] *Ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), chap. VIII.
[3] A/CN.4/664.
[4] A/CN.4/658.
[5] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.
[6] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), chap. XII.
[7] A/CN.4/675.
[8] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986), A/CONF.129/15.
[9] *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), chap. XI.
[10] A/CN.4/687.
[11] A/CN.4/676.
[12] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), chap. XII.
[13] A/CN.4/699 and Add.1.

it by the Commission on 28 July 2015 in a revised version of the text originally presented in the third report, which took into account comments received from the members of the Commission. Lastly, in his fourth report, the Special Rapporteur proposed a draft guideline (draft guideline 10), additional to those that had already been referred to the Drafting Committee.

6. At its sixty-ninth session,[14] in 2017, the Commission provisionally adopted a first complete set of guidelines (draft guidelines 1–11), together with their respective commentaries. At that session, the Commission had before it a memorandum[15] by the Secretariat analysing State practice in respect of more than 400 treaties, both bilateral and multilateral, deposited or registered in the previous 20 years with the United Nations that provide for provisional application, including treaty actions related thereto.

7. At its seventieth session,[16] in 2018, the Commission had before it the fifth report of the Special Rapporteur, together with a bibliography on the topic.[17] In his fifth report, the Special Rapporteur continued the analysis of views expressed by Member States on the topic. In addition, with the support of the Société française pour le droit international, further information was provided on the practice of international organizations, in particular the International Organization of la Francophonie, the International Labour Organization and the European Free Trade Association.

8. Meanwhile, the Special Rapporteur proposed a further 2 draft guidelines, in addition to the 11 already adopted by the Commission in 2017.[18] The additional draft guidelines were developed taking into account the observations and comments received with regard to two issues: (a) the termination or suspension of the provisional application of a treaty as a consequence of its breach (draft guideline 8 *bis*), and (b) the formulation of reservations (draft guideline 5 *bis*).

9. The Special Rapporteur also considered the issue of provisional application of treaty amendments. However, he concluded that there was no need to propose a draft guideline on that issue both because there had as yet been little practice in that regard and because the issue was to some extent covered by draft guideline 4 (b), although that provision did not expressly refer to amendments as such.

10. As part of the fifth report, the Special Rapporteur proposed a set of eight model clauses that had been prepared taking into account the time frame for the provisional application of a treaty and the scope of provisional application.

11. Also at its seventieth session, the Commission adopted the entire set of draft guidelines on provisional application of treaties, consisting of 12 draft guidelines, as the draft Guide to Provisional Application of Treaties, on first reading. The draft Guide was transmitted, through the Secretary-General, to Member States for their consideration. The Commission was not able to consider the draft model clauses because of a lack of time, but it left open the possibility of returning to the matter at the following session.[19]

12. At its seventy-first session,[20] in 2019, the Special Rapporteur held informal consultations with members of the Commission on the draft model clauses and

[14] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10* (A/72/10), chap. V.
[15] A/CN.4/707.
[16] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), chap. VII.
[17] A/CN.4/718 and Add.1.
[18] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 10 (A/72/10), paras. 55–56.*
[19] *Ibid., Seventy-third Session, Supplement No. 10* (A/73/10), para. 85.
[20] *Ibid., Seventy-fourth Session, Supplement No. 10* (A/74/10), chap. XI, sect. A, and annex A.

presented an oral report to the Commission on the outcome of those consultations. The Commission decided to take note of the Special Rapporteur's oral report and to annex the revised proposal for draft model clauses to the Commission's report to the General Assembly, with a view to seeking comments from Member States and international organizations in advance of the second reading of the draft Guide to Provisional Application of Treaties at its seventy-second session.

13. Meanwhile, the debates in the Sixth Committee of the General Assembly continued to contribute to the study of the practice of the provisional application of treaties. At the seventy-third session of the General Assembly, in 2018, a total of 40 delegations, including delegations representing the Community of Latin American and Caribbean States and the European Union, made statements on the topic of the provisional application of treaties.

14. Many delegations, including those of Germany,[21] Australia,[22] Austria,[23] Czechia,[24] Chile,[25] the Community of Latin American and Caribbean States,[26] Cuba,[27] El Salvador,[28] Slovakia,[29] Slovenia,[30] Spain,[31] Estonia,[32] the Russian Federation,[33] Finland (on behalf of the Nordic countries),[34] Greece,[35] Iran (Islamic Republic of),[36] Ireland,[37] Israel,[38] Malawi,[39] Mexico,[40] Nicaragua,[41] the Netherlands,[42] Peru,[43] Poland,[44] Portugal,[45] the United Kingdom,[46] the Republic of Korea,[47] Romania,[48] Sierra Leone,[49] Singapore,[50] Thailand,[51] Turkey,[52] the European Union[53] and Viet Nam[54] commended the work of the Commission on the topic and welcomed the draft Guide to Provisional Application of Treaties adopted on first reading. Some delegations stated that they would submit written comments at a later stage, while others made specific comments.

[21] A/C.6/73/SR.26. [Country names in para. 14 above and elsewhere in the present document are listed in Spanish alphabetical order.]
[22] A/C.6/73/SR.27.
[23] A/C.6/73/SR.25.
[24] *Ibid.*
[25] A/C.6/73/SR.27.
[26] A/C.6/73/SR.20.
[27] A/C.6/73/SR.28.
[28] A/C.6/73/SR.27.
[29] A/C.6/73/SR.26.
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.*
[33] *Ibid.*
[34] A/C.6/73/SR.24.
[35] A/C.6/73/SR.27.
[36] *Ibid.*
[37] A/C.6/73/SR.26.
[38] A/C.6/73/SR.27.
[39] A/C.6/73/SR.24.
[40] A/C.6/73/SR.25.
[41] A/C.6/73/SR.28.
[42] A/C.6/73/SR.26.
[43] A/C.6/73/SR.27.
[44] A/C.6/73/SR.25.
[45] A/C.6/73/SR.26.
[46] A/C.6/73/SR.27.
[47] *Ibid.*
[48] A/C.6/73/SR.26.
[49] A/C.6/73/SR.22.
[50] A/C.6/73/SR.25.
[51] A/C.6/73/SR.26.
[52] A/C.6/73/SR.27.
[53] A/C.6/73/SR.24.
[54] A/C.6/73/SR.27.

15. While several delegations made specific comments on the draft guidelines as a whole, most of the comments focused on draft guidelines 7 and 9. In this regard, the delegations of Germany,[55] Austria,[56] Brazil,[57] Czechia,[58] Chile,[59] China,[60] Slovenia,[61] France,[62] Greece,[63] Ireland,[64] Malaysia,[65] the Netherlands,[66] Poland,[67] Portugal,[68] Turkey,[69] the European Union[70] and Viet Nam[71] commented on those draft guidelines, examining their relevance and the possibility of their being further clarified in the commentaries. In addition, the European Union[72] welcomed the fact that the scope *ratione personae* of the draft guidelines included international organizations and suggested that the Commission clarify the commentaries to draft guidelines 3 and 5 with regard to the source of the obligation to provisionally apply a treaty and to unilateral declarations, respectively; the Islamic Republic of Iran[73] commented on draft guideline 4, requesting greater clarity on the forms of agreement for triggering provisional application; Estonia[74] suggested that draft guidelines 3 and 4 be merged; and Portugal[75] suggested that draft guideline 12 be repositioned as draft guideline 10 in order to give it more prominence, while Chile[76] also stressed its importance.

16. Meanwhile, in general terms, the delegations of Chile,[77] El Salvador,[78] Spain,[79] Finland (on behalf of the Nordic countries),[80] Greece,[81] Iran (Islamic Republic of),[82] Ireland,[83] Mexico,[84] Peru,[85] the United Kingdom,[86] the Republic of Korea,[87] Romania,[88] Singapore[89] and Thailand[90] expressed support for the inclusion of and the adjustments made to draft guidelines 6, 7, 9 and 10.

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[55] A/C.6/73/SR.26.
[56] A/C.6/73/SR.25.
[57] *Ibid.*
[58] *Ibid*.
[59] A/C.6/73/SR.27.
[60] A/C.6/73/SR.25.
[61] A/C.6/73/SR.26.
[62] *Ibid*.
[63] A/C.6/73/SR.27.
[64] A/C.6/73/SR.26.
[65] A/C.6/73/SR.27.
[66] A/C.6/73/SR.26.
[67] A/C.6/73/SR.25.
[68] A/C.6/73/SR.26.
[69] A/C.6/73/SR.27.
[70] A/C.6/73/SR.24.
[71] A/C.6/73/SR.27.
[72] A/C.6/73/SR.24.
[73] A/C.6/73/SR.27.
[74] A/C.6/73/SR.26.
[75] *Ibid*.
[76] A/C.6/73/SR.27.
[77] *Ibid*.
[78] *Ibid*.
[79] A/C.6/73/SR.26.
[80] A/C.6/73/SR.24.
[81] A/C.6/73/SR.27.
[82] *Ibid*.
[83] A/C.6/73/SR.26.
[84] A/C.6/73/SR.25.
[85] A/C.6/73/SR.27.
[86] *Ibid*.
[87] *Ibid*.
[88] A/C.6/73/SR.26.
[89] A/C.6/73/SR.25.
[90] A/C.6/73/SR.26.

B. Additional considerations by the Special Rapporteur

17. Article 25 of the 1969 Vienna Convention is framed as a relatively straightforward provision which makes available to States and international organizations a voluntary mechanism for giving immediate effect to all or some of the provisions of a treaty, prior to the fulfilment of the conditions and formalities required for the treaty's entry into force.[91] Article 25 (2) also provides for an extremely simple and efficient mechanism for terminating provisional application that distinguishes it from the formalities required for denouncing a treaty that is in force and avoids, where appropriate, the need to invoke the grounds for termination provided for in treaty law. However, article 25 is silent on a number of issues, such as its legal effects, which appear to be highly pertinent at a time of increasing recourse to provisional application by States and also international organizations.

18. However, practice shows that continuing uncertainty among States has led to the article 25 procedure's being used in an inconsistent and at times even rather confusing manner.

19. The Commission's well-known and abiding interest in the law of treaties is such as to suggest that the 1969 Vienna Convention has not yet revealed all its secrets. The provisional application of treaties is thus a new, albeit perhaps much more modest, chapter in this long, vast and inexhaustibly rich study of the law of treaties on which the Commission continues to work. The Commission took the view that the contours of article 25 remained somewhat unclear and that its legal regime should therefore be clarified for the benefit of States and international organizations and, more generally, the users of treaty law.

20. The Commission decided to undertake the study of article 25, based on the following premises, which it has borne in mind at all times:

(a) That, while provisional application was inadequately defined and its legal regime is confusing, the 1969 Vienna Convention nonetheless remains the source in which clarification of the regime must be sought;

(b) That, while the primary purpose of provisional application is to prepare for the entry into force of a treaty, its increasing use may be due to other reasons;

(c) That the main advantage of provisional application lies in its inherent flexibility and in its exceptional nature, which is reflected in the freedom of the parties to resort to it or not; and

(d) Lastly, that, since provisional application may give rise to situations that are not in accordance with procedures of the internal law of States or the rules of international organizations as regards the expression of consent to be bound by the treaty, account must be taken of the limitations that may derive from the internal law of States and the rules of international organizations.

21. The interest shown in the topic by delegations in the Sixth Committee also needs to be highlighted. The States that spoke on the topic, even before the submission of the Special Rapporteur's first report, noted the increasing use of provisional application, while acknowledging the uncertainty surrounding its modalities and legal effects. This underscores the importance of conducting a study of provisional application, particularly given that it is a topic that has been insufficiently addressed in the literature, especially in comparison with other aspects of treaty law.[92]

[91] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 90, commentary to draft guideline 9.

[92] A/CN.4/657, paras. 39–46.

22. That said, if the natural vocation of any treaty is to reach the point at which it comes fully into force and, in the case of a multilateral treaty, achieves universality, then what role does provisional application play?

23. It was therefore necessary to understand why States and international organizations resort to the provisional application of treaties in order to identify the advantages, as well as any disadvantages, of that procedure as provided by the 1969 Vienna Convention.

24. Of course, account was rightly taken of the concern that the Commission might be perceived as seeking to encourage recourse to provisional application, which, although in complete conformity with the law of treaties, might lead to non-compliance with the rules of domestic law governing the procedures for a State to consent to be bound by a treaty.

25. The Commission therefore undertook, on the one hand, to identify the practice of States and international organizations and, on the other hand, to study the relationship between article 25 of the Vienna Convention of 1969 and other treaty rules of the law of treaties, in order to ascertain more precisely the legal effects of provisional application and to draw more clearly the distinction between provisional application and the regime of the entry into force of treaties.

26. While continuing to examine the topic on the basis of the five reports successively submitted to it, the Commission considered it appropriate to request from the Secretariat memorandums on the negotiating history of provisional application in the work that led to the United Nations Conference on the Law of Treaties of 1969[93] and proceeded in the same manner with respect to the 1986 Vienna Convention.[94]

27. The first memorandum by the Secretariat[95] focused on the shift from the concept of "provisional entry into force", as used in the work of the Commission prior to 1969, to the formulation "provisional application", which was eventually chosen at the Vienna Conference. The study by the Secretariat included a description of various important issues raised both within the Commission and during negotiations at the Vienna Conference and broadly took up the issues set out by Giorgio Gaja[96] – now a judge at the International Court of Justice – in his capacity as a member of the Commission, concerning, in particular, the *raison d'être*, the legal basis and certain aspects of the commencement and termination of the provisional application of treaties.

28. At the sixty-sixth session of the Commission (2014), when the Special Rapporteur considered the practice of States in their relations with international organizations, the Commission decided to request from the Secretariat a second memorandum, on the *travaux préparatoires* of article 25 of the 1986 Vienna Convention. The Commission had the memorandum[97] before it at its sixty-seventh session (2015).

29. Lastly, at its sixty-eighth session (2016), the Commission requested the Secretariat to prepare a third memorandum,[98] analysing State practice with respect to treaties, both bilateral and multilateral, concluded for the most part in the previous 20 years and containing provisions for their provisional application, in whole or in part, and registered with the United Nations, in accordance with Article 102 of the Charter of the United Nations, or for which the Secretary-General acts as depositary.

[93] See A/CN.4/658.
[94] A/CN.4/676.
[95] A/CN.4/658.
[96] See the syllabus of the topic submitted by Mr. Giorgio Gaja, which was the basis for the Commission's decision to include the topic in its long-term programme of work, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 365 and annex C.
[97] A/CN.4/676.
[98] A/CN.4/707.

30. Although the analysis contained in the memorandum is based on more than 400 treaties, the number of treaties concerned by provisional application is clearly much higher. Thus, the Secretariat study notes that "in practice… bilateral treaties that are provisionally applied are frequently registered by the parties only after entry into force",[99] and without making it clear that they gave rise to some kind of provisional application. The same applies to multilateral treaties.[100] This is sufficient to establish that this practice is much more widespread than was thought when the Commission began its work.

31. In its third memorandum, the Secretariat confirmed most of the conclusions reached by the Special Rapporteur in the reports he had previously submitted. These include the following:

(a) States have complete freedom as to the scope of the clauses or separate agreements concerning provisional application; this is fully in line with the spirit and letter of article 25, whose flexibility is an advantage in situations that are in principle only temporary;

(b) Although internal law is irrelevant under article 27 of the 1969 Vienna Convention, the internal legislation of States and the rules of international organizations play an important role when it comes to restricting the scope of provisional application in the light of the limitations imposed by the internal legislation of States and the rules of international organizations. Hence, States and international organizations may have an interest in including limitation clauses in order to avoid differences in the interpretation of the treaty;

(c) In conclusion, "it can be observed that provisional application of treaties is a flexible tool available to States and international organizations to tailor their treaty relations".[101]

I. Comments and observations on the draft Guide to Provisional Application of Treaties adopted by the Commission on first reading

32. The Special Rapporteur is grateful to all who commented orally and in writing on the draft Guide to Provisional Application of Treaties and the commentaries thereto, as adopted by the Commission on first reading. While, as was to be expected, the comments and suggestions sometimes point in opposite directions, they are without exception extremely thoughtful and constructive and should greatly assist the Commission in improving its final output.

33. In preparing the present report, the Special Rapporteur reviewed all the comments made by States and international organizations from 2015 to the time of writing, both those expressed in the debates in the Sixth Committee and those transmitted in writing in response to the requests made by the Commission in the course of its consideration of the topic. It should be stressed that a large number of the concerns expressed have subsequently been addressed by the Commission. The Special Rapporteur has therefore focused on responding to those concerns that have been made known since the adoption of the draft Guide, on first reading, in 2018.[102]

[99] *Ibid*., para. 3.
[100] *Ibid*., para. 4.
[101] *Ibid*., para. 103.
[102] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), chap. VII.

34. The comments and observations that have been received are considered below in the present chapter. First, the comments and observations on the draft Guide as a whole are considered (sect. A), followed by comments and observations on individual draft guidelines (sects. B–M). In each case, the comments and observations are briefly described, and then the Special Rapporteur makes his suggestions, mainly for the text of the guidelines but also indicating, where appropriate, whether changes should be made in due course to the commentaries. For ease of reference, the changes to the draft guidelines suggested by the Special Rapporteur are set out in annex I to the present report; any proposals for changes to the commentaries will emerge from the work of the Drafting Committee. At this stage, therefore, the Special Rapporteur will only indicate, where appropriate, his intention to make changes to the commentaries; he will not propose any wording.

35. As noted in chapter XI of the Commission's report to the General Assembly on the work of its seventy-first session (2019),[103] the Special Rapporteur held informal consultations on the draft model clauses, on which the Commission had not had an opportunity to comment during its seventieth session (2018). Since most of the delegations that made reference to this issue in the Sixth Committee in 2018 expressed interest in the Special Rapporteur's proposal to include some model clauses as an annex to the draft Guide to the Provisional Application of Treaties, the Special Rapporteur circulated an informal paper containing a revised set of draft model clauses[104] with a view to seeking comments from States and international organizations. On this basis, the Special Rapporteur will make a proposal in the present report (chap. II), which relates to the draft model clauses contained in annex II.

36. Chapter III contains the Special Rapporteur's recommendations for the final form of the Commission's output.

A. General comments and observations

1. Comments and observations received

37. Since the adoption by the Commission of the draft Guide and the commentaries thereto on first reading in 2018, a total of 46 States and international organizations, including the Group of African States, the European Union and the Nordic countries, have referred to the draft Guide during the debates in the Sixth Committee, as well as in their written comments and observations, in generally positive terms, emphasizing that "the draft guidelines would provide a valuable and practical tool for States and international organizations in their treaty-making practice, and allow for the development of a consistent practice".[105] In addition, "the Commission was commended for embarking on an extensive study of the practice of States and international organizations, which could provide guidance on questions left unanswered by article 25 of the 1969 Vienna Convention."[106]

38. By way of example, Germany indicated that the draft Guide is "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".[107] Likewise, the Netherlands noted 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

[103] *Ibid., Seventy-fourth Session, Supplement No. 10* (A/74/10), paras. 274–284.
[104] *Ibid*., annex A.
[105] A/CN.4/724, para. 91.
[106] *Ibid*., para. 92.
[107] See written comments and observations received from Germany in 2019.

Kingdom of the Netherlands endorses this general approach of the topic."[108] The United Kingdom welcomed the statement of overall objectives in paragraph (2) of the general commentary and commended the Special Rapporteur and the Commission for their pragmatic approach, "which firmly roots the Guide within contemporary practice. The United Kingdom considers the Guide can make a significant contribution to the clarification of existing rules".[109] The United States of America welcomed the fact that the draft guidelines are in general accord with its view of provisional application.[110] Estonia noted "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 the States, International Organizations and other users to answers on relevant issues that are consistent with existing rules and contemporary practice."[111]

39. Some delegations highlighted the importance of further emphasizing the voluntary and flexible nature of provisional application in the general commentary.[112]

40. At the same time, some States expressed concern about a possible interpretation of paragraph (5) of the general commentary, which states that "the Guide recognizes that States and international organizations may set aside, by mutual agreement, the solutions identified in the draft guidelines if they so decide". In the view of these States,[113] an interpretation suggesting that the provisional application of treaties constitutes the default rule that necessarily prevails over entry into force should be avoided. Such an interpretation would go too far, bearing in mind the supplementary nature of provisional application and the non-binding nature of the draft Guide. Similarly, the Russian Federation pointed out that care should be taken to avoid giving the impression that the provisional application of treaties is the most convenient option for negotiating States.[114] Germany pointed out that a provision on provisional application must not be considered a routine clause to be included in every treaty.[115] Argentina, however, commending the methodology followed in the draft guidelines,[116] was pleased to note that "account has been taken of the fact that provisional application is not intended to give rise to the full range of rights and obligations that derive from a State's consent to be bound by a treaty or a part of a treaty".[117] Turkey took the view that provisional application should be regarded as an exception to the rule of entry into force and that, in this regard, the draft guidelines

[108] See written comments and observations received from the Netherlands in 2019.
[109] See written comments and observations received from the United Kingdom in 2019.
[110] See written comments and observations received from the United States in 2019.
[111] See written comments and observations received from Estonia in 2019.
[112] A/C.6/72/SR.18, para. 97 (Portugal). See written comments and observations received from the United Kingdom in 2019 ("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 emphasise the voluntary nature of provisional application"). See also written comments and observations received from Turkey in 2019 ("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"). See also written comments and observations received from Argentina in 2019 ("Finally, the recognition that provisional application constitutes a voluntary mechanism that may be subject to limitations resulting from the internal law of States is considered to be of great importance").
[113] A/C.6/72/SR.18, paras. 123–136 (France); see also written comments and observations received from the United States in 2019.
[114] A/C.6/73/SR.26, para. 128 (Russian Federation).
[115] See written comments and observations received from Germany in 2019.
[116] See written comments and observations received from Argentina in 2019.
[117] *Ibid*.

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 concept.[118]

41. Meanwhile, the United States noted that the value of the draft Guide depends principally on the extent to which the guidelines are supported by State practice. Consequently, those draft guidelines that are not sufficiently supported by State practice have less utility. The United States therefore encouraged the Commission to reconsider their inclusion in the draft Guide.[119] France also suggested that the Commission had not taken sufficient account of established practice when including some draft guidelines, such as draft guideline 7 (Reservations) and paragraph 3 of draft guideline 9 (Termination and suspension of provisional application).[120]

2. *Suggestions by the Special Rapporteur*

42. The Special Rapporteur recalls that the draft Guide should be read together with the commentaries,[121] thus ensuring the necessary balance between the text of the draft guidelines, which should be clear and concise, and the commentaries, which should be as comprehensive as necessary but not go beyond what is expressed in a particular draft guideline.

43. It should also be borne in mind that the guidelines should not be too rigid. This is principally because it impossible to address the multitude of questions that may arise in practice and to cover the myriad of situations that may be faced by States and international organizations.[122] Accordingly, the main aims should be to adopt a general approach, which is in no way at odds with the eminently flexible nature of the provisional application of treaties, and "to avoid any temptation to be overly prescriptive".[123] In any event, the Special Rapporteur suggests that the general commentary introducing the Guide should emphasize that the guidelines and commentaries are to be read together.

44. On the other hand, and with regard to the comments referred to in paragraph 40 above, while the Special Rapporteur understands the reason for the concerns expressed, he is of the view that delegations may not have not taken into account the repeated statement in the general commentary regarding the absolutely voluntary nature of recourse to the provisional application of treaties. Thus, paragraphs (3),[124] (5)[125] and (7)[126] of the general commentary underline this fundamental aspect of article 25 of the 1969 Vienna Convention. The draft Guide does not establish any preference for or presumption in favour of provisional application. Greece welcomed

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[118] See written comments and observations received from Turkey in 2019.

[119] See written comments and observations received from the United States in 2019.

[120] A/C.6/73/SR.26, para. 5 (France).

[121] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 90, general commentary, para. (1).

[122] *Ibid*., general commentary, para. (5).

[123] *Ibid*.

[124] "More generally, provisional application serves the overall purpose of preparing for or facilitating the entry into force of the treaty. It must, however, be stressed that provisional application constitutes a voluntary mechanism which States and international organizations are free to resort to or not, and which may be subject to limitations deriving from the internal law of States and rules of international organizations", *ibid*., para. (3).

[125] "In line with the essentially voluntary nature of provisional application, which always remains optional, the Guide recognizes that States and international organizations may set aside, by mutual agreement, the solutions identified in the draft guidelines if they so decide", *ibid*., para. (5).

[126] "Those draft model clauses would reflect best practice with regard to the provisional application of both bilateral and multilateral treaties. They are in no way intended to limit the flexible and voluntary nature of provisional application of treaties, and they do not pretend to address the whole range of situations that may arise", *ibid*., para. (7).

the approach chosen by the Commission in dealing with this topic, as described in the general commentary.[127] In this regard, Portugal noted its agreement with the general commentary and draft guideline 3 (General rule), which "clearly reflected the voluntary nature of the provisional application mechanism".[128] Similarly, the Special Rapporteur is of the view that there is nothing in the draft Guide or the commentaries to suggest that the draft guidelines constitute a legally binding instrument as such; as indicated in paragraph (4) of the general commentary, the draft guidelines are mainly based on article 25 of the 1969 Vienna Convention.[129] In this regard, the Special Rapporteur disagrees with the statement made by Slovenia, whose delegation considered that the draft Guide is overly reliant on the 1969 Vienna Convention.[130]

45. Furthermore, the Special Rapporteur wishes to emphasize that a fundamental difference between the regime of provisional application and the regime of entry into force of a treaty lies in the manner in which a State or an international organization may terminate provisional application, as provided for in article 25 (2) of the 1969 Vienna Convention. This was highlighted by, for example, the United Kingdom[131] and the United States.[132] The United States even recognizes that the draft guidelines are in accord with this view.[133] While this aspect is reflected in the commentary to draft guideline 9, the Special Rapporteur recognizes the importance of this distinction and is prepared to make the necessary clarifications in the general commentary.

46. With regard to the comments and observations described in paragraph 41 above, the Special Rapporteur takes note of the concerns expressed and will return to them when he addresses draft guideline 7 (Reservations) and paragraph 3 of draft guideline 9 (Termination and suspension of provisional application).

B. Guideline 1. Scope

The present draft guidelines concern the provisional application of treaties.

1. *Comments and observations received*

47. El Salvador and Ireland expressed support for the formulation contained in draft guideline 1.[134] Austria suggested that the commentary make clear that draft guideline 1 also encompasses the provisional application of treaties by international organizations.[135] For its part, Greece suggested the addition to draft guideline 1 of the phrase "by States and international organizations".[136] Czechia made a suggestion to the same effect.[137]

[127] A/C.6/73/SR.27, para. 2 (Greece).
[128] A/C.6/73/SR.26, para. 111 (Portugal).
[129] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 90.
[130] A/C.6/72/SR.19, para. 22 (Slovenia).
[131] See the written comments and observations received from the United Kingdom in 2019 ("and considers that it would also be helpful, for the same reason, to emphasise that Article 25 of the Vienna Convention on the Law of Treaties … and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations … envisages a flexible approach to the termination of provisional application").
[132] See written comments and observations received from the United States in 2019.
[133] *Ibid*.
[134] A/C.6/70/SR.24, para. 102 (El Salvador), and A/C.6/70/SR.25, para. 88 (Ireland).
[135] A/C.6/70/SR.24, para. 77 (Austria).
[136] *Ibid*., para. 8 (Greece).
[137] A/C.6/72/SR.20 (Czechia).

48. Czechia and Slovakia proposed that draft guideline 1 (Scope) be merged with draft guideline 2 (Purpose),[138] on the ground that draft guideline 1 is redundant.

49. Slovenia suggested the inclusion of a reference, either in the draft guideline or in the commentary thereto, to the relationship between "provisional application" and "provisional entry into force", on the grounds that in certain treaties, such as those concerning commodities, the two terms are used indiscriminately.[139]

50. Austria stated that draft guideline 1 should be reformulated to make clear that the possibility of resorting to provisional application depends on the provisions of internal law, since, in its view, the current wording "appeared to imply a presumption in favour of provisional applicability".[140]

2. Suggestions by the Special Rapporteur

51. The Special Rapporteur is of the view that the Drafting Committee might give consideration to merging draft guideline 1 with draft guideline 2. In any event, the Special Rapporteur is grateful for the suggestions made with a view to making clear that the draft Guide refers also to the provisional application of treaties by international organizations; he proposes revised wording in annex I.

52. On the other hand, the Special Rapporteur does not consider it appropriate to address the question of the indiscriminate use of terms such as "provisional application" and "provisional entry into force", as, in his view, this issue was duly settled both in the Secretariat's memorandum on the negotiating history of article 25 of the 1969 Vienna Convention[141] and the first report submitted by the Special Rapporteur.[142]

53. With regard to the suggestion by Austria referred to in paragraph 50 above, the Special Rapporteur reiterates the content of paragraph 44 above.

C. Guideline 2. Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

1. Comments and observations received

54. Greece and Ireland[143] expressed support for the wording of draft guideline 2, emphasizing that the purpose of the draft Guide is to provide guidance on provisional application, without seeking to encourage its use. Austria[144] proposed that it be made clear that the reference to "other rules of international law" does not detract from the purpose of the Guide, which is to supplement the rules of the 1969 Vienna Convention, not to change them.

55. Croatia suggested that a reference to the principles of international law be added to the text of draft guideline 2.[145]

[138] A/C.6/72/SR.20 (Czechia) and A/C.6/72/SR.19, para. 58 (Slovakia); see also written comments and observations received from Czechia in 2019.
[139] See written comments and observations received from Slovenia in 2019.
[140] A/C.6/70/SR.24, para. 75 (Austria).
[141] A/CN.4/658.
[142] A/CN.4/664, paras. 7–16.
[143] A/C.6/70/SR.24, para. 8 (Greece), and A/C.6/70/SR.25, para. 88 (Ireland).
[144] A/C.6/70/SR.24, para. 77 (Austria).
[145] A/C.6/71/SR.28, para. 39 (Croatia).

56. Czechia and Slovakia proposed that draft guideline 2 be merged with draft guideline 1, on the grounds that draft guideline 1 is redundant and that, as the draft Guide is not a legally binding instrument, a guideline on scope is not justified.[146]

57. Belarus proposed that examples of other rules of international law be added to paragraph (3) of the commentary to draft guideline 2.[147]

58. Czechia suggested that the reference to article 25 of the 1969 Vienna Convention, as well as a reference to article 25 of the 1986 Vienna Convention, be placed in draft guideline 3 (General rule).[148]

2. Suggestions by the Special Rapporteur

59. The Special Rapporteur welcomes the above suggestions, which will be duly forwarded to the Drafting Committee. However, it is his view that there are a large number of instruments which, while not legally binding, have for the sake of clarity a structure that is close to that of a treaty.

D. Guideline 3. General rule

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

1. Comments and observations received

60. The topics that generated the most interest may be grouped as follows.

(a) The meaning to be given to the expression "A treaty or a part of a treaty may be provisionally applied", which might be misinterpreted to suggest that the optional character refers to the legal effects of provisional application rather than to the will of two or more States or international organizations;

(b) The question of whether the expression "the States or international organizations concerned", as distinct from the expression "the negotiating States" contained in article 25 (1) (b) of the 1969 Vienna Convention, represents a desirable development and, if so, to what extent it is supported in the practice of States and international organizations;

(c) The possibility that the phrase "or if in some other manner it has been so agreed", although used in article 25 (1) (b) of the 1969 Vienna Convention in combination with the words "the negotiating States", might go beyond the letter and spirit of article 25 of the Convention.

61. In connection with the issue noted in paragraph 60 (a) above, Slovenia[149] considered that the use of the verb "may" might cause confusion, even if read together with the commentary, by suggesting that the agreement on provisional application as such is optional as regards its legal effects. Slovenia even suggested that this implies a step backwards from what was agreed at the time by the United Nations Conference on the Law of Treaties of 1969. Furthermore, Slovenia noted that this wording might undermine the proper interpretation of draft guideline 6 (Legal effect of provisional application). It therefore proposed that the wording of draft guideline 3 and the

[146] A/C.6/72/SR.20 (Czechia) and A/C.6/72/SR.19, para. 58 (Slovakia).
[147] A/C.6/72/SR.20, para. 55 (Belarus).
[148] See written comments and observations received from Czechia in 2019.
[149] A/C.6/72/SR.19, para. 22 (Slovenia); see also written comments and observations received from Slovenia in 2019.

commentary thereto be amended. An opposing view was taken by Brazil,[150] Micronesia (Federated States of)[151] and the European Union.[152] In addition, although in more general terms, Germany,[153] Czechia,[154] Estonia,[155] Portugal[156] and the United Kingdom[157] expressed support for the wording of draft guideline 3.

62. With regard to the question set out in paragraph 60 (b) above, Brazil[158] questioned whether the State practice relied on is sufficiently relevant to warrant the use of the expression "the States or international organizations concerned", which, in its view, would allow States that did not participate in the negotiation of a treaty to agree to provisionally apply it. The United States[159] took the view that the phrase "the States or international organizations concerned" creates uncertainty and potential confusion about the necessary parties to an agreement regarding provisional application of a treaty; on the other hand, the reference to "the negotiating States" designates all those States that would have rights or obligations under provisional application, given that they have effectively consented to such provisional application. The United States suggested that draft guideline 3 be reworded and that paragraph (5) of the commentary be deleted. In contrast, Bahrain[160] was of the view that the formulation "the negotiating States" may sometimes be relevant to multilateral treaties. Portugal[161] expressed support for both the text of draft guideline 3 and the commentary thereto, since the latter provides a clear explanation of the reasons that led the Commission to depart from the wording contained in article 25 (1) (b) of the 1969 Vienna Convention. Germany[162] was of the view that opening up provisional application to non-negotiating States "is a reasonable approach as it is already contemporary practice".[163] The United Kingdom[164] welcomed the broad application of draft guideline 3 and draft model clause 3, which does not qualify the applicability of the general rule, as it considered that the terms used in draft guideline 3 are wide enough to include both the negotiating States or international organizations and those intending to accede to the treaty at a later stage. Consequently, the United Kingdom considered that draft guideline 3 aligns with the broader interpretation to be given to

[150] A/C.6/73/SR.25, para. 42 (Brazil).
[151] A/C.6/72/SR.20, para. 59 (Federated States of Micronesia).
[152] A/C.6/73/SR.24, para. 112 (European Union).
[153] See written comments and observations received from Germany in 2019.
[154] See written comments and observations received from Czechia in 2019.
[155] See written comments and observations received from Estonia in 2019.
[156] A/C.6/73/SR.26, para. 111 (Portugal).
[157] See written comments and observations received from the United Kingdom in 2019.
[158] A/C.6/72/SR.21, para. 12 (Brazil).
[159] Ibid., para. 29 (United States); see also written comments and observations received from the United States in 2019.
[160] See written comments and observations received from Bahrain in 2019.
[161] A/C.6/73/SR.26, para. 111 (Portugal).
[162] See written comments and observations received from Germany in 2019.
[163] Ibid. ("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 this 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 (1) (c) of the 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. René Lefeber, 'Treaties, provisional application', in Rüdiger Wolfrum (dir.), *Max Planck Encyclopedia of Public International Law. Volume X*. Oxford, Oxford University Press, 2012; at p. 2, para. 5.")
[164] See written comments and observations received from the United Kingdom in 2019.

article 25 (1) (b) of the Convention. Belarus[165] expressed support for the Commission's approach both to draft guideline 3 and to the content of the commentary in paragraph (3).

63. With regard to the comments referred to in paragraph 60 (c) above, the United States[166] stated that the phrase "or if in some other manner it has been so agreed" lacks clarity, insofar as it does not indicate whose agreement to provisional application is required; the United States suggested that draft guideline 3 be amended and that paragraph (5) of the commentary be deleted. El Salvador[167] was of the view that it would be helpful to clarify the connection between draft guideline 3 and draft guideline 4. Estonia[168] expressed support for draft guideline 3 and considered its structure and its development in draft guideline 4 to be commendable.

64. The United States[169] and Greece[170] sought clarification of the meaning of paragraph (7)[171] of the commentary to draft guideline 3.

65. The European Union[172] and Germany[173] suggested that the commentary to draft guideline 3 be further elaborated upon in connection with the so-called "mixed agreements" that are often concluded between the European Union and third States. For its part, the Council of Europe[174] provided some examples to enrich the commentaries contained in paragraphs (3), (4) and (7) of the commentary to draft guideline 3.

66. Lastly, Slovakia[175] and Estonia[176] indicated that, while they understood the structure of draft guidelines 3 and 4, they took the view that these guidelines may be repetitive. They suggested that consideration be given to merging them or making changes so as to avoid the impression of overlap.

2. *Suggestions by the Special Rapporteur*

67. With regard to the observations referred to in paragraph 61 above, given the broad support for the wording of draft guideline 3, the Special Rapporteur is of the view that the concern of Slovenia can be addressed in the commentary.

68. With respect to the observations referred to in paragraph 62 above, given the broad support for the wording of draft guideline 3, the Special Rapporteur is of the view that the concerns of Brazil and the United States can be addressed in the commentary.

69. Regarding the observations referred to in paragraphs 63 and 64 above, the Special Rapporteur would like to draw attention to the fact that, to a large extent, these observations are directed more towards draft guideline 4, which is, of course, closely linked to draft guideline 3. The Special Rapporteur therefore deems it preferable to deal with these observations when he considers draft guideline 4.

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[165] See written comments and observations received from Belarus in 2019.
[166] A/C.6/72/SR.21, para. 29 (United States).
[167] A/C.6/73/SR.27, para. 52 (El Salvador).
[168] See written comments and observations received from Estonia in 2019.
[169] See written comments and observations received from the United States in 2019.
[170] A/C.6/73/SR.27 (Greece).
[171] The penultimate sentence of paragraph (7) of the commentary to draft guideline 3 reads as follows: "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", *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 90.
[172] A/C.6/73/SR.24, para. 112 (European Union).
[173] See written comments and observations received from Germany in 2019.
[174] See written comments and observations received from the Council of Europe in 2019.
[175] A/C.6/72/SR.19, para. 58, and A/C.6/73/SR.26, para. 19 (Slovakia).
[176] A/C.6/73/SR.26, para. 44 (Estonia).

70. The Special Rapporteur also takes note with appreciation of the proposals referred to in paragraph 65 above, which he will incorporate in due course into the commentary to draft guideline 3.

71. Lastly, with regard to the possibility of merging draft guidelines 3 and 4, and subject to the decision of the Drafting Committee, the Special Rapporteur considers it preferable to keep these two draft guidelines separate, given the support for that structure among the delegations that have spoken on the subject.

E. Guideline 4. Form of agreement

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

(a) a separate treaty; or

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

1. Comments and observations received

72. This draft guideline gave rise to comments and observations on the following issues:

(a) The reference to "any other means or arrangements", in particular "a resolution adopted by an international organization or at an intergovernmental conference"; and

(b) The reference to "a declaration by a State or an international organization that is accepted by the other States or international organizations concerned" as an example of the means or arrangements referred to in subparagraph (b) of draft guideline 4.

73. With regard to the comments and observations on the issue referred to in paragraph 72 (a) above, a number of States cautioned that a resolution adopted by an international organization or at an intergovernmental conference should not be given the same value and weight as an agreement reached between two or more States as a means of deciding on the provisional application of a treaty. In particular, these States indicated that a resolution that was not adopted unanimously because some States did not vote in favour of it or even voted against it could in no way be binding on the States that did not support it. The States that expressed this view are Algeria,[177] Brazil,[178] Chile,[179] Croatia,[180] Spain,[181] the United States,[182] Iran (Islamic Republic of),[183] Malaysia,[184] New Zealand,[185] the Netherlands,[186] Turkey[187] and Viet Nam.[188] In

[177] A/C.6/72/SR.21, para. 17 (Algeria).
[178] Ibid., para. 12 (Brazil).
[179] A/C.6/71/SR.25, para. 104, and A/C.6/74/SR.26, para. 117 (Chile).
[180] A/C.6/70/SR.24, para. 94 (Croatia).
[181] A/C.6/70/SR.25, para. 114 (Spain).
[182] A/C.6/71/SR.29, para. 73 (United States); see also written comments and observations received from the United States in 2019.
[183] A/C.6/72/SR.20, para. 44, and A/C.6/73/SR.27, para. 116 (Islamic Republic of Iran).
[184] A/C.6/70/SR.25, para. 56, and A/C.6/71/SR.29, para. 37 (Malaysia).
[185] A/C.6/72/SR.20 (New Zealand).
[186] A/C.6/70/SR.24, para. 38 (Netherlands).
[187] A/C.6/70/SR.25, para. 94 (Turkey).
[188] A/C.6/71/SR.29, para. 49, A/C.6/72/SR.21, para. 36, and A/C.6/73/SR.27, para. 92 (Viet Nam).

general, these States took the view that draft guideline 4 should be amended in order to establish the principle that provisional application is always subject to the consent of all States assuming rights and obligations pursuant to a resolution. Several States also suggested that this issue should be elaborated upon in the commentary.

74. For their part, Germany,[189] Austria,[190] Belarus,[191] Czechia,[192] Estonia,[193] the United Kingdom[194] and Singapore,[195] as well as the Council of Europe,[196] generally supported draft guideline 4, although in some cases they made suggestions regarding the commentary. In particular, France[197] and Romania[198] stated that the Commission should clarify the question of when a resolution of an international organization should be considered an agreement on the provisional application of a treaty. However, these States took the view that the structure of the draft guideline has the advantage of preserving the flexibility inherent in the concept of provisional application and is consistent with the sequence set out in article 25 of the 1969 Vienna Convention and article 25 of the 1986 Vienna Convention, while also highlighting two examples of what may constitute "any other means or arrangements".

75. With regard to the comments and observations on the issue referred to in paragraph 72 (b) above, several States (Brazil,[199] Slovakia,[200] Greece[201] and Israel[202]) and the European Union[203] pointed out the importance of not creating the impression that recourse to "a declaration by a State or an international organization that is accepted by the other States or international organizations concerned" reflects a practice that is broader than the examples outlined in the commentary. The United Kingdom[204] stressed the desirability of emphasizing in the draft guideline that the practice of making such a declaration is still exceptional. Likewise, the acceptance of a declaration by all the other States or international organizations concerned must be explicit and not limited to mere acquiescence inferred from an absence of objections, as noted by Belarus[205] and Brazil.[206] Moreover, Belarus,[207] Cuba,[208] Estonia[209] and Poland[210] took the view that such acceptance must be expressed in writing. Interestingly, the European Union[211] and the United Kingdom[212] stated that a declaration of the kind referred to in draft guideline 4 should be considered to come under the regime applicable to unilateral acts rather than the law of treaties and called

[189] See written comments and observations received from Germany in 2019.
[190] See written comments and observations received from Austria in 2019.
[191] See written comments and observations received from Belarus in 2019.
[192] See written comments and observations received from Czechia in 2019.
[193] See written comments and observations received from Estonia in 2019.
[194] See written comments and observations received from the United Kingdom in 2019.
[195] See written comments and observations received from Singapore in 2019.
[196] See written comments and observations received from the Council of Europe in 2019.
[197] A/C.6/72/SR.18, para. 131 (France).
[198] A/C.6/72/SR.19, para. 84 (Romania).
[199] A/C.6/72/SR.21, para. 13 (Brazil).
[200] A/C.6/72/SR.19, para. 58 (Slovakia).
[201] Ibid., para. 52 (Greece).
[202] A/C.6/72/SR.20, para. 5 (Israel).
[203] A/C.6/72/SR.18, para. 41 (European Union).
[204] See written comments and observations received from the United Kingdom in 2019.
[205] See written comments and observations received from Belarus in 2019.
[206] A/C.6/72/SR.21, para. 13 (Brazil).
[207] A/C.6/72/SR.20, para. 55 (Belarus); see also written comments and observations received from Belarus in 2019.
[208] A/C.6/72/SR.21, para. 34 (Cuba).
[209] See written comments and observations received from Estonia in 2019.
[210] A/C.6/72/SR.19, para. 94 (Poland).
[211] A/C.6/72/SR.18, para. 41 (European Union).
[212] See written comments and observations received from the United Kingdom in 2019.

for further elaboration upon this issue in the commentary, while recognizing that the Commission has already debated this point.

76. Slovakia[213] and Estonia[214] suggested that, in view of the interdependence between draft guideline 3 and draft guideline 4, consideration should be given to merging them. Austria[215] expressed support for draft guideline 4, while noting that agreement on provisional application through a separate treaty, as referred to in subparagraph (a), might have more stringent or rigorous consequences, particularly with regard to the termination of provisional application.

77. The United States,[216] which is not in favour of mentioning the forms of agreement referred to in subparagraph (b), suggested that, if the Commission decides to retain such a reference, it should revise the wording of draft guideline 4 to emphasize the consent of the States concerned when provisional application results from "any other means or arrangements". The United States also questioned the relevance of some of the examples cited in the commentary. Lastly, Belarus suggested the inclusion of additional examples derived from its recent practice and from that of the Commonwealth of Independent States created after the dissolution of the Soviet Union.

2. *Suggestions by the Special Rapporteur*

78. The Special Rapporteur wishes to take stock of the comments and observations received regarding draft guideline 4, both on their own merits and in the light of the comments and observations relating to draft guideline 3, since they are closely related. In general, it can be said that the concerns raised by some elements of the two draft guidelines relate to the determination, at any given time, of which States or organizations are concerned and how their consent to provisional application can be ascertained. This being the case, the Special Rapporteur's view is that the expression "that is accepted by the other States or international organizations concerned" should be understood to apply to both "declaration" and "resolution adopted by an international organization or at an intergovernmental conference". The Special Rapporteur has therefore proposed, in annex I, an amended version of draft guideline 4.

79. However, the Special Rapporteur wishes to draw attention to the role that draft model clauses 3 and 4 (see annex II) can play in clarifying the doubts raised in particular by subparagraph (b) of draft guideline 4, and the many examples of recent practice, cited in connection with the draft model clauses, with regard to resolutions of international organizations whereby the provisional application of a treaty or a part of a treaty has been agreed upon. The Special Rapporteur will return to this issue in the chapter on the draft model clauses. In addition, the Special Rapporteur will consider including these examples in the commentary to draft guideline 4.

80. The Special Rapporteur also takes note with appreciation of the proposals for enriching the commentary, which will be incorporated in due course into the commentary to draft guideline 4.

81. Lastly, with regard to the possibility of merging draft guidelines 3 and 4, and without prejudice to the decision of the Drafting Committee in that regard, the Special Rapporteur would prefer to keep the two draft guidelines separate, since most of the delegations that expressed a view on the subject indicated that they support that structure.

[213] A/C.6/73/SR.26, para. 19 (Slovakia).
[214] *Ibid*., para. 44 (Estonia).
[215] A/C.6/72/SR.18, para. 75 (Austria).
[216] See written comments and observations received from the United States in 2019.

F. Guideline 5. Commencement of provisional application

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

1. *Comments and observations received*

82. The Netherlands[217] noted that draft guideline 5, by providing for the provisional application of a treaty or a part of a treaty "pending its entry into force between the States or international organizations concerned", excludes situations in which a treaty has entered into force as such, but is not yet in force for one or more States that then decide to apply it provisionally. The Netherlands therefore suggested that the wording of draft guideline 5 be adjusted to take such situations into account.

83. Germany,[218] Czechia,[219] Chile[220] and Cuba[221] expressed support for draft guideline 5. In particular, Germany stressed that, as the commencement of provisional application can be agreed upon in different ways in order to meet different requirements, draft guideline 5 enables the parties concerned to react with flexibility to particular situations.

2. *Suggestions by the Special Rapporteur*

84. The Special Rapporteur takes the view that the reference to entry into force "between" the States "or" international organizations was rendered in general terms in order to cover the variety of possible scenarios, including, for example, provisional application between a State or international organization for which the treaty has entered into force and another State or international organization for which the treaty has not yet entered into force, as noted in paragraph (4) of the commentary to draft guideline 5. This is irrespective of the question of whether the treaty as such has entered into force in accordance with its provisions. In addition, the use of the word "concerned" further broadens the range of possibilities, without excluding any in particular. In relation to both this draft guideline and draft guideline 3, Germany[222] rightly recalled that treaties often provide that provisional application commences with the signing of the treaty. In such cases, the treaty is not necessarily applied provisionally between all the negotiating States, but only by those negotiating States that signed the treaty and, possibly, by other signatories that were not among the negotiating States. The Special Rapporteur is therefore of the view that there is no need to alter the wording of draft guideline 5.

G. Guideline 6. Legal effect of provisional application

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

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[217] A/C.6/70/SR.24, para. 36 (Netherlands).
[218] See written comments and observations received from Germany in 2019.
[219] A/C.6/72/SR.20, para. 19 (Czechia); see also written comments and observations received from Czechia in 2019.
[220] A/C.6/72/SR.19, para. 91, and A/C.6/73/SR.27 (Chile).
[221] A/C.6/73/SR.28, para. 20 (Cuba).
[222] See written comments and observations received from Germany in 2019.

1. Comments and observations received

85. Draft guideline 6 aroused great interest, both within the Commission and in the debates in the General Assembly, because it represents the core of the work done on the provisional application of treaties. The wording adopted on first reading is the outcome of very dedicated efforts on the part of the Drafting Committee. However, it must be acknowledged that this draft guideline is still controversial.

86. Austria,[223] Belarus,[224] China,[225] the United States,[226] France,[227] Greece,[228] Ireland,[229] Kazakhstan,[230] New Zealand,[231] Poland,[232] the United Kingdom,[233] Singapore,[234] the Sudan[235] and Turkey[236] expressed the view that the phrase "as if the treaty were in force" is excessive and contrary to paragraph (5) of the commentary.[237] Several of these States see this formulation as a sort of default rule that seeks to give pre-eminence to provisional application over entry into force. This is perceived as something that may undermine the prerogatives of States' legislative bodies; for this reason, it is argued, provisional application must always be exceptional. The Netherlands[238] stressed the supplementary role played by the guidelines on provisional application. Some delegations observed that the introduction of the expression "a legally binding obligation" in the draft guideline represented an improvement over the previous wording, which was even more general and practically equated the legal effects of provisional application with those of entry into force. Even so, this group of States took the view that the draft guideline would be clearer if the phrase "as if the treaty were in force" was deleted. They also stated that, at the very least, the commentary should further analyse the question of which rights and obligations arising from the entry into force of a treaty are triggered in the event of provisional application. In this regard, they expressed the view that the Special Rapporteur should compile more examples of practice in support of the assertion contained in paragraph (5) of the commentary.

[223] A/C.6/72/SR.18, para. 76 (Austria); see also written comments and observations received from Austria in 2019.
[224] A/C.6/70/SR.24, para. 19, and A/C.6/72/SR.20, para. 55 (Belarus).
[225] A/C.6/72/SR.18, para. 121 (China).
[226] A/C.6/72/SR.21, para. 31 (United States); see also written comments and observations received from the United States in 2019.
[227] A/C.6/72/SR.18, paras. 133–134 (France).
[228] A/C.6/70/SR.24, para. 9, and A/C.6/72/SR.19, para. 53 (Greece).
[229] A/C.6/71/SR.29, para. 83 (Ireland).
[230] A/C.6/70/SR.25, para. 118 (Kazakhstan).
[231] A/C.6/72/SR.20, para. 50 (New Zealand).
[232] A/C.6/72/SR.19, para. 95 (Poland).
[233] See written comments and observations received from the United Kingdom in 2019.
[234] A/C.6/72/SR.18, paras. 153–154 (Singapore).
[235] A/C.6/73/SR.28, para. 9 (Sudan).
[236] A/C.6/70/SR.25, para. 93, A/C.6/71/SR.29, para. 63, and A/C.6/73/SR.27, para. 108 (Turkey).
[237] The second sentence of paragraph (5) of the commentary to draft guideline 6 reads as follows: "Provisional application of treaties remains different from their entry into force, insofar as it is not subject to all rules of the law of treaties. Therefore, the formulation that provisional application 'produces a legally binding obligation to apply the treaty or part thereof as if the treaty were in force' does not imply that provisional application has the same legal effect as entry into force", *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 90.
[238] See written comments and observations received from the Netherlands in 2019.

87. For their part, Germany,[239] Czechia,[240] Chile,[241] Croatia,[242] Finland (on behalf of the Nordic countries),[243] Greece,[244] Ireland,[245] Norway (on behalf of the Nordic countries),[246] Peru,[247] Poland,[248] Portugal[249] and the United Kingdom,[250] as well as the Food and Agriculture Organization of the United Nations (FAO)[251] and the United Nations Industrial Development Organization (UNIDO),[252] expressed support for the wording of draft guideline 6. However, some delegations, including those of Australia,[253] the Republic of Korea[254] and Viet Nam,[255] suggested that the commentary be revised in accordance with the considerations set out in paragraph 86 above.

88. The Netherlands[256] raised the question of the extent to which the termination of the provisional application of a treaty affects respect for the *pacta sunt servanda* rule in situations where such termination would adversely affect the rights of third parties acting in good faith, with the result that obligations arising from provisional application might outlive its formal termination.

89. Slovenia[257] noted that the commentary to draft guideline 6 does not explain the distinction between 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. The delegation expressed the view that agreement is a precondition for provisional application and suggested that draft guideline 6 be amended. FAO,[258] meanwhile, suggested that the draft guideline be amended to remove any implication that what matters is only the obligation to apply the treaty and not the legal effect of the agreement from which the obligation is derived, or, in other words, the source of that obligation.

2. *Suggestions by the Special Rapporteur*

90. The opinions referred to in paragraphs 86 and 87 above show that the question of whether the legal effects of provisional application should be described as being the same “as if the treaty were in force” gives rise to diverging views that cannot be reconciled. The Special Rapporteur is convinced that, at the heart of the matter, there is a fear that recourse to provisional application could be abused, to the detriment of domestic legal procedures relating to the expression of a State’s consent to be bound by a treaty. This has been a constant throughout the consideration of the topic, more than the question of ascertaining, based on practice, the extent to which provisional application has legal effects and the extent to which these effects are the same as those of entry into force. Therefore, the Special Rapporteur does not believe that such issues

[239] See written comments and observations received from Germany in 2019.
[240] A/C.6/70/SR.24, para. 49, and A/C.6/72/SR.20, para. 19 (Czechia); see also written comments and observations received from Czechia in 2019.
[241] A/C.6/73/SR.27 (Chile).
[242] A/C.6/70/SR.24, para. 93 (Croatia).
[243] A/C.6/73/SR.24, para. 121 (Finland).
[244] A/C.6/73/SR.27 (Greece).
[245] A/C.6/73/SR.26, para. 80 (Ireland).
[246] A/C.6/71/SR.27, para. 101 (Norway).
[247] A/C.6/72/SR.19, para. 10 (Peru).
[248] A/C.6/71/SR.26, para. 60 (Poland).
[249] A/C.6/70/SR.24, para. 84, and A/C.6/73/SR.26, para. 112 (Portugal).
[250] A/C.6/73/SR.27, para. 69 (United Kingdom).
[251] See written comments and observations received from FAO in 2018.
[252] See written comments and observations received from UNIDO in 2018.
[253] A/C.6/70/SR.24, para. 61 (Australia).
[254] A/C.6/70/SR.25, para. 84 (Republic of Korea).
[255] Ibid., para. 45 (Viet Nam).
[256] A/C.6/70/SR.24, para. 37 (Netherlands).
[257] A/C.6/73/SR.26, para. 39 (Slovenia).
[258] See written comments and observations received from FAO in 2018.

can be fully addressed in the commentary alone, even if an additional effort is made to better document and analyse the practice of States and international organizations. This practice has already been brought to the attention of States and international organizations, not only in the five reports submitted by the Special Rapporteur to date, but also in the excellent memorandum by the Secretariat[259] referred to earlier in the present report. Furthermore, the Special Rapporteur has provided additional examples of practice in connection with the draft model clauses, which are the subject of chapter II of the present report and which have already been put before States and international organizations.[260] But beyond the abundance of practice, it is also a fact that a rule or set of rules for precisely delimiting the parameters of the legal effects of provisional application cannot be formulated *a priori* and in the abstract, lest they be overly prescriptive to the point of undermining the flexibility inherent in this feature of treaty law, something that the Commission decided to rule out from the start.[261] The answers to many of the questions raised by States can only be found through the examination of individual cases, in which efforts must always be made to discern the intention of the parties. In the light of the foregoing, the Special Rapporteur will propose an amendment to draft guideline 6 and, in due course, to the commentary thereto.

91. With regard to the opinion referred to in paragraph 88 above, the Special Rapporteur wishes to recall that the purpose of the Guide is to provide answers based on the 1969 Vienna Convention and other relevant rules of international law.[262] He will return to this issue in relation to draft guideline 9.

92. Finally, with regard to the comment referred to in paragraph 89 above, the Special Rapporteur wishes to draw attention to the fact that, without neglecting the question of the agreement between the States or international organizations concerned to apply a treaty or a part of a treaty provisionally, if this is the method chosen, the guiding principle of the Commission's work has been to emphasize the question of the legal effect of a treaty or a part of a treaty that is being applied provisionally. This can be seen from the phrase "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" at the beginning of draft guideline 6. In the Special Rapporteur's view, the point raised by Slovenia is also addressed in paragraph (1) of the commentary to draft guideline 6, although that paragraph undoubtedly could be improved. There thus appears to be no need to modify the wording of the draft guideline as suggested by Slovenia, nor does the amendment proposed by FAO seem appropriate, in view of the considerations set out above. The Special Rapporteur will seek to reflect these elements in the commentary at the appropriate time.

H. Guideline 7. Reservations

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

2. In accordance with the relevant rules of international law, an international organization may, when agreeing to the provisional application of a treaty or a part of

[259] A/CN.4/707.

[260] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), annex A.

[261] Ibid., *Seventy-third Session, Supplement No. 10* (A/73/10), para. 90, general commentary to the draft Guide to Provisional Application of Treaties, para. (5).

[262] Ibid., para. (4).

a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

1. Comments and observations received

93. The question of whether reservations can be formulated in the context of provisional application has, from the outset, given rise to heated debates in the Commission between, on the one hand, those who maintain that nothing prevents a State or an international organization from formulating reservations when deciding to apply a treaty provisionally and, on the other, those who maintain that reservations cannot be formulated until the State or the international organization expresses its consent to be bound by the treaty. The point on which all members agree is that the 1969 Vienna Convention is silent on this issue. Accordingly, some Commission members indicated that they would wait until the views of States and international organizations had been ascertained before deciding whether to support or oppose the inclusion of draft guideline 7.

94. Brazil,[263] Czechia,[264] China,[265] the United States,[266] Greece[267] and Poland[268] indicated that they consider draft guideline 7 to be of little use, particularly in view of the lack of practice in this area. In fact, as the vast majority of treaties that are applied provisionally are bilateral, and since the Guide to Practice on Reservations to Treaties adopted by the Commission in 2011[269] recognizes that the practice of formulating reservations does not apply to bilateral treaties, it may well be asked what purpose would be served by the inclusion of a guideline on that subject. Such a guideline might even cause confusion and generate uncertainty about the concept of provisional application. Even if the inclusion of the guideline is accepted for essentially academic reasons, the expression "*mutatis mutandis*" does not help to clarify which rules of the 1969 Vienna Convention are or are not relevant to cases of provisional application. Lastly, the Netherlands[270] stated the view that the reason that no treaty has been found that expressly provides for the formulation of reservations in relation to provisional application is that many treaties expressly limit the scope of provisional application to certain provisions of the treaty, making the formulation of reservations even less attractive.

95. For their part, Germany,[271] Australia,[272] Austria,[273] Chile,[274] El Salvador,[275] the Russian Federation,[276] Finland (on behalf of the Nordic countries),[277] Iran (Islamic

[263] A/C.6/73/SR.25, para. 45 (Brazil).
[264] Ibid., para. 61 (Czechia); see also written comments and observations received from Czechia in 2019.
[265] A/C.6/73/SR.25, para. 13 (China).
[266] See written comments and observations received from the United States in 2019.
[267] A/C.6/73/SR.27 (Greece).
[268] A/C.6/71/SR.26, para. 60 (Poland).
[269] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10 and Add.1), chap. IV. The text of the guidelines constituting the Guide to Practice is contained in the annex to General Assembly resolution 68/111 of 16 December 2013.
[270] A/C.6/71/SR.29, para. 9 (Netherlands); see also written comments and observations received from the Netherlands in 2019.
[271] See written comments and observations received from Germany in 2019.
[272] A/C.6/71/SR.27, para. 127 (Australia).
[273] Ibid., para. 117, and A/C.6/73/SR.25 (Austria); see also written comments and observations received from Austria in 2019.
[274] A/C.6/71/SR.25, para. 103, and A/C.6/73/SR.27 (Chile).
[275] A/C.6/73/SR.27, para. 53 (El Salvador).
[276] A/C.6/71/SR.28, para. 13 (Russian Federation).
[277] A/C.6/73/SR.24, para. 121 (Finland).

Republic of),[278] Mexico,[279] Peru,[280] the United Kingdom,[281] the Republic of Korea,[282] Romania[283] and Singapore[284] stated that they assume that, in the absence of a prohibition in the treaty concerned, nothing prevents a State from formulating a reservation upon accepting the provisional application of that treaty. Article 19 of the 1969 Vienna Convention allows States to formulate a reservation when signing, ratifying, accepting, approving or acceding to a treaty, and this also applies to article 25. The Nordic countries, for example, point out that allowing States to make reservations may help to increase their willingness to apply a treaty provisionally if they are considering the possibility of making such a reservation at the time they express their consent to be bound by the treaty. One interesting view is that of Germany, which considers draft guideline 7 to be particularly relevant in relation to multilateral treaties and, in consequence, suggests that its usefulness in the context of the so-called "mixed agreements" between the European Union and its member States, on the one hand, and third States, on the other, should be explored in greater detail. Some delegations stated that when a treaty expressly prohibits reservations, that prohibition should also be understood to apply in the event of the treaty's provisional application. This would also have an impact on the functions of the depositary.

96. Spain,[285] Ireland,[286] Portugal,[287] Singapore,[288] Turkey[289] and the European Union[290] took a position that is relatively more open to the inclusion of draft guideline 7, provided that the Commission flesh out its analysis of the issue. For example, one question that has often been raised is whether the legal effects of a reservation to a treaty that is being applied provisionally end concurrently with the termination of provisional application or continue even after the entry into force of the treaty.

2. Suggestions by the Special Rapporteur

97. None of the delegations that referred to this issue suggested any change in the wording of draft guideline 7. The question is whether the draft guideline should be retained or removed.

98. The Special Rapporteur is of the view that further discussion within the Commission would be useful, bearing in mind that most of the States that have taken a position in this regard are in favour of retaining draft guideline 7, with some of them making that stance contingent on further analysis of the issue.

I. Guideline 8. Responsibility for breach

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

[278] A/C.6/71/SR.29, para. 95 (Islamic Republic of Iran).
[279] Ibid., para. 78 (Mexico).
[280] A/C.6/73/SR.27, para. 77 (Peru).
[281] Ibid., para. 69 (United Kingdom); see also written comments and observations received from the United Kingdom in 2019.
[282] A/C.6/73/SR.27, para. 82 (Republic of Korea).
[283] A/C.6/71/SR.28, para. 24, and A/C.6/73/SR.26, para. 108 (Romania).
[284] A/C.6/73/SR.25 (Singapore).
[285] A/C.6/73/SR.26, para. 69 (Spain).
[286] Ibid., para. 81 (Ireland).
[287] Ibid., para. 112 (Portugal).
[288] See written comments and observations received from Singapore in 2019.
[289] A/C.6/73/SR.27, para. 109 (Turkey).
[290] A/C.6/73/SR.24, para. 114 (European Union).

1. *Comments and observations received*

99. Draft guideline 8 is a consequence of draft guideline 6 and has been understood as such both in the Commission and in the General Assembly. As a result, the few comments and observations made on this draft guideline indicate that it has not generated any major controversy; on the contrary, it enjoys almost unanimous support among States and international organizations.

100. Germany,[291] Belarus,[292] Czechia,[293] Croatia,[294] Micronesia (Federated States of)[295] and Viet Nam[296] expressed similar views on draft guideline 8. Czechia pointed out that provisional application creates a legally binding obligation based on the *pacta sunt servanda* principle, with the result that even the unilateral termination of provisional application, if carried out in violation of the conditions for such termination, would constitute a breach of an international obligation and give rise to international responsibility. Belarus took the view that international responsibility may arise not only during the period of provisional application of a treaty, but even after provisional application has ended, citing as an example article 45 (3) (b) of the Energy Charter Treaty[297] of 1994.

101. The Islamic Republic of Iran,[298] while not opposing the principle set forth in draft guideline 8, noted that the imposition, by way of analogy, of a strict interpretation of the rules of international responsibility in relation to the provisional application of treaties might make some States reluctant to have recourse to provisional application.

2. *Suggestions by the Special Rapporteur*

102. As currently worded, draft guideline 8 does not constitute a safeguard clause, as has been suggested. It is a direct expression of the principle that the breach of an international obligation gives rise to international responsibility, and thus strengthens draft guideline 6. In the Special Rapporteur's view, the affirmation of this principle is unrelated to the existence of contentious cases in which the breach of an obligation under a treaty that is being applied provisionally has led to the activation of mechanisms under international law for the attribution of international responsibility to a particular State or international organization.

103. The Special Rapporteur therefore suggests that draft guideline 8 be left unchanged. In due course, he will propose that the commentary include a reference to the *pacta sunt servanda* principle, in line with the observations made by some States.

J. Guideline 9. Termination and suspension of provisional application

1. The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or

[291] See written comments and observations received from Germany in 2019.
[292] See written comments and observations received from Belarus in 2019.
[293] A/C.6/70/SR.24, para. 50 (Czechia); see also written comments and observations received from Czechia in 2019.
[294] A/C.6/70/SR.24, para. 93 (Croatia).
[295] A/C.6/72/SR.20, para. 61 (Federated States of Micronesia).
[296] A/C.6/70/SR.25, para. 45 (Viet Nam).
[297] Energy Charter Treaty (Lisbon, 17 December 1994), United Nations, *Treaty Series*, vol. 2080, No. 36116, p. 95.
[298] A/C.6/71/SR.29, para. 96 (Islamic Republic of Iran).

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

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

1. Comments and observations received

104. In the consideration of draft guideline 9, two main positions could be discerned.

105. One school of thought[299] is in favour of limiting the means of terminating provisional application strictly, and indeed almost exclusively, to those set forth in article 25 of the 1969 Vienna Convention. In other words, the entry into force of the provisionally applied treaty or the notification referred to in article 25 (2) would be the only means of terminating provisional application. Austria[300] expressed support for this strict approach and warned against the inclusion of vague additional grounds, such as the termination of provisional application when it is of prolonged duration or when the entry into force of the treaty is unexpectedly delayed. Spain,[301] by contrast, took the view that provision should be made for such eventualities, at least by means of a "without prejudice" clause. Greece[302] and Romania[303] suggested that the question of how long provisional application could or should last and the question of unreasonable delay or reduced likelihood of the treaty's entry into force should be considered. By contrast, China[304] and the United States[305] expressed the view that draft guideline 9 had no practical value and, since it was not supported by sufficient relevant practice, should be deleted from the draft Guide. Others, such as Viet Nam,[306] noted that care should be taken in referring by analogy (*mutatis mutandis*) to part V, section 3, of the 1969 Vienna Convention, arguing in principle that part V as a whole deals with treaties that are already in force and that there is no basis for suggesting that the drafters at the 1969 United Nations Conference on the Law of Treaties intended part V to apply as well to the article 25 regime.

106. Another school of thought,[307] however, favours the consideration by the Commission of other conditions for the termination or suspension of provisional application, both because of the flexibility inherent in that concept and the freedom of the parties to agree as they see fit, and because the more recent practice of States and international organizations points in that direction. The delegations that expressed

[299] Austria (A/C.6/70/SR.24, para. 76), Brazil (A/C.6/72/SR.21, para. 17), Iran (Islamic Republic of) (A/C.6/71/SR.29, para. 95, and A/C.6/72/SR.20, para. 45), Malaysia (A/C.6/70/SR.25 and A/C.6/71/SR.29, para. 41) and Viet Nam (A/C.6/73/SR.27, para. 93).

[300] A/C.6/70/SR.24, para. 76 (Austria).

[301] A/C.6/70/SR.25, para. 114 (Spain).

[302] A/C.6/72/SR.19, para. 53 (Greece).

[303] Ibid., para. 85 (Romania).

[304] A/C.6/73/SR.25, para. 13 (China).

[305] See written comments and observations received from the United States in 2019.

[306] A/C.6/73/SR.27, para. 93 (Viet Nam).

[307] Austria (A/C.6/72/SR.18, para. 77, and A/C.6/73/SR.25, para. 4), Czechia (A/C.6/70/SR.24, para. 49, A/C.6/72/SR.20, para. 19, and A/C.6/73/SR.25, para. 62), Croatia (A/C.6/70/SR.24, para. 94), Slovakia (A/C.6/72/SR.19, para. 59) Spain (A/C.6/70/SR.25, para. 115, A/C.6/72/SR.20, para. 17, and A/C.6/73/SR.26, para. 72), Romania (A/C.6/72/SR.19, para. 85) and European Union (A/C.6/72/SR.18, para. 44).

this second point of view therefore welcomed the inclusion of paragraph 3 in draft guideline 9.[308]

107. In this connection, Austria[309] indicated that draft guideline 9 should also cover situations in which States decide to use the procedure set out in article 25 (2) of the 1969 Vienna Convention to terminate provisional application, but without linking that decision to the "intention not to become a party" to the treaty, possibly for political reasons. The United Kingdom[310] also expressed the view that the draft guideline or the commentary should indicate that a State or international organization may terminate provisional application without affecting its ability to become a party to the treaty at a later stage, and provided some recent examples of its practice. Slovakia[311] expressed a similar view. Germany[312] referred to a situation in which a State might wish to terminate provisional application as a result of a breach, but only in relation to the party that allegedly committed the breach, while still continuing to provisionally apply the treaty in relation to other parties. Germany also cited the situation in which a State decides to suspend the provisional application of a treaty as a consequence of a breach but decides to resume such provisional application when the reasons for the suspension no longer obtain. Germany provided an interesting example of its practice with regard to so-called "mixed agreements" concluded between the European Union and its member States, on the one hand, and third States, on the other, in which provisional application can be terminated without recourse to either of the means set out in part V, section 3, of the 1969 Vienna Convention. Finally, Slovenia[313] noted the importance of leaving open the possibility that a State that has given notice of the termination of provisional application under article 25 (2) might subsequently change its mind and decide to ratify or accede to the treaty. This would apply, of course, in the case of multilateral treaties.

108. Slovenia,[314] the Netherlands[315] and Singapore[316] referred to the question of whether the "without prejudice" clause contained in draft guideline 9 (3) is sufficient to "address a number of possible scenarios not covered by paragraphs 1 and 2" (paragraph (8) of the commentary). As will be recalled, such scenarios primarily concern responsibility for a breach of obligations arising from provisional application. These States, however, took the view that other situations should also be covered, such as those in which obligations do not end with the termination of provisional application because they may affect the rights of third parties acting in good faith. In other words, the question is whether draft guideline 9 and the commentary thereto should refer to article 70 (1) (b), contained in part V, section 5, of the 1969 Vienna Convention.

[308] Germany (A/C.6/73/SR.26, para. 27; see also written comments and observations received in 2019), Finland, on behalf of the Nordic countries (A/C.6/73/SR.24, para. 122), Netherlands (A/C.6/73/SR.26, para. 50), Peru (A/C.6/73/SR.27, para. 77), United Kingdom (ibid., para. 70; see also written comments and observations received in 2019), Republic of Korea (A/C.6/73/SR.27, para. 82), Sudan (A/C.6/73/SR.28), Thailand (A/C.6/73/SR.26, para. 95) and European Union (A/C.6/73/SR.24, para. 115).

[309] A/C.6/72/SR.18, para. 77, and A/C.6/73/SR.25, para. 4 (Austria); see also written comments and observations received from Austria in 2019.

[310] See written comments and observations received from the United Kingdom in 2019.

[311] A/C.6/73/SR.26, para. 20 (Slovakia).

[312] See written comments and observations received from Germany in 2019.

[313] A/C.6/72/SR.19, para. 24 (Slovenia).

[314] Ibid., para. 26.

[315] A/C.6/72/SR.20, para. 23 (Netherlands).

[316] A/C.6/72/SR.18, para. 156 (Singapore).

109. On the other hand, Belarus[317] and Slovenia[318] referred once again to the question of whether article 25 of the 1969 Vienna Convention is related in any way to article 18 of the 1969 Vienna Convention, given that, under both provisions, a State's "intention not to become a party" to a treaty constitutes grounds for its release from the obligations assumed under those two articles. In short, the question is whether, when the provisional application of a treaty ends, there is still an obligation not to defeat its object and purpose prior to its entry into force.

110. Finally, Czechia[319] questioned the wording at the end of paragraph 3 of the draft guideline, "or other relevant rules of international law concerning termination and suspension", given that this formulation could imply that such rules might be found outside the law of treaties.

2. *Suggestions by the Special Rapporteur*

111. The Special Rapporteur has noted with appreciation the many comments and suggestions received from States. In general, most of the concerns expressed with regard to draft guideline 9 have gradually been addressed, largely because of the structure that the Commission has chosen for this guideline, which begins with the most common and obvious means whereby provisional application is terminated, namely the entry into force of the treaty, and subsequently refers, in paragraph 3, to causes of termination arising from other circumstances, including a breach of the treaty, while also mentioning, in paragraph 2, the early termination procedure set out in article 25 (2) of the 1969 Vienna Convention.

112. In particular, the Special Rapporteur is of the view that there is a need to address the suggestions concerning situations in which a State decides to terminate the provisional application of a treaty without linking that decision to an intention not to become a party to the treaty. The Special Rapporteur also considers that the draft guideline would be enriched if it also addressed the consequences of the termination of a treaty provisionally applied in accordance with article 70 of the 1969 Vienna Convention, particularly with regard to paragraph 1 (b) of that article.[320] The Special Rapporteur will therefore propose an amended version of draft guideline 9.

113. Notwithstanding the foregoing, the Special Rapporteur draws attention to paragraph 2 of draft model clause 1, which was submitted to the Commission in 2019 ("The provisional application of this Treaty [or article(s)...] shall terminate upon its entry into force for a State [an international organization] that is applying it provisionally or if that State [international organization] notifies the other State [international organization] [Depositary] of its intention not to become a party to the treaty")[321] and is supported by abundant State practice. However, it would not seem contrary to the flexibility inherent in the regime of provisional application for another model clause to provide for termination by simple notification, without any link to the question of intention not to become a party to the treaty.

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[317] See written comments and observations received from Belarus in 2019.

[318] A/C.6/70/SR.24, para. 44, and A/C.6/72/SR.19, para. 26 (Slovenia).

[319] A/C.6/73/SR.25, para. 62 (Czechia).

[320] Article 70 (1) (b) of the 1969 Vienna Convention provides as follows:

Article 70. Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

[...]

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

[321] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), annex A.

114. With regard to the question of the relationship between the article 25 regime and the article 18 regime of the 1969 Vienna Convention, the Special Rapporteur recalls that, when the Commission first embarked on the topic of provisional application, taking into account the views of Member States, it agreed that a distinction should be made between the two regimes, as they are intended to serve different purposes, and neither affects the obligations arising from the other.[322] Provisional application entails obligations that go beyond the obligation not to defeat the object and purpose of a treaty prior to its entry into force, in accordance with article 18. Moreover, if considerations of undue delay in the entry into force of a treaty were brought within the scope of article 25, this would add a ground for termination of provisional application that is not provided for in article 25 and that article 18 clearly reserves for those States that have already expressed their consent to be bound by the treaty. Such an addition would thus be contrary to the letter and spirit of the provisional application regime. The Special Rapporteur therefore recommends that no element relating to article 18 be incorporated into the draft guideline.

115. Lastly, the wording at the end of paragraph 3 of draft guideline 9[323] reflects the fact that the 1986 Vienna Convention has not yet entered into force and the Commission has preferred not to involve itself in the determination of which provisions of the 1986 Vienna Convention are part of customary international law; rather, it has preferred to make reference, throughout the draft guidelines, to other rules of international law that are applicable to international organizations.

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

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

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

1. Comments and observations received

116. All the States that referred to draft guideline 10 expressed support for its inclusion in the draft Guide[324] and indicated that they welcome the fact that the text closely follows the wording of article 27 of the 1969 Vienna Convention.

2. Suggestions by the Special Rapporteur

117. The Special Rapporteur recommends that the wording of draft guideline 10, as adopted by the Commission on first reading, be retained.

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[322] A/CN.4/675, para. 14, and *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 147.

[323] "… or other relevant rules of international law concerning termination and suspension."

[324] Germany (written comments and observations received in 2019), Australia (A/C.6/71/SR.27, para. 88), Belarus (A/C.6/72/SR.20, para. 55), Czechia (written comments and observations received in 2019), Chile (A/C.6/71/SR.25, para. 105, A/C.6/72/SR.19, para. 91, and A/C.6/73/SR.27), Spain (A/C.6/72/SR.20, para. 15), United States (A/C.6/71/SR.29, para. 73; see also written comments and observations received in 2019), Mexico (A/C.6/71/SR.29, para. 79), United Kingdom (A/C.6/71/SR.28, para. 31), Republic of Korea (A/C.6/71/SR.30, para. 15) and Singapore (written comments and observations received in 2019).

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

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

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

1. Comments and observations received

118. The States that referred to draft guideline 11 expressed support for its inclusion in the draft Guide and indicated that they welcome the fact that the text closely follows the wording of article 46 of the 1969 Vienna Convention.[325] The United States, however, noted that while it has no substantive objections, the draft guideline is not supported by State practice and must thus be seen as reflecting the viewpoint of the Commission.

2. Suggestions by the Special Rapporteur

119. The Special Rapporteur recommends that the wording of draft guideline 11, as adopted by the Commission on first reading, be retained.

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

The present draft guidelines are without prejudice to the right of a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization.

1. Comments and observations received

120. Most of the States[326] that referred to draft guideline 12 expressed support for the principle it sets forth and took the view that it balances the other guidelines in such a

[325] Germany (written comments and observations received in 2019), Australia (A/C.6/72/SR.18, para. 90), Belarus (A/C.6/72/SR.20, para. 56), Czechia (written comments and observations received in 2019), Chile (A/C.6/73/SR.27), Greece (A/C.6/72/SR.19, para. 53) and Peru (*ibid.*, para. 10).

[326] Germany (written comments and observations received in 2019), Australia (A/C.6/71/SR.27, para. 88), Austria (*ibid.*, para. 117), Brazil (A/C.6/71/SR.26, para. 92), Czechia (written comments and observations received in 2019), Chile (A/C.6/71/SR.25, para. 105, A/C.6/72/SR.19, para. 91, and A/C.6/73/SR.27), China (A/C.6/71/SR.24, para. 97), United States (A/C.6/71/SR.29, para. 73), Estonia (written comments and observations received in 2019), Greece (A/C.6/71/SR.29, para. 25, and A/C.6/73/SR.27), India (A/C.6/71/SR.30, para. 19), Indonesia (A/C.6/72/SR.21, para. 10), Iran (Islamic Republic of) (A/C.6/71/SR.29, para. 95), Micronesia (Federated States of) (A/C.6/72/SR.20, para. 62), Poland (A/C.6/71/SR.26, para. 62, and A/C.6/72/SR.19, para. 94), Portugal (A/C.6/71/SR.28, para. 35, and A/C.6/72/SR.18,

way as to ensure that States' sovereign rights are respected. The wording chosen by the Commission covers limitations relating to internal legal procedures for the expression of consent to be bound by a treaty which, in some States, do not allow the State to agree to provisional application until the treaty has been approved by the legislature. But this wording also serves to cover those limitations in the internal law of a State or in the rules of an international organization without which there would simply be no need to agree on the provisional application of a treaty. In sum, draft guideline 12 meets the needs arising from the requirements of internal law while preserving the flexibility inherent in the concept of provisional application.

121. The Council of Europe proposed that further examples of its practice be included in the commentary.[327] Greece,[328] meanwhile, suggested that the content of draft guideline 12 be reflected in a draft model clause.

2. Suggestions by the Special Rapporteur

122. The Special Rapporteur recommends that the wording of draft guideline 12, as adopted by the Commission on first reading, be retained.

123. The Special Rapporteur takes note of the suggestion made by the Council of Europe to enrich the commentary. In addition, he shares the view expressed by Greece and draws attention to draft model clause 5,[329] which addresses that very issue. He will return to draft model clause 5 in chapter II of the present report.

II. Draft model clauses

A. Background

124. As mentioned in paragraph 12 above, in 2019 the Special Rapporteur circulated an informal paper containing a revised set of draft model clauses, which then served as a basis for discussion in the informal consultations held at the Commission's seventy-first session. On that occasion, as indicated in the Commission's report to the General Assembly on the work of that session, the Special Rapporteur "pointed to the following understandings that underpinned his revised proposal for the draft model clauses, namely that:

(a) the draft model clauses should be aimed at addressing the most common issues faced by States and international organizations who are willing to resort to provisional application;

(b) the draft model clauses should not pretend to address the whole range of situations that may arise;

(c) special care should be taken so as to avoid the draft model clauses overlapping with the guidelines contained in the Guide to Provisional Application of Treaties; and

(d) the draft model clauses should be accompanied, for reference purposes, with examples of clauses contained in existing treaties.

In addition, in his view, the draft model clauses should at least provide for the following situations:

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para. 97), and Turkey (A/C.6/71/SR.29, para. 73).

[327] See written comments and observations received from the Council of Europe in 2019.

[328] A/C.6/73/SR.27 (Greece).

[329] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), annex A.

(a) the provisional application of a treaty or a part of a treaty in the treaty itself or in a separate agreement;

(b) the most common situations of termination of the provisional application of a treaty or a part of a treaty;

(c) the possibility of opting for the provisional application of a treaty or a part of a treaty, or for opting not to have the treaty or a part of a treaty being provisionally applied for that State or international organization, particularly whenever the decision to resort to provisional application is made by:

(i) a resolution adopted by an international organization or at an intergovernmental conference in which the State or international organization concerned is not in agreement with such resolution; or,

(ii) a declaration by a State or international organization that is not a negotiating party to the treaty; and

(d) limitations deriving from internal law of States or rules of international organizations.

[…] Furthermore, as had been explained in his fifth report [A/CN.4/718, paras. 75–77, and A/CN.4/718/Add.1], submitted in 2018, the draft model clauses were intended only to draw attention to some of the most common legal issues that arose in the event of an agreement to apply a treaty provisionally. Accordingly, they contained elements that reflected the most clearly established practice of States and international organizations, while avoiding other elements that were not reflected in practice or were unclear or legally imprecise. While none of the proposed wording was taken verbatim from any existing treaty, the draft model clauses included footnotes giving examples of provisional application clauses found in treaties that referred generally to the same issue covered in the draft model clause in question, although such examples were by no means exhaustive.

[…] During the informal consultations, members were generally supportive of the proposal to include a set of draft model clauses, as an annex to the Guide to Provisional Application of Treaties, to be adopted on second reading next year. A number of suggestions were made concerning the approach to be taken to the model clauses, as well as on the drafting of the draft model clauses. For example, it was stated that the Commission should carefully explain their nature as not necessarily being definitive, but rather that they were intended to merely provide a basis for States to negotiate such clauses in their treaties. It was also suggested that a clearer distinction be drawn, in the text of the draft model clauses, between bilateral and multilateral treaties. Support was also expressed for the inclusion of draft model clauses 4 and 5, dealing with the question of opting out of provisional application arising from a resolution of an international organization, and limitations deriving from internal law of States or rules of international organizations, respectively. Indeed, the accompanying commentary would need to provide clear explanations.

[…] The concern was also expressed, during the informal consultations, that the inclusion of a set of draft model clauses could be interpreted as the Commission encouraging States to resort to provisional application. In the view of the Special Rapporteur, such concern had existed from the very beginning of the work on the topic. The very fact of clarifying the applicable rules could be understood as facilitating the provisional application of treaties. However, this was not necessarily the only possible interpretation. It was recalled that there already existed a significant body of practice of States resorting to provisional application from even before the 1969 Vienna Convention on the Law of Treaties, and especially so since the adoption of article 25 of that Convention. The Commission had decided to undertake the topic in order to provide a service to the Member States by seeking to clarify the legal

framework for provisional application as well as some of the legal consequences arising therefrom. At all times, the optional and voluntary nature of provisional application had been emphasized. The draft model clauses would simply be provided to facilitate drafting in those situations where negotiating parties decided to resort to the mechanism of provisional application."[330]

B. Comments and observations received

125. The vast majority of the States that commented on the possibility of supplementing the draft Guide with a set of model clauses before the Special Rapporteur circulated the 2019 version expressed support for this initiative, taking the view that such model clauses could usefully supplement the guidelines and provide a reference for States and international organizations.[331]

126. After the 2019 version, contained in the Commission's report to the General Assembly on the work of its seventy-first session, was brought to the attention of States and international organizations, the broad support for the idea of including model clauses in an annex to the draft Guide was confirmed.[332] The United States,[333] however, expressed doubts as to the usefulness of the model clauses and suggested that the Commission simply include a list of examples drawn from existing agreements.

127. The Special Rapporteur is fully aware that the Commission has not held a real debate on the proposal that was circulated in 2019, as only a few informal consultations took place. The Special Rapporteur would therefore like to give the Commission members the opportunity to express their views on the matter. Accordingly, and in order not to prejudge the Commission's decision, he will keep his comments to a minimum, taking account of the observations received from States, which are outlined below.

(a) In accordance with some of their comments on draft guideline 9, Austria[334] and the United Kingdom[335] suggested that a new model clause or a new paragraph in draft model clause 1 be added to allow a party to terminate or suspend provisional

[330] *Ibid.*, chap. XI, paras. 278–282.

[331] Austria (A/C.6/73/SR.25, para. 4), United States (A/C.6/70/SR.25, para. 76, and A/C.6/71/SR.29, para. 74), Estonia (A/C.6/73/SR.26, para. 44), Russian Federation (A/C.6/71/SR.28, para. 15, and A/C.6/72/SR.19, para. 47), Finland (A/C.6/73/SR.24, para. 120), Greece (A/C.6/70/SR.24, A/C.6/71/SR.29, para. 27, A/C.6/72/SR.19, para. 53, and A/C.6/73/SR.27), Ireland (A/C.6/73/SR.26, para. 82), Italy (A/C.6/71/SR.20, para. 91), Kazakhstan (A/C.6/70/SR.25, para. 118), Mexico (A/C.6/72/SR.18, para. 115, and A/C.6/73/SR.25, para. 56), Norway (A/C.6/70/SR.23, para. 116, and A/C.6/71/SR.27, para. 105), Poland (A/C.6/70/SR.25, para. 25), Portugal (A/C.6/70/SR.24, para. 85, and A/C.6/73/SR.26, para. 113), United Kingdom (A/C.6/72/SR.19, para. 7, and A/C.6/73/SR.27, para. 70), Romania (A/C.6/71/SR.28, para. 24, and A/C.6/73/SR.26, para. 108), Singapore (A/C.6/73/SR.25, para. 53), Sudan (A/C.6/73/SR.28, para. 10), Sweden (A/C.6/72/SR.18, para. 61), Turkey (A/C.6/71/SR.29, para. 64) and European Union (A/C.6/73/SR.24, para. 109).

[332] Austria (A/C.6/74/SR.23 and written comments and observations received in 2019), Belarus (written comments and observations received in 2019), Chile (A/C.6/74/SR.26), El Salvador (A/C.6/74/SR.25), Slovakia (A/C.6/74/SR.23), Slovenia (A/C.6/74/SR.25 and written comments and observations received in 2019), Estonia (written comments and observations received in 2019), Philippines (A/C.6/74/SR.27), Ireland (A/C.6/74/SR.24), Italy (A/C.6/74/SR.24), Mexico (A/C.6/74/SR.25), Norway (A/C.6/74/SR.23), Peru (A/C.6/74/SR.27), United Kingdom (written comments and observations received in 2019), Romania (A/C.6/74/SR.23) and European Union (written comments and observations received in 2019).

[333] See written comments and observations received from the United States in 2019.

[334] A/C.6/74/SR.23 (Austria).

[335] See written comments and observations received from the United Kingdom in 2019.

application on notice, without linking such an action to the intention not to become a party to the treaty.

(b) Estonia,[336] the Republic of Korea[337] and the European Union[338] took the view that draft model clause 2 should allow for the possibility that a decision to apply a treaty provisionally could be taken by means of a resolution of an international organization.

(c) Austria,[339] Slovenia[340] and the European Union[341] indicated that they consider it necessary to include a model clause or a new paragraph in draft model clause 5 to make provisional application contingent on compliance with domestic legal procedures concerning the expression of consent to be bound by the treaty.

(d) In general, suggestions were made to enrich the commentaries to the draft model clauses by including additional examples of the most recent practice of some States.

128. In the light of the foregoing, the Special Rapporteur has proposed some amendments to the draft model clauses, as set out in annex II to the present report.

III. Final form of the Commission's output

129. As the Special Rapporteur suggested in his first report, and as States have agreed in their written and oral comments, it is proposed that the final outcome of the Commission's work on the present topic consist of two elements: (a) a set of guidelines with commentaries adopted by the Commission, which, together with a set of model clauses with commentaries also adopted by the Commission, would constitute the Guide to Provisional Application of3 Treaties; and (b) a bibliography.

130. The Special Rapporteur proposes that the Commission recommend that the General Assembly:

(a) *Take note* of the Guide to Provisional Application of Treaties of the International Law Commission in a resolution, annex the Guide to the resolution and encourage its widest possible dissemination;

(b) *Commend* the Guide, and the commentaries thereto, to the attention of States and international organizations;

(c) *Request* the Secretary-General to prepare a volume of the *United Nations Legislative Series* compiling the practice of States and international organizations in the provisional application of treaties, as furnished by the latter over the years, together with other materials relevant to the topic.

131. The Special Rapporteur is currently updating the bibliography that was annexed to his fifth report.[342] A revised version will be circulated informally at the Commission's next session, and will then, as amended in the light of the suggestions received, be issued as annex III to the present report.

[336] See written comments and observations received from Estonia in 2019.
[337] A/C.6/73/SR.27, para. 82 (Republic of Korea).
[338] See written comments and observations received from the European Union in 2019.
[339] A/C.6/74/SR.23 (Austria).
[340] A/C.6/74/SR.25 (Slovenia); see also written comments and observations received from Slovenia in 2019.
[341] See written comments and observations received from the European Union in 2019.
[342] A/CN.4/718/Add.1.

Annex I

Guidelines adopted by the Commission on first reading in 2018, with changes recommended by the Special Rapporteur

Guideline 1. Scope

The present draft guidelines concern the provisional application of treaties *by States and international organizations*.

Guideline 2. Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

Guideline 3. General rule

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

Guideline 4. Form of agreement

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

(a) a separate treaty; or

(b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, *if such resolution has not been opposed by the State concerned*, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

Guideline 5. Commencement of provisional application

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

Guideline 6. Legal effect of provisional application

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

Guideline 7. Reservations

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

2. In accordance with the relevant rules of international law, an international organization may, when agreeing to the provisional application of a treaty or a part of

a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

Guideline 8. Responsibility for breach

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

Guideline 9. Termination and suspension of provisional application

1. The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization *so* notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally, ~~of its intention not to become a party to the treaty~~ *irrespective of the reason for such termination*.

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

4. *Unless the treaty otherwise provides or it is otherwise agreed, the termination of the provisional application of a treaty or a part of a treaty does not affect any right, obligation or legal situation created through such provisional application prior to its termination.*

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

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

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

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

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

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

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

The present draft guidelines are without prejudice to the right of a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization.

Annex II

Draft model clauses, with changes recommended by the Special Rapporteur

Commencement and termination

Draft model clause 1

1. This Treaty [article (s)…] shall apply provisionally[1] from the date of signature[2] [or from X date],[3] unless[4] a State [an international organization] notifies the other State [international organization] [Depositary] at the time of signature [or any other time agreed upon] that it does not consent to be bound by such provisional application.[5]

2. The provisional application of this Treaty [or article (s)...] shall terminate upon its entry into force[6] for a State [an international organization] that is applying it [them] provisionally or if that State [international organization] *so* notifies the other State

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[1] Protocol to the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, to take account of the accession of the Republic of Croatia to the European Union (Brussels, 17 December 2014), *Official Journal of the European Union*, L 373, 31 December 2014, p. 3, art. 4, para. 3 ("This Protocol shall apply provisionally…"); Agreement between the European Community and the Government of the Kyrgyz Republic on certain aspects of air services (Brussels, 1 June 2007), *ibid.*, L 179, 7 July 2007, p. 39, art. 9, para. 2 ("… the Parties agree to provisionally apply this Agreement…"); Agreement relating to the Treaty between the Swiss Confederation and the Principality of Liechtenstein relating to environmental taxes in the Principality of Liechtenstein (Berne, 29 January 2010), United Nations, *Treaty Series*, vol. 2763, No. 48680, p. 247, art. 12, para. 1 ("…this Agreement shall apply provisionally…"); Council Decision of 18 November 2002 on the signature and provisional application of certain provisions of an Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (2002/979/EC), *Official Journal of the European Communities*, L 352, 30 December 2002, p. 1, art. 2 ("The following provisions of the Association Agreement shall be applied on a provisional basis pending its entry into force …"); Economic Community of West African States (ECOWAS), Protocol A/P.1/12/99 relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (Lomé, 10 December 1999), art. 57 ("This Protocol shall enter into force provisionally upon signature…"); ECOWAS, Supplementary Protocol A/SP.1/01/06 amending articles VI-C, VI-I, IX-8, XI-2 and XII of Protocol A/P.2/7/87 on the Establishment of the West African Health Organization (WAHO), art. 2 ("This Protocol shall enter into force provisionally upon signature…"); ECOWAS, Supplementary Protocol A/SP.1/06/06 amending the Revised ECOWAS Treaty, art. 4 ("The present Supplementary Protocol shall enter into force provisionally upon signature…"); ECOWAS, Supplementary Protocol A/SP.2/06/06 amending article 3, paragraphs 1, 2 and 4, article 4, paragraphs 1, 3 and 7, and article 7, paragraph 3, of the Protocol on the Community Court of Justice, art. 8 ("This Supplementary Protocol shall come into force provisionally upon its signature…").

[2] 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 (Moscow, 29 March 1996), United Nations, *Treaty Series*, vol. 2014, No. 34547, p. 15, art. 26; Statutes of the Community of Portuguese-speaking Countries (Lisbon, 17 July 1996), *ibid.*, vol. 2233, No. 39756, p. 207; Agreement concerning permission for the transit of Yugoslav nationals who are obliged to leave the country (Berlin, 21 March 2000), *ibid.*, vol. 2307, No. 41137, p. 3, art. 7, para. 4; Agreement establishing the "Karanta" Foundation for support of non-formal education policies and including in annex the Statutes of the Foundation (Dakar, 15 December 2000), *ibid.*, vol. 2341, No. 41941, p. 3, art. 8; International Cocoa Agreement, 1972 (Geneva, 21 October 1972), *ibid.*, vol. 882, No. 12652, p. 67, art. 66; Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea (Honolulu, 13 August 2004), *ibid.*, vol. [not yet published], No. 51490, art. 17, para. 2 (text available at https://treaties.un.org).

[international organization] [Depositary] [of its intention not to become a party to the Treaty].[7]

[3] International Coffee Agreement, 1994 (London, 30 March 1994), United Nations, *Treaty Series*, vol. 1827, No. 31252, p. 3, art. 40, para. 2; International Tropical Timber Agreement, 1994 (Geneva, 26 January 1994), *ibid.*, vol. 1955, No. 33484, p. 81, art. 41, para. 2; Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (Brussels, 21 March 2014), *Official Journal of the European Union*, L 161, 29 May 2014, p. 3; International Coffee Agreement, 1968 (open for signature at New York from 18 to 31 March 1968), United Nations, *Treaty Series*, vol. 647, No. 9262, p. 3, art. 62, para. 2; International Coffee Agreement, 1976 (London, 3 December 1975), *ibid.*, vol. 1024, No. 15034, p. 3, art. 61, para. 2; International Coffee Agreement, 1983 (London, 16 September 1982), *ibid.*, vol. 1333, No. 22376, p. 119, art. 61, para. 2; Agreement relating to the Treaty between the Swiss Confederation and the Principality of Liechtenstein relating to environmental taxes in the Principality of Liechtenstein (see footnote 1 above), art. 12, para. 1 ("Like the Treaty, this Agreement shall apply provisionally as of…").

[4] Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part (Astana, 21 December 2015), *Official Journal of the European Union*, L 29, 4 February 2016, p. 3, art. 281, para. 5 ("unless otherwise specified therein, shall apply provisionally").

[5] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (New York, 28 July 1994), United Nations, *Treaty Series*, vol. 1836, No. 31364, p. 3, art. 7; Exchange of notes of 17 June 1979 constituting an agreement for the provisional application of the Convention on International Land Transport and the annexes thereto, signed at Mar del Plata on 10 November 1977 (available on the website of the Ministry of Foreign Affairs of Peru, Directorate-General for Treaties: https://apps.rree.gob.pe/portal/webtratados.nsf/Tratados_Bilateral.xsp?action=openDocument&documentId=E0F2); Protocol on the Provisional Application of the Agreement establishing the Caribbean Community Climate Change Centre (Belize City, 5 February 2002), United Nations, *Treaty Series*, vol. [not yet published], No. 51181 (text available at https://treaties.un.org); Protocol on the Provisional Application of the Revised Treaty of Chaguaramas (Nassau, 5 July 2001), *ibid.*, vol. 2259, No. 40269, p. 440; Agreement on the provisional application of certain provisions of Protocol No. 14 [to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention] pending its entry into force (Agreement of Madrid) (Madrid, 12 May 2009), Council of Europe, *Treaty Series*, No. 194; available at https://rm.coe.int/1680083718.

[6] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (see footnote 5 above) and the annex thereto, on costs to States parties and institutional arrangements; International Cocoa Agreement, 1986 (Geneva, 25 July 1986), United Nations, *Treaty Series*, vol. 1446, No. 24604, p. 103, art. 69, para. 2 ("It shall remain a provisional member until the date of deposit of its instrument of ratification, acceptance, approval or accession"); Agreement of Madrid (see footnote 5 above), para. e ("the provisional application of the above-mentioned provisions of Protocol No. 14 will terminate upon entry into force of Protocol No. 14 or if the High Contracting Parties in some other manner so agree").

[7] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331; Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the implementation of air traffic controls by the Federal Republic of Germany above Dutch territory and concerning the impact of the civil operations of Niederrhein Airport on the territory of the Kingdom of the Netherlands (Berlin, 29 April 2003), *ibid.*, vol. 2389, No. 43165, p. 117; Agreement between Spain and the International Oil Pollution Compensation Fund (London, 2 June 2000), *ibid.*, vol. 2161, No. 37756, p. 45; Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea (see footnote 2 above); 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, art. 41, para. 1; Energy Charter Treaty (Lisbon, 17 December 1994), *ibid.*, vol. 2080, No. 36116, art. 45, para. 3 (a) ("Any signatory may terminate its provisional application of this Treaty by written notification to the Depositary of its intention not to become a Contracting Party to the Treaty"); Association Agreement between the

Form of agreement

Draft model clause 2

This Treaty [or article (s)…] can be provisionally applied in accordance with the provisions of a separate agreement to that effect.[8]

Opt in/Opt out[9]

Draft model clause 3

A State [An international organization] that is not a negotiating State [international organization] of this Treaty may declare that it will provisionally apply it [or article (s)…], provided that the negotiating States [international organizations] accept such declaration.

European Union and its Member States, of the one part, and Ukraine, of the other part (see footnote 3 above), art. 486, para. 7 ("Either Party may give written notification to the Depositary of its intention to terminate the provisional application of this Agreement"); Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations (Washington, D.C., 17 May 2011), *Official Journal of the European Union*, L 143, 31 May 2011, p. 2, art. 10, para. 5 ("Either party may terminate this Agreement upon six months' written notice to the other Party"); Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part (see footnote 4 above), art. 281, para. 10 ("Either Party may terminate the provisional application by means of a written notification delivered to the other Party through diplomatic channels"); ECOWAS, Energy Protocol (A/P.4/1/03), art. 40, para. 3 (a) ("Any signatory may terminate its provisional application of this Protocol by written notification to the Depository of its intention not to become a Contracting Party to the Protocol."); 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*, L 127, 14 May 2011, p. 6, art. 15.10, para. 5 (c) ("A Party may terminate provisional application by written notice to the other Party. Such termination shall take effect on the first day of the month following notification"); Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the implementation of air traffic controls by the Federal Republic of Germany above Dutch territory and concerning the impact of the civil operations of Niederrhein Airport on the territory of the Kingdom of the Netherlands (see footnote 7 above), art. 16, para. 3 ("Its provisional application shall be terminated if one of the Contracting Parties declares its intention not to become a Contracting Party"); Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea (see footnote 2 above), art. 17, para. 3 ("This Agreement may be terminated by either Party upon written notification of such termination to the other Party through the diplomatic channel, termination to be effective one year from the date of such notification"); ECOWAS, Energy Protocol (A/P.4/1/03) (see footnote 7 above), art. 40, para. 3 (a) ("Any signatory may terminate its provisional application of this Protocol by written notification to the Depository of its intention not to become a Contracting Party to the Protocol").

[8] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (see footnote 5 above), art. 7; Agreement of Madrid (see footnote 5 above); International Wheat Agreement, 1986 (London, 14 March 1986), United Nations, *Treaty Series*, vol. 1429, No. 24237, p. 71, art. 28 (which refers to a decision "by mutual consent"); Havana Charter for an International Trade Organization (1947) (E/CONF.2/78), art. 23, para. 1 (d) ("Any Member which before July 1, 1948 has signed the Protocol of Provisional Application…").

[9] For draft guideline 3 (General rule), it was decided that the possibility of resorting to provisional application should not be restricted to the "negotiating States" (or negotiating international organizations) and that this possibility should be left open to "the States or international organizations concerned". In order not to create a presumption that non-negotiating States and international organizations are generally permitted to be bound by the provisional application of a treaty or a part of a treaty, there is a requirement that negotiating States must accept it, as

Draft model clause 4

A State [An international organization] may declare that it will not provisionally apply a treaty [or article (s)…] when the decision on its [their] provisional application results from a resolution of [X international organization or X intergovernmental conference] to which that State [international organization] does not agree.

Limitations deriving from internal law of States or rules of international organizations[10]

Draft model clause 5

A State [An international organization] may at the time of expressing its agreement to the provisional application of this Treaty [article (s)…] [or any other time agreed upon] notify the other State [international organization] [Depositary] of

established in draft guideline 4 (Form of agreement), paragraph (b). This is what draft model clause 3 is intended to address.

Draft guideline 4 allows also for a resolution adopted by an international organization or at an intergovernmental conference to serve as a means of agreeing on the provisional application of a treaty or a part of a treaty. The following examples may be cited in this regard: Council Decision of 25 June 2012 on the signing, on behalf of the European Union, of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, and the provisional application of Part IV thereof concerning trade matters (2012/734/EU), *Official Journal of the European Union*, L 346, 15 December 2012, p. 1, art. 3; Council Decision of 18 November 2002 on the signature and provisional application of certain provisions of an Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (2002/979/EC) (see footnote 1 above), art. 2; Council Decision of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII thereof, as well as the related Annexes and Protocols (2014/668/EU), *Official Journal of the European Union*, L 278, 20 September 2014, p. 1, art. 4; Council Decision of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (2014/494/EU), *ibid*., L 261, 30 August 2014, p. 1, art. 3; Council Decision of 10 May 2010 on the signing, on behalf of the European Union, and provisional application of the Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part (2013/40/EU), *ibid*., L 20, 23 January 2013, p. 1, art. 2. Without prejudice to the rules of decision-making applicable to an international organization or intergovernmental conference in a specific situation or to the question of whether a resolution has binding character, the voluntary nature of provisional application may call for an opt-out clause in case a State or international organization does not agree with such resolution. Draft model clause 4 addresses that situation.

[10] A number of multilateral treaties refer to the internal law of the States concerned. Examples include the following: Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea (see footnote 5 above), art. 7, para. 2; Agreement on Collective Forces of Rapid Response of the Collective Security Treaty Organization (Moscow, 14 June 2009), United Nations, *Treaty Series*, vol. 2898, No. 50541, p. 277, art. 17; Trans-Pacific Strategic Economic Partnership Agreement (Wellington, 18 July 2005), *ibid.*, vol. 2592, No. 46151, p. 225, art. 20.5, para. 3; International Grains Agreement, 1995 (including the Grains Trade Convention, 1995, and the Food Aid Convention, 1995) (London, 7 and 5 December 1994), *ibid.*, vol. 1882, No. 32022, p. 195, art. 26; Food Aid Convention, 1999 (London, 13 April 1999), *ibid.*, vol. 2073, No. 32022, p. 135, art. XXII (c) (Signature and Ratification) and art. XXIII (c) (Accession); International Coffee Agreement, 1994 (see footnote 3 above), art. 40 (Entry into force), paras. 2 and 3; International Tropical Timber Agreement, 2006 (Geneva, 27 January 2006), United Nations, *Treaty Series*, vol. 2797, No. 49197, p. 75, art. 38 (Notification of provisional application); and International Coffee Agreement, 2001 (London, 28 September 2000), *ibid.*, vol. 2161, No. 37769, p. 308, art. 45 (Entry into force), para. 2.

any limitations deriving from its internal law,[11] *including those relating to requirements for the expression of consent to be bound by a treaty*, [the rules of the international organization] that would affect compliance by that State [international organization] with such provisional application.

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[11] Energy Charter Treaty (see footnote 7 above), art. 45, para. 2 (c) ("to the extent that such provisional application is not inconsistent with its laws or regulations"); Protocol of Provisional Application of the General Agreement on Tariffs and Trade (Geneva, 30 October 1947), United Nations, *Treaty Series*, vol. 55, No. 814, p. 308, para. 1 ("undertake… to apply provisionally…to the fullest extent not inconsistent with existing legislation"); International Natural Rubber Agreement, 1979 (Geneva, 6 October 1979), *ibid.*, vol. 1201, No. 19184, p. 191, art. 60, para. 2 ("a Government may provide in its notification of provisional application that it will apply this Agreement only within the limitations of its constitutional and/or legislative procedures"); Sixth International Tin Agreement (Geneva, 26 June 1981), *ibid.*, vol. 1282, No. 21139, p. 293, art. 53, para. 1 ("will, within the limitations of its constitutional and/or legislative procedures, apply this Agreement provisionally…"); Agreement on Air Transport between Canada and the European Community and its Member States (Brussels, 17 December 2009), *Official Journal of the European Union*, L 207, 6 August 2010, p. 32, art. 23, para. 2 ("in accordance with the provisions of domestic law of the Parties"); Decision of the Council and of the representatives of the Governments of the Member States, meeting within the Council, of 15 October 2010 on the signature and provisional application of the Common Aviation Area Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part (2012/708/EU), *ibid.*, L 321, 20 November 2012, p. 1, art. 2 ("in accordance with their internal procedures and/or domestic legislation as applicable"); Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (see footnote 3 above), art. 486, para. 3 ("in accordance with their respective internal procedures and legislation as applicable"); Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part (see footnote 4 above), art. 281, para. 3 ("may apply this Agreement […] in accordance with their respective internal procedures and legislation, as applicable"); Euro-Mediterranean Aviation Agreement between the European Community and its Member States, of the one part and the Kingdom of Morocco, of the other part (Brussels, 12 December 2006), *Official Journal of the European Union*, L 386, 29 December 2006, p. 57, art. 30 ("in accordance with the national laws of the Contracting Parties, from the date of signature"); ECOWAS, Energy Protocol (A/P.4/1/03) (see footnote 7 above), art. 40, para. 1 ("to the extent that such provisional application is not inconsistent with its constitution, laws or regulations"); Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (Brussels, 27 June 2014), *Official Journal of the European Union*, L 260, 30 August 2014, p. 4, art. 464, para. 3 ("in accordance with their respective internal procedures and legislation, as applicable"); Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (see footnote 5 above), art. 7, para. 2 ("All such States and entities shall apply this Agreement provisionally in accordance with their national or internal laws and regulations").