



Following the letter from Mr Miguel de Serpa Soares (Ref. LA/COD/66), Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, the Council of Europe would like to hereby submit its comments and observations on the draft *Guide to Provisional Application of Treaties* adopted, on first reading, by the International Law Commission (ILC) at its 70th Session in 2018 (document A/73/10, pages 201 to 223).

The Council of Europe would like to convey its gratitude to the Special Rapporteur, Mr Juan Manuel Gómez Robledo, for the preparation of five Reports on the analysis of the provisional application of treaties based on the existing rules of international law – in particular Article 25 of both the *Vienna Convention on the Law of Treaties* of 1969 and the *Vienna Convention on the law of Treaties between States and International Organisations or between International Organisations* of 1986- in the light of contemporary practice.

We would also like to express our appreciation and underline the importance of the third *Memorandum*¹, prepared by the Secretariat, reviewing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General of the United Nations, that provide for provisional application, including treaty actions related thereto which was considered by the ILC last year.

In addition, we would like to express our appreciation to the Special Rapporteur for including in its Fifth Report several Council of Europe examples of provisional application of treaties. In this respect, we would like to suggest to include in the final *Guide to Provisional Application of Treaties*, to be adopted by the ILC, those examples already contained in the above-mentioned fifth Report.

¹ ILC, Provisional application of treaties, Memorandum by the Secretariat on the practice of States and international organisations in respect of treaties that provide for provisional application, [A/CN.4/707](#), 24 March 2017.

Turning to our specific comments and observations on the *draft Guide to Provisional Application of Treaties and commentaries thereto*, we would be very grateful for the ILC's consideration of the following points:

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

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

2. **Draft Guideline 3, paragraphs (3) and (7) of the Commentary**, refer to the provisional application of a treaty by a third State. The ILC acknowledges that provisional application of a treaty, "arising from contemporary practice", may be undertaken by States that are not negotiating States and/or are not connected to the treaty in question.

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

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

3. Concerning **draft Guidelines number 4 and 9**, we would be very grateful if the two references to the Madrid Agreement in relation to *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the control system of the Convention* (CETS No. 194), which appear in [footnotes 1018 and 1032](#), respectively, could mention that this is a Protocol to the *European Convention on Human Rights*, for the sake of clarity, even if it is not included in the official title of the Madrid Agreement. The text could

therefore read as follows: “[...] the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 [*to the European Convention on Human Rights*] Pending its Entry into Force).

4. **Draft Guideline 12, paragraph (3) of the Commentary** focuses on the fact that provisional application might not be possible under the internal law of States or the rules of international organisations. Footnote 1048 provides examples as regards the different clauses used in several Free Trade Agreements (e.g. “if its constitutional requirements permit”, “if their domestic requirements permit”). We would like to propose to add an example concerning an international organisation, namely the *General Agreement on Privileges and Immunities of the Council of Europe* (ETS No. 2) and its Article 22 on the possible provisional application of this Agreement by its signatories (from the date of signature and pending its entry into force) “so far as it is possible to do so under their respective constitutional systems”. A similar clause is found in Article 17 of the *Convention on the Elaboration of a European Pharmacopoeia* (ETS No. 50), whereby the signatories agree to provisionally apply the Convention “in conformity with their respective constitutional systems”.

5. Furthermore, we would like to provide you with the following additional information as regards the latest developments in the Council of Europe in relation with the provisional application of treaties:

- Article 5 of the *Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons* (CETS No. 222), not yet in force, provides that Parties to the Additional Protocol may declare (at the time of ratification, acceptance or approval of this Protocol or at any later moment) that they “will apply the provisions of this Protocol on a provisional basis”. The Protocol has currently 13 signatories and one ratification by the Holy See, on 15 January 2019. The Holy See made a Declaration “acting in the name and on behalf of Vatican City State”, stating that pending the entry into force of this Protocol, “it will apply its provisions on a provisional basis with respect to all other State Parties that make a declaration to the same effect”.

The Council of Europe avails itself of this opportunity to renew to the International Law Commission of the United Nations the assurances of its highest consideration.