

Written contribution of the European Union on the draft guidelines on provisional application of treaties, as adopted on first reading by the International Law Commission at its 70th session, as well as on the draft model clauses on provisional application of treaties, contained in annex A to the ILC Report on the work of its seventy-first session (A/74/10)

1. In its Report on the work of its seventy-first session (A/74/10), the International Law Commission recalled its request for written comments and observations from Governments and international organisations including comments and observations on the draft model clauses on provisional application of treaties, contained in annex A to that report. The European Union has the honor to present the following comments:
2. A first general comment to start with: in its previous oral contribution, the European Union noted with appreciation that the Special Rapporteur and the ILC, with the support of the Secretariat, had embarked on an extensive study of States and international organisations practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application. While the European Union commends the ILC for this essential study, it notes that this study does not analyze States and international organisations' rules/legislations and case law on provisional application which are key in supplementing the rules contained in the 1969 Vienna Convention and in addressing the meaning and sources of provisional application. The EU is conscious of the complexity of undertaking such thorough analysis but it would encourage the Special Rapporteur to consider examining the practice of a few States, from the main legal systems, and of the most relevant international organisations. This work will undoubtedly help elucidate some of the outstanding issues, including the ones raised below.
3. Turning now to the five draft model clauses, the European Union notes with appreciation that by inserting them the "Commission would seek to reflect the best practice with regard to the provisional application of both bilateral and multilateral treaties" and that these model clauses would in no way "be intended to limit the flexible and voluntary nature of provisional application of treaties". While the commentaries already provide for extensive references to treaty provisions, the European Union shares the view that draft model clauses may constitute a useful tool for treaty negotiators.

However, if the ambition is to have a practical tool, a certain degree of completeness is needed. For instance, the current draft model clauses do not contain any provision reflecting the situation where provisional application is agreed through a resolution adopted by an international organisation or at an intergovernmental conference. Furthermore, the draft model clauses should include a provision providing for provisional application not only from the date foreseen in the treaty, but also from a later date once the state concerned notifies that its internal procedures necessary for provisional application have been complied with. This should apply to non-negotiating states and to negotiating states alike.

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