



Berlin, December 12, 2019

**Comments and Observations by Germany  
on the Draft Guide to Provisional Application of Treaties,  
Adopted by the International Law Commission on First Reading**

- 1 With reference to the decision by the International Law Commission (hereinafter referred to as “ILC” or “the Commission”) taken at its 3441st meeting on August 2, 2018, Germany avails herself of the opportunity to submit the following comments and observations on the Draft Guide to Provisional Application of Treaties, adopted by the Commission on first reading.

## Introductory Observations

- 2 Germany wishes to express appreciation for the Commission's work on the complex matter of provisional application of treaties and the draft guidelines which will form a comprehensive manual for the practice of States and international organizations.
- 3 While it is indisputable that provisional application of treaties is a long-established legal instrument and often used by States and international organizations, several legal questions merit an in-depth analysis. Germany therefore considers a guide on handling provisional application of treaties to be a useful tool in treaty practice as a compact set of rules applied by the majority of States helping to achieve greater legal certainty and predictability.
- 4 Article 25 of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (not yet in force) forms the basic rule for provisional application of treaties. This remains so even once the guidelines will be adopted. The draft guidelines are mainly based on that article, and the central importance of Article 25 of the 1969 and the 1986 Vienna Conventions is also recognized in the commentary of Guideline 2.<sup>1</sup> While this provision constitutes a provision of customary law<sup>2</sup> and provides clear instructions, it remains silent on several important matters. For example, the decision on the scope and conditions of provisional application is left with the contracting parties.<sup>3</sup> This is, given the intended flexible nature of provisional application, entirely acceptable. Consistent standards might, however, provide valuable support to contracting parties.
- 5 Germany would like to point out that a provision on provisional application is not considered a routine clause to be included in every treaty, and to underline the importance of carefully assessing international needs of urgency in regulating a certain situation as a prime reason necessitating provisional application and national limits thereto emanating

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<sup>1</sup> ILC: *Report of the International Law Commission. Seventieth Session (30 April–1 June and 2 July–10 August 2018)*. New York NY: United Nations, 2018; Commentary 4 on Guideline 2, at p. 208.

<sup>2</sup> Mark E. Villiger: *Commentary on the 1969 Vienna Convention on the Law of Treaties*. Leiden/Boston MA: Martinus Nijhoff, 2009; at p. 357 § 12.

<sup>3</sup> Heike Krieger: "Article 25 – Provisional Application"; in: Oliver Dörr, Kirsten Schmalenbach (eds.): *Vienna Convention on the Law of Treaties. A Commentary*. Berlin: Springer, 2018 (second edition); at p. 441 § 2.

from domestic legislation.<sup>4</sup> In a dualist legal system like in Germany, where treaties must be transposed or incorporated into national law to become effective, it is a typical requirement of constitutional law that the competent organ may only agree to provisional application of a treaty if national law is already in conformity with the treaty or is brought into conformity with it first.<sup>5</sup>

- 6 This plays an important role especially against the background of the legal effects of provisional application at the level of international law. The principles of *pacta sunt servanda* and State responsibility apply also to the provisional application of treaties.
- 7 Due to the principle, enshrined in the Article 25 of the German Basic Law, that general rules of international law shall be an integral part of federal law, Germany supports the possibility to apply treaties provisionally because the course of actions facilitated by the provisional application of a treaty usually helps to build confidence between the contracting parties, creates an incentive to ratify the treaty and enables the parties to take preparatory measures<sup>6</sup> and thereby serves the further development of international relations.
- 8 Germany, in particular as a Member State of the European Union, would like to underline the importance of further exploring the interaction of international and domestic law, especially in the context with the so-called mixed agreements, *i.e.* agreements between the European Union and a third party which touch both on powers or competencies exclusive to the European Union and on competencies exclusive to Member States of the European Union. This should be reflected in the draft guidelines in a more detailed manner.
- 9 With regard to an increasing appearance and importance of other subjects of international law than States, most notably of international organizations, the issue of provisional applications of treaties has become more complex.<sup>7</sup> The system of multiple levels poses new

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<sup>4</sup> Bernhard Kempen, Björn Schiffbauer: “Die vorläufige Anwendung völkerrechtlicher Verträge im internationalen Mehrebenensystem”; in: 77 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht—Heidelberg Journal of International Law* 95–124 (2017), at p. 100. – See also Lyra Jakulevičienė: *Tarptautinių sutarčių teisė*. Vilnius: Registrų centras, 2011; at p. 171–172.

<sup>5</sup> Cf. Frank Schorkopf: *Staatsrecht der internationalen Beziehungen*. Munich: C. H. Beck, 2017; at pp. 189–190 §§ 111–112.

<sup>6</sup> ILC: *United Nations Document A/CN.4/664 First Report on the provisional application of treaties prepared by Mr. Juan Manuel Gómez-Robledo, Special Rapporteur*. Geneva: United Nations, 2013; at p. 8 § 31 and p. 9 § 34. – See also *op. cit.* Bernhard Kempen and Björn Schiffbauer, see note 4 *supra*, at p. 99.

<sup>7</sup> *Op. cit.* Bernhard Kempen and Björn Schiffbauer, see note 4 *supra*, at p. 96.

challenges on this particular issue of treaty law.<sup>8</sup> Only recently this became clear to Germany in the course of the negotiations of the Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA). As the draft guidelines aim to include treaties between States and international organizations or between international organizations, special issues arising in the course of concluding international agreements with them (*e.g.* the aforementioned mixed agreements) should be taken into account.

- 10** In the “Report of the Commission to the General Assembly on the Work of Its Sixty-fifth Session” (2013), the Special Rapporteur stated that he will take limitations under domestic law into account, without considering those limitations themselves.<sup>9</sup> While this approach is plausible to Germany, it is important to note that despite this methodological choice the effects of domestic law could also affect the international level. Germany would, therefore, welcome if the aspect of the relationship between established domestic procedures and treaty law was not left out completely.
- 11** Germany is aware that the draft guidelines are conceived as general recommendations which shall facilitate treaty operations at international level. Therefore, it would be considered beneficial if the Commission decided to offer further guidance on dealing with provisional application of mixed agreements. Practice shows that especially free trade agreements tend to be applied provisionally. In this area, the legislative power rests partially with international organizations, such as the European Union, and partially with its member States, which renders mixed agreements to be a more frequently used type of treaty. In the interest of all, problems concerning mixed agreements should be taken into consideration because even if a State cannot invoke the provisions of its internal law as a justification for its failure to perform obligations arising under such provisional application,<sup>10</sup> conflicts may arise which affect the trust among the contracting parties and the will to carry out the provisional application of the respective treaty. For Germany, this is an impending issue of great importance meriting broader regard in the draft Guidelines for the reason that the treaty type of mixed agreements is apt to modify the residual character of Article 25 of

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<sup>8</sup> *Ibid.*

<sup>9</sup> ILC: *Yearbook of the International Law Commission 2013. Volume II Part Two*. New York NY: United Nations, 2018; at p. 70 § 119.

<sup>10</sup> *Op. cit.* ILC Report 2018, see note 1 *supra*, Commentaries 1–7 to Guideline 10 and Commentaries 1–4 to Guideline 11, at pp. 219–222.

the 1969 Vienna Convention on the Law of Treaties as a default rule by relieving, in part, the provisional application tool from the hands of the negotiating States.

- 12 In the case of Germany, the prime relevance of the international law on provisional application emanates from multilateral treaties. Provisional application does not play an important role for bilateral agreements.<sup>11</sup>

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<sup>11</sup> ILC: *Comments by Governments. 66th Session of the International Law Commission (2014): Federal Republic of Germany. Information regarding the “Provisional Application of Treaties” in the Commission’s Programme of Work (March 2014)*, Geneva: ILC, 2014; [http://legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/pat\\_germany.pdf&lang=E](http://legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/pat_germany.pdf&lang=E).

## Specific Comments on the Guidelines

### ***Guideline 1 – Scope***

*The present draft guidelines concern the provisional application of treaties.*

### ***Guideline 2 – Purpose***

*The purpose of the present draft guidelines is to providing 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.*

## **Comment**

- 13** Germany concurs with the approach of Guideline 3. This assessment is informed by the comments which are further elaborated on in §§ 14–20 *infra*.
- 14** (A) As stated by Germany at the Commission’s sixty-sixth session (2014), “[...] the decision to include a provision on provisional application in a treaty will depend on a legal evaluation of the treaty clauses. The question is whether compliance with the treaty requires an adaptation of national rules and regulations or whether national rules and regulations are already in keeping with the treaty obligations. In Germany, provisional application of a treaty is possible only if and to the extent national laws and regulations are compatible with treaty obligations so that the national legal situation permits fulfilment of the treaty.”<sup>12</sup>
- 15** Article 59(2) of the Basic Law of the Federal Republic of Germany provides that a treaty requires parliamentary approval if it touches upon matters that, under the constitutional distribution of powers, are to be decided by the legislature. Hence, in cases where parlia-

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<sup>12</sup> *Ibid.*

mentary approval is required, Germany will be reluctant to agree to unlimited provisional application, even if compliance technically would not pose a problem. Instead, clauses providing for “the provisional application in accordance with domestic legislation” will be included, the respective clause both indicating that provisional application might be limited and, in fact, limiting provisional application to those provisions of the treaty with which the German legal framework is compatible or for which parliamentary approval is not required (*cf.* the Agreement on the International Tracing Service of December 9, 2011). Article 59(2) of the Basic Law addresses, on the one hand, treaties of outstanding political or legal importance which govern the political relations of the Federal Republic of Germany by being of significant and immediate meaning for the existence of the State, its territorial integrity, or its independence,<sup>13</sup> and, on the other hand, treaties that concern matters of federal legislation.

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

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<sup>13</sup> Stefan Ulrich Pieper: “Artikel 59: Völkerrechtliche Vertretungsmacht”; in: Volker Epping, Christian Hillgruber (eds.): *Beck’scher Online-Kommentar Grundgesetz*. Munich: C. H. Beck, 2019 (41st edition), at § 29.

- 17** In order to implement mixed agreements, the treaty-concluding procedures of the European Union and that of the Member States have to be followed. As this requires a considerable amount of time, the question arises if, and in the affirmative which, parts of the mixed agreement may be applied provisionally without advance participation of the national parliaments. As those parts which remain under domestic jurisdiction are governed by national law as described in comment (A) in § 15 *supra*, the case may occur that those selected parts of a mixed agreement, which fall under the competence of the European Union, will become provisionally applicable, while those clauses of the mixed agreement subjecting the provisional application to the requirements of national law do not.
- 18** (C) The use of the word “may” in Guideline 3 in contrast to the wording chosen in Article 25 of the 1969 and 1986 Vienna Conventions which state that a treaty “is applied provisionally” is not self-explanatory. While it appears to be clear that the Special Rapporteur has the intention to underline the optional character of provisional application, the reason for choosing terminology which differs from the Conventions’ provision is not apparent.
- 19** (D) Opening up provisional application to non-negotiating States and international organizations is a reasonable approach as it is already contemporary practice. As René Lefebvre 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.<sup>14</sup>

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<sup>14</sup> René Lefebvre: “Treaty, Provisional Application”; in: Rüdiger Wolfrum (dir.): *Max Planck Encyclopedia of Public International Law. Volume X*. Oxford: Oxford University Press, 2012; at p. 2 § 5.



**20** (E) The question to apply a treaty provisionally normally arises during its negotiation so that a corresponding provision will be included in the treaty itself<sup>15</sup> because in general the interest to render the treaty effective as soon as possible becomes apparent at this stage. In some cases, however, the need for provisional application is not foreseen while the text of the treaty is being negotiated but is felt at a later stage. A prominent example for this is the case of Protocol No. 14 (CETS:194) of May 13, 2004 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the Control System of the Convention. The considerations regarding compatibility with national law will be the same. Determining the possibility to start provisional application “in some other manner” appears to be a useful addition in this context.

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<sup>15</sup> *Op. cit.* ILC: Comments by Governments: Germany, see note 11 *supra*.

**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 mean or arrangement, 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.*

**Comment**

- 21** Germany concurs with Guideline 4.

### ***Guideline 5 – Commencement of the provisional application***

*The provisional application of a treaty or a part of 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.*

#### **Comment**

- 22** Germany concurs with the approach of Guideline 5. This assessment is informed by the comments which are further elaborated on in §§ 23–25 *infra*.
- 23** In many cases provisional application takes effect with a signature according to Article 14(1)(c) of the Conventions.<sup>16</sup> 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.<sup>17</sup>
- 24** Furthermore, a treaty may provide for its provisional application by States that have consented to the adoption of the text of a treaty.<sup>18</sup> Another option was chosen in the context of CETA: Pursuant to Article 30.7(3)(a), the starting point of provisional application depends on the Parties notifying each other that their respective internal requirements and procedures necessary for the provisional application of this agreement have been completed or on such other date as the Parties may agree.
- 25** It emerges that the commencement of provisional application can be agreed upon in many different ways to meet divergent requirements. Guideline 5 determines no specific date and operates with a general reference to conditions and procedure which leaves agreeing on the details to the contracting parties and enables them to react with flexibility to particular situations.

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<sup>16</sup> Cf. comment (C) to Guideline 3 in § 18 *supra*.

<sup>17</sup> *Op. cit.* René Lefeber, see note 14 *supra*, at p. 2 § 5.

<sup>18</sup> *Ibid.*

### **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.*

### **Comment**

- 26 Germany concurs with the approach of Guideline 6. This assessment is informed by the comment which is further elaborated on in § 27 *infra*.
- 27 While there are several necessary differences between provisional application of a treaty and its entry into force, there are also similarities, namely that a treaty provisionally applied is binding and enforceable. The principles of *pacta sunt servanda* and of good faith shall apply on provisional application<sup>19</sup> as much as the principle of holding a State or an international organization accountable in case of a breach of an obligation arising under the treaty or a part thereof being provisionally applied.<sup>20</sup> These legal effects are inherent to provisional application so as to flank the unfolding of the legal effects of the treaty as early as possible.<sup>21</sup>

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<sup>19</sup> *Op. cit.* Heike Krieger, see note 3 *supra*, at p. 455 § 32. – See also *op. cit.* Bernhard Kempen and Björn Schiffbauer, see note 4 *supra*, at p. 101.

<sup>20</sup> *Op. cit.* Heike Krieger, see note 3 *supra*, at p. 455 § 32.

<sup>21</sup> *Op. cit.* Bernhard Kempen and Björn Schiffbauer, see note 4 *supra*, at p. 101.

### **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.*

### **Comment**

- 28** Germany concurs with the inclusion of Guideline 7 in the draft Guide. This assessment is informed by the comments which are further elaborated on in §§ 29–30 *infra*.
- 29** In several reports by the Special Rapporteur the concept of including a provision on reservations purporting to exclude or modify the legal effect produced by the provisional application was deliberated.<sup>22</sup> In spite of a lack of practice the Commission decided on that matter in favor of inclusion. The scope of Guideline 7 and especially its delimitation to Guideline 3 which already provides for a provisional application of merely a part of the treaty, require clarification. Guideline 3 enables the contracting States to exclude parts thereof. Guideline 7 can be understood as being applicable only to multilateral agreements *mutatis mutandis* in accordance with the relevant rules of the Vienna Convention on the Law of Treaties. As the Special Rapporteur could not identify relevant State practice concerning reservations in the context of provisional application,<sup>23</sup> the Commission might consider it beneficial to examine in greater detail if this Guideline does not, in fact, have a role to play in the context of mixed agreements.

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<sup>22</sup> (1) ILC: *United Nations Document A/CN.4/687\* Third Report on the provisional application of treaties prepared by Mr. Juan Manuel Gómez-Robledo, Special Rapporteur*. Geneva: United Nations, 2015; at pp. 28–29 § 137; and (2) ILC: *United Nations Document A/CN.4/699 Fourth Report on the provisional application of treaties prepared by Mr. Juan Manuel Gómez-Robledo, Special Rapporteur*. Geneva: United Nations, 2017; at pp. 6–8 §§ 22–39.

<sup>23</sup> *Op. cit.* ILC, see note 1 *supra*, Commentary 2 to Guideline 7, at p. 215.

**30** Particular reference shall be made here to Article 30.7(3)(b) of CETA which states: “If a Party intends not to provisionally apply a provision of this Agreement, it shall first notify the other Party of the provisions that it will not provisionally apply and shall offer to enter into consultations promptly. Within 30 days of the notification, the other Party may either object, in which case this Agreement shall not be provisionally applied, or provide its own notification of equivalent provisions of this Agreement, if any, that it does not intend to provisionally apply. If within 30 days of the second notification, an objection is made by the other Party, this Agreement shall not be provisionally applied.” It is contended here that mixed agreements—especially those including the European Union and its Member States—will probably be the main area of application of Guideline 7. Due to partially complex provisions on the division of competences and different proceedings of domestic legitimation within the States concerned, some States might want to exclude or condition certain provisions while others are prepared to consent to them. As has been explained in comment (B) to Guideline 3 in § 16 *supra*, mixed agreements including the European Union and its Member States, from a German point of view, can be applied provisionally without involvement of the Federal Parliament only with regard to subject-matters which are under the legislative competence of the European Union. As the Second Senate of the Federal Constitutional Court held in its Order dated December 7, 2016, it might be disputable whether a particular subject-matter is under this legislative competence.<sup>24</sup> Moreover, even if there is no issue on jurisdiction, there can be differences in the constitutional processes of legitimation in the respective Member States. Therefore, the possibility of making reservations purporting to exclude or modify the legal effect produced by the provisional application is well-grounded. The Federal Constitutional Court held that the Federal Government had employed adequate legal instruments in order to terminate provisional application or exclude critical provisions in cases in which *ultra vires* actions or the impairment of the federal constitutional system seemed possible. In spite of the constitutional permissibility of transferring sovereign powers from the Federation to the European Union, the fundamental structure of the Basic Law functions as an absolute limitation to that authority. Tasks and power of substantial weight are supposed to remain with the federal leg-

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<sup>24</sup> Federal Constitutional Court: Order of the Second Senate of December 7, 2016 in the case 2 BvR 1444/16, §§ 21–31; [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/12/rs20161207\\_2bvr144416en.html;jsessionid=F09C5AF6B2815B1BF87A10EF5ADEABBF.1\\_cid370](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/12/rs20161207_2bvr144416en.html;jsessionid=F09C5AF6B2815B1BF87A10EF5ADEABBF.1_cid370).

islator as long as democratic legitimation on the EU level is not equated with the German one.<sup>25</sup>

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<sup>25</sup> Wolff Heintschel von Heinegg: “Artikel 23: Mitwirkung bei Entwicklung der EU”; in: Volker Epping, Christian Hillgruber (eds.): *Beck’scher Online-Kommentar Grundgesetz*. Munich: C. H. Beck, 2019 (41st edition), at § 29.

***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.*

**Comment**

- 31** With reference to comment 27 *supra*, Germany concurs with Guideline 8.



### **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 an international organization 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 notifies the other States or international organizations between which the treaty or a part of the 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.*

### **Comment**

- 32** Germany concurs with the inclusion of Guideline 9 in the draft Guide. This assessment is informed by the comments which are further elaborated on in §§ 33–38 *infra*.
- 33** (A) In many cases, the provisional application of treaties to which Germany is a contracting party is terminated as a consequence of the entry into force of the treaty in question. This does not require an exchange of notes with the other party or parties to the treaty. It ends with the events announced in Germany’s official bulletins.<sup>26</sup> For multilateral treaties, provisional application ends among parties for which the treaty enters into force. However, it continues to apply among States that have not become parties unless they choose to terminate such application.<sup>27</sup>
- 34** In one case, a bilateral agreement that never entered into force but has been applied provisionally for almost 20 years is now in the process of being replaced by a new agreement. The new draft includes a provision on the termination of the provisional application of the old agreement. Apart from this case, there are no other examples of treaties that were

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<sup>26</sup> *Op. cit.* ILC: Comments by Governments: Germany, see note 11 *supra*.

<sup>27</sup> Robert E. Dalton: “Provisional Application of Treaties”; in: Duncan B. Hollis (ed.): *The Oxford Guide to Treaties*. Oxford: Oxford University Press, 2014; at p. 232.

provisionally applied by Germany and the provisional application of which was terminated without the treaty actually entering into force.<sup>28</sup>

- 35 (B) On similarities between provisional application and the entry into force of the treaty, reference is made to § 27 *supra*. However, provisional application and entry into force of a treaty must not be equated. The provisional nature is secured by the possibility to unilaterally withdraw a declaration of provisional application. In this respect, Guideline 9(2) complies with Article 25(2) of the 1969 and 1986 Vienna Conventions. This provision is necessary since otherwise the stricter regulations regarding the termination and suspension of the operations of treaties in Part V, Section 3 of the 1969 and 1986 Vienna Conventions would apply.<sup>29</sup> The notification on not becoming a party to the treaty has only an *ex nunc* effect.<sup>30</sup>
- 36 (C) Germany notes that the meaning and purpose of Guideline 9(3) requires clarification beyond the commentaries (8)–(11) to Guideline 9:<sup>31</sup>
- While the ILC considered it useful to include a provision relating to termination and suspension in the Guidelines to address a number of situations not covered by paragraphs 1 and 2—as, for instance, the situation in which a State or an international organization may only wish to terminate provisional application, but still intend to become a party to the treaty or in situations of material breach, when a State or international organization may only seek to terminate or suspend provisional application *vis-à-vis* the State or international organization that has committed the material breach, while still continuing to provisionally apply the treaty in relation to other parties and when the State or international organization affected by the material breach may also wish to resume the suspended provisional application of the treaty after the material breach has been adequately remedied—, this case is already covered by the introductory proviso in Guideline 9(2) (“unless the treaty otherwise provides or it is otherwise agreed”). This formulation permits the contracting parties to agree upon modifications of provisional application, as was done, for example, in Article 30.7(3)(c) of the CE-  
TA, providing that “a Party may terminate the provisional application of this Agree-

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<sup>28</sup> *Op. cit.* ILC: Comments by Governments: Germany, see note 11 *supra*.

<sup>29</sup> *Op. cit.* Bernhard Kempen and Björn Schiffbauer, see note 4 *supra*, at p. 102.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Op. cit.* ILC, see note 1 *supra*, Commentaries 8–11 to Guideline 9, at p. 219.

ment by written notice to the other Party.” Germany holds that a notification about the intention not to become a party to the treaty is not required for the termination of the provisional application.

- With regard to mixed agreements, the retention of the right to terminate provisional application without having recourse to the conditions of Part V, Section 3 of the 1969 and 1986 Vienna Conventions, or other relevant rules of international law concerning termination and suspension, supports Member States’ discretion unilaterally to withdraw their authorization in the Council of the European Union to provisional application. As the Second Senate of the Federal Constitutional Court held in its Order of December 7, 2016 in the case 2 BvR 1444/16, this right must not be curtailed, in particular if it is controversial whether a certain area of legislation falls within the jurisdiction of the EU or one of its Member States. This is contextualized in the case when, after an authorization by a Council Decision under Article 218(5) of the TFEU to apply a treaty or a part thereof provisionally, assuming it belonged to the exclusive jurisdiction of the EU, it turns out that in fact it lies within the competence of the Member States.<sup>32</sup>

**37** With particular regard to mixed agreements Germany attaches great importance to the possibility to terminate provisional application without having to oblige to the stricter conditions of Part V, Section 3 of the 1969 and 1986 Vienna Conventions or other relevant rules of international law concerning termination and suspension. The Federal Constitutional Court ruled in the case 2 BvR 1444/16 that the Federal Government is obliged to ensure that it can withdraw its authorization in the European Council to provisional application unilaterally,<sup>33</sup> if it is disputed whether a certain area of legislation falls within the jurisdiction of the EU or of its Member States. Furthermore, in cases in which the German constitutional identity could possibly be affected it is essential for Germany to be able to withdraw from provisional application unilaterally without needing to state expressly that she does not intend to be become a part of the treaty.

**38** The application of Guideline 9(3) can result in a *de facto* equal status of provisional application and entry into force of a treaty. A binding effect of such kind which may have

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<sup>32</sup> *Op. cit.* Federal Constitutional Court, see note 24 *supra*.

<sup>33</sup> *Ibid.*

been materialized as a consequence of an *ultra vires* act or which touches upon the constitutional identity of Germany is hardly agreeable.

***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 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.*

**Comment**

- 39** Germany concurs with the approach of Guideline 10. This assessment is informed by the comments which are further elaborated on in §§ 40–42 *infra*.
- 40** Once a State or an international organization declared to apply a treaty provisionally according to international law, it may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application unless a limitation deriving from the internal law of the State or from the rules of the organization in the meaning of Guideline 12 applies.
- 41** However, international law in many instances leaves it to the States and international organizations to decide upon a conflict of laws internally. Thus, national law may be prioritized over international law. Conflicting rules are certainly undesirable, not least in view of potential issues of international liability that may be raised as a result of the choices of application made in such a conflict. Applying rules which are inconsistent with international law will in general violate the principle, enshrined in the Article 25 of the German Basic Law, that general rules of international law shall be an integral part of federal law. According the jurisprudence of the German Constitutional Court, this principle serves as a guideline for the interpretation of the Basic Law and other national law.<sup>34</sup> Although the principle has constitutional rank, it does not entail an unreserved constitutional duty to

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<sup>34</sup> Federal Constitutional Court: Order of the Second Senate of December 15, 2015 in the case 2 BvL 1/12, at § 64; [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/lS20151215\\_2bvl000112en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/lS20151215_2bvl000112en.html).

comply with all rules of international law.<sup>35</sup> Article 59(2) of the Basic Law determines that domestically, international treaties enjoy only the rank of an ordinary federal statute. The principle of openness to international law changes neither this classification in terms of rank nor the resulting applicability of the principle of *lex posterior*.<sup>36</sup>

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

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<sup>35</sup> *Ibid.*, at §§ 67 and 69.

<sup>36</sup> *Ibid.*, at § 74.

***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.*

**Comment**

- 43 Germany concurs with the approach of Guideline 11. This assessment is informed by the comments which are further elaborated on in §§ 44–45 *infra*.
- 44 This Guideline is modelled after Article 46 of the 1969 and 1986 Vienna Conventions which is also applies to provisional application. As the Commission explains, “[d]raft guideline 11 provides that any claim that the consent to provisional application is invalid must be based on a manifest violation of the internal law of the State or the rules of the organization regarding their competence to agree to such provisional application and, additionally, must concern a rule of fundamental importance. If an organ expresses consent without having the competence to do so, the state or international organization will either have to comply with the treaty or have to face liability.”<sup>37</sup> With reference to mixed agreements, Germany notes that potential conflicts and unsettled legal qualifications with respect to the issue whether legislative power has been transferred to the European Union might render the application of the constituent element “manifest violation” in Guideline 11 problematic as it does not rule out the possible legal effect for Member States to be bound by an *ultra vires* act of the European Union which does not manifestly violate internal rules.

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<sup>37</sup> *Op. cit.* ILC, see note 1 *supra*, Commentary 3 to Guideline 11, at p. 222.

45 The standard defining a violation as manifest, if “it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States or, as the case may be, of international organizations and in good faith,”<sup>38</sup> is not *per se* rejectable. In the context of mixed agreements, it will often entail that the risk of legal conflicts and unsettled legal qualifications with respect to the issue whether legislative power has been transferred to the European Union will shift towards the Member States due to the fact that a third party will hold that it is objectively non evident whether the rules of the European Union—although constituting international law themselves—have been violated or not.

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<sup>38</sup> *Ibid.*, Commentary 4 to Guideline 11, at p. 222.



***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 the 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.*

**Comment**

- 46 Germany welcomes the approach of Guideline 12.
- 47 This Guideline clarifies that provisional application can be made dependent upon the fulfillment of requirements of internal law of the State or of the rules of an international organization. As mentioned in comment (A) to Guideline 3 in § 15 *supra*, Article 59(2) of the Basic Law of the Federal Republic of Germany provides that a treaty requires parliamentary approval if it touches upon matters that, under the constitutional distribution of powers, are to be decided by the legislature. Hence, in cases where parliamentary approval is required, Germany will be reluctant to agree to unlimited provisional application, even if compliance technically would not pose a problem. Instead, clauses providing for “provisional application in accordance with domestic legislation” will be included, the respective clause both indicating that provisional application might be limited and, in fact, limiting provisional application to those provisions of the treaty with which the German legal framework is compatible or for which parliamentary approval is not required.
- 48 Guideline 12 refers to treaties that concern matters of federal legislation.<sup>39</sup> It states that Guidelines 10 and 11 notwithstanding it is possible to opt out of provisional application as was done in the case of the 1994 Energy Charter Treaty. In case of conflict, national law will thus prevail.<sup>40</sup>

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<sup>39</sup> Cf. Section 12(9) of the “Federal Foreign Office Guidelines for Processing International Agreements,” an administrative regulation binding upon the authorities of the Federal Government; in: Auswärtiges Amt: *Richtlinien für die Behandlung völkerrechtlicher Verträge (RvV) gemäß § 72 Absatz 6 der Gemeinsamen Geschäftsordnung der Bundesministerien*. Berlin: Auswärtiges Amt, 2019; at p. 29.

<sup>40</sup> (1) *Op. cit.* Heike Krieger, see note 3 *supra*, at p. 457 § 37; and (2) *op. cit.* René Lefeber, see note 14 *supra*, at p. 3 § 13.