

Comments by Slovenia on the text of the draft Guide to Provisional Application of Treaties (the Guide), adopted by the International Law Commission (ILC) on first reading (doc. A/73/10), as well as on the draft model clauses on the provisional application of treaties (doc. A/74/10)

As a preliminary comment, Slovenia would like to renew its continued support to the Special Rapporteur and the ILC for the work on this topic of great practical value to States and international organisations.

With regard to the Guide and model clauses, Slovenia would first like to express its general support to comments made by the European union with regard to the Guide and model clauses, and would like to add the following comments:

1. Comments on the Guide

Guideline 1

Since this guideline relates to scope, we believe that it would be relevant to address either in the Guideline itself or in its commentary the relations between "provisional application" and "provisional entry into force", in particular since the latter concept appears alongside "provisional application" in certain treaties (e.g. commodity agreements), and it would thus be useful to understand whether there are, and if so, what are the differences between the legal regimes of both concepts. For example, it appears from the *travaux préparatoires* with regard to the VCLT, in particular that on the draft article concerning *pacta sunt servanda* and on what is now Article 25, that the *pacta sunt servanda* rule applies to both concepts, which would mean in turn that from the perspective of this rule at least there is no difference between the two concepts. On the other hand, why would they both be included in a treaty if there is no difference between them.

Guideline 3

As we have expressed during consideration of this Guideline in the 6th Committee, we remain concerned by the Commission's departure from the VCLT terminology in this Guideline. The use of the word "may" might be misunderstood even if read in conjunction with the commentary, which itself is not very clear. In particular, the commentary wording "optional character of provisional application" does not clearly indicate that it is the agreement to provisionally apply that is optional and not provisional application itself once agreed via that agreement. Our concern is also based on the fact that this issue was discussed already during the Vienna Conference on the VCLT, where the Drafting Committee replaced the word "may" with the word "is" precisely because the former might imply a non-binding effect. The reappearance of the word "may" can be understood as reversing the developments arising from the *travaux préparatoires*, and might call into question Guideline 6 on legal

application implies *a fortiori* that a state terminating provisional application made clear its intention to terminate the interim obligation from under Article 18 as well.

2. Comment on the model clauses

As announced by our delegation at this years' 6th Committee and in line with the written contribution of the European Union, we would like to suggest adding to draft model clause 1 after "[or from X date]" the text "*[or from the date of notification of completion of the relevant internal procedures to provisionally apply it]*" (cf. Article 23 of the Agreement on Air Transport between Canada and the European Community and its Member States, at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1571650540418&uri=CELEX%3A22010A0806%2801%29>). This possibility enables States to complete the relevant internal treaty making procedures before provisionally applying it, which is of particular interest to those States that have internal limitations on the use of provisional application. Such a mechanism of provisional application is applied by the EU e.g. in the field of air transport agreements which partly fall under Member States' competences. Such a solution would in our view also serve to encourage the participation of States in the provisional application of multilateral treaties where internal law aspects of provisional application are often invoked as a reason not to participate at that stage of its application.