

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

COMMENTS ON DRAFT GUIDE TO PROVISIONAL APPLICATION OF TREATIES, AS ADOPTED ON FIRST READING BY THE INTERNATIONAL LAW COMMISSION AT ITS 70TH SESSION, AND 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)

20 December 2019

DRAFT GUIDE TO PROVISIONAL APPLICATION OF TREATIES, AS ADOPTED ON FIRST READING BY THE INTERNATIONAL LAW COMMISSION AT ITS 70TH SESSION, AND 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):

WRITTEN COMMENTS OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

DECEMBER 2019

1. The United Kingdom of Great Britain and Northern Ireland (“United Kingdom”) is grateful to the International Law Commission, its Special Rapporteur, Mr Juan Manuel Gómez Robledo and the Codification Division, for their excellent work to date, and welcomes the Commission’s thorough and pragmatic approach. This approach underlines that it is the prerogative of sovereign States to enter into international agreements in a manner which best suits their international relations and domestic considerations at the time. The United Kingdom is of the view that the Guide as a whole will bring greater clarity in this area.
2. The United Kingdom has considered the Guide as a whole (comprising the commentary, draft Guidelines and draft model clauses), and wishes to make the following suggestions.

General Commentary

3. The General Commentary at paragraphs (1) to (7) introduces the Guide and its overall purpose.

4. The United Kingdom welcomes the statement of overall objectives in paragraph (2) and commends 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.
5. The United Kingdom uses provisional application, on an exceptional basis, to apply a treaty prior to the completion of Parliamentary procedures. However, it does so with caution: provisional application is not, and cannot be used as a means of bypassing Parliamentary procedures (and nor is it a substitute for the application of the standard international rules and processes for securing full legal entry into force of treaties). 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, 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 (“the 1969 Vienna Convention”) and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (“the 1986 Vienna Convention”) envisages a flexible approach to the termination of provisional application.
6. The United Kingdom commends the Commission for its valuable work in analysing contemporary practice. This work identifies important differences in practice relating to bilateral and multilateral treaties – particularly in relation to how provisional application is brought into effect. The United Kingdom notes that the 1969 Vienna Convention does not generally distinguish between bilateral and multilateral treaties. Nonetheless, practice is important in understanding how the rules apply in each context. The United Kingdom considers that it might be helpful to draw out further the distinctions in practice relating to bilateral and multilateral treaties, referenced in paragraph (7), throughout the Guide and draft model clauses.

Guideline 3 – General rule

7. Draft guideline 3 and related commentary sets out and explains the general rule on the provisional application of treaties.
8. The United Kingdom welcomes the broad application of Guideline 3 (and draft model clause 3), which does not qualify the applicability of the general rule on the provisional application of treaties by reference to negotiating States or organisations.
9. In a bilateral context, the United Kingdom considers that it is clear that the terms ‘negotiating States’ and ‘negotiating organizations’, as used in Article 25(1)(b) of the 1969 and 1986 Vienna Conventions respectively, apply to the two parties negotiating the treaty. In a multilateral context, however, the United Kingdom considers that these

terms are wide enough to include both the negotiating States or organisations and those intending to accede to the treaty at a later stage. Consequently, the United Kingdom considers that Draft Guideline 3 aligns with a broad interpretation of the formulation used in Article 25(1)(b) and suggests that this might be reflected in paragraph (3) of the commentary.

Guideline 4 - Form of Agreement

10. Draft guideline 4 deals with the forms an agreement that gives rise to provisional application can take, in addition to when the treaty itself so provides.
11. The United Kingdom welcomes the emphasis in Guideline 4 and the accompanying commentary on the concept of “agreement”, as the basis on which a treaty, or part of it, may be provisionally applied.
12. In general, the United Kingdom does not consider that a treaty can be provisionally applied on the basis of a unilateral act, and that examples of what might constitute “agreement” or “acceptance” might help to provide clarity and certainty in this context. That said, whilst the United Kingdom acknowledges that a unilateral declaration of intention to apply a treaty might in certain circumstances have legal effect, in the view of the United Kingdom this practice should generally be analysed through the legal regime of the unilateral acts of States rather than through the law of treaties. The United Kingdom considers that this might usefully be clarified in footnote 1021.
13. On the question of the form of agreement, the United Kingdom notes that a declaration that is accepted by other States or international organisations is acknowledged in paragraph (5) of the commentary to be an exceptional practice. To ensure consistency between the Guideline and the related commentary, the United Kingdom considers that there might be merit in drawing attention in the Guidelines to the exceptional nature of the declaration example used.
14. The United Kingdom understands that the examples set out in Guideline 4(b) relate to multilateral treaties. Consequently, the United Kingdom considers that it might be beneficial to expand upon the examples listed so that examples from the bilateral context are also given.

Guideline 6 – Legal effect of provisional application

15. Draft Guideline 6 deals with the legal effect of provisional application.
16. As the United Kingdom has previously commented, further clarity on the distinction between the legal effect of a provisionally applied treaty and one in full force would be useful. Although the Guideline indicates that the legal effect of provisional application is the same as entry into force, paragraph (5) of the commentary makes it clear that provisional application “is not intended to give rise to the whole range of rights and

obligations that derive from the consent by a State or an international organisation to be bound by a treaty or part of a treaty” and that “it is not subject to all the rules of the law of treaties”. The United Kingdom believes that it would be useful to expand this analysis, in particular by providing greater clarity on the rules which do not apply (for example the rules relating to entry into force).

Guideline 7 – Reservations

17. The United Kingdom welcomes the inclusion of Guideline 7 which considers the effect of reservations on the provisional application of a treaty. The United Kingdom acknowledges that there is relatively little practice in the area, and welcomes the Commission’s further consideration of the topic in order to provide greater clarity, including on the question as to whether a reservation continues in effect upon the entry into force of the treaty. In any event, the United Kingdom considers that it would be beneficial for the parties to confirm their intentions relating to any reservation upon both provisional application and entry into force of the treaty.

Guideline 9 – Termination and suspension of provisional application

18. Draft guideline 9 concerns the termination and suspension of provisional application.

19. The United Kingdom welcomes the statement, in paragraph (8) of the commentary to Guideline 9, that Article 25(2) of the 1969 Vienna Convention provides a flexible means by which to terminate provisional application, in particular to enable a State or international organisation to terminate provisional application without affecting its ability to become a party to the treaty.

20. One option to which the United Kingdom wishes to draw attention is the ability to terminate provisional application on notice, which can provide a pragmatic way to manage provisional application in practice. The United Kingdom has agreed to articles that provide for termination of provisional application on notice in a number of recent treaties¹ and proposes that it might be helpful to reflect this practice within Guideline 9 and / or the accompanying commentary.

¹ For example:

Article 11(5) of the Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Republic of Lebanon, signed on 19 September 2010, which provides:

“5. A Party may terminate the provisional application of this Agreement, or provisions of it, by written notification to the other Party. Such termination shall take effect on the first day of the second month following notification.”

The full agreement is at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840961/

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

21. Draft guideline 12 relates to the limitations that could derive from the internal law of States and the rules of international organisations when agreeing to the provisional application of a treaty or part of it.
22. The United Kingdom would welcome further clarity on how such limitations might operate in practice, particularly against the backdrop of Guidelines 10 and 11.

Draft model clauses on provisional application of treaties

23. The United Kingdom welcomes the inclusion of model clauses as a practical and helpful tool to which States and international organisations might refer. As stated in paragraph 6 above, the United Kingdom suggests that it might be helpful to distinguish, where necessary, between clauses that may be appropriate in the context of multilateral treaties, and those that may be appropriate in the context of bilateral treaties.
24. In addition, the United Kingdom considers that it may be useful to explore the inclusion of additional model clauses to establish the date on which provisional application might come into effect and to allow for termination on notice. To the extent that it might be helpful, illustrative clauses recently agreed by the United Kingdom are referenced in the note below².

[CS Lebanon 1.2019 Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Republic of Lebanon.pdf](#)

Article 366(7) of the Strategic Partnership and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and Georgia, signed on 21 October 2019, which provides:

“7. Either Party may give written notification to the other Party of its intention to terminate the provisional application of this Agreement. Notwithstanding Article 364(2), termination of provisional application shall take effect two months after receipt of the notification by the other Party.”

The full agreement is at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844167/CS_Georgia_1.2019_UK_Georgia_Strategic_Partnership_and_Cooperation_Agreement.pdf

²For example:

Article 11(4) and (5) of the Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Republic of Lebanon, signed on 19 September 2019, which provides:

“4. Pending entry into force of this Agreement, the Parties may agree to provisionally apply this Agreement, or provisions of it, by an exchange of notifications signifying the completion of ratification or such other domestic procedures as are required for provisional application. Such provisional application shall take effect on the later of:

Draft model clause 1

25. The United Kingdom notes that draft model clause 1(1) provides for automatic provisional application on the date of signature. In a dualist system such as the United Kingdom, implementing legislation must be in place prior to the entry into force of the treaty, and prior to the treaty having legal effect through provisional application. When drafting model clauses, the United Kingdom would encourage the Special Rapporteur to take into account practice in both monist and dualist systems.

26. In addition the United Kingdom considers that a third sub-paragraph, or alternative model language in paragraph (2), to provide an ability to terminate provisional application on notice, might be a helpful way of reflecting State practice as has been further discussed in paragraph 20 above.

Draft model clause 2

27. The United Kingdom welcomes draft model clause 2, which illustrates a form which an agreement to provisionally apply might take. The United Kingdom draws attention to its recent practice, in a bilateral context, of allowing for provisional application to be

(a) the date on which the EU-Lebanon Agreements cease to apply to the United Kingdom; and

(b) the date of the later of the Parties' notifications.

5. A Party may terminate the provisional application of this Agreement, or provisions of it, by written notification to the other Party. Such termination shall take effect on the first day of the second month following notification."

The full agreement is referenced at note 1 above.

Article 366(4) and (7) of the Strategic Partnership and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and Georgia, signed on 21 October 2019, which provides:

"4. Where agreed pursuant to Article 366(3), this Agreement shall be applied provisionally between the Parties on the later of:

(a) the date on which the EU-Georgia Agreement ceases to apply to the United Kingdom, or

(b) the date of receipt of the later of the notification of provisional application from the United Kingdom or of the ratification or provisional application from Georgia.

7. Either Party may give written notification to the other Party of its intention to terminate the provisional application of this Agreement. Notwithstanding Article 364(2), termination of provisional application shall take effect two months after receipt of the notification by the other Party."

The full agreement is referenced at note 1 above.

activated by way of an exchange of notifications³, and invites the Special Rapporteur to take this practice into account in his work.

Draft model clause 3

28. The United Kingdom considers that it might be useful, for the purposes of providing certainty, to set out how a declaration ‘opting in’ to provisional application might be accepted.

Draft model clause 5

29. For reasons of certainty, and in line with Guidelines 10 and 11, the United Kingdom’s preference is to minimise the possibility of restrictions on provisional application arising from domestic legislation. The United Kingdom is concerned that Draft model clause 5 might operate in a manner which would undermine the legal effectiveness of provisional application.

³ See Article 11(4) of the Agreement establishing an Association between the United Kingdom of Great Britain and Northern Ireland and the Republic of Lebanon; and Article 366(4)(b) of the Strategic Partnership and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and Georgia, both referenced at footnote 2 above.