Comments of the United States
on the International Law Commission's Draft Guide to Provisional Application of Treaties, as Adopted by the Commission on First Reading in 2018

December 15, 2019

Introduction

The United States welcomes the opportunity to provide written comments on the International Law Commission's draft Guide to Provisional Application of Treaties ("draft guidelines"), and accompanying commentary, as adopted by the Commission on first reading in 2018.[1] The United States extends its appreciation to the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, for his contributions to the development of these draft guidelines, as well as to the other members of the Commission.

General Observation

According to the Commission, the purpose of the draft guidelines is "to provide assistance to States, international organizations and other users concerning the law and practice on the provisional application of treaties."[2]

The United States considers the meaning of "provisional application" to be clear, settled, and generally well understood.[3] At its core, provisional application means that a State[4] agrees to apply the treaty, or certain provisions thereof, on a legally binding basis prior to the treaty's entry into force for that State. It differs from entry into force of a treaty in one seminal respect: as a general matter, a State or international organization may terminate obligations arising from the

[1] *See* Report of the International Law Commission on the Work of Its Seventieth Session, UN GAOR, 73rd Sess., Supp. No. 10, UN Doc. A/73/10, at 203-23 (Sept. 3, 2018) (hereinafter "2018 Report").

[2] *Id*. at 205, General Commentary, paragraph 2. The Commission further states that the objective of the draft guidelines is to "direct States, international organizations and other users to answers that are consistent with existing rules and most appropriate for contemporary practice." Id.

[3] Article 25 of the Vienna Convention on the Law of Treaties of 1969 (the "1969 Vienna Convention"), which the United States considers to reflect customary international law, provides that:

> 1. A treaty, or a part of a treaty is applied provisionally pending its entry into force if:
>   a. the treaty itself so provides; or
>   b. the negotiating States have in some other manner agreed.
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> 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is applied provisionally of its intention not to become a party to the treaty

[4] Our comments generally refer to States rather than States and international organizations. We intend for them to apply to both States and international organizations, unless the context dictates otherwise.

provisional application of a treaty more easily than terminating the treaty after its entry into force.

The United States is pleased that the draft guidelines are in general accord with this view of provisional application. While we believe that the draft guidelines helpfully confirm the basic features of the legal regime regarding provisional application of treaties, we have concerns that in some areas, the draft guidelines and accompanying commentary make claims that are not supported by State practice. In these areas, we have concerns that the draft guidelines risk creating confusion about the state of the law and undermining the draft guidelines' purpose. Our observations focus on those draft guidelines and accompanying commentary that most implicate those concerns.

General Commentary

As with any Commission project, a threshold question arises regarding the character of the draft guidelines. The Commission has not proposed the draft guidelines as draft articles for a treaty on the provisional application of treaties, which might entail a corresponding recommendation to States that they consider adopting such a treaty. Rather, the draft guidelines appear to reflect observations by the Commission on questions related to provisional application. In some instances, the Commission finds support for these observations in examples of State practice with regard to provisional application. In other instances, as acknowledged by the Commission in the commentary to particular draft guidelines, the draft guidelines address topics on which the Commission has identified little or no relevant State practice.

Against this background, aspects of the Commission's commentary raise questions about the character of the draft guidelines. On the one hand, paragraph 4 of the General Commentary states that "[a]lthough the draft guidelines are not legally binding as such, they elaborate upon existing rules of international law in the light of contemporary practice." On the other hand, paragraph 5 goes on to state that, in elaborating the guidelines, the Commission sought to "avoid any temptation to be overly prescriptive" and observes that "in line with the essentially voluntary nature of provisional application … the guide recognizes that States ... may set aside, *by mutual agreement*, the solutions identified in the draft guidelines if they so decide." (Emphasis added.)

The United States agrees that the guidelines cannot be legally binding as such. There is therefore no basis for the suggestion that States would need specifically to agree to set aside the solutions identified in the draft guidelines in order to avoid those solutions applying. Except to the extent that the Commission's observations on a particular point reflect extensive and virtually uniform State practice such that States should regard the matter as having a customary character, States and the Commission should regard the observations contained in the Commission's draft guidelines as reflecting only the Commission's own views. While States may consider the guidelines as they see fit, they do not represent default rules that should be understood to apply unless States opt out of them.

More generally, the United States notes that the value of the draft guidelines depends principally on the extent to which the Commission has compiled examples of State practice to support them. Where the Commission has compiled such examples, the guidelines can usefully

illustrate how States have approached particular issues. For clarity, it would be helpful for the Commission to indicate any instances in which it believes such State practice and accompanying *opinio juris* meets the standard required to establish a customary law rule, and to distinguish those from instances in which there is insufficient practice and/or *opinio juris* to establish a customary rule. Even where no customary rule exists, the Commission's work to compile relevant practice in the area may nonetheless be helpful to States, as such practice may prove persuasive as they make their own decisions about how to handle analogous circumstances. Draft guidelines that are supported by limited or no State practice have much less utility, and the United States encourages the Commission to consider carefully whether they merit inclusion in the project at all. Guidelines not supported by significant State practice can only be understood as reflecting the Commission's own views for the progressive development of the law, and should be clearly identified as such if the Commission decides to include them.

Comments on Specific Provisions of the Draft Guidelines, accompanying commentary or both.

Draft Guideline 3 - General Rule

The Commission's approach to draft guideline 3 raises two principal matters of concern: the necessary parties to an agreement for a treaty to be provisionally applied and whether a State may provisionally apply a treaty pending its entry into force for that State after the treaty has entered into force for other States.

First, we address the "necessary parties" concern. As expressed in Article 25(1) of the 1969 Vienna Convention, a treaty is applied provisionally if the treaty itself so provides or if "the negotiating States have in some other manner so agreed." Draft Guideline 3 omits the reference to "the negotiating States" and in so doing creates uncertainty and potential confusion about the necessary parties to an agreement regarding provisional application of a treaty. The United States understands the reference to "the negotiating States" to be designed to ensure that all those States that would have rights or obligations under the provisional application of a treaty have consented to such provisional application. The issue of the necessary parties to an agreement for the provisional application of a treaty is a fundamental one, and the United States regards it as essential that the Commission accurately address it in a draft guideline purporting to articulate the "general rule" with regard to provisional application.

Second, the draft guideline does not make clear that a State may provisionally apply a treaty pending the treaty's entry into force for that State, even if the treaty has entered into force for other States. Draft guideline 3 does not address this particular circumstance. Yet there is ample support for States provisionally applying treaties that are in force for other States, and the Commission acknowledges as much in paragraph 5 of the commentary.[5] That

[5] 2018 Report at 210, paragraph 5:

> The second phrase, namely "pending its entry into force between the States or international organizations concerned", is based on the chapeau of article 25. The Commission considered the possible ambiguity in the reference to "entry into force". While the expression could be referring, on the one hand to the entry into force of a treaty itself, *examples exist of provisional application continuing for some States or*

acknowledgement, without addressing in the guideline itself the matter described in the first sentence of this paragraph, is not sufficient.

In order to address these concerns, we recommend that the Commission revise the draft guideline to read as follows, and delete paragraph 5 of the commentary in its entirety:

> "A treaty or part of a treaty may be provisionally applied by a State or international organization, pending its entry into force for that State ~~between the States~~ or international organizations ~~concerned~~, if the treaty itself so provides, or if in some other manner ~~it has been~~ so agreed~~.~~ by all States or international organizations incurring rights and obligations pursuant to the provisional application of the treaty.

Third, we have concerns about the following observation contained in paragraph 7 of the commentary that accompanies this draft guideline:

> "Furthermore, the draft guideline envisages the possibility of a third State or international organization, completely *unconnected to the treaty*, provisionally applying it after *having agreed in some other manner with one or more States* or international organizations concerned." (Emphasis added.)

It is unclear what this sentence means, and the commentary cites no examples of State practice involving the provisional application of a treaty in the manner described.[6] What does it mean to have a State "unconnected to the treaty" provisionally apply the treaty? What does "having agreed in some manner with one or more States or international organizations concerned" mean in this context? Would it be legally sufficient for a third State completely unconnected to the treaty to provisionally apply the treaty with the agreement of one, but not all, other States that are incurring rights and obligations pursuant to such provisional application? These are but few of the questions raised and left unanswered by paragraph 7 of the Commission's commentary. Accordingly, in the absence of language in the commentary that adequately addresses these questions, or otherwise clarifies the Commission's thinking in a manner that treaty law and practice support, we strongly urge the deletion of this sentence.

Draft Guideline 4 – Form of Agreement

We have several concerns regarding draft guideline 4, which is intended to address the form of agreement that could effectuate the provisional application of a treaty or parts thereof.[7]

> *international organizations after the entry into force of a treaty itself, when the treaty had not yet entered into force for those States and international organizations, as is the case for multilateral treaties*." (Emphasis added.)

[6] To the extent that it is intended to address a situation like Syria's 2013 unilateral statement in respect of the Chemical Weapons Convention, for the reasons discussed below in comments on Draft Guideline 4, the United States does not regard that statement as involving provisional application of a treaty.

[7] Draft guideline 4 provides that:

> "In addition to the case where a treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed through:

This guideline attempts to explain the reference to "in some other manner it has been so agreed" as it appears in draft guideline 3 and in Article 25, paragraph 2, of the 1969 Vienna Convention.

The principal substance of the draft guideline is contained in subparagraph (b), which makes the assertion that two specific forms of "means or arrangements" may satisfy the Vienna Convention standard:

- "a resolution adopted by an international organization or at an intergovernmental conference"; and
- "a declaration by a State or international organization that is accepted by the other States or international organizations concerned."

The United States is concerned about the draft guideline's treatment of each of these elements.

First, the discussion of resolutions adopted by an international organization or at an intergovernmental conference risks creating confusion as to the applicable standard for an agreement to apply a treaty provisionally. In particular, the draft guideline suggests that there is some particular significance to resolutions adopted at international conferences for the purposes of establishing valid agreements for provisional application of treaties. An agreement to apply a treaty provisionally requires the consent of all States (and international organizations) assuming rights and obligations pursuant to that provisional application. A resolution adopted at an international conference can establish provisional application obligations only if all such States express their consent to its adoption. Resolutions adopted by an international conference that do not reflect the consent of all States assuming rights and obligations pursuant to provisional application – such as those adopted without the participation of or without the consent of all relevant States – would not establish a valid agreement for provisional application in respect of those States. The key consideration is not the mechanism through which States reach an agreement to apply a treaty provisionally, but rather whether all the necessary parties have consented to the agreement.

In this regard, the United States does not regard many of the examples cited in the commentary as meeting this condition. The commentary does not discuss whether all States among whom provisional application rights and obligations are asserted to have been created participated in the adoption of the resolutions discussed. Moreover, the commentary does not identify instances in which States – as opposed to international organizations – have sought to rely on provisional application rights or obligations asserted to have been created in the instances

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(a) a separate treaty; or

(b) any other means or arrangements*, 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." (Emphasis added.)

it cites, and thus the effectiveness of the resolutions in establishing such rights and obligations has not been demonstrated.

In a number of other instances, the examples cited in footnote 1020 to the commentary do not support the view that States have used resolutions as means of establishing provisional application where not otherwise provided for in the treaty. For example:

- The agreements on Olive Oil and Table Olives, Tropical Timber, and Cocoa, all provide for provisional application in the terms of the treaties themselves, rather than provisional application being established by resolution outside the treaty.

- The commentary misattributes views expressed in a working paper prepared by the Secretariat of the UN Framework Convention on Climate Change as representing the views of the parties to the Kyoto Protocol. The Secretariat paper was prepared two years prior to the adoption of the amendments to the Kyoto Protocol and does not represent views or language adopted by the Parties, nor does it reflect what Parties decided to do two years later when they adopted the amendment at issue. Moreover, as noted above, there is no evidence that all States that would potentially incur rights or obligations under the provisional application regime actually consented to the adoption of the resolution. In any case, it appears that no State has, in fact, submitted a declaration claiming to apply the amendment provisionally, so there is no practice to illustrate whether and to what extent legally effective provisional application obligations would be created through this mechanism.

- The Comprehensive Nuclear-Test-Ban Treaty (CTBT) example does not involve provisional application based on agreement reached 'in some other manner,' or support the proposition of 'implied provisional application.' As footnote 1020 of the commentary acknowledges, there is no consensus that the 1996 resolution of the CTBT States Signatories that founded the CTBTO Preparatory Commission in fact provisionally applied the treaty, such that CTBT obligations became binding on signatories prior to entry into force of the treaty. No such intention to provisionally apply the treaty's provisions is clearly stated in the resolution itself, and it would be surprising if such an intention *was* stated, given that the negotiating States had affirmatively decided against including a mechanism for provisional application in the treaty.

- The Inmarsat example similarly does not involve "provisional application" based on agreement reached "in some other manner." In 1998, the Twelfth Session of the Inmarsat Assembly of Parties, adopted amendments to the Convention deemed necessary to effect Inmarsat's privatization. Recognizing that the time involved to formally bring the amendments into force would substantially delay the privatization, the Parties reached a separate legally-binding agreement to "rapidly implement"

> amendments deemed necessary to effect Inmarsat's privatization, to the extent permitted by their respective national constitutions, laws and regulations. In the lead up to the Assembly, the Parties had debated whether "provisional application" was the means through which privatization would be effected. The United States, among others, argued against use of that term to characterize what the Parties were contemplating. Implicit in the concept of provisional application is the notion that a Party may at any point, prior to the entry into force of a treaty, express its intent not to be bound by the treaty or amendments thereto. In the case of Inmarsat, it would have been difficult, if not impossible, for a Party that had agreed to Inmarsat's privatization at the Assembly thereafter to express its intent not to be bound to that agreement without there being a fundamental change to the pre-privatization status quo. There was nothing provisional about what was agreed at the Assembly.

In sum, we believe that the examples cited in footnotes to this draft guideline should be reviewed carefully and maintained only to the extent that they support the proposition for which they are cited. If the Commission cannot establish that they are reflective of provisional application as understood under current law or State practice, it should omit them altogether.

The draft guideline's assertion with respect to the second alternative form for establishing a provisional application agreement – a declaration by a State or international organization that is accepted by the other States or international organizations concerned – is not grounded in law or practice. The commentary to the draft guideline acknowledges the lack of support for this claim by noting that practice relating to provisional application through such declarations "is still quite exceptional."[8] The commentary cites only one example of practice to support this assertion. However, the example it cites – related to a declaration of the Syrian Arab Republic in respect of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction – does not involve the provisional application of a treaty. The Convention does not contain a provision on provisional application. In the example cited by the Commission, Syria deposited an instrument of accession stating that it "shall comply with the stipulations contained [in the Convention] and observe them faithfully and sincerely, applying the Convention provisionally pending its entry into force for the Syrian Arab Republic."[9] In the U.S. view, the Syrian statement constituted a unilateral undertaking on the part of Syria that did not afford Syria rights *vis-à-vis* the States Parties to the Convention, nor impose obligations on them. As noted in the commentary itself, this is a case "in which the treaty does not require the negotiating or signatory States to apply it provisionally, but leaves open the possibility for each State to decide whether or not it wishes to apply the treaty."[10] Whatever set of legal relationships are established by such an arrangement, they are not those of

[8] 2018 Report, at 212, paragraph 5.

[9] United Nations Treaties Collection, Status of Treaties, Chapter XXVI, 3.

[10] 2018 Report, at 212 n. 1021.

provisional application as that term is understood in the context of Article 25 of the 1969 Vienna Convention and customary international law.

For these reasons, the United States does not support inclusion of specific reference in draft guideline 4 to resolutions adopted by international organizations or conferences or to declarations made by States. We believe that, at a minimum, subparagraph (b) should be revised to make the limited statement that provisional application may be agreed through any means or arrangements other than a separate treaty that are accepted by *all* States or international organizations assuming rights or obligations in connection with the provisional application of the treaty. We recognize, however, that if limited in this way, the draft guideline would add little to the material already addressed in draft guideline 3. For this reason, the Commission may find it more appropriate to omit this draft guideline altogether.

Draft Guideline 6 – Legal Effect of Provisional Application

The United States appreciates the Commission's efforts to clarify the text of draft guideline 6, especially with regard to whether the provisional application of a treaty is the same as its entry into force. We concur with the Commission's view that these are separate concepts. However, we continue to have concerns about two aspects of the commentary accompanying this draft guideline.

First, for the reasons discussed above, we have concerns about the reference to draft guideline 4 that appears in the third sentence of paragraph 2 of the commentary. That sentence states, in relevant part, that the agreement to apply provisionally a treaty "may be expressed in the forms identified in draft guideline 4."[11] In light of our concerns regarding draft guideline 4, we recommend deletion of the clause "which may be expressed in the forms identified in draft guideline 4."

Second, we doubt the necessity and utility of paragraph 6 of the commentary. As the Commission itself notes the "formulation adopted for draft guideline 6 was considered to be sufficiently comprehensive to deal" with the point whether provisional application can result in the modification of the content of a treaty. It is therefore difficult to understand the purpose that paragraph 6 serves and we therefore recommend its deletion.

Draft Guideline 7 - Reservations

The United States does not support including this draft guideline and urges its deletion. As reflected in its associated commentary, the Commission has not identified any State practice with respect to the making of reservations in the context of provisional application of treaties.[12]

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[11] *Id.* at 214.

[12] *Id.* at 215, Commentary, paragraph 2 (noting the "lack of practice" involving reservations made in connection with provisional application of treaties. This point was underscored in an earlier report of the Special Rapporteur, in which he noted that he:

> has not yet encountered a treaty that provides for the formulation of reservations as from the time of provisional application, nor has he encountered provisional application provisions that refer to the possibility of formulating reservations. Furthermore, the memorandum of the Secretariat likewise does not

This calls into question the relevance of the draft guideline, as it addresses an issue that States do not appear to encounter in practice. It also highlights that the draft guideline and accompanying commentary are not grounded in any actual legal authority, but instead represent the Commission's speculative thoughts on essentially academic questions.

Even if taken only as the Commission's own views, the Commission's draft guideline is not particularly helpful. It is premised on the unexplained and unsupported assertion that particular rules of the 1969 Vienna Convention should be understood to apply *mutatis mutandis* to the provisional application of treaties. The Commentary states that this is "meant to indicate the application of some, but not necessarily all, of the rules of the 1969 Vienna Convention applicable to reservations in the case of provisional application." However, the Commentary does little to explain what criteria should be used to determine which of those rules should be understood to apply and which should not. This approach does little to provide States a reasoned basis for assessing the value of the Commission's proposals on these points. Moreover, the Commission leaves unanswered how a hypothetical regime for reservations to provisional application would work in practice, including how such reservations might be filed, what rights other States might have to comment or object to them, and how those might be exercised.

For these reasons, we strongly share the views of those members of the Commission who have argued that a draft guideline and accompanying commentary on these issues are neither appropriate nor necessary, and we urge that they be deleted in their entirety.

Draft Guideline 9 – Termination and suspension of provisional application

The United States has concerns with paragraph 3 of this draft guideline, and paragraphs 7, 8, 9 and 10 of the accompanying commentary.

Paragraph 3 provides in relevant part that "[t]he 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."[13]

The Commission in this instance states that its "without prejudice" formulation is:

> intended to preserve the possibility that provisions pertaining to termination and suspension in the 1969 Vienna Convention may be applicable to a provisionally applied treaty. However, the provision does not aspire to definitively determine which grounds in section 3 might serve as an additional basis for the termination of provisional application, or in which scenarios and to what extent those grounds would be applied.

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identify any cases where a treaty has provided for the formulation of reservations in relation to its provisional application, or cases where a State has formulated reservations to a treaty that is being applied provisionally. International Law Commission, Fifth Report on the Provisional Application of Treaties, UN Doc. A/CN.4/718 (Feb. 20, 2018), at para. 67.

[13] 2018 Report at 204.

> Instead, the rules of the Vienna Convention are to be 'applied *mutatis mutandis'* depending on the circumstances.[14]

The Commission itself acknowledges, however, an "apparent lack of relevant practice" with regard to these issues.[15] Accordingly, as with draft guideline 7, paragraph 3 and its accompanying commentary, draft guideline 9, paragraph 3, appears not to be grounded in any actual legal authority or practice.

In any case, we doubt whether it is necessary to "preserve the possibility that provisions pertaining to termination and suspension in the 1969 Vienna Convention may be applicable to provisional application." Article 25, paragraph 2 of the Vienna Convention on the Law of Treaties, which the United States considers to be reflective of customary international law, expressly addresses the circumstances under which States may terminate provisional application. A State may terminate provisional application by notifying the other States that are provisionally applying the treaty of its intent not to become a party to the treaty. There is no need for additional, rules for termination of provisional application and, in fact, State practice appears to support the proposition that these rules are unnecessary.

Furthermore, paragraph 3 and the accompanying commentary contain little in the way of analysis or explanation to give States a basis for understanding the Commission's proposal. The draft guideline makes a blanket assertion that the provisions Part V, paragraph 3 of the Vienna Convention may apply generally to the termination and suspension of provisional application, but makes little attempt to explain why this should be so, or what application of these provisions would entail in practice. Rather than providing useful guidance or suggestions on how States might approach these issues, paragraph 3 would create substantial confusion by suggesting the application of a set of legal rules that the Commission is unwilling or unable to explain.

For these reasons, the United States urges that the Commission delete paragraph 3 of the draft guideline, and paragraphs 7, 8, 9 and 10 of the accompanying commentary, in their entirety.

Draft Guidelines 10 and 11 – Internal law of States and rules of international organizations, and the observance of provisionally applied treaties, and Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

The United States does not have substantive concerns with the statements contained in draft guidelines 10 and 11. We note, however, that the Commission cites no State practice or other authority to support either guideline. Thus, while the positions reflected in these draft guidelines are sensible, we understand them to reflect the Commission's observations based on abstract reasoning rather than rules reflecting settled law.

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[14] *Id.* at 219, paragraph 9.

[15] *Id*, at paragraph 8.

Draft Model Clauses

Separately from the Draft Guidelines adopted by the Commission on first reading, the Special Rapporteur has also proposed in the Commission's 2019 annual report, for the Commission's consideration in 2020, draft model clauses on the provisional application of treaties. The United States does not find the proposed draft clauses particularly useful. They appear designed to serve as one size-fits-all formulations to address scenarios with multiple potential variations, and to apply uniformly to bilateral and multilateral treaties. The resulting clauses would require further adaptation and elaboration in just about any case in which they were to be used, substantially limiting their value as drafting models.

If the Commission wished to provide assistance to States in drafting provisional application clauses, a more useful approach would be to identify key elements that are frequently part of provisional application clauses, and to list examples of ways in which those elements have been addressed in actual treaties, including both bilateral and multilateral treaties. Such an exercise could be further enhanced by commentary that provides insight on whether particular formulations have proven more effective than others, and identifies particular interpretive difficulties States might wish to keep in mind when drafting clauses addressing such elements.

Conclusion

The United States appreciates this opportunity to express it views on the draft guide to provisional application of treaties, accompanying commentary, and draft model clauses, and hopes that these comments will be helpful to the Commission and its Special Rapporteur as these issues are further considered.