



**Statement on behalf of the European Union and its Member States**

**By**

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**at the General Assembly Sixth Committee**

**on**

**Item 81**

**Report of the International Law Commission on the work of its sixty-ninth session  
"Provisional Application of Treaties"**

**United Nations**

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**- CHECK AGAINST DELIVERY -**

## **Statement of the European Union on Provisional application of treaties**

**(UNGA 6<sup>th</sup> Committee, 72<sup>nd</sup> session, 2017)**

Mr/Ms Chairperson,

1. It is an honour for the European Union to participate in the discussion on the topic of provisional application of treaties. As stated on previous occasions, the European Union is greatly interested in this topic and it welcomes the work of the ILC and appreciates its efforts to provide clarifications and guidance on this important international law matter as this will contribute to enhancing legal certainty in cases of provisional application of treaties.
2. In this intervention the European Union will make some comments on the draft set of guidelines and commentaries to them as provisionally adopted by the ILC and will make some remarks on the Memorandum of the Secretariat of 24 March 2017 relating to this topic.

Mr/Ms Chairperson,

3. The European Union notes that the ILC has decided to enlarge the scope of the draft guidelines to include also treaties entered into by international organisations and that the provisionally adopted draft guidelines and the commentaries to them take account and reflect this enlarged scope. The European Union welcomes that the approach followed by the ILC was to keep the inherent flexibility of provisional application of treaties, which is something the European Union has been advocating for in its previous interventions on the subject.
4. In light of the continuing work of the ILC on this topic, the European Union would like to make the following concrete observations on the draft set of guidelines and the

commentaries to them for possible further consideration by the ILC:

5. The European Union notes that the commentaries to draft guideline 4 indicate that when referring to a possible declaration of a State or an international organisation to provisionally apply a treaty it was deliberately avoided to use the term "unilateral" in order not to confuse the rules governing the provisional application of treaties with the legal regime of unilateral acts of States.
6. While the European Union understands the underlying logic of this approach, it could be noted that a clause on provisional application contained in a treaty is not more than one of the provisions of a treaty not yet in force. Hence, if the consent to be bound by such provision is not given upon signature of the treaty and if the obligation to provisionally apply the treaty does not stem from a separate agreement, a question of the legal basis for provisionally applying the treaty arises. It is in that scenario where the matter of unilateral declarations and their effects could become relevant.
7. The European Union understands that the matter of unilateral declarations has been subject to extensive discussions in the Drafting Committee. However, the European Union is of the view that this subject has not been sufficiently clarified in the commentaries to draft guideline 4. In that respect, the European Union invites the ILC to consider further elaborating on this matter in the commentaries to draft guideline 4 or at another place, which the ILC might find appropriate. The European Union is of the view that a clear identification of all the possible scenarios and the sources of the obligation to provisionally apply a treaty would contribute to enhancing the integrity and coherence of the international legal order.
8. In the same vein, the European Union welcomes the efforts of the ILC directed at clarifying the relationship between provisional application and other provisions of the 1969 Vienna Convention. The European Union notes that the ILC is of the view that provisional application is not subject to the same rules of the law of treaties provided for in Part V,

section 3 of the 1969 Vienna Convention (point 5 of the commentary to draft guideline 6). As evident from the intervention of last year, the position of the European Union on the applicability of Article 60 of the Vienna Convention to provisionally applied treaties differs from the one taken by the ILC.

9. It is the understanding of the European Union that the ILC relies exclusively on the regime for termination of provisional application provided for in Article 25, paragraph 2 of the 1969 Vienna Convention. However, the said Article, first, does not explicitly provide for the possibility of terminating provisional application due to material breach of the treaty that is been provisionally applied. Although this could, of course, be agreed by the Parties, in practice situations exist where this is not the case. Under this scenario, the aggrieved Party will be left with only one option for terminating the provisional application, *i.e.* to declare its intention not to become a Party to the treaty. In the view of the European Union, this only option available may in some cases be considered a disproportioned outcome. It is therefore suggested to rely on the principle, applied by analogy, contained in Article 60 of the 1969 Vienna Convention for terminating the provisional application. While Article 60 of the 1969 Vienna Convention is not directly applicable to the case at hand, it may contain useful guidance in resolving this practical problem.
10. Second, the abovementioned disproportionality is further demonstrated by the fact that Article 25, paragraph 2 of the 1969 Vienna Convention does not provide at all for the possibility of suspending provisional application. As in the case of termination, it will be to the benefit of all States and international organisations if the ILC provides clarity on rules of international law that at their face value appear to limit or exclude the possibility of suspending provisional application on the basis of Article 60 of the 1969 Vienna Convention.
11. The European Union considers that the matter of legal effects of provisional application is essential for understanding the scope of the figure of provisional application and invites the ILC to further develop the commentaries to draft guideline 6 also in that respect in order to

provide more clarity on this important question.

Ms/Mr Chairperson,

12. The European Union welcomes the decision of the ILC to further clarify the effects of reliance on and references to internal law within the context of a provisional application of treaties and the European Union is of the view that guidelines 9 to 11 are unobjectionable.
13. References to internal law in the context of provisional application are far from being unusual and often touch on sensitive aspects related to constitutional law and they are frequently used by the European Union its own bilateral treaty practice.
14. With regard to draft guideline 11 relating to the right of a State or international organisation to agree to provisional application with limitations deriving from internal law of a State or the rules of the organisation, the European Union could mention that in its bilateral treaty practice it often exercises this right, in particular in cases of mixed agreements, i.e. agreements concluded by the European Union and its Member States, on the one part, and a third party, on the other part. The European Union takes the opportunity to refer to some recent examples demonstrating that:
15. Article 59(2) of the Cooperation Agreement on Partnership and Development between the European Union and its Member State, of the one part, and the Islamic Republic of Afghanistan, of the other part, provides that "(...) *the Union and Afghanistan agree to provisionally apply this Agreement in part, as specified by the Union, as set out in paragraph 3, and in accordance with their respective internal procedures and legislation, as applicable*". According to this provision it is up to the European Union to define the parts of the treaty to be provisionally applied. This was done by the respective internal act of the Union, namely Council Decision (EU) 2017/434 of 13 February 2017 on the signing and provisional application of the Agreement, which, first, in whereas clause 5 states that "*...the provisional application of parts of the Agreement between the Union and the Islamic*

*Republic of Afghanistan are without prejudice to the allocation of competences between the Union and its Member States in accordance with the Treaties". Second, in its Article 3 it provides that "...the following parts of the Agreement shall be provisionally applied the Union and the Islamic Republic of Afghanistan, but only to the extent that they cover matters falling within the Union's competence, including matters falling within the Union's competence to define and implement a common foreign and security policy."*

16. Provisions along the same lines could be found in also in Article 86(3) of Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part, and in the respective Council Decision (EU) 2016/2232 of 6 December 2016 on signing and provisional application of this Agreement.

17. Another example is Article 19(4) of the Agreement between the European Union and the Kingdom of Norway on supplementary rules in relation to the instrument for financial support for external borders and visa, as part of the Internal Security Fund for the period 2014-2020, which reads: "*Except for Article 5, the Parties shall apply this Agreement provisionally as from the day following that of its signature, without prejudice to constitutional requirements.*"

Ms/Mr Chairperson,

18. Before concluding, the European Union would like to make some remarks on the Memorandum of the Secretariat of 24 March 2017.

- a. In its last year's statement the European Union expressed its views on the priorities to be tackled by the future analysis of the Secretariat, and is pleased to see that its suggestions have been taken into account when structuring the Memorandum. The examination of the commencement, scope and termination of provisional application, as well as the analysis of the legal basis for provisional

application of in both bilateral and multilateral agreements contained in the Memorandum is much appreciated and deserves careful consideration.

19. At this stage the European Union would like to make comments on the Memorandum with regard to mixed agreements of the European Union. The Memorandum states that these agreements “share certain structural characteristics with bilateral and multilateral treaties, particularly those multilateral treaties with limited membership” (see point 5 of the Memorandum). It subsequently refers to these agreements under headings devoted to multilateral agreements (see point 46). Mixed agreements are a specific feature of the European Union legal order, having regard to the allocation of competences between the Union and its Member States as contracting parties. Many mixed agreements undertaken by the European Union and its Member States, of the one part, and a State/international organisation, of the other part have characteristics of bilateral agreements. Some mixed agreements have characteristics of multilateral agreements because of their specific aim, content and context.

Thank you for your attention.