Permanent Mission
of the Federal Republic of Germany
to the United Nations
New York

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Statement by the Federal Republic of Germany on Cluster 1 (Chps: IV (Protection of the Atmosphere) and V (Provisional Application of Treaties)) in the debate of the Sixth Committee of the Report of the International Law Commission, October 2021

Thank you Madam/Mister Chair,

Excellencies,
Ladies and Gentlemen,

On behalf of Germany, allow me to comment on the report of the ILC concerning the topics of "protection of the atmosphere" and the "provisional application of treaties". I will start with our comments on Chapter IV, the "Protection of the Atmosphere":

Protection of the atmosphere
Special Rapporteur: Shinya Murase (Japan)

Madam/Mister Chair,

Germany welcomes the work of the ILC on the highly relevant topic of the "Protection of the atmosphere" and commends the Commission on the adoption of the draft guidelines and their commentaries. We would like to express our special gratitude to Special Rapporteur Shinya Murase for his reports and efforts.

In particular, Germany welcomes that the preamble classifies atmospheric pollution and degradation as a common concern of humankind. As the Commission in the commentaries points out, this expression identifies a problem that requires cooperation from the entire international community. The protection of the atmosphere by preventing the introduction of harmful substances is crucial for

sustaining life on Earth, human health and welfare, as well as ecosystems. Transboundary air pollution, ozone depletion and changes in the atmospheric conditions leading to climate change are pressing global concerns that need to be addressed by the international community.

Secondly, Germany notes the clarification in the commentary to draft guideline 3 that this guideline, "[a]s presently formulated […] is without prejudice to whether or not the obligation to protect the atmosphere is an *erga omnes* obligation in the sense of article 48 of the articles on responsibility of States for internationally wrongful acts." Germany also acknowledges that there are different views on the *erga omnes* character of the obligation, as is further explained by the commentary. In this regard, Germany points to its view communicated in the past that it considers the obligation to protect the atmosphere an obligation *erga omnes.* Because of the unity of the global atmosphere, Germany deems the obligation to protect it to be one that is owed to the international community as a whole.

Germany welcomes the high threshold for activities aimed at international large-scale modification of the atmosphere expressed in draft guideline 7. Draft guideline 7 emphasizes that activities aimed at intentional large-scale modification of the atmosphere should *only* be conducted with prudence and caution and clarifies that this may imply the necessity to conduct an environmental impact assessment.

Germany considers that in certain cases also peaceful uses of nuclear energy might lead to significant deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth's natural environment and, consequently, fall under the definition of atmospheric pollution in draft guideline 1 (b). With regard to such cases, the phrase in the commentary that "the reference to radioactivity as energy is without prejudice to peaceful uses of nuclear energy in relation to climate change in particular" should not be interpreted in a way that would treat the peaceful use of nuclear energy differently from other peaceful activities that can lead to atmospheric pollution.

Let me finish our commentaries on this topic by emphasizing that Germany fully supports the ILC's recommendations that the General Assembly take note of the draft preamble and guidelines in a resolution, ensure their widest possible dissemination and commend them to the attention of states, international organizations and all who may be called upon to deal with the subject.

With your permission, I will now turn to Chapter V, the “Provisional application of treaties”.

Provisional Application of Treaties
Special Rapporteur: Mr. Juan Manuel Gómez Robledo (Mexico)

Madam/Mister Chair,

1 Germany wishes to express her appreciation for the work of the Commission on the complex matter of provisional application of treaties and, most notably, to congratulate the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, on the achievement of drafting the Guidelines which will form a comprehensive manual for the practice of States and international organizations. At the same time, Germany would like to particularly applaud the transparent, inclusive communication process that ensured that the Commission’s deliberations, work and findings were seen as a matter in the service, and for the benefit, of States and international organizations, which can only lead to a fruitful conclusion if feedback is actively encouraged and taken into account. Germany submitted comments to the Special Rapporteur on several occasions in the course of the Commission’s work, and the seriousness with which they were taken into account can be seen beyond doubt in the document now before us.

2 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 helps to achieve greater legal certainty and predictability. The detailed commentaries to the Guidelines support their interpretation, and the annex—a carefully compiled reference manual on examples of provisions on provisional application of treaties—will be consulted intensively when negotiations on treaties have reached the phase of drafting.

3 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 after the adoption of the Guidelines. The 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 to Guideline 2. While this provision constitutes a provision of customary law and provides clear instructions on pertinent aspects of this legal figure in treaty law, 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. This is, given the intended flexible nature of provisional application, entirely acceptable. The consistent standards developed by the International Law Commission can, however, rightfully be expected to provide valuable support to contracting parties.

4 Germany would like to reiterate 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 prime reason necessitating provisional application and national limits thereto emanating from domestic legislation. 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.

5 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 for provisional application of treaties.

6 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 and thereby serves the further development of international relations.

7 In joining the observations made in the "Statement of the European Union on Provisional Application of Treaties," Germany, in particular as Member State of the European Union, would like to underline the importance of further clarifying, through treaty practice and jurisprudence, the interaction of international and domestic law, especially in context with the so-called mixed agreements, *i.e.* with agreements between the European Union and its Member States, on the one part, and a third party, on the other part which touches both on powers, or competencies, exclusive to the European Union and on competencies exclusive to Member State of the European Union.—On a side note, Germany

noticed, not without interest, that the Commission chose to categorize mixed agreements as bilateral treaties, at least for purposes of the annex to the Guidelines.

8 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. The system of multiple levels poses new challenges on this particular issue of treaty law. Germany welcomes that the Guidelines aim to include treaties between States and international organizations or between international organizations and, thus, addresses, special—and often intricate—issues arising by concluding international agreements with them (*e.g.* the aforementioned mixed agreements).

9 Germany is aware that the Guidelines are conceived as general advice, which shall facilitate treaty operations at international level. Therefore, we communicated to the Commission that it would be deemed 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. The Commission has decided not to take problems concerning mixed agreements into detailed consideration. Even if a State cannot invoke the provisions of its internal law as justification for its failure to perform obligations arising under provisional application of those parts of mixed agreements for which the European Union—or, as the case may be, any other supranational organization—has exclusive competence and authority, 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 remains an impending issue of great importance for the reason that the treaty type of mixed agreements is apt to modify the residual character of Article 25 of 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.

Madam/Mister Chair,

Please allow me to briefly comment also on the Commission's recommendation to include the topic "Subsidiary means for the determination of rules of international law" in the long-term programme of work of the Commission. Germany shares the view that is presented also in the respective syllabus attached to the ILC report, that an elaboration of this topic by the Commission would complement the Commission's seminal work on the sources of international law and their identification. It would

certainly contribute immensely to deepening our common understanding of the functioning of Article 38 para. 1 (d) ICJ Statute and specifically also of the interplay of para. 1 (d) with para. 1 letters (a), (b) and (c). Germany would hence like to express its support of the inclusion of this topic in the Commission's long-term programme of work.

This concludes our statement on cluster 1. Thank you for your attention.