Sixth Committee Statements
Report of the International Law Commission
on the work of its 64th session

Provisional application of treaties

67th session of the General Assembly
2012

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* Statement made available in Russian only.

[**] The delegation of Australia never delivered its statement. Accordingly, it is being included in this compilation for information purposes only, but should not be cited in any official documentation.
[***] The delegation of Mexico never delivered its statement. Accordingly, it is being included in this compilation for information purposes only, but should not be cited in any official documentation.

18th meeting, 1 November 2012, a.m.

1. Slovenia

With regard to Chapter VII: Provisional application of treaties, a new topic included in the programme of work of the Commission, we would like to congratulate Mr Juan Manuel Gómez-Robledo on his appointment as Special Rapporteur for this topic. The topic is highly relevant for States and, as such, certainly deserves further examination. We feel that this topic has not received due formal attention in view of its use in the practice of States since the adoption of the Vienna Convention. We hope that an in-depth analysis of this topic by the Commission will contribute significantly to a better understanding of it, so that at the end of the process, it will be possible to say that the provisional application of treaties is no longer *"une notion ambiguë",* as some authors have maintained.

20th meeting, 2 November 2012, p.m.

2. Iran (Islamic Rep. of)

The topic 'Provisional application of treaties' is one of the new topics included in the ILC's programme of work. We regard this exercise as a useful one in clarifying and complementing, if needed, the provisions of Article 25 of the 1969 Vienna Convention on the Law of Treaties. The topic appears to be related to two other topics currently on the agenda of the Commission, namely 'Treaties over time' and 'Formation and evidence of customary international law', in many respects, and therefore the Special Rapporteur can exploit the Commission's findings under those topics to accelerate his work on the present topic.

It is highly questionable to assume that provisional application of a treaty, per se, can count as a practice evidencing the formation of a customary norm, since such alleged practice simply lacks the very basic constituting element of any 'customary rule', that is 'opinio juris. That a State chooses not to become bound to a treaty by opting to remain as a signatory (and not to ratify it) signifies that that State does not deem the treaty in question to have any legal force vis-a-vis that State.

We feel it would be overly difficult, both under the 1969 Vienna Convention and in the light of State practice, to extract a unified practice capable of evidencing the formation of customary norms as a result of 'provisional application of treaties' effected by signature (short of ratification). We do not deem it appropriate methodologically to disproportionately overstate the subsequent practice at the price of overlooking State consent as an essential component in determining opinion juris. It would be advisable also to follow a calculated and balanced approach when assessing the role and weight of regional and local practices in the formation of a customary norm of international law.

I conclude by underlining the importance of taking into account by the Commission of the views and concerns expressed during the sessions of the Sixth Committee by the member States. The views expressed by delegates during the debate on the ILC's annual report in the Sixth Committee shall be given the same treatment as the written comments communicated by

member States to the Commission.

3. Hungary

In connection with the provisional application of treaties I would like emphasize that during the last decade the number of international treaties containing provisional application clauses has substantially increased. This also applies to Hungary which as a member of the European Union has become a party to numerous multilateral international treaties which were concluded between the EU, its member states and third countries. These treaties would usually enter into force after all parties have ratified them. This would normally require twenty-nine ratifications, but to reduce the time before the full application, these treaties in almost every case include a provisional application clause. Article 25 of the Vienna Convention on the Law of Treaties does not contain detailed rules on provisional application, and there are numerous issues which are waiting to be addressed in this regard. Therefore Hungary wholeheartedly supports the Commission's plan, as envisaged in its work program for the present *quinquennium,* to elaborate the issue in draft articles/guidelines/model clauses, which would give much needed guidance to Member States.

4. Norway (on behalf of the Nordic countries)

I will now address the topic of Provisional application of treaties. The ILC decided this year to include this topic in the current programme of work and appointed Mr Juan Manuel Gómez-Robledo as Special Rapporteur for the topic. Divergent views were expressed last year by State representatives in the Sixth Committee on the appropriateness and outlining of this new topic. Against this background we find it helpful that the Commission has held informal consultations on the basis of preliminary elements prepared by the Special Rapporteur together with the original syllabus prepared by Mr Giorgio Gaja. We look forward to the first report by the Rapporteur.

With respect to the specific questions related to the relation between Articles 18 and 25 of the Vienna Convention on the Law of Treaties we agree with those views expressed in the Commission that provisional application under Article 25 goes beyond the general obligation not to defeat the object and purpose of the treaty prior to its entry into force. These two different legal regimes should be treated as such and would not in our view give rise to further elaboration. The question of which organs were competent to decide on provisional application and the relation to Article 46 of the Vienna Convention would not in our view deserve in-depth attention because of the constitutional nature of the question. Among the elements mentioned in the informal discussions that could gain from further clarification were the exact meaning of provisional application of a treaty and the nature of obligations created by provisional application.

Considerable State practice on the provisional application of treaties has formed over the years. Such state practice cannot remain a mere fact but should be given relevance to in the work of the Commission.
It is obvious that at this initial phase of deliberations of this new topic it is premature to try to

anticipate the desired outcome. Indication by the Special Rapporteur that the Commission should not aim at changing the regime of provisional application of treaties in the Vienna Convention provides, however, an appropriate starting point.

5. Austria

Permit me now to turn to the topic of the **"provisional application of treaties"**. Austria welcomes the inclusion of this topic into the agenda of the Commission and the appointment of Mr. Juan Manuel Gómez-Robledo as Special Rapporteur.

In recent times, provisional application has increasingly been resorted to although neither the conditions under which it is available nor its legal effect is undisputed. Since legal doctrine has also not very frequently dealt with this matter, provisional application remains vague and ambiguous.

For instance, one question is that of the scope of the provisional application of a treaty. Article 25 of the Vienna Convention of the Law of Treaties does not specify the extent to which a treaty is applied if it is provisionally applied, whether in its entirety, including also its procedural provisions like dispute settlement, or only partly, relating only to provisions of substance.

Another issue is whether provisional application of a treaty can be based on a unilateral declaration - as the UN Treaty Handbook seems to suggest - or whether an agreement of all states parties is needed for this purpose. The wording of Article 25 of the Vienna Convention favors the latter alternative, as it explicitly refers to the wording of the treaty itself or to an additional agreement of the negotiating states, which means of all negotiating states.

Provisional application raises a number of problems in relation to domestic law. It was argued that provisional application was possible even if domestic law including the constitution of a state was silent on this possibility. The opposite position is that domestic law defines the procedures by which a state accepts international commitments in an exhaustive manner. In addition, it also has to be pointed out that there is a certain tension between provisional application and parliamentary approval procedures based on the idea of democratic legitimacy.

The Austrian constitution does not contain any rules on the provisional application of treaties. However, since Austria has become a member of the European Union in 1995 and in view of the EU practice of provisional application, the need arose to apply provisionally certain treaties with third countries. Austria accepted this practice, but in order to respect democratic legitimacy it applied such treaties provisionally only after their approval by the Austrian parliament. If the treaty does not specify that the provisional application becomes effective only upon notification, allowing Austria to conclude its parliamentary procedure, Austria has adopted the practice of declaring that it would apply the treaty provisionally only after its parliamentary approval in Austria.

The Special Rapporteur also raised the question of the relation between Article 25 and Article 18 of the Vienna Convention, the latter regarding non-frustration. It is our view that these two issues concern different problems and should be kept separately, although both provisions apply simultaneously. Whereas provisional application is subject to its own conditions and may entail

a restricted extent of application of a treaty, the duty not to frustrate the object and purpose of a treaty relates to the whole treaty.

21st meeting, 5 November 2012, a.m.

6. Germany

Germany would like to thank the International Law Commission for including the important topic of provisional application of treaties in its programme of work..

Please allow me to make a few comments to point out the relevance of provisional application for treaty relations today and how we perceive it to function. The provisional application of treaties as provided for in article 25 of the VCLT has become more frequent over the years. States make use of this option when lengthy national ratification procedures stand in the way of the quick entry into force of a treaty. Provisional application is the tool to give a treaty effect pending its entry into force. It is used for bilateral treaties as often as for multilateral treaties.

It is Germany's understanding that the provisional application of a treaty means that its rules will actually be put into practice and will govern the relations between the negotiating States, i.e. the prospective Parties - to the extent provisional application is agreed.

States may decide to limit the extent of provisional application of a treaty. This has been done in many treaties concluded with Germany's participation. In that case, the extent of provisional application is determined either in the treaty itself or in the instrument containing the agreement on provisional application.

In many States - including Germany - internal law determines to what extent provisional application of a treaty may be agreed to or to what extent a treaty may be provisionally applied. If the implementation of a treaty requires change or adoption of internal national legislation in a negotiating State, the provisional application of this treaty will be impossible for the State, at least until the respective law has been changed or adopted by the legislative bodies. The same might be true if the financial funding demanded by the treaty requires parliamentary approval.

Therefore, in many cases where provisional application of a treaty is agreed in a treaty or otherwise, States will limit its provisional application to the framework of applicable national law, thereby making it clear that they may not be in a position to completely meet the treaty's obligations. Alternatively, States might agree to the provisional application of a treaty upon notification of completion of the necessary internal procedures, in other words, on the condition that the necessary internal procedures to ensure compliance with treaty regulations have been fulfilled.

Provisional application in itself is not in any way the expression of a consent to be bound nor does it lead to an obligation to declare consent to be bound. Article 25 Para. 2 VCLT clarifies that a State which has determined that it has no intention to be bound by a treaty -because e.g. necessary parliamentary approval for ratification has been refused - is entitled to end provisional application.

It may be a different matter - depending on the concrete terms of the agreement - whether and how States that have already consented to be bound by a treaty not yet in force may or may not terminate provisional application of that treaty.

Germany is very much looking forward to the ILC's contribution to this important topic in international treaty relations.

7. Republic of Korea

On the issue of the *"Provisional Application of Treaties,"* my delegation congratulates the appointment of Mr. Gómez-Robledo as Special Rapporteur, and we hope that he plays an active role in the future works of the ILC. Considering the importance of this topic, my delegation believes that it is reasonable to discuss on it in terms of elaborating the *1969Vienna Convention on the Law of Treaties.* In this regard, we would like to give the following suggestions.

First of all, we consider it is necessary to clarify the meaning of "provisional application" in Article 25 of the Convention. If it means that a treaty enters into force provisionally without the consent of the State to be bound, it should be considered how the provisional application regime could be in harmonization with the current international rules based on the consent of the State to be bound.

It is also necessary to review State practice on how a person is empowered to represent a State for the purpose of expressing the consent of the State to be bound "before its entry into force," as well as the related articles of the Convention, namely, Articles 7 *(Full powers),* Article 8 *(Subsequent confirmation of an act performed without authorization),* Article 46 *(Provisions of internal law regarding competence to conclude treaties),* and Article 47 *(Specific restrictions on authority to express the consent of a State).*

We would like to mention an example concerning this topic. For the provisional application of the Free Trade Agreement between the Republic of Korea and the EU, the consent of the National Assembly of Korea was required, as in case of its entry into force. Since the agreement was provisionally applied with the consent of the Assembly, additional measures have not been taken for its entry into force.

In regard to the issue of the relationship between Article 25 and Article 18 *(Obligation not to defeat the object and purpose of a treaty prior to its entry into force)* of the Convention, my delegation would like to point out that the two articles apply to a treaty as the separate regimes before its entry into force. That is, the obligation not to defeat the object and purpose of a treaty prior to its entry into force (Article 18) could be applied irrespective of the provisional application of the treaty. In this context, if the treaty itself provides a clause on provisional application, such a provision will be protected by Article 18 of the 1969 Vienna Convention as well.

8. Belarus*

Республика Беларусь приветствует начало работы Комиссией над темой «Временное применение договоров» и выражает надежду на успешную работу над ней Специального докладчика г-на Хуана Мануэля Гомес-Робледо.

Право международных договоров образует фундамент современного международного права, ввиду огромного количества норм международного права, создаваемых международными договорами. Это предопределяет значимость более широкой кодификации Комиссией тех вопросов права международных договоров, конкретизация которых продиктовано требованиями современного этапа развития международного права и отношений между государствами.

Применение положений Венской конвенции о праве международных договоров 1969 года в течение достаточно долгого времени свидетельствует о том, что закрепленные в ней основные нормы права международных договоров сохраняют актуальность и не нуждаются в коренном пересмотре. Белорусская делегация поддерживает избранный Комиссией подход к детализации отдельных положений права международных договоров (оговорки, временное применение, последующая практика сторон) в документах гибкого характера, обобщающих и рационализирующих практику государств без изменения самой Конвенции 1969 года.

Институт временного применения международных договоров широко используется в современной международной договорной практике, создавая международно-правовые условия для исполнения важных положений международных договоров до их вступления в силу. Наличие этого института вносит правовую стабильность в отношения между государствами, позволяет оперативно снимать проблемные вопросы между ними в различных сферах сотрудничества. При этом следует отчетливо осознавать, что одним из его нежелательных аспектов может быть затягивание государством выражения согласия на обязательность международного договора.

Временное применение не служит средством возникновения в прямом смысле правовых норм, поскольку для этого необходимо окончательное и недвусмысленное выражение согласия государств на юридическую обязательность международного договора. В процессе временного применения происходит выполнение государствами правил поведения, закрепленных в договоре, которые составляют содержание будущей нормы международного права, призванной регулировать отношения между ними. В то же время в целях стимулирования к более быстрому выражению согласия государств на обязательность международных договоров можно было бы обсудить в Комиссии целесообразность как de lege ferenda возникновения международного обычая вследствие длительного временного применения некоторых положений международных договоров.

Республики Беларусь активно использует временное применение в своей международной договорной практике. Временное применение международных договоров позволяет белорусской стороне приступить к сотрудничеству в рамках данных договоров при параллельном выполнении внутригосударственных процедур,

* Statement made available in Russian only.

необходимых для его вступления в силу.

В Законе Республики Беларусь «О международных договорах» предусмотрено, что международный договор, временно применяемый Республикой Беларусь до его вступления в силу, подлежит исполнению в том же порядке, что и международный договор, вступивший в силу (ст. 32). Таким образом, в рамках национального законодательства заложен принцип полноценной реализации Беларусью подлежащего временному применению международного договора с даты его подписания.

В Республике Беларусь решение о временном применении международного договора или его части принимается, как правило, одновременно с решением о его подписании или заключении путем обмена нотами, письмами или иными документами, образующими международный договор. В случае договоренности между сторонами, начало временного применения международного договора или его части возможно на основе принятия соответствующим государственным органом Республики Беларусь отдельного решение вне привязки к подписанию.

В отношении обязательства не лишать договор объекта и целей до его вступления в силу, как это предусмотрено статьей 18 Венской конвенции 1969 года, разделяем мнение о том, что оно носит самостоятельный параллельный характер и не перекрывается временным применением согласно статье 18 Конвенции.

В заключение хотел бы выразить надежду на то, что в документе, который будет итогом работы над темой, будут даны исчерпывающие и ясные ответы на ключевые вопросы, возникающие в ходе практики временного применения договоров. В частности, ожидаем исследования всех известных способов формирования соглашения о временном применении международных договоров, последствий прекращения временного применения, а также условий, которые могут выдвигаться для временного применения, и их практической реализации (например, временного применения в части, не противоречащей законодательству, в соответствии с правовой системой и др.).

9. Ireland

I now turn to the topic of "The Provisional Application of Treaties". Ireland congratulates Mr. Juan Manuel Gómez-Robledo on his appointment as Special Rapportuer for this topic and very much looks forward to reading his first report. We welcome the decision to request from the Secretariat a memorandum bringing together previous work undertaken on this topic and believe that this will be a valuable aid to our discussions. My delegation regards the issues identified in paragraph 151 of the Commission's Report on its Sixty-Fourth Session as being highly pertinent and welcomes further elaboration on these questions. We agree that the relevance of the provisional application of treaties in the formation of customary international law might best be considered in the context of the Commission's work on that separate topic.

10. The Netherlands

Turning to the topic of the Provisional Application of Treaties, we note the decision of the Commission to include this topic in its Work programme. We read the report of Special

Rapporteur Gómez-Robledo and the ensuing discussion in the Commission, with interest.

It is clear from the many points addressed by the Commission that the identification of the issues to be covered is still in the initial stage. The decision to take Article 25 of the Vienna Convention of the law of treaties and its *travaux*as the starting point makes sense, and we would welcome an analysis of the customary status of article 25, since, as yet, only 128 States are Parties to the Vienna Convention. A clarification on the customary status of Article 25 would thus be of importance for our understanding of the issue.

We consider provisional application an important instrument of international treaty practice. However, we would like to draw attention to the importance of domestic law in this respect. It is after all for individual States to determine whether or not their legal system allows for provisional application and, if so, on what conditions and to what extent. It may be difficult to draw any general rules from this diversity. We therefore call into question, for example, whether the ILC should take up questions such as which organs would be competent to decide on provisional application. This would seem to surpass the mere stock-taking of state law and practice. In the same vein we would advocate, at least at this stage of the discussions, that the ILC-study on this topic should result in guidelines and model clauses rather than in draft articles.

11. El Salvador

Nos referiremos a continuación a los dos temas nuevos que han sido incluidos por la Comisión de Derecho Internacional en su programa de trabajo de largo plazo, es decir, a la "Aplicación Provisional de los Tratados" y a la "Formación y Prueba del Derecho Internacional Consuetudinario".

AI respecto, nuestra delegación desea iniciar reiterando sus felicitaciones al Sr. Juan Manuel Gómez Robledo y al Sr. Michael Wood por sus respectivos nombramientos como relatores especiales y les auguramos el mayor de los éxitos en sus labores, sin duda sus amplios conocimientos en la materia permitirán un estudio profundo de estos temas que se enmarcan dentro del contexto general de' las fuentes del derecho internacional y de su alcance.

En relación al tema de la "Aplicación Provisional en los Tratados", apoyamos la orientación inicial propuesta por el relator especial pues, en *efecto,* el examen de los trabajos realizados por la Comisión en el tema del derecho de los tratados es un buen punto de partida, que puede resultar de gran utilidad para abordar las nociones generales del tema.

Por su parte, acerca del tema de la "Formación y Prueba del Derecho Internacional Consuetudinario", nuestra delegación atribuye especial importancia a la elaboración de un estudio a través del cual se pueda aclarar el proceso de formación e identificación de las normas de derecho internacional consuetudinario y sus efectos. Para ello, es fundamental que se tome en cuenta la jurisprudencia internacional y la practica interna, sin embargo, en este *caso,* también recordamos a la Comisión que debe prestar especial atención al sistema jurídico propio de cada uno de los Estados, en tanto estos puede presentar una mayor o menor apertura respecto a la costumbre como fuente de derecho.

En definitiva, expresamos nuestro apoyo a las labores de la Comisión en este tema de

gran importancia, y esperamos con especial interés los respectivos informes de los relatores especiales a ser presentados en el 65° período de sesiones de la Comisión.

12. Portugal

Turning now to the topic "Provisional Application of Treaties", Portugal would like to applaud the Commission for including this topic in its programme of work. This reflects the increasing need to further study classical International Law matters in a world in constant and fast evolution. We would also like to take this opportunity to congratulate Mr. Gómez-Robledo for being appointed Special Rapporteur for the topic.

The provisional application of treaties may have different reasonings, as Mr. Waldeck pointed out at the Vienna Conference in 1969*: the need for urgency in the application of a treaty; or when the content of a treaty seems highly desirable and its entry into force is not doubtful.

However, being provisional in nature, such provisions have a transitory application in a reasonable time-frame. The GATT is a good example, albeit an atypical one, of a transitory application being provisionally applied for decades, clearly exceeding the character of the provisional application regime.

We know, from the *travaux preparatoires* of the 1969 Vienna Convention, that there was some dispute concerning the acceptance of the provisional application regime**. At the end, it was adopted as Article 25. The big questions in 1969 remain the same today: how can a treaty be applicable if it is not yet in force? And, how can a treaty be applicable without passing through the domestic democratic controls? Through the lens of International Law, it can. In the *Yukos* case the arbitral tribunal recognized that such provision is binding and enforceable. Hence, once the signatory accepts the provisional application, the non provisional application of the treaty as agreed may trigger international responsibility.

However, the consent of the Parties providing strength to the *pact sunt servanda* principle implies that a provisional application of treaties also depends on the consent of the Parties regarding a given treaty. This means that the provisional application of a treaty is always dependent on the consent of a signatory State or International Organization. Clauses should be carefully designed in order to offer a clear opportunity to signatories to express, or not, their consent to the provisional application of a treaty.

In this regard, it is frequent that after the treaty is closed for signature it is still not in force. That leads us to the question if an acceding State or International Organization will be bound by a provisional application clause of the signed treaty or if it can make a declaration excluding it from the scope of such clause. If it cannot waive the provisional application obligation, its domestic laws can compromise its participation in the treaty and, thus, risk the number of Parties to such treaty.

In what concerns the obligation not to defeat the object and purpose of a treaty prior to its entry into force (Article 18 of the 1969 Vienna Convention), we find that both this obligation and the provisional application are related and have the same scope *ratione temporis.* Nevertheless, the~ lead to two different legal regimes.

Turning now to the significance of the legal situation created by the provisional application for the purpose of identifying rules of customary International Law, we find that there is indeed some relevance. Provisional application of substantive treaty norms indicates the existence of reiterated practice and of *opinio juris.* The *opinion juris* may even be revealed before the existence of reiterated practice. The signatory's intention to apply such norms provisionally clearly translates an already existing conviction that such norms are mandatory.

Nevertheless, and despite its relevance, we think that this matter has no place within this topic. Perhaps it could find some room for analysis in the topic "Formation and Evidence of Customary International Law", also on the agenda of the Commission.

The practice of States is extremely relevant. There are significant differences in domestic law from State to State regarding the possibility of accepting the provisional application of a treaty. Hence, the Commission should adopt a broad approach to this matter in order to respect the diversity of solutions taken by the domestic law of different States.

From the perspective of the States' domestic laws, there are different legal approaches that have to be respected. The first one would be that the domestic law does not allow the provisional application of any treaty. In other States, the legal approach is that the provisional application is accepted but only after passing all the required internal democratic controls. Finally, another possibility is the acceptance of provisional application without any other requirement than those vested in Article 25 of the 1969 Vienna Convention.

Even in domestic law, the acceptance of one of these options may be highly controversial. In what concerns Portugal, practice is based on a restrictive interpretation of Article 8(2) of the Portuguese Constitution. According to such interpretation, Portugal is only bound by a treaty after it has been internally approved and published in the official gazette, and the treaty itself enters into force in the international legal order. Hence, in the case of Portugal, the provisional application of a treaty is not admissible.

To conclude our intervention on the topic, we deem it is still premature to have a decision on the final form of the work of the Commission. However, being a topic that cannot go further than what is already provided for in the 1969 and 1986 Vienna Conventions, there is no room for progressive development, as the Special Rapporteur himself has observed.

The work of the Commission is to clarify the legal regime of provisional application of treaties. Therefore, for the moment, Portugal is inclined to consider that a guide with model clauses would be the best outcome to the topic.

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* United Nations Conference on the law of Treaties (1970) *Official Records of the Second Session:* Vienna, 9 April-22 May 1969. New York: United Nations.
** *Ibidem.*

13. United States

Turning to the topic, "Provisional Application of Treaties," the United States compliments Mr. Juan Manuel Gómez-Robledo on his appointment as Special Rapporteur for this topic. We also

thank Professor Gaja for his earlier work on this topic. In our view, provisional application means that states agree to apply a treaty, or certain provisions, as legally binding prior to its entry into force, the key distinction being that the obligation to apply the treaty - or provisions - in the period of provisional application can be more easily terminated than is the case after entry into force. We hope that the result of this work includes a clear statement to this effect. With regard to the issue of whether States should give notice prior to terminating provisional application, the United States urges caution in putting forward any proposed rule that could create tension with the clear language in Article 25 of the Vienna Convention on the Law of Treaties, which has no such restriction regarding a State's ability to terminate provisional application of a treaty. Finally, we think a decision on the final form that this project should take is best left to a later date.

14. Poland

Poland commends the Commission's choice of the topic of the "Provisional Application of Treaties" as a subject for its further elaboration and welcomes Mr. Gómez-Robledo as the Special Rapporteur to lead that endeavor. Poland expects the Commission to come up with useful directives and guidelines for States in their application of Article 25 provisions of the Vienna Convention on the Law of Treaties of 1969. Simultaneously we notice that similar problems arise when a treaty is concluded by an international organization either with States or with other international organizations. It is noteworthy that provisional application of a treaty may constitute very helpful instrument particularly in situation when there is a need for matters covered by the treaty to be dealt with urgently. Thus, we are awaiting the results of the Commission's works on the subject with great interest. Given the preliminary stage of the Commission's works on the subject let me limit my specific remarks to two points.

First, let me emphasize that there can be no doubt that the essence of the provisional application of treaties lies in its flexibility. That characteristic feature, inherent in this institution should be, by all means, preserved. In our view and practical experience, the issue deserves a detailed and careful analysis.

Second, let me formulate an important caveat. The Vienna Convention of 1969 is a superb, extraordinary instrument of constitutional nature that proved its utility. However, taking into account the lapse of more than 30 years from its entry into force, we are of the opinion that it might be recommended to study the convention as a whole, in order to review its provisions as confronted with a subsequent practice. This would be a perfect task for the ILC, corresponding with recent work of the Commission on both law of treaties and other sources of international law (incuding in particular effects of war upon treaties, reservations to treaties, unilateral acts, and currently customary law).

15. Romania

As regards the ***Chapter VII - Provisional application of treaties***, we consider it as a topic of great importance and relevance, mainly for the impact it may have on the future conduct of the States in concluding treaties containing this clause and on the interpretation of the legal regime

they create. Therefore, the relevant practice of the States up to now and the circumstances in which the States resorted to provisional application of treaties would be useful for the future work of the Commission on this topic.

We share the view of the Special Rapporteur - and we take this opportunity to congratulate Mr. Juan Manuel Goméz-Robledo for his appointment - that the first basis for the consideration of the topic should be the work undertaken on the law of treaties and the analysis of the *travaux préparatoires* of the 1969 Vienna Convention on the Law of Treaties. We also think that the final outcome of the Commission's work - draft articles or guidelines or model clauses- may be decided at a later stage after the preparation of the first report.

16. South Africa

I will now turn to the topic, "provisional application of treaties". We welcome the decision of the ILC to undertake a study into the topic of Provisional Application of Treaties and we also congratulate Mr. Juan Manuel Gómez-Robledo on his appointment as the Special Rapporteur for this important topic.

We take note of the 2011 Recommendation of the Working Group on the Long Term Programme of Work of the ILC and the various possible interpretations of a clause in a treaty that provides for provisional application of the treaty. Having regard to the negotiating history of Article 25 of the Vienna Convention on the Law of Treaties, as well as recent arbitral awards concerning provisional application, South Africa is of the opinion that the prevailing view should be that States who agree to provisionally apply a treaty, are bound to apply the relevant provisions of that treaty in the same way as if the treaty has entered into force, subject to the conditions provided in the particular provisional application clause.

The South African Constitution makes provision for two distinct procedures for the State to become bound to an international agreement. Which procedure to follow will depend on the nature of the international agreement. Agreements of a technical, administrative or executive nature, require Executive approval and bind the Republic of South Africa on signature. All other agreements agreements must be approved by parliament before it becomes binding on the Republic.

The provisional application of treaties and how it relates to domestic law, in particular where parliamentary approval is required before an international agreement would bind a State remains an important and much debated question.The challenge faced by many countries to conciliate provisional application of treaties with Constitutional requirements makes this study by the ILC relevant. The ILC's guidance concerning the legal meaning of provisional application, as well as the legal effect of termination of provisional application would greatly assist in determining the scope of obligations in terms of the treaties which apply provisionally.

22nd meeting, 6 November 2012, a.m.

17. India

We congratulate Mr. Juan Manuel Gómez-Robledo for his appointment as the Special Rapporteur for the new topic of 'Provisional application of treaties' and commend him for informal consultations on the topic and presenting thereupon an oral report at the Commission's session.

We support the view that aspects relating to the formation and identification of customary international law do not form part of the scope of this topic.

We are in favour of preserving the regime established under article 25 of the 1969 Vienna Convention on Law of Treaties and not to create new conditions and circumstances for the provisional application of treaties. On the question of the final outcome of the Commission's work, we agree with those members of the Commission who thought it pre-mature to take any decision as to the form of the outcome and that the topic did not necessitate the elaboration of draft articles.

18. Greece

Starting with the question of provisional application of treaties, we agree with the suggestion made by the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, that the very first basis for the Commission's consideration of this topic should be the previous work undertaken by the Commission on this subject in the context of its work on the law of treaties, as well as on the *travaux preparatoires* of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, and, in particular, article 25 therein.

In this regard, it should be pointed out that, as follows from the commentary to draft article 22, entitled "Entry into force provisionally" of the 1966 draft articles on the law of treaties, the main purpose of this provision is to formally recognize a practice which occurs with some frequency today and requires mention in the draft articles.

In our view, article 25 of the Vienna Convention is merely the written recognition of this wide State practice. Accordingly, it has more to do with the progressive development, rather than the codification, of a well-established rule of customary law.

We, therefore, believe that the Commission should be particularly cautious when examining this topic, which touches on very sensitive areas pertaining to the relationship of international law with national, in particular constitutional, law. Recourse to the provisional application of treaties should actually depend on the specific circumstances and the national legislation of each State.

Thus, in our view, the work of the Commission should rely on the research and analysis of existing State practice, which includes some notable examples, such as the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, which, in article 7, contains a clause on provisional application.

Moreover, it would, in our opinion, be useful to elucidate the legal situation arising out of the provisional application of a treaty, including the exact meaning of the expression itself and its difference in relation to the term of the provisional entry into force of a treaty, which first appeared in the 1966 draft articles on the law of treaties.

Starting with the assertion that provisional application of a treaty is based on an agreement, whether written or oral (or even implicit arising from the conduct of States parties), which is always separate from the treaty itself, it would be interesting to examine whether the rule of *pacta sunt servanda* is applicable to a treaty provisionally applied, and whether a breach of the obligations of the latter could entail the international responsibility of the State(s) concerned.

It would be equally important to examine the question of the termination of the provisional application of a treaty which is only partially dealt with in paragraph 2 of article 25.

Although we agree with the general view prevailing in the Commission that at this stage it would be premature to decide on the final outcome of this topic, we are of the view that the issues raised above could eventually lead to the elaboration of some model clauses on provisional application which would be of practical assistance to States when negotiating treaties.

19. United Kingdom

Turning now to the topic **Provisional application of treaties**. The UK welcomes the inclusion of this topic in the programme of work and congratulates Mr Juan Manuel Gómez-Robledo on his appointment as Special Rapporteur.

The UK believes that a study of this topic would usefully build on the body of work on treaties undertaken by the ILC. That includes those topics recently completed such as the Guide to Reservations to Treaties and the Effect of Armed Conflict on Treaties, as well as the ongoing topic of Treaties over Time, and of course the Vienna Conventions on the Law of Treaties themselves.

We think that this topic has the potential to be of genuine practical importance to States, though we note that in practice questions of provisional application can have important dimensions of national and constitutional law for States. Provisional application is being increasingly utilised in our own treaty practice. The UK acknowledges the initial view of the Commission that it is still premature to take a decision on what should be the outcome of this study. We think this is a sensible approach, and, given the nature of the topic, it may, at least in the first instance, lend itself better to a study of how Article 25 of the Vienna Convention is applied in practice, perhaps leaving general propositions or commentaries, if any, to be drawn out subsequently.

The UK notes the intention of the Special Rapporteur to submit his first substantive report at the sixty-fifth session and the UK looks forward to studying that.

20. New Zealand

New Zealand takes note of the inclusion of the topic **Provisional Application of Treaties** in the Commission's work programme, and welcomes the appointment of Ambassador Juan Manuel Gómez-Robledo as Special Rapporteur for this topic.

We agree that it would be useful to clarify issues relating to provisional application, in particular the relationship between Articles 18 and 25 of the Vienna Convention on the Law of Treaties and their differing legal regimes. There is merit in having a clear identification of the differing forms of provisional application, the procedural steps that are pre-conditions for provisional application, and the legal effect of provisional application. The memorandum to be prepared by the Secretariat on the previous work undertaken by the Commission on this subject in the context of its work on the law of treaties, and on the travaux préparatoires of the relevant provisions of the 1969 Convention on the Law of Treaties, should provide useful material for this purpose.

However, New Zealand also believes that the Commission's work on this topic would greatly benefit from consideration of the differing practice of States regarding provisional application. The legal regime of provisional application cannot be divorced from a State's constitutional and procedural requirements. The Commission's work would therefore benefit from a good understanding of the internal position of States towards provisional application.

21. Singapore

We note the decision of the Commission to include the topic "Provisional application of treaties" in its long-term programme of work and welcome Mr Juan Manuel Gómez Robledo's appointment as Special Rapporteur for the topic. My delegation eagerly anticipates elaboration on this topic by the Commission, especially since the "provisional" application of treaties is well-used in the area of bilateral and multilateral civil aviation treaties. As an aviation hub, these are matters which are not just of academic interest to Singapore, but also practical application. Interestingly, there are even instances where some provisional bilateral aviation treaties, which although have never entered into force, are subsequently replaced by updated but nevertheless still "provisional" treaties.

22. Spain

En relación con los otros cinco capítulos concernidos en esta tercera parte del informe, permítame que, dado el carácter limitado del tiempo de que disponemos, mi delegación se centre en esta presentación oral tan solo en algunos aspectos escogidos.

Por lo que respecta a la cuestión de la aplicación provisional de los tratados, mi delegación se congratula del nombramiento del Sr. Gómez Robledo como Relator Especial y serán dos los comentarios que haremos en esta temprana fase de tratamiento del tema. En primer lugar, a propósito de la relación entre los artículos 18 y 25 del Convenio de Viena, no creemos que esta

vaya mucho mas alía de que ambos operan antes de la entrada en vigor del tratado en cuestión. A partir de ahí la obligación de no frustrar el objeto y el fin del tratado antes de su entrada en vigor, por un lado, y la aplicación provisional, por el otro, conforman situaciones y regimenes jurídicos totalmente diferentes.

En segundo lugar, mi delegación considera que la práctica resulta fundamental en esta materia pues es la que permite verificar su aplicación e interpretación. Y lo es la práctica estatal, pero también la practica de otros sujetos de Derecho Internacional. Así, entre la amplia variedad de cuestiones jurídicas que se suscitan, podría destacarse el uso de la aplicación provisional que Estados y organizaciones internacionales como la Unión Europea están haciendo en los acuerdos mixtos de carácter comercial celebrados con terceros Estados. Así, a través del mecanismo de la aplicación provisional, en el marco de la Unión Europea se consigue adelantar la aplicación de aquella parte del tratado que sea de competencia exclusiva de la Unión. Ello plantea obviamente problemas que, a nuestro entender, merecerían una reflexión propia. Sirva como botón de muestra la incidencia de un régimen internacional especial (el Derecho de la Unión Europea) en la aplicación provisional de un tratado, pues pueden surgir conflictos que afecten a! tercer Estado en la determinación de lo que sea o no competencia exclusiva de la Unión Europea. En esta misma línea, también los acuerdos que se han celebrado en el marco de la *eurozona* para el rescate de Grecia presentan una interesante problemática al respecto.

23. Cuba

Sabre el Capitulo VII “Aplicación profesional de los tratados” y el Capitulo VIII “La formación y la prueba del Derecho Internacional, Cuba felicita a la Comisión per la inclusión de los mismos debido a su gran importancia y exhorta alos relatores especiales: Juan Manuel Gómez Robledo y al Sr. Michael Wood a que realicen una fructífera labor en sus temas que repercuta y sea de utilidad para el Derecho Internacional.

24. Russian Federation

I shall now turn to the topic **"Provisional application of treaties".** We learned with interest the results of informal consultations on this topic. Since at the current stage the Commission is setting up only the general course for its further work on this topic we will limit ourselves by brief comments.

The work of the Commission on this topic should follow in all cases a careful, measured and pragmatic approach.

In light of quite significant role played by the concept of provisional application for individual types of the treaties, any strict rules or procedural framework can be counterproductive.

We welcome the proposal made in the Commission that the Secretariat should prepare a special memorandum on the results of the previous work conducted by the ILC on this topic in the context of its discussion of the law of international treaties and preparatory materials pertaining to relevant provisions of the Convention on the law of international treaties of 1969.

23rd meeting, 6 November 2012, p.m.

25. Japan

For the topic of "Provisional Application of Treaties," the delegation of Japan would like to commend the work done by Mr. Juan Manuel Gómez-Robledo, Special Rapporteur on the topic that provided preliminary points of discussion. They were useful in fostering dialogues between members in the informal consultations.

The Commission undertook its discussion based on several points raised by the Special Rapporteur – 1) the procedural steps that would need to be considered as preconditions for the provisional application and for its termination; 2) the extent to which article 18 of the VCLT, which establishes the obligation not to defeat the object and purpose of a treaty prior to its entry into force, was relevant to the regime of provisional application under article 25 of the VCLT; 3) to what extent the legal situation created by the provisional application of treaties was relevant for the purpose of identifying rules of customary international law; and 4) the need for obtaining information on the practice of States.

Due to its preliminary nature, Japan is looking forward to further discussions on this topic with a view to deepening the understanding of the topic. Japan expects that the Commission, led by the Special Rapporteur, will bring forth a valuable outcome.

26. Ghana

It is not uncommon o find States enquiring whether bilateral treaties Ghana ahs signed could enter into force provisionally in light of our national constitutional provision requiring all agreements to be ratified by Parliament. Despite this constitutional provision, Ghana has signed a number of treaties, including ECOW AS Protocols requiring provisional entry into force pending compliance with national constitutional procedures or legislative approval. Ghana endeavours to ratify such treaties as soon as possible after signature. But one Convention which the Rapporteur may wish to look which has entered into force provisionally for a limited period (1 0), this grace period being part of the complicated set of compromises reached during the negotiations to facilitate the adoption of the UNCLOS. An examination of the legal effect of non ratification of the Part XI by States which are parties to the UNCLOS but are yet to ratify the Part XI agreement will be an interesting dimension worthy of the attention of the Special Rapporteur. But perhaps, any negative consequences of provisional application of treaties could be mitigated by the principle that a Signatory State to a Treaty is bound not to act in a manner that will defeat the object and purpose of the treaty even before ratification.

27. Israel

Turning to the subject of Provisional Application of Treaties, Israel welcomes the inclusion of this topic in the long-term programme of work of the Commission and congratulates the Special

Rapporteur for his nomination and preliminary thoughts.

In this regard we wish to inform the Committee that the practice in Israel is that, while there is a possibility for the use of provisional application of treaties, it is applied only in exceptional circumstances. Israel looks forward to a beneficial exchange of views on this topic.

With regards to the topic of "Formation and evidence of customary international law" we support the inclusion of this important topic in the long term programme of the Commission's work and we welcome the appointment Sir Michael Wood as Special Repporteur.

In recent years Israel has followed with concern the simplified process by which certain rules have been characterized as having a customary nature. Due to the significant implications which such a conclusion has on the legal obligations of States, Israel believes that it is important to adopt a carful and responsible approach as to the process of formulation of customary international law.

In respect to the question of methodology used for the study, Israel strongly supports focusing on the actual practice of states rather than on written materials. In addition, it is our view that the weight given to resolutions of international organizations should be considered with great caution, due to the highly political background from which such resolutions grow which stems from to the fact that such resolutions tend to reflect the political balance between States more than their sense of legal obligation towards a certain practice.

As to the scope of the topic, Israel supports the view of the Special Rapporteur and members of the Commission, that the topic should not include at this stage, the consideration of new peremptory norms of general international law (also referred to as “us cogens”. We believe that at this initial phase of the study all resources should be allocated to the extensive and in depth examination of the core principles of the topic before reviewing other aspects.

Finally, in light of these and many other aspects of the topic which require careful consideration, Israel is of the opinion that it is premature to decide on the final outcome of the Commission's work on the topic at this stage. We look forward to the fruitful exchange of views between States and the further work of the Special Rapporteur on this topic.

28. Iran (Islamic Rep. of)

The topic 'Provisional application of treaties' is one of the new topics included in the ILC's programme of work. We regard this exercise as a useful one in clarifying and complementing, if needed, the provisions of Article 25 of the 1969 Vienna Convention on the Law of Treaties. The topic appears to be related to two other topics currently on the agenda of the Commission, namely 'Treaties over time' and 'Formation and evidence of customary international law', in many respects, and therefore the Special Rapporteur can exploit the Commission's findings under those topics to accelerate his work on the present topic.

It is highly questionable to assume that provisional application of a treaty, per se, can count as a practice evidencing the formation of a customary norm, since such alleged practice simply lacks the very basic constituting element of any 'customary rule', that is *'opinio juris.* That a State

chooses not to become bound to a treaty by opting to remain as a signatory (and not to ratifY it) signifies that that State does not deem the treaty in question to have any legal force vis-a-vis that State.

We feel it would be overly difficult, both under the 1969 Vienna Convention and in the light of State practice, to extract a unified practice capable of evidencing the formation of customary norms as a result of 'provisional application of treaties' effected by signature (short of ratification). We do not deem it appropriate methodologically to disproportionately overstate the subsequent practice at the price of overlooking State consent as an essential component in determining *opinion juris.*

It would be advisable also to follow a calculated and balanced approach when assessing the role and weight of regional and local practices as well as the decisions of domestic courts in the formation of a customary norm of international law.

Australia[**]

Australia welcomes the Commission's commencement of its consideration of the topic "Provisional application of treaties" as well as the appointment of Mr Juan Manual Gómez-Robledo as Special Rapporteur.

The report recognises that the internal positions of States regarding provisional application should be considered, and in that light Australia offers its perspective. In Australia, treaties are subject to a two-step domestic process before Australia formally consents to be bound at international law. The first step is to obtain Executive approval prior to signature of the treaty, and the second step involves submitting the treaty for parliamentary scrutiny prior to ratification and its entry into force for Australia. As provisional application of a treaty means that all or part of an agreement would become legally-binding prior to ratification, it does not sit comfortably with the second step of Australia's treaty-making process, whereby a treaty must undergo parliamentary review before its provisions can enter into force. Generally, Australia does not take action to become legally bound to a treaty until any domestic laws necessary to implement the treaty obligations have been passed. Any new Australian legislation to implement a treaty must be in force on or before the date that a treaty enters into force for Australia.

There may be circumstances where there is a strong policy reason to implement a particular agreement as early as possible. In such situations, the Australian Government may - instead of provisional application - exchange a political, nonlegally binding undertaking with its treaty partner to apply provisions in the treaty to cover the period until the ratification process has been completed.

[**] The delegation of Australia never delivered its statement. Accordingly, it is being included in this compilation for information purposes only, but should not be cited in any official documentation.

Mexico[†††]

En primer lugar, México desea dar la bienvenida a la inclusión del tema "Aplicación provisional de los tratados" y a su Relator Especial, en el programa de trabajo de la Comisión y estaremos atentos a su primer informe.

Mi Delegación desea hacer las siguientes cinco precisiones respecto al tema en cuestión:

Primero.- En cuanto al punto de partida elegido por la Comisión para el examen de este tema, coincidimos en que el mismo debe centrarse en la labor realizada por la Comisión en relación al tema del Derecho de los Tratados y en los trabajos preparatorios relativos a las disposiciones pertinentes de la Convención de Viena sobre el Derecho de los Tratados, en particular el artículo 25 de dicha Convención.

Segundo.- México considera que la figura de la aplicación provisional de los tratados debe mantener su carácter como herramienta flexible, cuya utilización sólo debería promoverse en situaciones en las que existan circunstancias especiales que justifiquen el posponer los procesos internos de aprobación formal del tratado como podrían ser la resolución de crisis internacionales o su inminencia, así como prevenir que existan lagunas jurídicas entre tratados sucesivos. Un ejemplo de lo último lo constituye la disposición sobre aplicación provisional insertada en el Acuerdo de Aplicación de la Parte XI de la Convención de las Naciones Unidas sobre el Derecho del Mar de 1982 (*Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*).

Por su parte, un ejemplo de la primera situación lo constituye el Acuerdo de 1995 sobre Poblaciones de Peces Transzonales y Altamente Migratorias (*The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*), cuya aplicación provisional procuró lograr el objetivo urgente de asegurar la conservación a largo plazo y el aprovechamiento sostenible de las poblaciones de peces transzonales y las poblaciones de peces altamente migratorios (*Long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks*).

Tercero.- Ligado a la flexibilidad de la figura de la "Aplicación provisional de los Tratados", la Comisión de Derecho Internacional debería evitar "reinventar" el artículo 25 de la Convención de Viena sobre el Derecho de los Tratados.

Cuarto.- Consideramos útil el debate llevado a cabo en el seno de la Comisión en torno a la relación del artículo 25 de la Convención de Viena sobre el Derecho de los Tratados con otros artículos de la Convención tales como el 18 y el 46.

Cinco.- Por último estimamos que los laudos interinos sobre jurisdicción y admisibilidad en el litigio *Yukos*, en el que la Corte Permanente de Arbitraje confirmó la aplicación provisional del Tratado sobre la Carta de la Energía (*Energy Charter Treaty),* representa un precedente que podría ser útil a la Comisión.

[†††] The delegation of Mexico never delivered its statement. Accordingly, it is being included in this compilation for information purposes only, but should not be cited in any official documentation.