Sixth Committee Statements
Report of the International Law Commission
on the work of its 65th session

Provisional application of treaties

68th session of the General Assembly
2013

Table of Contents

26th meeting, 5 November 2013, p.m.

17th meeting, 28 October 2013, a.m.

1. France

I shall end with a few words on the subject of "Provisional application of treaties". I thank the Special Rapporteur for his first report, which identifies the avenues to be explored. Study of the legal regime should indeed focus on the form of consent given to provisional application; in my opinion, the hypothesis of implicit intention should be approached with care. I believe that the primary aim of this work should be to examine the legal effects of provisional application, given the extent to which that question remains unclear. While I agree that there is not much to be gained from examining States' responsibility, the question of the legal consequences arising from a State's failure to comply with the provisions of a treaty which it has agreed to provisionally apply deserves further consideration. The situation appears to be different *a priori* in the case of failure to comply with an obligation in force. The question that arises is whether such acceptance entails only duties or also rights. Another question concerns the provisional establishment of bodies created by a treaty. I further believe that the subject could be usefully extended to include provisional accession. It also does not seem possible to utterly rule out any consideration of domestic law obligations, mainly of a constitutional nature. Although these requirements do not allow a State to escape its international obligations, the situation is perhaps not quite so clear-cut when it comes to the scope of a provisional undertaking, in particular because its performance could be rendered impossible in domestic law. Lastly, I would underline that the richness of work on this subject will inevitably depend on the material provided by the States concerning their practice in the matter.

18th meeting, 29 October 2013, a.m.

2. Hungary

Turning to Chapter VIII on the Provisional application of treaties, the Commission requested States to provide information on their national law and practice concerning the provisional application oftreaties in relation to:

(a) the decision to provisionally apply a treaty;
(b) the termination of such provisional application; and
(c) the legal effects of provisional application.

In Hungary the relevant domestic law, namely Act 50 of 2005 on the conclusion of international treaties, contains detailed rules on the provisional application of international treaties. According to these rules the provisional application has to be decided by the same entity which is authorised to give Hungary's consent to be bound by a treaty. In Hungary only the Parliament and the Government has the power to express this consent. The Parliament gives its authorisation in the form of an act and the Government in the form of a government decree. In these very same laws, if necessary, the Parliament or the Government can decide on the provisional application of the treaty as well.

In case the termination of such a provisional application is necessary it is done in the same manner, namely in the respective act or decree. Since the respective laws in which the Parliament or Government agrees to the provisional application of a treaty also contain the text of the international treaty, in the Hungarian legal system the provisional application of a treaty has the same effect as the entry into force of the said treaty, and therefore Hungary has to comply with the articles of the provisionally applied treaty.

Hungary will also provide more detailed information on this subject matter in writing with examples by 31 January 2014 as requested by the Commission.

21st meeting, 1 November 2013, a.m.

3. Slovenia

Let me now address Chapter VIII: Provisional Application of Treaties. We would like to congratulate Special Rapporteur Mr. Gómez-Robledo on his First Report *on the provisional application of treaties*, in which he outlined the main elements of this mechanism and the issues to be discussed in the Commission. We also find the memorandum of the Secretariat on the *travaux préparatoires* with respect to Article 25 of the Vienna Convention on the Law of Treaties (VCLT) very useful.

In our view, the objective of the Commission should be to analyse as comprehensively as possible the mechanism of provisional application and its legal implications, so that States will be able to understand it better, both when they conclude treaties and agree to the mechanism and when they implement those treaties. As to the possible outcome of the consideration of this topic, we feel that it is perhaps too early to decide on whether guidelines, model clauses or some other form of outcome would be the most appropriate, since this will depend on the future work on the topic.

We would like to propose that the Special Rapporteur considers another aspect of provisional application. The Vienna Convention on the Succession of States in relation to Treaties, concluded after the VCLT, contains articles on the succession of provisionally applied treaties and the succession of treaties in force by way of provisional application. We believe that it would be useful to additionally examine the *travaux préparatoires* of that convention, as well as potential practice and doctrine in relation to it, since this could contribute to understanding of Article 25 of the VCLT and its implications in particular, and to the comprehensiveness of the analysis of provisional application in general. Such an approach would also correspond to the method of proceeding in relation to, *for example*, reservations to treaties, which were analysed also in the context of the succession of States in relation to treaties.

More specifically we would like to focus on three issues which we feel merit further consideration.

First, we agree with those members of the Commission and States that think that provisional application is not to be encouraged or discouraged, but should instead be understood, as the Special Rapporteur himself recognised, as a legal concept with its

accompanying international consequences. In this regard, it would be useful to include in the analysis the recent arbitral practice in the context of the Energy Charter Treaty.

Second, we are reluctant to ascribe great significance to the change in terminology from "provisional entry into force" to "provisional application", not least because this seems to appear from the *travaux préparatoires* with regard to the VCLT, in particular when comparing that on the draft article concerning *pacta sunt servanda* and that on Article 25, from which it is possible to conclude that the *pacta sunt servanda* rule applies to both concepts, which would mean in turn that, from the perspective of this rule at least, the two concepts are identical.

Third, although we agree that the main focus of the Commission's work on the provisional application should be on its analysis from the perspective of international law, we also believe that the decisions of States to use provisional application are often very closely related to their constitutional rules and procedures. This is apparent from the discussions of Article 25 at the Vienna Conference for the adoption of the VCLT, and it is our speculation that this is likely to emerge also from the results of the questionnaire to which States should reply by the end of January next year. Thus, the Commission will probably need either to expressly exclude this internal legal aspect from its considerations at the outset or decide how to include it. In the latter case, and in order to avoid an analysis of the internal law of States, which the Special Rapporteur correctly emphasised as not being the task of the Commission, the Commission could, for example, analyse the practice and implications of the internal legal "limitation clauses" in treaties which have been drafted in different variations and whereby provisional application is conditional upon being in accordance with internal or constitutional law.

23rd meeting, 4 November 2013, a.m.

4. European Union

As in previous years, the European Union welcomes the work o f the International Law Commission and reiterates its interest i n the important role played by the ILC in the progressive development of International law and its codification.

The Candidate, the former Yugoslav Republic of Macedonia[1], Montenegro*, and Serbia*, the countries of the Stabilisation and Association Process and potential candidates Albania and Bosnia and Herzegovina, as well as the Republic of Moldova and Georgia, align themselves with this statement.

The European Union noted with interest that the International Law Commission has decided at its sixty-third session (2011) to include the topic "Provisional application of treaties" in its long-term programme of work. This is an important legal matter and an in-depth study of Article 25 of Vienna Convention on the Law of Treaties (1969), which regulates the subject will be very useful and appreciated.

[1] The former Yugoslav Republic of Macedonia, Montenegro and Serbia continue to be part of the Stabilisation and Association Process

The Union welcomes the memorandum o f the Secretariat released on 1 March 2013 and containing a historical overview of ILC preparatory work on Article 25 of Vienna Convention on the Law of treaties as well as its examination in Vienna Conference. The Union has also examined with interest the First report of the Special Rapporteur identifying the principal legal issues "that should be given further consideration in subsequent reports and in the International Law Commission's discussion of those reports"[2].

The work of the International Law Commission in area of provisional application of treaties is of great interest to the Union. Over the years the European Union has concluded, alone or along its MS, a large number of agreements which provide for provisional application of the agreement or part of it. The Union makes use of provisional application primarily in sectors such as trade, fisheries, and aviation, but there are cases of provisional application in other areas as well.

The possibility for provisional application of international agreements is envisaged in the EU's founding treaties, namely Article 218(5) o f the Treaty on the Functioning o f the European Union and the Council of the European Union may, in the context of signature, adopt a decision authorising provisional application of a treaty prior to its entry into force.

In view of the Special Rapporteur's First Report, the European Union would like to make the following observations that the International Law Commission may wish to take into account in considering its future work in this area.

The European Union agrees with the Special Rapporteur's observation that provisional application is an area where flexibility is a primary factor due to the different institutional and legal circumstances of treaty makers in different parts of the world. Considering that the work of the Commission is at a very early stage, i t will be premature to discuss the possible outcome. The Union would like to only point out that because of the need for flexibility, it would seem that work focused on something like "model clauses" would be o f limited interest. Given the need for flexibility, the work on provisional application should rather be aimed at providing some kind of "guidelines" to help decision-makers in relevant aspects of treaty process. However, the Union would revert to this matter when the consideration of this topic is more advanced.

Provisional application of treaties raises a lot of questions with both practical and theoretical importance which are worth studying, for example:

- t o what extent provisions involving institutional elements, like provisions establishing joint bodies, may be subject to provisional application or whether there are limitations in that respect;

- whether provisional application should extend also t o provisions adopted in implementation o f a provisionally applied treaty by a body o f the state Parties established under such a treaty;

---

[2] First report on the provisional application of treaties, prepared by Mr. Juan Manuel Gomez-Robledo, special rapporteur, A/CNA/664, 3 June 2013, p.2

- are there limitations with regard to the duration of the provisional application;

- how provisional application o f treaties provided for in Article 25 o f the Vienna Convention on the Law o f Treaties relates to the other, provisions of the Vienna Convention and other rules of international law including responsibility for breach of international obligations.

These are just a few examples of issues that may come up in the context of provisional application o f treaties but there are many more questions, as indicated by the Special Rapporteur in his report. The Union looks forward to the further work of the International Law Commission and the orientation it decides to take in this area. I t stands ready to contribute to the ILC's work in the future.

5. Finland (on behalf of the Nordic Countries)

Mr. Chairman,

As far as provisional application o f treaties is concerned, the Nordic countries wish to thank the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, for his first report which seeks to establish the principal legal issues that arise in the context of provisional application, as well as for the informative memorandum by the Secretariat of the International Law Commission tracing the negotiating history of Article 25 of the Vienna Convention on the Law o f Treaties which provides the central norms relating to provisional application of treaties.

On the basis of this material and the deliberations of the Commission, we are of the view that the topic is well suited t o be considered by the TLC. While many of us struggle with the challenges provisional application poses to our national procedures, this topic provides amplitude of questions of international law character which merit consideration by the Commission. These include legal effect of provisional application, customary international law character o f provisional application and relationship o f Article 25 with the other provisions o f the Vienna Convention.

The Nordic countries have previously expressed their agreement with 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.

While we acknowledge that there is many times a need for provisional application in order to enable speedy implementation of newly established treaties, we agree with the approach o f the Commission neither to encourage nor discourage the resort to this possibility as it is for States to decide whether and when it is an appropriate avenue. Such a decision is essentially a constitutional and a policy matter for States. However, since the Commission's analysis is likely to identify strengths and weaknesses of different models of provisional application, it may be considered whether the Commission's work would benefit from including further analysis of the different models of provisional application, including partial provisional application. For instance, one may find that provisional application from the date of signature raises questions different from and additional to provisional application from the date of ratification. Therefore it may be feasible to

distinguish between the two. The latter seems for example not to raise questions with regard to circumvention of domestic procedures, including constitutional requirements.

As far as the treaties among the Nordic countries are concerned, provisional application has not been resorted to very frequently but I wish to mention one example. In 2010 the Nordic countries concluded a General Security Agreement on the Mutual Protection and Exchange of Classified Information which provides that "[u]ntil the entry into force of this Agreement, each Party may notify at the time of the deposit of the instrument of ratification, acceptance or approval, or any other subsequent time, that it shall consider itself bound by the Agreement in its relations with any other Party having made the same notification. These notifications shall take effect thirty days after the date of receipt of the notification." That example illustrates that provisional application may also be based on a provision avoiding such terminology. The terminology used in this particular example relates t o the discussion in the Commission during which it was suggested that concerns about the circumvention of domestic rules could be met by clarifying that the "provisional application" of a treaty carried with it the consequence that the obligations under the treaty would become binding on the State.

Another situation which could deserve further study is when certain treaty obligations are applied provisionally based on a unilateral declaration. An example of this is to be found in the 2013 Arms Trade Treaty, which states in article 23 that "Any State may a t the time o f signature or the deposit o f instrument of its of ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State.

We wish to comment on the form o f the final outcome of this topic once the work has progressed further.

6. United States

Mr. Chairman, turning to the topic, "Provisional Application of Treaties," the United States thanks Mr. Juan Manuel Gomez-Robledo for his first report.

The work on this topic appears to be at an early stage. As such, we can offer general reactions in anticipation of more detailed interaction as the Commission's work evolves. As we have previously noted in discussing this topic, our approach begins with the basic proposition that 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 o r 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 is clear on this basic definition.

As we have in the past, the United States urges caution in putting forward any proposal that could create tension with the clear language in Article 25 of the Vienna Convention on the Law of Treaties as it relates to provisional application.

The current report touches on the interaction between domestic law and the international law regarding provisional application. As the Special Rapporteur notes, domestic law is not, in principle, a bar to provisional application, but it seems equally plain to us that a State's domestic law may indeed determine the circumstances in which provisional application is appropriate for that State. The Special Rapporteur also alluded to concerns that provisional application may be used to sidestep domestic legal requirements regarding the conclusion of international agreements. The appropriateness of provisional application under a State's domestic law is a question for that State to consider. In this regard, the United States does not agree with the Special Rapporteur's characterization of the provisional application of the US-Cuba maritime boundary treaty. In our own practice, we examine our ability under domestic law to implement a given provision or agreement pending entry into force before we agree to apply it provisionally, and do so only consistent with our domestic law.

We note the Special Rapporteur describes the goal of his work on this topic to "encourage" and provide "incentives" for the use of provisional application. This appears to reflect his conclusion that provision application is rarely used, and that this fact suggests that States are "unaware of its potential." In our view, the question of whether States make use of provisional application or not depends on the particular circumstances of a given agreement or situation. For purposes of this report, the frequency of use seems to be a separate and secondary issue compared to clarifying the nature of provisional application and how to make use of it clearly and effectively. Although bringing additional clarity to this area of the law may indeed result in more frequent use of provisional application, we would urge the Special Rapporteur to focus on provisional application itself rather than on increasing its use.

7. Austria

Mr. Chairman,

As already stated last year, my delegation welcomes the inclusion of the topic "Provisional application of treaties" into the work program of the Commission and commends the Special Rapporteur for his first report. This report and the discussion held in the Commission already highlight the main issues requiring clarification. The particular importance of this topic has been demonstrated by some recent decisions on provisional application, relating to the Arms Trade Treaty and the Chemical Weapons Convention.

As to the form envisaged of this work, my delegation shares the approach of elaborating guidelines or model clauses that could help states wishing to resort to the provisional application of a treaty.

We also share the view that the provisional application of treaties by international organizations must be included in this topic, since the 1986 Vienna Convention on the law of treaties of international organizations also refers to this possibility.

As to the problems to be addressed, we can only reiterate what we pointed out last year. My delegation concurs with the view that the expression "provisional application" is

to be preferred to the expression “provisional entry into force”. As to the legal effects of “provisional application” the work of the Commission will have to explain whether provisional application encompasses the entire treaty or whether certain clauses cannot be applied provisionally. However, once a treaty is being applied provisionally, the obligations resulting there from are obligations the breach of which would lead to state responsibility.

It also must be clarified in which way provisional application can be initiated and terminated, in particular whether unilateral declarations are sufficient for this purpose. While article 25 of the Vienna Convention on the Law of Treaties leaves no doubt as to the possibility of unilateral termination, there is no uniform view concerning unilateral activation.

In a more general view, the Commission will have to examine how far the rules contained in the Vienna Convention, such as regarding reservations or invalidity, termination or suspension as well as the relation to other treaties, also apply to provisionally applied treaties.

My delegation shares the view that interim agreements are substantially different from provisional application since they are treaties that are subject to the usual entry into force procedures and to which the Vienna Convention applies without restrictions.

As the discussion about article 45 of the Energy Charter Treaty illustrates, the relationship between provisional application and national law is not yet sufficiently explored. The
Austrian delegation does not share the view of the Special Rapporteur that “domestic law does not provide a barrier to provisional application.” On the contrary, provisional application raises a number of problems in relation to domestic law, in particular if the constitution of a state is silent on this possibility. Moreover, as a matter of principle, not only in the context of constitutional law, but also of international law, the Commission must give serious consideration to the need to ensure that democratic legitimacy is preserved, even in the case of provisional application. It is for this reason that Austria applies treaties provisionally only after their approval by the Austrian parliament. *As to our practice in this regard we can refer to our statement of last year.*

8. Japan

With regard to the topic of “Provisional application of treaties”, the delegation of Japan would like to express its gratitude to the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, for his first report, to the Secretariat for its memorandum which traced the negotiating history of article 25 of the 1969 Vienna Convention on the Law of Treaties, and to all the members of the Commission, for their discussion on this topic.

The members of the Commission conducted an important discussion, including whether it is appropriate for the Commission to seek to promote the provisional application of treaties, and whether the provisional application of treaties would circumvent domestic procedures, and in particular the constitution.

The delegation of Japan is looking forward to further discussion on this topic with a view to deepening the understanding of the topic. Japan expects that the second report to be submitted next year will explore the issues raised in this year's Commission, including legal effects of the provisional application of treaties. Japan sincerely hopes that the Commission, led by the Special Rapporteur, will bring forth a valuable outcome.

9. Portugal

Turning now to the topic 'Provisional Application of Treaties', Portugal would like to congratulate Mr. G6mez-Robledo for delivering his first report, which we have read with interest.

The provisional application of treaties may have different reasoning, as Mr. Waldeck pointed out at the Vienna Conference in 1969[3]: 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. Nevertheless, being provisional in nature, such provisions have a transitory application in a reasonable time frame.

The scope is not limited to States but includes all parties to a treaty subject to provisional application. Hence, it includes International Organisations. Portugal encourages the Commission to study this issue at the light of both 1969 and 1986 Vienna Conventions on the Law of Treaties.2

Mr. Chairman,

We know, from the *travaux preparatoires* of the 1969 Vienna Convention, that there was some dispute concerning the acceptance of the provisional application regime[4]. At the end, it was adopted as Article 25. In 1969 as today the big questions are the same: 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.

However, the consent of the Parties providing strength to the *pact sunt servanda* principle implies that the provisional application of treaties also depends on the consent of the Parties regarding a given treaty. In fact, the provisional application of a treaty is a domestic legal and political option which cannot be imposed. This means that the provisional application of a treaty always depends on the consent of a signatory State or International Organisation. Clauses should be carefully designed in order to offer a clear opportunity to signatories to express their consent, or not, to the provisional application of a treaty.

From the perspective of States' domestic law of States, 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. Pursuant to the legal approach in other States, the

---

[3] 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.

[4] */bidem.*

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 settled in Article 25 of the 1969 Vienna Convention.

In this regard, we echo the viewpoint of some of the members of Commission when advising that the work on the topic should not promote the provisional application of treaties. Its work should stick to the clarification and guidance regarding this matter.

Mr. Chairman,

As we understand it, the main purpose of this study should be ascertaining the effects of the provisional application. That includes the effects of the breach of obligations being provisionally applied.

Once the signatory accepts the provisional application, the non provisional application of the treaty as agreed may trigger international responsibility. That does not mean that the Commission should deal directly and autonomously with the regime of International Responsibility. Nevertheless, this is an effect that the Commission should consider as well.

Mr. Chairman,

As regards the obligation to not defeat the object and purpose of a treaty prior to its entry into force (Article 18 of the Vienna Conventions), we find that both this obligation and the provisional application are related and have the same scope *ratione temporis.* Nevertheless, they lead to two different legal regimes and the provisional application obligations are wider in their scope and legal effects.

Mr. Chairman,

To conclude Portugal's intervention on this topic, we concur with most of the suggestions voiced at the Commission within the broad range of issues for possible discussion.
In what concerns the final outcome, we deem it is still premature to have a decision on the final form of the Commission's work. 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.

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

10. United Kingdom

Turning now to the topic of **Provisional application of treaties**. The UK welcomes the Special Rapporteur’s first report on this topic and considers that the continued study of this topic by the Commission will usefully build on the body of work on treaties already undertaken by the Commission. Provisional application of treaties is often utilised in the UK’s own treaty practice.

The UK firmly agrees with the Special Rapporteur that the need for flexibility is key. In order to ensure that this flexibility is maintained, we consider that the Commission's work should be aimed at the provision of some kind of "guidelines", with commentaries, to help decision-makers at various stages of the treaty process, taking into account State practice, rather than "model clauses" or the development of "agreed principles", which could tend to suggest something prescriptive and could hinder flexibility of parties to treaties. We agree that aim of the Commission should not be seen as encouraging or discouraging recourse to provisional application and should rather be to provide greater clarity to States when negotiating and implementing provisional application provisions.

The UK also believes that the study of this topic should focus on the wording of Article 25 of the Vienna Convention on the Law of Treaties. We will be interested to see how this is applied in practice and how parties express the intention to provisionally apply a treaty.

The UK will be particularly interested in the Commission's work on provisional application in the context of multilateral treaties (as distinct from bilateral treaties), which may present different scenarios and issues regarding provisional application.

We note that the Commission is surveying State practice and has requested information from States to be submitted in the New Year. This is to include information in relation to (a) the decision to provisionally apply a treaty; (b) the termination of such provisional application; and (c) the legal effect of provisional application. The UK welcomes this survey and looks forward to submitting information on UK practice in due course. We consider that State practice should inform the scope and nature of the Commission's work in this area.

24th meeting, 4 November 2013, p.m.

11. Greece

Greece wishes to express i t appreciation to the Special Rapporteur, Mr. Manuel Gomez-Robledo, for his first Report on the provisional application of treaties, which constitutes a good starting point for setting up the principal legal questions that may arise with regard to this topic.

Greece is also thankful to the Commission for having opted for a neutral approach on the above topic, seeking neither to encourage nor to discourage States from having recourse to provisional application. To this regard, i t should be pointed out that some States may be reluctant to provisionally apply international treaties both for policy reasons and because of constitutional constrains related to procedural requirements for participation in treaties. Thus, the Commission's task should be to clarify the legal issues surrounding the institution of provisional application, without taking position on policy matters.

As it was stated by my delegation when commenting on the work of the Commission on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the study undertaken by the ILC on provisional application should similarly be based on its previous work on the law of treaties, and in particular on Article 25 o f the 1969 Vienna Convention. However, given the disparity of State practice and the divergence of views expressed with regard to the provisional application as an autonomous institution of public international law, there seems to be no sufficient ground to believe that the rules embodied in Article 25 reflect customary international law.

Moreover, the variety of the situations occurring in practice inevitably give precedence to the treaty itself and the relevant provisions contained therein and may, therefore, call for a more in-depth consideration of the feasibility and the opportunity of the study undertaken by the Commission. As already mentioned by the Special Rapporteur, flexibility is one of the key features of the concept of provisional application and, in that context, it could be preferable to let States to decide whether and to what extent recourse should be had to provisional application, as well as to determine the legal consequences of such recourse in each particular case.

For this reason, we share the view already expressed by some members of the Commission that it is too early to take a position on the final outcome of the work of the Commission, including on the its final form. Whether the final project takes the form o f guidelines or model clauses, it should, in our view, focus on assisting States in the negotiation and drafting of international agreements and providing them guidance on how to interpret and give those agreements full effect. Within this framework, it would be useful to highlight some questions which have not been sufficiently addressed by the Vienna Convention and could be further explored in the framework of the present work of the Commission.

Of all these questions, the most important is, in our view, the question of the legal effects of provisional application. Taking into account that Article 25 of the Vienna Convention uses the term "provisional application", instead o f "provisional entry into force" as initially suggested by the Commission, it seems reasonable to assume that the former is a question of fact rather than an issue of law. Accordingly, the view expressed by the Special Rapporteur that such effects "could depend on the content of the substantive rule of international law being provisionally applied" needs, in our view, to be further clarified. Nor it is clear whether, in terms of the rules o f State responsibility for international wrongful acts, it is accurate to claim that a State may be found responsible for "breach of an obligation" arising out of a rule being provisionally applied. Having said this, one should also take into account the situation of individuals, which may be affected by the rule provisionally applied.

Another important issue is the termination of provisional application, including in connection with its temporal scope. The text of Article 25 of the Vienna Convention, which provides that a treaty may be provisionally applied "pending its entry into force" seems to suggest that provisional application of treaties is a rather transitional institution of limited duration which should not be indefinitely extended.

Finally, we consider that a distinction between multilateral and bilateral treaties could be of relevance in the context of the current work of the Commission on this topic.

On the basis of existing State practice, some of the parties to a multilateral treaty may agree inter se to apply it provisionally. It would, therefore, be interesting to determine the relations between the above parties and those which do not apply it provisionally, especially if the treaty itself does not provide for this possibility and such provisional application is agreed by means of a separate agreement, which may be tacit. Moreover, regarding the position of non-signatory or acceding States wishing to provisionally apply a multilateral treaty, we would like to underline that it flows from the text of Article 25 that it belongs to "negotiating States", e.g. States "which took part in the drawing up and adoption of the text of a treaty" (see Article 2 (I) (e) of the Vienna Convention) to decide to provisionally apply it or not.

12. Australia

Australia welcomes the first report of the Special Rapporteur, Mr Juan Manual Gomez-Robledo, on the provisional application of treaties, and the memorandum by the Secretariat examining the negotiating history of Article 25 of the Vienna Convention.

Australia shares the Special Rapporteur's view that the topic of 'Provisional application of treaties' is best suited for the development of guidelines or model clauses aimed at providing guidance to States. Such an approach reflects the divergent domestic positions of States regarding provisional application, and the fact that States are free to establish rules under their respective legal systems on how to engage with the provisional application of treaties. In Australia, for example, there is a two-step domestic process before Australia formally consents to be bound at international law. Accordingly, Australia's practice is *not* to provisionally apply treaties. Guidelines or model clauses could provide States with significant and useful guidance on this issue, without impinging on the relevant domestic and constitutional requirements of States.

Australia supports the position that the Commission should be guided by the practice of States during the negotiation, implementation and interpretation of treaties being provisionally applied. The Commission need not come to a view on whether provisional application should be encouraged or discouraged. Individuals States will be best placed to consent to provisional application in light of the purpose, scope and content of the specific treaty, as well as domestic legal and political considerations. Instead, the Commission should strive to provide clarity to States when negotiating and implementing provisional application clauses.

Australia welcomes the Special Rapporteur's continued work on this topic, and looks forward to the consideration of the relationship between Article 25 and other provisions of the Vienna Convention, and the temporal component of provisional application.

Finally, Australia notes the Commission's request for information on the practice of States concerning the provisional application of treaties and looks forward to contributing to this discussion.

13. Germany

Germany would like to thank the International Law Commission for having included the important topic of provisional application of treaties in its programme of work and also to express our support for the first report of Special Rapporteur Juan Manuel Gómez-Robledo.

Germany welcomes his approach to the topic, which is of great practical relevance today. The provisional application of treaties as provided for in Article 25 of the VCLT is a valuable tool which has been increasingly used over the years.

Provisional application is a flexible tool. States may decide to limit the extent of provisional application to certain parts of a treaty only. 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 some cases provisional application has permitted some of the negotiating States to go ahead and put into effect some of the treaty's intentions while allowing others to take their time, and possibly evaluate the functioning of a nationally disputed treaty project. The wide use of provisional application in multilateral and bilateral treaties demonstrates how useful this tool and its flexibility are for States.

In many States - including Germany – constitutional and internal law determine to what extent provisional application of a treaty can be agreed to, or to what extent a treaty may be provisionally applied. States have found several ways to agree on provisional application of a treaty taking into account such constitutional requirements.

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 that provisional application is agreed. At the same time, 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.

An in-depth analysis of State practice and case law regarding the legal effect of provisional
application of treaties, as provided for in Article 25 of the VCLT, will prove most valuable.

I very much look forward to the ILC's further contribution to this important topic in international treaty relations.

14. Chile

A continuación pasaré a referirme al Capitulo VIII del Informe, relativo a "La aplicación provisional de los tratados", tema respecto del cual el Relator señor Juan Manuel Gomez Robledo ha presentado su primer Informe (A/CN.4/664). Mi Gobierno

desea agradecer al Relator por el trabajo realizado y destacar la claridad de su enfoque para abordar este importante tema del derecho de los tratados.

Mi Delegación está consciente de que se trata de un tema incorporado sólo en los últimos años al programa de trabajo de la Comisión y, por lo mismo, su examen se encuentra en una primera fase en la que se han formulado s61o aproximaciones y puntos de vista de carácter general acerca de los aspectos jurídicos más relevantes en esta materia.

En este sentido, el primer informe del Relator Especial ofrece precisamente una visión general de las principales cuestiones jurídicas que surgen respecto de la aplicación provisional de los tratados, teniendo como punto de partida el artículo 25 de la Convención de Viena sobre el Derecho de los Tratados de 1969. Atendido el carácter preliminar de este Informe, resulta pertinente destacar el aporte realizado por el Relator al considerar y examinar los antecedentes históricos y terminológicos del tema en el seno de la Comisión de Derecho Internacional durante el proceso de elaboración de la mencionada Convención, lo que permite fijar su contexto y establecer una adecuada delimitación del tema.

A juicio de esta Delegación, la norma sobre la aplicaci6n provisional de los tratados contenida en el Articulo 25 de la Convención de Viena de 1969, a pesar de su brevedad, contiene los elementos esenciales de esta institución y no requiere de nuevos desarrollos convencionales. Por lo demás, el contenido y alcances más precisos de dicha aplicación provisional dependerán, principalmente, de los términos en que esta figura jurídica se establezca en el tratado mismo que haya de ser aplicado provisionalmente o de los términos que se convengan de otro modo. De tal manera, no tendría mayor sentido intentar una regulación a priori de las múltiples y variadas manifestaciones que puede adoptar, desde el punto de vista jurídico, la aplicación provisional de los tratados.

En atención a lo señalado precedentemente, el trabajo del Relator debiera estar orientado no a la elaboración de proyectos de artículos, sino a la formulación de directrices de carácter interpretativo que aborden fundamentalmente el régimen jurídico de la aplicación provisional, incluyendo las formas de manifestar la voluntad por parte de los Estados, sus efectos jurídicos y su terminación. Tales directrices, como lo expres6 el propio Relator, pueden servir de orientación a los gobiernos para el uso de esta figura jurídica.

Desde el punto de vista metodológico, compartimos el criterio del Relator de guiarse en su trabajo por la práctica de los Estados durante la negociación, aplicación e interpretaci6n de los tratados aplicados provisionalmente, orientación que por cierto debiera seguir la propia Comisión al examinar este tema en sus futuros periodos de sesiones.

Sr. Presidente,

Sin perjuicio de lo señalado precedentemente, esta Delegación desea llamar la atenci6n sobre un aspecto que excede, aparentemente, los propósitos del tratamiento de este tema por parte del Relator y de la Comisión de Derecho Internacional. Me refiero alas dificultades de orden interno, especialmente en el ámbito constitucional, que plantea o puede generar la aplicación provisional de los tratados, particularmente en los casos en que el tratado en cuestión requiera de aprobación parlamentaria o su ejecución implique

modificaciones legislativas en algunos ordenamientos internos de los Estados. Si bien esta es una cuestión para la cual no debiera esperarse una respuesta propiamente desde el derecho internacional, seria de gran utilidad que en los próximos informes del Relator se examinara este aspecto sobre la base de las informaciones que los gobiernos pudieran proporcionar. Esto daría una idea de las limitaciones prácticas que la aplicación provisional presenta en la hora actual.

Sr. Presidente,

Finalmente, mi Delegaci6n comparte la posición del Relator, expresada en los debates de la Comisión, en el sentido de examinar la relación entre el Articulo 25 y otras disposiciones de la Convención de Viena de 1969, en especial aquellas que se refieren a la manifestación del consentimiento, la formulación de reservas, los efectos sobre terceros Estados, la interpretación, aplicación y terminación de los tratados y la nulidad de éstos, ya que de una u otra forma todas estas cuestiones pueden presentarse en la aplicación provisional de un tratado. E1 carácter transitorio de la institución no la exime de la manifestaci6n de un consentimiento exento de vicios, ni la deja fuera de las normas y principios que rigen los tratados, desde su nacimiento hasta su extinción.

15. Romania

As regards the subject *Provisional application of treaties*, we extend our appreciation to the Special Rapporteur, Mr. Manuel Gomez-Robledo, for his first report, as well as to the Secretariat for the Memorandum prepared in relation to this topic.

We fully agree with the conclusions of the Special Rapporteur that the Commission should not be seen as encouraging or discouraging the recourse to this practice, but it should simply provide greater clarity regarding the legal regime of the provisional application of treaties.

Even if we share the view expressed in the report that provisional application of a treaty gives rise, in principle, to the same obligations which would arise upon the entry into force of the treaty, we believe that the provisional application of treaties should not be a substitute for completing timely the necessary legal requirements for the entry into force of a treaty, but should serve only as a very useful legal tool to be used exceptionally, when circumstances require an urgent application of the provisions of that treaty.

We also find appropriate that the outcome of the analysis of this topic should be the development of guidelines with commentaries to underscore the comprehensive legal effects, in term of treaty law, of the provisional application of treaties.

Romania has provisions in its *internal legislation on treaties* permitting, under certain strict circumstances, the provisional application, in total or in part, of an international treaty concluded by Romania. We will substantiate on such provisions in the written submission that we endeavour to provide to the Commission by the end of January 2014.

16. Republic of Korea

9. My delegation appreciates the Special Rappoteur Juan Manuel Gomez-Robledo and also the members of the TLC who have researched and developed the topic, and to the Secretariat for its excellent Memorandum. This is another topic of great interest to my delegation as we have had an incident of provisional application of a treaty. 'The Free Trade Agreement between the ROK and the EU' signed in 2010 and applied provisionally from 1st July 2011, is an example.

10. The question of the legal effects of provisional application should be clarified as long as it is one of the central issues. Therefore, we consider that there should be an in-depth review by the Special Rapporteur and the ILC members into whether the legal regime o f the 1969 Vienna Convention (i.e. the observance, application, and interpretation o f treaties) should be directly applied to the case o f provisional application. I n particular, i n relation to the provisional application, besides Article 25, the issues including the application of pacta sunt servanda (Article 26), Internal law and observance o f treaties (Article 27), Provisions o f internal law regarding competence to conclude treaties (Article 46), and treaties and the third States should be reviewed.

11. As long as the binding force o f the provisional application is accepted, when there is a violation of the relevant rule, the issue of State responsibility arises. Certainly, as the case of provisional application is an exception, the probability o f the breach o f obligation would be substantially low in comparison to the breach of an obligation arising from a treaty entered into force. Since the legal effect of the provisional application is not different from that of a treaty entered into force, the breach of the obligation of the provisional application could be considered in the realm of the general rules of State responsibility for internationally wrongful acts. Therefore, it is not necessary to discuss the issue of State responsibility in the breach of the obligation of the provisional application separately.

12. Similar to the stance of the Commission, my delegation considers that a practical guide is necessary in order to legislate, interpret, and apply rules of provisional application on the part of the State. We also believe that a guide is sufficient for the final outcome.

13. My delegation believe that this topic will be an important contribution to the field of the law of treaties, and we hope for discussion inside the ILC on this topic.

17. New Zealand

New Zealand welcomes the first report of the Special Rapporteur on "Provisional application of treaties". We place particular emphasis on the Commission's stated objective for this work, specifically, "greater clarity to States when negotiating and implementing provisional application clauses". New Zealand fully agrees that the implications of provisional application are significant, and accordingly supports efforts to provide additional guidance to States.

New Zealand shares the view that it is not appropriate for the Commission to seek to promote the provisional application of treaties in general. New Zealand acknowledges

that provisional application can be a legitimate tool, however we consider domestic procedures for entering into binding international obligations and for accepting provisional application are of the utmost importance. New Zealand agrees that such domestic procedures are a matter for individual States to determine in the context of the relevant constitutional framework. We do not support using provisional application to circumvent domestic constitutional processes. It is essential, therefore, when negotiating provisional application clauses that there is recognition that domestic procedures may place constraints on certain States.

New Zealand also notes the view of some members of the Commission that provisional application of a treaty implied that the parties concerned were bound by the rights and obligations under the treaty in the same way as if it were in force. Given the domestic constitutional issues that I have just noted, New Zealand supports consideration being given by the Special Rapporteur to the legal effect of provisional application. We believe that this will assist States in considering the implementation of provisional application and we look forward to the next report on this topic.

18. India

We welcome and appreciate the first report of the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo on the topic "Provisional application of treaties" and also welcome the comprehensive Memorandum of the Secretariat on the topic.

Since the provisional application is a sort of formal application, it would be relevant if the study addresses various legal implications of provisional application and relations between the State parties to it, including the extent of international responsibility incurred by a State vis-a-vis other State parties for violation of an obligation under a provisionally applied treaty.

We agree with the idea that the present study should be in the form of guidelines with commentaries for the guidance of States.

25th meeting, 5 November 2013, a.m.

19. Spain

Por lo que afecta a la cuestión de la *aplicación provisional de los tratados,* querríamos en primer termino felicitar al Relator Especial, D. Juan Manuel Gomez-Robledo, por el primer informe sobre la materia ya que constituye un útil punto de arranque en el que quedan bien identificados los principales elementos a considerar en esta materia. No cabe duda de que nos encontramos ante una cuestión de la mayor trascendencia práctica. Para percatarse de ello basta considerar la frecuencia creciente con la que los Estados hacen uso del mecanismo de la aplicación provisional (y también algunas organizaciones internacionales), así como los graves problemas que plan tea en el ámbito interno por constituir en muchas ocasiones una vía para eludir requisitos y procedimientos internos de naturaleza constitucional. De particular gravedad son los casos en los que se pretende sostener la posibilidad de aplicaciones provisionales de duración

indefinida. Compartimos, con todo, la visión de que a la postre el consentimiento de un Estado contratante es el elemento decisivo, por lo que no debe ser tarea de la Comisión adentrarse en la delicada senda de alentar o desalentar su uso ni probablemente tampoco en la del análisis o valoración de las normas internas de los Estados. No en vano, una vez aplicado provisionalmente un tratado, el Estado se somete a la norma del articulo 27 del Convenio de Viena relativa a que no cabe alegar el Derecho interno para justificar el incumplimiento de las obligaciones internacionales, aun si estas se han contraído provisionalmente. Precisamente por ello, en el proyecto de ley de tratados internacionales y otros acuerdos internacionales que mi Gobierno presento al Parlamento el pasado 25 de octubre (y que esperamos se convierta en ley en los próximos meses) se fijan algunas cautelas y limitaciones al posible uso de la aplicación provisional.

Por lo demás, parecen estar perfectamente perfiladas las cuestiones mas relevantes a tratar durante los trabajos sucesivos, resultando particularmente reseñables las relativas al estudio de la relación de la aplicación provisional con el resto de disposiciones del Convenio de Viena y al análisis de si el contenido del articulo 25 de este Convenio puede ser considerado Derecho Consuetudinario. Mi delegación desea, en esta línea, subrayar la importancia que en el estudio de esta materia tendría el diferenciar entre tratados bilaterales y tratados multilaterales.

Es más, en el mismo sentido en que ya nos pronunciamos en nuestra intervención del año pasado, creemos que el análisis de la practica de otros sujetos de Derecho Internacional diferentes a los Estados resulta absolutamente imprescindible. Por ello, pese a ser conscientes de que el Relator ha dejado constancia de que por el momento preferiría no abordar la cuestión de la aplicación provisional de los tratados por las organizaciones internaciones, mi delegación considera que es un tema difícilmente soslayadle. Entre otras cosas porque es una cuestión que a la postre afecta directamente a los Estados, como muestra con toda nitidez el uso de la aplicaci6n provisional que Estados y organizaciones internacionales como la Unión Europea están hacienda en los denominados *acuerdos mixtos* 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.

20. Mexico

Respecto al Capitulo que concierne a la "Aplicación provisional de los tratados" (APT), Mexico da la bienvenida al el primer informe (A/CN.4/664) del Relator Especial, señor Juan Manuel Gomez Robledo, y reconoce la el valor del debate entablado en la Comisión, así como la importancia del memoranda preparado por la Secretaria sobre los antecedentes ya tratados por la Comisión y los trabajos preparatorios pertinentes de la Convenci6n de Viena sabre el derecho de los tratados (CVDT).

Senor Presidente,

Mi delegación considera que es de gran utilidad el estudio del tema y que será una referencia practica para la actividad cotidiana de los Estados. Baste señalar que México formul6 una declaración de aplicación provisional para dar efecto inmediato a ciertas

disposiciones del Tratado sabre Comercio de Armas (ATT), de forma que sean implementadas en nuestro país de manera voluntaria hasta su entrada en vigor. Efectivamente, de conformidad con el artículo 23 del ATT, México se compromete a aplicar provisionalmente y hasta su entrada en vigor, los artículos 6 y 7, relativos a las exportaciones prohibidas y al mecanismo de evaluación de riesgos.

A continuación mi delegación formulara, de manera concisa, comentarios en relación a los principales puntas respecto al tema en cuesti6n:

Primero.- México considera que el resultado final del estudio de este tema debe de ser la elaboración de directrices o cláusulas modelo que sirvan de orientación a los Estados, sin pretender una regulación excesiva de la figura de la APT para salvaguardar la flexibilidad que puede llegar a brindar a las partes de un tratado.

Segundo.- Del examen del informe y de los debates en el seno de la Comisión, mi delegación considera correcto que la labor de la Comisión no sea la de alentar o desalentar el recurso a la APT por parte de los Estados. La APT es discrecional para los Estados, de carácter transitorio, y puede contribuir a la entrada en vigor definitiva del tratado.

Tercero.- En cuanto a la metodología, mi delegaci6n juzga un buen paso el recurrir a la practica de los Estados y a las opiniones que los tribunales internacionales hayan pronunciado en la materia. En este punta, externamos nuestro compromiso por dar respuesta a las preguntas que la Comisión ha señalado de interés en la materia.

Cuarto.- Por ultimo, México coincide en que el régimen de responsabilidad de la APT no es diferente a los principios que se evocan en términos generales, por lo que coincidimos en que el estudio se oriente hacia el proceso de la APT y sus efectos jurídicos.

21. Malaysia

19. Malaysia commends the efforts of the Special Rapporteur in preparing the First Report on the provisional application of treaties and notes that the study on the topic is still at a very initial stage of identifying areas of study and possible direction.

20. Malaysia agrees with the Special Rapporteur that it is important not to over regulate the topic and allow for flexibility in its application. While we understand that the study is intended to simplify provisional treaty application processes, there exists a number of States, like Malaysia, that have established, almost rigid procedures on the internalization and application of treaties. In this regard, Malaysia wishes to emphasize that States should not be compelled to implement their treaty obligations when they are not ready to do so.

21. Malaysia proposes that focus be given to principal legal issues arising in the context of the provisional application of treaties, by considering doctrinal approaches to the topic and by reviewing existing State practice.

22. Russian Federation

Let me turn now to the topic of **Provisional application of treaties.** This topic seems to be as never relevant. We believe that during its examination the Commission should in all cases follow a cautious, balanced and pragmatic approach and proceed from the understanding that Article 25 of the 1969 Vienna Convention on the Law of treaties is the departing point in any analysis of the concept of provisional application of international treaties.

While considering this topic it is important to distinguish between "provisional"/ "transitional"/ "intermediate" treaties and the treaties that are provisionally applied. The former, as it seems, could be taken into consideration within this topic only if they are provisionally applied.

We believe that the Commission should not get much in depth on theoretic research of the issue of correlation between provisional application of international treaties and the provisions of constitutions or other domestic acts of States whether it violates the principle of separation of power or prevents the parliamentary control over executive authority. This question might be considered only to the extent that it concerns possible invocation of violation of internal procedures as a ground for non- compliance with a provisionally applied treaty. Of interest is the practice of States that has “an external effect”.

We support the plans of the Commission to study the interrelation of Article 25 of the Vienna Convention with its other Articles and determine the effects of violation of a provisionally applied treaty. From a practical point of view the issue of the regime of provisional application as a norm of international customary law also deserves undoubtedly our attention.

We believe that the work of the Commission should be based on a comprehensive study of the practice by the states, in particular it is worthwhile to examine practice of provisional application of treaties, which do not provide for provisional application in their text.

To sum up all of the above we see the task of the Commission as follows: to systematize the issue of provisional application of international treaties along the lines indicated in the Report neither encouraging nor discouraging recourse to provisional application of international treaties. This institution is not worth being excessively regulated. We would like to support in this connection the proposal of the Special Rapporteur to prepare draft conclusions on this topic and model clauses on provisional application of treaties.

23. Belarus (Russian only)

24. Indonesia

Moving on to the issue of Provisional Application of Treaties, my delegation should like to express our appreciation to the Special Rapporteur, Mr. Manuel Gomes-Robledo for his first report. We take the view that Article 25 of the 1969 Vienna Convention on the Law of Treaties is certainly the basis on which the Commission will develop a mechanism or a set of guidelines that would provide States with a clear and viable option relating to the provisional application of treaties. We consider this topic to be very important as it aims to clarify the legal issues involved and the legal consequences of the provisional application of treaties.

We recognize that this topic is complex, and some issues raised have been quite controversial. We think that it would be beneficial, therefore, if more research could be done on State practices, judicial decisions and arbitral awards as appropriate, relating to the provisional application of treaties.

Specifically on the legal effect of provisional application, it would be essential to consider the relationship between provisional application of treaties and the constitutional law requirements for the entry into force of the treaty concerned, as the provisional application of treaties could lead to a conflict between international law and constitutional law of the parties concerned. It is therefore imperative that, for reason of legal certainty, any guidelines on the provisional application of treaties must include establishing conditions for the provisional application of treaties that would avoid or minimize the potential of conflict that I have just alluded to, including elements that establish conditions for the provisional application.

Pertaining to the form of outcome of this topic, whether a set of guidelines or any other forms, my delegation believes that it would be best for the Committee to make the decision on the form of the outcome only after the topic has made sufficient progress. The Indonesian Delegation would like to reiterate that the purpose of this topic is not to encourage States to use the mechanism of provisional application more often. Instead, the aim should rather be to provide a mechanism or guidelines for the provisional application of treaties that will serve as an option to States that might have the intention to provisionally apply a treaty pending its entry into force. Ultimately, it is the sovereign right of States to decide on what is best for them concerning the provisional application of treaties.

25. Cuba

Sabre el capitulo VIII "Aplicación provisional de los Tratados", mi delegación observa con interés la inclusión del mismo en los trabajos de la Comisión, y agradece el trabajo desarrollado par el relator especial Sr. Juan Manuel Gomez Robledo. En este tema Cuba desea expresar su estricto apego a la observancia de lo establecido en la Convención de Viena sabre Derecho de Tratados.

La delegación cubana considera importante señalar que en la labor de los relatores en este tema, es esencial que se observe prudencia sabre la interpretación de los aetas soberanos de los Estados en Ia firma de los Acuerdos internacionales y en su entrada en

vigor, pues dichos aetas soberanos pudieran están enmarcados en un contexto político complejo al entendimiento de terceros.

26. Israel

On the topic 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 First Report on the topic.

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. For example, provisional application may be relevant in cases of urgency or if exceptional flexibility is needed, or where a treaty is of great political significance or it is important not to wait for completion of the lengthy process of compliance with States' constitutional requirements for the approval of a treaty. As a general policy, however, Israel does not provisionally apply treaties.

27. The Netherlands

7. Turning to the topic of Provisional application of treaties, let me congratulate the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, on his first report. We have read the report as well as the subsequent discussion within the Commission with great interest, and appreciate the memorandum provided by the Secretariat which provides relevant background information.

8. The Special Rapporteur sets out the main parameters of provisional application. While we view this approach as a necessary initial step to establish the framework for future work, we are not convinced whether the issues identified by the Special Rapporteur in paragraph 53 of the report are indeed the ones in need of further clarification and whether it provides the adequate framework for conducting the study.

9. Although we view the provisional application of treaties to be an instrument of practical relevance, we do not believe that, as the report seems to suggest, it is for the Commission to encourage greater use of it. In our opinion, the main purpose of the study at this stage should be to elucidate the concept of provisional application.

10. With the Special Rapporteur we agree that the Commission should not aim at changing the terms of the Vienna Convention, but rather thoroughly analyze State practice in the light of the language of article 25 of the Convention. This is all the more relevant in light of determining the status of that provision under customary international law, which we believe the Special Rapporteur should reflect upon.

11. Furthermore, we would like the Commission to look into the ways in which States may express their consent to the provisional application of a treaty and the way it is terminated. As for the latter aspect the Special Rapporteur pointed out that article 25 o f the Vienna Convention takes as a point of departure the scenario of provisional application while the treaty is not yet in force and that, consequently, one way in which the provisional

application might end is with the entry into force o f the instrument. Yet, in such cases provisional application may still continue in respect of those States which have not by then ratified it. The Commission may have to look into the different legal relations that such a situation gives rise to. Similarly, article 25 provides that the provisional application ends when a State notifies other States o f its intention not to become a party. The Commission may look into the question of the significance of this specification from a legal perspective, since it could not prevent a State from joining the treaty at a later stage.

12. The Commission should also consider the question of the legal effect of the provisional application of treaties and its relationship to the principle of *pacta sunt servanda* laid down in article 26 of the Convention. In that respect it may be necessary to pay attention to different situations, including the one relating to provisional application of treaty regimes that may only become fully effective after the entry into force of the treaty such as those providing for an institutional framework or a secretariat.

13. More generally, the Commission may find it necessary to clarify the effect of other provisions, including on reservations, of the Vienna Convention for the provisional application of treaties. Similarly, the concept should be delimited from, for example, the obligation not to defeat the object and purpose of a treaty prior to its entry into force as provided for in article 18 of the Vienna Convention.

14. A study on the provisional application of treaties cannot ignore the importance of domestic law. It is in accordance with its domestic system that a State may or may not be able to make use of the option of provisional application and such processes therefore determine to a great extent the scope and usefulness of provisional application as an instrument of treaty practice. It is only logical for the Commission to clarify this relationship, but we would like to reiterate our call for caution not to go beyond the mere stocking-taking of State law and practice.

15. Since the Commission has only just embarked upon exploring this topic, it may still be too early to discuss a preferred outcome. The study should give guidance to States on how to use the instrument of provisional application - if they so choose - and, in such cases, should inform them of the legal consequences thereof, without imposing a particular course action that might prejudice the flexibility of the instrument. As with other studies undertaken by the Commission practical utility should be the yardstick with which to measure its usefulness.

28. Singapore

8. In looking at the topic of “provisional application of treaties”, my delegation thanks the Special Rapporteur, Mr Juan Manuel Gomez-Robledo, for his report. We note that the Special Rapporteur had examined the purpose and usefulness of provisional application, including identifying the factors which may lead states to resort to provisional application of treaties. While useful, Singapore agrees with the members of the Commission that the study should not be aimed at persuading states to utilise the mechanism of provisional application. Instead, the focus should be a practical guide how provisional application can be effected and what its legal effects are. This will enable states

to better understand what provisional application is and to utilise it in appropriate circumstances.

29. Ireland

Turning to the topic of "The Provisional Application of Treaties", Ireland expresses its gratitude to the Special Rapporteur, Mr Juan Manuel Gomez-Robledo, for his first report, as well as to the Secretariat for its Memorandum recounting in detail the development of Article 25 of the Vienna Convention on the Law of Treaties through the work of the International Law Commission and the Vienna Conference on the Law of Treaties. Together, these two documents shed much light on the mechanism of provisional application and the legal issues to which it gives rise and will provide a valuable framework for our future discussions.

In particular, my delegation looks forward to further consideration of the relationship between Article 25 and other provisions of the Vienna Convention, as well as an examination of the extent to which provisional application may apply t o provisions o f a treaty that create institutional mechanisms. We would also encourage consideration of the question whether the rules in Article 25 are applicable as rules of customary international law in cases where the Vienna Convention does not apply. Finally, my delegation would see the merit in including within our work some consideration of provisional application of treaties by international organisations, as envisaged by Article 25 o f the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations of 1986.

26th meeting, 5 November 2013, p.m.

30. Belgium

La Belgique note que la Commission demande aux Etats, avant le 31 janvier 2014, des informations sur leur pratique en matière d'application provisoire des traités, en particulier en ce qui concerne:

a) la décision d'appliquer provisoirement un traité ;
b) la cessation de cette application provisoire ; et
c) les effets juridiques de l'application provisoire.

La Belgique fournira ses observations à la Commission sur ce sujet par écrit dans le délai fixé.

La Belgique comprend que les renseignements demandés par la Commission au sujet de l'application provisoire des traités ne visent que les effets sur l'ordre juridique interne, propres à chaque Etat.

A cet égard, la Belgique souhaite déjà informer la Commission que l'article 167

de la Constitution belge révisée en 1994, contient un principe essentiel en la matière selon lequel tous les traités doivent être soumis à l'assentiment parlementaire de ou des Assemblée(s) compétente(s). L'assentiment conditionne l'effet des traités en droit belge.

Ni l'article 167 de la Constitution, ni l'Accord de coopération du 8 mars 1994 entre l'État fédéral, les Communautés et les Régions du Royaume de Belgique, relatif aux modalités de conclusion des traités mixtes (au sens constitutionnel belge), n'envisagent la question de l'application provisoire de traités.

L'application provisoire des traités, si elle peut assurément être convenue entre parties et produire ses effets en droit international, connaît donc une limite en droit interne du fait de l'exigence constitutionnelle d'assentiment.

Lorsque l'effet du traité provisoirement applicable est recherché en droit interne, l'accord concernant cette application provisoire, de même que les dispositions conventionnelles concernées par cette application provisoire, doivent faire l'objet d'une procédure d'assentiment.

Avant cette révision de la Constitution, la Belgique avait une pratique d'application provisoire de certains accords, sans assentiment préalable des Assemblées compétentes, tels les accords en matière de transport aérien et les accords relatifs aux matières premières.

En ce qui concerne la question relative aux effets de l'application provisoire, la Belgique comprend que la Commission souhaite savoir si le traité s'applique entre les parties ayant accepté son application provisoire, de la même manière que s'il était entré en vigueur.

La Belgique est d'avis que tel est, le plus souvent, le cas.

31. Iran (Islamic Rep. of)

Mr. Chairman,

I would like to congratulate Mr. Juan Manuel Gornez-Robledo, Special Rapporteur on the topic for his first report.

Some doubts have to be raised with regard to the assessment that provisional application o f treaties are consistent with the definitive commitment o f States pertinent to the constitutional rules. This commitment has to rely on the agreement of the States parties and is justified by the intention of the parties to rapidly achieve the purpose envisaged by the agreement. Some treaties, particularly those including rights and obligations for individuals, cannot be subject to provisional application. In fact, to the extent that it produces obligations identical to those resulting from its entry into force, the decision to put an end to its application brings about complex situations for the latter.

Similarly, as the special Rapporteur noted, provisions creating monitoring mechanisms cannot be subject to provisional application. Only on exceptional basis,

States may subject themselves to such mechanisms as measures o f confidence building and good will. We believe that, from a wide range of points of view, the time was not ripe enough for the Commission to consider this topic.

32. China

The Chinese delegation expresses its appreciation to Special Rapporteur Juan Manuel Gomez-Robledo for his first report on the topic, which established, on the basis of state practice, relevant legal issues that arose in the context of the provisional application of treaties and set the direction and plan for the next phase of work. State practice in provisional application of treaties has existed for a long time, but relevant rules have never been clarified or unified while relevant provisions in the Vienna Convention on the Law of Treaties are also short on details. As a result, many states find themselves in a muddle when deciding whether or how to resort to the provisional application of treaties, and international disputes have occurred in this context. Therefore, we see a practical and obvious need for the study of this topic.

On the approach to the study o f the topic, the Chinese delegation is of the view that the study should be carried out on the basis of an in-depth review of the relevant international and national practice, focus on the legal effects o f provisional application, particularly when i t comes to related rights and obligations. The Commission may provide guidance on the following issues: Will a signature state become bound by the rights and obligations under the treaty as a consequence of provisional application? Will those rights and obligations expire upon the unilateral decision of a state to terminate provisional application? After a treaty comes into force, what are the relations in the context of rights and obligations under the treaty between states that continue with provisional application and states that have completed their domestic process of ratification?

In addition, the Commission should study the relations between provisional application on the one hand and national constitutions and legislations on the other. Of all the treaties that are being provisionally applied, most require such application not to "contravene the internal laws of the state". As a result, the legal effects and consequences o f provisional application have been repeatedly challenged and remained a major contentious issue since the creation of this rule. Moreover, provisional application may give rise to problems relating to the separation of power between the executive and the legislative as the decision for provisional application can be made by the executive branch at the signing of the treaty. It may also lead to over hasty application. In this regard, some states have made useful attempts. For instance, some require provisional application to be approved by congress; some treaties stipulate that recourse to provisional application only becomes available after a state has completed domestic process of ratification and before the treaty enters into force. The Chinese delegation believes that the key to the solution of this issue lies in a reasonable balance between provisional application and domestic law. On the one hand, the effects of provisional application as a rule of international law should be guaranteed. On the other, there should be appropriate space for states to decide on provisional application in accordance with their domestic laws.