Sixth Committee Statements
Report of the International Law Commission
on the work of its 66th session

Provisional application of treaties

69th session of the General Assembly
2014

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20th meeting, 28 October 2014, a.m.

1. Slovenia

Let me now address Chapter XII: Provisional application of treaties. We would like to commend Special Rapporteur Gómez-Robledo for his second report on the provisional application of treaties, in which he analysed the legal effects of this mechanism and identified some further issues to be addressed.

With regard to issues to be discussed further, we note that in his report, the Special Rapporteur did not consider, nor did he propose to consider, the provisional application as regulated by the Vienna Convention on Succession of States in Respect of Treaties. As stated in our speech to this Committee last year, we believe that it would be useful to additionally examine the travaux préparatoires of the Convention, including the related practice and doctrine, which would improve understanding of Article 25 of the Vienna Convention on the Law of Treaties and its implications in particular, and the comprehensive analysis of provisional application in general. Such an approach would also correspond with the method of proceeding in relation to, for example, reservations to treaties, which were also analysed in the context of the succession of States in relation to treaties. We are aware that there might be reasons for excluding this aspect of provisional application from consideration of this topic by the Commission; however, if so, these reasons should be explained.

More specifically, we would like to address the main issue under consideration this year, which is the legal effects of provisional application. The conclusion made by the Special Rapporteur on the basis of discussion in the Commission, which also appears to reflect his own opinion, was that "there had been general agreement that the basic premise […] was that […] the rights and obligations of a State which had decided to provisionally apply the treaty, or parts thereof, were the same as if the treaty were in force for that State."

While we see no reason to withhold support for the above conclusion in principle, we (and some of the Commission members) understand it to be substantially the same as the conclusion of the Commission of 1966 in its comment on the draft article on provisional application, to which the Special Rapporteur also refers in his second report. However, the conclusion of the Commission of 1966 was made with regard to the "provisional entry into force," while the present conclusion refers to "provisional application," which the Special Rapporteur defined in his first report as a legal concept which is different from the provisional entry into force.

When commenting on the Special Rapporteur's first report during last year's session of this Committee, we advocated the view that these two concepts do not differ in terms of their legal effects, which now seems to be accepted. As an additional aspect in considering the legal effects of provisional application, we would like to propose an analysis of the reasons why provisional application has the same legal effects as provisional entry into force, how this is supported by the travaux préparatoires of the Vienna Convention on the Law of Treaties, practice and doctrine, and what – if any – is the difference between the two concepts.

An interesting example of international practice which illustrates the relevance of the above questions is taken from the framework of international commodity agreements, in which both terms are still used simultaneously. Since the Special Rapporteur is planning to consider the practice of international organisations (including as regards commodities), this would be a good opportunity to address the issue.

24th meeting, 31 October 2014, p.m.

2. Chile

Chapter XII deals with the topic "Provisional application of treaties". The Commission had before it the second report of the Special Rapporteur, the Mexican jurist Juan Manuel Gomez Robledo, containing a substantive analysis of the legal effects of the provisional application of treaties. This gave rise to an interesting debate in the Commission.

We endorse the broad agreement expressed in the Commission that the basic premise underlying the topic is that, subject to the specificities of the treaty in question, the rights and obligations of a State which has decided to provisionally apply the treaty, or parts thereof, are the same as if the treaty were in force for that State.

We consider it important to mention in this connection the aspects of domestic law that could, in practice, limit the provisional application of certain provisions of treaties in cases where those provisions require, in compliance with domestic requirements, prior approval by the respective legislatures.

25th meeting, 3 November 2014, a.m.

3. European Union

The European Union has the honour to address the Sixth Committee on the work of the International Law Commission relating to the topic of provisional application of treaties, in particular considering the second report on the topic presented by the Special Rapporteur Juan Manuel Gómez-Robledo.

The Candidate Countries Turkey, the former Yugoslav Republic of Macedonia*, Montenegro*, Serbia* and Albania*, the country of the Stabilisation and Association Process and potential candidate Bosnia and Herzegovina, as well as the Republic of Moldova and Georgia, align themselves with this statement.

The European Union welcomes the work of the international Law Commission on the topic of provisional application of treaties and reiterates its interest in the important role that the ILC could play in providing guidance and enhancing the understanding of this instrument of international law.

*The former Yugoslav Republic of Macedonia, Montenegro, Serbia and Albania continue to be part of the Stabilisation and Association Process.

The Union also welcomes the Second Report of the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, and appreciates his efforts to set the general framework of issues to be further considered in the course of the work on the topic of provisional application of treaties.

The Union understands that the work is still at its early phase and more detailed considerations will follow. In this respect, at this stage, the Union would make only some general comments.

The Union agrees that the focus of the analysis should be on the legal effects at the international level, rather than carrying out a comparative analysis of domestic law.
The second report contains an interesting analysis of the legal effects of provisional application. It already makes some distinctions and observations, for example, on the differentiation between agreements that produce effects primarily within a State from those that have effects at international level; on the different sources of obligation (the treaty itself or a parallel agreement); as well as on forms and issues connected with termination of provisional application. These are all important aspects and the Union is looking forward to the further analysis of these issues.

The Union would like to note that it may be beneficial to the practical value of the final outcome of the work of the ILC on this topic if the work focuses on some selected issues that are felt important in practice and which have the potential of presenting a difficulty when parties decide to resort to provisional application of treaties. During the consideration of the second Report the ILC members already pointed to a number of interesting issues that could be studied further.

The Union takes the opportunity to recall that in its last year's statement, it pointed to some specific issues for consideration, for example:

- to 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 also extend to provisions adopted by such joint bodies during provisional application;

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

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

The Special Rapporteur already briefly touched upon some of these matters but further more detailed analysis would be welcomed.

The European Union notes that the Special Rapporteur intends to address the provisional application of treaties by international organisations as part of his future work. In this respect, the Union would like to point out that the possibility for provisional application of international agreements with third countries is explicitly envisaged in the Union's Founding Treaties (Article 218(5) TFEU) and this possibility is often used in practice by the EU. Indeed, if the Special Rapporteur takes the opportunity to look at the practice of

the Union, he will find ample material for analysis. Should in the course of the considerations specific questions arise, the European Union would be pleased to address them on the basis of its own practice, including by providing more detailed information about its practice.

In concluding, the European Union reiterates its interest in the topic and looks forward to the further work of the International Law Commission in this important area.

Thank you for your attention.

4. Israel

With regards to the topic "Provisional Application of Treaties" Israel commends the discussion on the subject of provisional application of treaties in the commission and congratulates the special Rapporteur, Mr. Juan Manuel Gomez-Robledo, for his second report on the topic.

As noted in previous meetings, the provisional application of treaties does not fall within Israel's general policy with regard to treaty law. However, in exceptional circumstances only, a treaty may be provisionally applied. Such exceptional circumstances may include cases of urgency and cases in which there would be a great political or financial significance for the prompt application.

Any such provisional application would require prior approval by the Government of the State of Israel which would include a statement as to the extraordinary circumstances that would justify the provisional application of the treaty in the specific case. All treaties that were provisionally applied by Israel thus far were approved in advance by the Israeli Government. The Government of Israel's decision included the approval of the treaty itself and of its provisional application.

5. Russian Federation (No written statement)

6. Austria

With regard to the topic “Provisional application of treaties”, the Austrian delegation commends the Special Rapporteur, Mr. Gómez-Robledo, for his second report, which underscores the importance of this topic, as evidenced by some recent decisions on provisional application relating to the Arms Trade Treaty and the Chemical Weapons Convention. Already in our statements in the preceding years, Austria stressed the particular importance of the topic of the provisional application of treaties, identified the particular issues requiring further elaboration and explained its general position regarding this matter.

In his present report, the Special Rapporteur dealt with the issue of the source of provisional application and identified four ways in which Article 25 of the Vienna Convention on the Law of Treaties might be manifested. However, one may question whether Article 25 of the Vienna Convention can be interpreted as permitting a state to

unilaterally declare the provisional application of a treaty if the treaty itself is silent on this matter. Since the provisional application is deemed to establish treaty relations between the state parties, it could be argued that a unilateral provisional application would oblige the state parties to accept treaty relations with a state without their consent. This consent is usually expressed by the ratification and accession clauses of a treaty or the special clause on its provisional application.

A provisional application of a treaty by unilateral declaration without a special clause in the treaty could only take place if it can be established that the state parties agreed to this procedure in some other manner according to Article 25 paragraph 1 subparagraph b of the Vienna Convention on the Law of Treaties.

However, this conclusion does not rule out the possibility that a state commits itself to respect the provisions of a treaty by means of a unilateral declaration without obtaining the agreement of the state parties. Whereas the provisional application results in the establishment of treaty rights and obligations with the other state parties, the application resulting from a unilateral declaration can only lead to obligations incumbent upon the declaring state. This is also reflected in the "Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations", adopted by the International Law Commission in 2006, according to which a unilateral declaration entails obligations for the declaring state and cannot generate obligations incumbent on the other state parties without their consent.

As to the effects of provisional application, Austria shares the view of the Special Rapporteur that a breach of the applicable provisions of a treaty provisionally applied entails state responsibility that can be invoked by the other state parties.

7. Micronesia (Federated States of)

This statement deals only with the topic of the provisional application of treaties, as contained in Chapter XII of Document A/69/10. Micronesia is grateful to Special Rapporteur Mr. Manuel Gomez-Robledo for leading the work of the Commission and producing two reports to date on this important topic.

Mr. Chairman,
The act of entering into a treaty is a momentous affair in international law. When two or more States agree to bind themselves to the terms of a treaty, they place their national interests, their aspirations, and potentially their sovereignties at the mercy of their treaty partners. Whether it is for peace, defense, trade, economic union, or some other weighty matter, a treaty injects a measure of stability and predictability into international relations and provides a fertile source for rules and principles of international law. Given the far-reaching ramifications of validly concluded treaties, it is very important that Parties to a treaty know when the treaty actually applies and binds them, particularly if that occurs before the treaty enters into force. The Commission's examination of the provisional application of treaties is thus a critical one.

Indeed, Micronesia attaches such great importance to the Commission's work that it submitted Comments to the Commission earlier this year discussing Micronesia's views on the provisional application of treaties, marking the first time that Micronesia has ever submitted Comments to the Commission. As discussed in our Comments to the

Commission, Micronesia has a long history with the mechanism of provisional application. When Micronesia emerged from the trusteeship system, Micronesia made sure to notify the United Nations that it intended to provisionally apply a number of treaties that the United States had extended to Micronesia as its administering power during the trusteeship, until such time that Micronesia had completed a thorough review of whether to formally enter into those treaties as an independent sovereign. The provisional application of treaties was therefore one of the first acts undertaken by Micronesia under international law and as part of the international community, and it remains a matter of great interest for Micronesia.

Micronesia is not a Party to the 1969 Vienna Convention on the Law of Treaties, whose article 25 is a major focus of Mr. Gomez-Robledo's work. Nevertheless, Micronesia asserts that article 25 of the Convention is now part of customary international law, even though its specific content and parameters remain to be established in an authoritative manner. Although the drafters of the Convention grappled with the appropriateness of article 25 in light of the questionable legal status of the mechanism of provisional application at that time, the usefulness of the mechanism cannot be questioned, particularly with regard to jumpstarting treaty implementation and ensuring the continuity of functions in successive treaty regimes; and neither can the widespread use of the mechanism by States before and after article 25 was enshrined in the Convention.

Micronesia welcomes the decision by Mr. Gomez-Robledo to focus his current work on the legal effects of the provisional application of treaties. This practical approach will enhance States' understanding of the actual functions of the mechanism of provisional application and hopefully lead to broader utilization of the mechanism. In that regard, it is Micronesia's view that the mechanism, when utilized, does produce legal rights and generate legal obligations for the State utilizing the mechanism as if the treaty has entered into force for that State, but the exercise and discharge of those rights and obligations can be limited either by the terms of the treaty being provisionally applied or by a separate agreement struck by the treaty Parties that allows for the provisional application of the treaty. In no way can the provisional application of a treaty lead to a modification of the rights and obligations themselves, even though the exercise and discharge of those rights and obligations may be limited during the treaty's provisional application. As a necessary corollary, if a State fails to discharge a treaty obligation that it provisionally applies, then that is an internationally wrongful act that triggers the international responsibility of the State. As another necessary corollary, and in line with article 27 of the Convention, a State Party to a treaty that validly opts to provisionally apply the treaty but then fails to discharge its obligations under the treaty cannot use domestic law as an excuse for its failure. Indeed, because provisional application is a tool designed to hasten treaty implementation and ensure treaty continuity, States must make sure that they can actually use such a tool from the outset, or else the exercise is for naught.

Going forward, Micronesia encourages Mr. Gomez-Robledo and the Commission to consider the legal distinctions (if any) between, on the one hand, a State's provisional application of a treaty that has not yet entered into force internationally but which the State has ratified according to domestic constitutional requirements; and, on the other hand, a State's provisional application of a treaty that has entered into force internationally but which has not entered into force for the State due to delays in the State's ratification of the treaty in accordance with its domestic constitutional requirements. In the latter scenario, assuming that the State can indeed provisionally apply a treaty that has not entered into force for the State despite entering into force

internationally, what are the international legal consequences (if any) for the State if it fails to discharge the treaty obligations that it provisionally applies?

Mr. Chairman,
Perhaps realizing the expansive effects of treaties, the international community has shied away from concluding multilateral treaties in recent years, while those multilateral treaties that have been concluded struggle to attain sufficient ratifications in order to enter into force. In this climate, the mechanism of provisional application is a vital tool for triggering and sustaining treaty obligations in an expeditious and continuous manner. The Commission's work on this topic is thus important and timely.

8. Norway (on behalf of the Nordic countries)

As far as provisional application of treaties is concerned, the Nordic countries wish to thank the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, for his second report which seeks to provide a substantive analysis of the legal effects of the provisional application of treaties. The Nordic countries welcome the efforts of the Commission on this topic providing an amplitude of questions of an international law character which merit consideration. These include the legal effects of provisional application, its customary international law character and the relationship of Article 25 with the other provisions of the Vienna Convention.

We express our support for the decision of the Special Rapporteur and the Commission not to embark on a comparative study of domestic provisions relating to the provisional application of treaties. Whether or not a State resorts to provisional application is essentially a constitutional and policy matter.

The Commission has expressed its agreement with the view that the provisional application of a treaty produces legal effects and is capable of giving rise to legal obligations, and that those are the same as if the treaty were itself in force for that State. The Nordic countries are of the view 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. The question of legal consequences arising from a breach of a treaty being provisionally applied requires some further study.

The analysis of this topic is likely to identify strengths and weaknesses of different models of provisional application and, therefore, it may be considered whether the Commission´s work would benefit from further analysis of the different models of provisional application. This includes the possibility for a State to unilaterally declare its intention to provisionally apply a treaty when the source for provisional application does not arise from a provision of the treaty itself, a question which was debated by the Commission.

The rapporteur calls for more information on State practice, which will provide him with a representative sample of such practice for drawing conclusions. The Nordic countries have previously mentioned examples of Agreements where provisional application has been resorted to, such as the 2010 General Security Agreement on the Mutual Protection and exchange of Classified Information between the Nordic countries and the 2013 Arms Trade Treaty.

One model of provisional application is the adoption of the decision 1/CMP.8, where the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol recognized that Parties may provisionally apply the Doha Amendment pending its entry into force in accordance with Articles 20 and 21 of the Kyoto Protocol. The Parties intending to provisionally apply the Doha Amendment pending its entry into force in accordance with Articles 20 and 21 of the Protocol may provide notification to the Depositary of their intention to provisionally apply the Amendment. The Nordic countries implement the above mentioned treaties provisionally with the same legal effects as if they had formally been in force.

It may often take a certain amount of time to complete the constitutional requirements for ratification in the required number of States Parties. Provisional application may in such cases provide a suitable instrument to bring the treaty into early effect. Therefore, it might be useful if the Commission could develop model clauses on provisional application.

The Nordic countries find it important that the question of the provisional application of treaties by international organizations will be addressed as part of the further work on the topic, as it is stated in the second report in accordance with the mandate. For example, it is common that provisional application is resorted to in the cooperation agreements entered into by the EU and its Member States with a third State.

In concluding, we renew our wish to comment on the form of the final outcome of this topic once the work has progressed further.

26th meeting, 3 November 2014, p.m.

9. Portugal

I will now address the topic "Provisional application of treaties".

Portugal wishes, first of all, to thank Mr. Gómez-Robledo for his second report on the topic which provides a substantive analysis of the legal effects of the provisional application of treaties.

Mr. Chairman,

Portugal agrees that the provisional application of treaties does give rise to legal obligations, as if the treaty was in force for the signatories applying it. Those legal obligations are treaty based.

Domestic law concurs, of course, with the decision of a State to apply treaty norms provisionally. For example, it is common in treaty practice to have a clause making provisional application dependent on its compatibility with domestic law. This is the case with, for instance, Article 45(1) of the Energy Charter Treaty which states that "each signatory agrees to apply this Treaty provisionally (…) to the extent that such provisional application is not inconsistent with [the signatory's] constitution, laws or regulations".

Therefore, the two parts of this equation should be studied. The focus of the Commission should be, naturally, in the International Law aspects of provisional application. Nevertheless, since the purpose of the Commission's work regarding this topic is to provide guidance, a comparative study of relevant domestic law would be helpful.

Mr. Chairman,

As for the legal consequences of breach of a treaty being applied provisionally, we agree with the conclusion of the Special Rapporteur. Once the signatory accepts the provisional application, the violation of obligations of such treaty may amount to a wrongful act and, as such, trigger international responsibility. Therefore, a violation of a provisionally applied treaty should bear the same consequence as the violation of a treaty already in force.

Mr. Chairman,

We support the decision of the Commission to also consider the legal regime applicable to the provisional application of treaties between States and International Organizations, as well as between International Organizations. Furthermore, the Commission should also consider, besides State practice, case-law and doctrine.

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 to the topic of provisional application of treaties, the United Kingdom welcomes the second report of the Special Rapporteur on this topic.

The United Kingdom was pleased to respond to the Commission's request for information on state practice and thanks the Special Rapporteur for reporting on United Kingdom practice.

The analysis of the legal effects of provisional application at the international level is of particular interest to us. The United Kingdom was disappointed not to see more detailed reporting of State practice and would be very keen to see much more in the next report. Indeed, a broader picture on state practice is vital before any conclusions are presented. The United Kingdom looks forward to an analysis of further responses and the continuing work of the Commission on this interesting topic.

11. Belarus (Russian only)

12. Greece

Greece wishes to thank the Special Rapporteur, Mr. Juan Manuel GomezRobledo, for his second report on this topic and his endeavour to provide therein a substantive analysis of the legal effects of the provisional application of treaties. This is, in our view, a fundamental question that needs to be further explored, in particular, in the light of relevant State practice. In this respect, Greece would like to reiterate that given the disparity of the practice, the Special Rapporteur should engage in a more thorough analysis of the circumstances under which States have recourse to the provisional application of treaties before determining its legal effects. In the same vein, despite the merit of not embarking on a comparative study of relevant domestic and, in particular, constitutional provisions, it should be recalled that the decision to provisionally apply a treaty also depends on the national legal requirements of the State concerned. For this reason, one can find in treaty practice provisions stating that the Contracting States shall apply provisionally an international agreement only to the extent permitted by their respective national legislation.

In the view of this delegation, reliance on relevant State and judicial practice is also crucial when examining the consequences arising from a breach of an obligation in a treaty being provisionally applied. The assumption that the rules on responsibility for internationally wrongful acts should apply in this respect requires further consideration and, in our view, it would be premature to draw a conclusion thereon to the extent that this is not supported by a sufficient body of practice.

Furthermore, with respect to the applicability of the rules on the unilateral acts of States, Greece shares the concerns expressed by some members of the Commission in the light of the clarity of the terms used in Article 25 of the 1969 Vienna Convention on the Law of Treaties, which expressly provides for an agreement of the negotiating States. We, therefore, welcome the clarification provided by the Special Rapporteur that his reference to the unilateral declaration of a State to provisionally apply a treaty was not meant to be the "source" of the legal obligation but rather its "origin" in a temporal sense, i.e. the act which triggered the provisional application, although this concept needs to be further explored.

Taking into account that the consideration of this topic by the Commission is still at an early stage, Greece would like to conclude its preliminary remarks by reiterating that it looks forward to the future work on this issue, in particular in the form of draft guidelines or conclusions to be proposed by the Special Rapporteur, if possible, at the next session of the ILC.

I thank you Mr. Chairman.

13. Ireland

Turning to the topic, Provisional Application of Treaties, Ireland expresses its gratitude to Special Rapporteur, Mr Juan Manuel Gomez-Robledo, for his Second Report, and welcomes the report's focus on the substantive legal effects of the provisional application of treaties at the international level.

We agree with the core observation that both state practice and case law indicate that the provisional application of treaties does produce legal effects. We note with interest the consideration of the Commission's previous work on unilateral acts of states capable of creating legal obligations in the context of provisional application. Whilst we agree that the effect of a unilateral commitment to provisionally apply all or part of a treaty is an interesting and useful aspect of this topic, we would suggest that a clear distinction be maintained between principles or conclusions relevant to such unilateral act s, and the consideration of mutually agreed provisional application of a treaty by the parties thereto. In this regard, we would also suggest that, in relation to certain aspects of the topic, it may be helpful to have a more separate consideration of bilateral and multilateral treaties.

Finally, Mr. Chair, my delegation supports the issues identified in paragraphs 242 and 247 of the Commission's Report as questions meriting further examination, and shares the view that a study of the practice of treaty depositaries would be particularly beneficial.

14. The Netherlands

Turning to the topic of Provisional application of treaties, we thank the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, for his second report and his efforts to identify and clarify issues relevant to this topic.

We agree with the approach taken by the Special Rapporteur, to concentrate his analysis of the legal effects of provisional application of treaties on the effects produced at the international level. Indeed, there can be no doubt that the provisional application of a treaty has legal effects under international law.

We note the view expressed by the Special Rapporteur concerning the distinction to be made between the legal régime with respect to the entry into force of a treaty and the régime governing provisional application of a treaty and would ask him to further clarify that distinction, notably in the light of different situations, including the one relating to treaty regimes establishing an institutional framework or a secretariat that would require entry into force of the treaty to become fully effective.

We are not convinced of the relevance of, and therefore the need to include in this study the law relating to unilateral declarations of States, as the Special Rapporteur has done. As an instrument available under the law of treaties we believe that article 25 of the Vienna Convention should be the primary reference point for conducting this study.
In that respect, we are also not convinced whether there is any authority supporting the conclusion arrived at by the Special Rapporteur in paragraph 81 of his report that ‘a State that had decided to terminate the provisional application of a treaty would be required, as a matter of law, to explain to other States to which the treaty applies provisionally or, to other negotiating or signatory States whether that decision was taken for other reasons’. Neither do we believe there is any authority for the conclusion drawn in paragraph 82 that ‘provisional application could not be revoked arbitrarily’.

We believe that, in order to draw more definitive conclusions on the topic of provisional application of treaties, including in order to determine the status of the concept under customary international law, a thorough analysis of state practice in light of the language of article 25 of the Vienna Convention would be required and we would therefore like to reiterate our request made in last year’s statement.

Finally, as regards other issues the Special Rapporteur may want to address in his study, we support his proposal to pay attention to the provisional application of treaties by international organizations, particularly treaties concluded between the European Union and its Member States and third States.

15. Poland

Provisional application of treaties is becoming increasingly important in the development of international law. It is an instrument that grants states some flexibility in shaping their legal relations and accelerates the acceptance of international obligations. It could be particularly useful in cases when time-consuming ratification procedures may adjourn or even completely eliminate potential benefits arising from the conclusion of a treaty.

Our delegation fully concurs with the Commission's conclusion that the provisional application of the treaty shall have the same effect as its entry into force, unless otherwise agreed. This view is clearly supported by Polish treaty practice. Poland does not have a specific domestic law on the provisional application of treaties. The Polish practice in this regard is based on Article 25 of the 1969 Vienna Convention on the Law of Treaties and the general rules of domestic law regarding conclusion of the treaties. Under our constitutional order, we consider as optimal to apply a treaty temporarily only when we complete our domestic procedures necessary for its entry into force.

The Special Rapporteur rightly points out, in paragraph 229 and others, that the analysis of the legal effects of provisional application of treaties should be considered in the light of the state practice based on domestic law. Therefore, taking into account the divergent views expressed in the work of the Commission (paragraphs 238 and 247), we support the view that the Special Rapporteur should include a comparative analysis of national provisions concerning the provisional application of treaties in the course of his further research. Attention should be also paid to the practice of states that are members of regional integration organizations that themselves (acting independently from its members) may conclude treaties which are binding - within that organization's competence - for the members states. It is important that the Commission takes into account situations where the treaty is applied provisionally by such an organization as well as (some) of its members states, whereby the scope of provisional application is different for those entities.

Furthermore, we believe that the practice of issuing unilateral declarations which define the scope of the provisional application of a treaty deserves further examination. Such declarations may serve a significant role in ensuring a faster application of a treaty. Given a case when a treaty provides that it can be applied provisionally from the date of its signing, several situations could occur. First, a signatory may apply the treaty temporarily without further reservations. Second, a signatory - based on his domestic law - may declare that his provisional application of the treaty can be restricted as to the time or scope. For example: he may decline provisional application until his own constitutional procedures on the treaty conclusion are completed. Third, a signatory may indicate that it will apply provisionally only some of the provisions of the treaty. We believe that, in general, declarations are admissible, and may entail a number of consequences for mutual rights and obligations of the contracting parties. Therefore, the Polish delegation is of the view that it is highly desirable that further studies cover also the role of unilateral declarations in provisional application of treaties.

16. Singapore

On the topic of "Provisional application of treaties", my delegation concurs with the general agreement reached by the Commission that the provisional application of a treaty is capable of giving rise to legal obligations as if the treaty were itself in force. In respect of the legal consequences of the provisional application of treaties, we look forward to the Commission's study of whether or not provisional application could result in the modification of the content of the treaty. My delegation does not think that the answer to this question is a clear one. We are also preliminarily of the view that there may be an overlap here with the topic on "Subsequent agreements and subsequent practice", and my delegation trusts that the Commission will ensure coherence across its work in this regard.

In terms of the Commission's further work on this topic, my delegation agrees that the modalities for termination of provisional application and the applicability of the regime on reservations to treaties are important areas for further consideration.

17. Australia

On the first matter, Australia welcomes the second report of the Special Rapporteur, Mr Juan Manuel Gomez-Robledo, on the provisional application of treaties. Australia shares the Special Rapporteur's view that the task of the International Law Commission is neither to encourage nor discourage the provisional application of treaties, but rather to provide guidance to enhance understanding of this mechanism. In that regard, Australia appreciates the Special Rapporteur's substantive analysis of the legal effects of the provisional application of treaties.

Mr Chair
Australia notes the views expressed by Members on the value or otherwise of a comparative study of domestic provisions relating to the provisional application of treaties.

Individual States decide whether to provisionally apply treaties in light of the purpose, scope and content of the specific treaty, as well as domestic legal and political considerations. For example, Australia has adopted a dualist approach to the implementation of treaties under which treaties have no effect in Australian domestic law until incorporated formally by legislation. Accordingly, Australia's general practice is not to provisionally apply treaties – but there are exceptions, for example bilateral air services agreements. In short, for each State, domestic law, including constitutional law, is key to the provisional application of treaties by that State.
Australia notes also the views expressed by Members of the ILC as to whether the decision to provisionally apply a treaty might be characterised as a unilateral act. Australia agrees with the view that the source of the obligation remains the treaty itself and not the declaration of provisional application.

Australia welcomes the Special Rapporteur's continued work on this topic, including consideration of the provisional application of treaties by international organizations and the different consequences arising from the provisional application of bilateral as opposed to multilateral treaties.

18. Germany

Germany would like to thank the ILC and Special Rapporteur Gomez-Robledo for the Second Report on the important topic of provisional application of treaties. The Special Rapporteur's analysis on the legal effects of provisional application provides most valuable insight.

At this point, we tend to support his conclusions regarding the legal effect of the provisional application of a treaty as a matter of public international law. States agreeing to the provisional application of a treaty do so in the expectation that the treaty's rules will be put into practice and will govern the relations between the treaty's parties. Their mutual expectation is that they can rely on the treaty's provisions to be applied; that they may exercise the rights granted therein and that they will be expected to abide by the obligations spelled out in the treaty, in short: that they will be held to the treaty's term.

On the other hand, the domestic requirements and repercussions of provisional application of treaties are -as the Special Rapporteur pointed out- a matter of domestic law. The response to the question whether, under which conditions, and to which extent the provisional application of a treaty may be agreed to, varies from country to country. Here, we would agree with the Special Rapporteur that a comparative study on national regulations in this regard need not be part of the ILC 's work. It is up to each and every State to ensure that its constitutional provisions are respected and applied.

That having been said, Germany would like to stress that the legal effect of provisional application of a treaty and the possible domestic and international legal consequences are closely intertwined, especially in case of failure to meet the treaty's terms while it is applied provisionally. If domestic law does not allow for the provisional application of specific rules or of the treaty as a whole, due to, e.g. the lack of parliamentary approval, the international obligation cannot be fulfilled. As a consequence, the provisional application of a treaty should not be taken upon lightly. Parties intending to apply a treaty provisionally should first consider carefully:

- if their domestic legal situation pem1its provisional application of a treaty
- if it enables them to comply with the provisionally applied treaty as a binding obligation, and if they are determined to do so (i.e. comply with the treaty).

That means that in some cases, provisional application may turn out not be an option at all because the constitutional or other legal requirements of the Party concerned make it impossible.

If the treaty's negotiators reach the decision that provisional application is to be included in a treaty's terms, careful wording of the respective clauses is required, which allow the fulfilment of necessary national procedures or limits the provisional application to certain parts of the treaty. "Opt-out" clauses might be needed in multilateral treaties as the necessary safeguard for those state parties who for reasons of domestic law cannot agree to provisional application so easily.

One more aspect: In Germany's view the intention of a State to apply a treaty provisionally needs to be clearly communicated.

Insofar we would question whether such intention can be communicated tacitly or implicitly as suggested by the Special Rapporteur. The case quoted for tacit communication is that of the UNCLOS which provided for provisional application for all

States "that had consented to its adoption", if the Convention had not entered into force by a certain date. The provision included an "opt-out-clause". A state's obligation to apply UNCLOS provisionally thus already arose from participation in adopting the Convention - not from its remaining silent at a later date. Insofar the construction chosen for provisional application of UNCLOS does not appear to be so different from those clauses providing for provisional application of a treaty from the time of its adoption and quite removed from the idea of a "tacit or implicit agreement". Therefore, based on the fact that agreement to provisional application was expressed upon adoption, such clauses provide for an "opt-out" instead of an "opt-in".

It is with continued interest, that we are following the ILC's contribution to this important topic in international treaty relations.

19. Romania

The Delegation of Romania welcomes the work of the International Law Commission concerning the provisional application of treaties, and in particular the efforts of the Special Rapporteur, Mr. Gomez-Robledo, in drafting the second report on the topic and expresses its interest on the matter, as well as in other subjects on the ILC agenda concerning the law of the treaties.

With regard to the particular issue of provisional application of treaties, Romania has in its specific legislation on the law of treaties relevant provisions concerning specifically the provisional application.

It should be mentioned from the outset that in the Romanian legislation, provisional application is viewed as an exceptional treaty action, of limited applicability. Thus, according to the relevant provisions on the matter, only treaties for the entry into force of which ratification by Parliament is not required can be applied provisionally as of the date of signature, if the treaty expressly allows it. Treaties for which ratification by Parliament is compulsory cannot be applied provisionally.

One exception from the above-mentioned rule exists, however: treaties (even requiring ratification by Parliament) between the European Union and its Member States (Romania being an EU Member State), on the one side, and third States (the so-called “mixed treaties”), on the other side, can be applied provisionally before their entry into force if the treaty expressly provides so.

After this brief introduction into the relevant provisions of Romanian legislation, which may be of interest for the current study for reasons to be presented further on, the Romanian Delegation makes the following remarks concerning the draft Second Report of the Special Rapporteur on the provisional application of treaties:

Romania welcomes the Second Report of the Special Rapporteur, Mr. Gomez-Robledo, which serves as a very useful basis for further exploration and debate on the topic.
As it results also from its domestic legislation, provisional application of treaties is viewed by Romania as an exceptional, and therefore limited, treaty action, for reasons attached primarily to legal certainty.

In this respect, Romania believes that the usefulness of a comparative study of various domestic provisions on provisional application of treaties lies in the fact that they can contribute to understanding the State practice in the field.

As we are on the ground of treaty law, Romania underscores the relevance of the will of the parties in the case of provisional application. Therefore, the Romanian Delegation joins the reservations expressed as to the relevance of the law of unilateral acts in the context of provisional application of treaties. Although it may occur that a treaty is, on some occasion, applied provisionally by only one of the Parties, this does not modify the consensual nature of the source of provisional application. The Report should therefore underline the distinction between provisional application as a result of the agreement of the parties (which is the object of the current topic) and provisional application as a unilateral act (the case of the provisional application by the Syrian Arab Republic of the Convention on the Prohibition of Chemical Weapons), which is not the object of the present research. In the same vein, Romania considers that the rules applicable to the obligations resulting from provisional application may rather be inferred from the principle of good faith and the need for legal security than from the law of unilateral acts.

The Romanian Delegation suggests that a distinction should be made between two categories of obligations related to provisional application: the obligation to apply the treaty provisionally (in the case of treaties providing for compulsory provisional application) and the rights and obligations resulting from the provisional application itself.

Romania believes that further examination should consider the issue of termination of provisional application, under various aspects, including that of the legal consequences of such termination (including under the aspect of the termination of obligations, touched upon in the Special Rapporteur's second Report). On the particular point of the termination of obligations, Romania believes that deeper examination is needed of the question of the relevance of article 18 of the VCLT in the case of termination of provisional application, that is to what extent the obligation to defend the object and purpose of the treaty persists, especially if provisional application is terminated as a consequence of the intention not to ratify.

On the same point concerning the termination of provisional application, Romania would find it very helpful if the examination within the International Law Commission gave more guidance as to the possible different effects of such termination under various hypothesis: termination of provisional application with the intention not to ratify; termination of provisional application with the intention to continue the domestic process necessary for the entry into force; termination of provisional application after ratification but before the entry into force, especially in the case of the activation during provisional application of institutional mechanisms (EU practice could prove very useful in this respect).

Considering the multitude of hypotheses mentioned above (going beyond the limited case provided for in paragraph 2 of article 25 of the Vienna Convention), as well as other possible variations, a more thorough analysis of the customary character (or not) of paragraph 2 of article 25 of the Vienna Convention could prove very useful, especially for States, such as Romania, who are not parties to the Convention but apply it as customary international law.

Romania would also appreciate more in-depth argumentation on the non-arbitrary character of the termination of provisional application. Romania does believe that, indeed, for reasons of legal security and predictability, the party terminating provisional application should at least state its intention (of ratification or not).

As far as the future work is concerned, Romania subscribes to the proposal to look into the question of the provisional application of treaties by international organizations. Under this header, the practice of the European Union is particularly reach and the effect it may have on the law and practice of its Member States could be also relevant.

Additionally, the examination of the effects of other treaty actions during provisional application - e.g. modification of the treaty or ratification without entry into force – represents a significant aspect to explore further.

To conclude, Romania underlines its interest in the topic and is looking forward to the further study of the International Law Commission in this field.

20. South Africa

Let me now turn to the last topic "Provisional Application of Treaties". We have noted that considerable progress has been made with respect to the Commission's work on the topic of the provisional application of treaties since its inclusion in its programme of work in 2012. Two reports have since been produced by the Special Rapporteur, Mr Juan Manual Gomez-Robledo, the result of unfailing hard work for which we want to commend him.

The technique of provisional application of treaties is an important interim mechanism that can contribute to ensuring that the implementation of useful international norms is not delayed pending the definitive entry into force of a treaty.

However, whether a particular state is able to exercise this international law right is not a question of international law, but of the municipal law of the state concerned. Therefore, the effectiveness of a treaty regime during the provisional phase may depend on the attitude adopted by the national legal systems of its parties. It thus becomes important to consider whether it is necessary and possible for a provisionally applied treaty to become part of domestic law and if so whether the courts can actually apply it? We therefore recommend that the following questions may be of benefit to this study:

- Can a treaty that is being applied provisionally have any legal effect under domestic law?
- When could such a treaty be relied on as a basis for a right of interest before a domestic court?
- If a provisionally applied treaty supersedes a pre-existing treaty that is part of the law of the land, which one will prevail?
- If the domestic courts do not apply a provisionally applicable treaty, what consequences will this have for the country's international obligations?

Mr Chairman
In South Africa, new procedures for the conclusion of treaties were introduced in democratic South Africa, first by the 1993 Interim Constitution and finally by the 1996 Constitution of the Republic of South Africa. In view of the enhanced status the 1996

Constitution accords to international law, it may be of particular relevance to the Special Rapporteur to consider South African law with respect to the formation and domestic effect of provisional applicable treaties.
The customary right of the state to enter into provisionally applicable treaties is recognised in Section 232 of the 1996 Constitution.

Unless the agreement on provisional application itself requires ratification, the power of the executive to agree to the provisional application of a treaty without prior Parliamentary approval is established by the following sub-Sections of the Constitution: Sub-Section 231 (1) authorises the executive to negotiate and sign international agreements, which includes the power to negotiate and sign agreements on provisional application; and it can be inferred from sub-Section 231 (3) that the provisional application may commence without Parliamentary consent in three circumstances:

(a)Where the treaty that is provisionally applied is of a technical, administrative or executive nature;
(b)Where the agreement on provisional application of a treaty is itself an agreement of a technical, administrative or executive nature; and
(c)Where the agreement on provisional application of a treaty is one that requires neither ratification nor accession.

Arguably these approaches encompass almost, if not all, of the methods by which a State may agree to apply a treaty provisionally. This may be done by the inclusion of a provision to this effect in the treaty itself, an agreement in simplified form, a resolution of a conference, or a notification or declaration of provisional application. In the South African context, whatever form it takes, an agreement on provisional application must be tabled in the National Assembly and the National Council of Provinces, the two Houses of Parliament, within a reasonable time - failure to do so may constitute a breach of the Constitution.

Mr Chairman
The executive in South Africa may decline to ratify a treaty approved by Parliament should the other party/parties delay or refuse to ratify, the entire treaty has become obsolescent, or there is a need to renegotiate some terms. If the South African Government decides not to ratify a provisionally applied treaty, the executive could choose to terminate the provisional application (provided the agreement on provisional application does not prohibit this).

Section 233 of the 1996 Constitution commands that, when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law - it is believed that 'international law' in this context would include treaties that have entered into force for the Republic of South Africa and also those that it applies provisionally.

The Office of the Chief State Law Adviser (International Law) and the South African Treaty Section, the depositary of all South African treaties, are currently compiling the formal input requested in Para 33 of the Report of the International Law Commission's 66th Session.

21. Spain

On the topic of the provisional application of treaties, my delegation would like to express its congratulations to the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, on the introduction of his second report containing a remarkable study on the legal effects of provisional application. This is certainly an issue of great practical importance.
As a starting point, we would like to emphasise that the consent of a contracting State is ultimately the decisive element. Therefore the Commission should not embark on the sensitive task of encouraging or discouraging the use of provisional application. Nor, probably, should the Commission consider domestic provisions of States relating to this topic. After all, once a treaty is being provisionally applied, States abide by the rule set out in article 27 of the Vienna Convention according to which they may not invoke the provisions of their internal law as justification for their failure to comply with their international obligations even those provisionally undertaken. And that is precisely the reason why the Bill on treaties and other international agreements that the Spanish Senate approved last Wednesday and that will enter into force in a matter of weeks contains specific safeguards and limits regarding provisional application. By the way, in our opinion, the Special Rapporteur might undertake a more detailed study of State practice. A more inductive approach would certainly be very useful to address this issue.

We would also like to draw attention to the importance of the practice of International Organizations on this issue, namely the European Union which has made extensive and quite interesting use of the provisional application of treaties as provided for in article 218.5 of the Treaty on the Functioning of the E.U. This is the case, for example, of some mixed agreements (between the Union and its member States, on the one hand, and a third party on the other hand) in which only the parts affecting matters within the Union's competence are provisionally applied.

Furthermore, we have doubts as to whether or not the decision to provisionally apply a treaty can be characterized as a unilateral. act taking into account that the Vienna Convention specifically considers it as the result of an agreement between States. In our view, many of the ideas put forward by the Special Rapporteur on this issue should be carefully examined and, if necessary, revised.

We also cannot accept the assertion that provisional application of a treaty could not be undertaken arbitrarily. In our view, such an assertion requires a detailed explanation.

Without questioning the importance of the principle of good faith, when a signatory State notifies another signatory State of its intention to terminate the provisional application of a treaty, the former is under no legal obligation to provide the latter with a reasoned justification of its decision. There might be a number of legitimate reasons behind it, including a domestic political change. In our opinion, this could not be considered as a breach of good faith. The Special Rapporteur should maybe reconsider whether the rules of customary international law on provisional application are the same as those laid down in the Vienna Convention.

Mr. Chairman,
Finally, to conclude my third and last intervention before the Sixth Commission in this session, allow me to make a brief comment along with a suggestion, on behalf of my Delegation. In light of our experience in the Sixth Commission for the past three years, we believe that the International Law Commission should seriously reconsider some

issues that affect not only its internal functioning, something on which my Delegation will not comment, but also the role that States should play in their interaction with the ILC in the framework of the Sixth Commission.

In our- view, there are far too many topics in the Commission's Programme of Work right now. This makes it difficult for us to consider the issues which are submitted every year in as much detail as we would wish. Also, as a consequence, the States receive too many requests for information. To be precise, at the moment we have been requested to provide information on 7 out of the 11 topics under consideration, some of which are not particularly easy. Equally importantly, the usual and permanent tool for interaction between the Commission and the States - that is, the web site - could certainly be improved as well as regularly updated. Additionally, the site should be managed in accordance with the principle of equality of the languages

In summary, in our view the International Law Commission should seriously consider reducing the number of topics (but not the number of sessions). The requests for information should be more selective and precise. The Commission should always bear in mind the principle of equality of the languages and pay more attention to its web site. On the contrary, in no way, should the Commission reduce or eliminate the summaries of internal debates since they are a major source of information that facilitates the follow-up of the Commission's activities.

27th meeting, 5 November 2014, a.m.

22. New Zealand

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

New Zealand shares the view that it is not appropriate for the Commission to seek to promote the provisional application of treaties in general. While we acknowledge that provisional application may be a legitimate tool, its use must be coupled with an appreciation of the constitutional challenges that provisional application presents for many States.

We agree with the Special Rapporteur's view that the legal effect of provisional application is the same as that of treaties. In this regard, we appreciate the acknowledgement of Mr Gomez-Robledo that provisional application, if not fully implemented domestically, may give rise to an inconsistency between a State's international obligations and its domestic law. Domestic implementation of obligations accepted through provisional application is therefore a major issue for States. The use of provisional application to circumvent domestic constitutional processes is also a significant concern.

Despite his view on the legal effect of provisional application, New Zealand notes the Special Rapporteur's indication that the consideration of domestic procedures is out of scope of the Commission's work at this time. New Zealand does not necessarily expect a full study to be undertaken of the domestic implementation procedures for treaties accepted through provisional application. We accept the challenges this would present, given there is no common agreed framework for such domestic procedures as they are governed by individual States' relevant constitutional frameworks. However, New Zealand considers that the Commission needs - in some respect - to take into account the significance of domestic procedures for the acceptance of international obligations and their implementation when addressing provisional application.

23. United States of America

Mr. Chairman, turning to the topic of "Provisional application of treaties," the United States thanks Special Rapporteur Juan Manuel Gomez-Robledo for his second report and appreciates the many ways in which it reflects the views from States during the past year, as well as substantial additional work on the subject. That said, we think that the Special Rapporteur was correct in not proposing draft conclusions or guidelines at this stage, as a number of issues covered by the report require additional views and study by States and within the Commission, as reflected in the many and varying views expressed during the debate within the Commission this summer.

As the United States has indicated previously, we believe the meaning of "provisional application" is well-settled- "provisional application" means that States agree to apply a treaty, or certain provisions, as legally binding prior to the treaty's entry into force, with the distinction being that these obligations can be more easily terminated. Therefore, we were pleased with the repeated recognition in the second report that "the provisional application of a treaty undoubtedly creates a legal relationship and therefore has legal effects" and that these effects go beyond the obligation not to defeat the object and purpose of a treaty.

The United States also believes that- whatever the final form of the ILC's work on this topic- it should be fully consistent with Article 25 of the Vienna Convention on the Law of Treaties, in order to provide useful guidance on the use and consequences of provisional application. For this reason, we would like a more thorough explanation of report's suggestion that a party seeking to terminate provisional application of a treaty may not do so arbitrarily and must explain its decision, as Article 25 does not include those requirements.

Mr. Chairman, the United States disagrees with certain aspects of the second report, including the suggestion that international law rules regarding the unilateral acts of States (and the Commission's work on the subject) have general relevance to the subject of provisional application of treaties. While the United States agrees that States may in some, limited cases unilaterally undertake to apply a treaty provisionally, we disagree that that is the appropriate framework for analyzing the vast majority of cases of provisional application. In most cases, provisional application creates a treaty-based regime between or among States, not just obligations for one State.

On a related point, the second report asserts that "the form in which the intention to apply a treaty provisionally is expressed will have direct impact on the scope of the rights and

obligations assumed by the State in question." That statement is not correct as a general matter; the form by which the State's intention is expressed does not have an impact on the scope of the rights and obligations, any more than the form by which a State ratifies or accedes to a treaty. Rather, what may affect those rights and obligations is the text of the treaty or other instrument that allows for provisional application, as well as any text associated with a State's acceptance of provisional application. The one exception would appear to be the unusual circumstance where provisional application is truly the result of a unilateral act. However, in that case, the State's obligations would not be altered, but only the rights it would have vis-a-vis other States.

The United States also doubts the conclusion that "the intention to apply a treaty provisionally may be communicated ... tacitly." The practice cited by the Special Rapporteur for this assertion does not involve "tacit" acceptance of provisional application of a treaty as we would understand it. Rather, it involves a treaty in which States expressly agreed that its provisions would be applied provisionally as of a specified date, but which allowed States to opt out of that provisional application obligation by notifying the depositary in writing. As a general proposition, the same requirements that apply to a State's consent to a treaty, including those reflected in Article 11 of the Vienna Convention of the Law of Treaties, also apply to its consent to apply a treaty provisionally.

Mr. Chairman, again, we thank the Special Rapporteur for his work thus far, and look forward to engaging further with him on these and the many other challenging issues presented by this topic.

24. Turkey

On the topic of "provisional application of treaties" we note the second report of the Special Rapporteur. Provisional application is an important instrument of international treaty practice. As pointed out in the first report of the Special Rapporteur it can serve a useful purpose where the subject matter was urgent, implementation of the treaty was of great political significance or it was important not to wait for completion of the lengthy process of compliance with States' constitutional requirements for the approval of treaties. The term is widely known, yet the legal regime that applies to the provisional application deserves analysis by the Commission. However the study should not be aimed at persuading States to utilize the mechanism of provisional application. Instead, it should provide a practical guide on various aspects of provisional application. In this vein we would advocate that the ILC work on this subject should result in guidelines rather than in draft articles.

We would also 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 systems allows for provisional application. A comperative study on domestic provisions relating to the provisional application is necessary for proper consideration of the topic. We share the view that it is premature to draw any conclusions on the state practice on the basis of information submitted so far. We therefore support the Special Rapporteur's intention to collect more information on state practice before presenting conclusions drawn from the analysis of such practice.

The question of the legal effects of the provisional application of treaties lies at the very heart of the study undertaken by the Commission. In the first report the Special Rapporteur noted that the terms "provisional application" and "provisional entry into force" are not synonymous and refer to different legal concepts. In this regard further clarification on the view of the Special Rapporteur whether the legal effects and legal obligations arisen from the provisional application could be the same as if the treaty were itself in force would thus be of importance for our understanding of the issue.

Mr. Chairman,
Provisional application involves a treaty-based relationship. This mechanism is possible only on the basis of agreement between States and as an exercise of the free will of States. We therefore share the view that the decision to provisionally apply· a treaty cannot be characterized as a unilateral act.

In the explanations given as regards "unilateral act" the Special Rapporteur indicated that by using the term of "unilateral act" it was intended to highlight the fact that it was typically left to the negotiating or contracting states to unilaterally decide whether to provisionally apply a treaty or not. It is further stated that "As such the legal obligation for the State arose not when the treaty, containing a clause allowing provisional application, was concluded, but at the point in time at which the State unilaterally decided to resort to such provisional application." We are of the opinion that this could be valid for multilateral treaties. For bilateral treaties, however, the obligation will arise when the treaty was concluded. My delegation thus support that the Special Rapporteur proceed to consider different consequences arising from the provisional application of bilateral as opposed to multilateral treaties. As the work is still at its early phase we would like to the following. First of all we share the view that it would be beneficial if the work focuses on the specific issues that are felt important in practice and that would be useful for States to know when they decide to resort to provisional application of treaties. We also believe that the applicability of the regime on the reservations to treaties merits further consideration.

25. Malaysia

Further, moving on to the topic of “Provisional Application of Treaties”, the Second Report, while still at the initial stage of elaborating further the areas of study and possible direction of the topic, had managed to elucidate several scenarios within which the provisional application of treaties might operate. The myriad of scenarios, in an attempt to illuminate the question of creation of legal effects produced by the provisional application of treaties, should be discerned with great care and caution. In this regard, Malaysia wishes to highlight its preliminary views on the topic as the foregoing:

(a) in order to discern the application of treaty either provisionally or upon its entry into, primary guidance should be found in the express provision of the treaty itself which specifies the intended manner in which the treaty should be applied. This includes whether there is an unequivocal consent and explicit commitment made by States to apply the treaty provisionally and thereby agree to be bound by the treaty. Thus, the principle of Pacta Sunt Servanda as enshrined under Article 26 of the Vienna Convention on The Law of Treaties (“VCLT”) should be the general point of departure to determine manifestation of the will to be bound by a treaty and hence, the application of the treaty to the States concerned. Should there be no such an express provision in a treaty, recourse

to parallel agreement, unilateral declaration, diplomatic exchanges and conduct of States should be examined within the proper context and content as to how the will of the States are actually manifested. With this exercise of care and caution, we should be able to avoid a generalised interpretation and legal analysis that might ipso facto bring the effect of provisional application of treaties legally and technically equivalent to the effect of treaties that are going to be in force or are already in force. Further, in a circumstance where there is an explicit provision that specifies a treaty shall apply provisionally but conditional upon an express consent by the States concerned, legal effect ensuing from such a commitment is subject to the clear expression of intention. This determination of legal effect should be distinct from a "silence" scenario by State which does not manifest itself into a positive accord to apply the treaty provisionally. Without such a positive undertaking, the question of legal effect, source, rights, obligations and termination thereof should not arise;

(b) Malaysia notes the example highlighted in the Second Report relating to Article 23 of Arms Trade Treaty, which provides a certain level of discretion to States that they "may declare to apply provisionally Articles 6 and 7 pending the entry into force of the Treaty for that State, at the time of signature or the deposit of instrument of ratification, acceptance, approval or accession". Thus, the question of legal effect on the provisional application of treaties can be ascertained in the light of full or partial application of the treaty, subject also to the declaration by State of its clear intention to apply the treaty provisionally;

(c) in the context of Malaysia's experience and practice, signing of treaty does not necessarily create a legal obligation when the treaty further requires ratification, accession, approval or acceptance processes, unless the treaty otherwise provides. The effect of signing in this regard means, a State is not yet a Party albeit being a signatory to the treaty, pending its subsequent act of ratification, accession, approval or acceptance of the treaty. The effect emanating from this process is subject to the understanding as enshrined under Article 18 of the VCLT whereby the State must refrain from acts which may defeat the object and purpose of the treaty. Malaysia opines that the effect expounded from this context is confined to moral and political outcomes without giving rise to any legal consequences. Be that as it may, prior to signing or becoming a Party to a treaty, Malaysia will usually ensure that its domestic legal framework is in place and ready in order to implement the treaty; and

(d) in addition, the legal effect of provisional application of treaties, while also being mooted to go beyond the commitment under Article 18 of the VCLT, should also be analysed within the context on how the treaty provision is expressed, provided and intended to be applied. If the manifestation of intention is not or less than expressly clear, it is mootable to submit that the provisional application of treaties might even crystallise and create legal effects to the States concerned as well as affecting their commitment beyond Article 18 of the VCLT.

Mr. Chairman,

Hence, Malaysia reiterates its view that it is crucial to discern the provisional application of the treaties from the source of obligations as provided by the treaty provision itself. Otherwise, if recourse to alternative sources should be had, the analysis of legal effect should be guided and determined by the result of an unequivocal indication of consent by the State that it accepts provisional application of treaty. Thus, for a further

comprehensive analysis of the topic, Malaysia would like to suggest that the topic be further elaborated having due regard to State's sensitivities, as well as peculiarities and contextual differences embedded in the treaty provisions, and how State practices so far have responded to such variations.

26. Kazakhstan (Russian only)

27. Indonesia

Moving on to the Provisional Application of Treaties, my delegation would like to express our appreciation to the Special Rapporteur, Mr. Manuel Gomes-Robledo for his report. Even though Indonesia is not a party, we take the view that the 1969 Vienna Convention on the Law of Treaties is certainly the basis on which the Commission should develop a mechanism or a set of guidelines that would provide States with guidance relating to the provisional application of treaties.

We are further of the view that 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 the potential of conflict.

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. However, it is ultimately the sovereign right of States to decide on what is best for them concerning the provisional application of treaties.

28. Republic of Korea

The Korean Government welcomes the second report of Special Rapporteur Mr. Juan Manuel Gomez-Robledo on the provisional application of treaties. My delegation sincerely appreciates his hard work. My delegation would also like to express our gratitude to the members of the ILC who have developed this topic throughout their discussion.

The Korean Government have expressed a deep interest in this topic and made comments in the previous session of the 6th Committee. My delegation would like to present our stance and to make two comments in regard to the Special Rapporteur's second report and the result of the ILC discussions.

Firstly, my delegation agrees with the opinion that the provisional application of treaties would produce certain legal effects. However, we believe that the legal effects of the provisional application of the treaty should be distinguished from those of the entry into

force of the treaty because the nature of provisional application is “provisional” in a strict sense.

If the provisional application of treaties would create certain legal effects, it should be considered whether the articles of the 1969 Vienna Convention on the Law of Treaties which pertains to the entry into force of treaties could apply *mutatis mutandis* to the provisional application of treaties (for example article 46, article 54, article 60 and article 70).

Secondly, The Special Rapporteur took a position in principle that comparative studies of domestic laws are not necessarily needed to this topic ·provisional application of treaties. However, considering that a treaty or a part of treaty can be applied provisionally only on the basis of internal law, we believe that a systematic evaluation on domestic law and the related articles of the Vienna Convention on the Law of Treaties, for example article 46 might be done as a preliminary research.

The Korean Government believes this topic will contribute to the development of the area of the law of treaties. A practical guideline is necessary in order to legislate, interpret, and apply rules of provisional application on the part of State. The Korean Government will cooperate for the further discussion of this topic as well.