Sixth Committee Statements
Report of the International Law Commission
on the work of its 67th session

Provisional application of treaties

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1. France

Pour ce qui concerne le sujet de l'« **Application à titre provisoire des traités »,** ma délégation prend note des trois projets de directive adoptés provisoirement par le Comité de rédaction dans l'attente des commentaires devant les accompagner et présentés à ce stade pour information.

Ma délégation n'est pas persuadée que la Convention de Vienne de 1986 sur le droit des traités entre Etats et organisations internationales ou entre organisations internationales reflète, dans son intégralité, le droit international coutumier.

2. Norway (on behalf of the Nordic countries)

On the topic of provisional application of treaties, the Nordic countries wish to thank the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, for his third report.

The Nordic countries continue to support the efforts of the Commission on this topic, which provides a number of questions of an international law character worthy of consideration. These include the relationship of Article 25 with the other provisions of the Vienna Convention on the Law of Treaties and the provisional application of treaties by international organizations, both of which are central themes in the third report.

The report offers an analysis of the comments on State practice that were provided after the second report was submitted. The Nordic countries have previously mentioned examples of agreements where provisional application has been resorted to. The Rapporteur recognizes that the number of comments on State practice remains insufficient.

We express our continued support for the view of the Rapporteur not to embark on a comparative study of domestic provisions relating to the provisional application of treaties. A significant number of clauses on provisional application provide for provisional application to the extent that it is permitted by the provisions of the domestic legislation of each State.

Whether or not a State resorts to provisional application is essentially a constitutional and policy matter. The report quotes attempts to categorize State practice and to classify States on the basis of whether their internal law allowed for provisional application or not. These quotes illustrate the challenges and underline the need for caution in this respect.

The Nordic countries find it important that the question of provisional application of treaties by international organizations has been addressed in the third 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.

The practice collected by the Rapporteur shows that both States and international organizations frequently resort to provisional application and that both recognize the legal effects of treaties applied provisionally. The Nordic countries emphasize, however, that the topic should not be considered concluded in relation to international organizations, as there are still questions to be reflected upon.

The third report also presents an initial study of the relationship of article 25 with other provisions of the Convention on the Law of Treaties. The Nordic countries note with satisfaction the conclusion of the Commission that legal effects of a provisionally applied treaty are the same as those stemming from a treaty in force and that provisional application is subject to the pacta sunt servanda rule.

As has been stated before, when the Nordic countries agree to apply treaties provisionally, we are of the view that they produce the same legal effects as if they were formally in force. The issue of international responsibility of a breach of a treaty which is applied provisionally may require some further study.

The Nordic countries welcome the six preliminary proposals for guidelines on provisional application of treaties presented by the Rapporteur and the interim report of the drafting Committee to the Commission on the progress made with this respect. Keeping in mind Article 27 of the Vienna Convention on the Law of Treaties, we support the suppression of the reference to internal law in the draft general rule (Draft guideline 3).

The Rapporteur has also called for comments in order to identify the way forward. Some further study on the relationship with other provisions of the Vienna Convention, for instance articles 19, 46 and 60, seems justified.

The Nordic countries support the intention of the Rapporteur and the Commission to continue to formulate draft guidelines. We note that the Commission has discussed the option to adopt draft conclusions as opposed to draft guidelines on this topic. We tend to think that draft guidelines have potential to serve as a practical tool for States and international organizations.

We have earlier suggested that it might be useful if the Commission could develop model clauses on provisional application in its future work. 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.

Model clauses may make it easier to resort to provisional application in such cases. We recognize however that this could be challenging due to the differences between national legal systems, as the Rapporteur has pointed out.

We support die efforts of the Rapporteur and the Commission to gather and analyze State practice. As a part of this work, it would be important to examine the practice of multilateral treaty depositaries, as it seems that there are variations.

In concluding, we look forward to the further work by the Commission on this topic.

3. European Union

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 align themselves with this statement.

1. The European Union has the honor to address the 6th Committee on the topic of provisional application of treaties, considered by the International Law Commission (ILC).
2. We welcome the progress made by the Special Rapporteur Mr. Juan Manuel Gomes- Robledo and the ILC in the consideration of this important topic. We also note that some of the draft guidelines have already been submitted to the Drafting Committee, but it is our understanding that the three draft guidelines are at this stage presented only for information as they have not yet been formally adopted by the ILC.
3. As already indicated in our previous statements, the European Union makes regular use of the possibility of provisional application of treaties in various fields of law and the topic is of particular interest for the Union. Some part of the EU practice, more specifically relating to multilateral agreements, is well reflected in the Annex to the Third Report and, as it could be noted, in almost half of the fifty agreements identified by the Secretariat the European Union is a contracting party.
4. The European Union would like to point out that, in addition to multilateral agreements, it uses provisional application also in its bilateral relations with third States, including in the case of Association Agreements and Partnership and Cooperation Agreements that the Union concluded with other countries. These kinds of agreements establish broad frameworks for cooperation and integration. These agreements can be very complex and wide-ranging agreements and their entry into force entails a long process of ratification. Provisional application offers a useful way to bring the practical application of such agreements to an early start.
5. Recent examples include for instance the association agreements that the European Union has signed in 2014 with Ukraine, Georgia and the Republic of Moldova As reflected in these agreements the provisional application covers not only provisions relating to trade, but also provisions relating to political dialogue, as well as institutional provisions. The Association agreement between the EU and

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

its Member States and Ukraine is also an example of an agreement that provides explicitly for certain legal effects of provisional application as its Article 486 (5) states that *'For the purpose of the relevant provisions of this Agreement, including its respective Annexes and Protocols, any reference in such provisions to the "date of entry into force of this Agreement" shall be understood to the "date from which this Agreement is provisionally applied" in accordance with paragraph 3 of this Article'.* Furthermore, this agreement requires a six-month prior notification for both the termination of the Agreement and the termination of provisional application (see Articles 486(7) and 481(2) thereof).

6. The above examples demonstrate, on the one hand, that with respect to provisional application of treaties the Union acts in the same way as the other actors concerned. On the other hand, it shows that the European Union is an actor who is, in fact, actively contributing to shaping the practice in the field of provisional application of treaties. It should be noted, however, that when recourse is had to provisional application of a treaty where the Union and its Member States together are party to the agreement (the so called "mixed agreements", as in the case of the agreements mentioned in point 5 above), the provisional application may concern only matters falling within the competences of the Union and, from international law point of view, the agreement is applied provisionally only between the Union and the respective third State. In such cases, the Member States of the Union are bound to apply provisionally the agreement not as a matter of international law, but as a matter of EU law, in accordance with Article 216 (2) of the Treaty on the Functioning of the European Union.

7. The European Union is also pleased to see that in his third report of the Special Rapporteur has begun his initial analysis of the relationship of provisional application to other provisions of the Vienna Convention on the Law of Treaties and envisages expanding and deepening the consideration of that aspect in his future work. The Union has already highlighted in its previous interventions the practical relevance of such analysis and efforts of the Special Rapporteur and the ILC to that effect should be encouraged.

8. Based on its own rich experience with provisional application of treaties, the EU looks forward to continue the dialogue with the ILC, especially as its work on the guidelines advances further.

4. Singapore

On the topic of "Provisional application of treaties", we note the summary and examination in the Special Rapporteur's third report on the topic of the relationship of provisional application to the other provisions of the Vienna Convention on the Law of Treaties, and of provisional application of treaties by international organisations.

My delegation agrees with the general thrust of the Commission's discussions, that we would benefit from further substantiation regarding the conclusion that the legal effects of provisional application were the same as those after entry into force of the

treaty. As we have previously stated, we recognise that the provisional application of a treaty is capable of giving rise to legal obligations as if the treaty were itself in force. But questions remain: Would this be the case all the time? What factors would have to subsist?

We share the view that it would be useful to study whether the various "processes" for treaties that have been provisionally applied and for treaties that have entered into force would be the same. In this regard, we support the Special Rapporteur's intention to consider in his next report processes such as termination and suspension, reservations, and provisions of internal law regarding the competence to conclude treaties. We also continue to be interested in the Commission's study of whether or not provisional application could result in the modification of the content of the treaty. In undertaking the consideration of these questions, we support the Commission's desire to deal with the position of States first and to return to the question of international organisations at a later stage.

5. Greece

I wish to reiterate Greece's support to the work of the Commission on this topic which touches upon some very sensitive questions of both doctrinal and practical interest. Greece welcomes the third report of the Special Rapporteur on the provisional application of treaties, focusing on the relationship of provisional application to other provisions of the 1969 Vienna Convention on the Law of Treaties and on provisional application with regard to the practice of international organisations, as well as the preliminary proposals for guidelines presented therein.

Given that the Drafting Committee has not been able to conclude its consideration of the six draft guidelines proposed by the Special Rapporteur and has only presented an interim report on the progress made thus far, including, solely for information purposes, a first set of three draft guidelines, the comments provided herein by my Delegation are of a preliminary nature.

We note with appreciation the presentation by the Drafting Committee of the two introductory draft guidelines dealing respectively with the scope and the purpose of the draft guidelines on provisional application, as well as the reaffirmation in draft guideline 3 of the general rule, based upon the language of Article 25 of the 1969 Vienna Convention which should, in our view, be the point of departure for the consideration by the Commission of this important topic.

Regarding in particular draft guideline 1, it would be advisable to reconsider, at a later stage, the possibility of adding the qualifying phrase "by States and international organisations", in order to avoid stating the obvious and to emphasize that the scope is broad enough to take account of the significant amount of practice

developed by international organisations in relation to the provisional application of treaties.

As to draft guideline 2, we are of the view that it accurately reflects the purpose of the draft guidelines, which is to provide guidance to States on provisional application of treaties, without however seeking to encourage resort thereto. We could also accept the reference to other rules of international law, in addition to Article 25 of the 1969 Vienna Convention, provided that it is clearly indicated in the commentary which rules are meant herewith.

Moreover, with regard to draft guideline 3, and given that the decision of the Drafting Committee not to specify which States may provisionally apply a treaty marks a departure from the language used in Article 25 of the 1969 Vienna Convention, we would welcome a more thorough analysis of the cases in which States other than the negotiating States have provisionally applied a treaty.

Turning now to the key issue of the legal effects of provisional application, and given the silence of the 1969 Vienna Convention in this respect, we are of the view that the assessment that the legal effects of a provisionally applied treaty are the same as those stemming from a treaty in force should be further substantiated, taking into account various considerations. Thus, on the one hand, it would be undesirable to allow States to hide behind the fact that the treaty was being provisionally applied by denying the obligations resulting from the provisional application. On the other hand, one should not ignore that the provisional application allows for a simplified means of termination according to article 25, paragraph 2, of the 1969 Vienna Convention and that it is a way to circumvent national constitutional requirements regarding the expression of the consent to be bound by a treaty, which may give rise to serious concerns, especially in situations where the provisional application continues for a prolonged period of time.

Regarding the future work of the Commission, Greece shares the view that the Special Rapporteur should focus on the legal regime and the modalities for termination and suspension of the provisional application, including on the relevance in this respect of Article 60 of the 1969 Vienna Convention dealing with termination or suspension of the operation of a treaty as a consequence of its breach. In the view of this delegation, another question which deserves to be further explored is that of the limitation clauses used to modulate the obligations assumed in order to comply with internal law, given that compliance with this body of law could be an essential element of the State's consent to the agreement on provisional application.

In conclusion, Greece acknowledges the merit of a concise set of draft guidelines on provisional application of treaties for the purpose of providing states and international organizations with a practical tool and looks forward to the future work of the Commission on this topic Finally, Greece expresses its openness and

readiness to discuss the possibility of drafting model clauses which could further assist States in the process of the negotiation and conclusion of treaties.

6. Cuba

Con relación al capítulo XI Aplicación provisional de los Tratados, Cuba agradece el trabajo de su relator especial, Juan Manuel Gómez Robledo.

Cuba desea expresar, que la decisión de aplicar provisionalmente un tratado se fundamenta jurídicamente en la observancia estricta y la aplicación de los artículos 24 y 25 de la Convención de Viena sobre Derecho de Tratados; y en la aplicación del principio de autonomía de las Partes, en tanto que son estas las que por acuerdo fijan en un tratado el alcance de las obligaciones que asumirán, su aplicación en el tiempo y terminación.

Cuba también considera que lo regulado en el artículo 26 de la Convención de Derecho de Tratados en materia de observancia de los tratados es aplicable a la figura jurídica de la aplicación provisional, en el sentido de que las obligaciones derivadas del régimen de la aplicación provisional deberán estar regidas por el principio Pacta Sunt Servanda, en tanto que constituyen un compromiso de las Partes de cumplir las obligaciones de buena fe.

En la práctica cubana no se abusa de la utilización de la cláusula de la aplicación provisional y solo se aplica para los casos en que por interés de las Partes se acuerda la ejecuci6n inmediata.

Para Cuba la aplicación provisional, no suple la entrada en vigor de los tratados, sin embargo la aplicación provisional constituye un importante elemento que la Convención de Viena aporto al derecho internacional y que hoy dadas las circunstancias en que se celebran algunos tratados requieren una aplicacion inmediata.

En Cuba se asegura que la mayoría de los tratados que tengan la cláusula de aplicación provisional conlleven a la entrada en vigor y aplicación definitiva del tratado Muestra de esa práctica lo constituye la suscripción por el Gobierno de Cuba de acuerdos bilaterales que incluyen la cláusula de la aplicación provisional y que se encuentran en vigor o está cursando el proceso de cumplimiento de los trámites legales internos para su entrada en vigor.

Por otra parte, Cuba reitera su posición de que en materia de interpretación de los tratados deberá observarse con prudencia la interpretación de los actos soberanos de los Estados en la firma de los acuerdos internacionales y en su entrada en vigor. Son las Partes, a trav6s de la manifestación de su consentimiento y acuerdo entre ellas, quienes asumen -únicamente para ellas- determinados derechos y obligaciones, asociadas a contextos socio-políticos y económicos complejos, para

obtener un fin concreto.

7. Belarus (No statement provided)

8. United Kingdom

Turning to the topic of **Provisional application of treaties,** the United Kingdom welcomes the third 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 notes that a number of other States have done so since last year. The United Kingdom considers an analysis of State practice is an important contribution to the consideration of this issue

We support the preparation of guidelines, rather than draft articles or model clauses. In our view, guidelines, with commentaries, can assist decision-makers at various stages of the treaty process, taking into account State practice, whilst avoiding the unnecessary prescription of model clauses or agreed principles. Flexibility in this area is important.

We found the summary of the relationship of provisional application to other provisions of the Vienna Convention on the Law of Treaties valuable and look forward to further work in this regard.

We agree that the issue of legal effects of provisional application is the key provision of the draft guidelines. It also has implications for the consideration of the consequences of breach of obligations deriving from provisional application. We note that this issue was discussed in the Commission this year Draft guideline (4) merits further consideration and, in particular, we would encourage elaboration of the meaning of "legal effects".

In relation to the Special Rapporteur's draft guideline (1), we welcome the deletion of the expression "provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application" from the text of draft guideline 3 provisionally adopted by the Drafting Committee It is important to conform to Article 46 of the Vienna Convention on the Law of Treaties and to avoid any suggestion that the terms of internal law could be relied upon to avoid an international obligation.

9. The Netherlands

Turning to the topic of Provisional application of treaties, we express our appreciation to the Special Rapporteur, Juan Manuel Gomez-Robledo for his third report and also thank the Secretariat for its memorandum, providing useful background information.

The Special Rapporteur has provided us with an initial analysis of the relationship between the provisional application of treaties and other provisions of the 1969 Vienna Convention, which we believe is useful for the purpose of clarification and delimitation.

We agree that the conceptual distinction must be maintained between the means of expressing consent to the bound to a treaty, aimed at becoming a Party to the treaty once it enters into force for the State concerned, and provisional application of a treaty which obliges a State having consented to it to give effect to treaty provisions for as long as it has not entered into force for that particular State, or for as long as that State has not indicated its wish of not becoming a Party to the treaty. The conceptual distinction is also relevant for other purposes, particularly in respect of termination.

We would also agree that provisional application of a treaty must be distinguished from the obligation not to defeat the object and purpose of the treaty. Although both relate to the phase prior to the entry into force of a treaty for a particular State, they differ in their objectives: whereas provisional application of a treaty aims at the execution of (parts of) the treaty "as though the treaty were in force", the obligation not to defeat its object and purpose is aimed at ensuring the proper execution of the treaty from the moment it enters into force.

Regarding the relationship between provisional application of a treaty and its entry into force, my government would question whether the notion, that the provisional application of a treaty presumes that the treaty is not in force, is accurate. A treaty may very well have entered into force as such, for instance due to having obtained the required number of ratifications, while its entry into force may still be pending for a particular State which may then decide to apply it provisionally. Draft guideline 5 should be adjusted accordingly.

The position of the Netherlands with respect to the relevant provision in the VCLT has been that there can be no doubt that provisional application of a treaty has legal effects and, consequently, that any ensuing obligations must be observed. Contrary to what is suggested in para. 59 of the report and draft guideline 5, we would like to emphasise that any obligations incurred as a result of the provisional application of a treaty and, hence, the application of *pacta sunt servanda,* may not end with the termination of provisional application of a treaty. In situations where withdrawal of provisional application by a State would adversely affect third parties acting in good faith, obligations emanating from the provisional application of a treaty may well outlive its formal ending. This may require a transitional regime with respect to, or even the continuation of, obligations arising from the period of provisional application with respect to third parties acting in good faith.

In his third report the Special Rapporteur also dealt in some depth with different aspects of provisional application with regard to international organisations. We

thank the Special Rapporteur for the many examples of provisional application involving international organisations, demonstrating the frequency of provisional application with respect to treaties establishing international organisations or some type of international mechanism or "regime". These examples confirm that State practice on the interpretation and application of provisional application under article 25 of the 1969 Vienna Convention has been characterised by flexibility. In view of this flexibility, the formulation of draft guideline 2 describing the different forms of "agreement" regarding provisional application may take, may be too limited. States enjoy, and apply, considerable freedom and flexibility resulting in a pragmatic approach of reaching agreement on provisional application, including on the basis of a resolution by an international organisation. Such resolutions, however, cannot be equated to an agreement establishing provisional application.

Finally, we would like to note that the reference to the internal law of States or the rules of international organisations in draft guideline 1 would not seem appropriate. In our view, the topic of provisional application should be approached as an instrument under international law, well-established in the practice and international organisations.

10. Slovenia

Let me now address Chapter XI: Provisional application of treaties. First, we note with pleasure the Special Rapporteur's proposal in his third report and the support by some Commission members to consider in his further reports the provisional application in relation to the succession of states in relation to treaties, which Slovenia proposed at the last two sessions of this Committee. We continue to believe that it is important for the Commission to analyse provisional application comprehensively in order to make this exercise as useful as possible for states in their treaty relations.

With respect to the substance of the Commission's consideration of this topic, we agree with the Special Rapporteur on the need to analyse further the relationship between Article 25 VCLT and its other provisions. In this respect, it might be useful to consider the applicability of the VCLT regime for unilateral termination, i.e. denunciation, to the termination of provisional application, including reasons for denunciation and its consequences. With regard to the termination of provisional application, Article 18 would, in our view, require further analysis to the extent that it relates to the same period before the entry into force of a treaty, but differentiates between two manners of termination, depending on whether consent to be bound has been expressed or not. This and other comparisons with other relevant VCLT provisions could also clarify the interpretation of Article 25, as well as providing guidance as to whether and to what extent Article 25 is ***lex specialis*** in relation to them.

In conclusion, Slovenia welcomes the inclusion of draft guidelines in the present report, but reserves substantive comments for when they are at a more advanced stage of consideration by the Commission. In this regard, we believe it would be useful for the purpose of commenting before this Committee if the Commission added its comments to each guideline, making it possible to understand and comment on the underlying reasoning for them.

11. Czech Republic

On the basis of the Third report of the Special Rapporteur Mr. Juan Manuel Gomez-Robledo, the Commission continued its consideration of the topic ***"Provisional application* of treaties".** It referred to the Drafting Committee six draft guidelines proposed by the Special rapporteur. We also note that the Commission had before it a memorandum prepared by the Secretariat, on provisional application of treaties between States and International Organizations or between International Organizations. We will reserve our comments on individual guidelines after they are adopted by the Commission together with commentaries.

Three reports of the Special Rapporteur submitted so far touched upon a large spectrum of problems related to provisional application. For a successful consideration of the topic it is therefore important that the exercise remains focused on those aspects of provisional application, which are common for most of treaties. *Specific issues which are proper to some categories of treaties or treaty provisions, such as for example those concerning the establishment of international organizations should be left aside at this stage.*

The Commission should also remain focused on international dimension of provisional application. *While it is true that limitations resulting from their internal law will always be in mind of States when negotiating a treaty which could eventually be applied provisionally, it is primarily their responsibility to either satisfy their domestic law requirements in this respect prior to agreeing to provisional application, or not to consent to provisional application or, as the case may be, to take steps necessary to prevent being considered as a state which implicitly gave its consent to its participation in provisional application of the treaty.* Giving any relevance, on international level, to provisions of domestic law concerning provisional application of treaties would be a significant departure from the regime of the Vienna Convention on the law of treaties.

As with some other topics currently under Commissions consideration, clarification of many issues relating to provisional application will be a matter of interpretation of the treaty in question, in accordance with article 31 of the Vienna Convention. *This interpretation will clarify not only whether provisional application should encompass the treaty as a whole or only certain treaty provisions, when the provisional application starts or when and how it ends, but also a question whether, in the absence of an explicit provision envisaging provisional application, an implicit agreement concerning provisional application can be ascertained taking into account treaty provisions in their*

entirety as well as relevant circumstances concerning the negotiations of the treaty.

Whether formulated as guidelines or conclusions, Commission's findings in this respect will have to be of limited relevance for the process of such interpretation which is owned by the States participating in the treaty.

Commission, however, can usefully contribute to the clarification of several elements of the concept of provisional application. *Some of them may be common to bilateral and multilateral treaties; others may arise only in connection with provisional application of multilateral treaties,*

Provisional application of a treaty or some of its provisions is above all an "application" of the treaty. The nature of rights and obligations envisaged by the treaty is not altered by their implementation/realization as part of provisional application. The obligations in question are real legal obligations, even if the basis for their implementation is "provisional". They acquire their binding character at the latest in the moment when the provisional application is supposed to start. As a consequence, the breach of a treaty obligation in course of provisional application is subject to rules governing international responsibility. In this respect we endorse the view of the Special Rapporteur as reflected in his draft guideline 6.

As the provisional application of a treaty as such is not just an option available for unilateral choice of States or a courtesy that the States simply reciprocate, but a firm legal commitment within the realm of principle *"pacta sunt servanda"* unilateral termination of provisional application, in violation of conditions for such termination, amounts to a breach of an international obligation which also entails international responsibility. What are these conditions is again the matter of interpretation of the treaty in question.

Another important aspect which would deserve clarification concerns the circle of States between which the obligations arising from provisional application apply. Undoubtedly they apply in relation between States which agreed to provisional application. In the case of a multilateral treaty which, during the period of its provisional application entered for some of these States in force, the treaty provisionally applicable between remaining States will apply also in their relations with those States which became treaty-parties. *This should also be the case of international organizations, if the treaty is open to participation of both the States and international organizations.*

Concerning the relationship between article 25 on provisional application of treaties and other articles of the Vienna Convention, we are of the view that the Commission should limit its attention to situations for which there exist sufficient international practice. In the absence of practice revealing problems in the application of respective articles of the Convention, there is no need for abstract discussions.

12. 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 third 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. Therefore, the Romanian Delegation wishes to make the following remarks concerning the draft report on the provisional application of treaties:

Romania welcomes the work 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, as varied as it may be, 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 calls upon the Special Rapporteur to further investigate the issue of which States may agree on the provisional application of treaties (only negotiating States or other States as well) and whether such agreements, tacit or implicit, may be legally binding. On this particular point, Romania believes that deeper examination is needed on the question of whether the provisional application extends to the whole treaty or only to select provisions and if the legal effects of such application could continue after its termination.

Romania considers that further examination should consider the issue of provisional application, under various aspects, including that of the legal consequences of such application The Report should address the question of whether the provisional application of a treaty has the exact same effects as its entry into force In this respect, it would be helpful to see whether the termination and suspension processes for both regimes are identical.

On the point concerning the termination of provisional application, Romania encourages the International Law Commission to provide more guidance as to the possibility of unilateral termination or suspension to give rise to state responsibility under customary international law.

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, and its relationship with articles 19 and 46 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.

As far as the future work is concerned, Romania subscribes to the proposal to further look into the question of the provisional application of treaties by international organizations, especially the question whether such arrangements are considered as a useful mechanism. Under this header, Romania supports giving a closer look to the issue of the *so called* headquarters agreements which, by their very nature, need to be implemented immediately and therefore are provided for provisional application. Additionally, other forms of agreements- such as an exchange of letters or diplomatic notes - represent 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.

13. Australia

Australia welcomes the Commission's work m relation to the provisional application of treaties. This is a topic of considerable practical importance to States.

Australia would like to thank the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, for his work on this topic, and to thank the Drafting Committee for its constructive engagement with the Special Rapporteur's proposals.

At the heart of this topic lies the distinction, at international law, between a treaty that is applied provisionally and one that is in force for a particular State.

Australia believes that it is important that further consideration be given by the Commission of the extent to which the legal effects of provisional application may differ, in substance as well as in form, from those of a treaty that is in force.

In this respect, and as noted at paragraph 264 of the Commission's report, it would be helpful to identify the types of treaties, and provisions of treaties, that are often the subject of provisional application and the motivations behind such application.

Mr Chair

Australia welcomes the Special Rapporteur's consideration of the intersection between article 25 of the Vienna Convention on the Law of Treaties and other relevant provisions of that Convention. It is important that these provisions be read alongside one another. For example, article 27 makes clear that a party may not invoke its internal law to justify non-performance of a treaty obligation. This gives

context to the interpretation of article 25.

Australia supports the Commission's decision to remove the reference to internal laws from the initial version of Draft Guideline 1, to avoid creating the impression that States could turn to their internal laws to escape an obligation to provisionally apply a treaty.

For similar reasons, in Australia's view, the Commission's primary focus should not be on States' internal laws, but rather on States' obligations on the international plane.

A State's domestic legal arrangements may give context to its practice, for example, by explaining why it is that a State does not proceed expeditiously from signature to ratification. However, the often complex distinctions between different domestic legal systems should not distract from the central enquiry into States' international legal obligations.

Finally - and particularly, but not only, in relation to bilateral treaties - the procedural aspects and substantive consequences of a provisional application can be shaped by agreement of the parties to the treaty being provisionally applied.

The Commission should ensure that this discretion in the parties is not unduly constrained by the Guidelines it produces. To a degree this consideration is already contained in the reference in the Drafting Committee's Draft Guideline 3 to a treaty being provisionally applied 'in some other manner [as] it has been so agreed'.

14. Austria

The Austrian delegation wishes to congratulate Special Rapporteur Juan Manuel Gomez- Robledo for his work on the topic **"Provisional application of treaties",** which includes six draft guidelines attached to the Report of the Commission.

As to the form of the document to be elaborated we concur with the suggestion to produce draft guidelines which can be used by treaty-makers contemplating provisional application. The Austrian delegation takes note of the debate within the Commission with regard to the relevance of internal law. While we agree with the Special Rapporteur that it is not necessary to study in detail and on a broad comparative basis the different national constitutional provisions that address the possibility of provisionally applying treaties, we are of the firm view that the possibility of such provisional application always depends on the provisions of internal law.

With regard to draft guideline 1 as proposed by the Special Rapporteur, we

would suggest that the Drafting Committee consider the following: The current formulation of this draft guideline appears like a presumption in favour of provisional applicability. In our view it should be reformulated in terms insisting that the possibility of provisional application depends on the provisions of internal law. This does not mean that a state could avoid its obligations once it has committed itself internationally to the provisional application of a treaty. However, whether or not such a commitment can be made is determined by its internal law.

The Austrian delegation supports the Special Rapporteur's approach in his draft guideline 5 to limit the instances of termination of the provisional application of treaties to those provided for in the Vienna Convention on the Law of Treaties and to abstain from introducing the vague additional grounds of a 'prolonged period' of provisional application and the "uncertainty of the entry-into-force" of the treaty.

With respect to the three draft guidelines provisionally adopted by the Drafting Committee, which seem to contain only general introductory language, my delegation understands draft guideline 1 as encompassing also the provisional application of treaties by international organizations and expects that this will be clarified in the commentary.

As to draft guideline 2 it must be made clear that the reference to "other rules of international law" does not detract from the purpose of these guidelines, which is to supplement the rules of the Vienna Convention and not to suggest changes to them.

As to draft guideline 3 my delegation thinks that some questions might arise with regard to the words "or if in some other manner it has been so agreed" This wording goes beyond Article 25 paragraph 1 subparagraph b of the Vienna Convention on the Law of Treaties, which only refers to the agreement of the negotiating states on provisional application. Thus, the provisional application by states which were not negotiating states is only possible if the treaty so provides or all the other negotiating states so agree. Similarly, if only some of the negotiating states agree on the provisional application, this provisional application must be qualified as an agreement that is separate from the original treaty.

15. Portugal

I will now turn to the topic **"Provisional Application of Treaties"** included in the programme of work of the ILC in 2012 and Portugal commends the Special Rapporteur, Ambassador Gomez-Robledo, for the work conducted so far.

It is a topic that Portugal continues to follow with great interest, of important

practical value for legal advisors around the world and also one of considerable political interest, given the importance of the Law of Treaties and all its aspects for International Law and International Relations, and the increasing need for rapid responses to certain events or situations that are not fully compatible with the sometimes slow process of entry into force of international treaties.

The work of the ILC on this issue, however, should not go beyond Article 25 of the Vienna Convention on the Law of Treaties of 1969, specially having in mind that many States have domestic restrictions or requirements - some at constitutional level - concerning the acceptance of provisional application of treaties, though it is recognized, as mentioned above, that in certain instances this could be a useful tool.

Mr. Chairman,

Portugal would like to make a few remarks concerning some of the Draft Guidelines presented by the Special Rapporteur on his third report, as well as on the scope of the topic and final form of the work of the Commission.

Concerning Draft Guidelines 1 and 2, since we believe that one of the objectives of the ILC on this topic should be to clarify Article 25 of the Vienna Convention, it would be of particular interest to develop the meaning of the sentence "or when they have in some other manner so agreed". Draft Guideline 2 is helpful in this regard, but again it could be more explicit what should be meant by "any other arrangement between the States or international organizations". At the same time, the sentence "internal law of the States or the rules of the international organizations do not prohibit such provisional application", could be formulated in another manner, since this does not seem to reflect correctly the domestic provisions and practice of States with regard to provisional application and the Vienna Convention itself is silent in this respect, as it was also noted in the discussion in the ILC.

Turning to Draft Guideline 4, we share the view of the Members of the Commission that considered that the legal effects resulting from provisional application should be specified, namely that the provisional application does give rise to legal obligations, as if the treaty was in force for the signatories applying it.

Mr. Chairman,

Turning now to the scope of the work to be undertaken under this topic, we would like to offer two remarks. The first one concerns a possible comparative study of domestic provisions and practice on provisional application. In spite of the fact that we understand the complexities of this endeavor, as we have had the chance to say already before this body, the practice of State is extremely relevant and there are important differences in domestic law from State to State regarding the

possibility of accepting the provisional application of treaties. A broad approach to be taken by the Commission in order to respect the diversity of solutions that exist at the national level presupposes some level of knowledge of such solutions. Thus, it would be certainly useful that States themselves contribute with examples of their practice and domestic regime and that the ILC conducts a comparative study of relevant domestic law. It would be likewise useful to include in the study the practice of regional international organizations, as suggested by the Special Rapporteur. The European Union, for instance, has an extensive practice of provisional application, taking into account the different national regimes of its Member States, and thus constitutes a helpful example on how to reconcile the recognized interest of a rapid application of an international agreement, with the need to respect the domestic requirements of the involved States.

Mr. Chairman,

Our last remark goes to the final form of the work of the ILC on this topic. Portugal has taken already the view that the aim should be to clarify the legal regime of provisional application contained in the Vienna Conventions on the Law of Treaties. Thus, the objective should remain the development of a set of draft guidelines, possibly with model clauses.

16. Croatia

Finally, as regards the topic "Provisional application of treaties" let me stress that Croatia fully shares the Commission's understanding according to which the rights and obligations of a State which has decided to provisionally apply a treaty are the same as if the treaty was in force (legal effects of provisional application of treaties) and that a breach of the obligations assumed under the provisional application of a treaty is an internationally wrongful act which gives rise to the international responsibility of the State.

Croatia appreciates the initial series of the draft guidelines on the provisional application of treaties presented by the Special Rapporteur, including thorough analysis of the relationship between provisional application and other provisions of the 1969 Vienna Convention, and is very much looking forward to his intention to continue formulating supplementing drafting guidelines. In that context, there are a number of principles and rules pertinent to provisional application which, in our view, should, in one way or another, find their rightful place and precise articulation in the draft guidelines. Here we primarily think of the fact that legal effects of the provisionally applied treaties are enforceable and cannot subsequently be called into question in view of the "provisional" nature of the treaty's application. Equally so, legal effects of provisional application encompass not only the obligation to refrain from defeating the object and purpose of the treaty similar to obligations expected of a State that signs an international agreement, but also very important obligations arising from the rule *pacta sunt*

servanda and the obligation to fulfil the treaty in the good faith. All these principles and rules would generally come under (or would be derivable from) guideline 4, which, in our opinion, should be further developed or serve as an basis for development of additional principles.

Furthermore, Mr. Chairman, and as regards concrete Draft guidelines, Croatia believes that the reference to „such as a resolution adopted by international conference" in last part of the Draft guideline 2, should be taken with caution. Namely, in our view, the adoption of a resolution by an international conference does not necessarily constitute an agreement among States which participated in the conference which adopted the resolution on the provisional application of a treaty concerned. Such a resolution, at best, (only) in general terms allows for the possibility of the provisional application of a treaty, subject to some kind of later consent of each State concerned. In other words, the "(flexible) agreement" on provisional application is finally reached only if and when individual State make use of this opportunity and decides on provisional application of a treaty according to the possibility provided for such action in relevant resolution. Accordingly, and for the sake of clarity, we would therefore propose to omit the reference to "resolutions" in the Draft guideline 2.

As regards the draft guideline 5, Croatia would favor formulation of this draft guideline in line with paragraph 57 and 59 of the Special Rapporteur Third report. At the same time, in our view, it would be helpful also to address a possibility of termination of provisional application because of a material breach or simply because of its non- application by other State/States concerned.

Mr. Chairman, distinguished colleagues, let me further inform you that Croatia's legislation generally allows provisional application and our domestic law - the Law on Conclusion and Implementation of Treaties of 1996 - contains specific provision regulating provisional application of treaties. According to its Article 10, the consent for provisional application may be grated on behalf of the Republic of Croatia only upon approval of the President (this provision is not any more applicable after constitutional changes abandoning the presidential system) or the Government. The approval is in principle given within the governmental decision on initiating the process of conclusion (i.e. signing) of the treaty. At the same time, para 2 of the same Article, paraphrasing almost explicitly para 2 of Article 25 of the Vienna Convention on the Law of Treaties, stipulates that "if not otherwise provided by the treaty or if negotiating parties did not agree otherwise, provisional application terminates if the Republic of Croatia decides not to become a party to the treaty concerned and notifies such intention to other international subjects amongst which the treaty concerned provisionally applies".

Finally, Mr. Chairman, distinguished colleagues, let me inform you that Croatia since 1991 agreed to provisional application of 76 treaties, including a number of treaties of particular relevance.

17. El Salvador

Nos referimos a continuación al tema de la "Aplicación Provisional de los Tratados" en el cual se examinó el tercer informe del Relator Especial, Sr. Juan Manuel Gómez Robledo, a quien expresamos nuestros agradecimientos por la valiosa labor realizada.

Asimismo, reconocemos la importancia del memorando realizado por la Secretaría respecto a la aplicación provisional de los tratados, en el cual se detalla la historia de las negociaciones sobre el artículo 25 de la Convención de Viena sobre el Derecho de los Tratados, que sirve de fundamento al análisis del tema.

Respecto a los recientes avances realizados por la Comisión, es de gran utilidad el **proyecto de directriz 1** que refleja el carácter voluntario de la aplicación provisional para los Estados y organizaciones internacionales y, que establece la posibilidad de evaluar la aplicación de dicha figura en atención a lo establecido en el derecho interno.

Por otra parte, es acertado el **proyecto de directriz 4**, en tanto se afirma que la aplicación provisional de un tratado tiene efectos jurídicos; sin embargo, sobre este aspecto consideramos que no debería mantenerse un mero enunciado general, sino que aún es necesario profundizar sobre el tipo de obligaciones y efectos concretos que se pueden generar al optar por la aplicación provisional.

Señor presidente,

Deseamos finalizar nuestra intervención expresando nuestro apoyo a la propuesta del Relator Especial de distinguir entre la regulación de la aplicación provisional de un tratado en el ámbito interno estatal, de aquella que existe el ámbito internacional. En tal sentido, le instamos a continuar profundizando sobre este aspecto tomando como fundamento la practica internacional y, sugerimos que se siga un plan de trabajo que permita profundizar de manera individual en cada uno de los elementos vinculados al funcionamiento de esta figura.

18. Chile

Me referiré ahora al tema de la **"Aplicación provisional de los Tratados"** desarrollado en el capítulo XI del Informe.

La Comisión ha recibido el Tercer Informe del Relator Especial, Sr. Juan Manuel Gómez Robledo, en el que se examina la aplicación provisional de los tratados con otras disposiciones de la Convención de Viena sobre el

Derecho de los Tratados, y la cuestión de la aplicación provisional en relación con organizaciones internacionales. La Comisión además recibió un Memorando, preparado por la Secretaría, sobre la aplicación provisional con arreglo a la Convención de Viena sobre el Derecho de los Tratados celebrados entre Estados y Organizaciones Internacionales o entre Organizaciones Internacionales, de 1986. La Comisión remitió al Comité de Redacción, seis proyectos de directrices propuestos por el Relator Especial.

Sin perjuicio de felicitar al Relator Especial por su trabajo, consideramos importante hacer una mención en esta materia, a los aspectos de derecho interno que podrían, en la práctica, constituir límites a la aplicación provisional de ciertas disposiciones de los tratados en los casos en los que éstas requieran, de acuerdo a esos ordenamientos internos, la aprobación previa de los respectivos Poderes Legislativos.

La Convención de Viena sobre el Derecho de los Tratados, señala en su numeral 1 del artículo 25 que un tratado se aplicara provisionalmente antes de entrar en vigor, solo si el propio tratado así lo dispone o si los Estados negociadores han convenido en ello. Se desprende de este texto jurídico, que no es sino por consentimiento de las partes, y no de otro modo, que un tratado podrá aplicarse provisionalmente.

Este tema es de importancia ya que la aplicación provisional de un tratado genera efectos jurídicos y crea derechos y obligaciones. Y, por ende, el incumplimiento del tratado sujeto a aplicación provisional puede ser fuente de responsabilidad del Estado incumplidor. Es por esto que nos parece trascendental que la voluntad de los Estados de querer obligarse a aplicar provisionalmente un tratado, o de rehusar hacerlo, se exprese claramente.

Concordamos en que cada Estado es libre y soberano de obligarse o no a aplicar provisionalmente un tratado, y que este es el límite que debe establecerse en esta materia. Sin voluntad expresa de obligarse provisionalmente por parte del Estado, no debe haber tal aplicación provisional, sino esperarse su entrada en vigor.

19. Iran (Islamic Republic of)

On the topic "Provisional Application of Treaties", my delegation would like to express its appreciation to the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo for the third report on this topic.

The Islamic Republic of Iran supports the role of the provisional application of treaties in acceleration of the acceptance of international law. In this context, we do share the Special Rapporteur's viewpoint that the primary beneficiary of provisional application is the treaty itself, since it is allowed to be applied without

being in force, but the more important beneficiaries are the negotiating States who could partake in the provisional application and benefit from the rights stipulated in the treaty. My delegation believes that in a case when a treaty already entered in to force, a State may decide to apply such treaty provisionally.

However, the work of the Commission is fraught with difficulties and this is due to the fact that only a limited number of States have regulated provisional application of treaties in their domestic laws or constitutions. It worth noting here that there is no provision concerning the provisional application of treaties in the Constitution of the Islamic Republic of Iran.

We also believe that the concept of provisional application of treaties is limited to multilateral instruments and cannot be applied in bilateral treaties.

We are of the view that any work on the topic must be according to this general principle of international law that provisional application of treaties is merely determined by the decision of the State concerned. The will of the States parties to a treaty plays a pivotal role in provisional application as provided by Article 25 of the 1969 Vienna Convention on the Law of the Treaties. In other words, the obligation of a State to provisionally apply treaty provisions is derived from an explicit clause, contained in the treaty or a separate instrument or otherwise agreed by the negotiating States.

The modalities used to express consent by States to be bound by a treaty are linked solely to its entry into force, while the provisional application is aimed to effectuate during the period preceding the entry into force of a treaty; therefore, the means to express consent for provisional application should be materially distinct. Also, the legal regime and modalities for the termination and suspension of provisional application need further clarification.

The provisional application of a treaty does not prejudice the right of States to apply reservations on the same treaty at the time of ratification, acceptance, approval or accession. By way of explanation, the provisional application would not be basis for restriction of the rights of States in its future conducts toward treaty.

Mr. Chairman, my delegation takes note the proposed draft guidelines and welcomes the future work plan proposed by the Special Rapporteur.

20. Poland

Poland considers that provisional application of treaties is an important instrument for States in determining their international law rights and duties. In particular provisional application enable acceleration of acceptance of international obligations by states and international organisations. Therefore, Poland supports the work of ILC on this topic. We are of the view

that it has utmost practical importance and preparation *of* guidelines is the appropriate tool for achieving this aim.

With reference to three draft guidelines that were provisionally adopted by the Drafting Committee we are satisfied that they are solidly grounded on Article 25 of the Vienna Convention on the Law of Treaties. With respect to draft guidelines presented by the Special Rapporteur Mr. Juan Manuel Gomez-Robledo in his third report we would like to express our concerns on the limitations introduced to draft guideline 1. We fully agree that States and international organizations may provisionally apply a treaty, or part thereof, when the treaty itself so provides, or when they have in some other manner so agreed. But we think that from the international law perspective the internal law restrictions are irrelevant. Thus conditioning provisional application of a treaty on the basis of its provision by reference to the rule of internal law (as in draft guideline 1) could be in contradiction with the principle contained in article 27 of the Vienna Convention of the Law of the Treaties which states that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". We are satisfied that the restriction ("provided that the internal law of the States or the rules of the international organizations do not prohibit such provisional application") is absent in a new formula of draft guideline 3 proposed by the Drafting Committee. These issues should be rather elaborated in a commentary and not in a guideline itself.

Furthermore, we consider that draft guideline 4 proposed by the Special Rapporteur stating solely that provisional application of a treaty has legal effects should be substantiated.

Mr Chairman,

Poland is of the opinion that the ILC work on provisional application of treaties would have much higher practical value if the Commission identified certain types of model clauses that are used for provisional application with the commentary stating the advantages and drawbacks of particular clause. We are especially interested in an evaluation by the Commission of a "reservation" which is quite common in practice, making the scope of provisional application of a treaty dependent upon the availability of an internal law mechanisms at a given time. Moreover, it would be extremely useful to get from the commentary of the Commission the information on typical domestic regulations on provisional application of treaties covering the aspects of procedure and implementation. In many circumstances the provisional application of a treaty is effective only if it is executed in domestic legal order. The understanding of the practice of other States raises the awareness of the advantages and the difficulties of provisional application which in many cases can be overcome by introduction of a proper

internal law mechanisms.

21. Viet Nam

Finally, on topic Provisional application of treaties, I would like to express gratitude to the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo for his fourth report. My thanks also extend to the Secretariat for preparing the Memorandum **on** the legislative development of article 25 of the 1986 Vienna Convention, which was of great assistance to the Commission in its deliberation.

The fourth report continues an analysis of state practice with regard to provisional application of treaties, its legal effects and of the relationship between Article 25 and other relevant provisions of the 1969 Vienna Convention. As mentioned by the Chairman of the Commission, due to time constraints, the Drafting Committee was unable to conclude discussion of the draft guidelines and expected to do so in 2016. For now, my comments would direct to the progress made so far in this topic.

First, we agree that provisional application of treaties create rights and obligations and the treaty is subject to the *pacta sunt servanda* rule in Article 26 of the 1969 Vienna Convention. Breaches of provisionally applied obligations may entail some international responsibility. However, provisional remains provisional and only those states agreeing to provisional application are bound to parts of the relevant treaty subject to provisional application. In addition, we draw attention to the fact that provisional application may be used to bypass constitutional constraints, in particular in case parliamentary ratification is required. Therefore, it is important to further elaborate on the nuances of "legal effects" as presented in draft guideline 4.

Second, on the form of the project's outcomes, this delegation welcomes the Commission's intention to go along with draft guidelines. We are of the view that the two Vienna Conventions already provide sufficient legal basis for provisional application of treaties. It is expected that these draft guidelines provide states and international organizations with a practical tool in various ways, such as in how to formulate, arrangements for provisional application of treaties and its termination or suspension, among other things.

In conclusion, let me reiterate our delegation's intention to examine the draft guidelines together with commentaries when they are adopted by the Drafting Committee with keen interest.

22. Malaysia

12. On the topic "Provisional Application of Treaties", Malaysia commends the efforts of the Special Rapporteur in preparing the Third Report The

Third 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, as well as the relationship between provisional application and other provisions of the 1969 Vienna Convention on the Law of Treaties (VCLT) and the provisional application of treaties with regard to the practice of international organizations should be discerned with great care and caution. In this regard, Malaysia wishes to reflect its preliminary views on the topic:

12.1 Malaysia notes the proposals for six draft guidelines on provisional application of treaties Malaysia is of the view that due consideration must be given as to the issues of doubt on some parts of the guidelines. The draft guidelines must provide a clear understanding and interpretation as well as taking into account the practice and internal laws of States;

12.2 In this regard, Malaysia would like to raise its concern on several issues, among others, on the domestic law and Malaysia's practice on the signing and ratifying of treaties It is to be highlighted that in Malaysia, Article 39 of the Federal Constitution provides that "The executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable by him or by the Cabinet or any Minister authorized by the Cabinet" Further under Article 80(1), the executive authority of the Federation extends to all matters with respect to which Parliament may make laws" By virtue of the 'Federal List', matters with respect to which Parliament may make laws include "external affairs" which in turn include "treaties, agreements and conventions with other countries". The executive authority of the Federation thus extends to the making or concluding of treaties, agreements and conventions with other countries.

In relation to draft guideline 1, Malaysia's domestic law does not provide for any express provision that prohibits or allows for the provisional application of treaties In this regard, Malaysia has been very conscientious in ensuring obligations in the treaty are carried out accordingly once Malaysia ratifies a treaty by ensuring that its domestic legal framework are in place before the treaty is binding upon Malaysia;

12.3 In relation to draft guideline 2, Malaysia is of the view that at this juncture, the agreement for the provisional application of a treaty must either be expressly provided in the terms of the treaty itself or may be established by means of a separate agreement as both means have legal effect Malaysia would like to highlight the risk of agreeing to the

provisional application of a treaty by way of a resolution adopted by an international conference, or by any other arrangement between the States or international organizations as some of the States may not be directly involved during the negotiation of the resolution concerning the provisional application of a treaty at the international conference In addition to that, with a few exceptions, it is recognised that resolutions are normally not binding in themselves and therefore it is unacceptable that such resolutions be given the same legal effect as a legally binding treaty.

Malaysia strongly views that the terms must be provided explicitly in the treaty to avoid ambiguities in the future. Furthermore, in the event that States agree to apply a treaty provisionally by way of a separate agreement, Malaysia views that the provision which enables the States to form that separate agreement should also be provided explicitly in the main treaty itself;

12.4 In relation to draft guideline 3, a similar provision is stipulated in Article 11 of the VCLT whereby it explains the methods of giving consent to be bound by a treaty Consent can be given either by way of signature, ratification, acceptance, approval or accession or by any other means, if so agreed Malaysia takes a non-committal position as the consent to be bound by a treaty is subject to Malaysia's legal framework whereby subsequent act of ratification by our domestic legislations is required On this point, Malaysia is particularly concerned on the effects of the provisional application of treaties especially on the rights and obligations of States who agree to apply a treaty provisionally Therefore, Malaysia proposes that draft guideline 3 should be further deliberated by taking into consideration the rights and obligations of States which arise in a provisionally applied treaty;

12.5 Further, in relation to draft guideline 4, Malaysia is of the view that this draft guideline is to be read together with draft guideline 3 as they are interrelated. Malaysia's position on this point is that a provisionally applied treaty is only morally and politically binding Malaysia is nevertheless guided by Article 18 of the VCLT which spells out that States shall refrain from acts which may defeat the object and purpose of a treaty In this context, the term "legal effects" should be clarified and further developed but at the same time it must be ensured that the definition of legal effect should be within the context of Article 18 of the VCLT and not go against it. Malaysia wishes to reiterate its concern on the rights and obligations of States in a provisionally applied treaty and proposes for it to be addressed in the draft guidelines to ensure that the rights of the States are safeguarded. Considering Malaysia's domestic law and procedural law in signing and ratifying treaties as explained

before, Malaysia is of the view that extreme caution should be exercised in determining whether draft guideline 4 is acceptable as it has significant legal obligations;

12.6 As for draft guideline 5, Malaysia is mainly guided by paragraph (2) of Article 25 of the VCLT on the termination of the provisional application of a treaty Malaysia is also of the view that this issue must be addressed by the Special Rapporteur and that the termination of the provisional application and its obligations must be clearly stated to prevent issues of doubt;

12.7 As for draft guideline 6, Malaysia is of the view that the proposed draft guideline 6 is vague as the term "international responsibility" was not explained in the draft guideline Furthermore, draft guideline 6 did not discuss on the extent of the applicability of international responsibility of a State that applies a treaty provisionally. As the provisional application of a treaty may only apply to a certain part of a treaty, Malaysia would like to propose for the Special Rapporteur to deliberate and provide further clarification on draft guideline 6 to address the issue of remedy in the event of a breach, bearing in mind that the enforcement provision of the treaty may not yet come into force Malaysia also suggests that reference should be made to the draft articles on responsibility of states and draft articles on responsibility of international organizations to address the issue of international responsibility of a State;

12.8 In the context of Malaysia's experience and practice, the signing of a 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 ensure that its domestic legal framework is in place and ready in order to implement the treaty; and

12.9 In addition, the legal effect of the 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.

13. Last but not least, 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 by the State that it accepts the provisional application of treaty, as expressed via a clear mode of consent. Thus, for a further comprehensive analysis of the topic, Malaysia would like to suggest further elaborations of the topic having due regard to State's sensitivities, as well as peculiarities and contextual differences embedded in the treaty provisions, and how State practices have so far responded to such variations.

23. Canada

Canada has followed with interest the discussions of the International Law Commission on the provisional application of treaties. We would like to thank the Special Rapporteur for the work he has accomplished so far.

In reviewing the most recent version of the draft guidelines and the report of the Commission's work at its 67th session, we have noted two topics that may deserve further discussion and that we hope to see addressed in future sessions.

The first topic of interest to Canada concerns the validity of a State's consent to the provisional application of a treaty, most notably when the expression of this consent may be affected by that State's internal rules. There seems to have been a debate within the Commission as to whether greater attention should be paid to the internal rules of States when drafting the guidelines. It was noted, for example, that certain states have difficulty accommodating provisional application within their legal system.

As was noted in the Commission's report, a key factor in determining whether the internal rules of States are relevant is whether article 46 of the Vienna Convention applies to provisional application. Article 46 provides that a State cannot invoke internal law as a way to invalidate its consent to be bound by a treaty obligation. Considering that when States agree to provisional application they are presumably seeking to enjoy the benefits of a treaty commitment, it would seem natural to conclude that article 46 remains relevant, regardless of whether a treaty is in force or provisionally applied. It

should therefore be up to each State to ensure that its expression of consent to provisional application is consistent with its internal rules. Considering the impact that this issue could have on our understanding of provisional application, Canada is keen to see the Commission's final conclusions with regard the applicability of article 46.

Another point relating to the expression of consent is the suggestion that agreement to provisional application could be tacit or implied in certain situations. If the provisional application of a treaty has legal effects, as the Special Rapporteur suggests in his proposal for draft guideline number 3, then the presumption should be that States must formally express their consent to be bound. Canada looks forward to the Commission clarifying its thoughts on this issue. If there are any circumstances where implied consent can be envisaged, these would need to be very clearly and narrowly defined. Another related issue that deserves to be resolved at the same time is the Commission's debate over whether the provisional application of a treaty has the exact same legal effects as entry into force, or whether there are some distinctions It would be useful to have this point clarified as it is important for States to understand the exact nature of the legal obligations that they are undertaking when they agree to provisional application.

The second topic that Canada would like to raise today concerns the termination and suspension of the provisional application of a treaty. Article 25(2) of the Vienna Convention indicates that a State has the ability to terminate the provisional application of a treaty by notifying other States of its intention not to become a party. The Special Rapporteur's proposal for draft guideline 5 refers back to this provision. It may be necessary, however, to provide some additional clarifications with regard to what constitutes an acceptable method of signaling an intention not to become a party to a treaty. The process would presumably need to be different if a State has merely signed a treaty without ratifying it, or if a State has completed the necessary ratification procedures but the treaty itself has not yet entered into force and is still being provisionally applied by the parties. It would be helpful if the Commission could take this distinction into consideration as it continues its discussions.

Canada looks forward to the continued work of the Commission and the Special Rapporteur with regard to the provisional application of treaties. We are hopeful that the draft guidelines will become a useful tool for the interpretation of article 25 of the Vienna Convention and provide a predictable framework for state practice.

24. United States

Mr. Chairman, with respect to the topic of "Provisional application of treaties," the

United States thanks the Special Rapporteur, Juan Manuel Gomez-Robledo, for his third report, including the extensive work and consideration of States' views that it reflects. We also thank the Drafting Committee for its contributions in the three Draft Guidelines it provisionally adopted in July.

As the United States has stated, we believe the meaning of "provisional application" in the context of treaty law is well-settled - "provisional application" means that a State agrees to apply a treaty, or certain provisions of it, prior to the treaty's entry into force for that State. Provisional application gives rise to a legally binding obligation to apply to the treaty or treaty provision in question, although this obligation can be more easily terminated than the treaty itself may be once it has entered into force. We hope to see this clearly stated in the Draft Guidelines as they progress.

We also believe it is important that the Draft Guidelines make clear that a State's legal obligations under provisional application can only arise through the actual agreement of that State and the other States that undertake to apply the treaty provisionally. We are concerned that the Special Rapporteur's Draft Guideline 2 and the language of his report may suggest that such obligations may be incurred through some method other than agreement, contrary to Article 25 of the Vienna Convention on the Law of Treaties.

Mr. Chairman, the United States is impressed by the extensive research reflected in the Special Rapporteur s third report, which contains references to a wide variety of situations. We caution, however, that not every situation in which States apply a treaty prior to its entry into force involves "provisional application" of the treaty within the meaning of the Vienna Convention. We do not believe, for example, that the application by an international organization of its constituent instrument is provisional application" in the sense of the Vienna Convention, as the international organization is not a prospective party to the treaty. Similarly, a non-legally binding commitment to begin applying a treaty prior to entry into force is not "provisional application" in our view.

With regard to future work of the Special Rapporteur and the ILC on this topic, we support the suggestion that the ILC develop model clauses as a part of this exercise as those clauses may assist practitioners in considering the many options that are available to negotiators and how best to capture those options in their drafts. However, we are not convinced of the merits of studying the legal effects of the termination of provisional application with respect to treaties granting individual rights, as we do not believe that the rules regarding provisional application of treaties differ for such instruments.

Mr. Chairman, again, we thank the Special Rapporteur and the Drafting Committee for their contributions to this important topic and look forward to continuing to follow their work on these issues.

25. Israel

Regarding the **"Provisional Application of Treaties",** Israel welcomes the discussion on this matter and congratulates the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, on his third report on the topic.

As noted in the past, Israel does not provisionally apply treaties. However, there are exceptional circumstances in which the provisional application of treaties may be permitted. These include situations m which there is a clear financial or political significance for the provisional application of a treaty; cases in which there is a need for exceptional flexibility; or instances in which it is important not to wait for the completion of the lengthy internal requirements for the approval of the treaty. This practice is not part of the written legal framework, but is rather a matter of uncodified practice.

In any case, the Government of the State of Israel must approve the treaty and its provisional application prior to the date in which the agreement is provisionally applied. The Government's decision must contain special approval for provisional application before the treaty enters into force. The explanatory note submitted to the Government prior to its decision, must include a statement that the approval of the provisional application deviates from the general practice, and states the reasons for the exceptional approval in the specific case.

26. Republic of Korea

My delegation welcomes the third report by Special Rapporteur Mr. Juan Manuel Gomez- Robledo on the provisional application of treaties, and wishes to thank the Secretariat for providing the memorandum (A/CN.4/676) on the provisional application.

The third report is focused on the relationship of the provisional application of treaties with other provisions of the 1969 Vienna Convention on the Law of the Treaties and on the question of the provisional application with regard to the practice of international organizations. While my delegation agrees with the opinion that the provisional application of treaties would produce certain legal effects, we would like to highlight that the legal effects of the provisional application of a treaty should be distinguished from those of the entry into force of the treaty.

The Special Rapporteur concentrated on the articles whose relationship to provisional application is most salient, namely Articles 11, 18, 24, 26 and 27. We also think that these articles are applicable to the provisional application of a treaty. However, given that the 1986 Vienna Convention has not been entered into force yet, my delegation believes that the question on whether it is appropriate to compare the provisional application in the 1986 Vienna

Convention on the same terms with Article 25 of the 1969 Convention needs careful consideration.

Finally, my delegation believes this topic will greatly contribute to the development of the area of treaties law by providing clearer guidelines on the mechanism of provisional application of treaties, and looks forward to more in-depth discussion of the topic.

27. Ireland

Ireland aligns itself with the statement delivered by the European Union in relation to the Provisional Application of Treaties, and would like to offer the following additional observations.

Ireland thanks the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, for his third report and in particular for the detailed comparative analysis contained therein. The multiple examples provided of the provisional application of treaties, in a variety of scenarios, are very helpful in contextualising our discussions. We also wish to thank the Secretariat both for its Memorandum on the negotiating history of Article 25 of the Vienna Convention on the Law of Treaties between States and International Organisations, and for the non-exhaustive list of multilateral treaties which provide for provisional application, annexed to the Special Rapporteur's report.

My delegation welcomes the twin focus in this year's report on the relationship of provisional application to other provisions of the Vienna Convention on the Law of Treaties, and on provisional application with regard to international organisations.

With regard to the first theme, we agree with the need to stress the conceptual distinction between the expression of consent to be bound by a treaty with a view to its entry into force and the provisional application of a treaty for a period preceding its entry into force, albeit that the means of expressing consent to be bound by a treaty, as provided in Article 11 of the Vienna Convention, may also be used to agree to its provisional application. We agree, too, that provisional application is very different from any supposed exceptional modality for entry into force. As stated last year, Ireland shares the view that provisional application does produce legal effects. In this regard, we support the conclusion of the tribunal in the *Yukos* case, cited in paragraph 66 of the Special Rapporteur's report, that a treaty must not allow domestic law to determine the content of an international legal obligation as regards provisional application, "unless the language of the treaty is clear and admits no other interpretation". We would, however, support the suggestion that further analysis be undertaken as to the precise

nature of the legal effects created by provisional application, and the extent to which they differ, if at all, from the effects created by the entry into force of the treaty. This might include a consideration of whether there are any differences in the termination and suspension processes for both regimes.

As regards the second theme, the analysis undertaken provides firm support for the conclusion that legal regime of provisional application of treaties between states and international organisations, or between international organisations is, *mutatis mutandis,* the same as that relating to treaties between states. The example provided of the provisional application of amendments to the Convention on the International Maritime Satellite Organisation raises a number of interesting issues which, we would suggest, may benefit from some further examination. In particular, whether, in the absence of any explicit provision in a constituent agreement of an organisation, states parties to that agreement may decide to provisionally apply amendments thereto and, if so, how such decisions are to be taken.

Finally, we of course thank the Special Rapporteur for the proposed draft guidelines, and the Drafting Committee for their careful consideration of a number of these at its current session. We can support the provisionally adopted draft guidelines 1 and 2, on scope and purpose. My delegation would also concur with the proposal to suppress from draft guideline 3 any reference to the internal law of the state or the rules of international organisations, and to track the language of Article 25 of the Vienna Convention as closely as possible. We welcome the Special Rapporteur's intention to consider, in his next report, the question of the termination and suspension of provisional application, as well as the interplay between provisional application and reservations to treaties.

28. Turkey

In the last statement of my delegation under this agenda item, we wish to address the topic **"Provisional Application of Treaties".**

On this topic, we note the Third Report of the Special Rapporteur. Provisional application is an important instrument of international treaty practice. The term is widely known, yet the legal regime that applies to the provisional application deserves analysis by the Commission and would provide a useful guide for States which resort to provisional application, and for States whose legislation do not permit the provisional application of treaties, alike.

That being said, we would like to reiterate that, 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 welcome the approach of the Special Rapporteur, favouring guidelines rather than draft articles. In this framework, we concur with the view that the drafting of model clauses

could be of practical importance in the context of draft guidelines.

Furthermore, we would like to draw attention to the importance of domestic law in this respect. It is after all for individual states to determine whether or not their legal systems allows for provisional application. We therefore remain convinced that a comparative study on domestic provisions relating to the provisional application would be useful for proper consideration of this topic.

The question of the legal effects of the provisional application of treaties lies at the very heart of the study undertaken by Commission. In this regard, we would echo the call made by some members of the Commission to the Special Rapporteur to substantiate his conclusion that the legal effects of provisional application were the same as those after entry into force of the treaty. Indeed, since the Special Rapporteur indicated in his first report that "provisional application" and "provisional entry into force" are not synonymous and refer to different legal concepts, further clarification on the view of the Special Rapporteur according to which 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 important.

On the way forward, we welcome that the Special Rapporteur intends to further study the relationship between provisional application and other provisions of the Vienna Convention on the Law of Treaties, and we believe that article 19 relating to reservations would be particularly relevant in this context.

Although the study of provisional application with regard to international organizations might prove useful for the understanding of the issue, we believe that it would be appropriate to first undertake the examination of questions related to the provisional application of treaties concluded by States and only afterwards to proceed to the consideration of provisional application of treaties with the participation of international organizations, as expressed by some members of the Commission.

Mr. Chairman,

In concluding, let me share some comments on the draft guidelines proposed by the Special Rapporteur. On draft guideline 2, we believe that the reference to "a resolution by an international conference or by any other arrangement between a State or an international organization" should be clarified.

We believe that draft guideline 4, which deals with the legal effects of provisional application, a key provision of the draft guidelines, could be further elaborated.

And on draft guideline 5, we would welcome further clarification as to whether the term "entry into force" refers to the entry into force of the treaty itself, or the entry into force with regard to one State.

29. Mexico

Quisiera ahora referirme al tema "aplicación provisional de los tratados" En primer lugar, mi delegación desea agradecer al Relator Especial, Sr. Juan Manuel Gómez Robledo, por su excelente trabajo desarrollado desde 2013 y, en particular, por su tercer informe, contenido en el documento A/CN 4/687, en donde se hace un estudio de la relación que guarda la aplicación provisional con otras disposiciones de la Convención de Viena del Derecho de los Tratados de 1969, así como de la aplicación provisional en relación con organizaciones internacionales.

De igual manera, agradecemos a la Secretaria por la elaboración de un nuevo memorado relativo a la histona legislativa del artículo 25 de la Convención de Viena sobre el Derecho de los Tratados celebrados entre Estados y Organizaciones Internacionales o entre Organizaciones Internacionales, de 1986, el cual complementa aquel relativo a la Convención de Viena de 1969 Ambos documentos resultan muy pertinentes para el estudio de este importante tema.

Si bien el segundo informe tuvo un gran valor por abordar los efectos legales de la aplicación provisional de los tratados así como las consecuencias jurídicas de la violación a un tratado aplicado provisionalmente, el tercer informe contribuye en gran medida a aterrizar todas estas consideraciones en un nivel práctico. México coincide con la premisa del Relator Especial en el sentido que la aplicación provisional de un tratado genera los mismos efectos jurídicos que si estuviese en vigor Por lo tanto, el régimen de la responsabilidad del Estado por hechos internacionalmente ilícitos resulta aplicable *mutatis mutandis* en los casos de violaciones de tratados aplicados provisionalmente. No obstante, resulta de particular interés analizar el tema de la reciprocidad y de la posible nulidad del tratado conforme a las causas previstas en la Convención de Viena.

Respecto del último informe, mi delegación desea formular los siguientes comentarios puntuales:

- En cuanto a la relación de la aplicación provisional con el derecho interno de los Estados, consideramos que la cuestión ya ha sido zanjada y que, por lo tanto, no es necesario hacer un estudio comparativo exhaustivo de los diferentes sistemas jurídicos. Baste con reiterar que cada Estado mantendrá la potestad soberana de regular la aplicación provisional, de ser el case, y de conformidad con su derecho constitucional. Ello sin prejuicio de los dispuesto en los artículos 18 y 27 de la Convención de Viena de 1969.
- Consideramos que el análisis de la relación que guarda el artículo 25 con otras disposiciones de la Convención de Viena de 1969 brinda una

perspectiva práctica que resulta necesaria para entender de manera amplia el verdadero alcance de los efectos jurídicos de la aplicación provisiona. Exhortamos entonces al Relator Especial a que continúe con este análisis, incorporando otras disposiciones de dicho instrumento internacional, como aquellas relativas a las reservas.

- Por otra parte, el análisis que se hace del régimen de la aplicación provisional en relación con organizaciones internacionales resulta de suma importancia, especialmente tomando en cuenta que la Convención de Viena de 1986 aún no se encuentra en vigor Al respecto, México coincide en que la regla contenida en su artículo 25, relativa a la aplicación provisional, en efecto refleja una norma consuetudinaria. Sin embargo, esto no implica que todos los artículos de dicho instrumento internacional tengan ese mismo carácter, cuestión que resulta irrelevante para el estudio de este tema.
- Asimismo, invitamos al Relator Especial a que realice en su próximo informe un análisis más detallado de la práctica de organismos internacionales regionales, así como de las funciones del depositario de tratados multilaterales en relación con la aplicación provisional.
- Finalmente, mi delegación apoya la propuesta del Relator Especial de elaborar directrices que sirvan como guía para los Estados que decidan recurrir a la aplicación provisional, y agradece muy cumplidamente la presentación de seis proyectos preliminares de directrices. Dado que dichas directrices siguen siendo discutidas por el Comité de Redacción de la CDI, mi delegación no formulara coméntanos puntuales sobre su redacción. No obstante, México considera que el punto de partida para su elaboración debe ser el artículo 25 de la Convención de Viena de 1969, y que estos deben enfocarse principalmente en los efectos jurídicos de la aplicación provisional Asimismo, considera que el trabajo presentado hasta ahora por el Relator Especial recoge los elementos jurídicos que han sido desarrollados a lo largo de sus tres informes.

30. Spain

Pasando al capítulo XI, sobre la aplicación provisional de los tratados, la delegación de España desea expresar su reconocimiento al Relator Especial sobre la materia, el Sr. Juan Manuel G6mez Robledo, por el tercer informe que ha presentado a la Comisión de Derecho International.

Entrando en el detalle de los distintos proyectos de directrices contenido en dicho informe, son varias las observaciones que esta delegación desearía realizar.

En primer lugar, por lo que se refiere al *proyecto de directriz 1,* cabría señalar que la alusión final al Derecho interno de los Estados o las reglas de las organizaciones internacionales va en contra de la aproximación que sigue el Derecho internacional

de los tratados y el Derecho Internacional, en general. Admitir que los Estados y las organizaciones "podrán aplicar provisionalmente un tratado, o partes de él, (...) en la medida en que el derecho interno de los Estados o las reglas de las organizaciones internacionales no lo prohíban" suponen una quiebra al principio según el cual el Derecho interno resulta, en principio, indiferente en el piano internacional, un principio que encuentra en el artículo 27 de las dos Convenciones de Viena, de 1969 y 1986, sobre el Derecho de los tratados, cuando proclama que un Estado no puede invocar su Derecho interno como justificación del incumplimiento de un tratado y otro tanto sucede con las organizaciones internacionales y sus reglas. Si un Estado o una organización han aceptado aplicar provisionalmente un tratado no podrán luego invocar sus ordenamientos internos para desdecirse o eximirse del cumplimiento de ese tratado.

En cuanto al *proyecto de directriz* 2, su único objetivo es brindar ejemplos de otro tipo de formas (distintas a la inclusión en el propio tratado) en las que las partes pueden convenir la aplicación provisional. Se trata claramente de un *numerus apertus y,* al final, los ejemplos expresos se limitan, en realidad, a dos: un acuerdo separado y una resolución de una conferencia internacional. A la vista de este limitado alcance, hemos de confesar que no terminamos de verle el sentido; es más, ni siquiera nos parece que sea necesario brindar ejemplos, en un tema que en la práctica, hasta donde sabemos, no suscita problemas.

El *proyecto de directriz 3* trata del *dies a quo* de la aplicación provisional. Alude al momento de la firma del tratado, al de su ratificación, adhesión o aceptación o a cualquier otro momento convenido por los firmantes o los contratantes. La referencia a ese "cualquier otro momento que hayan convenido" los Estados o las organizaciones internacionales hace que pierda sentido cualquier comentario que pretendiera la inclusión de otros hitos; con todo, sorprende que en un texto que pretende estar alineado con las Convenciones de Viena de 1969 y 1986 sobre el Derecho de los tratados no haya una total coincidencia entre las formas de manifestación del consentimiento en obligarse por un tratado recogidas en dichas Convenciones (que en sus artículos 11 mencionan la ratificación, la aceptación, la aprobación y la aceptación) y las contempladas en el proyecto de directriz que ahora nos ocupa (que omite la alusión a la aprobación).

El *proyecto de directriz 4,* según el cual "La aplicación provisional de un tratado tiene efectos jurídicos", nos ha producido, hemos de decirlo, cierta perplejidad. Máxime porque nada parecido se dice en las Convenciones de Viena sobre el Derecho de los tratados a propósito de la entrada en vigor. En ningún momento alii se dice que los tratados vigentes "tienen efectos jurídicos", como tampoco en los ordenamientos internos (o, desde luego, no en el español) respecto de las normas o actos en vigor. Como mucho, por cumplir con el propósito pedagógico con el que parecen estar concebidos todos estos proyectos de directrices, podría decirse algo que apuntara más bien en la dirección de que la aplicación provisional supone adelantar la operatividad de las disposiciones de un tratado o de una parte de el a un momento

previo a su entrada en vigor.

Pasando al *proyecto de directriz 5,* que contempla dos supuestos de terminación de la aplicación provisional de un tratado (cuando este entra en vigor o cuando una parte anuncia su intención de no llegar a concluirlo), convendría introducir la fórmula de apertura habitual en el Derecho de los tratados, de naturaleza dispositiva, que dejara a salvo cualquier otro modo convenido entre los Estados o las organizaciones internacionales. Encontrarían así reflejo, de algún modo, aquellas previsiones que en ocasiones se encuentran en los tratados según las cuales la aplicación provisional se dará por terminada si pasado cierto tiempo desde su inicio no se produjera la entrada en vigor del tratado.

En otro orden de consideraciones, esta delegación considera que sería muy complicado que el proyecto de la Comisión incluyera clausulas modelo, dada la enorme variedad que podrían presentar y las diferencias entre los ordenamientos internos.

En cuanto a la aplicación provisional de tratados celebrados por organizaciones internacionales, puede ser oportuno dar cuenta de la práctica, habitual en el seno de la Unión Europea, de acuerdos mixtos (esto es, de acuerdos celebrados conjuntamente por la Unión Europea y sus Estados miembros, por un lado, y uno o varios terceros Estados, por el otro) que limitan la aplicación provisional a las previsiones que caen dentro del ámbito de competencias de la UE y en los que, por tanto, la decisión sobre la aplicación provisional es adoptada por ésta, sin que los Estados miembros *qua talis* tengan que intervenir (más allá de su presencia como miembros en el Consejo de la Unión Europea, órgano a quien el artículo 218.5 del Tratado de Funcionamiento de la UE confía la decisión sobre la aplicación provisional de los acuerdos internacionales de la Unión Europea).

La delegación española desea terminar su intervención en este punto manifestando su confianza porque se aborden los temas que, a nuestro juicio, suscitan dudas, cuando no problemas. A los ya identificados en la Comisión (y de los que deja esta constancia en su Informe de este año), es posible añadir otros; así, por ejemplo: ¿son todos los tratados susceptibles de ser aplicados provisionalmente o hay tratados que, bien por su materia o bien por las implicaciones que tendría la aplicación provisional, no pueden serlo?, ¿cabe la aplicación provisional *inter partes*?, ¿*y* solo para un Estado?, ¿computa el tiempo de aplicación provisional de un tratado para establecer el termino de aquellos cuya duración esta preestablecida?, ¿la terminación de la aplicación provisional sin que se produzca la entrada en vigor del tratado produce efectos *ex tunc* o *ex nunc?*

31. Kazakhstan

Now, turning to the topic "Provisional application of treaties" my delegation would like to welcome the work of the Commission on that subject and reiterate its

conviction in the important role that the ILC could play in providing guidance and enhancing the understanding of this instrument of international law.

We also appreciate the Third Report of the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, and his analysis of State practice, and consideration of the relationship of provisional application to other provisions of the 1969 Vienna Convention, as well as, with regard to international organizations.

Considering internal laws, and the way in which States enter into treaties, it is important that internal rules cannot be ignored. We are confident that the scrutiny of different internal laws could provide greater insights into how States view the nature of provisional application as a legal phenomenon.

My delegation also shares the view that while article 25 of the 1969 Vienna Convention is the basis of the legal regime of provisional application of treaties, it does not answer all the questions related to the provisional application of treaties. In that case, we hope that the Commission will provide guidance to States on such questions as: which States may agree on the provisional application of treaties (only negotiating States or other States as well); whether an agreement on provisional application must be legally binding; and whether such an agreement can be tacit or implied.

Mr. Chairman,

We agree that the provisional application of treaties has legal effects and creates rights and obligations. In that context, it would be helpful if the Special Rapporteur further substantiate his conclusion that the legal effects of provisional application are the same as those after the entry into force of the treaty and could also investigate whether the termination or suspension processes for both regimes are identical.

My delegation would also welcome further consideration of the legal regime and modalities for the termination and suspension of the provisional application and appreciate for information to what extent the provisional application of a treaty might be suspended or terminated by. It could be in examples of violations of the treaty by another party, which was also applying it provisionally, or in situations where it was uncertain if the treaty would enter into force.

On our view, it is important to identify the types of treaties, and provisions in treaties, which were often the subject of provisional application, and whether or not certain kinds of treaties addressed provisional application similarly.

We believe it would be worthwhile to draft model clauses which could be of practical importance to States and international organizations in the context of the draft guidelines.

Mr. Chairman,

In conclusion, my delegation underlines its interest and is looking forward to following the work on aforementioned important topics.

32. Russian Federation (Russian only)