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on the work of its 68th session

Provisional application of treaties

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Table of Contents

20th meeting, 24 October 2016, a.m. (A/C.6/71/SR.20) 4
1. Italy 4
24th meeting, 27 October 2016, p.m. (A/C.6/71/SR.24) 4
2. Cuba 4
3. China 5
25th meeting, 28 October 2016, a.m. (A/C.6/71/SR.25) 5
4. Chile 5
26th meeting, 28 October 2016, p.m. (A/C.6/71/SR.26) 7
5. Poland 7
6. Belarus (Russian only) 7
7. Brazil 7
27th meeting, 1 November 2016, a.m. (A/C.6/71/SR.27) 8
8. European Union 8
9. Norway (on behalf of Nordic) 9
10. Austria 10
11. Australia 11
12. Singapore 12
13. El Salvador 13
28th meeting, 1 November 2016, p.m. (A/C.6/71/SR.28) 14
14. Sudan (Arabic only) 14
15. Russian Federation 14
16. Romania 15
17. United Kingdom 15
18. Portugal 16
19. Croatia 17
20. Spain 17
29th meeting, 2 November 2016, a.m. (A/C.6/71/SR.29) 19
21. Netherlands 19
22. Greece 19
23. Malaysia 20
24. Vietnam 23
25. Slovenia 24
26. Turkey 24

27. USA 24
28. Mexico 25
29. Ireland 27
30. Iran 28
31. Israel 29
30th meeting, 3 November 2016, a.m. (A/C.6/71/SR.30) 29
32. Rep. of Korea 29
33. India 30

20th meeting, 24 October 2016, a.m. (A/C.6/71/SR.20)

1. Italy

I would like to say a few words about the "Provisional application of treaties" in Chapter XII of the Report. In 2012 the Commission decided to include this topic in its programme of work and appointed Ambassador Juan Manuel Gomez Robledo as Special Rapporteur. He has presented four reports and prepared a set of draft guidelines. I take this occasion to thank Ambassador Gomez Robledo for his work and congratulate him on the results he has achieved.

This topic raises both theoretical and practical questions. The work done so far has sought a fair balance between the international rules of the Vienna Convention and the implications of the provisional application for domestic law. Ideally international rules should coexist with some accommodation for domestic law in order to create a balanced “two-tiered” legal framework. Within the European Union, we have been discussing how the provisional application fits into the general dovetailing mechanisms between EU and national law. I am sure that in this respect, the EU ‘case study’ will provide the debate with useful insights.

Apart from the specific dimension of Treaty-making within the EU, there is little doctrinal convergence within our own domestic legal system on the applicability of Treaties before the Parliament’s formal ratification - which in Italy also encompasses the execution phase. Our Constitution sets a very strict threshold on Treaties that require parliamentary approval before gaining legal force. As we look for further guidance on this matter, we recognize the need to continue the work that has been done, and attempt to elucidate a particularly complex issue.

From a substantive perspective, we favour an approach rooted in practice, for example by providing States with a toolkit which they can use if and when appropriate. In this regard, “model clauses” could be particularly helpful.

A more thorough analysis of State practice is needed, but in any case, we encourage a prudent approach to the interpretation of such practices.

Finally, we would flag draft guidelines 7 and 8 as among the most contentious from a theoretical perspective: more nuanced language should be considered, but much will depend on the consensus that States reach on the overall scope of "provisional application."

We look forward to the future work of the Special Rapporteur and the Commission on this topic in the next stages of deliberation and in particular to the Commentaries that the Commission will examine in more detail at the next session.

24th meeting, 27 October 2016, p.m. (A/C.6/71/SR.24)

2. Cuba

Sobre el Capitulo XII "Aplicaci6n provisional', considera que se debe observar estrictamente la Convenci6n de Viena sobre el Derecho de los Tratados. Considera que ho debe abusarse de la aplicación provisional de los tratados y cuando se realice debe hacerse

bajo el respaldo de la Convención de Viena pues debe prevalecer la voluntad de la Partes. Debe primar el principio de que la aplicación provisional qe los tratados no suple la entrada en vigor de un tratado. Este debe cumplir los requisitos legales internos correspondientes para que entre en vigor.

3. China

With respect to "Provisional application of treaties", the Chinese delegation sees both connection and distinction between the principle of pacta sunt servanda and the provisional application of treaties, which may cause them to clash in practice. Any potential solution should be based on a proper balance between the provisional application of treaties and domestic law in order to both preserve the validity of provisional application as a rule of international law, and leave some leeway for States to choose the application of treaties based on their domestic law. We further suggest that in light of the close connection between this topic and other treaty law regimes such as reservations to treaties, lapse of treaties and succession of States, a holistic approach is needed in the consideration. The validity of the current conclusions should also be backed up with more practical examples.

25th meeting, 28 October 2016, a.m. (A/C.6/71/SR.25)

4. Chile

I would like to refer to chapter XII of the report, on the provisional application of treaties, which pertains to the fourth report of the Special Rapporteur, Mr. Juan Manuel Gomez Robledo.

This report sets out an analysis of the relationship of the provisional application of a treaty with other provisions of the 1969 Vienna Convention on the law of Treaties.

Regarding this matter, we are largely in accordance with the criteria supported by the Special Rapporteur. For example, with regard to reservations, we agree with him that nothing prevents a State from formulating reservations from the moment that it decided to apply a treaty provisionally.

Similarly, with regard to the invalidity of treaties in the light of articles 27 and 46 of the aforementioned Vienna Convention, we agree that the principle that a State cannot invoke its internal law as a justification for its failure to perform a treaty also applies in respect of treaties which have been provisionally applied.

With regard to the termination or suspension of a treaty or of a treaty provisionally applied as a result of a material breach, we agree with the Special Rapporteur that provisionally applied treaties produce the same legal effects as if the treaties were in force, so long as they remain in that situation, since the rules relating to the termination and suspension of treaties also apply to provisionally applied treaties. In his report the Special Rapporteur also notes that the Commission took note of the draft guidelines 1-4 and 6-9, provisionally adopted by the Drafting Committee. My delegation has studied these draft guidelines and shares the views supported by the Special Rapporteur. Guideline 4 (b), however, requires further analysis: the guideline states that (I quote): "In addition to the case where the treaty so provides, the provisional application of a treaty or part of a treaty may be agreed through:

(b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference."

Our observation is concerned with the latter part of the clause set out in paragraph (b). In our delegation's view, it is essential to maintain the principle that provisional application must always be subject to the consent of each of the States parties to the treaty, so that it cannot be imposed on them by a resolution adopted by an international organization or an international conference.

Another important issue broached in the report before us relates to draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty.

Draft guideline 10 proposed by the Special Rapporteur in his fourth report, which the International law Commission decided to submit for the consideration of the Drafting Committee, reads (I quote): "A State that has consented to contract obligations by means of the provisional application of all or part of a treaty may not invoke the provisions of its internal law as justification for non-compliance with such obligations. This rule is without prejudice to article 46 of the 1969 Vienna Convention" (end of quotation).

The possibility of provisionally applying a treaty is contingent not only on the provisions of the treaty itself or the agreement of the negotiating States, as stipulated in article 25 of the Vienna Convention of 1969, but also on whether it is permitted under the constitutional law of the State parties.

We certainly agree with the proposed guideline 10, as indicated earlier; we believe it important, however, to place this discussion on record, and that it would be desirable in the future also to give consideration, in a guideline, to the situation of those States which, under their internal law, are obliged to limit the provisional application of treaties. This is a quite different matter from that addressed by draft guideline 10.

Furthermore, my delegation shares the position taken by the Special Rapporteur in his conclusions set out in the report on the advisability of preparing a general draft guideline that would provide that the 1969 Vienna Convention applied mutatis mutandis to provisionally applied treaties, thereby making. it clear that there could be other grounds for annulment and termination provided for in the Convention, besides those of articles 46 and 60.

We hope that this issue will remain on the Commission's agenda under the wise leadership of its Special Rapporteur, Mr. Gomez Robledo. In this regard, we are convinced that a thorough analysis of the treaty provisions establishing the provisional application of a treaty will facilitate a better understanding of the subject. Accordingly, we believe that it will be very useful to prepare the memorandum which the Commission requested from the Secretariat in August 2015 on the practice of States on treaties, bilateral and multilateral, deposited or registered with the Secretary-General over the last 20 years, which make provision for provisional application.

In conclusion, allow me congratulate the Special Rapporteur, Mr. Juan Manuel Gomez Robledo, and all the Special Rapporteurs whose reports have helped ensure that this session has been one of the Commission's most fruitful sessions ever.

26th meeting, 28 October 2016, p.m. (A/C.6/71/SR.26)

5. Poland

Referring to the topic "Provisional application of treaties", Polish delegation would like to thank Special Rapporteur Juan Manuel Gómez-Robledo for his fourth report, which included a proposal for a draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty. We would like as well to congratulate the Commission for adopting draft guidelines 6 to 9.

Poland supports the general position of the ILC that provisional application of a treaty in principle produces the same legal effects as if the treaty were in force, unless the treaty provides otherwise or it is otherwise agreed. However, it seems that the nature and effects of the provisional application should be further studied and the comparative analysis of treaty practice is necessary in that regard.

As the relation between provisional application and reservations is concerned we endorse the opinion that the issue should be given careful attention. In particular, we find it somehow difficult to accept the right of formulating reservations with regard to the provisional application of a treaty. In accordance with the Vienna Convention on the Law of Treaties and international customary law reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. Thus, it is a normal practice that reservation activates only after expiration of provisional application, that is when the treaty enters into force. Any limitation to the provisional application of a treaty should be formulated in a treaty itself or in an agreement (whatever its form is) on the provisional application a treaty.

Furthermore, in our view the Commission, either in a conclusion or a commentary, should confirm the right of states to apply a treaty provisionally within the limits of their internal law. Such provisional application cannot be considered as reservation itself since very often the provision on such an application is already inserted into a treaty. The latter scenario is, as some members of the Commission have also noticed, often the most important, and contentious, aspect of provisional application. In this context, draft guideline 10 should be further carefully considered and streamlined.

Finally, Poland would like to reiterate that we concur with those members of the ILC who indicated that an exhaustive treatment of treaty provisions providing for provisional application is essential in order to gain better understanding of the topic. Thus, there is a need for more in-depth study of treaty practice particularly with respect to treaties that refer to the rights of individuals.

6. Belarus (Russian only)

7. Brazil

Finally, in relation to the topic "provisional application of treaties", Brazil considers it crucial that the Commission continues giving adequate consideration for fact that some States are not in a legal position to apply provisionally any sort of treaty, in light of constitutional regulations related to the separation of powers.

This is the case of Brazil that has therefore made a reservation to Article 25 of the 1969 Vienna Convention in the Law of Treaties. It is important that constitutional differences are

borne in mind when the Commission drafts its upcoming guideline regarding the relationship with domestic law.

27th meeting, 1 November 2016, a.m. (A/C.6/71/SR.27)

8. European Union

The European Union has the honour to participate in the discussion of the 6th Committee regarding the topic of provisional application of treaties.

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

We thank the Special Rapporteur Mr. Juan Manuel Gomes-Robledo for his Fourth Report and the International Law Commission for its considerations of this topic.

The European Union takes a keen interest in this topic. This flows from the fact that the European Union's founding Treaties foresee the possibility of provisional application, and in particular as this possibility is also widely used in EU practice. Therefore the EU supports the work of the ILC in the interest of advancing stability of treaty relations subject to provisional application.

In this intervention we would like to make some general comments regarding the regime of provisional application in the light of the progress that the ILC has made this year. We will also make a comment on a specific point in the Fourth's Report relating to EU practice.

It seems to us that there is no common view in the Commission as regards the methodology of the current work. While the Special Rapporteur proceeds on the basis of commentary on individual articles of the Vienna Convention and then largely draws conclusions by way of analogy, the ILC Report reflects a wide variety of views held by the members of the Commission. A number of ILC members question reliance on simple analogy and point to the need examine relevant international practice.

There is some truth with that methodological dilemma. Analogy goes as far as it goes – though we believe it goes quite far – but it should be appropriately combined with examination of practice concerning selected or targeted questions for the work to bear fruit. The problem perhaps stems ultimately from Article 25 of the Vienna Convention itself. On the one hand, Article 25(1) provides that a treaty or a part of it can be applied provisionally and thus confirms that it has legal effects. Yet, it does not for instance specify which articles of the Convention apply; nor does it limit the legal effects of provisional application to not to defeat the object and purpose of a treaty, as in the case of signature (Article 18). On the other hand, Article 25(2) permits disengagement from the treaty obligations without formalities attached to it, for instance as regards form of notification or notification period.

In this light we welcome the decision of the Commission to request from the Secretariat a memorandum analysing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, which provide for provisional application, including treaty actions related thereto (para. 258 of the ILC Report).

In view of the analysis that the ILC has requested the Secretariat to undertake, the European Union considers that the guidelines would be best served when the focus of such analysis is on the main trends of treaty practice striving to study broad and recurring themes, questions and issues related to the topic.

The EU would suggest that, among others, the following elements connected with provisional application be considered:

- is provisional application provided for in the agreement itself or is it agreed in some other manner?
- is provisional application used for the entire agreement or certain parts of it?
- which provisions are subject to provisional application, the substantive/technical provisions or also the provisions of institutional nature?
- can the fields where provisional application is being used, or most often used, be grouped in a useful way?
- is there any correlation between the degree of complexity of the agreements and provisional application?
- do the agreements contain separate provisions for the termination or suspension of provisional application?
- does the mechanism of provisional application differ in any manner depending on the treaty being bilateral or multilateral?

The ILC should be in a position to form a general view of the main "pillars" or general categories around which the issues connected with provisional application can be usefully arranged. We would expect the final outcome of the guidelines to be simple and clear, staying with the main issues most often faced in practice. This could also usefully feed into the model clauses that the Special Rapporteur intends to propose as well as the commentaries. On the other hand, expression of views on isolated agreements or issues may not serve, or even distract from, the main interest of the guidelines, which should be to advance the stability of treaty relations when provisionally applied and provide guidance on the principal issues.

9. Norway (on behalf of Nordic)

Turning to the topic of Provisional application of treaties the Nordic countries would like to thank the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, for his fourth report on the provisional application of treaties. We 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. In the fourth report the Rapporteur continues to study the relationship between Article 25 and other provisions of the 1969 Vienna Convention on the Law of Treaties, particularly the Articles in Parts II Reservations, V Invalidity of treaties and termination or suspension of a treaty as a consequence of its breach, and VI Cases of State succession, State responsibility, and outbreak of hostilities. The Nordic countries note that the Rapporteur has also, to a certain degree, addressed the issue of international responsibility for a breach of a treaty applied provisionally but state that this may require some further study. As stated before, when the Nordic countries agree on applying treaties provisionally, they consider the treaties to produce the same legal effects as if they were formally in force. This same conclusion was stated by the Commission after the third report of the Rapporteur and was reconfirmed by the Rapporteur in his fourth report.

The Nordic countries find it important that the question of the provisional application of treaties by international organizations has been addressed also in the fourth report. We note with satisfaction that the Rapporteur has gathered and analysed the practice of multilateral treaty depositaries. This is something that the Nordic countries have called for earlier, as there seems to be variation in the practices. The list included in the addendum clearly shows that it is common to resort to provisional application in respect of cooperation agreements entered into by the EU and its Member States with a third State. The Nordic countries emphasize, however, that the topic should not be considered concluded in relation to international organizations, as there remain questions to be reflected upon.

The Nordic countries welcome the initiative of the Commission to request from the

Secretariat a memorandum analysing State practice in respect of treaties deposited or registered in the last 20 years with the Secretary-General and providing for provisional application, including treaty actions related thereto. It is interesting to note that a large part of the registered actions took place subsequently to the entry into force of the 1969 Vienna Convention.

The Nordic countries welcome the new proposal for a guideline 10 on internal law and the observation of the provisional application of all or part of a treaty, presented by the Rapporteur. We also welcome the revised versions of the earlier guidelines, now also presented by the Drafting Committee. We are looking forward to the outcome of the next session of the Commission, during which it is due to take action on the draft guidelines and their commentaries. As noted before by the Nordic countries, draft guidelines have potential to serve as a practical tool for States and international organizations.

The Nordic countries wish to express their support for the continuing work of the

Rapporteur on this subject and welcome the planning for the future work as stated by the Rapporteur, including the plans to analyse the provisional application of treaties that enshrine rights of individuals and the plans to propose some model clauses.

We have earlier suggested that it might be useful if the Commission could develop model clauses on provisional application. 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 for bringing the treaty into effect earlier. Model clauses may make it easier to resort to provisional application. We recognize however that this could be challenging due to the differences between national legal systems, as the Rapporteur has pointed out earlier.

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

10. Austria

The Austrian delegation wishes to congratulate Special Rapporteur Juan Manuel Gómez Robledo for his work on the topic "Provisional application of treaties·, and, in particular, for his fourth report on this topic.

As regards the Commission's debate, my delegation would like to make the following comments:

In respect of reservations, the Austrian delegation shares the approach that reservations can be made also to provisionally applied treaties.

With regard to the new draft guideline la, my delegation is happy with the current implicit and explicit references to articles 27 and 46 of the Vienna Convention on the Law of Treaties.

However, it considers further elaboration on the problem of valid consent important. The question of internal, mostly constitutional law prerequisites for the provisional application of treaties is one of the most important areas in this field of treaty law.

As already stated last year, my delegation concurs with the underlying notion that once a state has committed itself internationally to the provisional application of a treaty, it cannot avoid its obligations thereunder. However, whether or not a commitment by a state to provisionally apply a treaty can be made depends not only on the provisions of the treaty, but also on the state's internal law. While this notion may seem implicit in the reference to article 46 of the Vienna Convention in the new draft guideline la, a more explicit confirmation, at least in the commentary, would be useful. It would also underline the link between provisional application and its democratic legitimation according to the internal law of each individual state.

11. Australia

Australia welcomes the Commission's work in relation to the provisional application of treaties. This is a topic of considerable importance to both the theory and practice of international law.

As noted by the Special Rapporteur, Mr Juan Manuel Gomez-Robledo, the issue of provisional application is relatively recent, and would greatly benefit from increased clarity.

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

It is clear that the provisional application of treaties or of certain treaty obligations is permitted by article 25 of the Vienna Convention on the Law of Treaties.

There are a number of practical reasons why States may want treaty obligations to apply prior to entry into force. Formal treaty action in domestic systems can take time.

Provisional application may be necessary to respond to an international crisis or to ensure the smooth transition of successive treaty regimes. For example, the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, was provisionally applied to ensure it applied at the time of entry into force of the 1982 Convention on the Law of the Sea. Similarly, aviation law agreements can require provisional application to ensure the continuity of commercial and technical standards relating to air services.

Concerning the form of the Commission's final outcome on this topic, Australia supports the development of guidelines, though would similarly support the development of model clauses. Such guidelines or model clauses could provide States with significant useful guidance, without impinging on the relevant domestic and constitutional requirements of States.

In developing these guidelines, the Commission should be guided by the practice of States during the negotiation, implementation and interpretation of treaties being provisionally applied. In examining this practice, Australia suggests that 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.

Australia appreciates that there is a scarcity or inaccessibility of State practice, which has meant that the Special Rapporteur's fourth report necessarily engages in analysis by analogy. Australia therefore encourages States to engage with the Commission's requests for information in order to provide a more representative sample of bilateral and multilateral treaties from various regions. Australia also supports the Commission's decision to request that the Secretariat provide a sample of relevant treaties deposited over the last 20 years, to serve as a basis for studying provisional application clauses and the actions of States in respect of provisional application.

Australia supports the conclusion, absent any clear prohibition in the treaty itself, that nothing prevents a State from formulating reservations as from the time of its agreement to the provisional application of a treaty. However, that situation should be distinguished from one in which a treaty expressly allows a State to make a declaration excluding or limiting the treaty's provisional application. The treaty provisions extracted by the Special Rapporteur at paragraphs 29 to 31 of the fourth report fall into this second category. Declarations made by States under these types of express provisions are not reservations to the treaty itself. Rather, they are declarations of the State's interpretation of the scope of any agreement on provisional application.

Australia would welcome clarification on this issue and the exploration of further relevant examples of State practice.

In terms of draft guideline 10, Australia recognises that the guideline is based on article 27 of the Vienna Convention on the Law of Treaties. Australia agrees that where a State has consented to the provisional application of treaty obligations, that State should not be able to invoke its internal law as justification for a failure to meet the international obligation.

However, Australia welcomes the Special Rapporteur's acknowledgement that this situation is different from the permissible case of States limiting the provisional application of treaties by reference to their internal law. Australia would support either the expansion of draft guideline 10, or the development of separate guidelines or model clauses to cover that latter situation.

12. Singapore

Turning to the topic of 'Provisional application of treaties', Singapore continues to welcome the Commission's attention to this important and practical topic. We thank the Special Rapporteur for his fourth report. In particular, we commend the Special Rapporteur on his particular effort to engage with the views of States, and on his collaboration with the Treaty Section of the UN Office of Legal Affairs in verifying state practice. This is a critical aspect of the Commission's work on this topic.

As a general observation, my delegation agrees with the view expressed in the Commission's report that more examples are needed to substantiate the conclusions supporting the draft guidelines provisionally adopted to date. This is also the case with draft guideline 10, which we understand was sent to the Drafting Committee at the end of the 68th session.

In this respect, we were struck by the relative absence of examples from Asia or the members States of the Association of Southeast Asian Nations (ASEAN). My delegation

has some sympathy for the view, expressed by the Special Rapporteur, that it is difficult to obtain the relevant information. There may, however, be some utility in exploring partnerships with institutions in Asia that have undertaken regional studies of treaty practice. One example is the Centre for International Law at the National University of Singapore. To assist the Commission, my delegation also undertakes to provide a written response concerning Singapore state practice within the stipulated deadline.

In line with these comments, my delegation looks forward to studying the Secretariat's memorandum analysing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last twenty years with the Secretary-General, which provide for provisional application, including treaty actions related thereto. We also take this opportunity to acknowledge the invaluable assistance of the Secretariat in supporting this important work.

My delegation has three further specific comments on the topic. First concerning reservations, my delegation agrees with those members of the Commission who expressed the view that some further work is required on the relationship between provisional application and reservations. In particular, we would be interested in the Commission's views on the relationship between provisional application and those guidelines of the Guide to Practice on reservations to treaties which have been specifically highlighted at paragraph 275 of A./71/10.

Secondly, concerning invalidity of treaties, we agree that some further work is also required in this regard. In particular, we think there is merit in distinguishing between the three situations described at paragraph 276 of A/71/10. We suggest that this analysis be kept in mind when the Drafting Committee examines draft guideline 10 at the 69th session.

Thirdly, concerning future work, while we support the proposition that the Commission should generally work efficiently and with dispatch, we are of the view that some further analysis of state practice is required before the Commission can conclude work on this topic. As such, we do not support the preparation of model clauses at this time. We also do not support the examination of the question of application of treaties that enshrine the rights of individuals, as we consider that the rules concerning provisional application will be the same unless separately and explicitly provided for in the relevant treaty.

As ever, Singapore looks forward to continuing our engagement with the Commission in the course of its work on these very important issues.

13. El Salvador

Finallzamos nuestra intervencion refiriendonos ai tema de la "Aplicadon Provisional de los Tratados". En particular, agradecemos al Relator Especial, Sr. Juan Manuel Gomez Robledo, por su cuarto inibrme y su respectiva adicion, a quien expresarnos nuestro reconocimiento por la valiosa labor realizada.

Mi delegacion atribuye especial importancia al estudio que se ha realizado sobre la relacion de la aplicadon provisional con otras disposiciones de la Convencidn de Viena de 1969, en particular con las disposiciones sobre las reservas, nulidad y terminacion de los contratos. Sin embargo, tambMn compartimos las inquietudes de algunos miembros de la Comision respecto a las conclusiones que poddan haber sido alcanzadas por analogia, en el sentido de aplicar automaticamente el regimen general a la aplicadon provisional de los tratados.

Consideramos que, algunas cuestiones sobre el derecho de los tratados, no requieren ser abordadas necesariamente a la luz de la aplicad6n provisional. En tal sentido, la ausencia de acuerdos o casos practicos, podria llevar a la conclusion de que no existe necesidad de abordarlo en el proyecto respective.

En todo caso, reiteramos nuestro apoyo al analisis detallado de este importante tema y a la necesidad de brindar claridad sobre el funcionamiento de la aplicadon provisional de los tratados.

28th meeting, 1 November 2016, p.m. (A/C.6/71/SR.28)

14. Sudan (Arabic only)

15. Russian Federation

We would like to start our comments on the topic of "Provisional application of treaties" by thanking the Commission and first of all the Special Rapporteur Mr. Juan Manuel Gomez-Robledo for their work. This topic has a great practical significance which has been confirmed in the comments of the States. From the methodological viewpoint the work of the Commission this year has been slightly complicated by the need to examine, at the request of States, some rather different levels of provisional application. We will try to make briefly some points on the issues that are the most important in our view.

Taking into account the consistent position of the Commission that the provisional application creates the same legal consequences as in the case of the entry of the treaty into force, we proceed from the understanding that nothing prevents the State from making reservations at the time when it expresses its consent to the provisional application of the treaty. Moreover, we should like to note that Article 19 of the 1969 Vienna Convention on the Law of Treaties implies the possibility to formulate a reservation at the stage of signing a treaty.

In the context of the analysis of the interrelationship between the regime of provisional application and other provisions the Vienna Convention on the Law of Treaties, we believe that an interesting idea had been expressed during the debates on the applicability of Article 60 to a provisionally applied treaty if it is used as the grounds for suspension or termination of the provisional application of the treaty in the relations between the affected State and the State that breached the treaty, despite the fact that Article 25 generally implies a simplified regime for the termination of the provisional application by sending a notification on the intent to terminate participation in the treaty.

By the way, it would be interesting to learn the ILC's opinion on whether it is possible to terminate the provisional application of the treaty by other ways without indicating the intent of not becoming a party to the treaty, and how, and on what grounds the provisional application can be terminated by the State, for which the treaty entered into force in the relations with the State, for which it has not yet come into force but has been applied provisionally.

The draft guidelines preliminarily adopted by the Commission up to date have been quite consistent with the existing practice. We should note however that most of presented draft

guidelines have been of a rather general character and almost have not added any specifics yet to the 1969 Vienna Convention on the Law of Treaties.

However, the examples provided in the report and during the debate allow us to make a conclusion that there are some urgent issues in this area, which require additional reflection and further examination. In particular, we believe that the restrictive clause and the principles of its formulation and expression are among such issues. We should like to suggest that the Commission should focus its future work precisely on such aspects of the provisional application.

Perhaps, it would be also useful to study the specifics of the provisional application regime for the treaties of different nature (bilateral, multilateral, and multilateral with limited participation).

We welcome the intent of the Special Rapporteur to prepare the model provisions of provisional application. We expect that during this work it would be possible to a certain extent to systematize the relevant practice and its relevant benchmarks.

16. Romania

The delegation of Romania welcomes the continuation of work by the International Law Commission concerning the provisional application of treaties, and appreciates the efforts of the Special Rapporteur in further substantiating his research.

Romania remains very interested in this topic, and reiterates its conviction that it is of great practical significance. Romania is also in agreement with the members of the Commission that more examples of practice are needed in order to substantiate the conclusion drawn. Even if, as stated during last year's intervention, provisional application of treaties is viewed by Romania as an exceptional, and therefore limited, treaty action, for reasons attached primarily to legal certainty, practice has been accumulating over the years. An analysis of this practice should pay particular attention to the nature and characteristics of each treaty. We maintain our previously sent comments on this topic many of which were not taken up in this year's Rapporteur's research. Romania also supports the idea of examining the question of interpretative declarations made by States provisionally applying a treaty, as well as the suggestion to develop an indicative list of model clauses. This delegation looks forward to the next reports and expresses the conviction that they will bring even more clarity on this topic.

17. United Kingdom

Turning to the topic of Provisional application of treaties, the United Kingdom welcomes the fourth report of the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo.

The United Kingdom supports the preparation of draft guidelines on this topic; provisional application is a matter that often arises in practice and on which there is not always clarity.

The United Kingdom was also pleased to note the development of draft guideline 10, concerning the obligation not to invoke internal law as justification for non-compliance with international obligations undertaken by means of the provisional application of all, or part, of a treaty.

The United Kingdom notes the view of the Special Rapporteur in their fourth report that because the provisional application of treaties produces legal effects, reservations may also, in principle, be made by a State as from the time of its agreement to the provisional

application of a treaty. The United Kingdom considers that the interplay between provisional application and the making of reservations would merit further consideration. In the United Kingdom's view, an analysis of the practice of States and international organisations would be of assistance in conducting a full and comprehensive consideration of this issue.

18. Portugal

I will now turn to the topic "Provisional Application of Treaties" included in the programme of work of the ILC in 2012. Let me commend the Special Rapporteur, Ambassador G6mez-Robledo, for the work conducted so far.

It is a topic that Portugal continues to follow with great interest and of important practical value for legal advisors around the world. It is also a topic of considerable political interest, given the increasing need for rapid responses in international relations that are not fully compatible with the sometimes slow process of entry into force of international treaties.

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.

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, including at constitutional level, as it is the case of Portugal, concerning the acceptance of provisional application of treaties.

As we had the occasion to state before, we consider that it would be useful for the ILC to undertake a comparative study of domestic provisions and practice on provisional application. In spite of the fact that we understand the complexities of this endeavor, the practice of States 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.

In our view, the Commission's work has to base itself in this diversity of solutions that exist at the national level. It is certainly useful that States themselves contribute with examples of their practice and domestic regime, but it seems also necessary that the ILC conducts a comparative study of relevant domestic law and State practice with respect to provisional application.

We thus welcome, as a positive step in this direction, the Commission's decision to request the Secretariat to prepare a memorandum analysing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, which provide for provisional application, including treaty actions related thereto.

It would be likewise useful to include in the study the practice of regional international organizations, as suggested by the Special Rapporteur. In this regard, we very much welcome the addendum to the Fourth Report of the Special Rapporteur that contains examples of recent European Union practice on provisional application of agreements with third States. The European Union has an extensive practice of provisional application, which takes into account the different national regimes of its Member States, thus constituting 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.

To conclude, Portugal welcomes in general the text of the Draft Guidelines 1 to 4 and 6 to 9 provisionally adopted by the Drafting Committee. The revised version of these guidelines meets many of the concerns we have expressed before this Committee. As to Draft Guideline 5 regarding the issue of provisional application by unilateral declaration, we believe that a cautious approach is warranted and we look forward to resuming the discussion on this issue next year.

19. Croatia

The second part of my today's intervention concerns "Provisional application of treaties", in regard to which we are thankful to Special Rapporteur Mr. Gómez-Robledo for his work on clarifying this issue. As a State that indeed utilizes the institute of provisional application of treaties, Croatia finds this set of comments and guidelines on how to provisionally apply treaties in practice very useful.

The legal effects of provisional application concern primarily obligations that arise from the principle of pacta sunt servanda, i.e. the duty to perform obligations that stem from such a legal relationship in good faith, including the obligation to refrain from defeating the object and purpose of the treaty. Croatia made observations to this effect last year, so I will not repeat them today. However, we would – in that sense – welcome supplementing draft guideline 2 to reiterate that the practice of provisional application of treaties needs to adhere not only to the "Vienna Convention" and "other rules of international law", but also to the principles of international law. The reference to principles of international law is quite frequent in this report and adding it at the end of the sentence which is now draft guideline 2 would do justice to that fact.

The duty to perform – in good faith – obligations that stem from such a legal relationship, no matter its provisional nature, is crucial to understand the possibility that a State's breach of this relationship, as discussed in Mr. Gómez-Robledo's report, can actually give rise to the other State's decision to terminate or suspend the provisional application of a treaty. Croatia agrees that Article 60 of the Vienna Convention on the Law of Treaties is – mutatis mutandis – applicable in its entirety in the context of provisional application of treaties.

As for why States choose to put an end to provisional application in case of a material breach of a Treaty being provisionally applied, and in particular having in mind Article 60 of the VCLT, Croatia is in full agreement with Mr. Gómez-Robledo and his remarks in paragraphs 80 and 81. Accordingly, a trivial violation of a provision that is considered essential may constitute a material breach and in assessing the "essentiality" of treaty provisions in context of termination or suspension of the operation of the treaty "account must be taken of the reasons motivating the conclusion of the treaty" and precisely these reasons may constitute an evidence of essentiality. The Vienna Convention and its most authoritative commentators agree that what matters here is what matters to the parties and in that sense; there is no ground for the Report of the International Law Commission to assert otherwise. Croatia notes with regret that this subjective, as well as rather objective component in understanding the concept of material breach and the extent and intensity of its violation was disregarded recently by an ad hoc international tribunal.

20. Spain

Proceeding to Chapter XII, on provisional application of treaties, the Spanish Delegation wishes to express its gratitude to the Special Rapporteur on this matter, Mr Juan Manuel

Gómez-Robledo, for his fourth report to the Commission. We also thank the Commission for its work on this matter.

Our delegation wishes to make several comments on draft guideline 10 ('Internal law and the observation of provisional application of all or part of a treaty'), included in the Rapporteur's Report.

Firstly, we consider that the title could be reduced to 'Internal law and the observation of provisional application'. This would bring the title into line with those of the other draft guidelines, which merely refer to provisional application, without the words "of a treaty" and certainly not "of all or part of a treaty".

Secondly, the fact that the draft guideline is limited to States is difficult to understand. As is the case of other draft guidelines (such as 6 or 7), international organisations should also be included. Such organisations are not able to cite their internal regulations to exempt themselves from complying with a treaty that has been applied provisionally.

Thirdly, it would be advisable to bring the wording of this draft guideline into line with Article 27 of the Vienna Convention on the Law of Treaties, and also with draft guideline 8 ('Responsibility for breach'). With a wording that would more closely reflect these provisions, the draft guideline could say: "A State or international organization may not invoke the provisions of its internal law as justification for non-compliance with a provisionally applied treaty".

Spain is pleased to note that some of the draft guidelines approved by the Drafting Committee in 2016 (such as 3 and 7) incorporate observations made by the Spanish delegation at last year's Committee. Spain also notes that draft guideline 9 centres on one of the causes for termination of provisional application, namely: notification of intention not to become a party to the treaty in question. We assume that another draft guideline will be formulated, comprising other reasons for termination, and in particular, entry into force of the treaty.

In other considerations, with regard to the Commission's debates, my delegation considers that when addressing the matter of provisional application and reservations, a distinction should be made as to whether the treaty in question has been provisionally applied prior to or after a subject expresses their consent to being bound by said treaty. If a treaty is provisionally applied after being concluded, the reservations shall apply that are set out in the instrument expressing consent to being bound by said treaty. In contrast, if a treaty is provisionally applied prior to being concluded, the following would have to be determined: (i) whether reservations can be formulated; (ii) when such reservations can be formulated: when provisional application is agreed or when a treaty is first applied provisionally; and, (iii) whether such reservations should be confirmed when they are expressed in the consent to be bound, as is the case for reservations formulated at the time of signature, pursuant to Article 23.2 of the Vienna Convention on the Law of Treaties.

The Spanish Delegation still considers that it would be very complicated to include example clauses in the Commission's draft, given the huge potential variety.

Lastly, Spain wishes to reaffirm its confidence that the Commission will address other matters which we consider to be debatable or indeed problematic in relation to provisional application, specifically: May all treaties be applied provisionally, or are there certain treaties—either due to their subject matter or to the potential implications of provisional application—that cannot be applied provisionally? Is provisional application inter partes

possible? Just for States? Is the period of provisional application included in the calculation of the duration of treaties whose period of application is pre-established? If the period of provisional application were to end without the treaty entering into force, would the effects be *ex tunc* or *ex nunc*?

29th meeting, 2 November 2016, a.m. (A/C.6/71/SR.29)

21. Netherlands

With respect to the topic of provisional application of treaties, we express our appreciation to the Special Rapporteur, Mr Juan Manuel Gómez-Robledo for his fourth report.

We have taken note of the debate in the Commission on the methodology of the current work, particularly concerning the question whether not or not to draw conclusions based (exclusively) on analogy. While we acknowledge that drawing conclusions by way of analogy may be useful since Article 25 of the Vienna Convention remains silent on the relationship with other provisions of the Convention, we share the words of caution expressed by members of the Commission that the conclusions arrived at should be supported by underlying State practice.

With respect to the question of reservations and provisional application, the question is whether reservations made at the time of signature, ratification etcetera would also apply when the treaty or any of its provisions are applied provisionally. The Special Rapporteur points out that no treaties provide for the formulation of reservations specifically in relation to provisional application. We would suggest that this is due to the fact that many treaties, including the examples mentioned by the Special Rapporteur, already limit the scope of provisional application to specific provisions.

Similarly, the law of treaties specifies the moment at which States may make reservations: i.e. when signing, ratifying, accepting, approving or acceding, in accordance with Article 19 of the Vienna Convention. My Government would consider that further analysis is required whether a reservation made at this stage is also applicable when the treaty or any of its provisions is applied provisionally. We would therefore welcome further analysis on this, including an analysis of the practice of States.

22. Greece

Turning to the last topic currently on the agenda of the International Law Commission, we would like to express our appreciation to the Special, Juan Manuel Gomez-Robledo, for his fourth report on provisional application of treaties, which continues the analysis of the relationship of provisional application to other provisions of the 1969 Vienna Convention on the Law of Treaties and of the practice of international organizations with regard to provisional application.

We also wish to extend our appreciation to the Drafting Committee for its consideration of the draft guidelines proposed by the Special Rapporteur.

Taking into account that the Commission is expected to take action on the draft guidelines provisionally adopted by the Drafting Committee at its next session, we will restrict at this point our comments to draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty, which is proposed by the Special Rapporteur in his fourth report.

While we agree, in principle, that provisional application should not be invoked by a State as justification for its failure to comply with its treaty obligations, we nevertheless consider that draft conclusion 10 is narrowly formulated, insofar as it does not take due regard of what actually may occur in practice. Indeed, there are situations where recourse to provisional application relies on a treaty provision, which provides that the treaty will be provisionally applied to the extent permitted by domestic law. We, therefore, concur with other members of the Commission having expressed the view that draft guideline 10 needed to be broadened in order to also address such situations, which, as has been rightly pointed out, are different from the impermissible invocation of internal law, as foreseen in Article 27 of the 1969 Vienna Convention.

In a broader context, Greece welcomes the analysis by the Special Rapporteur of other 1969 Vienna Convention provisions of direct relevance to provisional application, based on the suggestions previously made by various delegations. This analysis sets, in our view, the theoretical background against which relevant practice can be properly understood and evaluated.

Having said that, we believe that it is now time for the Commission to undertake a comprehensive study of the practice in relation to provisional application of treaties in order to provide us with more concrete results.

In this respect, we welcome the decision taken by the Commission to request from the Secretariat a memorandum analyzing State practice in respect of treaties deposited or registered with the Secretary General, which provide for provisional application, including treaty action related thereto.

As to the final outcome of the work undertaken by the Commission in this field, we believe that the adoption of concise and practice-oriented draft guidelines, followed by commentaries, as well as model clauses for inclusion in treaties would be of great assistance to States and other international actors engaged in the process of provisional application of treaties.

Finally, Mr. Chairman, I wish to reiterate my country's support for the continuation and the early conclusion of the work on this topic, taking into account that its overall purpose is to provide useful guidance in the course of provisionally applying a treaty and, thus, to promote the stability of treaty relations and the respect for the rule of law.

23. Malaysia

Last but not least, on the topic "Provisional application of treaties", Malaysia commends the efforts of the Special Rapporteur in preparing the fourth report on the "Provisional application of treaties". The fourth 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 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 view on the topic as the foregoing:

- Malaysia notes that the Drafting Committee has adopted on a provisional basis three draft guidelines on the Scope, Purpose and General rule on provisional application of treaties, at its meetings on 29 and 30 July 2015. In addition, the Drafting Committee is considering the proposals for six draft guidelines (draft guidelines 4 to 9) on provisional application of treaties which are currently pending discussion. Malaysia is of the view that due consideration must be given as to the issues of doubts on some parts of the guidelines. The draft guidelines must provide a clear understanding and interpretation as well as taking into account the practice of internal laws of states;
- In this regard, Malaysia would like to raise concern on several issues, among others, on the internal law and Malaysia's practice in signing and ratifying 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 but Parliament may by law confer executive functions on other persons." 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 conclusion of treaties, agreements and conventions with other countries. 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 domestic legal framework to be in place before the treaty is binding upon Malaysia;
- In relation to draft guideline 4, 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 for 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 any ambiguity 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;
- In relation to draft guideline 5, Malaysia notes that the Drafting Committee decided to keep draft guideline 5 in abeyance and to return to it at a later stage;
- In relation to draft guideline 6, a similar provision is stipulated in Article 11 of VCLT whereby Article 11 explains on the methods of giving consent to be bound by a treaty. Consent can either be given by way of signature, ratification, acceptance, approval or accession or by any other means if so agreed. In principle, Malaysia agrees that a treaty will come into force by way of such methods. However, Malaysia takes a non-committal

position as the consent to be bound by a treaty is subjected 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 provisional application of treaty especially on the rights and obligations of States who agree to apply a treaty provisionally. Therefore, Malaysia proposes that draft guideline 6 should be further deliberated by taking into consideration the rights and obligations of States which arise in a provisionally applied treaty;

- Further, in relation to draft guideline 7, Malaysia is of the view that this draft guideline is to be read together with draft guideline 6 as they are interrelated. Malaysia's position on this point is that a provisionally applied treaty is only morally and politically binding. However, Malaysia is also 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 shall be within the context of Article 18 of the VCLT and shall 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 internal law and procedural law in signing and ratifying treaties as explained in para 1.2 above, Malaysia is of the view that extreme caution should be exercised in determining whether draft guideline 7 is acceptable as it has significant legal obligation;
- As for draft guideline 8, Malaysia is of the view that the proposed draft guideline 8 is vague as the term "international responsibility" was not explained in the draft guideline. Furthermore, draft guideline 8 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, the provisional application of a treaty is not *pari materia* with a full pledge treaty. 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 this issue of international responsibility of a State;
- As for draft guideline 9, Malaysia is mainly guided by paragraph (2) of Article 25 of the VCLT on the termination of treaty. Malaysia is also of the view that this issue must be further addressed by the Special Rapporteur and that the termination of the provisional application and its obligations must be clearly stated to prevent any issues of doubts;
- Malaysia notes that the new draft guideline 10 submitted by the Special Rapporteur to the Committee is derived from the principle enshrined under Article 27 of the VCLT and should be without prejudice to Article 46 of the VCLT. In view of this, Malaysia observes that Article 27 of the VCLT is with regard to observance of treaties and refers to a different aspect from that referred to in Article 46 which is in respect of provisions of internal law concerning competence to conclude treaties. In relation to Malaysia's domestic law, there is no any express provision that prohibits or allows for the provisional application of treaties. In the context of Malaysia's experience and practice, signing of treaty does not necessarily create a legal obligation when the treaty further requires ratification, accession, approval or acceptance processes, unless the treaty otherwise provides. However, it is to be pointed out that each State must ensure that the manifestation of its consent to apply a treaty provisionally is compatible with its internal law. If a State is to adhere to a basic criterion of a legal certainty, such determination would be made beforehand, and not at a later stage. 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

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

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

24. Vietnam

On the final topic of Provisional application of treaties, we would first like to thank Mr. Juan Manuel Gomez-Robledo for his fourth report on the subject matter, which builds on the discussion of previous sessions and continues the analysis of the relationship of provisional application to other provisions of the 1969 Vienna Convention on the Law of Treaties and practice of international organizations with regards to provisional application.

First, we concur with the overall idea of draft guideline 8, which states that the provisional application of a treaty produces legal effects and is capable of giving rise to legal obligations and that the breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied entails international responsibility. However, we believe that the extent of legal consequences arising out of a breach of a treaty being provisionally applied requires further study.

Particularly, if the responsibility arising from a breach of a treaty that is provisionally applied equates to that where the treaty in question is in full effect, it will render States unable to invoke national law to justify the breach. This, in tum, will have a negative impact on the desirability to ratify or approve an international treaty. Therefore, we welcome the Commission’s decision to request from the Secretariat a memorandum analysing State practice in respect of treaties deposited or registered in the last 20 years with the Secretary-General, which provide for provisional application, including treaty actions related thereto.

Second, as regards the forms through which provisional application of a treaty may be applied, provided for under draft guideline 4, we are of the view that provisional application of a treaty should first and foremost be decided by the States concerned themselves. Otherwise, any other form for decision of provisional application of treaties would be a depart from Article 25 of the 1969 Vienna Convention. Furthenl1ore, the agreement through a resolution adopted by an international organization or at an intergovernmental conference may lead to cases where it unnecessarily infringes upon the sovereignty of States. Therefore, further studies should be given to this matter, as well as international practice In this regard.

25. Slovenia

26. Turkey

In our second and last statement under this agenda item we would like to address the topic "Provisional Application of Treaties".

We note the Fourth Report of the Special Rapporteur, Mr. Juan Manuel Gomez Robledo and thank him for his extensive work on this topic. Although Turkish law doesn't allow for provisional application of treaties, we believe that the study undertaken by the Commission, provides a useful source of information and guidance both for States which resort to provisional application, as well as those whose legislation do not permit the provisional application of treaties. Indeed provisional application provides a practical way in cases where it is not desired, for political or technical reasons, to await the completion of long ratification processes, and allows treaty obligations to be swiftly implemented.

In this regard, on draft guideline 7, according to which provisional application of a treaty produces the same legal effects as if the treaty were in force, it would be useful that the issue be dealt more in depth.

We concur with the idea that a comparative analysis of conventional practice would assist in clarifying the matter. Regarding draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty, it is not clear whether the draft guideline refers to the fact that a state may not invoke the provisions of its internal law as justification for its failure to perform a treaty or whether it concerns provisions of internal law regarding the competence to agree to apply a treaty provisionally, as has been said by some members of the Commission. We believe that there is a need to clarify this issue, taking into account that internal law of many countries, including Turkey, does not provide for provisional application of treaties.

In light of the limited recourse to the method of provisional application, we positively consider the proposal by the Special Rapporteur to prepare model clauses, which could constitute a useful reference.

Lastly, on, the Special Rapporteur's suggestion to revise the regulations on registration adopted by the United Nations General Assembly in 1946, in order to adapt them to the current state of practice relating to the provisional application of treaties, the Turkish delegation believes that, in any case, it would not be appropriate to use the Vienna Convention on the Law of Treaties as sole reference, not all member states being party to it. Moreover given that only a very small percentage of all treaties registered with the United Nations since 1945 have been subject to provisional application, we are not convinced of the necessity of such a study. This suggestion should be discussed once the work of the Commission is completed.

27. USA

Mr. Chairman, turning to the topic of “Provisional application of treaties,” the United States thanks the Special Rapporteur, Juan Manuel Gómez-Robledo, for his fourth report. We also thank the Drafting Committee for its contributions in the Draft Guidelines it has provisionally adopted.

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 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 approach all of the ILC's work on this topic from that perspective. With that in mind, we are generally in agreement with the text of most of the Draft Guidelines as provisionally adopted by the Drafting Committee.

One exception is Draft Guideline 4, entitled "Form." As we have noted previously, we are concerned that Draft Guideline 4 as provisionally adopted may suggest that a State's legal obligations under provisional application may be incurred through some method other than the consent of all the States concerned, contrary to Article 25 of the Vienna Convention on the Law of Treaties. We believe that it is important that that Guideline be reworked to avoid that interpretation, perhaps rephrasing subparagraph (b) to read: "any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, that reflect the consent of all the States concerned."

We also hope to see Draft Guideline 3 as provisionally adopted and Draft Guideline 10 as proposed by the Special Rapporteur clarified to make clear that a State may provisionally apply a treaty pending its entry into force for that State, even if it has entered into force for other States, and that a State may agree to provisionally apply a treaty only to the extent it is consistent with its national law.

In addition, we are continuing to consider Draft Guideline 7, which provides that the provisional application of a treaty or part of a treaty "produces the same legal effects as if the treaty were in force" unless otherwise agreed. While we believe that is largely correct, one way in which this is not precisely true is that, as we have noted, provisional application can be more easily terminated. Moreover, we are studying whether – as suggested in the Special Rapporteur's report and by some members of the Commission – Draft Guideline 7 means that that all or many of the rules set forth in the Vienna Convention on the Law of Treaties apply to the provisional application of a treaty as they would if the treaty were in force. This is a fascinating and complicated issue to which we will be giving additional thought as the Commission's work on this topic progresses.

With regard to future work of the Special Rapporteur and the ILC on this topic, we continue to 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. However, we are not convinced of the merits of specifically studying the provisional application of treaties that address the rights of individuals, as we do not believe that the rules regarding provisional application of treaties differ based on the subject matter of the instrument.

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

28. Mexico

La delegación de México agradece la labor del Relator Especial, Juan Manuel Gómez Robledo, sobre el tema de aplicación provisional de los tratados. Destaca la visión pragmática que le ha brindado a la consideración del tema, enfocando los resultados a la

emisión de directrices concretas que sirvan de referencia para los operadores jurídicos de los Estados y las organizaciones internacionales.

Teniendo en cuenta el artículo 25 de la Convención de Viena sobre el Derecho de los Tratados, mi delegación considera que la aplicación provisional necesariamente debe interpretarse de manera sistemática con dicho instrumento, por lo que no resulta conveniente analizarlo como un régimen auto-contenido. Conforme al criterio anterior, reconocemos el gran valor que tiene el análisis de la aplicación provisional en relación con otras disposiciones específicas de la Convención de Viena que pudiesen resultar aplicables.

En relación con el tema de las reservas en particular, de conformidad con la Convención de Viena, el Estado está en facultad de formularlas mediante cualquier manifestación de voluntad a través del cual el tratado adquiera efectos jurídicos, en tanto así lo permita el tratado. En ese sentido, siendo la determinación de aplicar provisionalmente un tratado una manifestación de voluntad para que el instrumento produzca efectos jurídicos, por analogía también se podría formular reservas en dicho contexto.

En casos en los que la aplicación provisional se activa mediante una declaración unilateral, toda vez que ésta se puede referir a la aceptación parcial del tratado, siempre y cuando ello no vaya en contra de su objeto y fin, es difícil prever una reserva en estos casos.

En todo caso, sería interesante analizar el mecanismo de objeción a las reservas que deban hacer otros Estados que hayan aceptado también la aplicación provisional del tratado sobre el que se ha formulado la reserva.

Coincidimos con el relator que una causal de terminación o suspensión de aplicación de un tratado aplicado provisionalmente es la violación del mismo por una contraparte con quien se haya acordado la aplicación provisional. En ese sentido, se considera que por analogía también es aplicable el artículo 60 de la Convención de Viena.

Considerando lo expresado tanto en el Tercer como en el Cuarto Informe, así como la interrelación con la nulidad y el artículo 46 de la Convención de Viena, mi delegación desea expresar que comparte plenamente el contenido del proyecto de directriz 10.

En cuanto a los temas pendientes abordados en informes anteriores, mi delegación considera deseable contar con directrices que señalen la relación de las declaraciones unilaterales respecto de la aplicación provisional de un tratado así como la relación de esta figura con el derecho interno. Asimismo, la delimitación de los alcances y los efectos jurídicos de los términos “aplicación provisional” y “entrada en vigor provisional” podría aclararse en los comentarios que se elaborarán sobre las directrices.

En relación con la práctica de varias organizaciones internacionales a nivel universal y regional, agradecemos el amplio esfuerzo del Relator Especial en la investigación y sistematización de la información obtenida. Sería pertinente la inclusión de la práctica de otras organizaciones internacionales sólo con la finalidad de contar con un panorama más amplio del tema, en la media en la que esto sea posible.

En lo que respecta a la práctica del depósito y registro que lleva a cabo Naciones Unidas, tomamos nota con mucho interés que la Secretaría de la ONU ha registrado un total de 1,733 tratados que prevén la aplicación provisional, y que sólo entre 1945 y 2015 se han registrado 1,349 acciones relacionadas con la aplicación provisional de tratados. Estas cifras muestran, por un lado, el gran volumen que ha habido en la práctica del recurso a esta figura y, por el otro, la importancia de abordar este tema para brindar claridad respecto de los

efectos jurídicos de todas estas acciones.

Igualmente, tomamos nota del hecho de que actualmente no existe un mecanismo de búsqueda mediante el cual un usuario externo de la Sección de Tratados pueda identificar el universo de 1,733 tratados que prevén la aplicación provisional, y de que las 13 categorías de búsqueda relacionadas con acciones de aplicación provisional con las que actualmente cuenta la Secretaría no reflejan una buena sistematización de la práctica en la materia.

Entendemos que la Secretaría actúa con base en lo establecido en el Reglamento para el Registro de tratados, el cual fue adoptado por la Asamblea General en 1946, es decir, antes del régimen establecido por la Convención de Viena sobre el Derecho de los Tratados. Lo mismo sucede con el repertorio de la práctica de 1955, y con el Manual de Tratados, el cual, al ser elaborado por la Sección de Tratados de la Secretaría, se ajusta a los lineamientos que ésta tiene para actuar, es decir: se ajusta al régimen establecido por el Reglamento desde 1946.

En ese contexto, sería altamente recomendable que la Asamblea General considere la revisión del Reglamento de Registro a fin de adecuar su contenido a la práctica vigente en materia de tratados y, en especial, de aplicación provisional.

Finalmente, encomiamos la propuesta del Relator Especial de elaborar un paquete de cláusulas modelo en materia de aplicación provisional, que serían de utilidad para los Estados al momento de negociar tratados internacionales.

29. Ireland

Turning to the topic "Provisional application of treaties", my delegation thanks the Special Rapporteur, Mr Juan Manuel Gomez-Robledo, for his fourth report, and the Drafting Committee for its careful consideration of draft guidelines 1-3 and 4-9, which have beer: provisionally adopted by the Committee. Ireland aligns itself with the statement delivered by the European Union, and would like to offer the following additional observations.

At our last session in 2015, Ireland was amongst a number of delegations which urged 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. While taking note of draft guideline 7 and the statement of the Chair of the Drafting Committee in relation thereto, we continue to be of the view that further elaboration of this question, based upon a detailed review of state practice, would be beneficial to the Sixth Committee's consideration of the topic as a whole.

In this connection, it is with considerable interest that Ireland notes the contribution of the

Treaty Section of the UN Office of Legal Affairs regarding the approach of the Secretariat to the provisional application of treaties in the context of its registration functions and the depositary functions of the Secretary-General. The statistics alone provide a valuable insight

-1,349 provisional application actions registered between 1946 and 2015, with 1,733 treaties registered subject to provisional application. The treatment of provisional application in the

1946 Regulations on Registration and Publication of Treaties, the Repertory of Practice of the United Nations, the Treaty Handbook, the Handbook on Final Clauses of Multilateral Treaties and the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties all appear, to my delegation, to be pertinent to an examination of this topic, and so worthy of further consideration. Such consideration might include an examination of issues such as the breakdown of treaties registered subject to provisional application when divided

as between bilateral and multilateral agreements; whether the practice of the Treaty Section with regard to displaying information on provisional application varies depending on whether provisional application is provided for in the agreement itself or has been agreed by some other means and if agreed by some other means, what information is required? Another issue that might be considered is the effect of Article 102, paragraph (2), of the UN Charter with regard to a provisionally applied treaty that has not been registered with the UN.

We very much welcome, therefore, the decision to request the Secretariat to prepare a memorandum analysing state practice in respect of treaties which provide for provisional application deposited or registered with the Secretary-General in the last 20 years, and look forward to reflecting on the further insights that this will surely provide.

30. Iran

Now turning to the topic of "Provisional application of treaties", my delegation would like to express its appreciation to the Special Rapporteur, Mr. Juan Manuel Gomez Robledo for his fourth report on the topic and the addendum thereto. Thanks should also go to the Secretariat for the preparation of the addendum containing examples of recent European Union practice on provisional application of agreements with third States. My delegation supports and shares the idea that provisional application of a treaty may accelerate and facilitate its implementation. We understand, however, that scarcity of practice and lack of adequate domestic legislation further hinders the work of the Special Rapporteur. This is especially remarkable in that Article 25 of the 1969 Vienna Convention on the Law of Treaties offers an example of an ILC draft proposal which underwent considerable change at the Vienna Conference and the final result leaves States free to disregard the possibilities currently offered by Article 25, if on constitutional grounds they cannot accept to be bound provisionally.

Also, since decision and consent of the State exercising its right to provisionally apply the treaty remains central to the concept, as it is evidenced by the wording provided by Article 25, nothing precludes exercise of application of reservation to the treaty at the time of ratification, acceptance, approval or accession. In this context, while we share the view that the legal regime and modalities for termination and suspension of provisional application of a treaty need further clarification, my delegation expresses its doubt as to the point that all the elements of the Vienna Convention could be inferred for provisional application of treaties by way of analogy.

As a final remark, my delegation expresses its doubt whether State practice approves the full implementation of international responsibility regime for breach of an obligation arising under a treaty or part of a treaty that is provisionally applied regardless of the content of the provisions being applied.

This is especially significant once one takes into account the raison d'etre of the legal institution of “provisional application of treaties” which is to ensure a wider acceptance of the treaty in question by States vis-à-vis to whom the treaty has not yet entered into force. As an example thereof, one may refer to article 18 of the Convention on Cluster Munitions, which upon recourse by States, facilitates and further accelerates a wider accession to the treaty by signatory States. Imposing a strict interpretation of rules of international responsibility on provisional application of treaties, by way of analogy, could create

reluctance to recourse to provisional application by some signatory States, who might, otherwise, prefer to provisionally apply the treaty in good faith and on a voluntary basis. To conclude, my delegation continues to attach high importance to the topic and will express its further comments in due time.

31. Israel

Regarding the "Provisional Application of Treaties", Israel commends the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, for his valuable work on the fourth report on this matter.

As part of the discussion on state practice of provisional application of treaties, and in continuation to the Special Rapporteur's analysis of the national practice of states in the third and fourth report, Israel wishes to clarify its practice on this issue. Israel's de facto practice does not generally permit the provisional application of treaties, however there are exceptional situations in which it may be permitted. These situations include cases in which the internal requirements for the approval of the treaty are lengthy or where there is an urgent need for the application of the treaty, such as treaties of great political or economic significance.

Even in the rare instances in which provisional application is implemented, such a step is subject to numerous procedural conditions. Israel does not provisionally apply treaties unless it has previously completed its internal legal procedures necessary for the entry of the treaty into force. For example, the provisional application of the treaty is done through a specific decision by the Government of the State of Israel that approves the treaty itself, as well as its provisional application. Upon submission of such a treaty for Government approval, the explanatory note must include a clear statement that recognizes that the approval of provisional application deviates from general practice, as well as the exceptional circumstances that require a deviation in the specific case. The provisional application will then be carried out in accordance with the mechanism specified in the treaty.

30th meeting, 3 November 2016, a.m. (A/C.6/71/SR.30)

32. Rep. of Korea

Finally, my delegation welcomes the fourth report on the "provisional application of treaties," presented by the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, and appreciates all of his hard work providing valuable analyses on the views expressed by Member States as well as elaborating the relationship of provisional application of a treaty to the other provisions of the Vienna Convention on the Law of Treaties concluded in 1969. In his report, the Special Rapporteur proposed draft guideline 10 on "internal law and the observation of provisional application of all or part of a treaty." My delegation believes that the proposed draft guidelines may serve as a useful point of reference in domestic application of a treaty. Nonetheless, my delegation is of the view that the insertion of draft guideline 10 in the body of the final draft guidelines ought to be in line with the agreement reached on the choice of subtle language comprising the current articles 27 and 46 of the 1969 Vienna Convention and likewise checked against the will of the conference of participant States to conclude that historic convention.

My delegation also welcomes draft guidelines adopted provisionally by the Drafting Committee at the sixty-eighth sessions of the Commission. It does so, despite the opinion of

my delegation that those guidelines might not be applicable to a treaty between States and international organizations or among international organizations.
While acknowledging the paramount importance of the draft guidelines, it must be reiterated that another Vienna Convention concluded in 1986 on the Law of Treaties between States and International Organizations or between International Organizations has not been entered into force yet. My delegation believes therefore that the question of whether it is plausible and appropriate to juxtapose the provisional application of the 1986 Vienna Convention with the same terms of the aforementioned 1969 Vienna Convention may warrant careful consideration.

33. India

We welcome the fourth report of the Special Rapporteur, Juan Manuel Gómez Robledo, on the topic 'provisional application of treaties'. The report continues the analysis of State practice, and considers the relationship of provisional application to other provisions of the 1969 Vienna Convention, as well as the question of provisional application with regard to international organizations. The report has also dealt with the topics in which States expressed interest during the debates in the 70th Session of the General Assembly.
It may be noted that the provisional application of a treaty will depend on the provisions of domestic law, including the manner of expressing consent. India being a dualistic State, treaty will not automatically form part of the domestic law; it applies only as a result of their acceptance by internal procedures. Thus resort to provisional application of treaties ie., treaties being applicable on the States before its entry in to force will go against the principle of dualism.