Sixth Committee Statements
Report of the International Law Commission
on the work of its 69th session

Provisional application of treaties

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18th meeting, 23 October 2017 (A/C.6/72/SR.18)

1. El Salvador (on behalf of CELAC) (Spanish and English)

[Celac] also acknowledge[s] the efforts made in the adoption of the draft guidelines reflecting the progressive development of important themes, such as: (1) Provisional application of treaties; …

2. European Union

It is an honour for the European Union to participate in the discussion on the topic of provisional application of treaties. As stated on previous occasions, the European Union is greatly interested in this topic and it welcomes the work of the ILC and appreciates its efforts to provide clarifications and guidance on this important international law matter as this will contribute to enhancing legal certainty in cases of provisional application of treaties.

In this intervention the European Union will make some comments on the draft set of guidelines and commentaries to them as provisionally adopted by the ILC and will make some remarks on the Memorandum of the Secretariat of 24 March 2017 relating to this topic.

The European Union notes that the ILC has decided to enlarge the scope of the draft guidelines to include also treaties entered into by international organisations and that the provisionally adopted draft guidelines and the commentaries to them take account and reflect this enlarged scope. The European Union welcomes that the approach followed by the ILC was to keep the inherent flexibility of provisional application of treaties, which is something the European Union has been advocating for in its previous interventions on the subject.

In light of the continuing work of the ILC on this topic, the European Union would like to make the following concrete observations on the draft set of guidelines and the commentaries to them for possible further consideration by the ILC:

The European Union notes that the commentaries to draft guideline 4 indicate that when referring to a possible declaration of a State or an international organisation to provisionally apply a treaty it was deliberately avoided to use the term "unilateral" in order not to confuse the rules governing the provisional application of treaties with the legal regime of unilateral acts of States.

While the European Union understands the underlying logic of this approach, it could be noted that a clause on provisional application contained in a treaty is not more than one of the provisions of a treaty not yet in force. Hence, if the consent to be bound by such provision is not given upon signature of the treaty and if the obligation to provisionally apply the treaty does not stem from a separate agreement, a question of the legal basis for provisionally applying the treaty arises. It is in that scenario where the matter of unilateral declarations and their effects could become relevant.

The European Union understands that the matter of unilateral declarations has been subject to extensive discussions in the Drafting Committee. However, the

European Union is of the view that this subject has not been sufficiently clarified in the commentaries to draft guideline 4. In that respect, the European Union invites the ILC to consider further elaborating on this matter in the commentaries to draft guideline 4 or at another place, which the ILC might find appropriate. The European Union is of the view that a clear identification of all the possible scenarios and the sources of the obligation to provisionally apply a treaty would contribute to enhancing the integrity and coherence of the international legal order.

In the same vein, the European Union welcomes the efforts of the ILC directed at clarifying the relationship between provisional application and other provisions of the 1969 Vienna Convention. The European Union notes that the ILC is of the view that provisional application is not subject to the same rules of the law of treaties provided for in Part V, section 3 of the 1969 Vienna Convention (point 5 of the commentary to draft guideline 6). As evident from the intervention of last year, the position of the European Union on the applicability of Article 60 of the Vienna Convention to provisionally applied treaties differs from the one taken by the ILC.

It is the understanding of the European Union that the ILC relies exclusively on the regime for termination of provisional application provided for in Article 25, paragraph 2 of the 1969 Vienna Convention. However, the said Article, first, does not explicitly provide for the possibility of terminating provisional application due to material breach of the treaty that is been provisionally applied. Although this could, of course, be agreed by the Parties, in practice situations exist where this is not the case. Under this scenario, the aggrieved Party will be left with only one option for terminating the provisional application, i.e. to declare its intention not to become a Party to the treaty. In the view of the European Union, this only option available may in some cases be considered a disproportioned outcome. It is therefore suggested to rely on the principle, applied by analogy, contained in Article 60 of the 1969 Vienna Convention for terminating the provisional application. While Article 60 of the 1969 Vienna Convention is not directly applicable to the case at hand, it may contain useful guidance in resolving this practical problem.

Second, the abovementioned disproportionality is further demonstrated by the fact that Article 25, paragraph 2 of the 1969 Vienna Convention does not provide at all for the possibility of suspending provisional application. As in the case of termination, it will be to the benefit of all States and international organisations if the ILC provides clarity on rules of international law that at their face value appear to limit or exclude the possibility of suspending provisional application on the basis of Article 60 of the 1969 Vienna Convention.

The European Union considers that the matter of legal effects of provisional application is essential for understanding the scope of the figure of provisional application and invites the ILC to further develop the commentaries to draft guideline 6 also in that respect in order to provide more clarity on this important question.

The European Union welcomes the decision of the ILC to further clarify the effects of reliance on and references to internal law within the context of a provisional application of treaties and the European Union is of the view that guidelines 9 to 11 are unobjectionable.

References to internal law in the context of provisional application are far from being unusual and often touch on sensitive aspects related to constitutional law and they are frequently used by the European Union its own bilateral treaty practice.

With regard to draft guideline 11 relating to the right of a State or international organisation to agree to provisional application with limitations deriving from internal law of a State or the rules of the organisation, the European Union could mention that in its bilateral treaty practice it often exercises this right, in particular in cases of mixed agreements, i.e. agreements concluded by the European Union and its Member States, on the one part, and a third party, on the other part. The European Union takes the opportunity to refer to some recent examples demonstrating that:

Article 59(2) of the Cooperation Agreement on Partnership and Development between the European Union and its Member State, of the one part, and the Islamic Republic of Afghanistan, of the other part, provides that "(…) *the Union and Afghanistan agree to provisionally apply this Agreement in part, as specified by the Union, as set out in paragraph 3, and in accordance with their respective internal procedures and legislation, as applicable*". According to this provision it is up to the European Union to define the parts of the treaty to be provisionally applied. This was done by the respective internal act of the Union, namely Council Decision (EU) 2017/434 of 13 February 2017 on the signing and provisional application of the Agreement, which, first, in whereas clause 5 states that "… *the provisional application of parts of the Agreement between the Union and the Islamic Republic of Afghanistan are without prejudice to the allocation of competences between the Union and its Member States in accordance with the Treaties*". Second, in its Article 3 it provides that "… *the following parts of the Agreement shall be provisionally applied the Union and the Islamic Republic of Afghanistan, but only to the extent that they cover matters falling within the Union's competence, including matters falling within the Union's competence to define and implement a common foreign and security policy*."

Provisions along the same lines could be found in also in Article 86(3) of Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part, and in the respective Council Decision (EU) 2016/2232 of 6 December 2016 on signing and provisional application of this Agreement.

Another example is Article 19(4) of the Agreement between the European Union and the Kingdom of Norway on supplementary rules in relation to the instrument for financial support for external borders and visa, as part of the Internal Security Fund for the period 2014-2020, which reads: "*Except for Article 5, the Parties shall apply this Agreement provisionally as from the day following that of its signature, without prejudice to constitutional requirements*."

Before concluding, the European Union would like to make some remarks on the Memorandum of the Secretariat of 24 March 2017.

a. In its last year's statement the European Union expressed its views on the priorities to be tackled by the future analysis of the Secretariat, and is pleased to see that its suggestions have been taken into account when structuring the Memorandum. The examination of the commencement, scope

and termination of provisional application, as well as the analysis of the legal basis for provisional application of in both bilateral and multilateral agreements contained in the Memorandum is much appreciated and deserves careful consideration.

At this stage the European Union would like to make comments on the Memorandum with regard to mixed agreements of the European Union. The Memorandum states that these agreements "share certain structural characteristics with bilateral and multilateral treaties, particularly those multilateral treaties with limited membership" (see point 5 of the Memorandum). It subsequently refers to these agreements under headings devoted to multilateral agreements (see point 46). Mixed agreements are a specific feature of the European Union legal order, having regard to the allocation of competences between the Union and its Member States as contracting parties. Many mixed agreements undertaken by the European Union and its Member States, of the one part, and a State/international organisation, of the other part have characteristics of bilateral agreements. Some mixed agreements have characteristics of multilateral agreements because of their specific aim, content and context.

3. Sweden (on behalf of Nordic Countries)

Turning next to the issue of provisional application of treaties, the Nordic countries are pleased to learn about the progress made at this year's session with the provisional adoption by the Commission of eleven draft guidelines and commentaries thereto. They appear to reflect well our earlier comments and observations. We continue to support the efforts of the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, and the Commission on this topic. While it is clear that domestic legislation plays an important role in the context of provisional application of treaties, the topic also presents a number of questions of an international law character that, in our view, merit consideration.

The Nordic countries welcome the memorandum by the Secretariat reviewing State practice in respect of treaties that have been deposited or registered in the last 20 years with the Secretary-General and that provide for provisional application, as well as treaty actions related thereto. We look forward to the Commission's consideration of the memorandum at its next session.

The Nordic countries have earlier suggested that it might be useful if the Commission could develop model clauses on provisional application. At the same time, we have acknowledged the challenges involved due to the diversity of the national legal systems. However, in some cases provisional application may provide a suitable instrument for bringing a treaty into effect sooner than the actual entry into force. In this regard, model clauses may be of assistance. We are therefore happy to discover from the Commission's report that, apart from additional draft guidelines, the Special Rapporteur aims to propose model clauses in his report to the next session of the Commission.

Similarly, we are delighted to note that the Commission has scheduled for 2018 the completion of the draft guidelines on first reading and for 2020 on second reading. The Nordic countries are looking forward to the fifth report of Mr. Gómez-Robledo and the further work of the Commission on this subject.

4. Austria

The Austrian delegation commends the Commission for consolidating its work on the topic "Provisional application of treaties" by provisionally adopting draft guidelines 1 to 11 and the commentaries thereto. We also thank the Special Rapporteur, Mr. Juan Manuel GómezRobledo, for his continued work on this topic.

We welcome draft guideline 4 on 'Form of agreement' indicating the various ways in which provisional application may be agreed upon. However, we wish to point out that the agreement on provisional application by a separate treaty may have more stringent consequences than other forms of agreement on provisional application. This applies in particular to the termination of a provisional application.

We note and accept that draft guideline 6 addresses the "Legal effects of provisional application" which are, as the Commentary explains, the legal effects of the treaty applied provisionally and not the legal effects of the agreement to apply provisionally referred to in draft guideline 4. Draft guideline 6 states, however, that provisional application "produces the same legal effects as if the treaty were in force". While this is acceptable as a principle, it is not a principle without exceptions. The Commentary itself states that "provisional application is not intended to give rise to the whole range of obligations that derive" from a treaty in force, and that "termination and suspension" are not subject to the same rules as those applicable to treaties in force. We agree, but in that case one wonders if the generality in which draft guideline 6 refers to "the same legal effects" is not misleading.

This impression is only partly mitigated by the existence of a separate draft guideline 8 on termination, as this guideline does not address suspension at all and, as far as termination is concerned, only takes up the specific case addressed in Article 25(2) of the Vienna Convention on the Law of Treaties, namely termination of provisional application if a state notifies its intention not to become a party to the treaty. While this is one important example for the termination of provisional application, my delegation believes that other situations where provisional application may be terminated should also be considered in the draft guidelines, thereby going beyond Article 25(2) of the Vienna Convention. For example, it may be necessary, for political reasons, to terminate the provisional application of a treaty without definitely expressing the intention never to become a party to it. The Commission itself seems to be of the view that draft guideline 8 does not indicate the only possibility of a termination of a provisional application, as it mentions in the Commentary that this provision was adopted without prejudice to other methods of terminating provisional application. This should be reflected not only in the Commentary, but also in the text of the guidelines themselves.

We support, wherever possible, a flexible approach to the termination of a provisional application of a treaty. However, where a flexible approach is possible

and more stringent rules do not apply, it would be advisable to provide for notifications and notice periods to ensure a minimum of stability of provisionally applied treaty relations. For this reason we regret the decision of the Commission not to include such safeguards in its current draft guidelines.

5. Australia

Australia also welcomes the Commission's important work on the provisional application of treaties, and the Commission's provisional adoption of draft guidelines 1-11 and commentaries thereto. We thank the Special Rapporteur, Mr Manuel Gomez Robledo, for his extensive work on the topic.

Australia appreciates the Commission's approach to the interaction between States' internal law and provisional application, and the main focus of the Commission on States' obligations on the intemational plane. Australia welcomes the clarification during the drafting process that draft guidelines 9 and 10 are without prejudice to Articles 27 and 46 of the Vienna Convention on the Law of Treaties.

Australia considers it crucial that flexibility be maintained where States agree to provisional application, to enable States themselves to shape the procedural aspects and substantive consequences of such application. In this regard, we welcome draft guideline 11, which specifically acknowledges the rights of contracting States to limit provisional application on the basis of their own internal laws, and draft guidelines 5 and 6, which provide scope for contracting Parties to agree on these issues themselves.

Australia welcomes the Commission's next tranche of work on these important areas of intemational law. We look forward to considering further the draft articles on crimes against humanity now adopted by the Commission and transmitted to States for comment, and to engaging with the next proposed draft guidelines on the provisional application of treaties.

6. Portugal

Portugal would like to commend the Special Rapporteur, Mr. G6mez-Robledo, for the work conducted so far. We also wish to thank the Secretariat for the useful Memorandum on State practice In respect of bilateral and multilateral treaties that provide for provisional application, deposited or registered in the last 20 years with the Secretary-General.

Portugal understands the pressing need for swift and flexible solutions and responses in today's International social relations. This includes the need for an almost Instant production of effects of treaties, especially in cases of multilateral treaties with a high number of contracting parties.

The 1969 and 1986 Vienna Conventions on the Law of Treaties have tried to cope with these concerns. Indeed, the aim of article 25 of the Vienna Conventions

was to allow some degree of flexibility concerning the date of production of effects of treaties.

However, as we have stated in previous occasions, the focus of the Commission's work should be to clarify the legal regime of provisional application contained in the Vienna Conventions, without any temptation of widening its scope.

Moreover, such clarification cannot. In any case, compel States to change their national constitutional practices. It must be recalled that the Vienna Conventions only open the possibility of choice of provisional application - they do not Impose It. The ultimate decision to provisionally apply a Treaty lies with the concerned State or International Organization.

Against this background, Portugal considers that It would be Important that the voluntary nature of the provisional application be further emphasized in the general commentary.

We read with great interest the Memorandum prepared by the Secretariat. We would like to suggest that this information be supplemented by a comparative study of domestic provisions and practice on provisional application, as there is still little information available on national practice.

We understand the complexities and the ambition of this endeavor. However, the practice of State is extremely relevant and there are important differences in domestic law from State to State on the provisional application that cannot be overlooked.

Portugal welcomes, in general, the revised draft of Guidelines 1 to 11. They show a consistent and practical approach to the topic. Nevertheless, we would like to take this opportunity to comment on Guideline 11 dealing with the agreement to provisionai application with limitations deriving from internal law. This is one of the questions States come across more frequently.

We consider that the drafting of the guideline can be improved in order to better reflect the voluntary nature of the mechanism of provisional application. As it stands, a less cautious interpreter can be misled to conclude that provisional application is the default rule, whereas the prerogative of the States to accept it or not is a special or even an exceptional situation. We all know that this is not the case.

This imprecision is somehow softened by point (2) of the Commentary, when it clarifies that 'Ihe guideline recognizes the flexibility of a State or an international organization to agree to the provisional application of a treaty or part of a treaty in such a manner as to guarantee that such an agreement conforms with the limitations derived from their internal provisions". This sentence is the core of Guideline 11 and Portugal considers that this idea should be better reflected on the text of the guideline.

7. Mexico (Spanish only)

En cuanto a la aplicación provisional de los tratados, la delegación de México felicita al Relator Especial, Juan Manuel Gómez Robledo, y a la GDI, por haber adoptado provisionalmente un paquete de once directrices sobre este tema, junto con sus respectivos comentarios.

Estas directrices reflejan una visión pragmática, con un contenido puntual que puede facilitar su uso y consulta por parte de operadores jurídicos de los Estados y las organizaciones internacionales.

Asimismo, los comentarios reflejan el profundo trabajo de investigación realizado sobre este tema a la fecha y recogen también las muy útiles referencias a los distintos tratados multilaterales y bilaterales que reflejan la práctica relevante en la materia. Reconocemos en este sentido las valiosas aportaciones de la Secretaria a través de su último memorando.

Consideramos además que las directrices presentadas son congruentes con las disposiciones de la Convención de Viena sobre el Derecho de los Tratados, así como con otras fuentes relevantes de derecho internacional, y que reflejan de manera clara la base consensual de la aplicación provisional de los tratados. Al mismo tiempo, responden a la práctica seguida a la fecha por los Estados, lo cual ofrece una coherencia de contenido teórico y practico.

Hemos notado que el trabajo de la Comisión recoge varíes de los comentarios y sugerencias planteadas por mi delegación en debates anteriores. Por ejemplo, encomiamos que el comentario sobre la directriz 1 aclare las diferencias jurídicas entre los términos "aplicación provisional" y "entrada en vigor provisional". Igualmente, se han incorporado directrices que aborden tanto la relación de las declaraciones unilaterales respecto de la aplicación provisional de un tratado, así como la relación de esta figura con el derecho interne.

El enfoque adoptado por la Comisión de expandir el alcance de las directrices a la aplicación provisional de tratados también por parte de organizaciones internacionales resulta muy útil y positive. Esto resulta aún más relevante tomando en cuenta el papel cada vez mayor que tienen dichas organizaciones en la vida jurídica internacional.

Tomando en cuenta el avance presentado sobre el tema hasta el momento, confiamos en que el próximo informe del Relator Especial sirva para completar el catálogo de directrices. Quizás resultaría pertinente agregar alguna directriz en relación con la terminación o suspensión de aplicación de un tratado aplicado provisionalmente por la violación del mismo por una contraparte con quien se haya acordado la aplicación provisional. Ello también estaría en consonancia con el artículo 60 de la Convención de Viena.

Por último, reiteramos la conveniencia que de contar con un paquete de cláusulas modelo en materia de aplicación provisional. Estas serían de gran utilidad para los Estados al momento de negociar tratados internacionales y servirían para dar consistencia a esta cuestión.

8. China

With respect to "Provisional application of treaties", the Commission adopted at this year's session the draft guidelines 1 to 11 and the commentaries thereto. The Chinese delegation commends the Commission for its progress on this topic. We have noted that draft guideline 6 establishes a " default rule " , namely the provisional apphcation of a treaty produces the same legal effect as if the treaty

were in force, unless the parties indicate to the contrary. As this formulation represents a major development of the rules governing the provisional application of treaties as defined by the Vienna Convention on the Law of Treaties, the Commission should proceed with utmost caution. We believe that to determine whether the provisional application of a treaty equals the coming into force of the treaty, the key is to ascertain the real intent of the parties and comprehensively examine relevant practices of States, including any possible exceptions.

Regarding the commentary on draft article 6, we have noted that it seems to suggest that the legal effect of provisional application of a treaty differs from that of the treaty's being in force only in cases of termination or suspension of the treaty. We would like the Commission to clarify whether difference in legal effects exists in cases of reservation to treaties, state succession or other special situations.

9. France (French and English)

Mr. Chairman, today I will share several observations on the topic of the "Provisional application of treaties". I will begin with two remarks on the Commission's working methods used to study the topic. I will then speak in more detail about the different draft guidelines adopted. First, the French delegation welcomes the fact that a working group was established to help prepare the commentaries and draft guidelines. Such an initiative—^already followed last year for the adoption of draft conclusions on the "Identification of customary intemational law"—adds to the Commission's collaborative way of working that should be supported.

Second, my delegation would like to thank the Secretariat General for the study it conducted on the contemporary practice of States regarding provisional application. This very informative report is a useful and valuable instrument at the Commission's disposal for preparing draft guidelines on the topic. It is however unfortunate that the Commission did not discuss this Memorandum this year. By definition, the Commission's drafts must be based on the study of intemational practice. The question can now be raised as to what extent the 11 draft guidelines adopted this year reflect the widespread practice reported by the Secretariat, the consideration of which the Commission decided to defer until next year. The comment of draft guideline 7 makes no reference to practice or precedents, which makes it more difficult for States to take a stance on this issue. It would have seemed better to examine the study conducted by the Secretariat this year, even if that would have meant deferring the adoption of the draft conclusions and their commentaries to next year.

I will now share a few observations concerning the draft guidelines.

In the general commentary, it is noted that "the draft guidelines allow States and intemational organizations to set aside, by mutual agreement, the practices addressed in certain draft guidelines if they decide otherwise". Such an affirmation can be surprising in that the Commission's drafts are not legally binding texts. Such an approach also seems contrary to the logic of the law of treaties: the mles in the

matter are supplementary by nature, States are free to decide whether to agree or not. The Commission should not lose sight of this fundamental principle.

The French delegation would like to imderline that although "the purpose of the draft guidelines is to provide assistance to States and international organizations", they can also serve as a guide for courts when the question of provisional application of treaties arises.

Taking up draft guideline 4, the French delegation supports the proposal stating that provisional application of a treaty may be agreed through any means or arrangements. Such a solution has the advantage of flexibility and seems to be compatible with Article 25 of the Vienna Convention. However the Commission must provide precisions on the point at which a resolution of an international organization should be considered an agreement on provisional application. The examples provided by the Commission in support of its proposal do not clarify the criteria required to determine whether an agreement on provisional application exists. With regard to the Comprehensive Nuclear Test-Ban Treaty "although in the negotiations that led to the Comprehensive Nuclear-Test Ban Treaty Organization a proposal for provisional application was rejected, although the Comprehensive Nuclear-Test Ban Treaty has no explicit provision for provisional application, and although no separate treaty has been concluded to that effect", it is noted in the Commission's commentary, on the basis of two academic articles, that, "the resolution of the Meeting of States Signatories can be interpreted as evidence of an agreement in some other maimer, or of an implied provisional application". Such an interpretation raises questions. To a great extent, the provisional application of treaties is a matter of States' constitutional law, the existence of an agreement to provisionally apply a treaty should not be readily presumed. In this respect, the Commission needs to explain in more detail the criteria required to determine whether an agreement on provisional application exists.

With regard to draft guideline 6, the wording of the provision is unclear: does provisional application of a treaty mean strict application of the treaty—^as stated in the provisions of Article 24, paragraph 4, of the Vienna Convention on final clauses—or a mutatis mutandis application? This brings us to the more general question of determining whether provisional application means that the treaty becomes binding or only that provisional application has a permissive power. It seems essential that the Commission clarify this point, which it has been silent about thus far. The approach the Commission has chosen seems very liberal in many respects. Yet the provisional application of a treaty is a practice that, because of its effects, must continue to be exceptional, and cannot be presumed. In France, a circular dated 30 May 1997 on the drafting and conclusion of international agreements thus notes that provisional application "may be provided for in final provisions for reasons related to the specific circumstances, but it must remain provisional. [...] It is to be prohibited in any event when the agreement may affect the rights and obligations of individuals and when its entry into force requires authorization by the Parliament".

With regard to draft guideline 7 as I mentioned earlier, the Commission's work would have benefited from the support of international practice and precedents, to which reference was not made. It is noted that the draft guideline is aligned with

draft articles of 2001 on the responsibility of the State and on draft articles of 2011 on the responsibility of international organizations. In my delegation's opinion it is not certain that all of these articles reflect international customary law. Under Article 20 of its Statute, the Commission must present practice and precedents and doctrine backing this draft guideline so that States can assess the content.

The same can be said for draft guidelines 9 andlO, whose commentaries do not contain any reference to practice or precedents. The Commission should therefore not proceed on the basis of abstract deductions or analogies, but should base the drafts it adopts on law.

To conclude, France considers that the draft guidelines on the provisional application of treaties can only be finalized by the Commission at the first reading if these important clarifications and precisions are made.

10. Singapore

I now turn to the topic "Provisional application of treaties". As the Special Rapporteur's reports, the Commission's debates, and the excellent studies by the Secretariat have already shown, provisional application is a tool of immense practical value in modem international life. Singapore continues to support the Commission's work.

In this context, we would like to make three points for the Commission's consideration.

First, on the key topics of legal effects, termination, and the relation between internal law and provisional application, the Commission's draft guideline 6 can be more definitively stated. Draft guideline 6 is entitled "Legal effects of provisional application", and it states: "The provisional application of a treaty or a part of a treaty produces the same legal effects as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed". With respect to the use of the words "same legal effects" in the guideline, we have noted that in the Commission's earlier syllabus for this topic in Annex C of the document A/66/10, the term "legal effects" was in fact used as an umbrella term encompassing four possible meanings of provisional application. However, from the Commission's debates and having read draft guideline 6 with the benefit of its commentary, it is clear that the Commission has, with respect to this guideline, settled on the first of those four possible "legal effects", namely that in the provisional application phase, the parties are "bound by the agreement to apply the treaty in the same way as if the treaty had entered into force". This is confirmed by paragraph (2) of the commentary to draft guideline 6, where the Commission states: "a treaty or a part of a treaty that is provisionally applied is considered as binding on the parties provisionally applying it...". We therefore suggest that the Commission consider recasting draft guideline 6 in terms of an explicit reference to the "binding" character of provisional application, instead of using the term "legal effects", which had been used earlier to encompass several possible meanings. This would put the Commission's conclusion on the meaning of provisional application beyond doubt.

Second, still on draft guideline 6, the Commission should, in its commentary, elaborate upon the exception to the default position contained in the proviso "unless the treaty provides otherwise or it is otherwise agreed". We have noted that a wealth of information on treaty practice has been amassed by the Secretariat, particularly in its excellent third Memorandum (A/CN.4/707) and I would, on behalf of my delegation, express our appreciation for the assistance the Secretariat has rendered in this regard. The Secretariat's Memorandum is currently cited in general terms in footnote 657 in the Commission's commentary on draft guideline 6. When the Commission considers this Memorandum in detail in 2018, we suggest that the Commission consider citing specific examples of clauses that, in the Commission's view, would fall within the proviso "unless the treaty provides otherwise or it is otherwise agreed". This will provide a useful reference point for States and international organizations when the guidelines are eventually finalized.

Third, on termination of provisional application: Termination is dealt with in paragraph (5) of the commentary to draft guideline 6, as well as in draft guideline 8, which is entitled "Termination upon notification of intention not to become a party". In paragraph (5) of the commentary to draft guideline 6, the Commission states that the termination rule is reflected in article 25, paragraph 2 of the 1969 Vienna Convention, and is "without prejudice" to issues of responsibility for breach arising in the provisional application phase. Singapore's view is that a more definitive statement can be made that in the absence of express treaty language or agreement to the contrary, termination of provisional application can only have prospective effect. In other words, the position in the provisional application phase mirrors that currently articulated in article 70 of the 1969 Vienna Convention. As a matter of practical guidance, it would be helpful for the Commission to set this out not just in the commentary but in the draft guidelines themselves.

19th meeting, 24 October 2017 (A/C.6/72/SR.19)

11. United Kingdom

The UK is grateful to the Special Rapporteur, Mr Gómez-Robledo, and the members of the Commission for their work in taking forward the topic of provisional application of treaties.

The UK welcomes the extension of the scope of the draft guidelines to include treaties to which international organisations are party.

In respect of Draft Guideline 6, the UK would seek further clarity on the distinction between the legal effect of a provisionally applied treaty and one in full force. Although the Guideline indicates that the legal effect is the same, paragraph 5 of the commentary makes it clear that provisional application does not “give rise to the whole range of rights and obligations that derive from the consent by a State or an international organization to be bound by a treaty or a part of a treaty.” As such, although the substantive legal effects may be the same, the technical and procedural

legal effects may be different. This should be made clear in the body of the Guideline and the relationship with the provisions of the VCLT further elaborated. The UK would invite the Commission to give further thought to this and develop the commentaries accordingly.

Draft Guideline 7 makes it clear that breach of a provisionally applied treaty entails international responsibility. However, this Guideline does not indicate the consequences of breach on the operation of the provisionally applied treaty itself, the Commentary is clear that in the opinion of the ILC, Part 5, section 3 of the VCLT will not apply. Therefore the Special Rapporteur could helpfully elaborate on the effect of breach on the provisionally applied treaty itself.

The UK welcomes the pragmatic and flexible approach taken by the Special Rapporteur and the Commission to provisional application of treaties, underlining the prerogative of sovereign states to enter into international agreements in a manner that best suits their international relations and domestic considerations at the time. However, given the difficulties that have arisen in the interpretation of some provisional application clauses, the Commission is invited to begin work on draft model clauses with commentary to cater for various modes of provisional application, particularly in respect of the completion of internal procedures. Where and when appropriate, model clauses which are fully explained and unambiguous, could be adopted to ensure legal certainty.

12. Peru

En cuanto al Capítulo V: "Aplicación Provisional de los Tratados", cuyo Relator Especial es el Sr. Juan Manuel Gómez Robledo, al agradecer su destacado trabajo, mi delegación recuerda que el Capítulo III del último Informe de la Comisión sérialа que sigue siendo relevante la solicitud de información que figura en el Capítulo III del informe sobre su 67° periodo de sesiones (2015). En tal sentido, con cargo a complementar nuestros comentarios por escrito en el plazo establecido, deseamos formular los siguientes comentarios preliminares.

Acerca de la decisión de aplicar provisionalmente un tratado, en el Perú no existe una norma interna que se refiera directamente a la aplicación provisional de los tratados, con excepción del artículo 25 de la Convención de Viena sobre el Derecho de los Tratados - la misma que Integra el derecho interno según la Constitución Política del Perú de 1993.

El Perú, al momento de manifestar su consentimiento a dicha Convención, planteo una reserva, sujetando la posibilidad de aplicación provisional de los tratados al cumplimiento previo de lo establecido por la Constitución del Perú en materia de aprobación y ratificación de los tratados. Sobre el particular, queremos resaltar la importancia del proyecto de directriz 11 en el texto de los proyectos de directrices aprobados provisionalmente hasta el momento por la Comisión.

Hemos podido identificar casos en la práctica del Perú de instancies en las que se ha tomado la decisión de aplicar provisionalmente un tratado, aunque tal decisión no es tomada por un solo órgano o autoridad sino que participan una serie de

órganos y autoridades del Estado, dependiendo de la etapa (en el proceso de celebración de tratados) en la que se lleve a cabo tal decisión.

Como ejemplo de aplicación provisional de un tratado tenemos el "Acuerdo Comercial Multipartes entre el Perú y Colombia, por una parte, y la Unión Europea y sus Estados Miembros, por Otra", firmado en Bruselas el 26 de junio de 2012, al que Ecuador se ha sumado recientemente ("Acuerdo Comercial de 2012"), cuyo artículo 330, numeral 3, posibilita la Aplicación Provisional. Al respecto, cabe resaltar que dicho Acuerdo continúe siendo provisionalmente aplicado hasta la fecha.

En cuanto a la terminación de la aplicación provisional de un tratado, ella termina normalmente con la entrada en vigor. Al respecto, el Perú se permite citar ciertos ejemplos: i) Acuerdo entre el Perú y los Países Bajos sobre el Establecimiento de Talleres de Capacitación, articulo VI (9 de diciembre de 1965); ii) Protocolo, 1979, para la Quinta Prórroga del Convenio sobre el Comercio del Trigo, 1971", articulo 8 (21 de marzo de 1979); iii) Acuerdo por intercambio de notas entre el Perú y Argentina (17 de junio de 1979); iv) Convenio Internacional del Azúcar, articulo 37 (5 de Julio de 1984).

Respecto de los efectos jurídicos de la aplicación provisional, consideramos -desde un punto de vista general- que cuando se pacta la aplicación provisional de un tratado, se genera una obligación jurídica de Derecho Internacional entre los sujetos de Derecho Internacional que han adoptado el texto del tratado. En efecto, en ese caso, existe una obligación jurídica de aplicar, total o parcialmente, las disposiciones del tratado, aun cuando dicho tratado no haya entrado formalmente en vigor.

En cuanto al funcionamiento de la Comisión, en particular aspectos contenidos en el Capítulo XI; "Otras decisiones y conclusiones", mi delegación acoge con beneplácito la decisión de la Comisión de que la primera parte de su 70° periodo de sesiones se celebre en Nueva York, lo que contribuirá a seguir mejorando la interacción entre la Comisión de Derecho Internacional y la Sexta Comisión. Asimismo, el Perú acoge con beneplácito la decisión de la Comisión de organizar actos conmemorativos de su 70° aniversario, en 2018, con actividades en Nueva York y en Ginebra.

Asimismo, mi delegación acoge que la Comisión haya decidido incluir en su programa de trabajo el tema "La sucesión de Estados en relación con la responsabilidad del Estado (respecto a actos internacionalmente ilícitos)", así como la designación del Sr. Pavel Sturma como Relator Especial.

Somos de la opinión que el producto de los trabajos a propósito de dicho tema podría dar lugar a unas pautas o directrices más que a la elaboración de un proyecto de Convención sobre la materia.

De otro lado, mi delegación toma nota con satisfacción del hecho que la Comisión de Derecho Internacional haya decidido incluir en su programa de trabajo de largo plazo los siguientes dos temas: i) principios generales del derecho, una de las fuentes principales del derecho internacional; y ii) la prueba ante las cortes y tribunales internacionales.

Acerca de otras decisiones y conclusiones contenidas en el Informe, el Perú hace aprecio del Programa de trabajo de la Comisión para el resto del quinquenio (para. 268 del Informe), el mismo que facilitara la atención que los Gobiernos presten a los

temas pendientes. Del mismo modo, hacemos especial aprecio por la publicación de la novena edición La Comisión de Derecho internacional y su obra.

Finalmente, el Perú reitera su firme compromiso con la labor de la Comisión de Derecho Internacional, así como su pleno apoyo al cabal cumplimiento de sus funciones.

13. India

Turning to the topic "Provisional application of treaties", we appreciate the efforts of the Special Rapporteur, Juan Manuel Gómez Robledo, put in the study of this topic that has resulted in the submission of four reports. At the current session, the Commission provisionally adopted the draft guidelines 1 to 11 produced by the Special Rapporteur.

The Commission also adopted the commentaries to the draft guidelines at the current session. The Commission also had before it a memorandum, prepared by the Secretariat, reviewing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the SecretaryGeneral, that provide for provisional application, including treaty actions related thereto. It will be taken up for consideration at its next session by the Commission.

We are of the view that a nation's political, social and legal system has greater role in the field of provisional application of a treaty, including the manner of expressing consent to a treaty. India being a dualistic State, treaties do not automatically form part of the domestic law. Their provisions become applicable only as a result of their acceptance by internal procedures.

14. Slovenia

Turning to the topic of the 'Provisional application of treaties', Slovenia appreciates the work done thus far on this topic by the Special Rapporteur and the Commission. We believe that the guidelines are an appropriate form of result of their work, aimed at assisting states and international organisations in their treaty practice. In order for that to be so, the guidelines require some refinement and, possibly, additions. In this regard, we are not convinced that overreliance on the VCLT terminology and its effective restatement in the guidelines is effective in providing useful guidance. We believe that the Commission could be more ambitious and provide further guidance.

On this occasion, Slovenia will concentrate on certain guidelines, but we are ready to provide further written comments to the Special Rapporteur in due course if requested.

In relation to the VCLT terminology in the guidelines, we are concerned by the Commission's departure from the VCLT terminology in draft Guideline 3. The use of the word 'may' in draft Guideline 3 might be misunderstood if not read in conjunction with the commentary, which itself is not very clear. Our concern is based on the fact that this issue was discussed already during the Vienna Conference

on the VCLT, where the Drafting Committee replaced the word 'may' with the word 'is' because the former might imply a non-binding effect. The reappearance of the word 'may' reverses the developments arising from the travaux préparatoires, and might call into question Guideline 6 on legal effects. We therefore propose the following wording of draft guideline 3: "*States or international organisations may agree in the treaty itself or in some other manner to apply a treaty or a part of a treaty provisionally between certain or all of them pending its entry into force between them*." In this case, the word 'may' would relate more clearly to the mutually agreed decision to provisionally apply a treaty or part of it, not to the effect of such an agreement. In the commentary, we propose to replace the first and second sentence of paragraph 2 by the following: "*The opening phrase confirms that provisional application of a treaty or a part of it is subject to an agreement between States or international organizations*."

In relation to Guideline 8, we believe that there are several issues which would benefit from further analysis and inclusion at least in the commentary. It should be clarified in the commentary that it is the provisional application that is being terminated, not a treaty as such which is not yet in force. Apart from other potential consequences of this conceptual difference between treaty termination and provisional application termination, the differentiation between bilateral and multilateral treaties might become relevant. In the case of bilateral treaties, the termination of provisional application by one of the two signatories in effect implies treaty termination as well. This is not necessarily true in the case of multilateral treaties, since the remaining signatories may continue to provisionally apply the treaty and bring it into force. In both cases, the question arises as to whether the notifying state can subsequently "change its mind" and ratify the treaty or whether the notification is irreversible. The latter option does not appear at first sight to be contrary to Article 25(2), which provides for a notification that a signatory 'does not intend' to become a Party rather than a notification in the sense that a signatory 'shall not' become a Party. Such an interpretation would enable a signatory to terminate its provisional application obligations and simultaneously open the door for it to still become a Party, a result that might benefit the treaty as such.

With regard to the termination of provisional application, Guideline 8 gives no guidance on the relation of this termination regime to that provided for in Article 18 of the VCLT, which contains a very similar termination provision. It appears reasonable to believe that a notification to terminate provisional application implies a fortiori that a state made clear its intention to terminate its so-called 'interim obligation' under Article 18 as well.

Another aspect of the relation between Articles 25 and 18 is how they interact during provisional application. Does the interim obligation imply that a state is bound to apply the treaty provisionally as if it were in force and in such a manner so as not to defeat its object and purpose as provided for in Article 18? Consequently, if only certain treaty provisions are being applied provisionally, does the interim obligation apply to all provisions or only those not being provisionally applied? Or does provisional application override the interim obligation, since it entails

responsibility for a breach of a more concrete obligation under the treaty being provisionally applied?

In addition, the commentary on Guideline 8 does not explain whether termination is effective ex nunc or ex tunc, and therefore whether Article 70 of the VCLT applies mutatis mutandis. It appears reasonable to believe that, since provisionally applied treaty provisions are binding on the signatories as clarified in Guideline 6, the said Article could also apply.

Slovenia looks forward to the discussion on the ILC Report in the coming days, where it will present its views on the remaining two clusters.

15. El Salvador (Spanish only)

Pasaremos ahora a referir nuestra intervención al tema de la "Aplicación Provisional de los Tratados". En particular, agradecemos al Relator Especial, Señor Juan Manuel Gómez Robledo, por su cuarto informe y su respectiva adición, a quien expresamos nuestro reconocimiento por la valiosa labor realizada.

Nuestra delegación desea reiterar el apoyo al análisis detallado de este tema y la necesidad de brindar claridad sobre el funcionamiento de la aplicación provisional de los tratados, particularmente, sobre el proyecto de directrices aprobadas de momento, por la Comisión de Derecho Internacional.

En este sentido, deseamos atribuir especial importancia a la labor de interpretación que se desarrollara en el seguimiento de tales disposiciones orientativas; por lo que, no debe olvidarse que su interpretación debe ser sistemática y congruente con el contenido de otras normas existentes en materia de aplicación provisional de los Tratados, tales como, la Convención de Viena sobre Derecho de los Tratados de 1969 y la Convención de Viena sobre el Derecho de los Tratados entre Estados y Organizaciones Internacionales o entre Organizaciones Internacionales de 1986 y otras normas de derecho internacional.

Específicamente, consideramos que esta interpretación sistemática podría aclarar la regulación de situaciones como, la terminación de la aplicación provisional de los tratados, cuyo régimen general supone la distinción entre dos supuestos: 1) la terminación de la aplicación provisional de los tratados por su entrada en vigor en los Estados o en las organizaciones internacionales de que se trate y, 2) cuando el Estado o la organización internacional que aplica provisionalmente el tratado o una parte de este, comunica su intención de no llegar a ser parte en el tratado a los otros Estados o a las otras organizaciones internacionales.

Adicionalmente, estimamos que este tipo de interpretaciones podrían orientar una regulación analógica a las directrices del proyecto actual, especialmente, en los casos donde no sea posible recoger una única formulación con todas las posibilidades jurídicas que pueden existir en cuanto a distintos temas, tales como: la terminación de la aplicación provisional, o la violación manifiesta del derecho interno de los Estados, o de las reglas de la Organización al momento de rendir su consentimiento en la aplicación provisional de un tratado.

Finalmente, mi delegación expresa su apoyo a la continuación del estudio de este tema, teniendo en cuenta que en los trabajos futuros, podría concurrir la posibilidad de que la Asamblea General determine la revisión de normativas como el Reglamento de Registro, aprobado en 1946, y el Manual de Tratados de la Secretaria General de las Naciones Unidas, a fin de adecuar su contenido en la práctica actualizada de los Tratados, particularmente, en cuanto a la regulación de su aplicación provisional de conformidad con las directrices que se están analizando en la presente Comisión.

16. Russian Federation

As to the topic “Provisional application of treaties” we would like to draw the attention of the Commission to the question that the Russian delegation raised earlier and which it would be useful to study in the framework of this topic. In particular it is a question on the specifics of provisional application of different types of treaties (bilateral, multilateral open, and multilateral with limited 9 participation); specifics of provisional applications based on unilateral declaration or a decision by international organization; and specific of termination of provisionally applied treaties. We would be interested in developing in the Commission the model provisions on provisional application of treaties.

In conclusion we would like to welcome the inclusion by the Commission of two new topics in its long term program of work: “Evidence before international courts and tribunals” and “General principles of law”. We think that their consideration would be useful.

17. Greece

Let me now turn to the topic "Provisional application of treaties". We express our appreciation to the International Law Commission, which under the guidance of the Special Rapporteur, Mr. Juan Gomez-Robledo, has provisionally adopted, at its current session, a consolidated set of draft guidelines on the provisional application of treaties with commentaries thereto.

In particular, we welcome the adoption by the Commission of the commentaries, which are in our view a useful complement to draft guidelines 1 to 11 as well as to Article 25 of the Vienna Convention on the Law of Treaties, and provide States and international organizations additional guidance and clarification on the scope and operation of existing rules of international law governing the provisional application of treaties.

We also take this opportunity to thank the Secretariat for the preparation of an updated memorandum, reviewing State practice in respect of treaties that provide for provisional application, including treaty actions related thereto.

As we have previously stated in the Sixth Committee, Greece fully supports the work of the Commission on this topic which is of great practical and doctrinal interest.

We are also in agreement with the Commission that the legal basis for provisional application should be found either in the treaty itself or in a separate agreement, which may take one of the forms specified in draft guideline 4.

This being said, it is still not clear to us how "a declaration made by a State or an international organization that is accepted by the other States or international organizations concerned", as subparagraph (b) of draft guideline 4 suggests, can provide the basis for an agreement on provisional application. According to paragraph (5) of the commentary to this draft guideline, such a declaration must be clearly accepted, and furthermore, this acceptance has to be explicit and not merely acquiescence based on non-objection. Given, however, the voluntary nature of provisional application and the fact that state practice in this respect is still quite exceptional, we believe that, should this reference be retained, the said commentary needs to be further elaborated and enriched with concrete examples of state practice and explanations regarding the above legal concepts (such as acceptance, acquiescence, non-objection) so as to avoid confusion with the regime of unilateral acts of States.

Regarding draft guideline 6, a key provision of the present set of draft guidelines, as it deals with the legal effects of provisional application, we consider that, in view of the far-reaching statement contained therein, both the text of the said guideline and the commentary thereto should be further elaborated in order to better reflect the position taken by the Commission according to which the provisional application of treaties (albeit a different concept from that of entry into force) "produces the same legal effects as if the treaty were in force", unless otherwise agreed.

Similarly, with respect to draft guideline 8, we think that it would be useful to further ad dress the question of how long provisional application can (or should) last, particularly in those cases where a long period of time has already elapsed since the commencement of provisional application, and there is no indication as to the intention of the States concerned to become a party to the treaty provisionally applied, nor an express treaty provision regulating the termination of provisional application.

We further note with satisfaction the inclusion of a new draft guideline 11, in the form of 'without prejudice' clause, addressing a different situation from that envisaged in draft guideline 10 and which is, in our view, necessary in order to capture a possibility already supported by an abundant State practice. Finally, with regard to the final outcome of the work undertaken by the Commission on this topic, we would like to reiterate our support for the development of model clauses, which should be tailored to fit the flexible nature of provisional application, that could assist States and international organizations in the negotiation and application of treaties.

18. Slovakia

Turning to the topic Provisional application of treaties allow me to express our satisfaction on the development of this particular topic by the Commission. Its

approach, in over view, enabled to overcome any early hesitations that might have occurred in the initial stage of the consideration of the topic. The topic, after successful conclusion, might provide a useful set of guidelines helping states and international organization to clarify many pertinent questions regarding the provisional application of treaties and possible help states in harmonizing some particularities in their state practice.

We would like therefore to appreciate the Commission for provisionally adopting draft guidelines 1 to 11 based on the second and third report of the Special Rapporteur Juan Manuel Gómez Robledo presented at the previous sessions. My delegation would like to commend also the fact that the Commission adopted 11 draft guidelines together with commentaries, which enables, already at this stage, to consider the topic in depth. We would like to use this opportunity to express gratitude also to the Secretariat for preparing the memorandum reviewing State practice in respect of treaties deposited or registered in the last 20 years with the Secretary-General. We are convinced that it will be useful in the upcoming discussion on the topic in the Commission next year.

Allow me at this stage to present some comments with regard specific draft guidelines. First, it seems for us slightly redundant to define the scope of the guidelines. Therefore, we think that it would be sufficient to keep the purpose defined in draft guideline 2 and merge it with draft guideline 1.

We also see some overlaps in draft guidelines 3 and 4, since they deal with basically the same issue, namely the general and specific way of agreeing on provisional application of treaties. With regard draft guideline 4 sub-paragraph b) we think that some precision is required, since in our understanding, State has to give its explicit consent, i.e. explicitly agree to apply treaty provisionally. Thus, all other forms, means or arrangements, including resolutions of international organizations, necessary have to include a positive consent of the State concerned to have the necessary effect of provisional applicability.

The draft guideline 8 needs further elaboration. In our view, there are other forms of termination of the provisional application of a treaty, which are not so far specified in the text provisionally adopted by the Commission. Besides the natural termination by entering into force of the treaty, we are convinced that state practice allows for termination of the provisional application upon notification of the State without having the clear intention not to become a party. This might be pertinent especially in cases of a prolonged ratification process, longer than originally previewed, or in case of a particular conditionality that might have been directly or indirectly linked with the agreeing to the provisional application. Exclusion of the possibility to terminate or even suspend the provisional application of the treaty without having the intention not to become a party would, in our view, restrict the broader rights of states existing before giving their final consent to be bound by a treaty.

19. Sudan (Arabic only)

[From (A/C.6/72/SR.19)]

20. Hungary

Regarding Chapter V (Provisional Application of Treaties), first let me express Hungary's appreciation for the achievements of the Commission to provisionally adopt draft guidelines 1 to 11 and the commentaries thereto, and especially to Special Rapporteur Juan Manuel Gómez Robledo for his efforts to prepare the four previous reports.

Hungary is among the states where, although the concept of provisional application of treaties exists under national law, apart from providing for an earlier starting date for application, general treaty conclusion procedure is to be followed. This means that provisional application does not represent a fast track approach to the treaty conclusion procedure under Hungarian law, since the same rules apply to provisional application as to the standard entry into force of international treaties.

Therefore, provisional application in case of bilateral agreements is practically non-existent in Hungary. Nevertheless, Hungary welcomes the memorandum which was prepared by the Secretariat, reviewing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application, including treaty actions related thereto. We believe that the detailed consideration of the memorandum will substantially help the Commission during the discussions of this issue at its next session. We are confident that the guidelines and commentaries thereto will provide useful assistance to States, international organisations and others concerning the law and practice on the provisional application of treaties.

Hungary will also send its written contribution to the Commission on this topic which will include more details on the Hungarian practice in provisional application related to the legal effects, the termination of provisional application and the experience gained so far.

21. Romania

My delegation is appreciative of the work done by the ILC and by the appointed Special Rapporteur, Juan Manuel Gomez Robledo, on this important topic and we welcome the draft set guidelines and commentaries as provisionally adopted. Treaty law, which inevitably includes provisional application of treaties, represents the subject matter that keeps legal advisers busy most of their time, and this makes the assessment of the ILC even more desirable and worthy of our attention.

We fully align with the comments already provided on this topic in the statement made by the European Union. In our national capacity we would like to put forward some additional remarks.

The provisional application of treaties is one of the fields of treaty law that has two special qualities - it is both old and new. On one hand, it was already addressed in the early period of treaty law codification. On the other, emerging practice which existed at the time continued to expand and deepen significantly, providing today a broad material for analysis.

We fully support the approach taken to include both states and international organizations in the scope of the guidelines. Given current practice, any other approach would not have brought the required level of guidance.

Notwithstanding the substantial progress achieved through the draft guidelines and commentaries, the delegation of Romania would like to draw attention to several aspects which in our view required additional clarification.

We shall address three issues which are closely related, as it is also clear from the commentaries: the legal basis for provisional application (guidelines 3 and 4), the material scope (guideline 6) and termination (guideline 8).

22. Chile

I turn now to the fifth chapter of the report on the "Provisional application of treaties", a topic entrusted to the Special Rapporteur, Mr. Juan Manuel Gomez Robledo. At the current session, the Commission referred draft guidelines and 6-9, provisionally adopted by the Committee in 2016, back to the Drafting Committee, with a view to preparing a consolidated set of draft guidelines, as provisionally worked out thus far. The Commission subsequently provisionally adopted draft guidelines 1-11, as presented by the Drafting Committee at the current session, with commentaries thereto.

The Commission also had before it a further memorandum, prepared by the Secretariat, reviewing State practice in respect of treaties deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application, including relevant treaty actions. The consideration of the memorandum was deferred to the next session of the Commission.

While, as noted above, the Commission adopted draft guidelines 1-11, with commentaries, draft guidelines 5,10 and 11 had not previously been considered.

On draft guideline 5 referring to the "Commencement of provisional application", although it might seem self-evident, we believe it appropriate to specify the moment when this occurs, which, as stated in the draft guideline, "takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed" by States or international organizations concerned, which, as rightly noted in the commentaries, was based on article 24, paragraph 1, of the 1969 and 1986 Vienna Conventions on the Law on Treaties, on entry into force.

Draft guideline 10 on "Provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties", is fully in line with the provisions set forth in the Vienna Conventions and with the well-known principle of international law that a State may not claim violation of a provision of internal law as invalidating its consent or that of international organizations, unless it can be shown that violation was manifest and concerned a rule of its internal law of fundamental importance in the case of States or a rule of fundamental importance for the international organization.

We also support the draft guideline 11 referring to the "Agreement to provisional application with limitations deriving from internal law of States or rules

of international organizations", insofar as it grants the right to States and international organizations to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty, with limitations deriving from the internal law of the State or the rules of the organization. This unquestionably gives flexibility to the draft guidelines.

Since March this year an interesting memorandum prepared by the secretariat of the Commission has been at our disposal, which examines in detail the practice of States in respect of the provisional application of treaties, taking as a basis the bilateral and multilateral treaties deposited and registered with the Secretary-General of the United Nations since 1 January 1996, which provide for their temporary implementation. Treaties which have not yet entered into force were also analysed. While the Commission has decided to defer the analysis of this important document to next year, I would like to commend the Secretariat on its rigorous work and the significant contribution that the drafting of this document represents in the development of this topic.

Lastly, I must commend the work done by the Special Rapporteur, Mr. Gomez Robledo, who knew the best way to navigate this complex subject of international law. We very much look forward to studying his fifth report next year. Thank you.

23. Poland

Referring to the topic “Provisional application of treaties”, Polish delegation welcomes the efforts of the ILC in this regards and notes 11 draft guidelines with the commentary provisionally adopted by the Commission. We would like to thank the Secretariat for preparing a new memorandum, reviewing State practice in respect of treaties that provide for provisional application.

We noticed the introduction of an express reference in draft guideline 4 subparagraph (b) of the phrase "or a declaration by a State or an international organization that is accepted by the other States or international organizations”. Such an approach seems to be more suitable than former proposal relating to provisional application by means of unilateral declaration. Nevertheless, there is still a need for further elaboration in this regard as this draft guideline tries to grasp all possible sources of obligation of provisional application, other than a basic treaty. The commentary indicates that practice with regard to use of declaration as such source is “exceptional”. In this context it is difficult to acknowledge that acceptance of declaration of a state expressing desire of provisional application of the treaty can have other than written form.

Furthermore, Poland welcomes draft guideline 11, which acknowledges that the draft guidelines are without prejudice to the right of a state to agree to the provisional application of the treaty with limitations deriving from the internal law of the state.

Finally, we would like to repeat our appeal that we made during the discussion on this topic in 2016. There is a need for a comprehensive analysis of provisions of Vienna Convention on the Law of Treaties in the context of provisional application in order to gain a better understanding of the topic. Such an in-depth study could

provide a clearer guidance as to which provisions of the Vienna Convention on the Law of Treaties apply to provisional application and which do not. In this respect we would like to point out two issues.

Firstly, we would seek additional explanation with regard to point of the commentary on the draft guideline 6 insofar it states that "As a matter of principle, provisional application is not intended to give rise to the whole range of rights and obligations that derive from the consent (…) to be bound by a treaty or a part of a treaty" vis-à-vis draft guideline 6 stating that "The provisional application of a treaty or a part of a treaty produces the same legal effects as if the treaty were in force (…)".

Secondly, a related issue arises with regard to the subsequent part of the same section of the ILC's commentary. Namely, the position of the Commission that "Provisional application of treaties remains different from their entry into force, insofar as it is not subject to the same rules of the law of treaties in situations such as termination or suspension of the operation of treaties provided for in Part V, section 3, of the 1969 Vienna Convention". In our view this pronouncement needs to be elaborated more thoroughly.

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24. Israel

Now we would like to address the topic of "Provisional Application of Treaties". Israel commends the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, and the International Law Commission on their valuable work on the Draft Guidelines.

As we have stated in the past, Israel's practice does not generally permit the provisional application of treaties. However, there are exceptional circumstances in which it may be allowed, including 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 that stems from political or economic considerations. Even in these cases, such a step in Israel is subject to numerous procedural conditions, including completion of necessary internal legal procedures for the entry of the treaty into force, and the adoption of a specific decision by the Government of the State of Israel approving the provisional application of the treaty in question.

This past year, Israel undertook a review of its practice on provisional treaty application. During this review, Israel identified an occasional need to apply Air Services Agreements between Israel and other countries prior to their signature and entry into force. This is, as a rule, due to the lengthy internal procedures in some countries with which Israel has Air Services Agreements, and the need to establish and operate regular air services between the respective countries in a timely manner. In order to implement such application, Israel decided to develop a unique procedure, which allows for the mutual administrative implementation of Air Services Agreements prior to their signature and entry into force. However, Israel

takes the view that this kind of early application is not considered provisional application per se, as provided in Article 25 of the Vienna Convention on the Law of Treaties; or at the very least it is not considered by the Government of Israel to be a classic example of provisional application.

Under this procedure, both sides must first initial the Air Services Agreement. Subsequently, the Government of the State of Israel must permit Israel to establish and operate air services between the relevant countries, in accordance with the provisions of the initialed draft agreement. Following the Government's approval, the provisional application of the agreement commences on the date upon which both countries notify each other of the completion of their respective internal procedures necessary for such application. As these circumstances were identified by Israel as those that require a special procedure, we would be greatly interested in learning from other Member States about their practice regarding similar situations. In addition, we would very much like to hear whether other fields have been identified by Member States as requiring unique procedures similar to those that have been introduced by Israel.

Regarding the Draft Guidelines provisionally adopted by the Drafting Committee, Israel supports the development of these Guidelines and commends the efforts of the Drafting Committee on this matter. However we are concerned with the wording of Draft Guideline 4, titled "Form of Agreement". It seems that the text may be interpreted as allowing other States or entities to initiate the provisional application of a treaty - which may include obligations - without the consent of the relevant States. We would emphasize the importance of clarifying that a treaty may be provisionally applied only subject to the consent of all States which are affected by such provisional application.

25. Spain (English and Spanish)

As regards Chapter V, on the provisional application of treaties, the Spanish Delegation wishes to express its acknowledgement to the Commission for its work on this issue, which has led to the provisional approval of draft Guidelines 1 to 11 and their respective Commentaries.

Generally speaking, the draft Guidelines that have been presented to us strike us as correct, both in terms of the matters addressed and of the contents presented. However, as we have already stated at this same forum on other occasions, Spain wishes to reaffirm its confidence that other issues will be addressed in connection with provisional applications which, in our opinion, raise doubts, not to mention problems, and to which the provisions of the 1969 and 1986 Vienna Conventions do not respond: Are all the treaties subject to being applied provisionally or, rather, are there treaties which, given their subject-matter or the implications that provisional application would have, cannot be applied provisionally? Is the period of provisional application of a treaty calculated for purposes of establishing the term of those treaties that have a pre-established duration? Does the termination of provisional application without the entry into force of the treaty produce *ex tunc* or *ex nunc*

effects? Neither can we overlook the question of provisional application and the reservations, which was discussed at the Commission during the 68th session.

We also believe that there are guidelines - as is clearly the case with number 7, but also partly with numbers 9 or 10 - which demand a study of the international practice and jurisprudence. The Memorandum prepared by the Secretary, by the way, offers very useful ground rules to the Commission. Going into the details of certain draft Guidelines, in the same manner as for the previous chapter, we provide our specific observations to Guidelines 2, 3, 4, and 8 in the written annex to our spoken presentation. My Delegation will now address only Guidelines 6 and 9. In the former case, to formulate a criticism; in the latter, to give praise.

As regards draft Guideline 6 ("Legal effects of provisional application"), we must express our disagreement with the statement contained in paragraph 5 of the Commentary, according to which the rules of the 1969 Vienna Convention on termination or suspension of treaties would not operate during or in relation to provisional application. The truth is we do not quite understand why this should be so. On the one hand, the suspension of provisional application (for which there are no ad hoc rules) may be necessary in a particular case, and we do not see why the Vienna rules would not be able to operate. As regards termination, the 1969 Convention envisages this only in general terms; i.e., with regard to the relations of a State or international organization with all the other parties to which a treaty is applied on a provisional basis; however, a State may want to put an end to provisional application only in its relations with another party which, for example, committed a serious violation of the obligations undertaken. Why would that State have to choose between ignoring this circumstance or relinquishing the possibility of concluding the treaty in order to generally terminate its provisional application?

As to the inclusion in draft Guideline 9 ("Internal law of States or rules of international organizations and observance of provisionally applied treaties") we must applaud the inclusion of a reference to the rules of international organizations. Last year we criticized that this draft Guideline only envisaged States and their internal legal systems.

Having said that, the wording of paragraph 2 would be improved (in addition to highlighting the parallel with paragraph 1) if, instead of saying that an international organization "may not invoke the rules of the organization", it said "may not invoke *its* rules".

26. Czech Republic

Concerning the topic “Provisional application of treaties”, the Czech Republic welcomes the adoption, by the Commission, of 11 draft guidelines with commentaries, on the basis of proposals in the second and third reports of the Special Rapporteur, Mr. Juan Manuel G6mezRobledo, which were considered by the Commission at its previous sessions. We also appreciate the Memorandum, prepared by the Secretariat, reviewing State practice in respect of treaties deposited or registered with the Secretary-General and providing for provisional application.

We are content with the substance of 11 draft guidelines before us. We appreciate the fact that we receive a meaningful set of draft guidelines together with commentaries thereto at the same time. It not only corresponds to the provisions of the Commission's statute, but first of all provides the governments with an opportunity to consider also the relationship between individual draft guidelines and comment on them also from this perspective. Now we would like to briefly comment on several draft guidelines and commentaries related thereto.

Our first comment relates to draft guidelines 1 and 2 on "Scope" and "Purpose ". It seems to us that one of them is superfluous. Taking into account that the outcome under this topic is not supposed to be a legally binding instrument, in which an article on the "scope" would perfectly make sense, we suggest that the Commission consider a possibility of merging these two guidelines in a single provision clarifying the purpose rather than the scope of the exercise. Such provision would inevitably contain all elements currently present in draft guideline 1, leaving no doubts about the subject matter of the draft guidelines.

We also suggest including in such single guideline another element, namely that the provisional application under consideration concerns treaties between States and treaties between States and international organizations or between international organizations. Relevant articles of each of the two Vienna Conventions do comprise such element of precision. In the draft guidelines under consideration this aspect is buried in the commentary to draft guideline 1 and surfaces only in some subsequent guidelines, which otherwise would be difficult to understand.

Furthermore, neither draft guideline 1 nor 2 indicates that the term "treaties", whose provisional application is covered by the draft guidelines, means treaties concluded in written form. An explicit confirmation of this aspect would be useful. It would make it clear that the draft guidelines deal with the subject matter identical with that to which Vienna Conventions of 1969 and 1983 apply. It would tighten the link between the draft guidelines and the two mentioned conventions.

We agree with the substance of draft guidelines 5 and 8 dealing, respectively, with the commencement and termination of provisional application. Concerning draft guideline 8, its title indicates that it covers only cases of "Termination [of provisional application] upon notification of intention not to become a party". Thus, the Commission decided to deal with a rather exceptional situation, in which the State or international organization gives notice of its intention not to become a party to a treaty, and not to deal with the most common situation, namely the case when the provisional application ends as a result of the entry of the treaty in force between respective States or international organizations. We are not convinced by Commission's explanation in para 3 of the commentary to draft guideline 8 that "it was not feasible to reflect in a single formulation all the possible legal arrangements that might exist if the treaty has entered into force for the State or international organization provisionally applying a treaty or a part of a treaty, in relation to other States or international organizations provisionally applying the same treaty or a part thereof. We encourage the Commission to address also these situations, even if not necessarily in a "single provision".

Similarly we are not convinced by reasoning in para 8 of the commentary to draft guideline 8, according to which "the Commission decided not to introduce a

safeguard in relation to unilateral termination of provisional application by, for example, applying mutatis mutandis the rule found in paragraph 2 of article 56 of the 1969 and 1986 Vienna Conventions, [...] out of concern for the flexibility inherent in article 25 and in view of insufficient practice in that regard". We suggest that the Commission study this issue further.

We agree with the content of the draft guideline 6 (Legal effects of provisional application). As we commented earlier: provisional application of a treaty or some of its provisions is above all an "application" of the treaty. The obligations in question are real legal obligations, even if the basis for their implementation is "provisional". For the same reasons we also agree with draft guideline 7 (Responsibility for breach) and we refer to our earlier comment in this Committee, namely that the breach of a treaty obligation which is provisionally applicable entails international responsibility.

We are also satisfied with the content of draft guideline 9,10 and II relating to internal law of States or rules of international organizations. These draft guidelines are adapting relevant provisions of the two Vienna Conventions to the circumstances of provisional application of treaties.

27. Netherlands

With respect to the topic of provisional application of treaties, my Government would like to align itself with the comments made by the European Union. We would like to thank the Commission for its efforts to provide guidance and clarifications. We also thank the Secretariat for its latest Memorandum providing useful background information and confirming the flexible nature of the instrument as it is applied in the practice of States and international organizations.

As the Commission recognizes, provisional application of treaties serves a useful purpose in the treaty relations between States and international organizations. Against this background, we appreciate the efforts of the Commission to retain an element of flexibility in the text of the draft guidelines and not to be overly prescriptive as it is often the specific circumstances of the case at hand that determine the solutions available and the course of action taken in concrete situations. The Guidelines generally reflect this, and the Commission wisely abstained from converting each and every possible legal arrangement in the Guidelines as some issues are more suitable for being addressed in the Commentary.

Regarding the Commentary, we would like to mention the commentary to Guideline 8 in which the Commission explains that it decided not to introduce a notice period for termination of provisional application analogous to provisions of that kind regarding denunciation or withdrawal from treaties. We support this decision for the reasons mentioned by the Commission related to flexibility and lack of sufficient practice. At the same time, we would like to reiterate a remark we made earlier that any obligations incurred as a result of the provisional application of a treaty and, hence, the application of *pacta sunt servanda*, may not end with the termination of provisional application of a treaty. When termination of provisional application by a State adversely affects third parties, including individuals, acting in

good faith, obligations emanating from the provisional application of a treaty may well outlive its formal ending. This may require a transitional regime with respect to, or even the continuation of, obligations arising from the period of provisional application with respect to third parties acting in good faith.

28. Iran, Islamic Republic of

Turning to the topic: Provisional Application of Treaties", my delegation appreciates the work undertaken by the Special Rapporteur. We are confident that the principle of consent prevailing in international law and particularly law of treaties remain to be the core element of present topic. We concur with proposing draft guidelines as the proper form for the ongoing work, since it demonstrates the flexible and non-binding nature of proposed provisions. We also maintain that provisional application would not serve as a basis for restricting States' rights with regard to their future conduct in relation to the treaty that might be provisionally applied.

The exceptional nature of the provisional application of treaties and variety of states practice as a result of different domestic laws regarding the issue require a balance approach on the need for early meeting of treaty obligations and the national requirements of the states concerned. In this regard, the rarity of internal laws which provide legal bases for provisional application of treaties should be taking into consideration.

Considering draft guideline 4 regarding the forms of agreement on provisional application and specifically 4(b), the inclusion of resolutions as means or arrangement of agreement on provisional application of treaties by international organizations, give rise to doubt, considering the non-binding character of the most of the resolutions of international organization as well as the difficulties arising from the resolutions that are adopted by vote and thus, do not reflect the consent of all the member states. Foreseeing such scenario may jeopardize the well-established international law of treaties.

The present guidelines along with their commentaries do not address some of the problematic issues including the formulation of reservations in the case of provisional application, while according to article 19 of the 1969 Vienna convention, a state may make reservation when signing, ratifying, accepting, approving or acceding to a treaty. Thus, a State's provisional application of a treaty does not preclude its right to enter reservations to that treaty.

Also the present work has not addressed the differences between the scope and subject matters of treaties. As a case in point, a distinction should be drawn between multilateral treaties vis-a-vis bilateral treaties, as, in our view, the latter could not, because of its nature and parties, be provisionally applied. In other words, the basic principle of equality of states and the reciprocity of the rights and obligations as a result of their bilateral treaties and relations, leave no logical reasoning to the temporary application of bilateral treaties.

At the same time, the legal regime and modalities for termination and suspension of provisional application do indeed require further clarification. In fact,

it is doubtful whether all the elements of the Vienna Convention could be inferred by way of analogy for provisional application of treaties. Thus, we are in favor of a comprehensive study of the Vienna Convention on the Law of Treaties in the context of provisional application to determine which provisions of the Vienna Convention apply to provisional application and which do not.

And finally on this topic, it is doubtful whether there are grounds in State practice for the full implementation of the international responsibility regime for breach of an obligation arising under all or part of a treaty applied provisionally, irrespective of the content of the provisions applied. In fact, since the raison d'etre of the legal institution of the provisional application of treaties has been to ensure wider acceptance of the treaty in question by States in respect of which the treaty had not yet entered into force, a stricter interpretation of the rules of international responsibility in such cases could make some signatory States reluctant to have recourse to provisional application; though same States might otherwise prefer to provisionally apply the treaty in good faith and on a voluntary basis.

29. New Zealand

I will now move onto chapter V. New Zealand thanks Mr. Juan Manuel Gómez Robledo and the drafting Committee for their work on the provisional application of treaties. New Zealand supports the current draft guidelines 1-11 but has some concerns about the current formulation of guideline six, where the default position is that provisional application of treaties produces the same legal effects as if the treaty was in force unless the treaty says otherwise. If provisional application of treaties has the same legal effects as the treaty when it is in force by default, this would undermine entry into force provisions which are key components of upholding parliamentary democracy and the rule of law in common law systems.

Care must be taken not to interpret these guidelines in a way that could result in a limitation on the ability of states to amend, suspend or terminate a treaty that is provisionally applied, as established in existing international treaty law. New Zealand believes that the intention of the parties should determine whether the provisional application of treaties produces the same legal effects as when the treaty is in force. In this regard, parties to a treaty should ensure the intention of provisional application is clear by addressing the issue in the text of a treaty or by recording the intention in another agreement.

Further, New Zealand notes the general approach supported by state practice that for multilateral treaties a state party who does not vote in favour of provisional application, or who does not join consensus, should not be required to provisionally apply the treaty obligations.

30. Belarus (Russian only)

[From (A/C.6/72/SR.20)]

31. Micronesia

Micronesia appreciates the efforts of Mr. Juan Manuel Gomez Robledo, the Special Rapporteur for the topic on provisional application of treaties, who has shepherded the Commission's consideration of the topic for half a decade and produced four important reports on the topic. Micronesia also notes the Commission's provisional adoption of 11 draft guidelines on the topic as well as the assertion of the Commission in its general commentary to the draft guidelines that the draft guidelines reflect existing rules of international law. Micronesia submitted national Comments to the Commission for this topic in 2014, which underscored the importance of the topic for Micronesia. Today, Micronesia wishes to comment on a number of the draft guidelines provisionally adopted by the Commission.

As a general note, Micronesia appreciates the relative brevity of the draft guidelines as a whole and notes that the Commission has avoided producing draft guidelines that are overly prescriptive, so as to acknowledge the flexibility of States to modify by mutual agreement the normal practice of provisional application. From the outset of the Commission's consideration of this topic, Micronesia has stressed the importance of provisional application as a means to an end—^namely, as a method for fostering the speedy implementation of treaties. Micronesia feels that the draft guidelines provisionally adopted by the Commission rightfully encourage this approach, as the general commentary to the draft guidelines attests.

Micronesia notes draft guideline 3 with appreciation. As the commentary for draft guideline 3 makes clear, a State or international organization may provisionally apply a treaty or a part of a treaty that has not entered into force for that particular State or international organization even if the treaty itself has entered into force. Micronesia previously raised this matter as one of importance for the Commission to consider, and Micronesia appreciates the Commission's work in response.

In connection with draft guideline 3, Micronesia notes that draft guideline 6 underscores that when a State or international organization provisionally applies a treaty, that provisional application produces the same legal effects as if the treaty were in force between the State or international organization and the other party or parties to the treaty. Micronesia is of the view that the phrase "in force" used in draft guideline 6 has the same meaning as the same phrase in draft guideline 3 - namely, when a State or international organization provisionally applies a treaty that has itself entered into force but which has not entered into force for that State or international organization, that provisional application produces the same legal effects as if that treaty had entered into force for that State or international organization. Such legal effects necessarily include rights as well as obligations for the party provisionally applying the treaty.

In line with the discussion on draft guidelines 3 and 6, Micronesia notes draft guideline 7, which indicates that when a State or international organization provisionally applies a treaty or part of a treaty and subsequently breaches one of its obligations arising from that provisional application, that State or international

organization incurs international responsibility for that breach. The tool of provisional application should not be used to enjoy certain rights under a treaty while avoiding the obligations that come with those rights. It is Micronesia's view that this important principle applies even when the treaty being provisionally applied has not entered into force for the State or international organization provisionally applying that treaty.

Finally, Micronesia notes the careful balance struck in draft guideline 11 and its commentary, which acknowledge that while a treaty may allow for its provisional application in a manner that is without prejudice to the internal laws or rules of a potential party to the treaty, such qualifications on the provisional application of the treaty must be sufficiently clear to all relevant parties from the outset. This will avoid the undesirable situation of a State or international organization invoking heretofore undisclosed internal laws or rules to negate its failure to discharge its obligations under a treaty it provisionally applies or to negate such a provisional application outright. Micronesia notes, however, that it is possible for the court of a State provisionally applying a treaty to render a decision invalidating the ability of that State to carry out its obligations arising from its provisional application of the treaty, if not to invalidate the provisional application as a whole. In that situation, it is unclear as to whether such a judicial decision would be considered an "internal law" for purposes of the draft guidelines. It is Micronesia's view that draft guideline 11 provides a possible way to account for such a judicial decision, insofar as the potential parties to a treaty can allow for its provisional application to be subject to internal judicial review. Draft guideline 10 might provide another option, insofar as the judicial decision holds that the State's provisional application of the treaty is a manifest violation of the internal law of the State regarding its competence to provisionally apply the treaty and concerns a matter of fundamental importance for the State.

Micronesia expresses its appreciation once again to Mr. Gomez Robledo for his diligent work on this topic and looks forward to putting the draft guidelines to full use in its engagements with the international community.

32. Ireland

Ireland aligns itself with the statement delivered by the European Union on the topic "Provisional Application of Treaties" and would also like to express our gratitude to the Commission and the Special Rapporteur, Mr Juan Manuel Gomez Robledo for his work on this topic.

In addition, Ireland notes with appreciation the Secretariat's 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.

33. Estonia

Concerning the topic of provisional application of treaties, we appreciate the work carried out by the Special Rapporteur Mr. Juan Manuel Gomez-Robledo and the Commission on the eleven draft guidelines provisionally adopted and the commentaries thereto. We thank the Secretariat for preparing the Memorandum (A/CN.4/707) on state practice in respect of treaties that provide for provisional application. It gives a valuable insight into legal basis, commencement, scope and termination of provisional application.

Estonia invites the Commission to further develop the commentaries to the draft guidelines in order to provide more clarity on the legal effects and the scope of provisional application. Although they are not legally binding as such, the draft guidelines and the commentaries should aim to reflect as thoroughly as possible the existing rules of international law. In its concrete observations on the draft set of guidelines and commentaries thereto, Estonia aligns itself with the statement made by the European Union.

Estonia finds it pertinent not to lose sight of the fact that provisional application of treaties is a decision to be made ultimately by states (or international organizations) and in accordance with their internal laws. We therefore look forward to the analysis of the information gathered in the Memorandum on state practice and hope that it could be supplemented by a comparative study of domestic laws and practice. As an example, Section 23 of the Estonian Foreign Relations Act states that the performance of a treaty shall be guaranteed by the Government or a governmental authority authorised therefor. The Government may temporarily {i.e provisionally) apply a treaty after approval and prior to the entry into force on the condition that the fundamental rights and freedoms of persons are not restricted thereby and the treaty or a legal act of the Government prescribes temporary {i.e provisional) application of the treaty.

34. Turkey

My delegation wishes to thank the Secretariat for the comprehensive memorandum reviewing State practice in respect of bilateral and multilateral treaties, deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application.

The memorandum provides a valuable source of information on provisional application of treaties. The analysis in the memorandum is based on over 400 bilateral and 40 multilateral treaties. We commend the Secretariat for the indepth review of the practice.

As the Commission deferred the consideration of the memorandum to the next session we wish to share at this stage some of our preliminary observations relating the memorandum.

The memorandum indicates that the number of bilateral and multilateral treaties provisionally applied during the time period of the study undertaken by the Secretariat, is in reality higher than that available in the Treaty Collection. Given the

numbers stated in the memorandum it is evident that provisional application practice in multilateral treaties is less frequent than that in bilateral treaties. It might be therefore useful to further consider whether a single set of guidelines for both bilateral and multilateral treaties is most approriate way to address the issue. One of the purposes of the draft guidelines is to provide greater clarity in the terminology. Indeed, an extensive use of terms for provisional application has led to confusion in practice. In this regard in addition to the guidelines, the model clauses, to be provided by the Commission could also contribute to the consistent use of terms.

The main aim of the provisional application of treaties is to give immediate effect to all or some of the provisons of a treaty without waiting for the completion of all domestic and international requirements for its entry into force. As pointed out in the report, it is a mechanism that allows States and international organizations to give legal effect to a treaty or a part of treaty by applying its provisons in view of the necessity created by certain acts, events or situations before it had entered into force.

Although it can be a useful instrument of international treaty practice, it is after all for individual States to determine whether or not their legal systems allow provisional application. In this regard, the Commission should continue to bear in mind that some States, including Turkey, are not in a legal position to provisionally apply treaties due to their Constitutional provisions on treaties.

The Commission should thus confirm, either in the Guidelines or Commentaries, the right of States to apply a treaty provisionally within the limits of their domestic law. Provisional application of treaties is not only dependant on the provisions of the treaty. It is the States that will decide whether or not to apply treaties provisonally. The guidelines provisionally adopted by the Commission seem to deal with and reflect to a greater extent the treaty aspect of provisonal application. The inherent right of States to give consent to be bound by treaties and their modalites in respect of provisional application merits further analysis by the Commission.

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35. Indonesia

Now I will turn to the draft guidelines on the Provisional Application of Treaties. My delegation would like to express its appreciation to the Special Rapporteur, Mr. Manuel Gomes-Robledo for his report.

We are of the view that the 1969 Vienna Convention on the Law of Treaties is certainly the basis on which the Commission should develop a mechanism or a set of guidelines that would provide States with guidance relating to the provisional application of treaties.

We are further of the view that it would be essential to consider the relationship between provisional application of treaties and the constitutional law requirements

at the domestic level for the entry into force of the treaty concerned. We are fully aware that this issue is a challenging one for the Commission due to the diversity of national legal systems and also the lack of practices and precedents, particularly to our country.

We would like to use this opportunity to convey that the provisional application of a treaty is meant to allow for immediate response a treaty aims to address in a certain situation, irrespective of the lengthy process for the entry into force of the treaty or domestic constitutional ratification processes. Therefore, the application must be on an exceptional basis, and not to encourage States to use the mechanism more often.

An important aspect that shall be addressed within this draft guideline is the "temporary nature" of the provisional application, to prevent conflict within the domestic constitutional system. There should be certainty on the duration of the provisional application, particularly in the case of delayed entry into force or where the treaty concerned does not enter into force at all.

The last point: my delegation wishes to support guideline 11, which provides flexibility to a State to conform to its internal constitutional rules, t is indeed the sovereign right of States to decide on what is best for them concerning the provisional application of treaties.

36. Brazil

I now turn to the topic "provisional application of treaties". In its commentary to Guideline 3, the Commission claims to have identified practice in the sense that negotiating States or non-negotiating States that subsequently acceded to the treaty can agree to provisionally apply it. By distancing itself from Article 25 of the Vienna Convention on the Law of Treaties – that explicitly mentions “the negotiating states” – the Commission navigates uncharted waters. It is questionable whether the current state of practice is relevant enough to allow for the creation of a new rule of international law. Our main concern is not that non-negotiating States may agree in the provisional application of a treaty. What seems problematic is to admit that there could be a treaty in which some parties agree to provisionally apply it, while others do not. By mentioning "the" negotiating states, the logic behind the Vienna Convention is that we cannot achieve an agreement on what relates the provisional application of treaties unless all States involved in the creation of that treaty agree to do so. If the unanimity system is discarded, it would be made possible that, in multilateral treaties with a high number of parties, a group of States decide, without the consent of all others, to apply it provisionally. Such situation would be made possible due to the reference, in several of the Guidelines, to the expression “other States or International Organizations concerned”, where “other” and “concerned” are not equated to “all”.

What remains unclear is that, if not every State in a treaty needs to agree on the possibility of its provisional application, to whom is the acceptance “by the other States or international organizations concerned” provided in Guideline 4 (b) directed? The commentary to this Guideline states that such acceptance is opposed to mere non-objection. But if silence is not the standard criteria for acceptance and

if acceptance needs to be expressed, normally in written form, and if unanimity is not necessary for admitting the possibility of provisional application, which States or international organizations would have to make such an acceptance?

From Guideline 6, at least one relevant issue emerges. Provisional application, at least in multilateral treaties, would establish different kinds of legal relationships between the parties. Some States or international organizations would apply it provisionally in their mutual relationship, while in other cases, mutual relationships between parties will not allow for it. As a result, the same criticism towards the current regime of reservation to treaties could be applied to provisional application of treaties: flexibility may affect the integrity of the treaty.

Some speakers before me have rightly pointed out that the Guidelines seem to treat provisional application as the rule, while it should be an exception. One example of such approach is the usage of the present tense "is" ("that is provisionally applied") in Guideline 7. In many cases, the identification of a breach to a treaty will occur only years after its provisional application and during its definite application.

Regarding Guideline 8, it is important to note that provisional application is, by its nature, provisional. Such temporary application has however undeniable legal effects. In this sense, it would be important to reflect upon what happens next to the so-called termination of provisional application. One example is the case of projects between States and international organizations developed based upon a certain treaty that was provisionally applied. Does the termination of the provisional application entail the termination of the projects as well? It would be useful to count with a tighter discipline of the legal consequences of the termination of provisional application.

In any case, the Commission should reflect whether "termination" is the proper term to describe the cessation of effects of the provisional application. It is undeniable that there is practice supporting the use of this expression and it appears on Article 25 of the Vienna Convention; however, it is certain that such word has a long history in the law of treaties and applying it to the cessation of effects of provisional application may lead to confusion. Theoretically speaking, it would be possible that a multilateral treaty being provisionally applied by one party be terminated by another that is applying it in a definite manner. In this case, there will be a termination of one party that does not refer to the "termination of provisional application".

The possibility of applying different forms of termination and suspension to treaties provisionally applied should be seen carefully. The risk here is developing a entire new regime for provisional application based upon something that should be considered an exception to the regular definite application of treaties.

Finally, in Guideline 11, the Commission should consider if the language of "rights of States" is the most appropriate to deal with the issue treated therein. One may question what would be the source for such right and if it has been fully recognized by the international community.

37. Algeria

Turning to the topic of 'Provisional application of treaties', my delegation appreciates the progress made on this important and practical issue. We would like to thank the Special Rapporteur for his extensive work on the subject and to congratulate the Commission for having provisionally adopted a consolidated set of guidelines on the provisional application of treaties with commentaries thereto.

These draft guidelines will certainly provide States and international organizations with useful guidance and clarification regarding the law and practice on the provisional application of treaties on the basis of article 25 of both the 1969 Vienna Convention and the 1986 Vienna Convention on the law of treaties.

We share the views expressed by the Commission that this basic approach does not necessariiy reflect aii aspects of contemporary practice on this matter by inciuding a reference to both the iaw and practice.

In this context, while it is stated in the report that the draft guidelines are also based on the practice of States, it wouid have been useful for the Commission to look more closely at the practice of states through the memorandum prepared by the secretariat reviewing State practice in respect of treaties deposited or registered with the Secretary Generai that provide for provisionai appiication.

As regards to the draft guidelines, we think that draft guideline 4 needs to ciarify the point at which an international organization resoiution shouid be considered an agreement on provisionai appiication.

38. United States of America

Mr. Chairman, turning to the topic of “Provisional application of treaties,” the United States thanks the Special Rapporteur, Juan Manuel Gómez-Robledo, the Drafting Committee, and the working group for their contributions to the Draft Guidelines and commentaries that have been provisionally adopted by the Commission.

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 (or international organization) agrees to apply a treaty, or certain provisions of it, prior to the treaty’s entry into force for that State (or organization). 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 once the treaty has entered into force. We approach all of the ILC’s work on this topic from that perspective.

Accordingly, while we are in agreement with many of the Draft Guidelines and commentaries as provisionally adopted, we have a number of concerns. We will discuss three of our concerns today.

First, we are concerned that the Draft Guidelines, especially Draft Guidelines 3 and 4 and their commentaries, fail to make clear that provisional application within the meaning of Article 25 of the Vienna Convention on the Law Treaties requires the agreement of all of the States and international organizations incurring rights or

obligations pursuant to the provisional application of the treaty. The lack of clarity arises from the draft's use of the passive voice in describing agreements for provisional application – for example saying that provisional application arises when "it has been so agreed" without indicating whose agreement is required. While the commentary to Draft Guideline 3 explains why the Draft Guidelines do not refer to the agreement of the "negotiating States" as in Article 25 of the Vienna Convention, it does not specify the group of States and international organizations that must instead agree. This problem could be corrected by using the active voice and by indicating whose agreement is required.

We are concerned that the ambiguity in the Draft Guidelines is compounded by confusing and potentially misleading language in the commentaries. For example, paragraph (7) of the commentary to Draft Guideline 3 makes reference to the agreement of "only some negotiating States" and "one or more negotiating States or international organizations" without making clear that only those States and international organizations that agree will be engaged in the provisional application of the treaty.

Second, we are concerned by the discussion in subsection (b) of Draft Guideline 4 and the accompanying commentary addressing what is described as a "quite exceptional" practice of establishing provisional application through a unilateral declaration by a State that is accepted by the other States and international organizations concerned. We do not believe that the examples cited in the commentary involve provisional application (within the meaning of Article 25 of the Vienna Convention) having been established through such a mechanism, and we are unaware of any other such practice. For this reason, we believe the discussion of such a hypothetical form of agreement to establish provisional application risks creating confusion, and we would urge that discussion of it be eliminated both from subsection (b) of Draft Guideline 4 and from paragraph (5) of the commentary.

The third concern deals with Draft Guideline 6, 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. We are concerned that this may not be true in all respects. For example, as we have noted, provisional application can be more easily terminated than a treaty that is in force for that State. Moreover, we are studying whether – as suggested in the Special Rapporteur's last report and by some members of the Commission – Draft Guideline 6 means 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. To avoid suggesting too close a parallel between provisional application and entry into force of a treaty, we believe that Draft Guideline 6 should be revised to read: "An agreement on provisional application of a treaty or part of a treaty produces a legally binding obligation to apply that treaty or part thereof."

Mr. Chairman, again, we thank the Commission for its work on this important topic and look forward to following future work on these issues.

39. Cuba (Spanish only)

En cuanto al proyecto de directrices sobre la aplicacion provisional de los tratados considera importante el mismo por la necesidad de determiner el alcance del principio basico de la aplicacion provisional de un tratado, recogido en el articulo 25 de la Convencion de Viena sobre el Derecho de Tratados de 1969, y la Convencion de Viena sobre el Derecho de los Tratados entre Estados y Organizaciones Internacionales o entre Organizaciones Internacionales, de 1986.

Cuba considera que el proyecto debe incluir un lenguaje mas especifico en cuanto a la practica de la prorroga de un tratado que nunca entro en vigor pero que se aplico provisionalmente.

Por otro lado, cuando el tratado no incluye una clausula de aplicacion provisional y esta puede realizarse por una resolucion posterior, por otro tratado b por la declaracion de un Estado, en el caso de la declaracion, debena quedar establecido que debe realizarse por escrito para garantizar la formalidad del hecho.

El proyecto de directriz 6 es importante a fin de que quede definido el efecto juridico de la aplicacion provisional de un tratado tal y como el mismo estuviera en vigor.

Consideramos que el proyecto debe profundizar en la terminacion o suspension de un tratado cuando se aplica provisionaimente, asi como en ia realizacion de reserves.

40. Viet Nam

Turning to the final topic of this cluster, my delegation would first like to thank Mr. Juan Manuel Gómez-Robledo for his extensive work in delivering the fifth report on the Provisional application of treaties.

At the outset, Viet Nam supports the early completion of the Guidelines to meaningfully assist States in developing consistent practices regarding their provisional application of treaties, despite the Guidelines' non-binding nature.

Furthermore, my delegation seeks clarification on the following issues. First, relating to the form of agreement reflected in draft Guideline 4(b), in cases where provisional application of a treaty is determined based on a resolution of an international organization which is adopted by the majority of State parties while some States voice their opposition to such provisional application, how then will the treaty be applied to such States? If the treaty is provisionally applied to the opposing States despite their opposition, is the national sovereignty of the States in question negatively affected? Secondly, regarding draft Guideline 11, more details should be given to the legal consequences in cases where a State or international organization makes a declaration on the provisional application of a treaty while other States or international organizations do not express clear acceptance of such declaration, or the rule that applies among States and international organizations in cases where a State or international organization is bound by the declaration and must provisionally apply the treaty while other States or organizations who do not make any such declaration are under no obligations to provisionally apply said treaty.

Finally, on a technical level, in order to specifically address the groups of States that agree to provisionally apply treaties, we suggest that the term "between the States or international organizations concerned" wherever it appears in the Guidelines should be changed to "between the provisionally applying States or international organizations".

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41. Bulgaria

With regard to the topic of "Provisional application of treaties" we would like to express our satisfaction with the presented draft guidelines. In our opinion, they consolidate the dispersed contemporary state practice and conform to the relevant provisions of the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organization. Additional clarification of this topic is needed due to the specific nature of the said provisions, which virtually come into force before the rest of the treaty itself. There is considerable misunderstanding on the subject among practitioners which would mean that the current and future work of the Commission is especially relevant.

We hope that the Commission will continue its work on this issue and will also consider the memorandum, prepared by the Secretariat that reviews relevant state practice. We encourage the ILC to elaborate further on this topic and hope that States can draw inspiration from the final guidelines in their daily work.

42. Malaysia

Malaysia commends the efforts of the Special Rapporteur in preparing four reports on the provisional application of treaties. The study and findings on this issue thus far, had managed to elucidate several scenarios within which the provisional application of treaties might operate.

Those scenarios, nevertheless, should be discerned with great care and caution, in our attempt to illuminate the question of creation of legal effects produced by the provisional application of treaties; the question of the relationship between provisional application and other provisions of the Vienna Convention on the Law of Treaties 1969 (VCLT); and the provisional application of treaties with regard to the practice of international organizations. In this regard, Malaysia wishes to reflect its preliminary view on the topic as follows;

1. Malaysia notes that the International Law Commission (ILC) has provisionally adopted all draft guidelines 1 to 11, as presented by the Drafting Committee, at its meetings on 12 May and 26 July 2017. Malaysia further notes that the Commission then adopted the commentaries to the draft guidelines on 2 August

2017. In relation to this, Malaysia is of the view that there are still some doubts on certain parts of the draft guidelines that need to be addressed. 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 reiterates its comments to the draft guidelines as submitted in the previous sessions particularly the 71st session of the United Nations General Assembly;
2. In relation thereto, my delegation wishes to highlight that 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 that its obligations under each particular treaty are carried out accordingly, by legislating appropriate domestic laws before Malaysia could ratify any particular treaty.
3. For this present session, Malaysia would like to focus on the newly formulated draft guidelines 10 and 11. Pursuant thereto, Malaysia notes that the new draft guideline 10 which had been provisionally adopted by the Commission deals with the effects of the provisions of the internal law of States and the rules of international organizations on their competency to agree to the provisional application of treaties. Malaysia further notes that draft guideline 10 follows closely the formulation of article 46 of the 1969 Vienna Convention and that commentaries to the draft guidelines indicated that draft guideline 10 should be considered together with article 46 and other rules of international law. In view of this, Malaysia observes that article 46 of the 1969 Vienna Convention relates to the competency of States and international organizations to conclude treaties vis-a-vis the provisions of the internal law of the State.

In relation to Malaysia's domestic law, there is no 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, Malaysia will only consider to become a Party to an international treaty once its domestic legal framework is in place. Further, Malaysia would like to highlight that presently, the 1986 Vienna Convention has not come into force, as such, Malaysia reserves its right to comment on the reference made to the 1986 Vienna Convention;

4. In relation to the newly added draft guideline 11, it should be noted that draft guideline 9 states that the internal law of a State or the internal rules of an international organization may not be invoked as a justification for failure to perform international obligations arising from the provisional application, contrary to draft guideline 11 which seems to allow some flexibility in provisional application of a treaty in terms of internal law or rules of States and international organizations. In this regard, it is noted that there is no specific

form for States to declare the limitations imposed by its internal law. States need only clearly states the existence of such limitations in the treaty itself, in a separate treaty or in any other form of agreement in order to provisionally apply a particular treaty wholly or partly. Therefore, my delegation wishes to reiterate that Malaysia needs to ensure that its domestic laws are in place before a particular treaty could be enforced in Malaysia.

Last but not least, Malaysia would like to stress that it is crucial for us to determine the provisional application of a particular treaty from the source of obligations as provided by that particular treaty. Otherwise, if recourse to alternative sources should be had, the analysis of legal effect should be guided and determined by unequivocal indication by a State that it accepts provisional application of a treaty, as expressed via a clear mode of consent.

Thus, for a better comprehensive analysis of this topic, Malaysia would like to suggest that we further discuss the draft guidelines taking into account States' sensitivities, as well as uniqueness and contextual differences embedded in the treaty provisions, and how States' practices so far have responded to such variations.

43. Jordan (Arabic only)

[From (A/C.6/72/SR.22)]

44. Council of Europe

We would like to thank the Special Rapporteur, Mr Juan Manuel Gómez-Robledo, for the preparation of four reports on the analysis of the relationship of provisional application of treaties to other provisions of the 1969 Vienna Convention and of the practice of international organisations with regard to provisional application.

We would like to welcome the Memorandum , prepared by the Secretariat, reviewing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General of the United Nations, that provide for provisional application, including treaty actions related thereto. The ILC will consider the Memorandum at its next session in 2018.

In relation to this subject, the Council of Europe suggests including some examples of provisional application of specific treaty provisions from our long-standing Council of Europe practice in this field.

The Memorandum, at paragraphs 20 and 33, makes reference to the provisional applicability of certain provisions of Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 194) by separate agreement, the so-called “Madrid Agreement”, and Protocol 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 204) including an express clause on provisional application.

Apart from these examples with regard to the European Convention on Human Rights we would like to draw your attention to other examples of provisional application included in conventions and protocols concluded within the framework of the Council of Europe: the provisional application of the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 2) (Article 22) and the Convention on the Elaboration of a European Pharmacopoeia (ETS No. 50) (Article 17).

Another unusual and peculiar example took place in 2016 in relation to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217) which has entered into force recently (1 July 2017). Article 7 of that Protocol, provides for the setting up of a network of 24-hour-a-day national contact points facilitating the rapid exchange of information concerning persons travelling abroad for the purpose of terrorism. With a view to applying this article provisionally, the Committee of Ministers at its 126th Ministerial session on 18 May 2016 "called for the expeditious designation of the 24/7 contact points to facilitate the timely exchange of information, as provided for by the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217), pending its entry into force."

As a most recent example, when the Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons 9 will be opened for signature on 22 November 2017 in Strasbourg (France) the signatories will have the possibility to declare under Article 5 of the Amending Protocol that they will apply the provisions of the Protocol on a provisional basis.

As you can see, the Council of Europe has a rich practice in the provisional application of treaties and therefore attaches great importance to the ILC's work in this field.