Sixth Committee Statements
Report of the International Law Commission
on the work of its 70th session

Provisional application of treaties

73rd session of the General Assembly
2018

Table of Contents

20th meeting, 22 October 2018 (A/C.6/73/SR.20)

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

We also take note that two additional products were adopted in first reading: first, the "Guidelines on Protection of the Atmosphere" and, second, the "Guide to Provisional Application of Treaties". We appreciate the work done by the Special Rapporteurs Shinya Murase and Juan Manuel Gómez-Robledo. CELAC members will carefully examine these sets of guidelines.

22nd meeting, 24 October 2018 (A/C.6/73/SR.22)

2. Sierra Leone

The progress being made on other topics, including protection of the atmosphere and provisional application of treaties, both of which reached the first reading stage, is also noted with appreciation. Sierra Leone has also further taken note of the Commission's requests for comments and observations on the two first reading topics by 15th December 2019. Though we are still studying them, and will continue to do so over the next several months, we hope to be able to submit written observations by the requested date.

24th meeting, 25 October 2018 (A/C.6/73/SR.24)

3. Malawi

… my delegation takes note of the request by the Commission on the topics, "Protection of the atmosphere" and "the Provisional application of treaties". Malawi wishes to encourage all Member States to make the submission of comments and observations so that the Commission's deliberations are enriched by State practice.

4. European Union

The European Union has the honour to address the 6th Committee on the topic of provisional application of treaties, considered by the International Law Commission (ILC).

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

The European Union notes that the ILC has adopted on first reading the whole set of draft guidelines on provisional application of treaties and the commentaries to them as a draft Guide on Provisional Application of Treaties and takes the opportunity to express its appreciation for the work done so far by the Special Rapporteur Mr. Juan Manuel Gomez Robledo and the ILC on this topic.

The European Union also notes that the ILC has decided to transmit the draft guidelines as adopted on first reading to Governments and international organisations for comments and observations, which should be made by 15 December 2019. The European Union highly values this opportunity and it will revert to the ILC, as appropriate. In that respect, the European Union will limit its current intervention to making only a few remarks.

The European Union finds the proposed outcome in the format of a Guide on Provisional Application of Treaties appropriate as it corresponds to the inherent need for flexibility on that matter. The European Union takes note that it is anticipated that the Guide will also include draft model clauses, which would reflect the best practice with regard to the provisional application of both bilateral and multilateral treaties. While *prima facie* such clauses would appear to be of limited interest, the European Union is open to consider them once the ILC has finalized its work on their possible content.

The European Union has advocated throughout its interventions that the practice of States and international organisations on provisional application should also be studied as it could contribute to providing answers and guidance on the many questions that remain unanswered by Article 25 of the 1969 Vienna Convention. In that respect, the European Union notes with appreciation that the Special Rapporteur and the ILC, with the support of the Secretariat, have embarked on an extensive study of such practice and the Guide is intended to provide guidance not only on the law but also on the practice on provisional application of treaties. In the view of the European Union, this greatly increases the authoritative value of the guidelines and their practical usefulness.

The European Union welcomes that the scope *ratione personae* of the draft guidelines is not limited to States but also includes international organisations. Indeed, as already indicated during previous interventions on the topic, the European Union is an actor who is actively contributing to shaping the practice in the field of provisional application of treaties. This has now been recognized by both the Special Rapporteur and the ILC, as in the reports and in the commentaries to the draft guidelines they refer on a number of occasions to treaty practice of the European Union to illustrate one guideline or another, or to come to an answer to open questions.

At this stage the European Union would like to make the following concrete observations on the substance of the draft set of guidelines and the commentaries to them.

With respect to draft guideline 3, while the European Union fully concurs that a treaty or a part of a treaty may be provisionally applied if the treaty itself so provides, what still remains unclear from the commentaries is what would be the source of the obligation to provisionally apply such a treaty or part of it, if the consent to be bound by the clause providing for provisional application is not given upon signature. As the European Union indicated in its intervention last year, if the consent is not given upon signature, such a clause is not more than one of the provisions of a treaty not yet in force.

The European Union invites the ILC to clarity whether it is considered that - if there is a provisional application clause - agreement to provisional application is

always given upon signature and if so, what the basis in international treaty or customary law for such a rule is. For example, under European Union law, the European Union may agree to provisional application in accordance with the procedure provided for in Article 218(5) of the Treaty on the Functioning of the European Union (TFEU), although the consent to be bound by the treaty is only given after the procedure of Article 218(6) TFEU is completed. Clarifying this matter would contribute to legal certainty and assist parties when deciding on provisionally applying a treaty and on what the appropriate form of their agreement would be.

Furthermore, this would be useful also with respect to the matter of commencement of provisional application where in draft guideline 5 the ILC has opted for referring to "taking effect" of provisional application.

Closely linked to the above is the matter of unilateral declarations as a source of an obligation to provisionally apply a treaty, which subject the European Union brought up in its last year's intervention. The European Union notes that the ILC recognises that it is possible, although according to it the practice is *"quite exceptional",* that a State or an international organisation could make a declaration to the effect of provisionally applying a treaty or a part of it when the treaty is silent or when it is not otherwise agreed. The ILC is of the view that *"the declaration must be verifiably accepted by the other States or international organizations concerned, as opposed to mere nonobjection "* and while there is a degree of flexibility as to the form of acceptance, this acceptance must always be express.

In that regard, the European Union would like first to bring the attention to a judgment of the European Court of Justice, in which the Court held that the declaration from the European Union, providing that it "shall issue fishing authorisations to a limited number of fishing vessels flying the flag of the Bolivarian Republic of Venezuela" in its exclusive economic zone, subject to certain conditions, must be regarded as an offer made by the European Union, which the Bolivarian Republic of Venezuela accepted by adopting a certain course of action, namely "by sending to the European Union — following the offer that had been made to it — specific applications for fishing authorisations and by refraining, when making those applications, from expressing any reservations as regards the conditions of that offer". The Court held that such concurrence of the wills constituted an agreement between the two parties, which set out reciprocal rights and obligations (Joined Cases C-103/12 and C-165/12, Parliament and Commission v Council, para 25, 60-73). Therefore, the European Court of Justice has recognized that express acceptance is not a requirement for rights and obligations to be created for the parties but that acceptance can take different forms such as relevant conduct.

Second, the European Union notes that there is at least one example, cited in footnote 1021, where a unilateral declaration was used and there was not express acceptance by the other parties.

In light of the above, the European Union would like to once again invite the ILC to further elaborate in the commentaries as to why the regime of unilateral acts of States could not be applied with respect to provisional application of treaties and, hence, there must always be acceptance, even more - express acceptance. This clarification would contribute to enhancing the integrity and coherence of the international legal order.

The European Union takes note that the ILC is still at the initial stage of considering the question of reservations in relation to provisional application and encourages the ILC to further study the matter. It would benefit all those using the Guide if the commentaries to draft guideline 7 clarify the effects of such reservations, including as to whether the legal effects of a reservation aimed at excluding or modifying the legal effects of certain provisions, which are provisionally applied, end with the termination of the provisional application or they could continue even after the treaty enters into force. In the view of the European Union, their effect would end with the termination of the provisional application.

Finally, the European Union notes with appreciation that in draft guideline 9 the ILC has included a separate paragraph 3 on application *"mutatis mutandis"* of the relevant rules of Part V, section 3 of 1969 Vienna Convention concerning termination and suspension of treaties. As the European Union has indicated in its previous interventions, relying exclusively on the regime for termination of provisional application provided for in Article 25, paragraph 2, of the 1969 Vienna Convention could lead to disproportionate outcomes. The European Union welcomes that the ILC has recognized that there might be a number of scenarios not covered by Article 25, paragraph 2, of the 1969 Vienna Convention, to some of which the European Union alluded in its last year's intervention, and, hence, confirmed that provisions pertaining to termination and suspension in the 1969 Vienna Convention may be applicable to a provisionally applied treaty.

In conclusion, the European Union wishes to once again express its appreciation for the work done so far by the ILC on this important topic and is looking forward to continue providing its contribution to the work of the ILC and engaging in further debates on the matter in the 6th Committee.

5. Finland (on behalf of the Nordic countries)

The Nordic countries are very pleased about the progress made at this year's session with the adoption on first reading by the Commission of the "Guide to Provisional Application of Treaties", which includes twelve draft guidelines and commentaries thereto. The Nordic countries continue to support the efforts of the Special Rapporteur and the Commission on this subject.

The Nordic countries welcome the Special Rapporteur's proposal for model clauses on provisional application. We believe that such clauses would be of practical assistance when formulating final provisions of treaties. A closer review of the relationship between the model clauses and the guidelines could however be called for, taking into account their partly overlapping nature.

Let me now turn to some more specific comments on the draft guidelines 6 on legal effect of provisional application, 7 on reservations, and 9 on termination and suspension of provisional application.

The revised wording of guideline 6 takes into account the distinction made in the Vienna Convention on the Law of Treaties between provisional application and entry into force. The Nordic countries can agree with this solution and the fact that the wording allows for the termination and suspension of provisional application in line with Part V, Section 3, of the Convention (*mutatis mutandis*).

The Nordic countries also welcome the Commission's work on the use of reservations in relation to provisional application. Any reservation in relation to provisional application should be made in accordance with the relevant rules of the Vienna Convention. The possibility to make a reservation to exclude or modify the legal effect produced by the provisional application of a treaty might increase the willingness to apply the treaty provisionally by states that would make a reservation to the treaty when expressing consent to be bound. A review of the practical impacts of draft guideline 7 might however be useful in the further work on the subject.

Although the practice on termination and suspension of provisional application is scarce, the Nordic countries note with interest draft guideline 9 and in particular its paragraph 3 on termination and suspension not only in the case of a material breach but with a *mutatis mutandis* reference to Part V, Section 3 of the Vienna Convention. The reference will guide future practice in the area, and clarifies the relationship between Article 25 and Part V, Section 3 of the Convention. The specific reference to Part V, Section 3 also complies with the principle of legal certainty.

The Nordic countries are looking forward to the second reading of the Commission on this topic and will be providing written comments and observations to the Secretary-General by 15 December 2019.

25th meeting, 26 October 2018 (A/C.6/73/SR.25)

6. Austria

The Austrian delegation commends Special Rapporteur Gómez Robledo for his fifth report and congratulates the Commission on the adoption of the Draft Guidelines on "Provisional application of treaties" on first reading. The Draft Guidelines will provide a valuable tool for states and international organisations in their treaty making practice. We also want to express our appreciation of the extensive study of practice in regard to provisional application of treaties prepared by the Secretariat.

The Austrian delegation notes, however, that the present formulation of the Draft Guidelines resembles very closely the text of the Draft Guidelines provisionally adopted last year and that suggestions made by delegations during the past 6th Committee meetings have not or only very cautiously been taken up.

With regard to the possibility to make reservations when agreeing to the provisional application of treaties, as provided for in Draft Guideline 7 on reservations, the Austrian delegation concurs with the underlying idea that such modification of legal effects between parties should be made possible. However, we would appreciate further explanation of the legal effect of such reservations, which has not been sufficiently dealt with in the 2011 Guide to Practice on Reservations to Treaties.

Concerning Draft Guideline 9 on termination and suspension of provisional application, my delegation notes that the current wording restates the provisions of the two Vienna Conventions on the Law of Treaties regarding termination of provisional application as a result of a treaty's entry into force as well as of a state's or international organisation's notification that it no longer intends to become a party to the treaty. While we appreciate adherence to the rules of the Vienna Conventions,

we would have welcomed an additional provision on other forms of termination and/or suspension, going beyond the present content of Article 25 of the Vienna Conventions. We note that the Commission seems to have contemplated such other forms, including unilateral termination of provisional application, but decided against introducing respective language. Since states and international organisations may have to terminate or suspend the provisional application of treaties as a result of internal democratic decision-making procedures or other legal or political reasons, without necessarily expressing their will not to become a party at all in the future, it would seem useful to include some additional language in the Draft Guidelines to that effect.

Finally, the Austrian delegation notes with regret that the Commission did not have sufficient time to discuss and formulate in detail the draft model clauses proposed by the Special Rapporteur, *as contained in footnote 996 to the present report*. Such model clauses seem to be of particular value, and it is hoped that the Commission will revert to a more detailed discussion of them in the future.

7. China

With regard to the topic "Provisional application of treaties", the Chinese delegation noted that the Commission had adopted on first reading a set of 12 draft guidelines, with commentaries thereto. We are of the view that the scope of legally binding obligations on the parties concerned created by the provisional application should be defined cautiously, with due respect for the genuine intentions of those parties. The conditions and procedures of the provisional application agreed upon by the parties should be interpreted rigorously, to avoid imdue expansion of the scope of obligations placed upon the parties. China suggests that the relevant commentaries clarify this matter. Regarding draft guideline 7 "Reservations" and draft guideline 9 "Termination and suspension of provisional application", it seems no State would need such provisions in reality, therefore, we suggest that the Commission consider the practical value of drafting these two guidelines.

8. Brazil

I now turn to the topic “provisional application of treaties”. As a general commentary, Brazil finds commendable that the guidelines frequently refer to “agreement” between states relating to the provisional application of a treaty. The Commission’s heavy reliance on “agreements” is advisable, since the intention of states cannot be inferred or assumed in the domain of provisional application of treaties. On the contrary, states have to formally, explicitly, and in a written form, agree on the provisional application of a treaty. In the same vein, Brazil finds commendable that Guideline 3 adopts the term “may”, thus reinforcing the idea that the provisional application of a treaty happens in a completely voluntary basis by the states concerned.

We also perceive a tension between the guidelines and the Vienna Convention on the Law of Treaties, which emerges clearly in some parts of the study. On guideline 6, paragraph (5) of the commentaries contains an important element to understand the

Commissions' method on this topic, by stating that the existence of legally binding obligations resulting from the provisional application of a treaty does not imply that provisional application has the same legal effect as entry into force. Although the Guidelines attempt to apply several aspects of the law of treaties to the idea of provisional application, this commentary makes clear that there are areas not touched by the regime of the Vienna Convention on the Law of Treaties, given that provisional application does not equate to being in force.

A good example of this tension is the usage of the term "mutatis mutandis" in Guidelines 7(1) and 9(3), used in order to specify or isolate the domain of the provisional application from the general rationale of the Vienna Convention on the Law of Treaties. We see a risk in this methodology, because it stimulates legal uncertainty by not establishing the limits and the extent to which the Vienna Convention of the Law of Treaties rules will be applicable to different aspects of the provisional application of treaties.

Turning now to more specific aspects of the report, on guideline 4, which refers to the form of agreement, neither the guideline itself nor its commentaries are clear on the number of parties that shall agree to the provisional application of a treaty through a resolution adopted by an international organization or by an intergovernmental conference. Will all states parties be bound by a decision of an international organization or of an intergovernmental conference that allows the provisional application of a treaty – even if the resolution was not unanimous?

On guideline 7, related to reservations, the commentaries recognize that there is a substantive lack of practice in relation to provisional application of treaties. Moreover, as the report correctly states, bilateral treaties "constitute the vast majority of treaties that historically have been provisionally applied". Since the Guide to Practice on Reservations to Treaties approved in 2011 by the Commission recognizes that there are not, properly speaking, reservations to bilateral treaties, we wonder about the need for a specific Guideline on reservations in relation to the provisional application of a treaty. A specific guideline on this matter might cause confusion, adding legal uncertainty in the domain of provisional application of treaties.

Finally, as we have mentioned on our commentaries about "jus cogens", here as well we consider it important to maintain consistency in the work of the Commission under different topics. Hence, we believe that Guideline 8 should reflect, as far as possible, the notions contained in the ILC articles on state responsibility, particularly the elements detailed in articles 1 and 2 of the articles.

9. Poland

Allow me now to turn to the topic "Provisional application of treaties". Poland would like to thank the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, for his fifth report. We welcome the adoption by the Commission on the first reading of the draft Guide to Provisional Application of Treaties, consisting of 12 guidelines together with commentaries. At this stage, we would like to share two specific comments on the Guide.

Firstly, we are of the view that for the sake of stability and predictability of treaty relations, some reasonable period of notice as to when the termination of provisional application takes effect should be introduced in guideline 9 paragraph 2.

And secondly, let me turn to draft guideline 6, which states: "The provisional application of a treaty (…) produces a legally binding obligation to apply the treaty (…) as if the treaty were in force". In this context my delegation believes that there is a need to consider introducing into the Guide a provision equivalent to article 70 of the Vienna Convention on the Law of Treaties, a kind of formula whereby provisional application does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

10. Singapore

Mr Chair, my delegation thanks the International Law Commission for its report on the topics "Protection of the atmosphere", "Provisional application of treaties", and "Peremptory norms of general international law (jus cogens)". We continue to follow all three topics with great interest and would like to offer some comments.

…

I now turn to Chapter VII of the Report, on the topic "Provisional application of treaties". Singapore expresses its appreciation to the Special Rapporteur, Mr Juan Manuel Gómez-Robledo, for his fifth report. We commend the Special Rapporteur and the Commission for adopting on first reading a set of draft guidelines and commentaries thereto. Provisional application is a tool of immense practical value in modern international life. Singapore continues to support the Commission's work. Singapore will endeavour to respond in writing to the Commission's request through the Secretary-General before 15 December 2019.

We are heartened that the Commission's present work addresses some of the concerns my delegation had raised before. Our observations on these are available via PaperSmart.

[Additional observations not included in oral delivery:

(a) First, my delegation had earlier suggested 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". Draft guideline 6 now provides that "*The provisional application of a treaty or part of a treaty produces a legally binding obligation to apply the treaty or part thereof as if the treaty were in force, unless the treaty provides otherwise or it is otherwise agreed*."

(b) Second, we had asked that the Commission clarify the relation between provisional application and reservations. My delegation therefore welcomes new draft guideline 7 and its commentary which addresses this very important issue. However, we agree with views expressed in the Commission that further work is required. For example, with respect to draft guideline 7, paragraph 1, the Commission might state that the relevant rules in the Vienna Convention on the Law of Treaties are those relating to the formulation of reservations. This is consistent with the commentary and will provide the correct reference point for users when the guidelines are eventually finalised.]

On the Commission's proposal to annex draft model clauses to the guidelines, my delegation observes a lack of examples involving Asian States in the draft model clauses and hopes that more could be done to represent the full diversity of State practice in this field. For instance, the Memorandum by the Secretariat, refers to Article 20.5 of the Trans-Pacific Strategic Economic Partnership Agreement as an example of provisional application of part of a treaty that applies only to one party. The Commission may wish to consider similar examples in its 71st session.

11. Mexico (Spanish only)

En cuanto a la aplicación provisional de los tratados, México felicita al Relator Especial. Juan Manuel Gómez-Robledo, y a la GDI, por haber adoptado en primera lectura la "Guía para la aplicación provisional de los tratados". Las doce directrices que componen la Guía reflejan una visión pragmática, con un contenido puntual que puede facultar su uso y consulta por parte de operadores jurídicos de los Estados y las organizaciones internacionales.

Nos parece pertinente que se haya agregado una directriz relativa a reserves y que se haya añadido un tercer párrafo a la directriz 9 para incorporar la noción de la terminación o suspensión de la aplicación provisional por violación de una obligación. Estas adiciones sirven para dar un tratamiento complete a la relación que guarda el Articulo 25 de la CVDT con sus demás disposiciones.

Reconocemos también los ajustes realizados a los comentarios, en particular a la directriz 6, que se refiere a los efectos jurídicos de la aplicación provisional, los cuales sirven para aclarar y resolver algunas de las preguntas que fueron expresadas por varias delegaciones en cuanto a la diferencia del alcance de las obligaciones de un tratado aplicado provisionalmente frente a las que emanan de un tratado en vigor.

Reiteramos la conveniencia de contar con un paquete de cláusulas modelo en materia de aplicación provisional y agradecemos al Relator Especial haber presentado un primer paquete de propuestas en su quinto informe.

Apoyamos la idea de que éstas se incluyan como anexo a la Guía sobre la aplicación provisional, lo cual sería de gran ayuda para los Estados al momento de negociar tratados internacionales, dando coherencia y consistencia a esta figura. Estaremos atentos a la labor que desarrolle la Comisión en la revisión de las cláusulas modelo, esperando que éstas se incorporen a la Guía en su segunda lectura.

12. Czech Republic

I will now tum to the topic „ProvisionaI application of treaties". The Czech Republic welcomes the adoption, on first reading, of draft Guide to Provisional Application of Treaties and appreciates the contribution of the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, to this outcome. His five reports, as well as three Memoranda prepared by the Secretariat, were instrumental for the work on this topic.

We intend to submit our written comments on the entire draft Guide in due course.

In our today's remarks we will focus on those draft guidelines, which have been adopted or substantively amended by the Commission at its 70th session.

Concerning draft guideline 7 on formulation of reservations, we are not convinced of the need for its inclusion. We worry that it may cause confusion as far as the integrity of the legal regime of reservations is concerned. As it was rightly underlined in connection with the elaboration of the Guide to Practice on Reservations, the regime of reservations is a single and xmiform regime applicable to all reservations, irrespective of the material content of a treaty provision in respect of which the reservation is formulated, and - in our view - also irrespective of whether such provision will or will not be provisionally applied. This fact is, in our view, blurred by inclusion of words "*mutatis mutandis* " in paragraph 1 of the draft guideline 7. These words imply that relevant provisions of the 1969 Convention are not directly applicable to reservations to treaty provisions, which may be provisionally applied. We cannot agree with such assumption.

A reservation may be formulated before the action triggering provisional application is taken. Accordingly, the standard provisions concerning reservations apply directly, not "*mutatis mutandis*", to such reservation. Both paragraph 1 and 2 put inappropriate accent on the moment of the formulation of the reservation. However, the real issue here seems to be that of the time span of the reservation, namely limitation of reservation's duration to the duration of the provisional application of the treaty. In other words, it is about the exclusion of some treaty provisions from provisional application, or modification of their content during their provisional application. By focusing on the moment of formulation of reservation to a provision to be provisionally applied draft guideline 7 does not seem to properly capture this issue.

We noted the debate, which took place in the Drafting Committee on this matter. In fact, the arguments that the Drafting Committee viewed as potentially favoring inclusion of a provision on reservations rather strengthened our misgivings concerning draft guideline 7 as currently drafted. We appreciate that the Drafting Committee acknowledged that it moved towards adoption of draft guideline 7 with considerable degree of hesitation. We will further reflect on this matter and revert to it in our written comments.

As regards draft guideline 9, we welcome the adoption of its new paragraph 1 by the Commission. The inclusion of this paragraph responds to requests by several delegations, including Czech delegation, made last year. We agree with its content, as well as with its prominent place, in view of the fact that it addresses the most common scenario of termination of the provisional application.

We have some hesitation concerning current drafting of paragraph 3 addressing the issue of termination and suspension of provisional application as such. In principle we are in favor of a provision addressing these issues. However, as far as the phrase "other relevant rules of international law concerning the termination and suspension " is concerned, we want to stress that in our view the rules on suspension or termination of a treaty, as a whole or in part, can be found solely in the law of treaties and not in other branches of international law (as the existing formulation would allow to argue). We believe that, if the provisional application of a treaty or its part produces the same legal effect as if that treaty were in force (see draft guideline 6), the rules governing the termination and suspension of such provisional application cannot be different from the rules governing the termination and suspension of the treaty which is in force. This

should be crystal clear from the draft guideline itself and also unambiguously explained in the commentary.

26th meeting, 26 October 2018 (A/C.6/73/SR.26)

13. France (French only)

S'agissant du sujet de l'«Application à titre provisoire des traités», la France transmettra à la Commission des observations détaillées sur ce sujet d'ici au 15 décembre 2019. Je souhaiterai dès à présent formuler deux observations à propos de la décision de la Commission d'adopter cette année en première lecture le projet de «Guide de l'application à titre provisoire des traités».

Dans son rapport, la Commission propose d'examiner en seconde lecture seulement la question de savoir si des clauses modèles pourraient être ajoutées au projet. L'adoption en deux lectures des projets de la Commission du droit international repose sur le principe de donner l'opportunité aux Etats membres de se prononcer sur *un ensemble de projets de texte* adopté en première lecture. La décision de renvoyer la question directement à la seconde lecture prive les Etats de cette possibilité et empêche la Commission de préparer un projet répondant aux attentes et observations des Etats. Une telle approche est d'autant plus regrettable que rien n'imposait à la Commission d'achever dès cette année la première lecture du projet.

On peut également regretter que la pratique internationale en matière d'application provisoire des traités n'ait pas été prise en compte de manière satisfaisante, alors même que le projet de directives est présenté comme un guide utile pour les Etats. A titre d'exemple, le renvoi à l'application «*mutatis mutandis*» de la Convention de Vienne sur le droit des traités s'agissant des réserves (directive 7) et de l'extinction et de la suspension du traité (directive 9-3) ne permet pas de «guider» les Etats comme c'est pourtant l'objet annoncé du projet de la Commission. La présentation orale du Président du Comité de rédaction souligne d'ailleurs que ces projets ont été adoptés sans examen approfondi de la pratique.

Il appartiendra à la Commission de déterminer comment elle pourra donner l'opportunité aux Etats de réagir en temps voulu, avant l'adoption finale du projet, aux nouveaux éléments qu'elle entend inclure dans ce projet et dont elle n'a pas débattu au cours de la première lecture.

14. Slovakia

Turning to the topic "Provisional application of treaties", I would like to commend Special Rapporteur Juan Manuel Gómez Robledo for his fifth report. We note with appreciation the adoption on first reading of the whole set of 12 draft guidelines with commentaries thereto, as well as the decision of the Commission to transmit the draft guidelines to Governments and international organizations for comments and observations. We welcome the formulation of the title for the proposed final outcome of the topic as "*Guide to Provisional Application of Treaties*". We think it properly reflects its intended nature and purpose. We are of the view that the guide, after its

completion, will serve for states as a useful tool. It will contribute to further harmonization of the practice and will reduce the risk of its fragmentation.

I would like to reiterate comments made last year. In our view, it is not necessary to define the scope of the guidelines. Instead, we think that it would be sufficient to keep draft guideline 2 on purpose 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 way of agreeing on provisional application of treaties. Concerning draft guideline 4 sub-paragraph (b) we think that some precision is required, since in our understanding, the State has to give its explicit consent for the treaty to apply provisionally. Thus, all other means or arrangements, including resolutions of international organizations, necessarily have to include a positive consent of the State concerned to have the effect of provisional applicability.

Concerning draft guideline 9 on termination and suspension of provisional application, we understand that it contains two forms of termination, namely the termination by the treaty's entry into force and by the notification of a State of its intention not to become a party to the treaty. With regard to our recent national practice concerning notification of the intention not to become a party as a form of termination of provisional application, I would like to mention two issues. First, we would welcome, if the respective draft guideline could address also the temporal aspect of such notification. The question is, whether it may be upon the notifying State to determine unilaterally when the provisional application terminates. Second, in our view the intention of a State to terminate the provisional application of a treaty does not always have to coincide with notification by the same State of its intention not to become a party to the treaty, as the paragraph 2 of draft guideline 9 presupposes.

In concluding, I would like to use this opportunity to express our gratitude for the elaboration by the Secretariat of the extensive study on practice of states and international organisations on provisional application of treaties. We will follow with great interest the future work of the Commission on this topic.

15. Germany

Germany welcomes the impressive and highly informative fifth report by Special Rapporteur Juan Manuel Gómez-Robledo on the topic "*Provisional application of treaties*". We deem it noteworthy that the Special Rapporteur has proposed two additional draft guidelines concerning relevant aspects of international law in his present report that both take into account prior observations and comments and do not restrict the flexibility that is inherent in the mechanism for the provisional application of treaties.

Moreover, we welcome the work undertaken by the drafting committee, which has contributed significantly to the formulation of appropriate wording for the draft guidelines. Germany appreciates the ILC's efforts to provide practical guidance on this important matter.

I would like to make two comments in particular:

- First, reservations play an important role in the conclusion of multilateral treaties. Given the fact that the provisional application of treaties already produces legal effects, the parties to a treaty should be afforded the opportunity

to formulate reservations when agreeing to provisional apply a treaty as well. We have taken note that the Commission will be revisiting this issue. Germany would deem it helpful to have the ILC's guidance on this topic after the second reading. It would, for example, be interesting to learn whether reservations as referred to in guideline 7 can also play a role in limiting the scope of provisional application due to internal laws as referred to in guideline 12.

- Second, Part V, section 3, of the Vienna Convention on the Law of Treaties provides States with flexible means to react to the development of the application of a treaty and to the conduct of other parties, in particular in the event of breaches and in the context of multilateral treaties. Germany welcomes the approach to grant such flexibility also in the case of provisional application. In this context, we would appreciate it if the second reading were to provide further clarification on the relationship between the currently available means of termination as referred to in guideline 9, paragraphs 1 and 2, and the new opportunities, especially with regard to multilateral treaties, created by the reference made in guideline 9, paragraph 3, to Part V, section three, of the Vienna Convention on the Law of Treaties.

Germany will continue to follow this project with great interest.

16. Slovenia

It is my pleasure to address the Sixth Committee regarding the work of the International Law Commission on the Cluster 2 topic Provisional Application of Treaties.

Slovenia appreciates the work of the Special Rapporteur Juan Manuel Gómez-Robledo and the Commission as a whole on this topic, and the opportunity to submit comments to the draft Guide to Provisional Application of Treaties by 15 December 2019.

Since this is a topic of great practical interest to states and international organisations, the end result should be aimed at assisting states and international organisations in their treaty practice by providing comprehensive guidance both on the concept and practical aspects of provisional application. This year, we have been concentrating on the concept, because we believe that a solid understanding of the concept leads to better practice.

In that sense, with regard to draft Guideline 6 and its commentary – similar to this years' comments by the European Union – we would like to emphasise, as we have in the past in this Committee, that the issue of the source of the provisional application is still not sufficiently clear. The commentary on draft guideline 6 does mention that the binding legal effect derives from the agreement to provisionally apply the treaty, but it does not say why that agreement should be considered as binding. If the treaty provides for consent to be bound to be expressed by certain means, e.g. ratification, does that imply that there is double consent in cases where provisional application is agreed to? This conceptualisation of the agreement to provisionally apply the treaty is essential, and has an impact on its other aspects. This is also the point where the Commission could provide added value, since the binding effect has already been determined in the *travaux préparatoires* to Article 25 VCLT, whereas its source has

not. Since the issue of agreement as necessary precondition for provisional application is an important issue, in our view it should be reflected in the text itself of draft Guideline 6, for example by stating at the beginning that "The agreement to provisionally apply a treaty…produces a legally binding obligation". This is also in accordance with the end of this draft guideline, where agreement is implied in the wording "unless…otherwise agreed".

The foregoing conceptual underpinning of provisional application as based on agreement is, for example, relevant for unilateral declarations. In this regard, we believe that in such a case the agreement to provisionally apply the treaty should also exist if agreement is the basis for consent to provisional application. However, that agreement does not necessarily need to be explicit. As we have already stated in our previous statements, the regulation of provisional application in the Vienna Convention on the Succession of States in regard to Treaties could be relevant in this regard. There, Articles 27 and 28 provide that a treaty shall apply provisionally between States if they expressly so agree, or if by reason of their conduct it is to be considered that they have so agreed. In our opinion, this would mean that an implied agreement exists. We see no reason why this would apply only in the case of the succession of treaties and therefore could not be possible in the case of Article 25 of the VCLT, especially since the *travaux* to that convention do state that provisional application in it is based on Article 25.

Slovenia wishes to reiterate the importance of the topic and expresses its support to the work of the Special Rapporteur and the Commission in this regard.

17. Estonia

We are now turning to the topic provisional application of treaties. Estonia expresses its gratitude for the work done by the Special Rapporteur Juan Manuel Gomez-Robledo and the Commission for adopting on first reading a set of 12 draft guidelines with commentaries thereto.

Estonia aligns itself with the statement made by the European Union.

While agreeing with the content of draft guideline 3 and understanding that it is intended to be read together with draft guideline 4, our observation is that the current wording of the two guidelines is repetitive in the sense that draft guideline 4 entails the essence of draft guideline 3. We therefore suggest either merging the two draft guidelines or rewording draft guideline 4 so that it removes the reference to the form of provisional application by means of treaty itself providing it.

We welcome the inclusion of the draft model clauses intending to reflect best practice with regard to the provisional application of treaties and we encourage formulating them for a wider range of situations that may arise.

Estonia notes that the draft guidelines have been transmitted to States and international organisations for comments and observations and is grateful for this opportunity. We will carefully study the text and revert to the Commission as appropriate.

Estonia once again congratulates the Commission and the Special Rapporteur for the important work done so far.

18. Netherlands

With respect to the topic of 'Provisional Application of Treaties', my Government would like to extend its appreciation to the (1) Special Rapporteur for his fifth report, (2) to the Secretariat for its memorandum providing useful background information, and to (3) the Commission as a whole for adopting the text of the draft Guide to Provisional Application of Treaties and commentaries thereto on first reading.

We note the decision of the Commission to transmit these draft guidelines to Governments and international organisations for comments and observations to be submitted by 15 December 2019. We intend to make use of that opportunity to provide further comments. For now, we would like to make the following remarks.

As regards the proposed outcome of the work of the Commission on this topic, we consider that the form of a Guide on Provisional Application of Treaties is appropriate. As we have stated previously, the study should give guidance to States on how to use the instrument of provisional application - if they so choose - and, in such cases, should inform them of the legal consequences thereof, without imposing a particular course of action that might prejudice the flexibility of the instrument.

Similarly, we have held that an analysis of State practice in light of the language of Article 25 of the 1969 Vienna Convention on the Law of Treaties should be the point of departure for the present study. In this respect, exploring the relationship of that provision with other provisions of the Convention for the purposes of clarification and delimitation is useful.

One could think of the relevance and effects of reservations made upon signature for the provisional application of a treaty or termination of provisional application of a treaty other than by application of the provisions of Article 25 of the Convention. We would reiterate, however, our words of caution that any conclusions arrived at should first and foremost be supported by underlying State practice.

Finally, we note that draft guideline 9 includes a 'without-prejudice' clause in paragraph 3, referring to the application, *mutatis mutandis*, of the relevant rules on termination and suspension contained in the Convention. While acknowledging an apparent lack of relevant State practice and the flexibility inherent in the formulation of Article 25, paragraph 2, of the Convention, the Commission apparently considered it useful to address a number of possible scenarios not otherwise covered by the guidelines. While we agree that scenarios could occur in practice that are not easily brought within the scope of Article 25 of the Convention, we would once more express a word of caution: it is important not to blur the conceptual distinction between the rules applicable to termination of treaties that have entered into force and those that are applied on a provisional basis.

19. Spain (English and Spanish)

With regard to Chapter VII, on the provisional application of treaties, the Spanish Delegation expresses its appreciation of the Fifth Report submitted to the Commission by the Special Rapporteur on this issue, Mr Juan Manuel Gomez Robledo.

The Special Rapporteur's hope, as expressed in his latest report, was that the Commission would complete its first reading of the draft guidelines and draft model clauses at its 70th session. In the end, the Commission did not have enough time to

discuss the model clauses, and has expressed its intention of doing so at its next session. For this reason, we will focus on the two new draft guidelines :7 and 9.

Draft guideline 7 concerns reservations. On the basis of this draft guideline, and taking into consideration draft guideline 6, it could be concluded that reservations that take effect in provisional applications could be formulated at two different moments, that could take place, or not, at the same time:

One possible moment occurs when the State or international organization expresses their consent to be bound by the treaty. A reservation formulated at this moment shall take effect when the treaty enters into force for the author of the reservation; but we believe that the reservation shall also take effect for the author during the provisional application. And this is because according to draft guideline 6, provisional application produces the obligation to apply the treaty or a part thereof "as if the treaty were in force". It is true that the comment to draft guideline 6 points out that the "Provisional application of treaties remains different from their entry into force, insofar as it is not subject to all rules of the law of treaties". But it is possible to formulate reservations to provisional application, and said reservations shall be governed by the rules of the law of treaties relating to the formulation of reservations. Therefore, there seems to be no reason to rule out that reservations taking effect when the treaty enters into force may also take effect during provisional application.

The above notwithstanding, this is a possibility, not an imposition. Draft guideline 6 sets forth that provisional application produces the obligation to implement the treaty or a part thereof as if the treaty were in force, "unless the treaty provides otherwise or it is otherwise agreed". This latter caveat is the framework for draft guideline 7, but its scope is, nonetheless, broader.

The other possible moment occurs when the provisional application of a treaty or a part thereof is agreed upon. According to draft guideline 7, at that moment the reservation is formulated "purporting to exclude or modify the legal effect produced by the provisional application". From this wording we understand that, unless the treaty provides otherwise or it is otherwise agreed, reservations formulated at the moment of agreeing to the provisional application shall not take effect for the author of the reservation when the treaty enters into force. This conclusion is especially relevant when the agreement to the provisional application happens in a later moment than the expression of consent to be bound by the treaty; otherwise, reservations relating to provisional application could be used as a means of incorporating "late reservations" to the implementation of the treaty.

The new draft guideline and its comment provide a response to important questions raised in 2016 when the Special Rapporteur analysed the problems surrounding reservations. But even so, certain questions have yet to be clarified; for example: "What about reservations formulated at the moment of signing a treaty and which, pursuant to Article 23.3 of the "Vienna Conventions of 1969 and 1986, must be confirmed by the author at the moment of expressing its consent to be bound by the treaty? If at the moment of agreeing to the provisional application nothing is stated in this regard, and said provisional application begins after the signature but before confirmation, do those reservations take effect during the provisional application?

Another issue is the wording of draft guideline 7, in two paragraphs, one with regard to States and the other to international organizations. The only difference between the two is the legal framework of reference: "the Vienna Convention on the Law of Treaties" and "the relevant rules of international law", respectively. But the two could have been addressed jointly, as in draft guidelines 2 and 9, with the formula "Vienna Convention on the Law of Treaties and other rules of international law". In addition to being more streamlined, it seems more appropriate, bearing in mind the States that are not party to the Vienna Convention on the Law of Treaties.

We will now refer to draft guideline 9, on termination and suspension. We agree with the new version and congratulate the Commission for it, on the basis of three considerations.

First, because it modifies elements of the 2017 version with regard to which our delegation submitted observations last year. At that time, we expressed our disagreement with the reasoning that had led the Commission to rule out the explicit inclusion of termination of provisional application as a result of the entry into force of a treaty. And we also voiced our disagreement with the statement that provisional application is not subject to the rules of the law of treaties on termination and suspension.

Second, because reference to the rules of international law on the termination and suspension of treaties opens up a new possibility that could be extremely useful: termination or suspension of provisional application exclusively when it is in relation to another subject of International Law.

Third, we agree with the inclusion of the causes for termination and suspension of provisional application in a single draft guideline. It contributes to greater clarity.

Finally, and as we have already stated hi this same forum on other occasions, we conclude our comment on provisional application by pointing out that we would like to see a mention of what are known as "mixed agreements" concluded by the European Union and its Member States, on the one hand, and one or more States or international organizations, on the other. As regards the European Union, the entry into force of a mixed agreement entails the obligation to only apply the provisions falling under its authority; and provisional application, logically, cannot go beyond that. We interpret that this possibility is included in the present guide when referring to the provisional application of only a part of a treaty, not to the treaty as a whole. And we do not consider it necessary for the Commission to address the bilateral or multilateral nature of these mixed agreements; the issue was addressed by the Secretariat in its third memorandum, and by the European Union itself in its address last year. But insofar as both the European Union and its Member States give, in the international arena, their consent to be bound by a treaty, we believe that the reference made to the rules of this particular international organization, albeit appropriate, is insufficient. A guide with the aim to offer insight into law and practice on provisional application of treaties should include in its comment the practice of mixed agreements. As we stated last year, this could be included in paragraph 4 of the comment to draft guideline 3, on the provisional application of a part of a treaty. The current wording of the mentioned paragraph seems to focus exclusively on cases in which provisional application does not include certain provisions that will be

applicable upon entry into force for that same State or organization. Mixed agreements, as we have just pointed out, constitute a different case.

20. Ireland

My statement will address the topic Provisional Application of Treaties. Ireland aligns itself with the statement delivered by the European Union.

My delegation welcomes the adoption on first reading of a full set of draft Guidelines and Commentaries on this topic. We would like to express our gratitude to the Special Rapporteur, Mr Juan Manuel Gomez-Robledo, for his fifth report and the Drafting Committee for its consideration of the draft guidelines.

Turning first to draft Guideline 6, Ireland welcomes the decision of the Drafting Committee to amend the guideline and replace the phrase "the same legal effects" with "a legally binding obligation to apply the treaty or a part thereof. The clarification in paragraph 5 of the Commentary that this new formulation does not imply that provisional application has same legal effect as entry into force is also a useful addition.

In relation to draft Guideline 7, Ireland takes note of the divergent views of Commission Members on whether it is necessary to include a provision on reservations in the context of provisional application of treaties. Furthermore, we note that no case where a treaty has provided for the formulation of reservations in relation to provisional application or where a State has formulated reservations to a treaty that is being applied provisionally has been identified. Bearing that in mind , and given that the Commission is only at an initial state of considering the question of reservations in this context, my delegation is of the view that further study of the practice of States and international organisations should be undertaken and referred to in the Commentaries if this guideline is to be adopted.

The development of model clauses provides useful assistance in cases where provisional application is considered appropriate. However, there is a need for flexibility in an area where different institutional and legal systems may seek to use provisional application. The tendency of states and intemational organisations to tailor their treaty obligations through the use of provisional application was noted by the Secretariat in its memorandum. In particular, the Secretariat noted that this flexibility reveals itself with regard to the terminology used, the type of agreement on and conditions for provisional applications. If these model clauses are adopted, it would be important to note in the commentaries that they are provided simply as a useful guide for parties seeking to avail of provisional application.

Ireland looks forward to considering the entire set of draft Guidelines and commentaries in greater detail and hopes to provide comments and observations by December 2019.

21. Belarus (Russian only)

[From (A/C.6/73/SR.26)]

22. Thailand

With regard to Chapter VII on the topic of provisional application of treaties, Thailand wishes to thank the Special Rapporteur for his fifth report. Thailand also welcomes the adoption of the draft Guide to Provisional Application of Treaties adopted by the Commission on the first reading and looks forward to the development of draft model clauses. These guidelines help clarify the scope of application of article 25 of the Vienna Convention on the Law of Treaties, in particular questions regarding the provisional application of international organizations and the legal effects of the provisional application of a treaty or a part of a treaty, among others.

With regard to the commencement of provisional application, Thailand is a country with a dualist system. Therefore, the application of a treaty or the provisional application of a treaty or a part of a treaty will not automatically form part of Thai law unless properly legislated domestically through internal procedures.

Finally, Thailand welcomes the approach concerning the termination and suspension of provisional applications in Guideline 9. Since the provisional application of a treaty would produce the same legal effect as if the treaty were in force, it is only rational therefore that the relevant rules governing the termination and suspension of the operation of treaties as set forth in the Vienna Convention on the Law of Treaties should apply *mutatis mutandis* to the provisional application of a treaty or a part of a treaty.

23. Romania

The Romanian delegation would like to express its appreciation and gratitude for the impressive work done by the ILC and by the appointed Special Rapporteur, Juan Manuel Gomez Robledo, on this significant topic, which has enabled the Commission to adopt on first reading the entire set of draft guidelines and the commentaries to them, as the draft Guide to Provisional Application of Treaties.

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 add a few additional comments and observations.

We welcome the revised version of the commentaries, which reflect the requests for clarification made on the occasion of our previous discussion. While we fully acknowledge the flexible nature of provisional application, the pursued objective of the guidelines is to provide further clarity to subject of international law so that practice can be adjusted accordingly.

We consider that substantial progress has been made in the complex task of distinguishing between provisional application and entry into force. The additional explanations included in the commentaries to guidelines 6 and 9 are useful in this regard.

The topic on which Romania considers that additional clarity is still required concerns the source of the obligation for States or international organizations not taking part in treaty negotiations.

Equally, the situation of States that do not take part in the process of the adoption of a decision by an international organization or intergovernmental conference or voting against it should be further clarified.

Having clarity on the source of the obligation, hence the moment as of when the pacta sunt servanda principle is relevant is also necessary in view of clarifying the circumstances on the formulation of reservations. It is with this pre-requisite that we welcome the addition of guideline 7. We note that the Commission is only at the initial stage of considering this question and we express our support for its further exploration.

With regard to the proposed model clauses, we consider them extremely relevant and useful and expect that they will be widely used in the future treaties. The list of model clauses proposed reflect at least Romania's practice on the matter.

24. Portugal

I will now turn to the topic 'Provisional application of treaties'. Allow me to start by congratulating the Special Rapporteur, Mr. Gomez Robledo, for the work conducted on this topic over the last years. I wish to underline that this is an important topic for my country and a topic to which we pay much attention, since the provisional application of a treaty is not compatible with our Constitution.

Portugal welcomes the revised text of the draft guidelines, as it addresses the majority of the concems expressed in our previous interventions. We would like to stress that both the text of Guideline 3 and of the General Commentary affirm beyond doubt the voluntary nature of the provisional application mechanism. Also, we welcome that the commentary to Guideline 3 explains clearly the reasons that led the Commission not to use the language of Article 25 of the Vienna Convention on the Law of Treaties as to what must be understood by "negotiating States".

We also welcome the changes in the text of Guideline 6 as the new wording leaves less room for confusion and doubts. However, the text of the new Guideline 7 uses the term "legal effect" again, re-introducing the uncertainty that previously hovered over Guideline 6.

Even though the expression "legal effect" comes from the definition of reservation found in the Vienna Convention on the Law of Treaties, we consider that it would be preferable to use a less ambiguous wording. In our view, the explanation given in paragraph 5 of guideline 7 is not sufficient to re-enact the Commission's rational to choose this expression. In particular, the idea of a reservation to the "legal effect arising from the provision application" itself seems quite unlikely, as a State can obtain the same effect through the provisional application of parts of a treaty.

Given the lack of state practice on this matter, Portugal suggests that the Commission reflects more carefully on the issue of reservations.

Even if Guideline 12 (previous Guideline 11) has not been redrafted, the strengthening of the references to the voluntary nature of the provisional application of treaties has softened the idea that the provisional application can be considered as a default rule or a general practice. In any case, the Commission might consider changing the systematic position of this particular guideline, placing it as a new Guideline 10, in order to give it more prominence.

Portugal also welcomes the Model Clauses presented by the Special Rapporteur, and considers that they will be an excellent complement to the text of the guidelines. Therefore, we hope that the Commission may work on the text of the Model Clauses, so that they can become part of the Guide to the provisional application of treaties.

Finally, we would like to convey that Portugal will continue to follow with interest the work of the Commission on this topic.

25. Russian Federation (Russian and English)

We welcome the fifth report of the Special reporter Mr J.M.Gomez Robledo on the topic of Provisional application of treaties presented during the session of the Commission which studied among other things the issues of termination of provisionally applied treaty due to its violation and of reservations regarding the provisionally applied treaty. We would like to make two points in this connection.

The interest to the topic of provisional application of treaties which is becoming even more relevant from year to year is practical. At the same time the observe an obvious trend of more active attempts to include the language of provisional application into treaties.

The Russian legislation on treaties is based on the provisions of the Vienna Convention on the Law of Treaties and it allows for provisional application. The total number of treaties provisionally applied by the Russian Federation remains relatively unchanged - there are about one hundred of such treaties. We believe however that this concept is exclusive and should be used only when there is a real necessity to begin implementation of a treaty before its entry into force. The Legal Department of the Russian MFA is trying to maintain this policy. Nevertheless, we regularly confront practical issues of various nature.

For instance, let us take up the case when within the regional organization for economic integration there is a necessity to envisage the provisional application of treaty, whilst the legislation of one of the Member States of that organization does not allow a provisional application. The interests of integration require that the treaty begin to apply simultaneously by all Member States. What is the way out? Of course, it can be envisaged that the treaty becomes binding from the moment of express of the consent to be bound by a treaty with regard to the State which cannot provisionally apply the treaty. However, in this case some uncertainty arises on the legal nature of obligations of that State during the time of its consent to be bound by a treaty and its entry into force.

There is another issue. Under Article 25 of the Vienna Convention on the Law of Treaties (which was recorded in draft guideline 9) the provisional application of a treaty as a general rule is terminated if a State notifies other States who provisionally apply the treaty on its intent not to become a party to that treaty. Let us figure out the following situation: a State has expressed its consent to be bound by a provisionally applied treaty, but decided not to become a party to the treaty before its entry into force. Should that State revoke its consent to be bound by the treaty and simultaneously notify other States of its intent not to become a party to the treaty; or simply revoke its consent to be bound by the treaty: or simply notify other States of its intent not to become a party to the treaty?

Recently we witnessed another interesting incident. Russia terminated its provisional application of a multilateral treaty by notifying the depositary on its intent not to become a party to it. At the same time the depositary of the treaty is interpreting the situation in such a way that Russia terminated the provisional application of the treaty but remains bound by the obligations deriving from the signing of the treaty. On our part, we proceed from the understanding that the sending of notification of intention not to become a party to the treaty does not only terminate its provisional application but also lifts all obligations of the State deriving from its signature. Nevertheless, there is a subject for research on that issue as well.

The examples mentioned above prove that the topic of provisional application is inexhaustible. We strongly believe however that it would be indeed useful to study it on the basis of practical issues. On that note we intend to prepare the comments of the Russian Federation to the draft guidelines approved by the Commission and circulated by the Secretary-General among the Member States.

Let me turn now to the second com ent. During the consideration of this topic in the Commission and its outcome we witnessed a trend to dissolve the difference between the provisional application of the treaties and their entry into force. It is implied that practically all the institutes of the law of treaties should be applied with regard to a provisionally applied treaty, including reservations and termination on the grounds envisaged for termination or suspension of the treaties. There is an impression that we want to make the provisional application of treaties the most convenient for their parties. We think that we need to treat this issue as careful as possible. The proliferation of the regime of provisional application of treaties and its convenience may substitute the entry of treaties into force by their provisional application, which would negatively affect the stability of the treaties and as a consequence the entire system of international law.

27th meeting, 30 October 2018 (A/C.6/73/SR.27)

26. Greece

Greece expresses its appreciation to the International Law Commission and its Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, for the work accomplished during the present session in relation to the topic "Provisional application of treaties".

The adoption, on first reading, of an entire set of 12 guidelines, as the draft Guide to provi sional application of treaties, as well as the text of the draft model clauses proposed by the Special Rapporteur, in his fifth report, regarding the commencement, termination and scope of provisional application, are a significant step towards bringing more clarity on the rules applicable to the matter.

We welcome the approach taken by the Commission in handling this important issue, as explained in the general commentary, which should in our view be read together with draft guideline 2. Given that the purpose of the draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, it is important that the Com mission clarifies from the outset its intention to provide answers that are consistent with the existing rules, as enshrined in particular

in article 25 of the Vienna Convention on the Law of Treaties, while also acknowledging the voluntary, flexible nature of provisional applica tion and the need to take into account limitations deriving from the intemal law of States.

We further consider that the inclusion, in an annex to the draft Guide to Provisional Appli cation of Treaties, of draft model clauses reflecting best practice in this field will provide additional assistance to States when seeking to draft and negotiate treaties. We are, therefore, looking forward to the development of new model clauses, based on relevant practice of States and international organizations.

In addition, for such clauses to be more practical and user-friendly, it would in our view be appropriate to determine whether each of the draft model clauses proposed by the Special Rapporteur is relevant to bilateral or multilateral treaties only, or may apply to both.

Turning now to the legal effects of provisional application, we agree with the statement, in the commentary to draft guideline 6, that provisional application is not intended to give rise to the whole range of rights and obligations deriving from the consent of a State or an inter national organization to be bound by a treaty. However, the commentary does not sufficiently explain where lays the difference between provisional application and entry into force and should in our view be further elaborated in order to address a number of questions that may arise in practice, as for example whether the dispute settlement procedures provided by a treaty that is being provisionally applied would be operative before its entry into force, in the case of a difference between two States regarding the interpretation or application of a treaty provision.

Further comments would also be welcomed regarding the commentary to draft guideline 3, to the extent that it recognizes the possibility for a third State, completely unconnected to the treaty, to provisionally apply it after having agreed to do so with or more States concerned.

Moreover, given the lack of relevant State practice on the matter, we have some doubts as to the necessity and opportunity to include a draft guideline regarding the formulation of reservations in the case of provisional application.

From our point of view, reliance on practice is essential for reaching a successful outcome in this field, since the purpose of the draft Guide to Provisional Application of Treaties is not to set up new rules, but to clarify and explain the existing ones, in the light of the contemporary practice. One such example of practice-oriented and carefully balanced formulation is that found in draft guideline 12, which recognizes the right of States to agree to provisional application subject to limitations that derive from internal law and should in our view be mirrored in a corresponding draft model clause.

With these concluding remarks, we would like to thank the Commission and its Special Rapporteur for the adoption, on first reading, of the draft Guide to Provisional Application of Treaties and reiterate our support for this topic.

27. Chile (Spanish only)

Paso ahora a referirme al Capítulo V del informe relativo a la "Aplicación provisional de los tratados", tema que está a cargo del Relator Especial, Sr. Juan

Manuel Gómez Robledo. En el actual período de sesiones, la Comisión aprobó en primera lectura 12 proyectos de directrices, y sus correspondientes comentarios.

Al respecto, manifestamos nuestro apoyo al trabajo de la Comisión y quisiéramos mencionar algunos puntos, que a nuestro juicio merecen ser destacados:

En relación con el *proyecto de directriz 5 ("Comienzo de la aplicación provisional")*, aún cuando su redacción podría ser más depurada, nos parece adecuado que se explicite que la aplicación provisional de un tratado "comenzará en la fecha y con arreglo a las condiciones y los procedimientos que establezca el tratado o se acuerden de otro modo" por los Estados o las organizaciones internacionales de que se trate, pues está en consonancia con lo dispuesto en el artículo 24, párrafo 1, de las Convenciones de Viena de 1969 y 1986, relativo a la entrada en vigor.

Por su parte, estamos de acuerdo con lo señalado en el *proyecto de directriz 6, sobre las "Efectos jurídicos de la aplicación provisional"*, y nos parece relevante destacar que, aun cuando la aplicación provisional de un tratado daría origen a una "obligación jurídicamente vinculante" de aplicar ese tratado o una parte de él "como si el tratado estuviese en vigor", esto no significa que la aplicación provisional tenga los mismos efectos jurídicos que la entrada en vigor. En efecto, y como se explica en el comentario de este proyecto de directriz, la aplicación provisional no está sujeta a todas las normas del derecho de los tratados. Además, la aplicación provisional no tiene por objetivo "desplegar todo el abanico de derechos y obligaciones que se derivan del consentimiento de un Estado o de una organización internacional, en su caso, de quedar obligados por un tratado o de una parte de este".

En relación con el *proyecto de directriz 7 ("Reservas")*, destacamos la inclusión de una directriz que se refiera a las reservas que tengan por objeto "excluir o modificar los efectos jurídicos producidos por la aplicación provisional de ciertas disposiciones" del tratado. No obstante, creemos que la expresión *mutatis mutandis* no es suficiente para resolver las dudas que puede plantear la aplicación de las normas sobre reservas a los tratados contenidas en la CVDT a las reservas relativas a la aplicación provisional. Si bien reconocemos la falta de práctica en la materia, sugerimos se profundice el estudio sobre este punto; asi como la interrelación de los efectos de las reservas con los efectos de la aplicación provisional del proyecto de directriz 6.

Por su parte, estimamos que los *proyectos de directriz 10 ("Derecho interno de los Estados y regias de las organizaciones internacionales, y observancia de los tratados aplicados provisionalmente") y 11 ("Disposiciones de derecho interno de los Estados y reglas de las organizaciones internacionales concernientes a la competencia para convenir en la aplicación provisional de los tratados")* son adecuados, puesto que su contenido refleja lo dispuesto en los artículos 27 y 46 de las referidas Convenciones de Viena de 1969 y de 1986, respectivamente.

Apoyamos asimismo el *proyecto de directriz 12 ("Acuerdo relativo a la aplicación provisional con las limitaciones derivadas del derecho interno de los Estados o de las reglas de las organizaciones internacionales")*, pues consideramos que la práctica de los Estados y de las organizaciones internacionales en materia de aplicación provisional requiere flexibilidad. Consideramos que se posibilitaría con el derecho de convenir, sea en el propio tratado o de otro modo, en la aplicación provisional del

tratado o de una parte del tratado, con las limitaciones derivadas del derecho interno del Estado o de las reglas de la organización en cuestión.

Para concluir, quisiera felicitar nuevamente al Relator Especial, Sr. Gómez Robledo, por su destacada labor en la conducción de este complejo, pero cada vez más relevante, tema del derecho internacional. Otras observaciones y comentarios de nuestra delegación a los proyectos de directrices los haremos llegar a la Comisión el próximo año, siguiendo la invitación que ha extendido para tal efecto.

28. El Salvador (Spanish only)

En relación con el capítulo VII sobre la *aplicación provisional de los tratados*, deseamos expresar nuestro agradecimiento al Relator Especial, Sr. *Juan Manuel Gómez Robledo* por la presentación de su quinto informe en el que se han considerado los comentarios relativos a la práctica de los Estados, incluyendo El Salvador, y la práctica de las Organizaciones Internacionales en la suscripción de tratados con cláusulas de aplicación provisional.

Nuestro agradecimiento se dirige también a la Comisión por su labor en la aprobación de la Guía de la Aplicación Provisional de los Tratados y a la relatora Sra. *Patricia Galvão Teles* por la compilación de comentarios de la Comisión en esta materia.

En general, mi delegación considera que los proyectos de directriz cumplen la finalidad de orientar sobre el desarrollo progresivo de este tema; no obstante, existen algunos aspectos que – conforme a la solicitud de comentarios realizada por la Comisión en su resumen de labores – estimamos pertinente considerar:

- Sobre la redacción del **proyecto de directriz número 3**, consideramos de utilidad práctica aclarar al final de la frase "[…] o si se ha convenido en ello de otro modo" su relación con el siguiente proyecto de directriz, a fin de reflejar con mayor especificidad la conexión normativa entre tales disposiciones.
- Con respecto a los comentarios sobre el **proyecto de directriz 4**, particularmente, cuando se *hace referencia a otro medio o arreglo*, sería oportuno abordar explícitamente cuál sería el rol del depositario con relación a los instrumentos en los cuales se pacta esta forma de arreglo relativa a la aplicación provisional del tratado.
- En cuanto al **proyecto de directriz 7**, *relativo a la formulación de las reservas*, compartimos la opinión del Relator en cuanto a la importancia de establecer un régimen jurídico propio para la situaciones, en las cuales, puedan formularse reservas en relación con la aplicación provisional de los tratados.

  Asimismo, observamos con satisfacción que en los comentarios a este proyecto de directriz se refleja la referencia al artículo 19 de la Convención de Viena sobre Derecho de los Tratados que contempla la regla general en materia de formulación de reservas; no obstante, mi delegación considera que, con el objeto de esclarecer las reglas aplicables a estas circunstancias, y en armonía con la directriz 2.1.7 contenida en la Guía de la Práctica sobre la Reserva de los Tratados[1], es necesario

[1] ***Funciones del depositario***

reflejar también cuáles serían las implicaciones de su formulación frente al órgano o Estado designado como depositario del tratado.

En este sentido, conviene esclarecer que cuando el tratado prohíbe expresamente la reserva, ello debe entenderse también respecto de su aplicación provisional, lo cual, genera un supuesto en el que el depositario podrá realizar una evaluación jurídica para determinar si una declaración formulada por una de las partes del tratado constituye, en su naturaleza jurídica, una reserva a la aplicación provisional; y, notificar, según sea el caso, a las otras partes del tratado.

En definitiva, el desarrollo progresivo de este proyecto de directrices contribuirá significativamente hacia la codificación de este importante tema; no obstante, reconocemos que aún existen retos en la determinación de parámetros generales para la regulación sobre la aplicación provisional de los tratados; por lo que, expresamos nuestra disponibilidad de continuar su estudio jurídico.

29. Israel

With regard to "Provisional Application of Treaties", Israel commends the Special Rapporteur, Mr. Juan Manuel Gómez-Robledo, and the International Law Commission on their valuable work on the Draft Guidelines. Israel is in the process of studying these draft guidelines with a view to considering preparing written comments on them, and reserves its right to address this issue until such time.

30. United Kingdom of Great Britain and Northern Ireland

The United Kingdom is very grateful to the Special Rapporteur, Mr Gómez-Robledo, and the members of the Commission for their continued work in taking forward the topic of provisional application of treaties. The adoption of the guidelines and commentaries on first reading gives States the opportunity to step back and look at the project overall. We shall submit our observations in writing within the deadline. We welcome the fact that, in the meantime, further thought will be given to model clauses.

The United Kingdom welcomes the inclusion of Draft Guidelines concerning reservations made to provisionally applied treaties and the termination or suspension of such provisional application. The United Kingdom notes that the Commission is only at the initial stage of considering the question of reservations. In

---

1. *El depositario examinará si la reserva a un tratado formulada por un Estado o una organización internacional está en la forma adecuada y debida y, cuando proceda, señalará la cuestión a la atención del Estado o la organización internacional de que se trate.*
2. *De surgir alguna discrepancia entre un Estado o una organización internacional y el depositario acerca del desempeño de esta función, el depositario señalará la cuestión a la atención:*
    a. *De los Estados y las organizaciones signatarios, así como de los Estados contratantes y las organizaciones contratantes; o,*
    b. *Cuando proceda, del órgano competente de la organización internacional interesada.*

(Directriz 2.1.7 de la Guía de la Práctica sobre las reservas a los tratados, Informe de la Comisión de Derecho Internacional A/66/10 Add.1)

the United Kingdom's view, an analysis of the practice of States and international organisations would be of assistance for a comprehensive consideration of this issue.

The United Kingdom agrees with the text of the draft guideline 6, but finds paragraph 5 of the commentary less than clear when it states that "Provisional application of treaties remains different from their entry into force, insofar as it is not subject to all rules of the law of treaties. Therefore, the formulation that provisional application "produces a legally binding obligation to apply the treaty or part thereof as if the treaty were in force" does not imply that provisional application has the same legal effect as entry into force." It would be helpful if the Commission could explain in a little more detail, if possible with examples, in what ways a provisionally applied treaty is "not subject to all rules of the law of treaties".

The United Kingdom was pleased to see the addition of Draft Guideline 9 on the termination and suspension of provisional application and the evident efforts of the Special Rapporteur and the Commission to maintain, in this Guideline, a pragmatic and flexible approach. Further, given the difficulties that have arisen in the interpretation of some provisional application clauses, the United Kingdom is pleased to note the recommendation of the Drafting Committee that a reference be made in the Commentaries to the possibility of including a set of draft model clauses and looks forward to seeing revised proposals from the Special Rapporteur in that regard.

The United Kingdom looks forward to providing further comments on the draft Guidelines and commentaries by December 2019.

31. Peru (Spanish only)

Expresamos nuestro reconocimiento al Relator Especial, Sr. Juan Manuel Gómez Robledo, quien con la presentación de su quinto informe y una bibliografía sobre el tema, lo que -a su vez- permitió que la Comisión aprobase, en primera lectura, un conjunto de 12 proyectos de directriz, con comentarios, titulado "Guía para la Aplicación Provisional de los Tratados".

Al respecto, si bien mi país se encuentra evaluando dicho trabajo - para el que se ha establecido como plazo el 15 de diciembre de 2019-, y que anteriormente hemos presentado algunos comentarios, incluyendo diversos casos de aplicación provisional de los tratados desde la experiencia peruana, de manera preliminar señalamos lo siguiente.

Respecto de la Directriz 7, acerca de las Reservas, destacamos la importancia que el proyecto de Guía práctica haya incorporado mutatis mutandis las normas pertinentes de la Convención de Viena sobre el Derecho de los Tratados, lo que permite - a su turno- que se guarde coherencia con las normas constitucionales y legales de cada Estado concernido.

Asimismo, recibimos con interés la Directriz 9, vinculada a la terminación y suspensión de la aplicación provisional. Consideramos pertinente profundizar el análisis diferenciando entre los casos de tratados bilaterales o multilaterales objeto de aplicación provisional, y, dentro de estos últimos, teniendo en perspectiva la situación de tratados multilaterales que pudieran haber entrado en vigor para algunos Estados y que al mismo tiempo estuvieran siendo aplicados provisionalmente por otros.

32. Republic of Korea

Turning to the topic of "provisional application of treaties", my delegation welcomes the fifth report of Special Rapporteur Mr. Juan Manuel Gómez-Robledo and the adoption of the entire set of draft guidelines on provisional application of treaties on first reading. We express our deepest gratitude to the Special Rapporteur, ILC members and the Secretariat for their efforts.

Regarding new draft guidelines 7 and 9, my delegation welcomes the adoption of these draft guidelines, which concern the reservations and termination or suspension of provisional application. Given that States do not have any practice related to the reservations and termination of provisional applications, these new guidelines should be reviewed cautiously. Thus, my delegation supports draft guidelines 7, in which the phrase "in accordance with the relevant rules of the 1969 Vienna Convention on the Law of Treaties, applied *mutatis mutandis*'" was inserted. This phrase was also inserted in draft guideline 9.

Regarding the draft model clauses, I have doubts about whether it is appropriate to make a set of draft model clauses on this topic. My delegation would like to express its concern about the ILC's elaboration of model clauses on provisional application as this could be deemed as encouraging States to apply a treaty or a part of a treaty provisionally. Notwithstanding that guideline 4 (form of agreement) prescribes various forms of agreement, the model clauses are designed for just one of these forms. Accordingly, my delegation is of the view that the ILC should carefully review this issue at the next session.

The Korean government believes that this topic will contribute to the development of treaties law. We will continue to take interest in further discussions on this topic and the outcomes. Once again, we would like to express our thanks to the members of the ILC and Special Rapporteur Mr. Gómez-Robledo for their outstanding work.

33. Australia

First, Australia welcomes the Commission's continued work on the provisional application of treaties, and the Commission's updates to draft guidelines 1-12 and commentaries thereto.

We emphasise the importance that the Commission's work has in providing clarity to the international community on the provisional application of treaties.

We thank the Special Rapporteur, Mr Manuel Gómez Robledo, for his extensive work on the topic.

Australia welcomes the Commission's invitation for States to submit comments on the draft guidelines and looks forward to studying the proposal in more detail.

34. Viet Nam

Turning next to the topic of Provisional Application of Treaties, this delegation congratulates the Special Rapporteur and the Commission on the completion of the full draft Guidelines for the first reading of the General Assembly.

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 further clarification on the following issues.

First, relating to the form of agreement reflected in draft Guideline 4(b), in the case 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 have voiced 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, we notice an issue with regard to Guidelines 9 (c) which provides that the Guidelines would not prejudice Part V of the Vienna Convention 1969 on the Law of Treaties. In fact, Part V of the Vienna Convention only deals with treaties already in force while the Guidelines govern treaties which are provisionally applied. This leads to an uncharted problem with legal consequences for serious violations of provisionally applied treaties. In our view, the Special Rapporteur and the Commission should have a careful evaluation of such violation in order to ascertain the *mutatis mutandis* application of the Vienna Convention 1969.

35. Malaysia

Malaysia commends the efforts of the Special Rapporteur in preparing the Fifth Report on the provisional application of treaties. In this regard, Malaysia wishes to reflect its preliminary view on the topic as the foregoing:

a) Malaysia notes that the Commission has provisionally adopted all draft guidelines and the commentaries to the draft guidelines. Malaysia is of the view that due consideration must be given as there are issue of doubts on some parts of the draft guidelines. The draft guidelines must provide a clear understanding and interpretation as well as take 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 during the 72nd session of the United Nations General Assembly;

b) Malaysia would like to raise its concerns on several issues, among others, on the internal law and Malaysia's practice in signing and ratifying treaties. Malaysia's domestic law does not provide for any express provision that prohibits or allows for the provisional application of treaties. In this regard, Malaysia has been very conscientious in ensuring obligations in the treaty are carried out accordingly once ratified. Malaysia would ensure domestic legal framework to be in place before a treaty is binding upon Malaysia;

c) For this present session, Malaysia would like to focus on the two other draft guidelines in the present report as proposed by the Special Rapporteur. The two

issues are *(a)* the termination or suspension of the provisional application of a treaty as a consequence of its breach; and *(b)* the formulation of reservations. In relation to the newly proposed draft guideline 8 *bis*, Malaysia notes that this proposal entitles the States or international organizations concerned to invoke a "material breach of a treaty or a part of a treaty that is being provisionally applied" as a ground for terminating or suspending such provisional application in whole or in part, in accordance with Article 60 of the VCLT. With regard to the term "termination" and "suspension" under this new draft guideline 8 *bis*, Malaysia is mainly guided by Article 60 whereby the termination and suspension should be applicable to a treaty that is being provisionally applied by a State as a consequence of a breach by another State.

d) Malaysia is also of the view that careful consideration shall be given by the affected State in determining the "material breach" whereby it should be a violation of an essential provision of the treaty. In addition to this, it is also important to note that Article 60 of the VCLT refers only to breaches of treaties that are actually in force between the parties. Nevertheless, Malaysia notes that previous study of this topic has confirmed that provisional application of a treaty produces legal effects as if the treaty were actually in force and that obligations arise therefrom must be performed under the *pacta sunt servanda* principle. Therefore, the formulation of this draft guideline 8 *bis* should refer to the States or international organizations that had negotiated the treaty and agreed to provisionally apply it.

e) In the context of Malaysia's experience and practice, we wish to reiterate that the signing of treaty does not necessarily create a legal obligation when the treaty further requires ratification, accession, approval or acceptance processes, unless the treaty otherwise provides. However, it is to be pointed out that each State must ensure that the manifestation of its consent to apply a treaty provisionally is compatible with its internal law. If a State is to adhere to a basic criterion of a legal certainty, such determination would be made beforehand, and not at a later stage. Be that as it may, prior to signing or becoming a Party to a treaty, Malaysia will ensure that its domestic legal framework is in place and ready in order to implement the treaty;

f) As for draft guideline 5 *bis*, Malaysia notes that this draft guideline was drafted to allow a State or an international organization to formulate reservations from the time of its agreement to apply a treaty provisionally. This draft was based on the fact that the provisional application of treaties produces legal effects and the purpose of reservations is precisely to exclude or modify the legal effects of certain provisions of the treaty on that State. On this point, Malaysia stands guided by Article 19 of the VCLT which clearly indicates that a State may formulate a reservation unless the reservation is prohibited by all or part of the treaty, and in cases where it is not prohibited by the treaty, the reservation in question must not be incompatible with the object and purpose of the treaty.

g) It is interesting to note that Article 19 of the VCLT is silent about the possibility of formulating reservations in the context of the provisional application of a treaty. This is because, Article 19 provides that a State may formulate a reservation when signing, ratifying, accepting, approving or acceding to a treaty. In other words, a State can formulate a reservation at many different forms and stages in which the State places on record its consent to be bound by a treaty. For purposes of consistency and

clarity, it may be a good practice if a State may formulate reservations with respect to a treaty that will be applied provisionally if that treaty expressly so permits; and if there are reasons to believe that the entry into force will be delayed for an indefinite period of time.

h) In this regard, Malaysia is of the view that the proposed draft guideline 5 *bis* which allows a State to formulate reservations with regard to the provisional application of a treaty may be given due consideration as the effect of provisional application is to give immediate effect to some of the provisions of the treaty. On the other hand, the effect of reservation is to exclude the legal effects of certain provisions of the treaty. Nonetheless, in as no treaty or practice has been identified in which a State has formulated reservations at the time of deciding to apply a treaty provisionally, Malaysia proposes that draft guideline 5 *bis* should be further deliberated.

Last but not least, Malaysia reiterates its view that it is crucial to discern the provisional application of the treaties from the source of obligations as provided by the treaty provision itself. Otherwise, if recourse to alternative sources should be had, the analysis of legal effect should be guided and determined by the result of an unequivocal indication by the State that it accepts provisional application of treaty, as expressed via a clear mode of consent. Thus, for a further comprehensive analysis of the topic, Malaysia would like to suggest that the topic be further elaborated having due regard to State's sensitivities, as well as peculiarities and contextual differences embedded in the treaty provisions, and how State practices so far have responded to such variations.

36. Turkey

Turning to the topic "provisional application of treaties", we would like to extend our appreciation to the Special Rapporteur, Mr. Juan Manuel Gomez Robledo for his fifth report on this subject, and also to thank the Secretariat for its ongoing support to the topic with a new Memorandum reviewing State practice in respect of treaties deposited or registered in the last 20 years with the SecretaryGeneral, that provide provisional application.

In respect of the fifth report of the Special Rapporteur, it is the legal effect of the provisional application of treaties dealt with in draft guideline 6 and commentary thereto is the most tricky part to determine, which the Vienna Convention on the Law of Treaties, too is silent on. However, the Special Rapporteur in the end favors the option of legally binding obligation, in case of a silence in the treaty itself. Detailed explanation about our views in this regard you will find in PaperSmart portal too.

I just want to emphasize that we are questioning this matter, since we are hesitant over vesting a default binding force in a provisionally applied treaty, which is silent, and that is mostly the case, can make this option into a rule in fact. The situation as such could pose a threat to the exclusive power to consent to undertake an intemational commitment, of the legislative authority, by removing the need for taking an approval and could create as such a discouraging effect on the executive authority to initiate and complete the ratification process with the legislative body.

As well as draft guideline 6 over legal effect, we would think draft guideline 7 dealing with the formulation of reservations on that legal effect, which is directly linked to the former, would also call for further discussion and analysis of possible circumstances.

Diverse scenarios according to variable attitudes of numerous parties upon the binding force may lead to inequal consequences. In so doing it may create legal uncertainty and stability in terms of compliance with treaty norms among the parties. Besides, the differences between the parties with respect to the consent to be bound, in other words, the acceptance of a treaty provision binding for one party; whereas non-binding for the other, is likely to make the treaty questionable in terms of conformity with the general principle of contract law as the mutuality of the consent to be bound is the essential element for the formation of a contract.

Regarding the scarcity of reservation examples on provisional application, affirmed by the Special Rapporteur, we are of the view that further contemplation would be material considering the viable situations and some supplementary clarifications, as might be necessary, could be incorporated into draft guidelines itself or its commentary.

37. Iran (Islamic Republic of)

As regards Provisional Application of Treaties, my delegation would like to express its appreciation to the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, for his fifth report on the topic. We are sure the final outcome of the work, including the guidelines and the commentaries thereto, could contribute to clarification of the diverse aspects of the institution of provisional application of treaties.

On the topic under consideration, let me start with some general comments:

We wish to reiterate that the article 25 of VCLT on provisional application of treaty merely offered States the possibility of provisional application without imposition of any obligation. As a result, the 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. It is also crucial that the principle of consent prevailing in international law and particularly law of treaties as well as flexibility and non-binding nature of the proposed provisions remain to be the core element of present topic. Therefore, provisional application of treaty by a state party to that treaty should only be considered as volimtary rather than mandatory.

In that context, we align with the view expressed by the special rapporteur in paragraph 82 of his report that the present guidelines, without detracting from the flexibility inherent in the mechanism of provisional application by overdeveloping the regime set out in article 25 of VCLT, will merely serve as a practical tool for the growing number of users of international law.

We deem that the present guidelines would be applicable to multilateral treaty and do not cover and address bilateral treaties, while the later could not, because of its nature and parties, be provisionally applied. In other words, the basie 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.

My delegation concurs with the view that jurisdictions with legal dualism in which treaties entered into force needs internal legal procedure, provisional application of treaties become applicable only after their acceptance through internal procedures.

We also welcome that the Special Rapporteur deemed it necessary to add a draft guideline on formulation of reservation with regard to the provisional application of a treaty or a part of a treaty, while according to article 19 of VCLT, a state may make reservation to a treaty. Thus, a State's provisional application of a treaty does not preclude its right to enter reservations to that treaty.

That being said, I would like to make two main observations to the draft Guideline 4 as following:

First, Draft Guideline 4 refers to form of agreement on provisional application of a treaty, we maintain that in case of silence of the treaty concerning provisional application such formality should be applied as well. On this Draft Guideline, we reiterate our concern regarding agreement purportedly demonstrated through "resolutions", "declarations" or "any other means or arrangements"; while resolutions adopted at international forums carry some weight with respect to treaties they refer to, they are sometimes results of political convenience and synergy and do not always reflect consent of States to give effects with respect to treaties including provisional application thereof. Furthermore, the phrase "any other means or arrangements" seems too broad.

Second, while the role of provisional application of a treaty is rightly said to be to facilitate its entry into force, we acknowledge that the conclusion "a separate treaty" as in Paragraph (a) of Draft Guideline 4 would be considered procedural than substantial one which its aim is merely to facilitate such entry into force as it requires its own separate process.

28th meeting, 30 October 2018 (A/C.6/73/SR.28)

38. Nicaragua (Spanish only)

Permítame agradecer a la Comisión y al Relator Especial por el informe presentado que además contiene una tabla que refleja la práctica de otras entidades. También deseo agradecer a la Secretaria por la elaboración y presentación del Memorando sobre la práctica de los Estados en materia de tratados (bilaterales y multilaterales) depositados o registrados en los últimos 20 años en poder del Secretario General en los que se prevé su aplicación provisional. Este documento en sí mismo es una fuente de información muy importante.

Es evidente que el tema en cuestión es de utilidad práctica para la agilización de las negociaciones entre los estados, entre otras cosas, y de ahí la importancia de estudiar el contenido de este tema contemplado en el artículo 25 de la Convención de Viena.

En el caso de Nicaragua, la Constitución expresa que los tratados internacionales deben ser aprobados por la Asamblea Nacional para que [...] adquiera[n] efectos legales dentro y fuera de Nicaragua "una vez que hayan entrado en vigencia internacionalmente, mediante depósito o intercambio de ratificaciones o

cumplimiento de los requisitos o plazos, previstos en el texto del tratado o instrumento internacional". De tal forma que en Nicaragua incluso la aplicación provisional de un tratado requeriría que dicho instrumento fuese aprobado por la Asamblea Nacional para que tuviese efectos legales dentro y fuera de Nicaragua.

Un ejemplo reciente que evidencia la práctica de Nicaragua en este sentido es el caso del Convenio Internacional del Cacao de 2010, el cual entró en vigor de manera provisional el 15 de Julio del 2013, fecha en que fuera depositado el instrumento de adhesión ante el Secretario General de Naciones Unidas, habiendo sido sometido a un proceso usual de adhesión ante la Asamblea Nacional, independientemente que el instrumento estuviese destinado a ser aplicado provisionalmente.

En un contexto no igual pero similar, el Acuerdo de Asociación de la Unión Europea con Centroamérica se aplica de forma provisional parcial en el entendido que solamente se aplican las provisiones relativas a los aspectos comerciales. En este punto, vale aclarar que este tipo de aplicación provisional parcial se debe diferenciar de una entrada en vigor provisional total de un instrumento como el primer ejemplo. Pero en todo caso, ambas modalidades requieren de la aprobación de la Asamblea Nacional.

Es en este sentido, Señor Presidente, que Nicaragua desea llamar la atención sobre la importancia de tener en cuenta el derecho interno en este tema. Es decir, que a pesar de la utilidad práctica que pueda tener este tema no debe nunca perderse de vista que debe existir un balance entre esa necesidad y el cumplimiento de los requisitos del derecho interno en materia de tratados. De lo contrario, se estaría invitando a los estados a obviar el cumplimiento de los requisitos legislativos de sus países.

En ese sentido, Nicaragua es de la opinión que la aplicación provisional de un tratado no puede nunca automáticamente ser considerada como que surte el mismo efecto que un tratado que ha completado el proceso interno de ratificación o adhesión y a partir del cual el estado se vuelve parte contratante con todos los efectos legales que eso implica.

Por otro lado, si bien es cierto Nicaragua no es parte de la Convención de Viena sobre el Derecho de los Tratados, dicho instrumento contiene numerosos artículos de derecho consuetudinario. En ese sentido, en términos generales Nicaragua entiende que una vez que el tratado haya entrado en vigor de manera definitiva se da por terminada la aplicación provisional del mismo, o que la aplicación provisional también se podría dar por terminada cuando se notifica la intención de no ser parte del tratado.

Sobre otro punto práctico, resulta lógico suponer que la aplicación provisional de cualquier tratado debería ser compatible con la legislación vigente en ese momento no solamente por razones legales sino prácticas en cuanto a que el sentido de una aplicación provisional normalmente deviene de la necesidad o deseo de poner en práctica dicho acuerdo de manera inmediata, lo cual no sería posible de existir incompatibilidad con el derecho interno.

Como comentario final mi delegación desea manifestar la importancia de tratar otros temas conexos a la aplicación provisional como son el error, el dolo, la corrupción y la coacción, contenidos en otros artículos de la Convención de Viena.

Agradecemos nuevamente a la Comisión por el excelente informe y esperamos que se logre encontrar el balance adecuado que permitan tener como referencia práctica estas directrices.

39. Sudan (Arabic only)

[From (A/C.6/73/SR.26)]

40. Cuba (Spanish only)

Permítame referirme ahora brevemente al proyecto de directrices sobre la Aplicación provisional de los tratados. Felicito a su relator especial, Sr. Juan Manuel Gómez Robledo, por los avances logrados, así como a la Comisión por la aprobación del quinto informe en su primera lectura que incluye dos nuevos proyectos de directriz, 5 bis y 8 bis.

Con independencia de los comentarios y observaciones que serán enviados antes del 15 de diciembre de 2019, realizaremos algunas observaciones preliminares.

Cuba aprecia el análisis de las observaciones realizadas por los Estados y las organizaciones internacionales y coincidimos que son idos instituciones diferentes del Derecho de tratados: aplicación provisional y entrada en vigor. Al mismo tiempo, la institución objeto de estudio, constituye una herramienta importante que nos permite darle a un tratado efecto inmediato a todas o algunas de las disposiciones de un tratado sin esperar a que se cumplan todos los requisitos nacionales e internacionales para su entrada en vigor, en especial cuando el objeto de tratado entraña cierta urgencia o cuando los Estados negociadores o las organizaciones internacionales negociadoras quieren fomentar la confianza.

Sobre la directriz 5, comienzo de la aplicación provisional de un tratado o de una parte de un tratado, siempre es antes de su entrada en vigor. Generalmente, en el caso de Cuba, la práctica es a partir del día de su firma; sin embargo, pueden acordar otra fecha o momento, pero siempre antes de su entrada en vigor. Tal directriz tiene el efecto a que se refiere la No. 6, pues a partir del momento en que acuerde su aplicación comienza a surtir los mismos efectos que un tratado como si estuviera en vigor y, por consiguiente, la violación de una obligación que emana del tratado o de una parte del tratado aplicado provisionalmente constituiría necesariamente un acto ilícito que genera responsabilidad internacional.

Por último, en relación con el proyecto de cláusulas modelo entendemos que es una herramienta útil que brinda el Relator Especial para facilitar el trabajo de los Estados y de las organizaciones internacionales, las cuales podrán adaptarse a las situaciones concretas que se presenten. Por tanto, no constituyen de por sí “camisas de fuerza” para los Estados y las organizaciones internacionales. Esperamos que la Comisión la incluya en su segunda lectura.