

**Sixth Committee Statements  
Report of the International Law Commission  
on the work of its 71st session**

*Provisional application of treaties*

74th session of the General Assembly  
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## 23rd meeting, 28 October 2019, 10:00

### 1. Sierra Leone (on behalf of the African Group)

We also take note of the draft model clauses on Provisional Application of Treaties annexed to the report with a view to receiving comments from States.

### 2. Norway (also on behalf of Denmark, Finland, Iceland and Sweden (Nordic countries))

The Nordic countries welcome the draft model clauses on provisional application of treaties contained in Chapter XI of the Report and will provide written comments on the topic, including the model clauses in due time.

### 3. Austria

At its past session, the ILC also received an oral report by the Special Rapporteur Juan Manuel Gómez Robledo for the "Provisional application of treaties" on proposed model clauses to be annexed to the draft guide on this topic. We note that the annex to this year's ILC report contains several model clauses. However, we miss a model clause allowing also negotiating states to opt-in into the provisional application of a treaty, not just non-negotiating states. This is important since some states are only able to apply a treaty provisionally after the relevant steps under domestic law, including parliamentary approval, have been taken. Moreover, the model clauses should also provide for a possibility to terminate or suspend a provisional application, even if a state does not intend to become a party in the future. With these improvements the draft model clauses will certainly be of practical value for states in drafting relevant treaty provisions.

### 4. Romania

This delegation acknowledges with gratitude the efforts of the Special Rapporteur to provide model clauses that cover a wide variety of state practice and which actually draw on language already inserted in various international treaties.

While model clauses 1, 2 and 5 reflect a wide practice on treaty provisions relating to provisional application of treaties, we are not sure of the applicability of draft model clause 3 (opt in/opt out). It is not clear when the non-negotiating State/ international organisation could make such a statement. Could such a statement occur in the context of the signature of the treaty by the non-negotiating State/ international organization? Would non-opposition imply acceptance or the model clause envisages only express acceptance? In our view, draft model clause 3 reflects a certain formalism which is not necessarily to be found in Article 25 of the *Vienna Convention on the Law of Treaties*.

Reading draft model clause 4 against Article 25 para. 1 letter b) of the *Vienna Convention on the Law of Treaties*, we are not sure of the necessity of a declaration of a State in

respect of non-application of the provisional application in the context in which a decision as per provisional application was taken through a resolution to which that State does not agree. According to mentioned provisions of the Vienna Convention, the provisional application of treaties occurs when States have *agreed* to that in whatever form. Therefore, if a State does not agree to a resolution which also includes a decision on a provisional application of a treaty, in view of art. 25 of the Vienna Convention, it is clear that such a provisional application does not occur.

## 5. Slovakia

...allow me first to congratulate the Commission and the Special Rapporteur on the topic **Provisional application of treaties** Juan Manuel Gómez Robledo for preparation of Draft model clauses on provisional application of treaties, which is annexed to the report. Five model clauses were presented to the governments for comments in advance of the commencement of the second reading of the draft Guide to Provisional Application of Treaties at the next session of the Commission. We think that model clauses can be a useful complement to the guide and can help states in developing their practice in this regard, at the same time not limiting the flexible and voluntary nature of provisional application of treaties. With regard to paragraph 2 of the draft model clause I, we would like to recall our observation from last year that 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, which is bases for the model clause I.

## 24th meeting, 29 October 2019, 10:00

### 5. Ireland

Ireland welcomes the inclusion of the five draft model clauses, as set out in Annex 1, of the ILC' s Report. Ireland agrees that these model clauses may constitute a useful tool for treaty negotiators in terms of having a guide for parties seeking to avail of provisional application. It is helpful that these model clauses have been refined to focus more precisely on the most common issues facing states. Ireland also welcomes the "understandings" in respect of the model clauses, set out in Chapter XI of the ILC' s report, which give helpful context and guidance.

### 6. Italy [excerpt from A/C.6/74/SR.24]

56. With regard to the topic “Provisional application of treaties”, the five draft model clauses proposed by the Commission in annex A of its report (A/74/10) might be useful in providing guidance for the treaty practice of States. However, draft model clause 4, which stated that “a State [An international organization] may declare that it will not provisionally apply a treaty [or article (s)...] when the decision to its [their] provisional application results from a resolution of [X international organization or X

intergovernmental conference] to which that State [international organizations] does not agree”, was of limited potential use when international organizations were endowed with the power to adopt binding measures with regard to their member States, including measures that would prevail over conflicting obligations contained in treaties. One clear example was that of the Security Council adopting measures under Chapter VII of the Charter of the United Nations that would prevail over any opt-out treaty clause on provisional application. In general, it would be useful for the Commission to state clearly that draft model clause 4 might not operate with regard to the membership of States in certain international organizations.

## 7. United States of America

I would note that the Special Rapporteur on the topic Provisional application of treaties has proposed a series of “model clauses” for possible inclusion in its draft guide on this topic. We are currently reviewing these draft clauses, and considering whether including them would provide any particular benefit. We may provide additional views as part of the U.S. Government’s formal comments on this project later this year.

## 8. Belarus

The delegation of Belarus expresses its appreciation to the Commission for the proposed model provisions regarding the provisional application of treaties. We will submit our written comments; at this stage we would like to note that we find these formulations useful.

## 25th meeting, 30 October 2019, 3:00 pm

## 9. Mexico

... agradecemos al Relator Especial Juan Manuel Gómez Robledo por la elaboración de un paquete de cláusulas modelo que acompañen a las directrices sobre la aplicación provisional de los tratados. Al ser éste un tema eminentemente práctico, contar con dichas cláusulas puede ser de gran ayuda a las delegaciones al momento de negociar tratados a fin de que, si las partes negociadoras así lo desean, se incorpore ésta figura de una manera que sea congruente con el derecho de los tratados. Esperamos que la Comisión recoja dichas cláusulas cuando se adopte el proyecto de directrices en segunda lectura el año próximo.

## 10. El Salvador

tomamos nota y agradecemos la labor del Relator Especial, Sr. Juan Manuel Gomez Robledo, con relación al proyecto de cláusulas modelo cuyo análisis se realizará en conjunto con la Guía para la Aplicación Provisional de los Tratados

## 11. Slovenia

Slovenia continues to support the work by Special Rapporteur Juan Manuel Gómez Robledo. As an advocate of the need to ensure the practical use of any outcome in relation to the topic of provisional application, Slovenia welcomes and supports the inclusion of draft model clauses in the guide on that topic.

This delegation sees merit in commentaries being added to the model clauses to facilitate their interpretation.

With regard to specific draft model clauses, Slovenia is ready to submit a written proposal on draft model clause 1 and thus allow the states to complete the relevant internal treaty-making procedures before provisionally applying it. The latter is of particular interest to those states that have internal limitations on the use of provisional application. Such a provisional application mechanism is applied by the European Union in the field of air transport agreements, which partly fall under the competence of EU Member States.

## 12. Portugal

We would also like to thank the oral report of Mr. Gómez Robledo on the topic 'Provisional Application of Treaties'. Portugal will submit its comments to the draft model clauses as requested.

## 26th meeting, 31 October 2019, 10:00 am

## 13. Turkey

With regard to the provisional application of treaties, we would like to thank Special Rapporteur Mr. Juan Manuel Gomez Robledo for the draft model clauses. As we mentioned last year, Turkey attaches importance to the consent of the States and international organizations regarding the provisional application. With this understanding we just would like to reiterate that the rules should not create legally binding obligations.

## 14. Chile

As regards the Draft Guidelines, we welcome the Special Rapporteur's decision to take as a starting-point the system described in article 25 of the Vienna Convention on the Law of Treaties and we consider that this text will provide very useful guidance in this area to States and international organizations.

It would be useful to clarify whether acts performed by a State in provisional application of a treaty can be considered as "Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" [article 31, paragraph 3 (b), of the Vienna Convention] or whether this refers only to acts performed once the treaty has entered into force.

Paragraph 4 (b) of the Draft Guidelines mentions that provisional application may be agreed by means of a resolution adopted by an international organization or an intergovernmental conference, among other possibilities. In this connection, my delegation considers that such resolutions could be a means of agreeing on provisional application, but only if a prior treaty or other agreement between the parties involved recognizes the use of such resolutions for this purpose. Otherwise the resolution alone would not suffice as a means of agreeing on provisional application. My delegation also supports draft guideline 12, establishing the possibility that States or international organizations may agree on the same treaty or alternatively on provisional application of the treaty with the limitations deriving from the internal law of the State or organization.

As regards the draft model clauses on provisional application of treaties, we find draft model clause 1 to be appropriate, since it leaves open the possibility that it would be the parties to the treaty that decide whether the treaty will apply from the date of signature or from some other date, if the treaty will apply provisionally. It is also noteworthy that this clause reserves the right of the States to opt not to apply the treaty provisionally, under an arrangement similar to the opt-out option contained in draft model clause 4, which is a positive measure.

On the other hand, States which did not participate in the negotiation of a treaty are correctly given the option of applying it provisionally under the opt-in arrangement in draft model clause 43.

Lastly, as already stated in connection with draft guideline 12, my delegation welcomes the provision in model clause 5 allowing a State to notify other parties of any limitations on the provisional application of a treaty deriving from its internal law, as this provides a pragmatic and realistic solution to the diversity of legal systems coexisting in the world.

## 27th meeting, 31 October 2019, 3:00 pm

### 15. Indonesia

As for the provisional application of treaties, our preliminary view is that the guide could become a useful tool in addressing special circumstances between states as long as there is an agreement on that provisional application.

In our case, we remain [of the view that there] require[s] further consideration concerning the guide on the provisional application, especially having the latest ruling made by the

Indonesian Constitutional Court on the new interpretation towards the Law No. 24 of 2000 on Treaties.

Through such ruling, the Court has expanded the classifications of treaties which requires the involvement of [the] Indonesian parliament, and consequently further extends the process to apply to certain types of Treaty.

## 16. The Philippines

The Philippines considers the revised draft model clauses complementary to the Guide to Provisional Application of Treaties, clarifying issues and providing guidance to states that wish to resort to provisional application of treaty under Article 25 of the Vienna Convention on the Law of Treaties. We do not view the model clauses as promoting or encouraging resort to provisional application, but rather as a tool to assist states should they decide, and if conditions permit them, to resort to provisional application of a treaty. We will submit further comments on this in advance of the commencement of the second reading of the draft Guide to Provisional Application of Treaties at the seventy-second session of the Commission.

## 17. Peru

...deseamos manifestar nuestro respaldo a que en la segunda lectura de la Guía para la Aplicación Provisional de los Tratados pueda incluirse un proyecto de cláusulas modelo como anexo a la misma, según lo ha propuesto por el Relator Especial, Embajador Juan Manuel Gómez Robledo.