Sixth Committee Statements
Report of the International Law Commission
on the work of its 72nd session

Provisional Application of Treaties

76th session of the General Assembly
2021

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16th meeting, 25 October 2021 (A/C.6/76/SR.16)

1. Ghana (on behalf of the African Group)

The report clearly indicates that the Commission was engaged in a productive hybrid-session, the first ever, with the consideration of six (6) substantive topics, namely: "Protection of the atmosphere", "Provisional application of treaties", "Immunity of State officials from foreign criminal jurisdiction", "Succession of States in respect of State Responsibility", "General principles of law", and "Sea level rise in relation to international law". The African Group thanks the Commission, its Members, especially the Special Rapporteurs, Mr. Shinya Murase of Japan, on the adoption of draft guidelines upon second reading of the topic "Protection of the Atmosphere" and Mr. Juan Manuel Gomez Robledo of Mexico, on the adoption of draft guidelines, upon second reading of the topic "Provisional Application of Treaties".

2. European Union (the candidate countries the Republic of Northmacedonia, Montenegro, Seerbia and Albania, the country of the Stabilization and Association Process and potential candidate Bosnia and Herzegovina, as well as Ukraine, the Republic of Moldova and Gergia, aligned themselves with the statement)

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), in particular in light of the adoption by the ILC on second reading of the Guide to Provisional Application of Treaties, the annex and the commentaries to it, as well as the decision of the ILC to submit those to the General Assembly.

At the outset, the European Union would like to congratulate the ILC and the Special Rapporteur Mr. Juan Manuel Gomes Robledo for the successful completion of the consideration of this topic and to express its appreciation for the work done on this very important topic.

The European Union welcomes the adoption of the Guide as well as the recommendation of the ILC to compile the practice of States and international organizations in the provisional application of treaties, as furnished by the latter over the years, together with other materials relevant to the topic. The European Union has been actively involved in the discussions on this topic and is pleased to see that some of its observations and suggestions are reflected in the final outcome.

The European Union will limit its intervention to making only a few remarks in relation to the text of the Guide and the commentaries thereto, as adopted.

The European Union notes with great satisfaction that the scope *ratione personae* of the draft guidelines is not limited to States but also includes international organisations.

Throughout its previous interventions, the European Union has advocated that the practice of States and international organisations on provisional application of treaties should be examined in depth. The European Union thus appreciates the fact that the ILC has considered the practice of the European Union and refers to it in the commentaries to the Guide, as well as in the annex containing examples of provisions on provisional application of treaties.

The European Union welcomes that the ILC emphasises the flexible nature of the provisional application of treaties and recognizes that international organisations may agree on solutions not identified in the Guide, if they consider them more appropriate to the purposes of a given treaty.

The European Union welcomes that guideline 4 on the form of agreement on provisional application recognizes that provisional application may be agreed also through an act of an international organisation adopted in accordance with its rules or by a declaration of an international organisation which is accepted by a State or other international organisations concerned. The European Union notes that subparagraph (b) of guideline 4 is intended to give examples and does not constitute an exhaustive list of means or arrangements through which provisional application may be agreed. The European Union observes that in case where the provisional application is agreed through a declaration, the commentary states that the declaration must be expressly accepted by the other States or international organisations concerned, for the treaty to become provisionally applicable in relation to those States or international organisations. The commentary further mentions that the guideline retains a certain degree of flexibility to allow for modes of acceptance other than written form on the condition that such acceptance is express. In addition, the commentary states that *"[t]he term "declaration" is not meant to refer to the legal regime concerning unilateral declarations of States, which does not deal with the provisional application of treaties"*. The European Union notes that the ILC did not provide the clarifications requested by the Union, in particular with respect to the requirement for express acceptance and on the inapplicability of the legal regime of unilateral declarations.

The European Union observes the "*without prejudice*" nature of guideline 7 on reservations relating to provisional application and notes that the commentaries do not provide for more guidance on the legal effectsof such reservations and their termination when a treaty enters into force. As the European Union has stressed in its previous interventions, in its view the effect of such reservations would end

with the termination of the provisional application. The European Union notes with regret that due to the lack of significant practice concerning reservations relating to provisional application the ILC could not provide more clarifications on this matter.

Finally, the European Union notes with appreciation that the commentary to draft guideline 9 concerning the termination of provisional application recognizes the possibility that grounds other than those anticipated in paragraph 2 of Article 25 of the 1969 Vienna Convention may also be invoked by a State or an international organisation for the termination of provisional application. The European Union observes with satisfaction that the commentary mentions, among others, the situation of a material breach, in case of which a State or international organisation may seek to terminate or suspend the provisional application vis-à-vis the State or international organization that has committed the material breach, while still continuing to provisionally apply the treaty in relation to other parties.

3. Sweden (on behalf of Denmark, Finland, Iceland and Norway (Nordic Countries))

This year the Commission adopted on second reading the Guidelines on the protection of the atmosphere with commentaries as well the Guide on the provisional application of treaties, including an annex of examples of provisions on provisional application of treaties. Substantial progress was made on other topics on the Commission's agenda as well. We salute these results, which are all the more remarkable given the challenges of working in hybrid format.

[…]

Regarding the topic of **Provisional Application of Treaties**, the Nordic countries are very pleased with progress made at this year's session with the adoption of the Guide to Provisional Application of Treaties, including the draft guidelines, the commentaries thereto and a draft annex containing examples of provisions on provisional application. The Nordic countries have continuously supported the efforts of the Special Rapporteur and the Commission on this subject. We believe that the work of the Commission on this topic is of significant practical importance.

The Nordic countries commend the guide and its commentaries as well as the efforts of the International Law Commission in compiling the practice of States and international organizations in the provisional application of treaties. The material altogether offer great and valuable practical assistance when formulating final provisions of treaties.

Turning to specific comments, we welcome the Commission's work on the legal basis of provisional application, including the reference to Article 24 of the Vienna

Convention on the Law of Treaties in the commentary to draft guidelines 3 and 5. We are of the view that the issue of provisional application arises from the time of the adoption of the text of the treaty. This provides the legal basis for the provisional application.

The Nordic Countries commend the final formulation of guideline 4 as it confirms that, in addition to a separate treaty; provisional application may also be agreed through "any other means or arrangements", which broadens the range of possibilities for reaching agreement on provisional application. According to the commentary, the draft guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that such acceptance is express. The Nordic Countries also support the view taken by the International Law Commission that the term "declaration" is not meant to refer to the legal regime concerning unilateral declarations of States, which does not deal with the provisional application of treaties.

The Nordic countries also commend the Commission on its work on the use of reservations vis-à-vis provisional application in draft guideline 7. While, recognising the
lack of significant practice, the guidelines and the commentary may nevertheless provide guidance.

On behalf of The Nordic countries I would like to express our congratulations to the Special Rapporteur Gómez Robledo for the results achieved along with our warmest thank you for his efforts on this subject, which is of great practical significance.

4. Latvia (also on behalf of Estonia and Lithuania)

I will now address the ILC's Guide to Provisional Application of Treaties, adopted on second reading this year.

Latvia, Estonia, and Lithuania express warm congratulations to the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, for the outstanding contribution he has made to the elaboration of the Guide. Provisional application is an important element of the law of treaties, and the Commission is to be commended for providing guidance regarding the law and practice on the basis of the rather concise Article 25 of the Vienna Convention on the Law of Treaties. As the Commission explains in the General Commentary, provisional application is characterised by the capacity to adapt to varying circumstances to give immediate effect to a treaty -- but without either substituting the entry into force of treaties or bypassing domestic procedures. The Guide is likely to be of considerable assistance to practitioners, both its draft guidelines on provisional application of treaties and the annexed examples of provisions on provisional application of

treaties. Indeed, even further examples of provisions, including on declarations and resolutions foreseeing the provisional application, would have been welcome.

The Guide and commentaries thereto, which have to be read together, answer a number of important questions regarding provisional application. In draft guideline 6, the Commission confirms that '[t]he provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty' – except to the extent that that treaty otherwise provides or it is otherwise agreed – and that '[s]uch treaty or part of a treaty that is being applied provisionally must be performed in good faith'. We agree. Importantly, the Guide does not purport to be comprehensive, as suggested by the without-prejudice draft guideline 7 regarding reservations, and has to be read and applied alongside the broader corpus of residual rules of the law of treaties. Nor is it inflexible. As Estonia pointed out in its written comments and the Guide accepts in the General Commentary, provisional application is essentially voluntary and optional, and States and international organizations may agree on more appropriate solutions not identified in the Guide. We would, however, have appreciated further clarification in the commentaries to draft guideline 4(b) with respect to the stated requirement for express acceptance and on the inapplicability of the legal regime of unilateral declarations regarding provisional application through a declaration, a point repeatedly made in the statements of the European Union. We welcome the Commission's recommendation at paragraph 43 of the report, including the preparation of a volume in the United Nations Legislative Series. Finally, we note with appreciation the reliance by the ILC on the practice of the European Union and its Member states in the preparation of the Guide.

5. Singapore

Second, on **Chapter V on the topic "Provisional application of treaties"**, Singapore is pleased that the Commission successfully concluded its work on the Guide to Provisional Application of Treaties and its commentaries, and welcomes the overall approach that the Guide encourages. The Guide provides important and concise practical guidance to States and international organisations on how treaties can be applied provisionally and the legal effects of such provisional application.

With regard to draft Guideline 4 on "Form of agreement", we are heartened that the Commission's output addresses concerns that my delegation raised before. We particularly welcome the amendments to emphasise the requirement of consent to the provisional application of a treaty between the States and international organisations concerned.

With regard to draft Guideline 6 on "Legal effects", Singapore's understanding is that an agreement between States or international organisations to provisionally apply a treaty or part of a treaty can create a legally binding obligation. Whether

any such legally binding obligation is created is ultimately dependent on the intention of the parties and what they have agreed. This may be reflected in the circumstances surrounding the treaty and the agreement on provisional application, in cases where both are silent or ambiguous on the legal effect of provisional application. In situations where there is an obligation on States or international organisations to provisionally apply a treaty or part of a treaty, they must do so in good faith.

On this understanding, my delegation supports the Commission's recommendations as set out at paragraph 49 of the report and the Guide as a whole.

6. Sierra Leone

Similarly, Sierra Leone also commends the Commission, and its Members, and pays tribute to the Special Rapporteur **Mr. Juan Manuel Gomez Robledo** of **Mexico** on the adoption of draft guide with the commentaries thereto, upon second reading on the topic "Provisional Application of Treaties" comprised of a set of 12 draft guidelines and an annex containing examples of provisions on provisional application of treaties. Sierra Leone takes note of the recommendation of the Commission in paragraph 49 of the report, and as we continue to study the adopted guidelines, annex and commentaries, my delegation makes the following preliminary observations:

First, Sierra Leone acknowledges that provisional application of treaties, contemplated by the 1969 *Vienna Convention on the Law of Treaties* in Article 25, has become more common as a tool in State practice to give effect to all or some provisions of a treaty pending the completion of formalities for their entry into force, including for African States. Sierra Leone constitutional law, however, still requires internal approval for provisional application, that is completion of the required formalities internally, in the same way for a treaty that has entered into force.

Second, we appreciation the addition of the annex, containing examples of recent practice on provisional application of treaties, reflecting regional diversity, and providing useful guidance for States and international organizations.

Third, on the adopted Guideline 3 (General rule), Sierra Leone in principle agrees with the first part of the general rule to the extent that the provisional application of a treaty or a part thereof between the States or international organizations concerned pending its entry into force has to be based on a provision contained therein as aligned to article 25 of the *Vienna Convention on the Law of Treaties*, 1969.

Fourth, the second part of the general rule, that is, "*A treaty or a part of a treaty is applied provisionally pending its entry into force between the States or international organizations concerned, [...] if in some other manner it has been so agreed*", is linked to Guideline 4 (Form of agreement), in our view, and requires further consideration. In situations where provisional application of a treaty or part of a treaty is agreed through a) separate treaty or b) any other means or arrangements, including by resolutions of international organizations or intergovernmental conference, attention must be paid to the fundamental principle of representation and inclusion that must inform resolutions adopted at international organizations and intergovernmental conferences on the one part, and such resolutions must not be accorded the same weight as agreements between two or more States on provisional application, which are the clearest manifestations of State consent.

Fifth, Sierra Leone takes notes of the prevalent State practice, in the context of provisional application, of *exchanges of notes or memoranda of understanding* or notifications of acceptance to provisional application to a treaty depository such as the Secretary-General of the United Nations. The key element in this aspect is the transparency element that should be taken into account in this prevalent practice.

Sixth and finally, Sierra Leone notes the retention of Guideline 7 (Reservation) with modification to the previous first reading text, and although we continue to give serious consideration to this guideline, we further note the absence of relevant practice on provisionally applied treaties.

7. Iran

On the topic of “provisional application of treaties”, we would like to commend the Commission for the adoption of the “Guide to provisional Application of Treaties” and commentaries thereto in its second reading. We also thank Special Rapporteur Mr. Juan Manuel Gomez Robledo for the contribution he made to this process.

At the very outset, my delegation appreciates the Commission for the studies which it undertook on the law of treaties during the last decades. These studies, including Vienna convention on the law of treaties, Vienna Convention on the law of treaties between States and international organizations or international organizations, reservation to treaties, the effect of armed conflict on treaties, unilateral acts of States, subsequent agreements and subsequent practices in relation to the interpretation of treaties, and now the provisional application of treaties have significantly contributed to the codification and progressive development of international law in this fundamental field.

On the topic in consideration, we would like to emphasize that article 25 of VCLT on provisional application of treaty merely offered. States the possibility of provisional application without the 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.

In this connection, we align with the view expressed by the Special Rapporteur in paragraph 114 of his Sixth report which recommends that no element relating to article 18 of VCLT be incorporated into the draft guideline, inter alia, we emphasize that since there is a substantial difference between article 18 regime and article 25 regime, there is no relation between these two articles of 1969 Vienna Convention.

With regard to guideline 4, we welcome the formulation adopted by the Commission and also the draft clause model proposed by the Special rapporteur in Annex II of his report. We are of the view that a resolution, decision, or other act adopted by an international organization or at an intergovernmental conference might have such effect, only if, the State concerned agreed upon the binding nature of that decision.

On guideline 6, we accept the wording adopted by the Commission. However, we are of the view that the provisional application of a treaty only produces limited legal effects during the specific period in which mutually agreed upon its application.

By this consideration, we maintain that the principle of consent prevailing in international law and particularly the law of treaties as well as flexibility and non-binding nature of the proposed provisions as the core elements of the provisional application of treaties indicates the different characteristics of the topic. Thus, defining a responsibility regime, through analogy, in guideline 8, is inconsistent with the nature of the regime of the provisional application. This guideline would undermine willingness of Countries to apply treaties provisionally.

8. France

[Original : French]

Concernant « l'application provisoire des traités », ma délégation remercie la Commission pour la transmission du Guide pour l'application provisoire des traités et félicite chaleureusement le rapporteur spécial, l'Ambassadeur M. Juan Manuel Gómez Robledo, pour la qualité du travail accompli. La France a bien noté que l'objet de ce projet de directives est « de fournir des orientations en ce qui concerne le droit et la pratique relatifs à l'application à titre provisoire des traités », et non d'établir de nouvelles obligations juridiques.

Ma délégation relève l'effort fourni par la Commission pour s'appuyer sur la pratique des États – qui, en la matière, revêt une importance cruciale – et note que la circulaire française du 30 mai 1997 relative à la conclusion des traités par la France figure parmi les documents mentionnés par la Commission. La liste de clauses conventionnelles qui a été annexée au projet de directives constitue également un outil pratique bienvenu.

La France tient à souligner que l'application provisoire d'un traité est une pratique qui, en raison de ses effets, doit rester exceptionnelle, et ne saurait se présumer. Elle se félicite que la Commission ait inscrit son projet dans cette perspective. Dans le commentaire sous le projet de directive n°4, la Commission évoque « la possibilité exceptionnelle qu'a un État ou une organisation internationale de convenir de l'application à titre provisoire d'un traité ou d'une partie d'un traité au moyen d'une déclaration, dans les cas où cette application n'est pas prévue par le traité en question ni convenue par un autre instrument. La déclaration doit toutefois être expressément acceptée par les autres États ou organisations internationales concernés ».

La France partage cette analyse et considère que, pour des considérations de sécurité juridique, la mise en application provisoire d'un traité suppose le consentement explicite des parties audit traité, que ce consentement soit exprimé directement dans l'accord ou en marge ? en parallèle ? [sic] de celui-ci.

9. Egypt

[Original: Arabic]

Excerpt from press release/meeting coverage:

On the topic, "Provisional application of treaties", he stressed the importance of considering the topic, adding that the Commission's examination of it and preparation of the guide will enable States to be guided by it when they implement treaties provisionally. Also welcoming the annex that was attached, which contains examples of some of the practical applications in bilateral and multilateral treaties, he reaffirmed support for the Commission's work in the development of international law.

10. Belarus

[Original: Russian]

Unofficial translation by the Codification Division:

My delegation would like to thank the Commission and the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, for their work on this very timely topic.

The provisional application of treaties gives a great deal of flexibility to the subjects of international law in the conclusion and application of treaties. In this regard, we are closely following the Commission's work on this topic and consider the guidelines to be of great practical value.

The comments by the Belarusian delegation on the provisional application of international treaties during the 73rd session of the UN General Assembly remain relevant.

We would like to draw attention to the question of the unilateral termination of the provisional application of treaties (Guideline 9). The termination of the provisional application of an international treaty unilaterally generally takes place when the contracting parties receive notification of the intention of one of the contracting parties not to become a party to the international treaty. At the same time, there have been cases where the provisional application of an international treaty may have lasted for decades. In such situations, there are certain legitimate expectations of the contracting parties to an international treaty regarding the stability of legal relations on the basis of continuously applied treaty provisions in the regime of provisional application. We propose that consideration be given to the possibility of establishing the right of the contracting parties to request a reasonable period for termination of the provisional application of an international treaty in their relations with another contracting party after the latter has been notified of its intention not to become a party to the international treaty, where the provisional application of an international treaty has been of a long duration and its abrupt unilateral termination would be detrimental to the contracting parties.

11. Cuba

[Original: Spanish]

En cuanto a la aplicación provisional de los Tratados, Cuba aboga por que no se abuse de la aplicación provisional de los Tratados y por que esta se base en los postulados de la Convención de Viena sobre tratados, la cual otorga prevalencia al principio de la voluntad de las partes.

En materia de interpretación, Cuba insta a la observancia con prudencia de la interpretación de los actos soberanos de los Estados en la firma de Acuerdos internacionales, así como su entrada en vigor, toda vez que son las partes quienes asumen determinados derechos y obligaciones.

La aplicación provisional de un tratado no suple la entrada en vigor de los mismos. Cuba considera que los tratados que se encuentran en aplicación provisional deben entrar en vigor de manera definitiva una vez cumplidos los trámites constitucionales de aprobación establecidos en las respectivas legislaciones nacionales de las partes signatarias. Es decir, la aplicación provisional de un tratado no debe sustituir la búsqueda de su entrada en vigor de manera definida.

La figura de la aplicación provisional de un tratado debe estar muy ligada al principio de la autonomía de la voluntad de sus partes, en tanto son estas las que por acuerdo deciden de manera facultativa la aplicación provisional, al tiempo que fijan su alcance y las obligaciones derivadas de la misma.

12. Australia

Australia would like to make some remarks today on the Commission's work on Provisional Application of Treaties.

We thank the Special Rapporteur, Mr Juan Manuel Gómez Robledo, for his work on this topic through the publication of six reports, and the Commission for the development of the Guide to Provisional Application of Treaties.

Australia welcomes the Guide as a framework for guiding international bodies and governments on the provisional application of treaties. It is a useful compilation of contemporary practice.

Provisional application is an important and practical mechanism available to States and international organisations where circumstances call for the application of some or all provisions of a treaty prior to its entry into force.

One of the overarching objectives of provisional application is that it should facilitate the subsequent entry into force of the treaty. Australia therefore welcomes that the commentary to the Guide highlights that provisional application can facilitate entry into force of a treaty.

Australia notes that a treaty should not be provisionally applied in a manner that in effect bypasses important domestic or constitutive procedures. The commentary to the Guide provides important clarity on this point, and we also welcome the compilation of provisions in the Guide that reflect this qualification.

The draft guidelines strike a good balance between protecting compliance with domestic or constitutive procedures and facilitating provisional application of treaties.

Australia also supports the Commission's recommendation that the General Assembly should request the Secretary-General to prepare a volume of the United

Nations Legislative Series on the practice of States and international organisations in the provisional application of treaties. Australia encourages Member States and international organisations that have not provided such information to do so in order to promote wider knowledge of such practice.

13. South Africa

Allow me to turn to **"Provisional Application of Treaties"**. South Africa welcomes with great appreciation, the report by the Special Rapporteur on this very important subject. The extensive work that has gone into the development of this report and the accompanying guidelines is commended and highly valued by my delegation. We also commend States and International Organizations that have provided comments and shared their practices on this subject. Learning from others is always fundamental in developing long lasting international practices.

The Provisional Application of Treaties, when done correctly, can contribute immensely to the speedy implementation of certain provisions of treaties. In order to ensure speedy implementation of provisions of treaties meant for the upliftment of the lives and livelihoods of our people, more states may consider the provisional application of treaties in so far as it is not inconsistent with their domestic laws and acquired treaty practices.

We believe the great work done on this matter will ensure proper interpretation of the legal prescripts and minimize the abuse of this provision.

South Africa reiterates, its support to the Special Rapporteur and the Commission as a whole.

14. Colombia

[Original: Spanish]

A continuación, Colombia se pronunciará sobre los temas del grupo 1: protección de la atmósfera, aplicación provisional de los tratados y otras decisiones de la Comisión.

• En ese sentido, desea empezar por agradecer a la Comisión y a los relatores especiales, Shinya Murase y Juan Miguel Gómez-Robledo, por completar exitosamente de los Proyectos de Lineamientos en materia de protección de la atmósfera y de aplicación provisional de los tratados, así como sus respectivos comentarios, y por tener en cuenta ciertas consideraciones de los Estados en su elaboración.

• Colombia da la bienvenida a la forma holística en que ambos temas fueron abordados y al interés por reflejar la práctica los Estados en estas materias.

• Por su parte, al tratarse de directrices o lineamientos, Colombia entiende ambos productos como verdaderos instrumentos de soft law, que en ninguna circunstancia generarían obligación jurídica alguna para los Estados en caso de ser acogidos por esta Comisión.

• Colombia comprende que frente a ambos productos hubo un debate juicioso por parte de los miembros la Comisión, y los Estados tuvieron la oportunidad de pronunciarse sobre ellos, por lo cual reconoce que los mismos obedecen a un buen ejercicio deliberativo por parte de la CDI y un punto de partida importante para los Estados y para profesionales en estas materias.

15. Portugal

I will now turn to the topic '**Provisional application of treaties**.", starting by thanking the Special Rapporteur, Mr. Gómez Robledo, for his sixth report on this topic.

My delegation joins the International Law Commission in its tribute to the Special Rapporteur for his noteworthy contribution in preparing the Guide to Provisional Application of Treaties.

Portugal welcomes this Guide, along with its accompanying commentaries, seeing it as a comprehensive and useful document dealing with the topic of current practices with respect to the provisional application of treaties.

[…]The importance of this guide is even more evident because, as noted in Guideline 8, the breach of an obligation arising under a treaty or a part of a treaty that is applied provisionally entails international responsibility – and that of States and international organisations alike.

Accordingly, any effort to improve current practices and to clarify the use and application of the provisional application mechanism must be celebrated. *With this Guide, States, international organisations, and other users now have at their disposal a "one-stop document" that reflects existing rules of international law in light of contemporary practice and addresses topical questions on the matter – including the form of the agreement to apply provisionally a treaty or a part of a treaty, the commencement and termination of such provisional application, and its legal effects.*

What is more, it is commendable that, while recognising the need for flexibility in this respect, the Guide builds upon the legal regimes provided by the 1969 Vienna Convention on the Law of Treaties, and the 1986 Vienna Convention on the Law

of Treaties between States and international organizations or international organizations. In doing so, the guide contributes to the harmony and consistency of public international law.

[…]Portugal once again emphasises the voluntary nature of the provisional application mechanism, as highlighted throughout the Guide and the general commentary.

In this respect, it is worth noting, inter alia, that Guideline 7 – which deals with the question of reservations – leaves open the possibility of States or international organisations to submit a reservation relating to the provisional application of a treaty or a part of a treaty, including for the purpose of opting out from its legal effects.

Furthermore, the solution contained in Guideline 4(b)(ii) is equally relevant. According to this Guideline, while States and international organisations may declare they wish to apply provisionally a treaty or a part of a treaty in cases where the treaty remains silent or when it is not otherwise agreed, the legal of effects of such declarations depend entirely on the express acceptance of the other States or international organisations involved.

For my delegation, the special relevance of this Guide also stems from the fact that Portugal, in accordance with its constitutional framework, is prevented from applying treaties provisionally.

Therefore, Portugal welcomes the acknowledgement that States and international organisations retain the right (i) to submit a reservation concerning the provisional application of the treaties which they have signed; and (ii) to oppose the provisional application of a treaty by means of a unilateral declaration by other State or international organisation.

[…]*My delegation also notes gladly that Guideline 3 does not refer to 'negotiating States' or 'negotiating States and negotiating organisations.' That is the correct legal solution since, as noted by the International Law Commission, and I quote, "provisional application may be undertaken by States or international organizations that are not negotiating States or negotiating organizations of the treaty in question but that have subsequently consented to provisional application of the treaty" (end quote).*

A final word of appreciation is due to the Special Rapporteur for compiling a useful list of model-clauses, which in Portugal's view complements the text of the

guidelines and serves as additional guidance on a better and broader perspective on the existing international practice.

17th meeting, 26 October 2021 (A/C.6/76/SR.17)

16. China

[Original: Chinese]

Excerpt from press release/meeting coverage:

Turning to "Provisional application of treaties," he welcomed that the Commission's draft guidelines on this topic partially reflect the comments and views of various countries. He said that the Commission's work on this topic can provide a reference for practice in the relevant fields. However, he stressed that the provisional application of treaties must be predicated on the consent of countries. Future interpretation of the draft guidelines should also proceed on that basis, he added.

17. United States of America

Turning to the substance of this year's ILC report, the United States welcomes the completion of the Guide to Provisional Application of Treaties. We express our appreciation to the Special Rapporteur, Ambassador Juan Manuel Gómez Robledo, and other members of the Commission, for their significant contributions to the development of this topic. Moreover, we are appreciative of the consideration given to U.S. comments on prior iterations of the Guide and the Commission's efforts to address those concerns.

The United States is generally supportive of the Guide, whose purpose, as described in Guideline 2, is "to provide assistance to States, international organizations and other users concerning the law and practice on the provisional application of treaties." In this respect, the Guide helpfully confirms the basic features of the legal regime concerning provisional application of treaties. In some areas, however, the guidelines and accompanying commentary are neither necessary nor supported by law or State practice. Those areas of concern may give rise to confusion regarding the law and practice on provisional application and in so doing undermine the Guide's purpose.

With respect to Guideline 4, we appreciate the Commission's efforts to address our concerns regarding the potential for confusion arising from statements related to the use of means other than a treaty to establish an agreement to apply a treaty on a provisional basis. In this regard, the guideline previously singled out two possibilities for specific mention: "resolutions adopted by an international

organization or at an intergovernmental conference[,] or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned." We were particularly concerned that the guideline appeared to place undue consideration on the venue at which an agreement is reached or the adoption of a resolution rather than on whether all States and international organizations assuming rights and obligations to provisionally apply the treaty have agreed to do so. Resolutions adopted by an international conference, or in other similar fora, that do not reflect the consent of all States assuming rights and obligations pursuant to provisional application – such as those adopted without the participation of or without the consent of all relevant States – would not establish a valid agreement for provisional application in respect of those States. The revised commentary clearly establishes that the States or international organizations "concerned must consent to provisional application."

With respect, however, to declarations by a State or an international organization that are accepted by other States or concerned international organizations, we reiterate our previous observations that the commentary to the guideline has identified little support in state practice for the use of such declarations to establish the provisional application of treaties. Moreover, the commentary fails to establish persuasively that such declarations are most appropriately understood as implicating the doctrine of provisional application of treaties rather than the law regarding unilateral declarations by States. We note that the commentary describes such declarations as an "exceptional possibility," underscoring the ambiguity of State practice on this point. In light of this concern, we continue to question the soundness of this element of the guideline.

The Guide similarly lacks support in State practice in other areas. Of particular note, the commentary accompanying Guideline 7 expressly addresses "*the possibility* of formulation of reservations ... purporting to exclude or modify the legal effect produced by certain provisions of a treaty that is subject to provisional application" while acknowledging that there is no significant State practice involving reservations in the provisional application context.

These and other previously stated concerns notwithstanding, the United States on balance believes that the Guide can serve as a useful reference source for States and international organizations in the negotiation and conclusion of provisions on provisional application.

18. India

Now I turn to the topic "Provisional application of treaties", we thank Special Rapporteur Mr. Juan Manuel Gómez Robledo, for his efforts which has resulted in the sixth report (A/CN.4/738), and also comments and observations received from Governments and international organizations (A/CN.4/737), on the draft

Guide and on several draft model clauses, proposed by the Special Rapporteur to the Commission at its seventy first session (2019). The Commission has adopted, on second reading, the entire Guide to Provisional Application of Treaties, comprising 12 draft guidelines and a draft annex containing examples of provisions on provisional application of treaties, together with commentaries thereto.

Article 25 of the 1969 Vienna Convention on the Law of Treaties forms the basic rule for provisional application of treaties. The purpose of provisional application is to give immediate effect to all or some of the substantive provisions of a treaty without waiting for the completion and effects of the formal requirements for entry into force contained therein. It is a mechanism that allows States to give legal effect to a treaty by applying its provisions to certain acts, events and situations before it has entered into force. Treaties may also be applied provisionally in order to expedite their implementation prior to completion of the constitutional procedures for their ratification and entry into force.

We express our appreciation for the Commission's work on the complex matter of provisional application of treaties and the draft guidelines, which will form a comprehensive manual for the practice of States and international organizations. In a dualist legal system like in India, where treaties must be transposed or incorporated into national law to become effective, it is a typical requirement of domestic law of certain States that the competent organ may only agree to provisional application of a treaty if national law is already in conformity with the treaty or is brought into conformity with it.

We maintain the view that treaties should be applied after their entry into force, as a rule, and that provisional application before entry into force should be regarded as an exception that would be applied at the discretion of States. In this regard, the draft guidelines and the draft model clauses should only aim to guide those States and international organizations that wish to apply certain bilateral or multilateral treaties provisionally, and should not prejudice the flexible and voluntary nature of this legal concept.

Based on this understanding, it would be more suitable for the concept of provisional application to be included in treaties as a voluntary option which States can choose to apply, and not as a legal obligation which States would have to opt out of or make reservations to. We are of the view that State's political social and legal system has greater role to play in the provisional application of a treaty, including in the manner of expressing consent to a treaty.

19. Italy

We will now turn to the topic **"Provisional Application of Treaties"**. At the very outset, we would like to commend the Commission and the Special Rapporteur,

Mr. Manuel Gomez-Robledo, for the adoption of the Guide to Provisional Application of Treaties on second reading and their accompanying commentary.

The Guide to Provisional Application of Treaties **constitutes a practical and flexible instrument**, which will facilitate the work of legal practitioners, including the legal services of ministries of foreign affairs and international organizations, in identifying the most appropriate legal arrangements in order to provisionally apply treaties, which have not yet entered into force.

Italy is of the view that the Special Rapporteur and the Commission have managed to strike a **good balance between the need to preserve the *acquis* of the Vienna Conventions on the Law of Treaties and the need to clarify a number of legal issues** arising out of the growing practice of provisional application of treaties.

At the same time, as a country whose Constitution regulates in detail the entry into force of international treaties at the domestic level, Italy finds very important the ILC reassurance – to be found in the general commentary – "that it is in no way claimed that the Guide creates any kind of presumption in favor of resorting to the provisional application of treaties.

Provisional application is neither a substitute for securing entry into force of treaties, which remains the natural vocation of treaties, nor a means of bypassing domestic procedures."

Italy also supports the **"open" and flexible formulation of Draft Guideline 4**, which does not limit the variety of forms through which States and international organizations can agree to provisionally adopt a treaty, and yet underlines the role of resolutions and decisions adopted by international organizations and intergovernmental conferences as a means to agree on the provisional application of treaties.

In terms of internal consistency, given the ILC's distinction between the legal obligation deriving from the agreement to apply the treaty provisionally and the legal obligations deriving from the provisionally applied treaty **as explained in the commentary to Guideline 6, Guideline 8 on "responsibility for breach"** should have clarified the double-tier of potential responsibility for breach that provisionally applied treaties entail.

Italy concurs instead with the Commission **on its formulation of Draft Guideline 7**, to the extent that the practice of reservations to provisionally applied treaties is very limited.

Finally, Italy would also like to express appreciation for the choice of the ILC **to provide examples** drawn from existing treaties with regard to the several issues involved. While treaties with regard to non-parties remain *res inter alios acta*,

useful lessons can be drawn from past and current practices in the provisional application of treaties.

20. Brazil

Let me now turn to Chapter V, on "Provisional application of treaties". Brazil commends the International Law Commission for the successful conclusion of its work on provisional application of treaties, with the adoption of the guide about this issue. We would like to congratulate the Special Rappoteur, Juan Manuel Gómez Robledo, for his outstanding contribution for the results achieved. Brazil believes that the guide adopted by the Commission sheds light on a practice that is important to several states.

The general commentary to the guide stresses that provisional application constitutes a completely voluntary mechanism, which states are free to resort to or not. Brazil reiterates that it does not join this practice.

According to guideline 6 recently adopted, the provisional application of a treaty produces legally binding obligation to apply the treaty, and a breach of this obligation entails international responsibility, in accordance with article 8 of the guide. However, the Brazilian constitutional system, as a general rule, requires parliamentary approval of treaties that create binding obligations to Brazil. For this reason, when the National Congress approved the Vienna Convention on the Law of Treaties, it objected article 25, related to provisional application. Therefore, Brazil ratified the Vienna Convention with reservation to this article.

As Brazil disassociates itself from the practice of provisional application of treaties, the guide adopted by the ILC, including its guideline 10, related to the internal law of states, is not applicable to Brazil.

This objection does not affect the obligation not to defeat the object and purpose of a treaty before its entry into force, as prescribed in article 18 of the Vienna Convention on the Law of Treaties. It is also without prejudice of 24 (4) of the Vienna Convention, according to which certain provisions regarding matters arising necessarily before the entry into force of a treaty apply from the time of the adoption of the text, as stated in commentary to guideline 5. Articles 18 and 24 of the Vienna Convention were not subject to any kind of reservation by Brazil, and they are not directly included in the guide recently adopted.

Although the Brazilian practice does not include provisional application of international agreements, we do not object other states following this practice, and provisionally applying bilateral or multilateral treaties vis-à-vis Brazil. Brazil may only apply the treaty after the parliamentary approval and subsequent ratification, but we do not object European Union members applying it before its entry into force, based on their own constitutional systems.

21. Romania

The Romanian delegation would like to express its appreciation for the outstanding work of the Special Rapporteur, Mr. Juan Manuel Gomez Robledo, reflected in the adoption, by the International Law Commission, on second reading, of the *Guide to Provisional Application of Treaties, the annex and the commentaries to it*.

We fully align with the comments already provided on this topic in the statement made by the European Union. We would also like to make a few additional remarks, in our national capacity.

Romania welcomes the adoption of the Guide, which represents a very useful compendium on this subject and a practical tool for States and international organizations in their treaty-making practice.

The separation of paragraph (b) of *guideline 4* into a chapeau and two subparagraphs facilitates a clearer distinction between two different scenarios of agreeing the provisional application of a treaty or a part of a treaty. The explanation concerning the broader interpretation of the term "*intergovernmental conference*", in the commentaries, is equally useful.

We support the decision to eliminate the phrase "*as if the treaty were in force*" from *guideline 6*, taking into account the diverging views on this issue and the argument that such a phrase might implicitly encourage the recourse to provisional application to the detriment of completing the national legal procedures necessary for the entry into force of a treaty.

As regards *guideline 9*, Romania welcomes its amendment, in order to take into account other grounds for the termination of provisional application, besides the intention not to become a party to the treaty.

While we acknowledge the efforts of the Special Rapporteur to provide model clauses in relation to provisional application of treaties, an idea which we have previously supported, we understand the rationale behind limiting the content of the annex, for future reference, to examples of provisions in existing agreements and other instruments and we are not oppose to such a course of action.

To conclude, I reiterate the appreciation of my delegation for the completion of the work on this topic which is of high practical value to every day work of the legal advisers in the Ministries of Foreign Affairs all over the world. In this vein, we support the recommendation addressed to the Secretary General to prepare a volume compiling the practice of States and of international organisations in the provisional application of treaties and other relevant materials to this topic.

22. El Salvador

[Original: Spanish]

A pesar de las restricciones derivadas por la pandemia de COVID-19, la Comisión logró satisfactoriamente concretar sus trabajos, destacando la aprobación en segunda lectura del proyecto de directrices sobre la **Protección de la Atmósfera** y la **Guía para la Aplicación Provisional de los Tratados**, y respecto de los cuales, mi delegación desea – brevemente- expresar las siguientes consideraciones:

Deseamos expresar nuestro agradecimiento al Relator Especial, Sr. Juan Manuel Gómez Robledo por el arduo y valioso trabajo. Adicionalmente, queremos manifestar nuestro reconocimiento a la Comisión de Derecho Internacional y al Comité de Redacción por sus meritorios aportes, entre ellos la recomendación de solicitar al Secretario General que preparara un volumen de la **United Nations Legislative Series** en el que se recopilara la práctica de los Estados y las organizaciones internacionales en materia de aplicación provisional de los tratados, todo lo cual reforzará la interpretación y aplicación de esta Guía, específicamente a países como el nuestro que, dada las particularidades de nuestro sistema jurídico, nos regimos según la práctica de conclusión de tratados en los que se ha convenido la aplicación provisional.

[…]
Desde que se empezó con el análisis de este tema, mi Delegación expresó su apoyo a la orientación inicial en el sentido que, el examen de los trabajos realizados por la Comisión en el tema del Derecho de los Tratados, era un buen punto de partida que podía resultar de gran utilidad. Nos congratulamos porque ahora que estamos ante el trabajo concluido confirmamos nuestro argumento.

En general, mi delegación considera que la Guía que se nos presenta, cumple la finalidad de orientar sobre el desarrollo progresivo de este tema; no obstante, aún existen algunos aspectos que estimamos pertinente reiterar:

- 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**, 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, en armonía con la directriz 2.1.7 contenida en la Guía de la Práctica sobre la Reserva de los Tratados, es necesario 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, señora Presidenta, estamos seguros que tanto el proyecto de Directrices sobre Protección de la Atmósfera como la Guía para la Aplicación Provisional de los Tratados contribuirá significativamente hacia el desarrollo progresivo y codificación de estos importantes temas; por lo que acogemos con beneplácito las recomendaciones elaboradas por la Comisión.

23. Slovakia

At this session, the Commission proceeded to conclude its work on two topics, namely, the **'Provisional application of treaties'** and the **'Protection of the atmosphere'** which is a remarkable achievement bearing in mind the disruption caused by the COVID-19 pandemic and the hybrid format employed at the session. The Commission, with the indispensable and invaluable support of the Codification Division, demonstrated the necessary degree of flexibility and adaptability, crucial for fulfilling its mandate in the field of codification and progressive development of international law under challenging circumstances.

With respect to **'Provisional application of treaties,'** I would like to commend Special Rapporteur Mr. Juan Manuel Gómez-Robledo for his sixth report and welcome the adoption by the Commission, on the second reading, of the Guide to Provisional Application of Treaties. Having considered the nature of the text adopted by the Commission and its intended purpose, the recommended course of action for the General Assembly seems to be a suitable one. It will enable the widest possible dissemination of the Guide and support practitioners when dealing with the subject. There is no doubt that it will also contribute to further harmonization of the practice and reduce the risk of divergencies. It is our view

that the main value of the Guide lies in expressly specifying rules and understandings that are solely implied by the rather brief wording of Article 25 of the Vienna Convention on the Law of Treaties.

Notwithstanding the completion of the Commission´s work, we would like to highlight some elements of our views expressed continuously at previous sessions of the Sixth Committee.

First, both the guidelines 3 and 4 specify the way of agreeing on the provisional application of a treaty. It is our understanding that, without prejudice to its specific form, a State in question has to give its explicit consent for a treaty to be applied provisionally. Consequently, while we agree that an act of an international organisation or international conference may constitute a legal basis for the provisional application of a treaty, its adoption must unequivocally reflect the consent of the States concerned.

Second, the guideline 9 on termination and suspension of provisional application 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. In this regard, we wish to point out that the paragraph 2 does not expressly address the temporal aspect of the notification of intention not to become a party to the treaty. As a result, a question may arise, whether the notifying State may determine unilaterally when the provisional application terminates. Moreover, in our view, the decision of a State to terminate the provisional application of a treaty itself should not be automatically considered as the notification by the same State of its intention not to become a party to the treaty.

24. Mexico

[Original: Spanish]

En cuanto al tema relativo a la aplicación provisional de los tratados, México felicita a la Comisión por haber adoptado la Guía sobre el tema y agradece al Relator Especial Gómez Robledo por su labor en el desarrollo de ésta.

México, al pertenecer a la tradición jurídica del derecho civil, privilegia y promueve un sistema de derecho internacional basado en reglas claras creadas a partir de la voluntad de los Estados. La práctica relacionada con la aplicación provisional de los tratados, sean estos bilaterales o multilaterales, demuestra el gran valor de esta figura que, en general, ha sido poco explorada y, en muchas ocasiones, ha sido incomprendida. Por ello, la Guía adoptada por la CDI representa una herramienta de la mayor utilidad para las oficinas jurídicas tanto de los Estados como de los organismos internacionales al esclarecer el alcance y las consecuencias jurídicas de la aplicación provisional de los tratados.

Por otro lado, consideramos que los ejemplos anexos aportan un valor agregado a este producto de la CDI. Como lo expresamos en ocasiones anteriores, mi delegación hubiese preferido que la Comisión adoptase una serie de cláusulas modelo que sirvieran como punto de referencia para los Estados en sus negociaciones de tratados, tal y como fue propuesto por el Relator Especial en un principio. Sin embargo, esperamos que los ejemplos sirvan de manera ilustrativa, tanto por sus aciertos como por sus deficiencias en su redacción.

En suma, el tema de la aplicación provisional de los tratados está ligado estrechamente con la manifestación de la voluntad de los Estados que participan en procesos de negociación, firma y ratificación de instrumentos internacionales. Se trata, entonces, de reforzar un ángulo muy importante de una de las principales fuentes del derecho internacional. Sin lugar a dudas, la comunidad internacional se beneficiará enormemente de esta Guía que contribuirá a crear reglas claras sobre la aplicación provisional de los tratados.

25. Chile

[Original: Spanish]

Me referiré a continuación al Capítulo V del Informe, relativo a la "**Aplicación Provisional de los Tratados**", a cargo del Relator Especial, Embajador Juan Manuel Gómez Robledo.

En primer lugar, en nombre de la Delegación de Chile quisiera expresar nuestro reconocimiento y agradecimiento al Relator Especial del tema, Embajador Juan Manuel Gómez Robledo, por el excelente trabajo realizado a lo largo de los últimos años, contenido en seis Informes, los que han sido la base de la Guía para la aplicación provisional de los tratados contenida en doce Directrices aprobadas en segunda lectura.

La Comisión, al concluir el tratamiento del tema, recomienda a la Asamblea General, entre otras cosas, que tome nota de la Guía, en una Resolución y aliente a que se le dé la máxima difusión posible, así como que se señale la Guía y sus comentarios a la atención de los Estados y de las Organizaciones Internacionales.

[…]
Como mi Delegación ha tenido la oportunidad de expresarlo en ocasiones anteriores, se trata sin lugar a dudas de un tema muy relevante en el derecho de los tratados. Su utilización ha ido aumentando con la práctica de los Estados y de las Organizaciones Internacionales, respondiendo a requerimientos muy importantes en las relaciones entre los Estados y estás. Lo anterior permite hacer aplicables todas o algunas de las disposiciones de un tratado antes del cumplimiento de los requisitos para su entrada en vigencia, cuando razones de

urgencia en la aplicación de los mismos, o para evitar la discontinuidad en la aplicación de determinados regímenes jurídicos, no hace posible esperar hasta la entrada en vigor del tratado.

Si bien el Artículo 25 de la Convención de Viena de 1969 está en la base de este ejercicio, sin lugar a dudas dicha disposición dejaba sin resolver una serie de aspectos que la práctica y la doctrina han ido desarrollando.

En ningún caso la aplicación provisional debe entenderse como un desincentivo a la plena vigencia de un tratado, ni como una forma de eludir las exigencias internas sobre aprobación de los mismos. La entrada en vigencia del tratado de acuerdo a sus términos, debe seguir siendo el objetivo final a alcanzar.

Compartimos el carácter y la naturaleza que se le ha asignado a esta Guía, en el sentido de no constituir un marco de normas vinculantes, sino que un instrumento para asistir y orientar a los Estados y las Organizaciones Internacionales en lo que es la práctica en la materia, alejándose de lo excesivamente prescriptivo que atente contra la flexibilidad que debe tener la aplicación provisional.

[…]
Centraré mis comentarios en las Directrices más relevantes de la Guía.

En primer lugar, la Directriz 3, Regla General, merece una referencia en cuanto a que siguiendo el contenido del Artículo 25 de la Convención de Viena, reitera el carácter esencialmente voluntario de la aplicación provisional de un tratado.

En lo que se refiere al Comentario 6) de esta Directriz, la Comisión señala que el Artículo 25 b) de la Convención de Viena hace referencia a un acuerdo consistente en aplicar provisionalmente un tratado o una parte de él entre "los Estados negociadores", expresión que se omite en la Directriz. Esto permite que la aplicación provisional pueda extenderse a Estados u Organizaciones Internacionales que no hayan negociado el tratado respectivo. Se entiende en todo caso, que la determinación de aplicación provisional debe ser hecha ordinariamente por los Estados negociadores.

En cuanto a la Directriz 4, Formas del acuerdo, mi Delegación se referirá a la letra b) contenida en el Proyecto de la Comisión.

En efecto, en ella se contempla que la aplicación provisional puede ser establecida mediante una resolución, decisión u otro acto, aprobados por una organización internacional o en una conferencia intergubernamental ... que refleje el acuerdo de los Estados.

Esta última frase, de alguna manera recoge inquietudes expresadas por Estados y por mi propia Delegación, en anteriores intervenciones. A este respecto debe quedar muy claramente establecido que, en el caso de resoluciones u otros actos

adoptados por organizaciones internacionales o conferencias diplomáticas, aunque se hayan adoptado de acuerdo a las reglas propias de ellas, el acuerdo y la aceptación de los Estados es una cuestión ineludible. Claramente una resolución no tiene el mismo carácter o naturaleza que un acuerdo entre Estados para efectos de decidir una aplicación provisional.

En relación con la Directriz 5, quisiéramos referirnos al contenido del 5) en cuanto a que esta Directriz se entiende sin perjuicio de lo dispuesto en el Artículo 24 párrafo 4 de la Convención de Viena, según el cual hay disposiciones de un tratado que se hacen aplicables desde la fecha de la adopción del texto, esto es las disposiciones que regulan cuestiones que susciten antes de la entrada en vigor del tratado.

Por otra parte, en lo que se refiere a los efectos jurídicos de la aplicación provisional al que hace referencia la Directriz 6, como muy bien lo señaló el Relator Especial, la aplicación provisional no apunta a dar un efecto jurídico menor de la norma o normas así aplicadas. Efectivamente si bien el texto presentado por el Relator, remarcaba este elemento con la frase "como si el tratado estuviese en vigor", mereció ciertas observaciones de parte de los Estados no en cuanto al fondo sino en cuanto podía entenderse como que asimilaba la aplicación provisional con la vigencia del tratado. El texto que nos presenta la Comisión corrige este aspecto sin debilitar el carácter plenamente vinculante de las normas en aplicación provisional, omitiendo la frase referida. La aplicación provisional no dice relación con el valor jurídico relativo de las normas sujetas a esa aplicación o cuyo cumplimiento pudiere considerarse como discrecional. El tratado o la parte de él que se apliquen provisionalmente, deberá serlo de buena fe sujeto al principio de que lo pactado obliga contenido en el Artículo 26 de la Convención de Viena. La Directriz 8, como veremos, refuerza este concepto.

Lo mismo cabe señalar y por la razón antes indicada respecto de la aplicación del Artículo 27 de la Convención de Viena sobre el Derecho de los Tratados, el que debe entenderse con el mismo alcance y sentido que en el caso de un tratado en vigor.

Creemos que esta es una cuestión muy central en relación con la institución de la aplicación provisional, que en ningún caso tiene por objeto agregar una nueva forma de entrada en vigor de los tratados o utilizarse como un sustituto de la entrada en vigor del tratado ni como un estímulo a esta modalidad en detrimento de la entrada en vigor del tratado, la que obviamente mantiene su lugar central.

Tampoco debe entenderse como un medio para eludir las exigencias que en materia de expresión del consentimiento establecen los ordenamientos jurídicos internos como lo veremos al analizar las Directriz 12.

La Directriz 8, “Responsabilidad en caso de violación”, es plenamente coherente con otras disposiciones del Proyecto, particularmente con la Directriz 6. El

incumplimiento de normas que se encuentren en aplicación provisional genera, como lo señala esta Directriz, responsabilidad internacional de conformidad con las normas de derecho internacional aplicables en la materia.

La Directriz 9 referida a la "terminación de la aplicación provisional" menciona la entrada en vigor del tratado respectivo.

Sin embargo, se pueden plantear diversas otras situaciones. Como dice el párrafo 2 del Artículo 25, la aplicación provisional termina para un Estado si este comunica a los demás Estados entre los que se aplica el tratado provisionalmente, su intención de no llegar a ser Parte en el Tratado.

Lo cierto es que un Estado debería tener derecho a poner fin a la aplicación provisional por otros motivos distintos de aquel, sin tener la intención de no llegar a ser parte en el tratado una vez que este entre en vigor, como se indica en el párrafo 3) de esta Directriz. Incluso podría darse otra situación como cuando un tratado multilateral entra en vigor de acuerdo a sus normas, pero hay Estados que todavía no han expresado su consentimiento. Ellos deberían tener derecho a continuar aplicando provisionalmente el tratado hasta el momento en que dicho instrumento entre en vigor en pleno régimen para él y no ponerle fin para él.

Directriz 10, "Derecho interno de los Estados y reglas de las organizaciones internacionales y observancia de los tratados aplicados provisionalmente". Esta Directriz reafirma los conceptos que sustentan a las Directrices 6 y 8 antes referidas.

La que recoge los términos del Artículo 27 de la Convención de Viena en el sentido que un Estado no puede invocar sus normas internas como justificación del incumplimiento de una disposición que se encuentra en aplicación provisional y en tanto ella se mantenga. Lo mismo vale para una Organización Internacional, respecto de sus propias reglas.

La Directriz 11 dice relación con las "normas internas de un Estado en materia de competencia para convenir la aplicación provisional de un tratado". Se trata de una réplica, en el ámbito de la aplicación provisional, del Artículo 46 de la Convención de Viena.

Finalmente, la Directriz 12 está destinada a permitir a un Estado convenir la aplicación provisional sujeta a las limitaciones que el derecho interno le pueda imponer. Esta es una salvaguardia muy importante especialmente para los ordenamientos jurídicos en los que no se regula esta institución de la aplicación provisional. Con esta salvedad, el Estado respectivo podrá invocar su derecho interno como límite a la aplicación provisional de un tratado, situación diferente a la regulada en la Directriz 10. De esta manera la aplicación provisional estará condicionada por la normativa interna de cada Estado o a las normas de la Organización en el caso de las Organizaciones Internacionales.

26. Switzerland

[Original: French]

Nous nous exprimons aujourd'hui sur l'application provisoire des traités. A cet égard, la Suisse soutient en particulier la recommandation de la Commission à l'Assemblée générale de prendre note et d'encourager la diffusion du Guide sur l'application à titre provisoire des traités.

L'application provisoire peut être utile, en particulier quand des traités doivent être appliqués rapidement et que cela s'avère difficile, par exemple parce qu'un nombre substantiel de ratifications est requis pour l'entrée en vigueur.

Cependant, l'application provisoire d'un traité constitue un défi particulier quand ce traité doit être soumis pour approbation au législatif d'un Etat. D'une part, l'exécutif doit agir vite ; d'autre part, les compétences du législatif doivent être respectées. Il s'agit alors de trouver un équilibre entre ces deux exigences, ce qui peut s'avérer délicat.

A cet égard, notre délégation souhaite brièvement expliquer la solution qui a été trouvée en droit suisse pour satisfaire à ces exigences.

Trois conditions cumulatives doivent être remplies pour que le gouvernement suisse puisse consentir à une application provisoire de traités dont l'approbation appartient au Parlement : il faut, premièrement, que des intérêts essentiels du pays soient en jeu et, deuxièmement, qu'il y ait une urgence particulière. Troisièmement, les commissions parlementaires compétentes doivent être consultées et ne pas s'opposer à l'application.

Il convient en outre de relever que cette procédure s'inscrit dans un cadre temporel prédéterminé : si le gouvernement n'a pas soumis ledit traité pour approbation au Parlement dans les 6 mois qui suivent le début de l'application provisoire, celle-ci prend fin.

Le Guide proposé par la commission rappelle à juste titre, dans sa Directive n° 10, que les dispositions du droit interne ne peuvent pas être invoquées pour justifier une violation d'un traité appliqué à titre provisoire. Cette directive, comme les autres, contribue à la sécurité juridique dans les relations internationales. Elle énonce en effet des règles claires et elle complète ainsi très utilement la disposition succincte de l'article 25 de la Convention de Vienne sur le droit des traités.

Dans cette perspective, la Suisse salue particulièrement les efforts de la Commission et du Rapporteur spécial, Monsieur Juan Manuel Gómez Robledo, qui ont abouti, avec ce Guide commenté, à un excellent résultat.

27. Croatia

I shall start by the topic of "Provisional Application of Treaties". Croatia welcomes the adoption in the second reading of the Guide to Provisional Application of Treaties, the annex and the commentaries to it, as well as the decision of the ILC to submit those to the General Assembly for its widest possible dissemination. We commend the work of the ILC and Special Rapporteur Mr. Juan Manuel Gomes Robledo and express our appreciation for the efforts they have invested in the preparation of these valuable and useful documents. We are convinced that practitioners and our colleagues dealing with the treaty making process will benefit from those.

28. Germany

Germany wishes to express her appreciation for the work of the Commission on the complex matter of provisional application of treaties and, most notably, to congratulate the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, on the achievement of drafting the Guidelines which will form a comprehensive manual for the practice of States and international organizations. At the same time, Germany would like to particularly applaud the transparent, inclusive communication process that ensured that the Commission's deliberations, work and findings were seen as a matter in the service, and for the benefit, of States and international organizations, which can only lead to a fruitful conclusion if feedback is actively encouraged and taken into account. Germany submitted comments to the Special Rapporteur on several occasions in the course of the Commission's work, and the seriousness with which they were taken into account can be seen beyond doubt in the document now before us.

While it is indisputable that provisional application of treaties is a long-established legal instrument and often used by States and international organizations, several legal questions merit an in-depth analysis. Germany therefore considers a guide on handling provisional application of treaties to be a useful tool in treaty practice as a compact set of rules applied by the majority of States helps to achieve greater legal certainty and predictability. The detailed commentaries to the Guidelines support their interpretation, and the annex—a carefully compiled reference manual on examples of provisions on provisional application of treaties—will be consulted intensively when negotiations on treaties have reached the phase of drafting.

Article 25 of the 1969 Vienna Convention on the Law of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (not yet in force) forms the basic rule for provisional application of treaties. This remains so even after the adoption of the Guidelines. The Guidelines are mainly based on that article, and the central importance of Article 25 of the 1969 and the 1986 Vienna Conventions is also recognized in the commentary to Guideline 2. While this provision constitutes a provision of customary law and provides clear instructions on pertinent aspects of this legal figure in treaty law, it remains silent on several important matters. For example, the decision on the scope and conditions of provisional application is left with the contracting parties. This is, given the intended flexible nature of provisional application, entirely acceptable. The consistent standards developed by the International Law Commission can, however, rightfully be expected to provide valuable support to contracting parties.

Germany would like to reiterate that a provision on provisional application is not considered a routine clause to be included in every treaty, and to underline the importance of carefully assessing international needs of urgency in regulating a certain situation as prime reason necessitating provisional application and national limits thereto emanating from domestic legislation. In a dualist legal system like in Germany, where treaties must be transposed or incorporated into national law to become effective, it is a typical requirement of constitutional law that the competent organ may only agree to provisional application of a treaty if national law is already in conformity with the treaty or is brought into conformity with it first.

This plays an important role especially against the background of the legal effects of provisional application at the level of international law. The principles of *pacta sunt servanda* and State responsibility apply also for provisional application of treaties.

Due to the principle enshrined in the Article 25 of the German Basic Law, that general rules of international law shall be an integral part of federal law, Germany supports the possibility to apply treaties provisionally because the course of actions facilitated by the provisional application of a treaty usually helps to build confidence between the contracting parties, creates an incentive to ratify the treaty and enables the parties to take preparatory measures and thereby serves the further development of international relations.

In joining the observations made in the "Statement of the European Union on Provisional Application of Treaties," Germany, in particular as Member State of the European Union, would like to underline the importance of further clarifying, through treaty practice and jurisprudence, the interaction of international and domestic law, especially in context with the so-called mixed agreements, *i.e.* with agreements between the European Union and its Member States, on the one part,

and a third party, on the other part which touches both on powers, or competencies, exclusive to the European Union and on competencies exclusive to Member State of the European Union.—On a side note, Germany noticed, not without interest, that the Commission chose to categorize mixed agreements as bilateral treaties, at least for purposes of the annex to the Guidelines.

With regard to an increasing appearance and importance of other subjects of international law than States, most notably of international organizations, the issue of provisional applications of treaties has become more complex. The system of multiple levels poses new challenges on this particular issue of treaty law. Germany welcomes that the Guidelines aim to include treaties between States and international organizations or between international organizations and, thus, addresses, special—and often intricate—issues arising by concluding international agreements with them (*e.g.* the aforementioned mixed agreements).

Germany is aware that the Guidelines are conceived as general advice, which shall facilitate treaty operations at international level. Therefore, we communicated to the Commission that it would be deemed beneficial if the Commission decided to offer further guidance on dealing with provisional application of mixed agreements. Practice shows that especially free trade agreements tend to be applied provisionally. In this area the legislative power rests partially with international organizations, such as the European Union, and partially with its Member States which renders mixed agreements to be a more frequently used type of treaty. The Commission has decided not to take problems concerning mixed agreements into detailed consideration. Even if a State cannot invoke the provisions of its internal law as justification for its failure to perform obligations arising under provisional application of those parts of mixed agreements for which the European Union—or, as the case may be, any other supranational organization—has exclusive competence and authority, conflicts may arise which affect the trust among the contracting parties and the will to carry out the provisional application of the respective treaty. For Germany, this remains an impending issue of great importance for the reason that the treaty type of mixed agreements is apt to modify the residual character of Article 25 of the 1969 Vienna Convention on the Law of Treaties as a default rule by relieving, in part, the provisional application tool from the hands of the negotiating States.

29. Czech Republic

Let me now focus on the topic **"Provisional Application of Treaties"**. The Czech delegation congratulates the Commission on the adoption of the Guide on this topic and expresses its gratitude to the Special Rapporteur Mr. Juan Manuel Gomez Robledo, for his outstanding contribution to this outcome. We also acknowledge, with great appreciation, contribution of the Secretariat, which prepared three Memoranda on various aspects of this topic.

We agree that in order to ascertain more precisely the legal effects of provisional application, the attention has to be paid both to the practice of States and international organizations, but also to the relationship between provisions of article 25 and other provisions of the Vienna Convention on the Law of Treaties. In this respect, and having regard to the divergence of State practice in this field, we note with appreciation Special Rapporteur's effort to take on board the comments of governments and identify their common elements.

The Czech delegation considers that the outcome of the work on this topic is properly reflecting the flexible nature of the provisional application of treaties as "a voluntary mechanism for giving immediate effect to all or some of the provisions of a treaty, prior to the fulfillment of the conditions and formalities required for the treaty's entry into force."

While the Guide consist of only 12 guidelines, these guidelines and commentaries thereto address in concise manner the most pertinent issues of provisional application of treaties. We will mention at least some of them.

Guideline 4 (Form of agreement) clarifies that in addition to the case where the treaty so provides, the provisional application of a treaty or its part may be agreed through four different forms listed therein. It also reveals that the basis for provisional application of a treaty is an agreement between the States or international organizations concerned.

Hence, as further provided in Guideline 6 (Legal effect), unless the treaty provides otherwise or it is otherwise agreed, provisional application produces legally binding obligation to apply the treaty or a part thereof. This aspect is convincingly explained in paragraph 2 of the commentary to this guideline. Such treaty or a part thereof must be performed in good faith. We agree both with the principle announced in this guideline, and the element of flexibility reflected in the formulation of the guideline.

As a logical consequence, Guideline 8 (Responsibility for breach) provides that the breach of an obligation arising under the treaty which is provisionally applied entails international responsibility – a conclusion we fully support.

We appreciate that Guideline 7 on reservations is formulated as a saving clause, in view of insufficient practice in this field.

Finally, we welcome that Guideline 9 on termination of provisional application includes further clarifications in addition to restating elements of article 25 of the 1969 Convention. Paragraph 3, analogically with rules governing the termination of the treaty, envisages possibility of additional grounds for termination of provisional application, while paragraph 4 clarifies another important element of the termination of provisional application, namely that such termination does not affect rights, obligations or legal situations created through provisional

application prior to its termination. This provision contributes significantly to strengthening of legal certainty and stability of legal relations.

The Czech delegation is confident that the Guide to Provisional Application of Treaties will provide useful guidance to the States and international organizations and contribute to further consolidation and unification of the practice in this field. We therefore support the recommendation of the Commission to the General Assembly to take note of the Guide, to commend it to the attention of States and international organizations, and to request the Secretary-General to prepare a volume of the United Nations Legislative Series compiling the practice of States and international organizations in the provisional application of treaties.

30. Ecuador

[Original: Spanish]

Por otra parte, mi delegación felicita al señor Juan Manuel Gómez Robledo, por su trabajo como Relator Especial en el tema **"Aplicación provisional de los tratados"** y acoge con beneplácito las recomendaciones de la Comisión para que la Asamblea General tome nota, en una resolución, de la Guía para la Aplicación Provisional de los Tratados y aliente su difusión y que pida al Secretario General que prepare un volumen de la Series Legislativas de las Naciones Unidas en el que se recopile la práctica relativa a la aplicación provisional de los tratados.

31. Viet Nam

Turning to the topic "Provisional application of treaties", my Delegations hails the efforts of the Special Rapporteur Ambassador Juan Manuel Gómez Robledo in advancing the project to develop a draft guide to provisional application of treaties.

Article 25 of the Vienna Convention on the Law of Treaties provides the general rule of international law regarding provisional application of treaties. Yet, there has not been detailed guidance as to the law and state practice in this aspect. With this project, the Commission has conducted a careful, rigorous study of state practice. The Guide is expected to contribute meaningfully to addressing certain practical challenges in the provisional application of treaties.

We concur with the views by other delegations that provisional application of treaties serve several practical and useful purposes. It allows for certain or some provisions of a treaty to have immediate effect prior to the completion of internal procedures or international requirements for its entry into force. Such might include bilateral agreements on visa exemption, consular affairs or multilateral agreements such as free trade area agreements. In these cases, provisional

application of these agreements could contribute to promoting application of the treaties and furthering international cooperation.

It must, however, be emphasized that, the completion and adoption of the Guide requires thorough examination and great caution. The agreement and/or acceptance of States and international organisations to apply a treaty provisionally must always be secured. In this regard, we encourage the ILC to carefully consider all comments by States and international organisations in completing this project.

Finally, though the Guide does not intend to create a presumption in favour of resorting to provisional application of treaties, we hope that with its adoption, provisional application of treaties will become a more popular practice and promote good faith cooperation among states.

32. Slovenia

Please allow me to refer to the next topic, namely Provisional application of treaties.

Slovenia highly appreciates the Commission's consideration of this topic within its programme of work and commends the Special Rapporteur Mr Juan Manuel Gómez Robledo for his dedicated work resulting in the "Guide to Provisional Application of Treaties". We believe that the Guide will provide support to States when resorting to the provisional application of treaties. Slovenia has actively followed this topic and participated with comments and suggestions in the 6th Committee. We would at this point like to thank the Special Rapporteur and the Commission for taking several of our suggestions on board. Today we have only a few general remarks on the Guide.

We believe that the Guide contributes to the clarification of several issues in relation to the provisional application, the most significant being the one on the legal effect of this mechanism, which we fully support. We also support the Commission's acknowledgment of the flexible nature of the mechanism. However, we also believe that certain issues that have been discussed should also have been reflected in the Guide, because their absence is likely to generate further uncertainties.

For example, the Guide does not address the relationship between provisional application and "provisional entry into force", other than to imply in the commentary of Guideline 1 that the latter term is not to be understood as a substitute for provisional application, which would imply that it relates to

something else. But what that is the Guide does not explain, although these two mechanisms do coexist in treaty practice.

The Guide also does not explain the interaction between the provisional application from Article 25 and the so-called interim obligation from Article 18 of the VCLT, which relate to the same time period before a treaty enters into force. We believe that it would be useful to explain for example in Guideline 9 the effect of the termination of provisional application on the interim obligation if the State notifies others that it does not wish to become party to a treaty, since the interim obligation ends in a very similar way under Article 18.

[…]
Although the Guide on the provisional application of treaties could, in our view, be more comprehensive, we do believe that after so many years of relying on provisional application in practice without an authoritative guidance from the Commission, the Guide is indeed a commendable achievement, which will enhance clarity when concluding and implementing treaties.

18th meeting, 27 October 2021 (A/C.6/76/SR.18)

33. New Zealand

Turning to Chapter five, on Provisional Application of Treaties, New Zealand thanks Special Rapporteur, Mr Juan Manuel Gómez-Robledo and the Commission for their work in finalising the Guide to the Provisional Application of Treaties.

The Guide and Commentaries will be a valuable practical tool for States, supporting the development of consistent practice in this area. New Zealand also welcomes the detailed analysis in the Special Rapporteur's report on the crucial question of which rights and obligations arising from the entry into force of a treaty are triggered in the event of provisional application. In New Zealand's view, provisional application is not, and cannot be used as a means of bypassing Parliamentary procedures. Retaining the flexibility of provisional application is key to managing the tension between bringing a treaty into force at the international level, and ensuring relevant domestic constitutional procedures are completed.

34. Peru

[Original: Spanish]

De la misma manera, en cuanto a la Guía para la Aplicación Provisional de los Tratados, agradecemos la notable labor del Embajador Juan Manuel Gómez Robledo y acogemos la recomendación de la Comisión para que la Asamblea

General, del mismo modo, tome nota de la citada guía y que se ponga a consideración la Guía, con sus comentarios, de los Estados y organizaciones internacionales. Debe destacarse que esta guía constituye un instrumento de indudable utilidad para los Estados y organizaciones internacionales.

35. Sri Lanka

Excerpt from press release/meeting coverage:

On the topics taken up by the Commission, he highlighted its work on "Protection of the atmosphere" and "Provisional application of treaties", which resulted in a set of draft guidelines. He also supported the reconstitution of the Study Group for the topic of "Sea-level rise in relation to international law" and of the planning group to consider the Commission's programme, procedures and working methods.

36. Ireland

My remarks today will focus on the topic of **"Provisional application of Treaties"**.

My delegation would like to thank the Special Rapporteur Mr Juan Manual Gomes Robledo for successfully steering this topic to its conclusion. His tireless work since 2012 has come to fruition with the adoption by the Commission of the Guide on Provisional Application of Treaties, together with its associated Recommendation to the General Assembly.

Ireland aligns itself with the statement delivered by the European Union in relation to this topic and would like to make the following additional observations.

[…]

Ireland welcomes the adoption of the Guide by the Commission - the guidelines together with their associated commentaries provide a valuable practical tool for states and international organisations. Ireland also supports the Commission's recommendation to the General Assembly as outlined in Section C of Chapter V of the Report.

My delegation commends the Commission for its clear indication in the General commentary that the objective of the Guide is to direct users to answers that are consistent with existing rules or that seem most appropriate for contemporary practice; to describe and clarify existing rules of international law in the light of contemporary practice; thus generally reflecting *lex lata*, albeit with some more recommendatory aspects.

In reviewing the guidelines and commentaries, we note with satisfaction that the legal effect of provisionally applying a treaty, or part of a treaty, is unequivocally affirmed in Guideline 6. Considering that Article 25 of the 1969 Vienna Convention on the Law of Treaties and Article 25 of the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations are both silent as to the legal effects of provisional application, this guideline is an important confirmation of the legal obligation on States and international organisations to apply in good faith those provisions that are subject to provisional application. My delegation also welcomes the commentary explaining in more detail the legal effect of provisional application in its two elements. However, as paragraph (3) of the General commentary acknowledges, provisional application is not an alternative to full application of a treaty. Rather, provisional application is a complementary and temporary regime.

Moreover, as is indicated in paragraph (2) of the General Commentary, the provisional application is a practical tool and it is the flexible nature of provisional application that makes it attractive to States and international organisations. In that respect, Ireland is pleased to see that the guidelines and accompanying commentaries place an appropriate emphasis on this inherent flexibility.

Ireland further appreciates the inclusion of the Annex to the Guide, with extensive examples of existing treaty provisions which have been used to address various aspects of provisional application. My delegation is satisfied that the current approach provides a sufficiently large number of illustrative examples to assist States and international organisations in dealing with the most common issues that they face in considering provisional application of treaties.

It is clear, especially from paragraph (3) of the General commentary, that the Guide is not intended to be a comprehensive or exhaustive account of all issues concerning the provisional application of treaties. This is understandable in light of a lack of State practice on many aspects of this topic, such as the effect of reservations referenced in the statement of the European Union in relation to Guideline 7. We further note that there are other important aspects of the provisional application of treaties that are beyond the scope of this guide, such as the impact of provisional application of provisions creating institutional mechanisms. Further research on these topics may be warranted as State practice develops into the future.

37. United Kingdom of Great Britain and Northan Ireland

I now turn to the topic of **'Provisional application of treaties'**. The United Kingdom is grateful to the Commission, and especially to the Special Rapporteur, Ambassador Juan Manuel Gómez Robledo, and the Drafting Committee for their work on this important set of guidelines. The United Kingdom welcomes the

Commission's adoption on second reading of the 'Guide to Provisional Application of Treaties', including the draft guidelines, accompanying commentaries and a draft annex containing examples of provisions on provisional application.

The Commission is to be commended for giving due weight to the comments of States. Some important clarifications were introduced, both in the guidelines themselves and in the commentaries. Above all, in draft guideline 6 the Guide makes clear the legal effect of provisional application. The Guide to Practice seems likely to become a useful tool for all those who have to address questions on provisional application.

The United Kingdom strongly supports the recommendation before this Committee, especially in encouraging the widest possible dissemination of the guidance. A consistent approach from all countries and jurisdictions to provisional application will aid the negotiation and drafting of treaties, and promote a uniform approach. The United Kingdom, however, remains of the view that provisional application should not become a routine occurrence and should remain a tool used in a specific context.

38. Malaysia

Turning to the topic of "Provisional application of treaties", Malaysia commends the effort of the Special Rapporteur for the submission of the Sixth Report on the subject, and the Commission upon the adoption, on second reading, the entire Guide to Provisional Application of Treaties, comprising 12 draft guidelines and a draft annex containing examples of provisions on provisional application of treaties, together with commentaries thereto.

Malaysia further notes that in accordance with article 23 of its statute, the Commission recommended to the General Assembly to take note of the Guide and to encourage its widest possible dissemination; to commend the Guide, and the commentaries thereto, to the attention of States and international organisations; and to request the Secretary-General to prepare a volume of the United Nations Legislative Series compiling the practice of States and international organisations in the provisional application of treaties, as furnished by the latter over the years, together with other materials relevant to the topic.

It is noted that position and comments expressed by Malaysia and other States have been addressed by the Special Rapporteur and the Commission including the comments which Malaysia provided during the seventy-third session of the General Assembly in 2018. Malaysia recognises the importance of the Guide as a non-binding instrument in clarifying existing rules of international law in the light of contemporary practice regarding provisional application of treaties.

Nevertheless, as provided in the General commentary to the Guide, Malaysia wishes to underscore the voluntary basis of the provisional application of treaties in which States and international organisations shall have the freedom and option to choose either to resort to such mechanism or not. In this regard, Malaysia reiterates its view that there should be a manifestation of an unequivocal consent and explicit commitment made by States and international organisations to apply the treaty provisionally and thereby agree to be bound by such provisional application.

Additionally, the provisional application of treaties may also be subject to limitations deriving from the internal laws of States and rules of international organisations. Thus, Malaysia reiterates its view that a State and international organisation must ensure that the manifestation of its consent to apply a treaty provisionally is compatible with its internal laws or rules.

In this regard, as submitted previously, Malaysia's domestic law does not provide for any express provision that prohibits or allows for the provisional application of treaties. Nevertheless, in preparation of ratifying or acceding to any treaty, Malaysia as a dualist State will ensure that its domestic laws are in place to be in line with the requirements under the international law. This is to ensure that Malaysia will be able to fulfil its obligations made under the treaty and devoid from any breach of international legal principles. Thus, Malaysia has been very conscientious in ensuring obligations in the treaty are carried out accordingly once Malaysia ratifies a treaty, by ensuring domestic legal framework to be in place before the treaty is binding upon Malaysia.

Considering the above, Malaysia unequivocally agrees with the General commentary of the Guide indicating that the Guide does not create any presumption in favour of the provisional application of treaties and is neither a substitute for securing entry into force of treaties which remains the natural vocation of treaties, nor is it a means of bypassing domestic procedures.

Malaysia once again expresses its appreciation on the work of the Commission and believes that the Guide will become a useful tool in assisting States and international organisations concerning the law and practice on the provisional application of treaties.

In addition, the recommendation for the Secretary-General to prepare a volume of the United Nations Legislative Series compiling the practice of States and international organisations in the provisional application of treaties, together with other materials relevant to the topic would provide States and international organisations with source of references on the practice regarding the subject matter.

39. Thailand

With respect to the designated Cluster I of the ILC Report, Thailand welcomes the adoption of **the Draft Guidelines on the Protection of the Atmosphere** and **the Draft Guide to Provisional Application of Treaties** with their respective commentaries. We express our deep appreciation to the Special Rapporteurs, Mr. Shinya Murase and Mr. Juan Manuel Gómez Robledo, respectively, for their hard work.

Turning to the topic of **provisional application of treaties**, allow me to highlight the following points:

First, Thailand wishes to echo **the rationale of the Draft Guideline 12 and its commentary**. Given the fact that the provisional application of treaties might not be possible at all under the internal law of States,[1] it is essential and proper that the Draft Guide **unambiguously reflects the consensual nature** of the provisional application of treaties.

Second, while facilitating the entry into force of treaties, the provisional application should not undermine or delay consent-to-be-bound processes of negotiating parties. In order **to prevent the potential challenges of the provisional application**, Thailand shares the view of other delegates that the provisional application of treaties should have **a fixed time period of implementation.** The negotiating parties should resort to the provisional application of treaties only when **there is a real necessity** to begin implementation of treaties before their entry into force, including primary factors, [2] such as to address urgency [3] and to ensure continuity of the implementation of treaties.

Thailand believes that the completion of the Draft Guide to Provisional Application of Treaties at this stage will provide mutual understanding and uniformity for state practice in this regard. Thailand therefore would like the ILC to continue its work on various aspects of treaty law and to facilitate States in their treaty-making process as treaties continue to be one of the most prolific sources of international law.

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[1] A/76/10, page 86

[2] A/CN.4/664, paragraph 25 - 35

[3] A/CN.4/658, paragraph 38

40. Argentina

[Original: Spanish]

Excerpt from press release/meeting coverage:

On "Provisional application of treaties", he emphasized that this topic is a fundamental aspect of the law of treaties and holds practical relevance. He welcomed the Commission's decision to provide the draft guidelines to States and international organizations for their comments; this is essential so that traditions and customs are reflected in the Commission's work. He also supported the guidelines' recognition that the provisional application of treaties is a voluntary mechanism that can be limited or restricted based on States' domestic law.

41. Republic of Korea

Turning to the topic of "**provisional application of treaties**", the Korean delegation would like to express its sincere appreciation to Special Rapporteur Mr. Juan Manuel Gomez Robledo for his contribution in preparing the draft guidelines on "Provisional Application of Treaties".

My delegation also extends our gratitude to members of the Commission who achieved great results in elaborating the draft guidelines and welcomes the adoption of the entire second reading draft of "the Guide to Provisional Application of Treaties", which will serve as a useful reference for Member States.

Regarding the form of agreement, my delegation takes note with appreciation that the phrase "in accordance with the rules of such organization or conference, reflecting the agreement of the States or international organizations concerned" has been added to draft Guideline 4 (b) (i). This makes it clear that the means for expressing agreement to provisional application of a treaty should comply with the rules of the organization or the conference.

Moreover, regarding draft Guideline 7, my delegation recognizes the insufficient practices in expressing reservation on provisional application of a treaty or a part of a treaty. However, there is no reason not to accept the reservation system for provisional application, unless otherwise provided in the treaty or agreed upon by the parties. Thus, my delegation supports the cautious approach in the current wording, especially the "without prejudice to" part.

The Korean delegation believes that the Commission's study on the topic will contribute to the development of international law.

42. The Netherlands

Nine years ago, at its sixty-fourth session (2012) the Commission commenced its work on the topic of "Provisional application of treaties". This year the Commission concluded its work on this topic and adopted the Guide to Provisional Application of Treaties, consisting of draft guidelines and a draft annex, and the commentaries thereto. We extend our sincere appreciation to the Special Rapporteur for his efforts.

My Government expects that the Guide to Provisional Application of Treaties, including the commentaries, will be a useful tool for states and international organizations. It will contribute to the development and understanding of relevant practice in accordance with Article 25 of the Vienna Convention on the Law of Treaties.

We note and appreciate that our comments on this topic as submitted throughout the years have been taken into account. We would like to point in particular to our comment not to blur conceptual distinction between the rules applicable to treaties that have entered into force and those that are applied on a provisional basis, the need to uphold the flexible nature of the instrument and, finally, recognition of the potential consequences of termination of provisional application.

43. Austria

With respect to the topic **"Provisional application of treaties"**, Austria commends Special Rapporteur Gómez-Robledo and the Commission for the adoption in second reading of its Guide to Provisional Application of Treaties, comprising 12 guidelines with commentaries as well as an annex containing examples of treaty clauses relating to provisional application. We support the Commission's recommendation that the General Assembly take note of the Guide and bring it to the attention of the international community.

We welcome the approach chosen in guideline 3 to go beyond Article 25 of the Vienna Convention on the Law of Treaties (VCLT) by omitting its explicit reference to negotiating states and thus to enable provisional application not only for negotiating states but also for acceding states. The approach reflects, as noted in the commentary, the contemporary practice in the field.

Austria also welcomes the clarification introduced to guideline 4 subparagraph (b) (i) that provisional application may be agreed upon by way of a resolution, decision or other act of an international organisation if adopted "in accordance with the rules of such organization [...], reflecting the agreement of the States and international organizations concerned". This wording takes account of the fact that the rules of international organisations may provide for binding decisions on

a treaty's provisional application pursuant to specific voting procedures, including majority voting.

We are similarly in favour of guideline 4 subparagraph (b) (ii) describing the option to agree on provisional application by way of a declaration that is "accepted by the other States or international organizations concerned". Austria, however, does not consider it necessary for such acceptance to be "express", as paragraph 7 of the commentary requires; an implicit acceptance would be sufficient.

As for guideline 5 on the commencement of provisional application, Austria notes that the current wording seems to exclude the possibility that a state declaring its provisional application of a treaty may unilaterally determine the date on which such provisional application is to commence. We would propose that apart from the date agreed in a treaty or otherwise, the guideline also refer to the date "as notified". This would guarantee that a state wishing to apply a treaty provisionally may announce the beginning of its provisional application of the treaty unilaterally.

The commentary to draft guideline 6 on legal effect rightly notes in paragraph 6 the important distinction between provisional application and entry into force of a treaty. Austria supports the resulting view that provisional application is "not subject to all rules of the law of treaties", a statement relevant both for provisional application by states already bound by the treaty and states applying it provisionally. In Austria's view it would have been useful to include in the commentary examples of rules the Commission deems inapplicable to provisional application.

Regarding guideline 7 on reservations, Austria concurs with paragraph 5 of the commentary and the distinction made therein between reservations on the one hand and declarations limiting the scope of the provisional application of a treaty on the other hand. However, a small inconsistency remains in the commentary, as the last sentence of paragraph 5 refers to "reservations limited to the phase of the provisional application".

We particularly welcome that the Commission has taken up Austria's suggestion in guideline 9 paragraph 3 to allow for the invocation of "other grounds" for the termination of provisional application than the treaty's entry into force or the intention not to become a party to the treaty. We believe that this adds to the flexibility of the system of provisional application. We also agree with the decision not to include a notice period or a "reasonable period" for termination in the guideline itself, as outlined in paragraph 7 of the commentary. However, we recognise that notice periods may be useful and are grateful for the examples in the annex alerting treaty drafters of the benefits of clearly defined termination dates.

Lastly, with respect to guideline 12, the commentary in paragraph 4 leaves it open whether the agreement to limit the provisional application of a treaty according to the internal law of a state requires consent of all states parties or only of those states applying the treaty provisionally.

44. Turkey

Turning to the topic: "Provisional Application of Treaties", we would like to thank Special Rapporteur Juan Manuel Gómez-Robledo for his sixth report and the Commission for the second reading of the draft guidelines.

As we have mentioned in our previous statements and in our written comments, in order for Turkey to be legally bound by any international agreement, such agreement has to be approved in accordance with the relevant domestic procedures.

In this regard, mere signing of the agreement does not suffice.

I also note that Turkey is not party to the Vienna Convention on the Law of Treaties (1969).

In view of the foregoing, Turkey maintains the view that treaties should be applied after their entry into force, as a rule, and that provisional application before entry into force should be regarded as an exception that would be applied at the discretion of States.

In this vein, regarding draft guideline 6, I refer to our previous statements in the past Sixth Committee sessions.

Although the wording of draft guideline 6 has changed, we believe the new wording is still establishing a "default rule".

That way, while the treaties are usually silent on the matter, vesting the provisional application of a treaty with default binding force could turn the option into a rule in fact.

That situation could pose a threat to the exclusive power of the legislative authority to consent to international undertakings by removing the need for approval; it could also discourage the executive authority from initiating and working with the legislature to complete the ratification process.

Therefore, we expect that the Commission proceed with utmost caution on this matter.

We also maintain our view that, like Turkey, there are many other countries that are not party to the Vienna Convention on the Law of Treaties, and that it would be appropriate not to mention the Vienna Convention in draft guideline 2.

Finally, we welcome the decision of not including "Draft model clauses" which was proposed in 2019.

19th meeting, 28 October 2021 (A/C.6/76/SR.19)

45. Cameroon

[Original: French]

En ce qui concerne le sujet relatif à **l'« application à titre provisoire des traités»**, inscrit à l'ordre du jour des travaux de la Commission à sa soixante-quatrième session (2012), ma délégation prend acte de l'adoption en seconde lecture de l'ensemble du Guide de l'application à titre provisoire des traités, composé de 12 projets de directives et d'un projet d'annexe contenant des exemples de dispositions relatives à l'application à titre provisoire d'un traité, ainsi que les commentaires y relatifs. Ma délégation félicite le Rapporteur spécial dont le travail effectué donne encore plus de pertinence à l'examen de la question sous rubrique.

[…]
Ma délégation tient avant tout débat au fond à rappeler les dispositions de **l'article 25 de la Convention de vienne de 1969 sur le droit des traités**, relatif à l'application à titre provisoire des traités, dont la Commission de Droit international veut étayer l'application. Selon cet article, « 1. Un traité ou une partie d'un traité s'applique à titre provisoire en attendant son entrée en vigueur : a) Si le traité lui-même en dispose ainsi; ou b) Si les Etats ayant participé à la négociation en étaient ainsi convenus d'une autre manière. 2. A moins que le traité n'en dispose autrement ou que les Etats ayant participé à la négociation n'en soient convenus autrement, l'application à titre provisoire d'un traité ou d'une partie d'un traité à l'égard d'un Etat prend fin si cet Etat notifie aux autres Etats entre lesquels le traité est appliqué provisoirement son intention de ne pas devenir partie au traité ». Derrière la clarté apparente de cet article, se cache une ambigüité juridique certaine, qui questionne la forme du traité et son corollaire , l'expression du consentement à être lié et finalement , l'entrée en vigueur .Cette ambiguïté a d'ailleurs émaillé l'adoption de cet article, aussi bien au sein de la Commission du droit international que par la Conférence sur le droit des traités. En effet, plusieurs voix se montrèrent peu persuadées de la nécessité d'un tel article. Aujourd'hui encore, ma délégation qui salue le rendu et la pertinence des conclusions et qui s'intéresse particulièrement aux **Directives 3, 4, 5, 6, 7, 8, et 10**, voudrait faire les remarques ci-après.

Ma délégation constate une difficulté dans la compréhension de certaines de ces dispositions, notamment la terminologie qui influence fondamentalement le fond. Faut-il parler de l'entrée en vigueur provisoire ou de l'application provisoire ?la décision d'effets provisoires a –t'elle la même nature que l'accord lui-même ou au contraire constitue-t-il un accord autonome en forme simplifié ?

Ma délégation relève que l'application provisoire des traités s'apparente aux conditions d'entrée en vigueur, et notamment à celles de la ratification ou de l'approbation, puisque à l'inverse du traité soumis à une de ces formalités, l'accord en forme simplifiée ou plus exactement l'accord non soumis à ratification ni à approbation et entrant en vigueur du seul fait de sa signature, ne pose pas a priori les mêmes problèmes que l'application provisoire. A l'inverse, dès l'instant que la signature n'est plus la seule condition de l'entrée en vigueur, mais où il doit en outre y avoir une ratification ou une approbation, se pose la question de l'entrée en vigueur totale ou partielle. De ce qui précède, ma délégation s'interroge sur la portée de la **Directive 4**. En effet, la préoccupation majeure demeure celle de la ratification parlementaire, qui est une question de fond, du moment où il s'agit d'un traité conclu en forme solennelle. Faut–il le rappeler, par cette formalité substantielle, le peuple par ses représentants s'assure du respect par ses plénipotentiaires du mandat qui leur a été donné. Ne pas attendre la ratification est un risque, une véritable fuite en avant. Pour ma délégation, aucun adjuvant, ni un traité distinct , ni un autre moyen ou arrangement, ne peut remédier à cette question de fond , étant entendu par ailleurs qu'il peut arriver que les parlementaires rejettent tout ou partie du traité, et particulièrement les dispositions soumises à application provisoire par clause résolutoire .Ma délégation s'interroge, et soupçonne une fois de plus là, une tentative de développement progressif du droit international qui tend à torpiller la souveraineté de l'Etat en la matière, souveraineté exprimée en l'occurrence par les parlements qui sont les législateurs, les jurislateurs et des soupapes de sureté et de sécurité juridique dans certains pays, comme le mien.

Par ailleurs, cette pratique pose le problème de la validité des droits et obligations que des individus auront contracté pendant cette période. Contrairement à la directive, ma délégation estime qu'une déclaration d'un État ne peut pas outrepasser les dispositions constitutionnelles qui habilitent l'Etat en matière conventionnelle. Ce serait aller dans une illégalité originelle de l'engagement pris et ont rentrerait là dans la problématique de la ratification imparfaite.

L'hypothèse envisagée par la **Directive 5** qui envisage l'application à titre provisoire d'un traité ou d'une partie d'un traité à la date et suivant les conditions et les modalités fixées par le traité, est toute aussi complexe, car elle pose également le problème de l'habilitation du parlement pour les traités dont l'entrée en vigueur relève du domaine de la loi. Et dans l'hypothèse où les négociateurs font deux traités, l'un soumis à ratification, l'autre d'application immédiate et provisoire, on sauvegarde certes le besoin de rapidité dans la mise en application

de certaines dispositions, mais cette parade est imparfaite, puisque les dispositions dont l'effet est soumis à l'autorisation parlementaire ne peuvent figurer que dans la première convention.

Dans l'hypothèse où, sans préjudice de la clause d'entrée en vigueur par ratification, une convention dispose que telle ou telle de ses dispositions entrera en vigueur soit immédiatement, soit à une date déterminée comme envisage la **Directive 6**, là également il y a un problème, car si la ratification n'intervient jamais, on se demande quel sera le statut de ces dispositions déjà appliquées et qui sont en quelque sorte haut-le –pied, faisant partie d'un traité non entré en vigueur. En quoi lient–elles les parties ? Une partie du traité subsiste –t-elle comme une sorte d'accord en forme simplifiée, sans que le traité lui-même prenne vigueur ? Ce procédé est pour le moins désordonné et la sécurité juridique mal assurée. En réalité, le procédé n'est valable que pour des dispositions de nature préparatrice dont la non-ratification fait apparaitre la caducité, pas pour des dispositions de fond. S'agissant particulièrement d'une convention multilatérale, peut-on concevoir si elle est entrée en vigueur à l'égard de certaines de ses parties signataires par suite de ratification, que d'autres continuent à ne l'appliquer qu'à titre provisoire ? Si on répond par l'affirmative, est-ce le traité lui-même qui s'applique ou un accord subsidiaire provisoire ?

La **Directive 7** relative aux réserves, semble également ambiguë **l'article 2 alinéa 1)d dispose d)** de la Convention de Vienne de 1969 sur le droit des traités dispose : « L'expression « réserve » s'entend d'une déclaration unilatérale, quel que soit son libellé ou sa désignation, faite par un Etat quand il signe, ratifie, accepte ou approuve un traité ou y adhère, par laquelle il vise à exclure ou à modifier l'effet juridique de certaines dispositions du traité dans leur application à cet Etat ». Cette disposition est confirmée par **l'article 19** de la Convention de Vienne précitée. Peut-on formuler des réserves en dehors des modalités prévues par les articles 2 et 19 pour les traités qui ne sont ni des exécutive agreements ni des gentlemen agreements ?

Ma délégation estime que la **Directive 8** relative à la violation d'une obligation découlant d'un traité ou d'une partie d'un traité appliqué à titre provisoire n'est valable que dans le cadre de l' Article 18 de la convention de vienne de 1969 qui enjoint à l'Etat de s'abstenir d'actes qui priveraient un traité de son objet et de son but « a) Lorsqu'il a signé le traité ou a échangé les instruments constituant le traité sous réserve de ratification, d'acceptation ou d'approbation, tant qu'il n'a pas manifesté son intention de ne pas devenir partie au traité; ou b) Lorsqu'il a exprimé son consentement à être lié par le traité, dans la période qui précède l'entrée en vigueur du traité et à condition que celle-ci ne soit pas indûment retardée. »

S'agissant de la **Directive 10** qui évoque le Droit interne des États, ma délégation relève que si elle peut être applicable aux organisations internationales, son application est plus complexe pour ce qui est des Etats .Il peut arriver que les

plénipotentiaires aillent au-delà des pleins pouvoirs définis par **l'article2 c)** de la convention de Vienne sur le droit des traités, sont des « documents émanant de l'autorité compétente d'un Etat et désignant une ou plusieurs personnes pour représenter l'Etat pour la négociation, l'adoption ou l'authentification du texte d'un traité, pour exprimer le consentement de l'Etat à être lié par un traité ou pour accomplir tout autre acte à l'égard du traité ».C'est justement pour se rassurer de la conformité des engagements pris par les plénipotentiaires avec ces pleins pouvoirs que les ordres juridiques internes ont mis des verrous susceptibles de contrecarrer des décisions prises sous pressions , sous la menace ou pour lesquelles il y a des forts soupçons de corruption. Un Etat peut donc légitimement dans ces hypothèses, évoquer les dispositions de son droit interne comme justifiant la non-exécution de telles obligations découlant de ladite application à titre provisoire. D'ailleurs, le mécanisme d'application provisoire visant la célérité dans l'application de certaines dispositions du Traité, peut mettre sous boisseau des détails importants et Dieu seul sait que le Diable est dans les détails. Pour ma délégation, si l'application provisoire des traités lève ces verrous, l'insécurité juridique pourrait s'accentuer, lorsqu'on connait l'atmosphère et la dynamique ambiante dans le milieu diplomatique.

46. Poland

The Commission's activities this year are significant for the other reasons as well. The ILC finished work on two different topics – the provisional application of treaties and protection of the atmosphere. In the first case, this involved preparing a Guide composed of 12 draft guidelines and a draft annex; in the second, a draft preamble and 12 draft guidelines. These results are an increasingly frequent trend in the recent work of the Commission: the preparation of instruments which from the beginning are considered to be non-binding, instead of draft articles, which can be further elaborated, by the engagement of interested states, into conventions. Poland considers such an approach to have merit in certain circumstances, since not all topics lend themselves to transposition into draft articles and subsequently into potential conventions. At the same time, this does not signify that such topics are of no interest to states. They certainly can be, and their comprehensive elaboration can have practical value.

Furthermore, completing work on two such different topics illustrates the complexity and diversity of issues, including branches of international law, which members of the Commission have tackled with a high level of expertise.

[…]
With respect to the topic of provisional application of treaties, please allow me to make some preliminary remarks. Poland welcomes the Secretariat's new practice of preparing a detailed document containing comments and observations received from Governments and international organizations. This practice should continue and if possible be applied to the Sixth Committee's annual discussions of

the Commission's report. Such an approach would much better serve a genuine dialogue and exchange of views between states – through discussion in the Sixth Committee and the ILC.

We would also like to take note of the sixth report of the Special Rapporteur, Mr. Juan Manuel Gómez Robledo, and welcome his extensive study of the opinions of delegations presented in the Sixth Committee on this topic.

With respect to the Guide to Provisional Application of Treaties adopted by the Commission on second reading, we are of the view that it can be a useful tool in treaty practice and certainly can facilitate treaty operations at the international level. The Republic of Poland uses provisional application on an exceptional basis, particularly because it cannot be used as a means of bypassing Parliamentary procedures. In this context, the guide seems to adequately balance different values standing behind provisional application. Furthermore, we are of the view that the Commission's streamlining of the guidelines text during this year's session, specifically with respect to reservations and performance in good faith of treaties provisionally applied, was a step in the right direction.

Poland notes that the Guide to Provisional Application of Treaties fits into the ILC's practice of commenting on and clarifying different provisions of the Vienna Convention on The Law of Treaties. The significance of this 'Code of Treaties' undoubtedly demonstrates the pertinence of such a methodology. In this context, the Commission could consider whether other provisions of the Vienna Convention, such as the definition of a treaty, denunciation, or inter-se agreements, could be similarly elaborated. Furthermore, taking into account the lack of progress in the Sixth Committee's work on universal criminal jurisdiction, the Republic of Poland is of the view that the Commission is well-positioned to assist States in defining universal jurisdiction, identifying its nature and scope, and considering State practice in its application.

47. Greece

Greece expresses its gratitude to the International Law Commission for the adoption, on second reading, of the Guide to Provisional Application of Treaties, together with commentaries thereto and an annex containing examples of provisions on provisional application, as it constitutes a valuable tool providing guidance and assistance to States and international organizations regarding the applicable law, in light of contemporary practice.

We would also like to extend our gratitude and congratulations to the Special Rapporteur, Mr. Juan Manuel Gomez Robledo, for his 6th Report on Provisional Application of Treaties, as well as for his overall contribution to the Commission's study of the topic. The efforts made by the Special Rapporteur in his 6th Report to take stock of and accommodate the various comments and concerns expressed by

States are highly appreciated, as they provide an important example of the kind of interaction and constructive dialogue that should exist between the International Law Commission and the UNGA Sixth (Legal) Committee.

Turning now to the Guide on Provisional Application of Treaties, and by way of general comment, Greece supports the pragmatic approach taken by the Commission, which recognizes the usefulness but also the flexible and inherently voluntary nature of provisional application, while at the same time cautioning against it being used as a
substitute for securing entry into force, that remains the natural vocation of treaties, or as a means of circumventing domestic procedures.

Greece also welcomes that the Guide is in general intended to reflect the current *lex lata* and notes with appreciation the restraint exercised by the Commission in relation to aspects of provisional application where practice has not sufficiently developed yet.

In this respect, and given the purpose set forth in Guideline 2, that is "to provide guidance regarding the law and practice on the provisional application of treaties", it would have been useful if the Commission had specified which are the rules of international law, other than Article 25 of the 1969 and 1986 Vienna Conventions on the Law of Treaties, that reflect the law applicable to the matter, in relation to each corresponding draft guideline contained in the Guide.

In the same vein, regarding Guideline 6, Greece fully agrees with the distinction made by the Commission between provisional application and entry into force, in terms of legal effect, but would welcome a more thorough explanation of how these two are different, including by providing relevant examples from contemporary practice.

Having said that, Greece commends the Commission for its outstanding contribution in bringing more clarity on critical aspects of provisional application of treaties with significant legal and practical implications, including on the terminology used, the commencement of provisional application and its termination.

Greece would also like in particular to express its support for Guideline 4 on the form of agreement, on the basis of which a treaty may be applied provisionally, and the analysis made by the Commission in the commentary thereto, as well as for Guideline 12, which has been drafted in a way that duly takes into account the current practice and the inherently voluntary nature of provisional application.

With these concluding remarks, Greece wishes once again to warmly thank the Commission and its Special Rapporteur for their tireless efforts and persistent work that led to the expeditious and successful conclusion of the work on this topic.

48. Indonesia

Moving on to the **Provisional Application of Treaties**, my delegation would like to express our appreciation to the Special Rapporteur, Mr. Juan Manuel Gomes Robledo, for his report.

We take note of the text of "Guide to Provisional Application of Treaties" and the commentaries thereto, adopted at the seventy-second session of the Commission.

Even though Indonesia is not a party, we are of the view that the 1969 Vienna Convention on the Law of Treaties is certainly the basis on which the Commission should develop a mechanism or a set of guidelines that would provide States with guidance relating to the provisional application of treaties.

The exercise/practice of provisional application of treaties, in this respect, may provide a solution to address difficulties in meeting the conditions of the entry into force of the treaty, however it should never undermine the ultimate objective of the treaty which may include the establishment of global/multilateral standard.

My delegation therefore would like to reiterate that the aim of this guidelines should rather be to provide a mechanism or guidelines for the provisional application of treaties, that will serve as an option to States that might have the intention to provisionally apply a treaty to serve their immediate purpose/interest, pending its entry into force. However, it is the right of States concerned to decide on what is best for them concerning the provisional application of treaties.

We are further of the view that it would be essential to have information from States and international organizations regarding the practice and regulation of provisional application of treaties through their national/domestic legislations or internal rules as for the international organizations.

To conclude, we are delighted to further study and involves in the deliberation on this pertinent topic within the relevant forums, including the Sixth Committee.

49. Canada

[Original: French/English]

Pour commencer, le Canada remarque avec intérêt les travaux de la CDI sur l'application provisoire des traités, particulièrement le *Guide de l'application à titre provisoire des traités* et ses clauses types. Nous saluons la Commission et le rapporteur spécial pour les efforts qu'ils ont déployés pour l'élaboration du Guide,

qui fournira une base commune à la communauté internationale en matière d'application provisoire, ainsi qu'un modèle favorisant une utilisation cohérente entre les États. La cohérence favorise l'échange de pratiques et le renforcement de l'ordre fondé sur des règles.

L'article 25 de la *Convention de Vienne sur le droit des traités* fait depuis longtemps autorité en matière d'application provisoire. Toutefois, sa mise en œuvre dans la pratique a créé certaines incertitudes dans des contextes bilatéraux et multilatéraux. La publication du Guide contribue grandement à clarifier les questions relatives à l'article 25. Nous espérons qu'il servira de base pratique aux États négociateurs qui envisagent d'inclure une disposition d'application provisoire dans un traité. En particulier, les clauses types incluses dans le Guide fournissent aux négociateurs de traités les éléments essentiels à inclure dans une disposition d'application provisoire.

L'application provisoire fait partie intégrante du processus d'adoption des traités au Canada, bien que nous préférions généralement nous appuyer des dispositions d'entrée en vigueur, puisqu'il s'agit d'un mécanisme plus simple. Au Canada, selon la pratique actuelle, l'application provisoire ne peut prendre effet qu'après la signature d'un traité, pour autant qu'aucune mesure législative de mise en œuvre nationale ne soit requise. Si une mesure législative de mise en œuvre est nécessaire, l'application provisoire est retardée jusqu'à l'entrée en vigueur de la mesure législative.

Dans certains cas, l'application provisoire a été limitée, dans la pratique, à des dispositions précises d'un traité, plutôt qu'au traité dans son ensemble. Ultimement, l'intention des parties concernées doit être reflétée dans les dispositions relatives à l'application provisoire, au même titre que dans le reste du traité, en gardant à l'esprit que le besoin de cohérence et d'uniformité est primordial. Le Canada se réjouit de renforcer ses pratiques en matière d'application provisoire des traités à l'aide du précieux travail de la CDI.

50. Russian Federation

[Original: Russian]

Unofficial translation by the Codification Division

On the topics of protection of atmosphere and provisional application of treaties, I would like once again to congratulate the Special Rapporteurs, Mr. Murase and Mr. Gómez-Robledo, on the successful completion of their work. In both cases, the process involved answering very difficult questions, required professionalism and great effort, especially since the final stage came during the pandemic.

In addition, I will limit myself to one brief comment on the topic of provisional application of treaties. We trust that the guidelines, which include an annex with examples of practice, will be useful to States and international organizations in the subsequent development of international treaties.

At the same time, with all the relevance of provisional application of treaties, it is inherently exceptional in nature, the function of provisional application is to ensure, in case of special need, the immediate or accelerated entry into force of an international treaty or part thereof.

However, the unduly broad use of the instrument of provisional application should be avoided. This mechanism cannot be used as a way of circumventing domestic procedures and should not replace international rules and processes to ensure the full entry into force of treaties. One of the merits of the guidelines is that they do not create a presumption in favour of provisional application and take into account the indicated factors, while offering practical guidance to States on how to invoke provisional application when it is actually needed.

51. Serbia

It seems that one of the problems concerning provisional application of the treaties is contained in its determination provided, *inter alia*, in Guideline 3 "A treaty or a part of a treaty is applied provisionally pending its entry into force .... if the treaty itself so provides, or if in some other manner it has been so agreed."

All of the elements of this determination are subject to other guidelines. However, what remains problematic is the part of this provision stating ---in English - "pending its entry into force", or--- in Russian "до его вступления в силу". In fact, during provisional application it is uncertain whether a treaty will enter into force or not.

The very definition of the provisional application of treaties should reflect commencement and termination of provisional application. While it could be reasonably expected that in ordinary state of affairs provisional application shall be terminated when a treaty enters into force, that might not be the case for variety of reasons. Some of those reasons could be justified, some not. Well known ground for termination of the provisional application is when the State or international organization provides notification of its intention not to become a party to a treaty. However, as reflected in Guideline 9, provisional application may be terminated without necessarily expressing intention not to become a party to a treaty, but that possibility needs to be agreed in advance of provisional application. That clearly follows from the Article 25 of the Vienna Convention on the Law of Treaties.

Whether the State or international organization will express its consent to be bound by a treaty is, at the time of provisional application, uncertain, and it seems that that should be clearly reflected in guidelines and corresponding commentaries.

In the general commentary, the ILC has provided that "provisional application serves the overall purpose of preparing for or facilitating the entry into force of the treaty". While fully in agreement with this position, it might be the case that termination of the provisional application could be done in good, or bad faith, taking benefit of provisional application without real intention to express consent to be bound by the treaty.

In this context, it seems desirable that the ILC provide a more detailed analysis of the termination of provisional application of treaty and the possible consequences thereof, particularly whether under certain circumstances termination of provisional application could give rise to state responsibility. It seems that Guideline 8 (Responsibility for breach) does not fully cover the situations of unlawful termination of the provisional application. It seems that the relationship between Guideline 9 and Guideline 8 should be further examined, in order to provide appropriate guideline to state practice and to indicate on possible consequences of acting in bad faith.

52. Algeria

[Original: Arabic]

Excerpt from press release/meeting coverage:

Turning to "Provisional application of treaties", he spotlighted guideline 5 according to which the provisional application of a treaty or a part of a treaty takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as is otherwise agreed. Stressing the need to pay due attention to the principle of good faith in provisional application of treaties in order to prevent improper application, he also welcomed guideline 7 on reservations. Encouraging the Commission to include issues in its long-term programme of work that truly reflect the needs of States, he noted that his country has nominated a candidate for election to the Commission.

53. Kenya

Regarding the topic "Provisional application of treaties", we welcome the progress achieved by the Commission in the adoption of the draft guidelines, their commentaries and the draft annex containing examples of practical provisions. The guidelines will provide States with a flexible and voluntary tool in giving effect

to provisions of a treaty pending the completion and entry into force of such treaty. This achievement is an enriching elaboration of Article 25 1969 *Vienna Convention on the Law of Treaties*, Article 25, and is most welcome. We commend the Special Rapporteur, Mr. Juan Manuel Gomez Robledo of Mexico, who led the Commission on the topic and the successful completion and adoption of draft guidelines.

54. Bulgaria

With regard to Chapter V of the Commission's report on the topic of Provisional application of Treaties, Bulgaria is grateful to the Special Rapporteur Mr. Juan Manuel Gomez Robledo for his excellent work in preparing the text of the guidelines and the commentaries thereto.

We find the Special Rapporteur's effort to provide detailed examples from both bilateral and multilateral treaties on the various elements of the provisional application of treaties, and practice from all geographical regions, to be extremely fruitful. We highly appreciate the potential practical effect of the guidelines, as they provide guidance and clarity on questions left unanswered by Article 25 of the 1969 Vienna Convention on the Law of the Treaties. The present guidelines were used by the time of the drafting in a legal opinion with regard to a decision of the Constitutional Court of the Republic of Bulgaria in relation to a preliminary question concerning the concept of "the provisional application". It should also be noted that the dynamics of drafting international instruments during the pandemic provided space for the practical application of this concept.

We welcome the broad scope embraced by the Guide with regard to the inclusion of international organizations in guideline 1 and the purposeful clarification regarding responsibility for breach in guideline 8 and termination procedures in guideline 9.

We are also supportive of the preparation of a compilation of the practice of States and international organizations in the provisional application of treaties. In this regard it is worth mentioning that Bulgaria formulated the opt-in clause for the provisional application of the Protocol for amendment of Convention 108 of the Council of Europe by using the guidelines prepared by the Commission.

55. Philippines

The Philippines commends Special Rapporteurs Mr. Murase Shinya and Mr. Juan Manuel Gomez Robledo for their outstanding contribution to the work of the ILC, respectively, on "Protection of the Atmosphere" and "Provisional application of treaties."

The Philippines welcomes the adoption by the ILC of the entire Guide to Provisional Application of Treaties, including the commentaries thereto.

As a general observation, in relation to the Guide, we considered the possibility of a rule of construction that a treaty shall not be deemed subject to provisional application unless the text of the treaty or other instrument expressly and categorically provides it. This would be consistent with our practice and takes into account realities of republican states where the executive negotiates treaties but shares foreign policy powers with other bodies, so provisional application which derogates from the sharing should not be presumed.

In terms of its own state practice, consistent with Article 25 of the Vienna Convention on the Law of Treaties, the Philippines observes the concept of "provisional application" of treaties and international agreements under its national guidelines.

Specifically, Executive Order No. 459 (Providing for the Guidelines in the Negotiation of International Agreements and its Ratification), under Section 6, states that:

> *b. No treaty or executive agreement shall be given provisional effect unless it is shown that a pressing national interest will be upheld thereby. The Department of Foreign Affairs, in consultation with the concerned agencies, shall determine whether a treaty or an executive agreement, or any amendment thereto, shall be given provisional effect.*

Under Section 2 of the same executive issuance, the term "Provisional Effect" is defined as the "recognition by one or both sides of the negotiation process that an agreement be considered *in force* pending compliance with domestic requirements for the effectivity of the agreement" (emphasis supplied). Due to this definition, there has been marked hesitation in making a positive determination that a treaty or an international agreement shall be given provisional effect. This stems from the perception that this might lead to non-compliance with internal rules governing procedures of a state to consent to be bound to a treaty.

The robust discussions on the legal effects of provisional application are therefore welcome. We appreciate the efforts of the Commission in ascertaining more precisely the legal effects of provisional application to draw more clearly the fine distinction between provisional application and the regime of entry into force.

We support the request of the Commission for the Secretary-General to prepare a volume of the United Nations Legislative Series compiling the practice of states and international organizations in the provisional application of treaties along with other relevant materials. This would help assist states in assessing and

reviewing their current internal guidelines, also as against the Guidelines adopted by the Commission, and the practice of other States.