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UN GENERAL ASSEMBLY
SIXTH COMMITTEE
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Agenda item 83: Report of the International Law Commission, Cluster III

Statement by Ms Julia O'Brien
First Secretary, Permanent Mission of Australia to the United Nations

(Check against delivery)

Mr Chair

Australia welcomes the Commission's work in relation to the provisional application of treaties. This is a topic of considerable practical importance to States.

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

At the heart of this topic lies the distinction, at international law, between a treaty that is applied provisionally and one that is in force for a particular State.

Australia believes that it is important that further consideration be given by the Commission of the extent to which the legal effects of provisional application may differ, in substance as well as in form, from those of a treaty that is in force.

In this respect, and as noted at paragraph 264 of the Commission's report, it would be helpful to identify the types of treaties, and provisions of treaties, that are often the subject of provisional application and the motivations behind such application.

Mr Chair

Australia welcomes the Special Rapporteur's consideration of the intersection between article 25 of the Vienna Convention on the Law of Treaties and other relevant provisions of that Convention. It is important that these provisions be read alongside one another. For example, article 27 makes clear that a party may not invoke its internal law to justify non-performance of a treaty obligation. This gives context to the interpretation of article 25.

Australia supports the Commission's decision to remove the reference to internal laws from the initial version of Draft Guideline 1, to avoid creating the impression that States could turn to their internal laws to escape an obligation to provisionally apply a treaty.

For similar reasons, in Australia's view, the Commission's primary focus should not be on States' internal laws, but rather on States' obligations on the international plane.

A State's domestic legal arrangements may give context to its practice, for example, by explaining why it is that a State does not proceed expeditiously from signature to ratification. However, the often complex distinctions between different domestic legal systems should not distract from the central enquiry into States' international legal obligations.

Finally – and particularly, but not only, in relation to bilateral treaties – the procedural aspects and substantive consequences of a provisional application can be shaped by agreement of the parties to the treaty being provisionally applied.

The Commission should ensure that this discretion in the parties is not unduly constrained by the Guidelines it produces. To a degree this consideration is already

contained in the reference in the Drafting Committee's Draft Guideline 3 to a treaty being provisionally applied 'in some other manner [as] it has been so agreed'.

Thank you.