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UNITED NATIONS GENERAL ASSEMBLY
SIXTH COMMITTEE

REPORT OF THE INTERNATIONAL LAW COMMISSION (CLUSTER 3): PROVISIONAL APPLICATION OF TREATIES

1 November 2016

Statement by Skye Bale

Mr Chairman,

Australia welcomes the Commission's work in relation to the provisional application of treaties. This is a topic of considerable importance to both the theory and practice of international law.

As noted by the Special Rapporteur, Mr Juan Manuel Gómez-Robledo, the issue of provisional application is relatively recent, and would greatly benefit from increased clarity.

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

Mr Chairman,

It is clear that the provisional application of treaties or of certain treaty obligations is permitted by article 25 of the Vienna Convention on the Law of Treaties.

There are a number of practical reasons why States may want treaty obligations to apply prior to entry into force. Formal treaty action in domestic systems can take time. Provisional application may be necessary to respond to an international crisis or to ensure the smooth transition of successive treaty regimes. For example, the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law

of the Sea, was provisionally applied to ensure it applied at the time of entry into force of the 1982 Convention on the Law of the Sea. Similarly, aviation law agreements can require provisional application to ensure the continuity of commercial and technical standards relating to air services.

Mr Chairman,

Concerning the form of the Commission's final outcome on this topic, Australia supports the development of guidelines, though would similarly support the development of model clauses. Such guidelines or model clauses could provide States with significant useful guidance, without impinging on the relevant domestic and constitutional requirements of States.

In developing these guidelines, the Commission should be guided by the practice of States during the negotiation, implementation and interpretation of treaties being provisionally applied. In examining this practice, Australia suggests that 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 Chairman,

Australia appreciates that there is a scarcity or inaccessibility of State practice, which has meant that the Special Rapporteur's fourth report necessarily engages in analysis by analogy. Australia therefore encourages States to engage with the Commission's requests for information in order to provide a more representative sample of bilateral and multilateral treaties from various regions. Australia also supports the Commission's decision to request that the Secretariat provide a sample of relevant treaties deposited over the last 20 years, to serve as a basis for studying provisional application clauses and the actions of States in respect of provisional application.

Mr Chairman,

Australia supports the conclusion, absent any clear prohibition in the treaty itself, that nothing prevents a State from formulating reservations as from the time of its agreement to the provisional application of a treaty.

However, that situation should be distinguished from one in which a treaty expressly allows a State to make a declaration excluding or limiting the treaty's provisional application. The treaty provisions extracted by the Special Rapporteur at paragraphs 29 to 31 of the fourth report fall into this second category. Declarations made by States under these types of express provisions are not reservations to the treaty itself. Rather, they are declarations of the State's interpretation of the scope of any agreement on provisional application.

Australia would welcome clarification on this issue and the exploration of further relevant examples of State practice.

Mr Chairman,

In terms of draft guideline 10, Australia recognises that the guideline is based on article 27 of the Vienna Convention on the Law of Treaties. Australia agrees that where a State has consented to the provisional application of treaty obligations, that State should not be able to invoke its internal law as justification for a failure to meet the international obligation.

However, Australia welcomes the Special Rapporteur's acknowledgement that this situation is different from the permissible case of States limiting the provisional application of treaties by reference to their internal law. Australia would support either the expansion of draft guideline 10, or the development of separate guidelines or model clauses to cover that latter situation.