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**STATEMENT BY
MS. LIYANA MUHAMMAD FUAD, DELEGATE OF MALAYSIA
ON AGENDA ITEM 81: REPORT OF THE INTERNATIONAL LAW COMMISSION ON
THE WORK OF ITS SIXTY-NINTH SESSION**

**CLUSTER 1
CHAPTER V: PROVISIONAL APPLICATION OF TREATIES**

**AT THE SIXTH COMMITTEE OF THE 72nd SESSION OF THE UNITED NATIONS
GENERAL ASSEMBLY, NEW YORK, 23-25 OCTOBER 2017**

Mr. Chairman,

1. Malaysia commends the efforts of the Special Rapporteur in preparing four reports on the provisional application of treaties. The study and findings on this issue thus far, had managed to elucidate several scenarios within which the provisional application of treaties might operate.

2. Those scenarios, nevertheless, should be discerned with great care and caution, in our attempt to illuminate the question of creation of legal effects produced by the provisional application of treaties; the question of the relationship between provisional application and other provisions of the Vienna Convention on the Law of Treaties 1969 (VCLT); and the provisional application of treaties with regard to the practice of



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international organizations. In this regard, Malaysia wishes to reflect its preliminary view on the topic as follows:

2.1 Malaysia notes that the International Law Commission (ILC) has provisionally adopted all draft guidelines 1 to 11, as presented by the Drafting Committee, at its meetings on 12 May and 26 July 2017. Malaysia further notes that the Commission then adopted the commentaries to the draft guidelines on 2 August 2017. In relation to this, Malaysia is of the view that there are still some doubts on certain parts of the draft guidelines that need to be addressed. The draft guidelines must provide a clear understanding and interpretation as well as taking into account the practice of internal laws of states. In this regard, Malaysia reiterates its comments to the draft guidelines as submitted in the previous sessions particularly the 71st session of the United Nations General Assembly;

2.2 In relation thereto, my delegation wishes to highlight that Malaysia's domestic law does not provide for any express provision that prohibits or allows for the provisional application of treaties. In this regard, Malaysia has been very conscientious in ensuring that its obligations under each particular treaty are carried out accordingly, by legislating appropriate domestic laws before Malaysia could ratify any particular treaty.



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2.3 For this present session, Malaysia would like to focus on the newly formulated draft guidelines 10 and 11. Pursuant thereto, Malaysia notes that the new draft guideline 10 which had been provisionally adopted by the Commission deals with the effects of the provisions of the internal law of States and the rules of international organizations on their competency to agree to the provisional application of treaties. Malaysia further notes that draft guideline 10 follows closely the formulation of article 46 of the 1969 Vienna Convention and that commentaries to the draft guidelines indicated that draft guideline 10 should be considered together with article 46 and other rules of international law. In view of this, Malaysia observes that article 46 of the 1969 Vienna Convention relates to the competency of States and international organizations to conclude treaties vis-à-vis the provisions of the internal law of the State.

In relation to Malaysia's domestic law, there is no express provision that prohibits or allows for the provisional application of treaties. In the context of Malaysia's experience and practice, signing of treaty does not necessarily create a legal obligation when the treaty further requires ratification, accession, approval or acceptance processes, unless the treaty otherwise provides. However, it is to be pointed out that each State must ensure that the manifestation of its consent to apply a treaty provisionally is compatible with its internal law. If a State is to adhere to a basic criterion of a legal certainty, such determination would be made beforehand, and not at a later stage. Be that as it may, Malaysia will only consider to become a Party to an international treaty once its domestic legal framework is



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in place. Further, Malaysia would like to highlight that presently, the 1986 Vienna Convention has not come into force, as such, Malaysia reserves its right to comment on the reference made to the 1986 Vienna Convention;

2.4 In relation to the newly added draft guideline 11, it should be noted that draft guideline 9 states that the internal law of a State or the internal rules of an international organization may not be invoked as a justification for failure to perform international obligations arising from the provisional application, contrary to draft guideline 11 which seems to allow some flexibility in provisional application of a treaty in terms of internal law or rules of States and international organizations. In this regard, it is noted that there is no specific form for States to declare the limitations imposed by its internal law. States need only clearly states the existence of such limitations in the treaty itself, in a separate treaty or in any other form of agreement in order to provisionally apply a particular treaty wholly or partly. Therefore, my delegation wishes to reiterate that Malaysia needs to ensure that its domestic laws are in place before a particular treaty could be enforced in Malaysia.

3. Last but not least, Malaysia would like to stress that it is crucial for us to determine the provisional application of a particular treaty from the source of obligations as provided by that particular treaty. Otherwise, if recourse to alternative sources should be had, the analysis of legal effect should be guided and determined by unequivocal indication by a State that it accepts provisional application of a treaty, as expressed via a clear mode of consent.



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4. Thus, for a better comprehensive analysis of this topic, Malaysia would like to suggest that we further discuss the draft guidelines taking into account States' sensitivities, as well as uniqueness and contextual differences embedded in the treaty provisions, and how States' practices so far have responded to such variations.

I thank you, Mr. Chairman.