

**Written Comments by Austria on the
Draft Guide to Provisional Application of Treaties**

12 December 2019

In addition to the Austrian oral statements made in the Sixth Committee of the General Assembly on this topic and the information submitted in 2015, Austria would like to present the following comments on the first reading text of the draft Guide to Provisional Application of Treaties adopted by the International Law Commission at its seventieth session in 2018

Austria welcomes **draft guideline 4** on "Form of agreement" indicating the various ways in which provisional application may be agreed. However, agreement on provisional application by way of a separate treaty may have more stringent consequences than other forms of agreement on provisional application, in particular concerning the termination of provisional application. Moreover, a separate treaty could give rise to different effects for States Parties of the main treaty (that is to be applied provisionally) who are not parties to the separate treaty. We would appreciate further explanation in this respect in the Commentary. Concerning the possibility to agree on provisional application through a resolution, it is in our view necessary that such a resolution is carried by all states that should be entitled to apply a treaty provisionally. Moreover, the commentary should clarify the relation between this draft guideline and draft guideline 11 on provisions of internal law regarding competence to agree on provisional application, which is modelled on article 46 of the Vienna Convention on the Law of Treaties regarding the non-compliance with national procedures.

Draft guideline 6 on "Legal effect of provisional application" states that provisional application produces the same legal effects "as if the treaty were in force". As a principle, this is acceptable, but it is not a principle without exceptions. The Commentary itself states that "provisional application is not intended to give rise to the whole range of obligations that derive from the consent by a state or an international organization to be bound by a treaty or a part of a treaty", and that "termination and suspension" are not subject to the same rules as those applicable to treaties in force. Therefore, the generality in which draft guideline 6 refers to "the same legal effects" is misleading. The commentary does not determine which obligations would not become effective under the provisional application, for instance, whether this could only encompass provisions concerning question of treaty law or also substantive provisions of the treaty in question. It is Austria's understanding that "the same legal effects" would also comprise the application of the rules and principles dealing with the treaty's relation to other treaties, such as the *lex specialis* and *lex posterior* principles. In the same vein, it appears necessary to explain that a state that applies a treaty provisionally is entitled to participate in bodies created by this treaty unless the treaty provides otherwise. It should be further explained whether a state is entitled to invoke a provisionally applied treaty before the organs of the United Nations if the treaty has not yet entered into force and has not been registered with the United Nations.

With regard to the possibility to make reservations when agreeing to the provisional application of treaties, as provided for in draft guideline 7 on "Reservations", Austria concurs

with the underlying idea that such modification of legal effects between parties should be possible. However, we would appreciate further elaboration on the legal effect of such reservations, which has not been sufficiently dealt with in the 2011 Guide to Practice on Reservations to Treaties.

Concerning **draft guideline 9** on "Termination and suspension of provisional application", we note that the current wording restates the provisions of the two Vienna Conventions on the Law of Treaties regarding termination of provisional application as a result of a treaty's entry into force as well as of a state's or international organisation's notification that it no longer intends to become a party to the treaty. While we appreciate adherence to the rules of the Vienna Conventions, we would welcome an additional provision on other forms of termination and/or suspension, including for instance on unilateral termination of provisional application. States and international organisations may have to terminate or suspend the provisional application of a treaty as a result of internal democratic decision-making procedures or other legal or political reasons, without necessarily expressing their will not to become a party to the treaty at all in the future.

Furthermore, according to para. 2 of draft guideline 9, the notification on the intention not to become a party to the treaty has to be addressed only to the other states or international organizations between which the treaty or a part of a treaty is being applied provisionally. Such a restriction is too narrow since the provisional application applies also in the relations between these states and states already parties to the treaty. Accordingly, such notification must also be addressed to states parties. The commentary should indicate whether such a notification is to be considered as having a binding effect. Austria doubts such interpretation since a state only notifies about its intention, but is not precluded to change such intention at a later stage.

In Austria's understanding **draft guideline 12** referring to provisional application with limitations deriving from internal law of states and rules of international organizations foresees that the right to limit provisional application in accordance with internal law or rules requires either a respective clause in the treaty or another form of agreement. The commentary is not very clear in this respect since it refers only to a consensual basis of provisional application without clarifying with whom this consensual basis has to be achieved. Clarification should be provided whether agreement among all states parties or only those states applying the treaty provisionally is required.

As to the **draft model clauses** Austria considers it necessary to include a model clause providing for provisional application from the date a state or international organization notifies that its internal procedures necessary for provisional application have been complied with. Moreover, the model clauses should also provide for a possibility of a state or international organization to terminate or suspend provisional application, even if a state or international organization does not declare its intention not to become a party to the treaty, since other reasons may require termination or suspension of provisional application as well.