

Estonia's written comments on the Draft Guide to Provisional Application of Treaties (ILC)

In reply to the request of the Secretary-General of the United Nations, Estonia has the honour to submit its written comments on the draft Guide to Provisional Application of Treaties as adopted by the International Law Commission (ILC).

Estonia would like to express its gratitude for the outstanding contribution of the Special Rapporteur Juan Manuel Gómez-Robledo to the draft Guide to Provisional Application to Treaties, commentaries hereto and model clauses. Estonia would also like to thank the ILC for its thorough work on this subject.

We are particularly glad to comment on this topic in 2019, as this year marks the 50th anniversary of the Vienna Convention on the Law of Treaties, Article 25 of which is the basis for the draft guidelines of the provisional application.

Estonia stresses the high value of the draft guidelines, commentaries thereto and model clauses as a practical tool, which gives answers to questions arising in practice. They provide very good guidance regarding the law and practice on the provisional application and wisely direct the States, International Organizations and other users to answers on relevant issues that are consistent with existing rules and contemporary practice.

We welcome that in draft guideline 3 it is stated clearly, that the provisional application of a treaty can be mentioned in the treaty itself or can be expressed in other manner if so agreed. It is laudable, that guideline 4 explains, that such agreement can be reached through a separate treaty or through any other means or arrangements, for example by a resolution adopted by an International Organization or at an international conference or even by a declaration of States or an International Organization, if accepted by other States or International Organization concerned.

However, as mentioned already in our oral comments in 2018 regarding draft guidelines 3 and 4 we find the wording and distinction between the general rule (guideline 3) and form of agreement (guideline 4) confusing and partly repetitive. We understand that the general rule of the form of the agreement is already presented in guideline 3 and draft guideline 4 only elaborates this rule further and does not present separate substantive issue. We therefore suggest rewording the guidelines 3 and 4, either by combining the two or enabling clear distinction in the essence.

With regard to draft guideline 4.b – provisional application can be agreed through a declaration by a State that is accepted by other States – we suggest to further elaborate the commentaries and explain if there is a certain time-line for acceptance of declarations on provisional application. Furthermore, the commentaries state, that most of the existing practice reflects the acceptance in written form. Could then theoretically a tacit acceptance be assumed? Could the acceptance be valid after certain amount of time if no clear acceptance is given or no reservation/objection is expressed?

Concerning the legal effects of provisional application, we would be grateful if the guide or commentaries could be clearer about the legal effects of such application in case it is expressed unilaterally. Draft guideline 4 states: provisional application *may be agreed by a declaration*, guideline 6 states: provisional application produces *legal effects between the States or*

International Organizations concerned, unless the treaty provides otherwise or it is otherwise agreed. The aspect we would like to see reflected in the commentaries is, if the unilateral declaration to apply the treaty provisionally could be issued to a bilateral treaty. If yes, the question arises about its legal effects. In our opinion, such a unilateral declaration (accepted or not by another party) could not bring any obligation to the other party, which is not willing to apply the treaty provisionally; it could only bring rights to the other party. In addition, a question arises, whether a clear written acceptance of such declaration of unilateral provisional application of a bilateral treaty should follow from the other party, in order to enable the use of rights agreed in the treaty.

We notice positively that the guide recognizes that States may set aside, by mutual agreement, the solutions identified in the draft guidelines if they so decide. It concurs with the idea of the sovereign States, who have the right to choose necessary measures, as far as these do not contravene the rules of international law.

We also find draft model clauses a useful toolbox, which however could include even more possible draft texts (for example, how a resolution foreseeing the provisional application or a unilateral declaration could be formulated etc.).

Estonia once again thanks the International Law Commission for the valuable work done so far and we hope that these comments will contribute to the further consideration of the Guide to Provisional Application to Treaties.