

 **Permanent  
Mission  
of Austria**

to the United Nations  
in New York

**76<sup>th</sup> Session of the General Assembly  
Sixth Committee**

**Agenda item 82: Report of the International Law Commission on the work of  
its seventy-second session**

**Cluster I - Chps: I, II, III, IV (Protection of the Atmosphere), V (Provisional Application of  
Treaties) and X (Other Decisions)**

**Statement by**

**Ambassador Helmut Tichy**

**Legal Adviser of the Ministry of European and International Affairs**

**New York, 27 October 2021**

Chairperson,

As regards the topic “**Protection of the Atmosphere**”, Austria expresses its appreciation to Special Rapporteur Murase and the Commission for the adoption in second reading of the guidelines, preamble and commentaries. Austria fully concurs with the principles set out in the preamble, in particular with the view that atmospheric pollution and atmospheric degradation are a common concern of humankind.

With respect to guideline 9 regarding the interrelationship among relevant rules, we agree with the guideline that the rules of international law relating to the protection of the atmosphere should, to the extent possible, be interpreted and applied in harmony with other existing rules of international law. However, Austria wishes to underline that such harmonic interpretation or application cannot expand international legal obligations beyond the content originally accepted by states.

Guidelines 10 and 11 on implementation and compliance deal with general matters that are either already adequately addressed by international and national law or are outside the scope of the present guidelines.

Chairperson,

With respect to the topic “**Provisional application of treaties**”, Austria commends Special Rapporteur Gómez-Robledo and the Commission for the adoption in second reading of its Guide to Provisional Application of Treaties, comprising 12 guidelines with commentaries as well as an annex containing examples of treaty clauses relating to provisional application. We support the Commission’s recommendation that the General Assembly take note of the Guide and bring it to the attention of the international community.

We welcome the approach chosen in guideline 3 to go beyond Article 25 of the Vienna Convention on the Law of Treaties (VCLT) by omitting its explicit reference to negotiating states and thus to enable provisional application not only for negotiating states but also for acceding states. The approach reflects, as noted in the commentary, the contemporary practice in the field.

Austria also welcomes the clarification introduced to guideline 4 subparagraph (b) (i) that provisional application may be agreed upon by way of a resolution, decision or other act of an international organisation if adopted “in accordance with the rules of such organization [...], reflecting the agreement of the States and international organizations concerned”. This wording takes account of the fact that the rules of international organisations may provide for binding decisions on a treaty’s provisional application pursuant to specific voting procedures, including majority voting.

We are similarly in favour of guideline 4 subparagraph (b) (ii) describing the option to agree on provisional application by way of a declaration that is “accepted by the other States or international organizations concerned”. Austria, however, does not consider it necessary for such acceptance to be “express”, as paragraph 7 of the commentary requires; an implicit acceptance would be sufficient.

As for guideline 5 on the commencement of provisional application, Austria notes that the current wording seems to exclude the possibility that a state declaring its provisional application of a treaty may unilaterally determine the date on which such provisional application is to commence. We would propose that apart from the date agreed in a treaty or otherwise, the guideline also refer to the date “as notified”. This would guarantee that a state wishing to apply a treaty provisionally may announce the beginning of its provisional application of the treaty unilaterally.

The commentary to draft guideline 6 on legal effect rightly notes in paragraph 6 the important distinction between provisional application and entry into force of a treaty. Austria supports the resulting view that provisional application is “not subject to all rules of the law of treaties”, a statement relevant both for provisional application by states already bound by the treaty and states applying it provisionally. In Austria’s view it would have been useful to include in the commentary examples of rules the Commission deems inapplicable to provisional application.

Regarding guideline 7 on reservations, Austria concurs with paragraph 5 of the commentary and the distinction made therein between reservations on the one hand and declarations limiting the scope of the provisional application of a treaty on the other hand. However, a small inconsistency remains in the commentary, as the last sentence of paragraph 5 refers to “reservations limited to the phase of the provisional application”.

We particularly welcome that the Commission has taken up Austria's suggestion in guideline 9 paragraph 3 to allow for the invocation of "other grounds" for the termination of provisional application than the treaty's entry into force or the intention not to become a party to the treaty. We believe that this adds to the flexibility of the system of provisional application. We also agree with the decision not to include a notice period or a "reasonable period" for termination in the guideline itself, as outlined in paragraph 7 of the commentary. However, we recognise that notice periods may be useful and are grateful for the examples in the annex alerting treaty drafters of the benefits of clearly defined termination dates.

Lastly, with respect to guideline 12, the commentary in paragraph 4 leaves it open whether the agreement to limit the provisional application of a treaty according to the internal law of a state requires consent of all states parties or only of those states applying the treaty provisionally.

Chairperson,

Allow me to conclude this statement with some remarks on the long-term programme of work of the Commission.

As regards the topic "**Subsidiary means for the determination of rules of international law**" most recently included in the long-term programme of work, we believe that studying this topic in detail would mainly be of academic value. While we recognise that the Commission could undoubtedly contribute to the clarification of the role of the subsidiary means as well as complement and finalise its consideration of all the sources of international law, we are not convinced that this topic is as pressing and practically relevant for states as other topics on the long-term programme of work.

In this respect, let me reiterate our regret that the topics "Universal criminal jurisdiction" and "The settlement of disputes to which international organizations are parties" have not been taken on by the Commission so far.

Austria has repeatedly supported the idea that the Commission, building on the work of the Sixth Committee, examine the topic of "**Universal criminal jurisdiction**" and develop guidelines thereon.

Unlike the assertion voiced by some that the concept was too politically sensitive to be dealt with by the Commission, we believe that it is essentially legal and therefore must also be approached in this way. There is an urgent need for profound analysis of this topic. We trust that the Commission will be able to dispel the existing misunderstandings and explain universal jurisdiction as a necessary element for the cooperation among states in their fight against impunity for international crimes.

Also regarding the topic “**The settlement of disputes to which international organizations are parties**”, we would like to highlight once again that disputes of international organisations with private parties, governed by domestic law, are most relevant in practice and have raised important questions on the scope of privileges and immunities enjoyed by international organisations and on adequate dispute settlement mechanisms established in such organisations.

We hope that both topics will receive the Commission’s attention in the near future.

Thank you for your attention.