Provisional Application of Treaties

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Introduction

Today, States often choose ratification, approval or acceptance as a means of expressing consent to be bound because it allows them to bring the treaty before parliament, obtain its consent, and make the necessary changes in domestic legislation prior to committing the State to the treaty under international law. As a separate matter, treaties may require that a particular number of States express their consent to be bound in order for the treaty to enter into force. For these reasons, a certain amount of time may often pass between, on the one hand, the adoption and authentication of the treaty text, and on the other hand, the treaty's entry into force.

On some occasions, however, States may be eager to expedite the application of the treaty's provisions; they may do so via provisional application. There are numerous reasons why States may choose to apply a treaty provisionally, such as: (a) urgency *(*e.g., peace treaties which terminate hostilities*)*; (b) certainty of ratification, which may encourage them to propose provisional application; (c) the need to ensure legal continuity between an earlier and a later treaty on the same subject-matter; (d) legal consistency so amendments can be applied as early as possible among parties able to provisionally apply them; and (e) circumvention of obstacles to express consent to be bound and entry into force.[1] Provisional application disentangles the

[1] A Michie, 'The Provisional Application of Treaties in South African Law and Practice' (2005) 30 S Africa Ybk Intl L 1-32; A Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Martius Nijhoff, Leiden, 2012) 9-11; H Kriege, 'Article 25: Provisional Application', in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, Berlin 2018), 441, 442-446 [4]-[10];

treaty's application from its entry into force.[2] Entry into force is concerned with when the treaty becomes operative.[3] The treaty becomes binding on an international subject once the latter has consented to be bound by the treaty, and the treaty has become operative.[4] But, provisional application enables States to apply a treaty temporarily prior to its entry in force. Under the current state of international law, however, recourse to provisional application is not compulsory. States may, if they choose so, agree to apply a treaty provisionally. Such agreement may either require States (and/or international organisations ('IOs')) to apply the treaty provisionally or it may give States (and/or IOs) the option to activate the obligation to apply the treaty provisionally. Once such an agreement between negotiating States (and/or IOs) is effectuated, it establishes an obligation on those that have consented to it to apply a treaty provisionally.

The 1969 Vienna Convention on the Law of Treaties ('VCLT') as well as the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations ('1986 VCLT')[5] each include a provision on the provisional application of treaties: Article 25. VCLT Article 25 has been recognised as setting forth a rule of customary international law ('CIL').[6] It has been suggested that it is not beyond

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International Law Commission (ILC), 'Provisional summary record of the 3270th Meeting' (15 July 2015) UN Doc A/CN.4/SR.3270, 7 (Murase).

[2] Although the treaty's application and the treaty's entry into force may coincide, they may also occur separately. AD McNair, *Law of Treaties* (Clarendon Press, Oxford, 1961, reprinted 2013) 193-194.

[3] GE Do Nascimento e Silva, 'Le Facteur Temps Et Les Traités' (1977) 154 RcD 221-298, at 226.

[4] See eg Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art 84(1) (introduces a passage of 30 days for entry in force from the date of deposit of 35th instrument of consent to be bound: 'The present Convention shall enter into force *on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession*.' (emphasis added)).

[5] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) [1986] 25 ILM 543.

[6] D Mathy, 'Article 25' in O Corten and P Klein (eds.), *The Vienna Conventions on the Law of Treaties* (OUP Oxford 2011) 639-654, at 641; Kriege (n 1) [3].

doubt that 1986 VCLT Article 25 does so, since there is not as much practice in relation to provisional application of treaties between States and international organisations ('IOs') or between IOs.[7] However, it is difficult to sustain an argument that in the current state of international law treaties between States and IOs or between IOs cannot be subject to provisional application, given the contractual freedom of subjects of international law.

Even though VCLT and 1986 VCLT Article 25 set out the basic parameters for generating and terminating provisional application, these provisions leave open a number of key questions. At the same time, there is growing practice in the field. In recent years, disputes concerning the effects of provisional application and its relationship with domestic law have arisen. This increasing attention on the legal complexities of provisional application in international and domestic jurisprudence—and in the practice of States—encouraged the International Law Commission ('ILC') to include the topic in its programme of work in 2012.[8] In 2018, the ILC adopted on first reading Draft Guidelines on Provisional Application of Treaties.[9] However, the Draft Guidelines on Provisional Application are not yet adopted on second and final reading at the time of this edition's publication. Thus, readers should consider and consult the final (second) reading of these Guidelines for the purpose of understanding the ILC's position on this topic.[10]

[7] 3270th ILC meeting (n 1) 11 (Park); ibid 19 (McRae).

[8] ILC, 'Report on the work of its Sixty-Fourth Session' (2012) UN Doc A/67/10, [267].

[9] ILC, 'Text of the draft guidelines on provisional application of treaties with commentaries thereto adopted by the Commission on first reading' (2018) UN Doc A/73/10, 245-270 (available at <http://legal.un.org/docs/?path=../ilc/reports/2018/english/a_73_10_advance.pdf&lang=E> ('Draft Guidelines on Provisional Application').

[10] The deadline for governments to submit written comments to the UN Secretary-General is 15 December 2019, but no written comments were available on first reading as of 30 December 2018. ILC, 'Report on its work in its seventieth session' (2018) UN Doc A/73/10, 203 [88].

The ILC Draft Guidelines on Provisional Application partly involve the interpretation of VCLT Article 25 on provisional application.[11] They are intended to provide 'clarity to States when [...] implementing provisional application clauses',[12] 'guidance regarding the law and practice on [provisional application], on the basis of [VCLT Article 25] and other [CIL] rules of international law',[13] and to 'try to clarify and explain' mainly VCLT Article 25.[14] Owing to these objectives, the ILC does not intend to propose to States the conclusion of a treaty on this subject: the Draft Guidelines are intended to remain a non-binding instrument, influencing the future development of the law by soliciting future State practice.

This chapter begins in Part I with an examination of the shift in terminology from 'provisional entry into force' to 'provisional application'. Part II explores the formal source of the binding effect of provisional application and the forms it can take. Part III takes up the legal effects of provisional application. Part IV deals with the relationship between provisional application and domestic law, and Part V with the termination of provisional application. The chapter finishes with some conclusions on provisional application and the future developments in this area.

I. A Shift in Terminology

The term 'provisional application' was not widely used prior to the VCLT's adoption. Yet, the practice of States had regularly involved the provisional application of treaties—within the meaning of the term under VCLT and 1986 VCLT Article 25—dating back to the two treaties comprising the 1648 Peace of Westphalia that brought an end to the Thirty Years' War. Dalton,

[11] For the legal effects of the ILC's interpretative activity, see D Azaria, '"Codification by Interpretation": The International Law Commission as an Interpreter of International Law' (forthcoming 2019).

[12] Concluding Remarks of Special Rapporteur in Plenary, ILC, 'Report on the work of its Sixty-Fifth Session' (2013) UN Doc A/68/10, 2013, 104 [126].

[13] Draft Guidelines on Provisional Application (n 9) 246 (Guideline 2).

[14] Ibid 250 [4].

writing in the first edition of this volume, provides an excellent and concise summary of State practice from the 17th century to the early 20th century in this respect.[15] In 1965, the ILC's fourth Special Rapporteur on the Law of Treaties, Humphrey Waldock, commented that Draft Article 22 (which formed the basis for the negotiations for what became VCLT Article 25) was 'introduced in order to cover a fairly common contemporary State practice'.[16]

Draft Article 22 of the ILC's 1966 Draft Articles on the Law of Treaties was entitled 'Entry into force provisionally' and provided:

1. A treaty may enter into force provisionally if:

(a) The treaty itself prescribes that it shall enter into force provisionally pending ratification, acceptance, approval or accession by the contracting States; or

(b) The negotiating States have in some other manner so agreed.

2. The same rule applies to the entry into force provisionally of part of a treaty.

During the preparation of the Draft Articles on the Law of Treaties, there was some discussion in the ILC about whether the term 'provisional entry into force' was appropriate.[17] Reuter (with whom Verdross,[18] de Luna[19] and Lachs[20] agreed) pointed out that

'[t]he expression "provisional entry into force" no doubt corresponded to practice, but it was quite incorrect, for entry into force was something entirely different from the application of the rules of a

[15] RE Dalton, 'Provisional Application of Treaties', in D Hollis, *The Oxford Guide to Treaties* (OUP, Oxford 2012) 220, 222-226.

[16] [1965] YBILC, vol I, 106 [72].

[17] For the preparation of VCLT Article 25 by the ILC and the Vienna Conference, see also Memorandum by the Secretariat, 'Provisional application of treaties' (1 March 2013) UN Doc A/CN.4/658. For the negotiating history of 1986 VCLT Article 25, see also Memorandum by the Secretariat, 'Provisional application of treaties' (25 November 2014) UN Doc A/CN.4/676.

[18] [1965] YBILC, vol I, 106 [81].

[19] Ibid, 107 [91].

[20] Ibid, 108 [100].

treaty. Entry into force might depend on certain conditions, a specified term or procedure, which dissociated it from the application of the rules of the treaty. The practice to which the article referred was not to bring the whole treaty into force with its conventional machinery, including, in particular, the final clauses, but to make arrangements for the immediate application of the substantive rules contained in the treaty.'[21]

In the Vienna Conference, the United States, after proposing the article's deletion, stated that if it were retained, the expression 'entry into force provisionally' should be replaced by 'provisional application'.[22] Czechoslovakia and Yugoslavia made a written proposal for amending the provision to the same effect. The proposal was approved without a vote of the Committee of the Whole, and by the Conference itself the following year.[23] Italy also urged that 'confusion should be avoided between mere application, which was a question of practice, and entry into force, which was a formal legal notion. Mere […] application did not involve entry into force'.[24]

In light of these proposals and discussions, the term 'provisional entry into force' was changed to 'provisional application'. Today, VCLT Article 25 reads as follows:

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies

[21] [1965] YBILC, vol I, 106 [75].

[22] UN Conference on the Law of Treaties, Summary Records of First Session (1968) UN Doc A/CONF.39/11, 140 [23]-[24] ('Vienna Conference, First Session').

[23] UN Conference on the Law of Treaties, Summary Records of Second Session (1969) UN Doc A/CONF.39/11/Add.1, 43 [101] ('Vienna Conference, Second Session').

[24] Vienna Conference, First Session (n 22) 142 [43].

the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

In order to dispel any uncertainty that this terminological change might have on whether provisional application would be governed by the principle of *pacta sunt servanda*, the terms 'a treaty is applied provisionally' were used in VCLT Article 25.[25]

II. The Formal Source of the Binding Effect of Provisional Application and its Form

Provisional application is based on an agreement to apply the treaty provisionally (Part III.A), which can take different forms (Part III.B). This section also addresses the question about whose agreement is required in order for a treaty to apply provisionally (Part III.C).

A. An Agreement to Apply a Treaty Provisionally

Provisional application is based on a (secondary) international agreement (i) to apply the treaty provisionally, or (ii) to provide for the possibility of provisional application that can take effect for each State or IO, if and when some further conditions are met, including, for instance, expressing consent by notification or declaration.[26] The existence of such an international agreement to apply the main treaty provisionally cannot simply be presumed. To determine whether there is an international agreement (pursuant to which the treaty provisions shall apply provisionally), rules of agreement-ascertainment have to be employed.[27] In relation to tacit

[25] See infra Part III(C)(1) at xxx et seq.

[26] [1965] YBILC, vol I, 108 [7] (Ago) ('certain of the treaty's clauses were applied provisionally by virtue of a secondary agreement between the parties, and it was only that agreement which entered into force.').

[27] *Aegean Sea Continental Shelf (Greece v. Turkey)* [1978] ICJ Rep 39, [96]; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility* (Judgment) [1994] ICJ Rep 112, [23]. See also Chapter 1 in this volume.

agreements, the rules on acquiescence will apply, pursuant to which circumstances exist that call for some reaction; and the 'silent' State is in a position to react within sufficient time.[28]

An agreement to apply a treaty provisionally may enter into force on signature or by other means so agreed by the parties to that agreement, including orally. It requires the provisional application of the 'main treaty' thus bringing about the application of the provisions of the main treaty earlier in time.[29] Alternatively, the provisional application agreement may incorporate specific treaty provisions that are subject to provisional application.[30]

B. The Form of an Agreement to Apply the Treaty Provisionally

An international agreement to apply a treaty provisionally may take a number of different forms. Article 25(1) expressly leaves it to the negotiating States (and IOs) to decide the form that the agreement may take. According to Article 25(1)(a), the treaty itself may so provide. Examples of a provisional application agreement within the treaty to be applied provisionally include: Article 45 of the Energy Charter Treaty;[31] Article 54 of the International Agreement

[28] IC McGibbon, 'Some Observations on the Part of Protest in International Law' (1953) 30 BYBIL 293; J Barale, 'L'Acquiscement dans la Jurisprudence Internationale' (1965) 11 Annuaire Français de Droit International 389, 405.

[29] ILC, 'Provisional summary record of the 3232nd meeting' (30 July 2014) UN Doc A/CN.4/SR.3232, 13 (Wood) ('provisional application was always application of the treaty as such, and thus the rights and obligations under provisional application would always derive from the treaty itself.').

[30] D Vignes, Une notion ambiguë: la mise en application provisoire des traités (1972) 43 Annuaire Français de Droit International 181, 192.

[31] Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) [1995] 34 ILM 360, Art 45 (ECT).

on Olive Oil and Table Olives;[32] and Article 7 of the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea.[33]

Article 25(1)(b) also provides for the possibility that 'the negotiating States have in some other manner so agreed'. Waldock had envisaged that provisional application could be agreed in a separate agreement, which 'would itself constitute a treaty, but would not be the treaty whose provisional entry into force was in question.'[34] Such a separate agreement can take any form – written, oral or tacit[35] – and denomination: exchange of notes or letters,[36] agreement,[37] protocol,[38] joint communiqué, press release, memorandum of understanding.

Since the treaty awaits its entry into force, it cannot and does not bring about its own provisional application. One way of explaining how a provisional application clause within the main treaty may produce binding legal effect is the rule set forth in VCLT Article 24(4). According to this rule, '[t]he provisions of a treaty regulating the authentication of its text, the

[32] International Agreement on Olive Oil and Table Olives, (concluded 1 July 1986, entered in force 1 January 1987) 1445 UNTS 13, 35.

[33] Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force provisionally 16 November 1994 and definitively 28 July 1996) 1836 UNTS 31, 41.

[34] [1965] YBILC, vol I, 107 [90].

[35] [1965] YBILC, vol I, 110 [17] (Ago); ibid, 110 [27] (Tsuruoka); ibid, 110 [28] (Tounkine).

[36] 1982 Interim Agreement Relating to the Civil Air Transport Agreement of August 11, 1952, as Amended, with Record of Consultations, Memorandum of Understanding and Exchange of Letters (concluded 7 September 1952, entered into force 7 September 1952) 1736 UNTS 284; Exchange of letters constituting an agreement between the United Nations and Spain regarding the hosting of the Expert Group Meeting entitled 'Making it work — Civil society participation in the implementation of the Convention on the Rights of Persons with Disabilities' (concluded 15 November 2007, entered into force provisionally on 23 November 2007) 2486 UNTS 5.

[37] Agreement on the provisional application of certain provisions of Protocol No. 14 pending its entry into force (concluded 12 May 2009) CETS No 194.

[38] Protocol on the Provisional Application of Certain Provisions of the Treaty on Conventional Armed Forces in Europe (concluded 19 November 1990) [1991] 30 ILM 52; Protocol on the Provisional Application of the Revised Treaty of Chaguaramas (concluded 5 July 2001) 2259 UNTS 440.

establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary *and other matters arising necessarily before the entry into force of the treaty* apply from the time of the adoption of its text.'[39] Yet, even this proposition is based on a separate and implicit agreement of the negotiating States to apply certain provisions prior to the treaty's entry into force. Alternatively, the provisional application clause can be seen as being based on a tacit agreement separate from the main treaty, as is the case when there is a separate written (or oral) agreement.

C. Agreement between Whom?

VCLT and 1986 VCLT Article 25(1)(b) refer to 'negotiating States' and 'negotiating States and negotiating organizations' respectively. This wording indicates that the negotiating States or IOs can agree on whether the treaty shall be provisionally applied. At the Vienna Conference, the UK stated its understanding that

> [t]here were instances in international practice where the text of a general multilateral convention had been adopted but where the necessary number of ratifications required for entry into force had not subsequently been forthcoming. If that situation occurred, *certain of the negotiating States, but not necessarily all of them, might come together and agree that the treaty or part of the treaty should be applied provisionally between them*. Accordingly, it was his understanding that paragraph l(b) of article 22 [which later became Article 25] would apply equally to the situation where certain of the negotiating States had agreed to apply the treaty or part of the treaty provisionally pending its entry into force.[40]

India expressly agreed with both these understandings of the UK,[41] and Greece agreed with the UK's second understanding.[42] No State objected to this understanding. There is, moreover,

[39] VCLT Art 24(4) (emphasis added).

[40] Vienna Conference, Second Session (n 23) 40 [57] (emphasis added).

[41] Ibid 41 [68].

[42] Ibid 41 [74].

nothing problematic in this scenario because the *inter se* agreement only binds the parties to it in the relationship between themselves.

As a separate matter, although all negotiating States (and IOs) may agree to apply the treaty provisionally, it is equally possible that all negotiating States (and IOs) may agree on a provisional application mechanism that allows for some (but not necessarily all) negotiating States (and IOs) to be required to apply the treaty provisionally. There are at least two techniques that fit in this scenario: (i) a limitation clause is included in the provisional application agreement thus introducing an opt-out system (some negotiating States or IOs may, in accordance with a 'Limitation Clause', not to provisionally apply a treaty or some provisions); or (ii) the provisional application agreement may introduce an opt-in system, requiring a negotiating State or IO to make a future notification (and thus actively accept) to apply the treaty provisionally. In both cases, all negotiating States and/or IOs have agreed on the mechanics of provisional application, but they have not all consented to be bound by provisional application.

Draft Guideline 3 of the ILC Draft Guidelines on Provisional Application explicitly avoids the use of the term 'negotiating States (and IOs)'. Instead, it reads: '[a] treaty or a part of a treaty may be provisionally applied, pending its entry into force between *the States or international organizations concerned*, if the treaty itself so provides, or *if in some other manner it has been so agreed*.'[43] As such, Draft Guideline 3 deviates from VCLT (and 1986 VCLT) Article 25; unlike these articles, it does not require that as a minimum (all or some) negotiating States (and/or IOs) have agreed in some way on provisional application.[44] However, it becomes apparent in the commentary to Draft Guideline 3 that what is envisaged

[43] Draft Guidelines on Provisional Application (n 9) Guideline 3 (emphasis added).

[44] VCLT and 1986 VCLT Art 25(1)(b) ('the negotiating States [and IOs] have in some other manner so agreed'). See commentary, Guideline 3 (n 9) 208 [3].

is that non-negotiating States may be bound by provisional application. The commentary states: 'relevant practice [of provisional application] was identified […] as applying to States that *had acceded* to the commodity agreement [which never entered in force], thus demonstrating the belief that those States had also been provisionally applying the agreement.'[45] However, this example may better be explained as an instance where (all or some) negotiating States agreed that non-negotiating States may accede to the provisional application agreement. Otherwise there would be a general presumption that non-negotiating States and IOs are generally permitted to become parties to the provisional application agreement – a presumption that would deviate from the general rule on consent to be bound by accession, which requires either the consent of the negotiating States or subsequently the consent of all parties to the treaty.[46] Additionally, some treaties are negotiated by a limited number of States and are intended to have a limited number of parties: such as the founding treaties of the European Union. Given that such treaties have limited accession terms, it cannot be presumed that any non-negotiating State may become party to an agreement to provisionally apply them.[47]

The agreement of negotiating States and IOs is constitutive of the provisional application agreement. While all or some negotiating States and IOs may agree on the provisional application of the treaty between themselves, they may also agree that States and IOs that were

[45] Draft Guidelines on Provisional Application (n 9) 209 [3] (emphasis added).

[46] VCLT Art 15 (consent of a State to be bound by a treaty is expressed by accession when: (a) the treaty provides that such consent may be expressed by that State by means of accession; (b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or (c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession).

[47] A non-negotiating State (or IO) may unilaterally undertake obligations for itself, as reflected in the treaty provisionally applied. But such unilateral undertaking differs from the provisional application of a treaty. The latter entails both rights and obligations for those States (and IOs) bound by it. For more, see the analysis in Part II.D below.

not involved in the negotiations may by accession consent to be bound by the provisional application agreement.

D. Unilateral declarations are not *per se* a formal source of provisional application

A unilateral declaration alone cannot be the *source* of provisional application.[48] A unilateral declaration, as unilateral act, may under certain conditions entail *obligations* for the State (or IO) making such declaration or act. In contrast, provisional application establishes a compound of obligations *and rights* for States (or IOs) bound by it.[49] Moreover, unilateral undertakings are not based on acceptance by others; they fail to reflect the *common intention* to agree on the provisional application of the treaty.[50] That said, provisional application may be brought about by unilateral declaration/notification,[51] when the unilateral declaration/notification gives effect to an underlying earlier agreement envisaging the possibility of provisional application that can be triggered by subsequent unilateral notification or declaration. The notification/declaration may serve as evidence of a pre-existing agreement (tacit or otherwise) if the terms of the

[48] Special Rapporteur Gómez-Robledo had argued that unilateral declarations can be the source for the provisional application of a treaty: Special Rapporteur Juan Manuel Gómez-Robledo, Second Report to the ILC (9 June 2014) UN Doc A/CN.4/675, [36] ('in short, the source of obligations incurred as a result of provisional application may take the form of one or more unilateral declarations […]'). Others disagreed. See eg ILC, 'Provisional summary record of the 3232nd meeting' (30 July 2014) UN Doc A/CN.4/SR.3232, 12-13 (Wood) ('a unilateral declaration was merely a response to a standing offer contained in the treaty to conclude an agreement to provisionally apply the treaty'); Ibid at 3 (Forteau) ('article 25 of the Vienna Convention did not allow for a treaty to be applied provisionally on the basis of a unilateral declaration by a State. The State […] could be bound as a matter of international law, but such a unilateral commitment did not fall within the provisional application of treaties'); ibid, at 6 (Park) ('The obligations arising from provisional application were thus derived, not from the unilateral declaration itself but from the agreement between the States concerned').

[49] *Nuclear Tests (Australia v. France; New Zealand v. France)* (Judgments) [1974] ICJ Rep 267-8 [43], [46] and pp. 472-3 [46], [49]; ILC, 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations with commentaries thereto' [2006] YBILC 160-166 (Guideline 1).

[50] 3232nd ILC meeting (n 48), 5 (Escobar-Hernandez).

[51] [1965] YBILC, vol I, 111 [37] (Reuter); Mathy (n 6) 639, at 651.

declaration and the circumstances in which it was made indicate that the declaration/notification intends to give effect to an existing agreement.

Draft Guideline 4 of the ILC Draft Guidelines on Provisional Application adopted on first reading envisages a completely different and plausible scenario: the establishment of an international agreement based on the declaration of a State or an IO, which operates as an offer, and the acceptance by the other States or IOs concerned.[52] However, the analysis and examples provided in footnote 1021 of the commentary to Draft Guideline 4 concern a different situation to the one actually envisaged in Draft Guideline 4 and the text of the commentary: the existence of a pre-existing agreement on provisional application that allows provisional application to be triggered and take effect for each State only upon that State's declaration.[53] In support, footnote 1021 cites the Protocol to the Agreement on a Unified Patent Court on Provisional Application.[54] As such, it is beyond the scope of Draft Guideline 4.

Another example invoked in footnote 1021 of the commentary to Draft Guideline 4 is Syria's unilateral declaration to provisionally apply the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.

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[52] Draft Guidelines on Provisional Application (n 9) Guideline 4 ('In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed through: […] (b) any other means or arrangements, including […] a *declaration by a State or an international organization that is accepted by the other States or international organizations concerned*' (emphasis added)).

[53] Commentary to Guideline 4 (n 9) 212-213, footnote 1021 ('[t]here are cases in which *the treaty* does not require the negotiating or signatory States to apply it provisionally, but *leaves open the possibility for each State to decide* whether or not it wishes to apply the treaty or a part of the treaty […]. *In these circumstances, the expression of intention that creates the obligation arising from provisional application may take the form of* a *unilateral declaration* by the State.' (emphasis added)).

[54] Ibid; see also Protocol to the Agreement on a Unified Patent Court on Provisional Application (concluded 1 October 2015) available at www.unified-patent-court.org/sites/default/files/Protocol_to_the_Agreemetn_on_Unified_Patent_Court_on_provisional_application.pdf> (arts 1, 3 provide a paradigmatic example of the situation where States agree to an 'opt-in system' of provisional application).

The analysis in footnote 1021 of the commentary states that '[a]lthough the Convention does not provide for [its provisional application] and such possibility was not discussed during its negotiation, neither the States parties nor OPCW objected to the provisional application by the Syrian Arab Republic of the Convention, as expressed in its unilateral declaration […].'[55] This example does not meet (at least by virtue of the information provided in the commentary) the requirement in the commentary that 'the declaration must be verifiably accepted by the other States or [IOs] concerned, as opposed to mere non-objection.'[56] The silence of other States in that scenario (as described in the footnote) cannot be presumed to constitute acceptance,[57] because there is no circumstance that calls for the reaction of other negotiating States or IOs (all the more so other non-negotiating States or IOs). The declaring State may instead be unilaterally undertaking obligations (set forth in the treaty). For this reason, it may better be classified as a unilateral undertaking of obligations (set forth in the treaty).

Further, in relation to multilateral treaties, it cannot be presumed that an agreement of provisional application established in the form of a unilateral declaration accepted by other States concerned, as envisaged in Draft Guideline 4, is an agreement that establishes an obligation for all negotiating States to apply the treaty provisionally: it may be that a group of negotiating States agrees (by acceptance of the unilateral declaration of a non-negotiating State) to apply the treaty provisionally. This is because a group of negotiating States may agree among themselves to apply the treaty provisionally.[58] Additionally, depending on the wording of each declaration and evidence of acceptance, what may be agreed instead is a matrix of separate agreements on provisional application between the declaring State and each accepting

[55] Draft Guidelines on Provisional Application (n 9) Commentary to Guideline 4, footnote 1021 (emphasis added).

[56] Ibid 212-213, [5].

[57] Ibid.

[58] See analysis in Part II.C above.

State. Evidence of the intention to establish an agreement on the treaty's provisional application among all (or a group of) negotiating States has to be furnished.

III. The Legal Effects of Provisional Application

The rule of *pacta sunt servanda* reflected in VCLT Article 26 stipulates that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith.' It follows that the treaty is binding upon those States that have expressed consent to be bound and the treaty has entered in force for these States. The question thus arises whether a provisionally applied treaty can produce such effects that are reserved to entry into force or is rather of an aspirational nature.

Part III.A assesses the legal effect of provisional application by examining the preparation of VCLT Article 25 (Part III.A.1), international jurisprudence and State practice within the context of judicial proceedings subsequent to the conclusion of the VCLT (Part III.A.2), as well as in the Sixth Committee of the United Nations ('UN') General Assembly ('GA') (Part III.A.3). It then discusses the law applicable in the relationship between States (and IOs) that provisionally apply the treaty and those for which the treaty has entered into force (Part III.A.4). Part III.B distinguishes provisional application from other mechanisms that relate to conduct prior to the treaty's entry into force, namely the obligation not to defeat the object and purpose of the treaty (reflected in VCLT Article 18) and the retroactive application of a treaty.

A. Provisional Application Establishes an Obligation to Apply the Treaty Provisionally

1. Article 25 of the VCLT and its preparatory works

As adopted by the ILC in 1966, Draft Article 22 provided that 'a treaty may […] be applied provisionally if […]'. Despite the verb 'may', the ILC did not intend to suggest that provisional application was aspirational. Read in its immediate context, including sub-paragraph (a)—

[t]he treaty itself prescribes that it shall'—the term 'may' in the chapeau of Draft Article 22 was not intended to suggest that when provisional application has been agreed it does not establish an obligation to apply the treaty. The term simply indicated that provisional application rests on the discretionary agreement of States; States always being free *not* to agree to provisional application. The ILC commentary accompanying Draft Article 22 confirmed this reading, indicating that '[w]hether in these cases the treaty is to be considered as entering into force in virtue of the treaty or of a subsidiary agreement concluded between the States concerned in adopting the text may be a question. *But there can be no doubt that such clauses have legal effect and bring the treaty into force on a provisional basis*.'[59] The commentary to Draft Article 23 on '*pacta sunt servanda*' (now, VCLT Article 26) further, indicated that '*[t]he words "in force" of course cover treaties in force provisionally* under article 22 as well as treaties which enter into force definitively under article 21.'[60]

In the First Session of the Vienna Conference (1968), the Drafting Committee replaced this 'a treaty may […] be applied provisionally' expression with 'a treaty […] is applied provisionally' to avoid the interpretation that the parties were free not to apply a treaty provisionally, even when such application was prescribed by the treaty.[61] Additionally, in the Committee of the Whole, two delegations suggested that *pacta sunt servanda* applied to an agreement to apply the treaty provisionally.[62] In the Second Session of the conference (1969), delegates and officers of the conference made comments in the course of 5 meetings on the

[59] ILC, Draft Articles on the Law of Treaties with commentaries (1966) UN Doc A/6309/Rev.l, 210 [1] (emphasis added) ('ILC Draft Articles on the Law of Treaties').

[60] Ibid 211 [3] (emphasis added).

[61] Vienna Conference, First Session (n 22) 426–27 [24]–[27]. The Committee of the Whole approved this change without discussion. Ibid [28].

[62] Vienna Conference, First Session (n 22) 150 [50] (Ecuador); ibid 157 [59] (Indonesia).

then Article 22 (on provisional application) and on the then Article 23 (on *pacta sunt servanda*) supporting that *pacta sunt servanda* applies to provisional application.

In the 11th Plenary meeting, the UK delegation pointed out its understanding that the *pacta sunt servanda* rule applied to the provisional application of treaties.[63] India was the only delegation that stated that the principle only governed treaties in force.[64] Instead 9 other States stated that *pacta sunt servanda* applied to provisional application.[65] Among them, Yugoslavia made a written proposal for a new article that would read 'Every treaty applied provisionally in whole or in part is binding on the contracting States and must be performed in good faith'.[66] Israel 'doubted the usefulness of the Yugoslav amendment […] It would be remembered that the text of article 22 had been changed at the first session so as to show clearly that the provisional application of a treaty was in every case the result of agreement between the parties. It would not therefore be wise to adopt a provision which might throw doubt on the validity and applicability of such an agreement.'[67] On the basis of these statements, the President of the Plenary Meeting, Roberto Ago, stated:

[…] no one doubted the soundness of the Yugoslav and Colombian amendments. In the light of the interpretative statements just made, it was obvious that the expression "treaty in force" also covered treaties applied provisionally and that the same was true of the expression "in good faith".[68]

[63] Vienna Conference, Second Session (n 23) 40 [58] (UK).

[64] Ibid 41 [70] (India).

[65] Ibid 39 [53] (Guatemala); ibid 40 [62] (Iran); ibid 41 [73] (Greece); ibid 47 [33] (Norway); ibid 47 [44] (Colombia); ibid 48 [50]-[51] (Yugoslavia); ibid 48-49 [58] (Romania); ibid 49 [61] (Ukraine); ibid 158 [2]-[3] (Poland).

[66] Vienna Conference, Second Session (n 23) 48 [50]-[51] (Yugoslavia). Colombia also made an oral amendment proposal. Ibid 47-48 [45].

[67] Vienna Conference, Second Session (n 23) 49 [62].

[68] Ibid 49 [63].

The Drafting Committee rejected the Yugoslav proposal, but not because it considered that *pacta sunt servanda* did not apply to provisional application. The Chairman of the Drafting Committee, Mustafa Yasseen, stated that:

> The Drafting Committee considered that […] *provisional application also fell within the scope of article 23 on the* pacta sunt servanda *rule*. [T]he Drafting Committee considered that it would be better not to state such an obvious fact. The principle of *pacta sunt servanda* was a general rule, and it could only weaken it to emphasize that it applied to a particular case.[69]

2. Judicial Decisions and State Practice within Judicial Proceedings

In recent years, the binding effect of provisional application has been contested. In *Ioannis Kardassopoulos v. Georgia* ('Kardassopoulos v. Georgia'), a Greek investor claimed that Georgia had expropriated a pipeline construction concession and failed to reimburse him for the loss of his investment. Both Greece and Georgia signed the Energy Charter Treaty ('ECT') on 17 December 1994. The measures complained of took place between 1995 and 1997, when both Greece and Georgia provisionally applied the ECT. Kardassopoulos argued that under Article 45(1) of the ECT Georgia was bound by the Treaty's obligations between the date of its signature and the entry into force of the ECT. On the other hand, Georgia argued that provisional application was 'only aspirational' and thus it had no legal obligation to refrain from expropriation during the ECT's provisional application.[70]

In 2007, contrary to Georgia's argument, the Tribunal reasoned that 'properly interpreted' ECT Article 45(1) obliged both States to apply the whole Treaty as if it had entered into force on 17 December 1994, the date on which they both had signed it. More specifically, it pronounced:

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[69] Vienna Conference, Second Session (n 23) 157 [47] (emphasis added).

[70] *Ioannis Kardassopoulos v Georgia* (Decision on Jurisdiction) (6 July 2007) ISCID Case No. ARB/05/18, [84].

209. Applying the ECT provisionally is used in contradistinction to its entry into force: '[...] agrees to apply this Treaty provisionally pending its entry into force [...]'. Provisional application is therefore not the same as entry into force. But the ECT's provisional application is a course to which each signatory 'agrees' in Article 45(1): it is (subject to other provisions of the paragraph) thus a matter of legal obligation. The Tribunal cannot therefore accept Respondent's argument that provisional application is only aspirational in character. […]

211. It follows that the language used in Article 45(1) is to be interpreted as meaning that each signatory State is obliged, even before the ECT has formally entered into force, to apply the whole ECT as if it had already done so.[71]

In 2009, in *Yukos Universal Ltd. (UK—Isle of Man) v. The Russian Federation* ('*Yukos v. Russia*'), *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* ('*Hulley v. Russia*') and *Veteran Petroleum Limited (Cyprus) v. The Russian Federation* ('*Veteran Petroleum v. Russia*') the Tribunal was concerned with the complaints of Yukos, Hulley and Veteran Petroleum respectively that Russia had expropriated their investment contrary to the ECT, at a time when the ECT was provisionally applicable for Russia.[72] The case revolved around the interpretation of Article 45 of the ECT. Russia did not contest that *pacta sunt servanda* applies to provisional application,[73] and the Tribunal was not directly concerned with this question.

In 2016, The Hague District Court reversed all three cases – *Yukos v. Russia*, *Hulley v. Russia* and *Veteran Petroleum v. Russia*.[74] Here too, however, the court did not contest that

[71] Ibid [209], [211].

[72] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No AA 226; *Yukos Universal Ltd. (UK—Isle of Man) v. Russian Federation*, PCA Case No AA 227; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No AA 228, UNCITRAL (Energy Charter Treaty), Interim Award on Jurisdiction and Admissibility, 30 November 2009.

[73] *Yukos v. Russia* (n 72) [71].

[74] *The Russian Federation v. Veteran Petroleum Limited* (C/09/477160 / HA ZA 15-1), *The Russian Federation v. Yukos Universal Limited* (C/09/477162 / HA ZA 15-2), *The Russian Federation v. Hulley Enterprises Limited* (C/09/481619 / HA ZA 15-112), Hague District Court, Judgement, 20 April 2016, available at:

under international law provisional application of treaties is binding. Nor had Russia contested before the Court that provisional application produced binding legal effects.

3. Responses of Governments in the Sixth Committee to the ILC's Work on Provisional Application of Treaties (2016-2018)

The statements of governments (and IOs) to the ILC's work on the topic of Provisional Application in the UNGA Sixth Committee indicate that States consider that the provisional application is governed by *pacta sunt servanda* in the sense that (once it takes effect) it establishes an obligation on States (and IOs) to apply the treaty provisionally. From 2012, when the Commission decided to include the topic in its programme of work, to 2018, once the topic was adopted on first reading,[75] numerous States made statements accepting that provisional application establishes an obligation on States (and IOs) to apply the treaty provisionally.[76]

4. Legal Effects in the Relationship Between Parties and Those Provisionally Applying the Treaty

VCLT (and 1986 VCLT) Article 25 is not express about which law governs the relationship between States (and/or IOs) that provisionally apply the treaty (or treaty provisions) and States (and/or IOs) that have become parties to the main treaty that is being provisionally applied. As explained in Part V, for those States (and IOs) for which the treaty has entered in force, the provisional application has been terminated, as indicated in Article 25(1). Neither the ILC's

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<https://www.italaw.com/sites/default/files/case-documents/italaw7258.pdf> ('Hague *Yukos/Hulley/Veteran Petroleum* Judgement')

[75] Governments have until 15 December 2019 to submit written comments to the UN Secretary-General. At the time of this volume's publication, there were no written comments available on the first reading of the Draft Articles on Provisional Application. See ILC, 'Report on its work in its seventieth session' (n 10) 203 [88].

[76] UNGA Sixth Committee, 73rd session (October 2018): 4 (Statement of China); 4 (Statement of Czech Republic); [3] (Statement of Ireland); 3 (Statement of Romania). Available at: https://papersmart.unmeetings.org/ga/sixth/73rd-session/statements/.

work on the law of treaties before the conclusion of the VCLT nor the Vienna Conference negotiations shed light on the law applicable to the relationship between these groups of States (and/or IOs).

However, logically, provisional application (of the treaty or treaty provisions) governs that relationship: the provisional application agreement continues to apply. The VCLT does not exclude this proposition, and international jurisprudence may implicitly support it. For instance, *Hulley v. Russia* and *Veteran Petroleum v. Russia* involved a Cypriot investor and *Yukos v. Russia* involved a UK-Isle of Man investor. Cyprus and the UK were ECT parties when the facts complained occurred and when the arbitration claim was brought by the claimants against Russia, which (the Tribunal found that it) applied the treaty provisionally.[77] The ILC Draft Guidelines on Provisional Application adopted on first reading do not address this issue. It may be useful for States (and IOs) if the ILC addressed and thus clarified this question during its consideration of this topic on second reading.

B. Distinguishing Provisional Application from Other 'Institutions'

1. Provisional Application and the Obligation Not to Defeat the Treaty's Object and Purpose

[77] In the context of investor-State arbitrations, this issue may come up concerning whether the claimants were 'investors' within the meaning of ECT Article 1(7)(a)(ii), pursuant to which 'a company or other organization organized in accordance with the law applicable in that *Contracting Party*'. In *Hulley v. Russia* and in *Veteran Petroleum v. Russia*, the Tribunals noted that the claimants were incorporated in Cyprus and that the ECT had entered in force for Cyprus in order to conclude that the claimants were investors within the meaning of ECT Article 1(7). *Hulley v. Russia*, (n 72) [405], [411]-[417]; *Veteran Petroleum v. Russia*, (n 72) [405], [411]-[417]. Similarly, in *Yukos v. Russia*, the Tribunal noted that the UK had expressed consent to be bound (implicitly acknowledging that the ECT had entered in force for it), before concluding that the claimant was an investor under Article 1(7). *Yukos v. Russia*, (n 72) [404], [411]-[417]. Their reasoning may suggest implicitly that the ECT applied provisionally in the relationship between the provisionally applying State and the parties (albeit a case by a claimant of a provisional applying State against a party might have illustrated more vividly such a reasoning).

Provisional application resembles the obligation not to defeat the object and purpose of the treaty, set forth in VCLT Article 18. Both require States to take conduct prior to a treaty's entry into force. However, the obligation set forth in VCLT Article 18 is a default (and customary)[78] obligation. It exists irrespective of whether States agree to such an obligation vis-à-vis a treaty. Moreover, its effects are limited to prohibiting conduct that would defeat the treaty's object and purpose. In contrast, provisional application depends on the agreement of States (and/or IOs), and establishes an obligation to apply the treaty provisionally to facts prior to the treaty's entry into force.

2. Provisional Application and Retroactive Application

Provisional application also differs from the retroactive application of a treaty. The treaty's retroactive application means that the treaty applies to facts that occurred prior to the application of the treaty. In contrast, provisional application entails that the treaty applies (prior to entry into force, but) to present and future facts (not to past facts).[79]

IV. The Relationship between Provisional Application and Domestic Law

Provisional application involves an invitation to dispense with the normal domestic treaty-making procedures. However, how provisional application is accommodated by each State depends on its domestic (constitutional) law. States whose domestic law permits provisional application without prior completion of the normal treaty-making procedures may use all the advantages of provisional application. Other States have domestic laws that either do not recognize—or actually prohibit—provisional application. In such cases, treaties subject to

[78] See J Charme, 'The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of the Enigma' (1991-1992) 25 G.W. J Int'l L & Econ 71-92.

[79] D Bindschedler-Robert, 'De la retroactivité en droit international public', in *Recueil d'Etudes de Droit International en Hommage à Paul Guggenheim* (Faculté de droit de l'Université de Genève, Genève, 1968) 178; Quast Mertsch (n 1) 21.

provisional application must follow exactly the same domestic law process as required for ratification.[80] The advantage of provisional application for such States may be that provisional application can still begin for them once their internal processes have been completed and consent to be bound has been given, in lieu of waiting for entry into force in those cases where a particular number of States must consent to be bound in order for the treaty to enter into force.

In relation to this second group of States, delegates in the Vienna Conference recognized that provisional application '[is] an awkward [question], because it cut[s] across the dividing line between international law and internal law'.[81] In a country where the constitution precludes the creation of treaty obligations unless such treaties have first been approved by the legislature, the obligations created during the provisional application period may give rise to legal relations of questionably validity and unconstitutional character.[82] This may explain why numerous States, whose constitution requires parliamentary approval for all international agreements (and thus do not foresee provisional application without such internal approval), have made reservations to VCLT Article 25.[83]

This part examines three issues on the relationship between provisional application and internal law. Part IV.A discusses the rule that internal law cannot justify non-performance of a provisional application agreement. Part IV.B examines the particular issue of provisional

[80] For instance, see Vienna Conference, Second Session (n 23) 39 [53] (Guatemala); ibid 41[77] (Uruguay); UNGA Sixth Committee, 72nd session (October 2017): [9] (Statement of Peru), available at: https://papersmart.unmeetings.org/ga/sixth/72nd-session/agenda/81/; ibid 6 (Statement of Turkey). UNGA Sixth Committee, 73rd session (October 2018): 1 (Statement of Portugal), available at: https://papersmart.unmeetings.org/ga/sixth/73rd-session/statements/.

[81] Vienna Conference, Second Session (n 23) [46] (Switzerland).

[82] Ibid 39 (Guatemala).

[83] See reservations made by Brazil, Colombia, Costa Rica, Guatemala and Peru, at MTDSG Reference XXIII-1: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

application clauses subjecting provisional application to internal law, elaborating on the *Yukos* arbitration and the reversal decision in a domestic Dutch court. Part IV.C then explores whether the fact that consent to be bound by provisional application has been given in violation of an internal law can be invoked as a ground for invaliding consent to be bound by the provisional application agreement.

A. Internal Law Cannot Justify Non-Performance of Provisional Application

It follows from VCLT Article 27 that a State that has agreed to apply a treaty provisionally cannot invoke its domestic law in order to justify non-performance of the provisionally applied treaty. This is the logical corollary of the fact that *pacta sunt servanda* applies to provisional application (as shown in Section 3 above).[84] However, this rule does not apply to clauses within the provisional application agreement which subject provisional application to consistency with internal law.

B. Subjecting Provisional Application to Consistency with Internal Law

Some provisional application agreements include clauses that expressly subject provisional application to consistency with internal law of a State. Examples include Article 45(1) of the ECT, which provides that: '[e]ach signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations'.[85] But, there are also examples of bilateral treaties that do include such clauses (with variations).[86]

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[84] See also Draft Guidelines on Provisional Application (n 9) Draft Guideline 10.

[85] ECT (n 31), art 45(1).

[86] See eg Agreement between Spain and El Salvador on air transport 2023 UNTS 341, Article XXIV(1) ('The Contracting Parties shall provisionally apply the provisions of this Agreement from the time of its signature to the extent that they do not conflict with the law of either of the Contracting Parties'); Agreement between Germany and Serbia and Montenegro regarding Technical Cooperation, 2424 UNTS 167, 190 (Article 7(3): provisional application shall be "in accordance with appropriate domestic law").

In these cases, the precise relationship of provisional application with the internal law is a matter of treaty interpretation. Issues of such treaty interpretation have arisen in recent years in the context of investment arbitrations under the ECT, most notably in the Tribunal's reasoning in *Yukos v. Russia* and the Dutch court decision that overturned it. Although the matter remains in litigation, it is possible to draw some interim conclusions from the 'Yukos saga' to date.

1. Yukos v. Russia, *Hulley v. Russia*, and *Veteran Petroleum v. Russia (2009)*

In in *Yukos v. Russia*, *Hulley v. Russia*, and *Veteran Petroleum v. Russia* (only *Yukos v. Russia* is cited here) the Tribunal's jurisdiction revolved around Article 45(1) of the Energy Charter Treaty, which provides that: 'Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.' Russia signed the ECT on 17 December 1994 without making any declaration. The ECT was submitted to the State Duma for ratification on 26 August 1996, but since then, no formal decision has been adopted. On 20 August 2009, pursuant to ECT Article 45(3)(a), Russia notified its intention not to become party to the ECT.

Russia never claimed that ECT Article 45 was not binding on it because the provision was contrary to its internal law. Rather it claimed that provisional application under Article 45(1) did not apply to Russia because the conditions for the provision's application had not been satisfied. More specifically, Russia argued that the wording 'to the extent that such provisional application is not inconsistent with its constitution, laws, or regulations' (the 'Limitation Clause') requires that each provision of the ECT (as provisionally applied) be consistent with its constitution, laws or regulations.

The Tribunal rejected Russia's interpretation. It pronounced that the correct interpretation of the ECT is that the Limitation Clause requires that the 'principle of provisional application' is consistent with the domestic constitution, law or regulations of the signatory.[87] It introduced an 'all-or-nothing' standard: either the entire Treaty is applied provisionally, or it is not applied provisionally at all.[88] For the Tribunal, Russia's interpretation that Article 45(1) allowed signatories to 'pick and choose' was not in harmony with the 'grain of international law'.[89] It continued:

Under the *pacta sunt servanda* rule and Article 27 of the VCLT, a State is prohibited from invoking its internal legislation as a justification for failure to perform a treaty. [T]his cardinal principle of international law strongly militates against an interpretation of Article 45(1) that would open the door to a signatory, whose domestic regime recognizes the concept of provisional application, to avoid the provisional application of a treaty (to which it has agreed) on the basis that one or more provisions of the treaty is contrary to its internal law. Such an interpretation would undermine the fundamental reason why States agree to apply a treaty provisionally. They do so in order to assume obligations immediately pending the completion of various internal procedures necessary to have the treaty enter into force.[90]

The Tribunal then pronounced that

[I]nternational law and domestic law should not be allowed to combine […] to form a hybrid in which the content of domestic law directly controls the content of an international legal obligation. This would create unacceptable uncertainty in international affairs. Specifically, it would allow a State to make fluctuating, uncertain and un-notified assertions about the content of its domestic law, after a dispute

[87] *Yukos v. Russia* (n 72) [394].

[88] Ibid [311].

[89] Ibid [312].

[90] Ibid [313].

has already arisen. […] *A treaty should not be interpreted so as to allow such a situation unless the language of the treaty is clear and admits no other interpretation*.[91]

As a result, the Tribunal further found that by virtue of ECT Article 45(3), the obligations under ECT paragraph (1) to apply parts of the treaty on investment protection and dispute settlement to investments made in its territory by covered investors during the provisional application period remain in effect with respect to such investments for twenty years following the effective date of termination—that is, until 19 October 2029. The Tribunal's reasoning has been criticized in literature.[92] It has also been reversed by a domestic court.

2. Russia v. Yukos, Hulley and Veteran Petroleum (2012)

In *Russia v. Yukos, Hulley and Veteran Petroleum*, Russia requested the reversal of the Arbitral Tribunal's decision to entertain jurisdiction in *Yukos v. Russia*, *Hulley v. Russia*, and *Veteran Petroleum v. Russia*.[93] It contested the Tribunal's interpretation of ECT Article 45(1). The question revolved around whether or not the Limitation Clause should be interpreted in such a way that this clause relates to the *pacta sunt servanda* principle – in which case the possibility of applying the ECT (as a whole) provisionally depends on whether national law provides for this principle – or that the provisional application of the ECT is limited to the treaty provisions that are not contrary to national law.

The Hague District Court relied on the customary rules on treaty interpretation set forth in VCLT Articles 31 and 32. It disagreed with the Tribunal's analysis concerning the ordinary meaning of terms[94] and the object and purpose of the ECT.[95] Contrary to the Arbitral Tribunal,

[91] Ibid [315] (emphasis added); see also ibid [320] (same reasoning repeated).

[92] See eg T Gazzini, Provisional Application of the ECT in the Yukos Case (2015) 30 ICSID Rev 293–302.

[93] Hague *Russia v. Yukos/Hulley/Veteran Petroleum Judgement* (n 74).

[94] See eg ibid [5.13].

[95] Ibid [5.19].

it did not resort to preparatory works since it considered that the interpretation reached by use of the rule set forth in VCLT Article 31 was not ambiguous.[96] In relation to the ECT's object and purpose, more specifically, the Court disagreed with the Tribunal 'that the interpretation of the Limitation Clause [that the Tribunal] had rejected supposedly conflicted with the object and purpose of the ECT and the nature of international law [on the ground of] the *pacta sunt servanda* principle of Article 26 VCLT and the associated principle, laid down in Article 27 VCLT […].'[97] For the Court, the rules set forth in VCLT Articles 26 and 27 'do not automatically lead to the interpretation of Article 45 as applied by the Tribunal.'[98] It continued:

> […] Signatories to a treaty can explicitly limit the provisional application of treaty provisions, as becomes apparent from Article 25 VCLT which reads as follows, in so far as is relevant: "A treaty or a part of a treaty is applied provisionally pending its entry into force if (a) the treaty itself so provides". […]. In this case, the Signatories to the ECT have explicitly laid down in the Limitation Clause in Article 45 paragraph 1 ECT […] that the scope of the provisional application is limited to treaty provisions that are not contrary to national law. Even while it is possible that provisions of national law can stand in the way of the performance of one or more provisions of the ECT, the basis for doing so is encased in the ECT itself – i.e., at treaty level. [A] state that relies on a conflict between a treaty provision and national law, on sound grounds and referencing the Limitation Clause, *does not act contrary to the* pacta sunt servanda *principle, nor to the principle of Article 27 VCLT*. [T]he fact that the invocation of a provision of national law can lead to a discussion about the meaning of the contents of [the] said provision and thus result in uncertainty in international matters, does not affect this. After all, that is inherent in the Limitation Clause contained in the ECT.[99]

Yukos, Hulley and Veteran

[96] Ibid.

[97] Ibid.

[98] Ibid.

[99] Ibid (emphasis added).

Petroleum appealed the District Court's Judgment. The Hague Court of Appeal did not deal with and thus did not reverse the reasoning of the District Court's analysed above.[100]

3. Interim Conclusions regarding the 'Yukos saga'

This chapter is not intended to analyse exhaustively ECT Article 45 or to serve as a commentary on the *Yukos cases*. Rather it discusses these cases to demonstrate some common issues likely to arise from similar Limitation Clauses in other provisional application agreements.

Some authors have supported the reasoning of the Tribunal in *Yukos v. Russia* by suggesting that '[ECT] Article 45(1) seems to set [the principle embodied in VCLT Article 27– namely that a state may not invoke its internal law to escape *pacta sunt servanda*—] aside'.[101] This proposition is misplaced. A 'Limitation Clause' is designed precisely to avoid a conflict between the provisional application agreement (international law) and domestic law.[102]

Nonetheless, the rules set forth in VCLT Articles 26 and 27 may—pursuant to VCLT Article 31(3)(c)—be understood as 'relevant [customary] rules of international law applicable in the relations between the parties'. As such, interpreters are obliged to take them into account

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[100] *Veteran Petroleum Limited (Cyprus) v. The Russian Federation* (C/09/477160/HA ZA 15-1), *Yukos Universal Ltd. (UK—Isle of Man) v. Russian Federation* (C/09/477160/HA ZA 15-2), *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (C/09/477160/HA ZA 15-3), Hague Court of Appeal, Judgement, 25 September 2018. Available at: https://www.italaw.com/sites/default/files/case-documents/italaw10081.pdf.

[101] Y Banifatemi, 'Provisional Application of the Energy Charter Treaty: the Negotiating History of Article 45' in G Coop (ed), *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty* (Juris Publishing, New York, 2011) 219; see also M Belz, 'Provisional Application of the Energy Charter Treaty: *Kardassopoulos v. Georgia* and Improving Provisional Application in Multilateral Treaties' (2008) 22 Emory Int'l L Rev 727, 731–732 (criticizing the Tribunal's reasoning in *Kardassopoulos v. Georgia* as violating customary international law since 'Article 27 VCLT prohibits states from invoking their internal laws as justification for their failure to perform a treaty').

[102] U Klaus, 'The Gate to Arbitration: The *Yukos Case* and the Provisional Application of the Energy Charter Treaty in the Russian Federation' (2005) 2 Trannat'l Disp Mgmt 8; T Ishikawa, 'Provisional Application of Treaties at the Crossroads between International and Domestic Law' (2016) 31 ICSID Review 270, 281.

together with the context in interpreting the 'Limitation Clause'. And although the Tribunal did not expressly suggest this, its reasoning may be understood as having taken into account the rules set forth in VCLT Articles 26 and 27 alongside an emphasis on the need for the treaty's effective interpretation.[103] The Dutch District Court (correctly, as far as the current author is concerned) found that the rule set forth in VCLT Article 27 does not apply directly to the situation of a Limitation Clause. Yet, the court stopped there—it did not take into account the rules set forth in VCLT Articles 26 and 27 in then interpreting that limitation clause (nor is it clear whether it did so because it considered these rules irrelevant or not applicable in the relationship between the parties and thus beyond the scope of the rule in VCLT Article 31(3)(c)).

If the wording of the ECT 'Limitation Clause' is interpreted, as the Dutch court did, to carve out from the scope of provisional application particular domestic laws that are inconsistent with the obligations under the ECT as provisionally applied, a problem of uncertainty arises because the 'Limitation Clause' does not specify (nor does it require signatories to specify) the domestic laws in issue. Because of the vagueness of the language 'constitution, laws or regulations' in the Limitation Clause, no other ECT Contracting Party (or investors) may determine with certainty which ECT obligations are provisionally applicable for each Signatory.[104] This is the case in relation to ECT provisions that protect investors but also those dealing strictly with inter-ECT Contracting Parties relationships, such as trade and transit. If, instead of including such a Limitation Clause, a State decided to place a reservation

[103] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility* (Judgment) [1995] ICJ Rep 6, 19 [35]; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russia)* (Provisional Measures) [2008] ICJ Rep 353 [134] (15 October 2008).

[104] M Arsanjani and M Reisman, in E Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (OUP, Oxford 2011) 86-102, at 101.

to the provisional application agreement excluding the legal effect of certain ECT provisions in their (provisional) application to that State 'to the extent that such provisional application [is] inconsistent with its [domestic laws]', such a reservation could, according to the ILC, be invalid. This would not be 'because it aims to preserve the integrity of specific rules of internal law',[105] but because it would be vague (it would not be clear which domestic rules are not inconsistent with provisional application),[106] making it incompatible with the treaty's object and purpose of the treaty, and thereby running afoul of VCLT Article 19(c).[107] Clauses that introduce such an uncertain 'piecemeal effect' may thus be used as a technique for avoiding what might otherwise constitute an invalid reservation.

C. Invalidation of Consent to be Bound by the Provisional Application Agreement

For States whose constitution prohibits provisional application of treaties without the involvement of the legislature (or for States whose constitution permits provisional application of only some treaties or only under some conditions that relate to domestic procedures), the question arises whether the rule set forth in VCLT Article 46 applies to the agreement to apply

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[105] ILC, 'Guide to Practice on Reservations to Treaties' [2011] YBILC, vol II(2), 383 [7] ('Guide to Reservations Practice'). Guideline 3.1.5.5 on reservations relating to internal law provides that '[a] reservation by which a State […] purports to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in order to preserve the integrity of specific rules of the internal law of that State […] in force at the time of the formulation of the reservation may be formulated only insofar as it does not affect an essential element of the treaty nor its general tenour.' Ibid. For a consideration of the ILC Guide to Reservations Practice, see E Swaine in Chapter XX of this volume.

[106] Guide to Reservations Practice (n 105), Guideline 3.1.5.2: 'A reservation shall be worded in such a way as to allow its meaning to be understood, in order to assess in particular its compatibility with the object and purpose of the treaty'. The ILC commentary accompanying the Guide to Reservations Practice explains that '[in cases where] a reservation [that] invokes the internal law of the State that has formulated it without identifying the provisions in question" as 'the vagueness and generality of the reservations referring to domestic law [makes] it impossible for the other States parties to take a position on them.' Ibid 364-365 [4]. For this reason, such a reservation is incompatible with the treaty's object and purpose. See ibid 367 [8].

[107] According to the ILC, an impermissible reservation is invalid (null and void). Ibid (Guideline 4.5.1). For more on the admissibility of reservations and the consequences of an invalid reservation, see Chapter 12.

the treaty provisionally.[108] Constitutional rules that limit the capacity of a State to provisionally apply a treaty or restrict the capacity of the executive to consent to be bound by an agreement to provisionally apply a treaty could fall within the meaning of 'domestic rules of fundamental importance', which determine the scope of the customary rule set forth in VCLT Article 46. That rule permits invalidation of the consent to be bound only if the consent involved a manifest breach of a domestic law rule of fundamental importance regarding the competence to conclude treaties. Such a domestic law rule may be a constitutional requirement that subjects consent to be bound by any agreement—including an agreement to apply a treaty provisionally—to a parliamentary decision. As discussed in Chapter 23, the threshold for invalidating consent under Article 46 is quite high: it requires a manifest violation of such internal law for invalidation; a nonmanifest violation does not entail such an effect. According to VCLT Article 46(2), '[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.' In *Cameroon v. Nigeria* (2002), the ICJ pronounced that while domestic rules concerning the authority to sign treaties for a State are rules of fundamental importance, the limitation on a head of State's capacity (and by implication the capacity of the head of government and the minister of foreign affairs) to perform this function was not manifest unless properly publicized given these officials' authority for the purpose of performing all acts relating to a treaty under the VCLT and customary international law.[109]

[108] 3270th ILC Meeting (n 1) 16 (Šturma).

[109] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303 [265], [266] The Court also found that States are not under a general legal obligation to keep themselves informed of legislative and constitutional developments in other States. Ibid [266]. As such, the fact that the constitutional requirement was public under Nigeria's domestic law did not mean that its breach was manifest under VCLT Article 46(2).

The application of the rule set forth in VCLT Article 46 may flow logically, since provisional application is based on an international agreement. The ILC Draft Guide to Provisional Application supports the proposition that VCLT Article 46 or a rule *mutatis mutandis* applies to agreements on provisional application.[110] However, it is not beyond doubt that this rule applies to provisional application agreements. For instance, in *Yukos v. Russia*, James Crawford, in his expert opinion, stated that the scope of VCLT Article 46 'does not cover provisional application, but only definitive acceptance.'[111]

Under the law of treaties, termination and invalidity are different legal concepts with different legal consequences. Termination and withdrawal operate *ex nunc*, while invalidity of the treaty and of one's consent to be bound operates *ex tunc*.[112] If the rule set forth in Article 25(2) on termination of provisional application was intended to be exclusive of grounds of invalidity, some evidence is required that those grounds had been considered and a choice was made to displace them. If there is no evidence to the contrary, the *lex specialis* argument can be made only in relation to other grounds of termination.

Despite the fact that numerous States whose constitutions do not permit provisional application raised their concerns about what became Article 25, this issue was not specifically discussed in the Vienna Conference. Italy asked whether in provisional application under paragraph 2 'termination [would] take effect *ex tunc* or *ex nunc*?[113] Uganda stated that the 'termination [of provisional application] [meant] that the State […] was later able to withdraw

[110] Draft Guidelines on Provisional Application (n 9) Draft Guideline 11.

[111] *Yukos v. Russia* (n 72) [220].

[112] F Capotorti, 'L'Extinction et la Suspension des Traités' (1971) 134 RcD 417-587, at 457.

[113] Vienna Conference, Second Session (n 23) 42 [84].

from the obligation.'[114] Uganda's delegate proposed the following amendment to paragraph 2 of the provision:

"[…] the provisional application of a treaty or a part of a treaty with respect to a State *shall not take place* or shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty."[115]

Uganda's proposal entailed that, by notification, the signatory would choose either to withdraw from provisional application or invalidate its consent to be bound by the provisional application agreement. There was no proposal to introduce a separate invalidation procedure. However, paragraph 2 remained unchanged, even though the Drafting Committee was requested to consider Uganda's proposal.[116] It is not clear what was the reasoning behind not introducing grounds of invalidation for a provisional application agreement. It is true that other Vienna Conference delegates and officers never argued that the rule of invalidation of consent to be bound set forth in VCLT Article 46 applied and thus there was no need for such an insertion in VCLT Article 25(2). This is despite the fact that Humphrey Waldock, who served as an Expert Consultant to the negotiations, indicated that 'article 22 did not seem to involve any real risks to States which might have very strict constitutional requirements because […] there was no need for the State concerned to resort to the procedure of provisional application at all.'[117] Waldock thus seemed unconvinced about the value of addressing invalidation of provisional application.[118] Such limited consideration of this issue in the negotiations indicates that there was no concrete understanding that the grounds of invalidation set forth in VCLT Article 46 would be available to—or excluded from—provisional application. However, even the attempt

[114] Ibid 43 [93].

[115] Ibid (emphasis added).

[116] Ibid [97].

[117] Ibid [90].

[118] Vienna Conference, Second Session (n 23) [94].

to introduce a ground for the invalidation of provisional application was proposed within what became VCLT Article 25(2). This may suggest that the drafters perceived provisional application as a special regime within the law of treaties, and may support the argument that the grounds of termination envisaged in the rule set forth in Article 25 exclude the general grounds of termination and invalidation of treaties from the scope of provisional application.

At the time of this edition's publication, there is no evidence of State (or IO) practice that the rule set forth in VCLT Article 46 (and Article 46 of the 1986 VCLT) applies to provisional application agreements. The written observations of governments to the first reading of the Draft Guidelines on Provisional Application may clarify this issue in the future.

V. Termination of Provisional Application

Article 25 envisages three ways in which provisional application can be terminated. First, VCLT Article 25(1) stipulates that the treaty 'is applied provisionally pending its entry into force'. The provisional application of a treaty (or part of it) terminates upon the treaty's entry into force.[119] This is confirmed by the VCLT's preparatory works discussed part V.A below.

Second, VCLT Article 25(2), by deferring to situations where 'the negotiation States have otherwise agreed', envisages that provisional application may be terminated by agreement. This may be part of the main treaty (that is being provisionally applied) or it may be a separate agreement made by all States who agreed on the provisional application.[120] Although the wording '[u]nless the treaty otherwise provides or the negotiating States have otherwise agreed' gives the impression that the agreement establishing the entitlement to withdraw from

[119] Mathy (n 6) at 652-653 [28]; IM Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed MUP, Manchester 1984) 46 (implicitly).

[120] See eg Arrangement on Provisional Application of the Agreement on the Establishment of the ITER (International Thermonuclear Experimental Reactor) International Fusion Energy Organization for the Joint Implementation of the ITER Project (16 December 2006) OJ L0081, 358, Arts 4-5 (providing for withdrawal from provisional application on 120 days written notice).

provisional application has to pre-exist, it is possible that such an agreement may be established subsequently. This is also confirmed by the preparatory works.[121]

Third, a treaty's provisional application can be terminated 'if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.' Part V.A discusses the preparatory works for VCLT Article 25(2). Part V.B analyses the consequences of terminating provisional application followed by Part V.C's examination of whether other unilateral grounds of termination may apply to a provisional application agreement.

A. The preparatory works of VCLT Article 25(2)

The ILC had included in the first reading of the Draft Articles on the Law of Treaties (1962) that provisional entry in force continued 'until *either the treaty [had] entered into force definitively* or the States concerned [had] *agreed* to terminate the provisional application of the treaty' (Draft Article 24).[122] On the basis of a comment by Sweden,[123] Waldock, as Special Rapporteur, made a new proposal in 1965: the treaty would continue to be in force provisionally until either its definitive entry into force or until 'it [would] have become clear that one of the parties [would] not ratify or, as the case may be, approve it'.[124] The relevant sentence was eventually deleted from Draft Article 22 on the second reading. The accompanying commentary explained that 'the Commission decided to dispense with the

[121] As Expert Consultant, Waldock, explained '[t]he International Law Commission had discussed [the question of termination of provisional application] and in its earlier drafts had actually made provision for termination. [I]t had arrived at the conclusion that the contents of any provision on the subject of termination would either go without saying, or would be covered by article 51 on the termination of treaties by agreement.' Vienna Conference, First Session (n 22) 145 [20].

[122] [1962] YBILC, vol I 259 [37] (emphasis added) (Article 21); [1962] YBILC, vol II, 182.

[123] H Waldock, 'Fourth Report on the Law of Treaties' [1965] YBILC, vol II, 58 (Sweden).

[124] Ibid 58 [3].

provision and to leave the point to be determined *by the agreement of the parties and the operation of the rules regarding termination of treaties*'.[125]

The Vienna Conference included the termination provision (paragraph 2). This change eased concerns that provisional application might thwart compliance with a State's constitutional law since the executive could terminate a treaty's provisional application should a parliamentary body indicate that it would not consent to the treaty or to its provisional application. At the first session of the Vienna Conference (1968), the US delegate proposed the insertion of the following paragraph: 'Provisional application of a treaty or part of a treaty may terminate as agreed by the States concerned or upon notification by one of those States to the other State or States that it does not intend to become definitively bound by the treaty'.[126] Belgium proposed an amendment to the US proposal noting '[t]here was no question in that case of applying the provisions of article 53 of the draft relating to denunciation of treaties […]. It should therefore suffice to terminate provisional application if the State concerned manifested its wish not to become a party to the treaty.'[127] Hungary and Poland proposed the insertion of a requirement to give notice of termination of a provisional application.[128] These amendments were referred to the Drafting Committee,[129] which introduced text that took into account the various proposals. The Committee of the Whole then adopted without a vote the text (Article 22(2)), which reads as the current text of VCLT Article 25(2).[130]

[125] [1966] YBILC, vol II, 210 [4] (emphasis added).

[126] Conference, First Session (n 22) 140 [24] (oral proposal).

[127] Ibid 142 [42] (Belgium); see also ibid 142 [45] (France).

[128] Ibid 144 [6] (Belgium: UN Doc A/CONF.39/C.1/L.194; and Hungary and Poland: UN Doc A/CONF.39/C.1/L.198).

[129] Vienna Conference, First Session (n 22) 146 [28]-[29].

[130] Ibid 426-427 [24]-[28].

At the second session of the Vienna Conference (1969), numerous States made statements relating to termination of provisional application. The UK stated its understanding 'that the inclusion of the phrase "pending its entry into force" […] did not preclude the provisional application of a treaty by one or more States after the treaty had entered into force definitively between other States. A regime where a treaty had entered into force definitively between certain States, but was nonetheless being applied provisionally by other States, was not unknown in international practice.'[131] India expressly agreed with this understanding.[132] No State objected. However, it was not clarified which would be the applicable law in the relationship between those that were parties to the treaty and those that were applying the treaty provisionally. However, as explained in Part III.A.4 above, logically, the provisional application agreement applies to that relationship.

B. The Consequences of Termination of Provisional Application and 'Sunset Clauses'

1. Consequences of Termination of Provisional Application

The termination of provisional application produces a similar effect as that of terminating any treaty.[133] The termination of the provisional application agreement releases the parties to the provisional application agreement from any obligation further to perform (provisionally) the 'main treaty or parts of the treaty that was provisionally applied' from the date that termination takes effect. In case of unilateral withdrawal from—or denunciation of—the provisional application agreement, this rule applies in the relations between that State and each of the other parties to the provisional application agreement (and logically any treaty party in the relationship with the State terminating for itself the provisional application agreement) from

[131] Vienna Conference, Second Session (n 23) 40 [56].

[132] Ibid 41 [68].

[133] See VCLT Art 70; Chapter 26 discusses treaty termination extensively.

the date when such denunciation or withdrawal takes effect. In case of termination of provisional application by virtue of the treaty's entry into force for some States (or IOs), as argued in Part III.A.4 above, the provisional application agreement continues to apply in the relationship between the State (or IO) that has become party (and thus for which provisional termination has terminated) and States (or IOs) applying the treaty provisionally.

2. 'Sunset Clauses'

Some provisional application agreements include a 'sunset clause'—a clause that purports to continue the operation of provisional application after the termination or after the withdrawal from the provisional application agreement. An example of such a clause is ECT Article 45(3)(b):

'In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III [Investment Promotion and Protection] and V [Dispute Settlement] with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination.'[134]

The VCLT and the 1986 VCLT do not deal with the specific issue of 'sunset clauses'. However, it is reasonable to argue that 'sunset clauses' attached to a provisional application agreement cannot be affected by the notification of the intention not to become party to the treaty. The whole purpose of the 'sunset clause' is to survive the termination of provisional application. If the notification for terminating the provisional application terminated the 'sunset clause', the 'sunset clause' would be rendered meaningless. The better view is that the option of terminating provisional application by notification cannot (and does not) affect the 'sunset clause' because the latter is necessarily beyond the scope of the entitlement to terminate by

[134] ECT (n 31) Art 45(3)(b).

notification (unless there is unequivocal evidence to the contrary in the provisional application agreement). Alternatively, it may be argued that 'sunset clauses' are based on a separate agreement to the provisional application agreement. As such, they are governed by *pacta sunt servnada*.[135]

C. Notification of One's Intention Not to Become Party to the Treaty

Article 25(2) provides that the State that provisionally applies a treaty or part of it, may terminate provisional application for itself by unilaterally notifying 'the other States between which the treaty is being applied provisionally' of its 'intention not to become a party to the treaty'. In instances where there are States that apply the treaty provisionally and States for which the treaty has entered in force (and there is no agreement to apply the treaty provisionally between a group of States excluding others for which the treaty enters in force), the question arises about to whom the notification has to be made: only to those that provisionally apply the treaty or also those for which the treaty has entered into force? As explained in Part III.A.4 above, the VCLT does not address (and thus does not exclude) the possibility of continuing provisional application (as the minimum common denominator) in the relationship between treaty parties and States (and IOs) that apply the treaty provisionally. Following this reasoning, the notification has to be made not only to those States that only apply the treaty provisionally but also to those that have become parties.

As a separate matter, VCLT Article 18(a) provides that a State that has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval is obliged to refrain from acts that would defeat the treaty's object and purpose, until 'it shall have made its intention clear not to become a party to the treaty.' Given that 'the intention not

[135] Whether – in either of these two different classifications of sunset clauses – unilateral grounds of withdrawal from the sunset clause are available is beyond the scope of this chapter.

to become party to the treaty' can terminate (by virtue of notification) provisional application and the duty under Article 18, the question arises whether the State that notifies its intention not to become party to the treaty terminates provisional application for itself and by virtue of the same notification it also terminates its obligation not to defeat the treaty's object and purpose (under VCLT Article 18). If the State making such notification clarifies that it does or does not release itself also from Article 18, that express choice shall apply.[136] But, in most cases States will not necessarily be express. In such cases, it is reasonable to argue that by virtue of one act the notifying State releases itself from the obligation to perform the provisional application agreement and from the obligation not to defeat the object and purpose of the treaty (unless it clarifies in the notification or by any other manner that it does not release itself from the duty under Article 18).

D. Other Grounds of Termination and Suspension of the Operation of the Provisional Application Agreement

VCLT and 1986 VCLT Article 25 do not expressly indicate whether the other grounds for the invalidation, termination, withdrawal, and suspension of a treaty provided in VCLT Part V Section 3 respectively apply to a provisional application agreement (or the treaty as provisionally applied). It may be argued that the rules on provisional application are *lex*

[136] If one instead considers that provisional application does not continue to govern the relationship between parties and States provisionally applying the treaty, a notification concerning the termination of provisional application would have to be addressed only to the States provisionally applying the treaty and not also to treaty parties. Since Article 18 does not limit the group of States to which the relevant intention has to be made clear (including by notification, which is the relevant case here), it would have to be made to all negotiating States, treaty parties, and those provisionally applying the treaty. The argument could then be made that a notification made to all negotiating States, parties and States applying the treaty provisionally may indicate the intention to terminate solely one's intention to terminate the duty under Article 18, and not to terminate provisional application. However, it is unlikely that a State would seek to release itself of a lesser obligation under Article 18 while remaining bound by the obligation to perform the provisional application agreement.

specialis and exclude all grounds of unilateral entitlement to terminate, invalidate or suspend the operation of the provisional application agreement. In order for Article 25(2) to displace such general grounds, it has to overlap in terms of subject-matter with each general ground and it has to reflect an intention to deviate from these general rules.

The ILC had decided to leave termination to be determined by the agreement of the parties and the operation of the rules regarding termination of treaties,[137] thus implicitly recognizing that general rules on termination (at least) would be available. States in the Vienna Conference, however, considered that unilateral withdrawal from provisional application was exceptional;[138] that '[the provisional application article] *established a special regime* [which] was a similar situation to that which arose in private law in connexion with so-called pre-contractual instruments where a kind of specific relationship was established between a contract and the instruments preceding it;'[139] and that '[t]here was no question in that case of applying the provisions of article 53 of the draft relating to denunciation of treaties […]. It should therefore suffice to terminate provisional application if the State concerned manifested its wish not to become a party to the treaty.'[140]

The ILC Draft Guide to Provisional Application contains a 'non-prejudice clause'—Draft Guideline 9(3)—in relation to all other grounds of termination and suspension set forth in VCLT Part V. In so doing, the ILC has left open the possibility that the grounds for termination (and possibly suspension of the treaty's operation, and invalidation) apply to the provisional application agreement. Some governments (and IOs) in their oral statements in the Sixth Committee (2017-2018) have supported the general proposition that some general termination

[137] [1966] YBILC, vol II, 210 [4].

[138] Iran was reluctant about the fact that the opportunity was given to a signatory to withdraw unilaterally from provisional application. Vienna Conference, Second Session (n 23) 40 [62] and 41 [71].

[139] Ibid, 42 [82] (emphasis added) (Costa Rica).

[140] Vienna Conference, First Session (n 22) 142 [42] (Belgium); see also ibid 142 [45] (France).

or suspension grounds (especially those concerning responses to material breach) may apply to provisional application agreements by analogy.[141] Others have shown reluctance in this respect.[142] Further clarifications may be expected by the ILC and the responses of governments in the coming years.

Conclusions

Provisional application is a useful technique in the treaty-making practice of States (and IOs), which recognizes and addresses the practical realities of modern treaty-making and the (increasing) parliamentary involvement in international affairs. Provisional application is based on an international agreement, and cannot be based solely on a unilateral undertaking. This agreement may take various forms – written, oral or tacit – and has to be made among negotiating States. It brings about the treaty's application (or some of its provisions) prior to the treaty's entry into force, and once triggered it establishes an obligation on the State that is provisionally applying the treaty to perform it (or part of it), pending its entry into force. It thus differs from the default obligation set forth in VCLT Article 18 not to defeat the treaty's object and purpose and from the retroactive application of a treaty.

Provisional application may be terminated: on the date of entry into force of the treaty for each State; by agreement of all parties to the provisional application agreement; or unilaterally by virtue of a notification that the notifying State does not intend to become party to the main treaty. Such notification, however, does not entail the termination of any 'sunset clause' attached to a provisional application agreement and the State remains obliged to perform the

[141] UNGA Sixth Committee, 72nd session (October 2017) 4 (Statement of Austria); ibid [9]-[10] (Statement of the European Union); ibid 4 (Statement of the Czech Republic); ibid 6 (Statement of Spain); ibid 1 (Statement of Thailand. Available at: https://papersmart.unmeetings.org/ga/sixth/72nd-session/agenda/81/.

[142] Urging for caution in this respect see UNGA Sixth Committee, 73rd session (October 2018): 3 (Statement of The Netherlands); 3 (State of Russian Federation). Available at: https://papersmart.unmeetings.org/ga/sixth/73rd-session/statements/.

treaty or some of its provisions after the termination of the provisional application. Further, although the preparatory works suggest reluctance to accept that the grounds of invalidation, termination and suspension apply to the provisional application agreement, in the future, some developments may take place as to whether the ground of termination set forth in VCLT Article 25(2) is exclusive of any other ground of invalidation, termination or suspension set forth in VCLT Part V. This is especially the case, given that the ILC has recently left open this issue in its Draft Guidelines on Provisional Application (on first reading).

A major controversy surrounding provisional application, even at the Vienna Conference, has been the relationship between the obligation to provisionally apply a treaty (under international law) and domestic law. As discussed in this chapter, this relationship takes primarily three forms. First, the general obligation not to justify non-performance of a provisionally applied treaty on the basis of one's domestic law (Part IV.A). Second, the case where the provisional application agreement itself expressly subjects provisional application to consistency with domestic law (Part IV.B). In this case, the rule that a State cannot invoke its domestic law in order to justify non-performance with a provisional application agreement does not apply. The precise relationship between domestic law and provisional application in the case of a clause delineating the scope of provisional application is a matter of treaty interpretation of each clause separately. However, States should be encouraged, when drafting limitation clauses that refer to domestic law, to be clear concerning whether the clause restricts the availability of provisional application (as a principle/institution) or the scope of obligations in the main treaty that are to be applied provisionally. Otherwise such clauses introduce considerable uncertainty for other States that apply the treaty provisionally (and for individuals, such as investors, to the extent that they derive benefits or rights from the provisional application). As the 'Yukos saga' demonstrates, this may lead to protracted disputes and international judicial settlement; indeed that saga has been further extended with confidential

arbitral proceedings in *Yukos Capital v. Russia*,[143] and domestic annulment procedures were brought in Switzerland.[144]

Third, the question whether a State may invalidate its consent to be bound by a provisional application agreement by virtue of the fact that its constitutional law prohibits provisional application or subjects it to certain requirements may be the next frontier in the field of provisional application and its relationship with domestic law (Part IV.B). In principle, the possibility is based on logic. However, the preparatory works indicate that—despite the fact that there was some concern about the need to invalidate consent to be bound rather than to withdraw from provisional application—there was resistance to accepting such a separate consequence, and resistance to accepting invalidation by use of other grounds or procedures than the one provided for in what became VCLT Article 25(2). Since the ILC is currently considering this possibility, future responses of governments are likely to shed light on State practice and *opinio juris*, and may confirm that the rule set forth in Article 25 does not permit grounds for invalidation or they may further develop the law in this respect.

Overall, provisional application enables States (and IOs) to establish treaty relations, rights and obligations, while dispensing with the formalities of effectuating the whole treaty machinery, which may enter in force at a later time (or never). At the same time, under the VCLT (and 1986 VCLT) provisional application can be terminated on the basis of a lower

[143] *Yukos Capital SARL v Russian Federation*, UNCITRAL (Geneva Tribunal), Interim Award on Jurisdiction, 18 January 2017.

[144] *Fédération de Russie c Yukos Capital Sarl*, Arrêt du 20 Juillet 2017, Cour de droit civil, available at <https://www.italaw.com/sites/default/files/case-documents/italaw9253.pdf>. The Federal Swiss Court rejected the request to annul the Arbitral Tribunal's Interim Award on Jurisdiction, because the Tribunal had discarded in a definite manner only three out of five preliminary objections concerning its jurisdiction. Given that the Tribunal had not pronounced on the other two objections (it had decided to deal with them in the merits), the Tribunal had not as yet pronounced that it was competent or not, and thus the Federal Court was unable to deal with the request. Ibid 10-11.

threshold than the stringent requirements provided pursuant to the grounds under Part V of the VCLT (and 1986 VCLT). On the one hand, the termination provision operates as a 'safety net' against the violation of internal constitutional law requirements: it allows States (and IOs) to terminate provisional application at any time after provisional application takes effect for that State (or IO) thus enabling them to return to compliance with internal law, if their internal law prohibits (specifically or by implication) provisional application. On the other hand, it also entails a lesser level of stability and security of relations: States (or IOs) that apply the treaty provisionally may terminate provisional application simply by notifying their intention not to become treaty parties (and irrespective of whether the reason for termination relates to constitutional law).

Despite its risks, provisional application is a useful option available to States (and IOs) on the basis of their contractual freedom, and offers considerable advantages, as discussed in this chapter. This is reflected in the number of provisional application agreements to date. It can be expected that States (and IOs) will continue to use provisional application as an important medium in the field of international law-making.

Bibliography

M Arsanjani and M Reisman, in E Cannizzaro (ed), *The Law of Treaties beyond the Vienna Convention* (OUP, Oxford 2011) 86

RE Dalton, 'Provisional Application of Treaties', in D Hollis (ed), *The Oxford Guide to Treaties* (OUP, Oxford 2012) 220

T Gazzini, Provisional Application of the ECT in the Yukos Case (2015) 30 ICSID Rev 293

ILC, 'Text of the draft guidelines on provisional application of treaties with commentaries thereto adopted by the Commission on first reading' (2018) UN Doc A/73/10, 245-270

T Ishikawa, 'Provisional Application of Treaties at the Crossroads between International and Domestic Law' (2016) 31 ICSID Review 270

H Kriege, 'Article 25: Provisional Application', in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, Berlin 2012) 441

R Lefeber, The Provisional Application of Treaties, in J Klabbers, R Lefeber (eds), *Essays on the Law of Treaties* (Martinus Nijhoff, The Hague/Boston, 1998) 81

R Lefeber, Treaties, Provisional Application, in R Wolfrum (ed), *The Max Planck encyclopedia of public international law* (OUP, Oxford)

D Mathy, 'Article 25' in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties* (OUP Oxford 2011) 639

F Montag, *Völkerrechtliche Verträge mit vorläufigen Wirkungen* (Humboldt, Berlin 1986)

D Vignes, Une notion ambiguë: la mise en application provisoire des traités (1972) 43 Annuaire Français de Droit International 181

A Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Martius Nijhoff, Leiden, 2012)