Provisional Application of Treaties

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I. Introduction

The provisional application of treaties has always raised some concern since its legal effect showed some enigmatic features.1 Accordingly, it could be asked whether the elaboration of a separate article on this issue in the Vienna Convention on the Law of Treaties of 1969 (VCLT), namely its Article 25, might have been a superfluous exercise.

Indeed, already at the Vienna Conference of the Law of Treaties, taking place in 1968 and 1969, amendments had been presented proposing the deletion of the relevant draft article proposed by the International Law Commission (ILC)2 by the United States, supported by Republic of Korea and Republic of Vietnam.3 Fifty years later, the ILC is presently again working

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1 See also D Vignes, ‘Une notion ambiguë: La mise en application provisoire des traités’ (1972) 18 Annuaire Français de Droit International 181.
3 UN Doc A/CONF.39/C.1/L. 154 and Add.1. The delegate of the United States justified the deletion by three reasons: ‘Article 21, paragraph 1, already provided that a treaty entered into force “in such manner” as the negotiating States might agree. Secondly, article 22 failed to define the legal effects of provisional entry into force and could give rise to difficulties of interpretation with respect to other articles of the convention, notably those on observance and termination of treaties. Thirdly, it left unanswered the question how provisional force might be terminated. The article was therefore neither necessary nor desirable.’ UN Doc A/CONF.39/C.1/SR.26, at 140. However, at the 27th meeting of the Committee of the Whole, it was announced that the amendment would not be pressed to a vote, see: United Nations Conference on the Law of Treaties, Documents, UN Doc A/CONF.39/11/Add.2, at 144.
on this topic, but its work raises certain doubts about the usefulness of this kind of a separate treaty application.

Beyond the question of the very utility of this kind of – provisional – treaty application, its mysterious character can be studied in relation to its activation procedure, effects, and termination.

II. Emergence of the Rule on Provisional Application

Despite theoretical misgivings, states very often have resorted to provisional application, and still continue to do so; it is said that the treaties of Münster and Osnabrück of 1648 were the first instance of provisional treaty application. In any case, the most famous recent example is the GATT of 1947, which was provisionally applied until 1995; other examples include various boundary agreements, air service agreements and trade agreements. In recent decades,

4 In 2012, the International Law Commission included the topic ‘Provisional application of treaties’ in its programme of work. Mr Juan Manuel Gómez-Robledo became Special Rapporteur for the topic.

5 See Art XVI,1 Treaty of Osnabrück: ‘Simulatque vero instrumentum pacis a dominis plenipotentiariis et legatis subscriptum et signatum fuerit, cesset omnis hostilitas, et quae supra conventa sunt, utrinque e vestigio executioni mandentur.’ Likewise, see §98(1) Treaty of Muenster (Die Westfälischen Friedensverträge vom 24. Oktober 1648. Texte und Übersetzungen (Acta Pacis Westphalicae. Supplementa electronica, 1)) <http://www.pax-westphalica.de/> accessed 9 December 2019 (‘So soon as the Treaty of Peace shall have been subscribed and signed by the Plenipotentiaries and Ambassadors, all Acts of Hostility shall cease, and whatever things have been agreed above, shall at the same time be executed and performed on both sides.’ <http://www.pax-westphalica.de/ipmipt/index.html.> accessed 31 August 2020). According to Geslin, the Four-Powers-Treaty of 15 July 1840 between United Kingdom, Austria, Prussia and Russia, on the one side, and the High Porte, on the other side, constituted the first example of a provisional application on the basis of an additional Protocol; Albane Geslin, La mise an application provisoire des traités (2005) 6.

6 See the Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Austrian Law Gazette No 254/1951.

7 See in particular the memoranda of the Secretariat of the United Nations, ILC, ‘Provisional application of treaties, Memorandum by the Secretariat’ (6 May-7 June and 8 July-9 August 2013) UN Doc A/CN.4/658; ILC, ‘Provisional application of treaties, Memorandum by the Secretariat’ (4 May-5 June and 6 July-7 August 2015) UN Doc A/CN.4/676; ILC, ‘Provisional application of treaties, Memorandum by the Secretariat’ (1 May-2 June and 3 July-4 August 2017) UN Doc A/CN.4/707.
the number of treaties provisionally applied has increased, as the cases of the Agreement relating to the implementation of Part XI of the UNCLOS⁸ or the Energy Charter Treaty⁹ indicate. A frequent use of this form of application also results from the practice of the European Union, as can also be seen in

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⁹ Austrian Federal Law Gazette III No 81/1998. See in particular Article 45, paras 1-3:

**Provisional application**

(1) 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.

(2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depositary a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depositary.

(b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).

(c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations.

(3) (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depositary of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory’s written notification is received by the Depositary.

(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 and V 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, except as otherwise provided in subparagraph (c).

(c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depositary of its request therefor.

[...]
the case of the Comprehensive Economic and Trade Agreement (CETA) and other recently concluded trade agreements.¹⁰

In light of the then existing practice, when dealing with the law of treaties, the ILC included a Draft article on what was first called ‘provisional entry into force’.¹¹ During the Vienna Conference (1968/1969), this provision was renamed ‘provisional application’¹² since the respective treaties had not yet entered into force when they were being provisionally applied. This explicit reference to provisional application is insofar a novelty¹³ as private attempts to codify the law of treaties had not referred to this possibility of treaty application so that the impression existed that formerly there had been no need to address this matter. Several amendments were made to the text proposed by the ILC; with amendments to the second paragraph, the provision became Article 25 of the VCLT. As to the Vienna Convention on Succession of States in respect of Treaties, some problems arose, and the final text did not follow the model of the original Article 25 VCLT.¹⁴

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¹¹ See UN Doc A/CONF.39/11/Add.2, at 143.

¹² See the amendment proposed by Czechoslovakia and Yugoslavia, UN Doc A/CONF.39/C.1/L. 185 and Add.1, where the provisional entry into force was replaced by provisional application. The amendment was adopted by 72 votes to 3, with 11 abstentions, see UN Doc A/CONF.39/11/Add.2, at 144.


¹⁴ Article 27 (1) of the Vienna Convention on Succession of States in respect of Treaties, 23 August 1978, 1946 UNTS 3, provides that a newly independent state can, merely by a unilateral declaration of its intention, apply a treaty provisionally:

1. If, at the date of the succession of States, a multilateral treaty was in force in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should be applied provisionally in respect of its territory, that treaty shall apply provisionally between the newly independent State and any party which expressly so agrees or by reason of its conduct is to be considered as having so agreed.
Article 25 of the VCLT reads as follows:

**Article 25**

**Provisional application**

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

The VCLT has remained subject of debate, also within the ILC. Thus, certain parts of the VCLT have been taken up as topics of investigation, in particular the question of reservations to treaties, interpretation by subsequent agreements and practice, peremptory norms, and since 2011 also the provisional application of treaties. The ILC has submitted the first reading text of Draft guidelines regarding the provisional application of treaties to states for their

Accordingly, in contrast to Article 25 VCLT, the provisional application of a treaty does not require the consent of all state parties or a provision of the treaty.

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17 Peremptory norms of general international law (*jus cogens*); this topic is presently under consideration; the first reading text was presented in 2018; ILC, ‘Peremptory norms of general international law (*jus cogens*), Text of the draft conclusion and draft annex provisionally adopted by the Drafting Committee on first reading’ (29 April-7 June and 8 July-9 August 2019) UN Doc A/CN.4/L.936.

written comments.\textsuperscript{19} It was hoped that the respective guidelines regarding this topic could remove certain doubts connected with this subject,\textsuperscript{20} but – in my humble opinion – they have failed to achieve this aim as of yet.

III. The Particular Features of Provisional Application

A. Objective of Provisional Application

The objectives of provisional treaty application are said to be manifold.\textsuperscript{21} One of them is to save time by allowing the contracting parties to square the urgency of a treaty’s application with the usually lengthy processes required for it to enter into force.\textsuperscript{22} For instance, the entry into force of a treaty often requires the ratification by certain or a certain number of states, which can lead to a long temporal gap between conclusion and entry into force. Similarly, domestic (constitutional) legal provisions often require parliamentary approval for ratification. However, the subject matters addressed by treaties can be very urgent and can require the immediate application of a treaty to be meaningful, as was the case with the Agreement on an International Energy Program\textsuperscript{23} or the two Conventions of 1986 regarding nuclear accidents

\textsuperscript{19} According to the practice of the ILC, the ILC elaborates on the basis of drafts by the Special Rapporteur the first reading text of a given topic, requests states to provide written commentaries on this text and elaborates the final draft text on the basis of the first reading text and the commentaries of states. The final draft text is then submitted to the General Assembly. The first reading text regarding the topic of provisional application is reproduced in ILC, ‘Report of the International Law Commission on the Work of its 70\textsuperscript{th} Session’ (30 April-1 June and 2 July-10 August 2018) UN Doc A/73/10.

\textsuperscript{20} Danae Azaria, ‘Provisional Application of Treaties’ in Duncan B Hollis (ed), \textit{The Oxford Guide to Treaties} (2\textsuperscript{nd} ed, 2019) 230.


\textsuperscript{23} See Austrian Federal Law Gazette III, \textit{supra} note 9.
elaborated as a consequence of the Chernobyl disaster. Sometimes, mention is made of the need to protect legal consistency or of economic reasons. In all these cases, the main issue is that this kind of application should avoid any delayed application. Ultimately, it may result from the desire to ensure continuity among successive treaties, such as in the case of fisheries agreements, or to circumvent political obstacles. The aims of time saving and of an avoidance of a time gap between conclusion and entry into force are the overarching reasons for provisional application.

However, one cannot avoid the impression that the objective of provisional application seems to have changed: At the time of the Havana Charter, provisional application could have signaled that a – different – final agreement was still to be expected. In other words, provisional application was agreed so that at least a preliminary agreement could be concluded but that it was expected that the whole agreement would be renegotiated later. Presently, states are instead forced to resort to this kind of provisional application mainly due to time constraints; the purpose of provisional application is therefore less owed to disagreements between states, but rather to the intention to reduce the risk of delays owing to various domestic processes.

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25 Azaria, supra note 20, 243.

26 Geslin, supra note 5, 36.


B. The Legal Basis for Provisional Application

As to the establishment of provisional application, the ILC’s present Draft guidelines clarify that a unilateral act does not suffice for the creation of the right of provisional application.30 According to Lefeber, provisional application is ‘based on the mutual consent of States’ and a treaty containing such provisions ‘constitutes a binding legal instrument between States which is enforceable’.31 A different case is the situation where the treaty itself provides for the unilateral declaration, as for instance is foreseen in Article 15 of the Convention of 1986 on Assistance in the Case of a Nuclear Accident or Radiological Emergency;32 in this case, the unilateral declaration finds its basis in the agreement of the state parties. If a treaty does not include a relevant provision in its text, the legal basis must result from other acts of the state parties signaling their consent. The ILC’s solution is correct insofar as the other state parties must accept such a provisional application since it

30 ILC Report, supra note 19, 203, Draft Guideline 4 reads as follows:

Guideline 4
Form of agreement
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: (a) a separate treaty; or (b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

The commentary confirms that a unilateral declaration ‘must be verifiably accepted by the other States or international organizations concerned, as opposed to mere non-objection’. Ibid., 213.

31 See Lefeber, supra note 22, 88, 90.

32 Article 15 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 26 September 1986, 1457 UNTS 133, reads as follows:

‘Provisional application
A State may, upon signature or at any later date before this Convention enters into force for it, declare that it will apply this Convention provisionally.’

creates mutual rights and obligations so that one state alone cannot create provisional application.

Of course, individual state parties can agree on the provisional application separately and outside the four corners of the treaty, if, e.g., the treaty itself does not admit such provisional application, but this form of provisional application creates effects only for the states involved and not for (or in relation to) the other state parties. One example of this scenario is provided by the Comprehensive Nuclear-Test-Ban Treaty (CTBT). Doctrine and practice frequently speak of a provisional application of the CTBT although neither the treaty itself provides for this possibility nor any formal decision of the state parties to this effect exists. Certain questions may be raised as to whether Syria was bound by the provisional application of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, but it seems that a tacit agreement was deemed sufficient to create this effect.

C. Activation

Another question concerns the types of acts an individual state can use to activate this kind of application. Article 25 VCLT and the treaties providing for provisional application are silent in this regard so that it is left to the state to determine by which acts and by whose acts such provisional application can be produced. Likewise, the ILC’s Draft guideline 5 is also not very revealing on this question. According to it, provisional application ‘takes

36 Destruction of Syrian Chemical Weapons, OPCW Executive Council (Decision of 27 September 2013) No EC-M-33/DEC.1, preambular para 6: ‘Noting also that on 12 September 2013, in its communication to the Secretary-General of the United Nations, the Syrian Arab Republic notified its intention to apply the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction (hereinafter “the Convention”) provisionally.’
effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed.37

Practice on this matter merely reveals that states refrain from ratification procedures if required by the treaty and consider declarations by the head of government or even foreign minister as sufficient. Insofar as a parliamentary approval is felt unnecessary, a declaration issued by a different competent state organ suffices to activate such a provisional application. Although the power to make such a declaration is restricted to the well-known triad of state organs mentioned in Article 7(2) VCLT,38 such a procedure excludes the democratic element of the treaty-making procedure given that the conclusion seemingly remains in the hands of the executive power alone.39 There are several attempts to overcome this democratic deficit: An example is the Russian Law on International Treaties40 which specifically addresses the issue of provisional application and provides that within six months, the provisionally applied treaty must be submitted to the Duma which can then

37 ILC Report, supra note 19, 203, Draft guideline 5 reads as follows:

Guideline 5
Commencement of provisional application
The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed.

38 Article 7(2) Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331, reads as follows:

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
(b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
(c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

The national legislation could also endow a different organ with the relevant competence.

39 Kempen, Schiffbauer, supra note 28, 110.

decide either to ratify the treaty, to prolong the provisional application, to deny ratification (with the effect of its termination), or to end the prolongation.\textsuperscript{41}

\textsuperscript{41} Article 23 reads as follows:

\textit{Статья 23. Временное применение Российской Федерации международного договора:}

1. Международный договор или часть договора до его вступления в силу могут применяться Российской Федерацией временно, если это предусмотрено в договоре или если об этом была достигнута договоренность со сторонами, подписавшими договор.

2. Решения о временном применении Российской Федерацией международного договора или его части принимаются органом, принявшим решение о подписании международного договора, в порядке, установленном статьей 11 настоящего Федерального закона. Если международный договор, решение о согласии на обязательность которого для Российской Федерации подлежит в соответствии с настоящим Федеральным законом принятию в форме федерального закона, предусматривает временное применение договора или его части либо договоренность об этом достигнута со сторонами каким-либо иным образом, то он представляет в Государственную Думу в срок не более шести месяцев с даты начала его временного применения. По решению, принятому в форме федерального закона, в порядке, установленном статьей 17 настоящего Федерального закона для ратификации международных договоров, срок временного применения может быть продлен.

3. Если в международном договоре не предусматривается иное либо соответствующие государства не договорились об ином, временное применение Российской Федерацией договора или его части прекращается по уведомлении других государств, которые временно применяют договор, о намерении Российской Федерации не стать участником договора.

\textsuperscript{81} A not totally correct translation reads as follows (‘temporary application’, in Russian ‘Временное применение’, would have to be translated as ‘provisional application’ according to the official Russian text of the VCLT where the Russian title of Article 25 VCLT is ‘Временное применение’ see <https://www.legalacts.ru/doc/venskaja-konventsija-o-prave-mezhdunarodnykh-dogovorov-zakliuchen/> accessed 31 August 2020:

\textsuperscript{81} A Temporary Application by the Russian Federation of an International Treaty

\textsuperscript{81} See also: Д. А. Шлянцев, О международных договорах Российской Федерации (2006) 81.

\textsuperscript{81} Article 23.
As in the case of most other states, the Austrian constitution does not contain any rule on the provisional application of treaties. However, as a member of the European Union, Austria was forced to resort to it on a number of occasions. Austria accepted this practice, but made it subject to the preceding approval by the Austrian parliament. In cases where a treaty, however, does not permit such a procedure, Austria has adopted the practice of declaring that it would apply the treaty provisionally only after its parliamentary approval in Austria.42

The practice of the EU is somewhat different: Although Article 218 TFEU explicitly refers to provisional application,43 the decision on provisional

1. An international treaty or a part thereof before its entering into force may be applied by the Russian Federation temporarily, if this is stipulated in the treaty or if an arrangement thereto has been achieved with the signatories parties.

2. The decisions on a temporary application by the Russian Federation of an international treaty or a part thereof shall be taken by the body which took the decision on the signature of the international treaty in the procedure established by Article 11 of the present Federal Law. If an international treaty, the decision on the consent to whose obligatoriness for the Russian Federation is subject in accordance with the present Federal Law to adoption in the form of a federal law, stipulates a temporary application of the treaty or a part thereof, or the arrangement thereto has been achieved with the parties in any other way, then it shall be presented to the State Duma within a period of not more than six months from the date of the beginning of its temporary application. By a decision adopted in the form of a federal law, in the procedure established by Article 17 of the present Federal Law for the ratification of international treaties, the period of the temporary application may be prolonged.

3. Unless otherwise provided for in an international treaty or unless the relevant States have arranged otherwise, the temporary application by the Russian Federation of the treaty or a part thereof shall be terminated upon the notification of the other States which are temporarily applying the treaty on the intent of the Russian Federation not to become a party to the treaty.


43 Article 218 (5) Treaty on the Functioning of the European Union, C202/1, reads as follows:

5. The Council, on a proposal by the negotiator, shall adopt a decision authorizing the signing of the agreement and, if necessary, its provisional application before entry into force.
application is taken by the Council alone and the Parliament is only informed by the Council of the provisional application. Thus, in one instance, the relevant decision of the Council notes that ‘[c]onsidering the need for the European Parliament’s consent before the agreement is concluded, the Commission will inform the European Parliament of the provisional application of the agreement.’ Only in recent times did the EU first seek the consent of the European Parliament before the relevant agreement was provisionally applied.

The uncertainty regarding the internal procedure required for provisional application undoubtedly raises tensions with Draft guideline 11, which is modelled on Article 46 VCLT. However, the commentary on this guideline is relatively brief and does not address this issue. Thus, the removal of any tension between these procedural issues is left to the individual states with undefined consequences for the other state parties.

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46 ILC Report, supra note 19, 204, Draft guideline 11 reads as follows:

**Guideline 11**

Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties

1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

47 ILC Report, supra note 19, 221.
D. The Legal Effect of Provisional Application

Whether a provisionally applied treaty is applied in its entirety, has always raised certain concerns. Article 25 VCLT does not indicate any restriction of the applicable content of a treaty that is applied provisionally, so that it may be asked, whether provisional application automatically entails the application of only a reduced scope of the treaty. The Draft guidelines are very clear: according to Draft guideline 6 on legal effect, this application produces a legally binding obligation to apply the treaty or a part thereof as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

Arbitral awards confirm this interpretation as, for instance, the decision on jurisdiction in the ICSID Case Ioannis Kardassopoulos v Georgia:

Where what is in issue is, as in the present case, the provisional application of the whole treaty, then such provisional application imports the application of all its provisions as if they were already in force, even though the treaty’s proper or definitive entry into force has not yet occurred.


49 ILC Report, supra note 19, 203, Draft guideline 6 reads as follows:

Guideline 6
Legal effect of provisional application
The provisional application of a treaty or a part of a treaty produces a legally binding obligation to apply the treaty or a part thereof as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

50 Ioannis Kardassopoulos v Georgia, ICSID Case No ARB/05/18, para 219 (Decision on Jurisdiction of 6 July 2007).
Accordingly, Draft guideline 7\textsuperscript{51} declares the rules of the VCLT on reservations applicable \textit{mutatis mutandis} also to provisionally applied treaties. Irrespective of certain views of a less binding force of provisionally applied treaties, which have been expressed in doctrine,\textsuperscript{52} Draft guideline 8\textsuperscript{53} establishes that a breach of the provisionally applied treaty entails the same consequences of responsibility as if the treaty were genuinely in force.

As to the legal effect, there is obviously and in accordance with guideline 6 no difference between a state provisionally applying the treaty and a state party, irrespective of the fact that the former does not qualify as state party. For this reason, provisional application creates legal relations not only among the state applying the treaty in this way, but also in relation to the state parties. It must also be concluded that a treaty organ such as an ASP (Assembly of States Parties) or COP (Conference of the Parties) embraces both categories of states unless the treaty explicitly excludes the states provisionally applying the treaty from these organs. Notwithstanding its provisional application, states have participated in the relevant organs created by the UNCLOS and the Agreement relating to the implementation of Part XI of the UNCLOS. Austria, for instance, declared ‘that pending parliamentary approval of the

\textsuperscript{51} ILC Report, \textit{supra} note 19, 204, Draft guideline 7 reads as follows:

\textit{Guideline 7}

Reservations

1. In accordance with the relevant rules of the Vienna Convention on the Law of Treaties, applied \textit{mutatis mutandis}, a State may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.

2. In accordance with the relevant rules of international law, an international organization may, when agreeing to the provisional application of a treaty or a part of a treaty, formulate a reservation purporting to exclude or modify the legal effect produced by the provisional application of certain provisions of that treaty.


\textsuperscript{53} ILC Report, \textit{supra} note 19, 204, Draft guideline 8 reads as follows:

\textit{Guideline 8}

Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied entails international responsibility in accordance with the applicable rules of international law.
Likewise, those states are equally bound to implement the treaty through their internal legislation or, if it is the case, to apply it directly. Accordingly, the relations between a provisionally applied treaty and treaties in force are governed by the same rules as the relations among fully applied treaties so that rules like *lex posterior* or *lex specialis* apply also in that regard. States applying a treaty provisionally would also be in the same position as state parties, e.g., with regard to the participation in the amendment and modification procedure. A different solution would hardly be in conformity with a rule as reproduced in Draft guideline 6.

However, the ILC’s commentary is far from clear in this regard and seems to contradict the text of the Draft guideline that places the provisional application on the same footing as normal application. As the commentary to the relevant guideline states,

> [a]s a matter of principle, provisional application is not intended to give rise to the whole range of rights and obligations that derive from the consent by a State or an international organization to be bound by a treaty or a part of a treaty. Provisional application of treaties remains different from their entry into force, insofar as it is not subject to all rules of the law of treaties. Therefore, the formulation that provisional application ‘produces a legally binding obligation to apply the treaty or part thereof as if the treaty were in force’ does not imply that provisional application has the same legal effect as entry into force. The reference to a ‘a legally binding obligation’ is intended to add more precision in the depiction of the legal effect of provisional application.

The problem remains that we cannot find any indication of the rules of the law of treaties which do not apply in the case of provisional application.

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54 See 5 der Beilagen XIX. GP – Regierungsvorlage, 277; the full text of the declaration reads as follows:

*Austria declares that it understands the provisions of its article 7 paragraph 2 to signify with regard to its own position that pending parliamentary approval of the Convention and of the Agreement and their subsequent ratification it will have access to the organs for the International Sea-Bed authority.*


55 Geslin, *supra* note 5, 90.

Certainly, one can assume that the rules concerning entry into force do not apply since the treaty does not enter into force through provisional application. Consequently, it is doubtful, for example, whether the registration obligation would apply to a provisionally applied treaty. Indeed, the Regulations to Give Effect to Article 102 of the UN Charter (originally adopted in 1946, and subsequently modified) do not mention the possibility of provisionally applied treaties. Thus, it can be discussed whether a state provisionally applying a treaty can invoke this treaty before any organ of the UN. In the North Sea Continental Shelf cases, the common rejoinder of Denmark and the Netherlands referred to the Protocol of Provisional Application of the Fisheries Convention (9 March 1964), basing the binding effect of the Fisheries Convention on Germany on this Protocol. However, the Court took no note thereof and so far no judgment of the ICJ has referred to provisionally applied treaties in the sense of the VCLT or has drawn any conclusion regarding the legal effects: The Declaration of 1947 which the ICJ qualified as being of provisional nature in the Case concerning Maritime Dispute (Peru v Chile) was a unilateral act of Peru. The meaning of the provisional agreement mentioned by the Court in judgment of 13 December 1999 in the case Kasikili/Sedudu Island (Botswana v Namibia) was different from that employed in the VCLT since it was a document established in the course of negotiations. Although, in the judgment in the case Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), the Court referred to a provisional agreement, this qualification, however, does not coincide with the meaning of provisional application in the sense of the VCLT since it was concluded ad referendum. In its judgment on

57 However, the Codification Division of the UN added to this confusion since it stated that the Implementing Agreement regarding Part XI of the Law of the Sea Convention ‘entered into force provisionally’ although the number of parties to it did not encompass states provisionally applying this Agreement.

58 North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) [1969] ICJ 3 (Judgment of 20 February); see the Common Rejoinder Submitted by The Governments of the Kingdom of Denmark and the Kingdom of the Netherlands, regarding the Protocol of Provisional Application of the Fisheries Convention; International Court of Justice, Pleadings, Oral Arguments, Documents, 1968, vol I 490.

59 Maritime Dispute (Peru v Chile) [2014] ICJ 3, para 43 (Judgment of 27 January).

60 Kasikili/Sedudu Island (Botswana v Namibia) [1999] ICJ 1045, para 46 (Judgment of 13 December).

preliminary objections in the case *Interhandel (Switzerland v United States of America)* the Court referred to a provisional agreement concluded towards the end of World War II between Switzerland, the United States of America, France and the United Kingdom, pursuant to which property in Switzerland belonging to Germans in Germany was blocked, but it did not draw any conclusion from this qualification, except the fact that this property was provisionally blocked by a Swiss administrative act.\(^62\)

It now is the responsibility of states to add some clarity to the ILC’s text and commentary through the written comments on the first reading text.

### E. Termination

Since the beginning of the discussion on what later became Article 25 VCLT, one major issue has been the question of the way in which this kind of application could be terminated or suspended.\(^63\) There is certainly no doubt that provisional application ends with the entry into force of the treaty for the respective party.\(^64\) Moreover, the normal methods of termination of treaties as provided in the VCLT apply *mutatis mutandis* to provisional application, as confirmed by Draft guideline 9.\(^65\) In such situations, this kind of application is terminated or suspended in relation to the other states applying the treaty provisionally as well as the state parties.

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\(^62\) *Interhandel Case (Switzerland v United States of America)* [1959] ICJ 6, 16-17 (Judgment of 21 March).

\(^63\) Mertsch, *supra* note 21, 35.

\(^64\) See Article 25 VCLT, *supra* note 38.

\(^65\) ILC Report, *supra* note 19, 204, Draft guideline 9 reads as follows:

*Guideline 9*

Termination and suspension of provisional application

1. The provisional application of a treaty or a part of a treaty terminates with the entry into force of that treaty in the relations between the States or international organizations concerned. 2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty. 3. The present draft guideline is without prejudice to the application, *mutatis mutandis*, of relevant rules set forth in part V, section 3, of the Vienna Convention on the Law of Treaties or other relevant rules of international law concerning termination and suspension.
However, doctrine and practice frequently refer to the right of unilateral termination, as exemplified by former ILC Special Rapporteur Humphrey Waldock. Although Article 25 VCLT implicitly admits such a right, it makes it dependent on the declaration of the will not to become party to the relevant treaty. Accordingly, the unilateral termination is connected with, and dependent upon, the declaration of this intention. According to Draft guideline 9, this notification has to be addressed only to the other states or international organizations between which the treaty or a part of a treaty is being applied provisionally. Such a restriction is hardly understandable since the provisional application applies also in the relations between these states and state parties. Accordingly, this notification must be addressed also to the state parties.

The dependence on the declaration of an intention raises the question as to whether the declaring state is bound by it so that, by this declaration, it is later precluded from becoming a party to the treaty. On the one hand, if the state were bound, the other state parties could then deny its right of becoming a party. On the other, if it were not bound, the right to terminate would amount to nothing else than a genuine unilateral right of termination.

According to the ILC, unilateral declarations by a state could entail binding effects and create legal obligations provided they are made publicly, manifest the will to be bound, and are stated in clear and specific terms. They would

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66 ILC Report, supra note 19, 203, Draft guideline 5 explicitly refers to provisional application between a State or international organization for which the treaty has entered into force and another State or international organization for which the treaty has not yet entered into force.

67 See the ILC, ‘Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries’ (2006) Yearbook of the International Law Commission, 2006, Vol II, Part Two, 161, elaborated by the ILC:

4. A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations. Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence;

6. Unilateral declarations may be addressed to the international community as a whole, to one or several States or to other entities;

7. A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obliga-
also need to be issued by the competent organ of the state. Notwithstanding this legal effect, they can be revoked, but only in a non-arbitrary manner. Applied to the issue of the termination of a provisional application, one must acknowledge that the declaration of an intention is different from assuming an obligation. The declaration of an intention is only a declaration concerning the plan of future conduct, but does not include the decision to carry out this plan. Accordingly, it is doubtful whether such a declaration could produce legal effects. For this reason, the only condition for a unilateral termination is the declaration which does not hinder a state from becoming party to the treaty later on.

Austria – in its written statements delivered to the 6th Committee – even tried to disconnect treaty termination from this declaration by stating that other situations where provisional application may be terminated should also be considered in the draft guidelines, thereby going beyond Article 25(2) of the Vienna Convention. For example, it may be necessary, for political reasons, to terminate the provisional application of a treaty without definitely expressing the intention never to become a party to it.68

But irrespective of whether that declaration on non-ratification or other political reasons is needed, it does not preclude the state from later ratifying...
the treaty so that the state is unbound regarding its future relation to the treaty. The only condition is the declaration. One cannot deny – and this was a main issue at the second session of the Vienna Conference – that such a solution jeopardizes the stability of treaty relations. The more that states resort to the instrument of provisional application, the more treaty relations become flexible and it is to be doubted whether such a development is desirable.

IV. Conclusions

This attempt of an analysis of the present conception of provisional application by the ILC raises the question as to whether a separate legal regime of provisional application is necessary at all. If, for instance, a treaty provides

1. that it becomes binding on a state by a mere notification that the internal procedures have been completed; and
2. that a state party is entitled to withdraw unilaterally for vital reasons that it has to notify,

there is no difference from the international legal perspective between such formal application and a provisional one. In such case, a right to a provisional application would be redundant.

At least this lack of distinction or this similarity between these two options results from the ILC’s present draft guidelines. It is possible that certain differences will surface once states have commented upon the first reading text, such as those regarding the scope of provisional application. But generally, it cannot be excluded that the institution of provisional application rather reflects a certain practice than a need to establish a particular legal regime. As such, it seems to raise more problems than it solves.