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PROVISIONAL APPLICATION OF TREATIES. FROM THE VIENNA CONVENTION TO THE UN ILC GUIDE AND BEYOND

Abstract: The article is devoted to the provisional application of treaties (PATs) as it was given by the Vienna Convention on the Law of Treaties, as well as that which results from further development of this legal institution, especially from the work of the International Law Commission and legal practice. In particular, the elements comprising the PATs mechanism, its place in the field of incurring international obligations, the legal effects of the PATs, the scope of the PATs, as well as the relation to other provisions of the Vienna Convention, and finally the use of the PATs during armed conflicts are critically analyzed. The pragmatic nature of the PATs is highlighted. The differences between the provisional application of the treaty and the situation when it has entered into force are shown. It is considered that PATs can be seen as one of the manifestations of the deformalization of international law, reducing the importance of formal consent to be bound by a treaty. The dangers of the temporality *ex definitione* produced by the PATs were also pointed out.

Keywords: Vienna Convention on the Law of Treaties, International Law Commission, provisional application of a treaties, treaty, *pacta sunt servanda*, freedom to incur international obligations, deformalization of international law

Introduction

From the point of view of current international practice, the basic regulatory instruments are treaties, and therefore, as understood by Article 2(a) of the Vienna Convention on the Law of Treaties of 23 May 1969¹ (Vienna Convention, VCLT), agreements between states concluded in writing, subject to international law, regardless of how many documents they consist of and what their name is. As the structure of the international community developed, treaties began to also include international organizations.²

In international relations, there are concluded bilateral treaties and multilateral treaties. Especially in the case of multilateral treaties, which usually require a minimum number of parties to enter into force, but also some bilateral treaties, mainly with a complex party structure (e.g. integration organization and member states, member states themselves acting as a bloc), on the one hand, the problem of prolonged waiting for the entry into force of an agreement in general, on the other hand, even if a multilateral treaty enters into force, not all interested states become parties to it at once. If the importance of the treaty is significant or the expectations of the treaty are serious, or, whatever the meaning and expectations of the treaty, if the parties so agree, the question arises of applying the treaty before its entry into force. The importance of the provisional application of treaties (hereinafter, except for subtitles: PAT, in plural PATs), known for some time, is increasing today, although it is still not a common phenomenon. In any case, a manifestation of its growing importance is the approval of the draft decision of the International Law Commission (also ILC) on including this subject in its work by the UN General Assembly.³

The study includes a brief historical reflection, defining the contemporary meaning of PATs, a discussion of the current regulation contained in the 1969 VCLT, an overview of the work of the International

¹ The Convention entered into force 27.1.1980, UNTS vol. 1155, 116 parties.

² See Vienna Convention on the Law of Treaties between States and International Organizations and Between International Organizations of March 21, 1986, which has not yet entered into force (the number of parties is increasing, but slowly), A/CONF. 129/15, 45 parties, including 31 States Parties and Palestine (however, there are not enough State/Parties to enter into force, i.e. 35).

³ Resolution of 9.12.2011 on the Report of the International Law Commission on the work of its sixty-third session, point 7, A/RES/66/98.

Law Commission developing the provisions on PATs, an analysis and assessment of its nature and legal effects, its relation to the treaty structure as well as to the various institutions of the law of treaties regulated in the Vienna Convention or later formulated in the documents of the ILC.

1. Historical Outline and Contemporary Significance

There is no consensus in the doctrine of international law as to whether PATs is an institution known for a long time or a relatively new institution. In this context, R.E. Dalton⁴ points out that the doctrine sometimes sees the origins of PATs in the Treaties of Westphalia of 1648 (in the French and Swedish treaties with the Empire). In turn, for example, J.H. W. Verzijl noticed the provisional application in the treaty practice of the 18th century. After all, even if the treaty was applied temporarily, until the 19th century the period between its conclusion and entry into force was actually very short.

Until the 19th century, bilateral treaties dominated. In their case, the provisional application was used much less frequently. Therefore, it was of minor importance. According to some views, only the development of parliamentarism in the 19th and 20th centuries slowed down the processes of concluding treaties and created the problem of waiting for the treaty to be bound and its entry into force. Thus, the place for PAT appeared.⁵ However, there are also opinions that PATs are a new legal solution, an invention of the second half of the 20th century.⁶

Dalton also mentions that before 1969 the term “provisional application of a treaty” was rarely used. In his opinion, one of the first cases of explicit reference to it was the Franco-Greek Convention on Trade, Shipping and Settlement of 1929 (ratified in 1931). In practice, the phrase “provisional entry into force of the treaty” was mainly used. PAT, or even its provisional entry into force, does not occur in the private codifications known from the 19th century, nor in drafts developed or conventions adopted in the first half of the 20th century (the Harvard draft of the Convention on the Law of Treaties of 1935, although while working on

⁴ Dalton, *Provisional Application of Treaties*, 221-223.

⁵ Frankowska, *Prawo traktatów*, 72.

⁶ Krieger, *Commentary to Article 25 VCLT*, 411.

this project, the issue was discussed in the context of the Rapallo Treaty of 1922; the Montevideo Convention on the Law of Treaties of 1928).⁷ Rather, the principle of being bound by treaties was emphasized only after their entry into force as a result of ratification (e.g. Article 6 of the Harvard Draft, Article 5 of the Havana Convention).⁸

In the course of the work of the ILC on the Articles on treaty law⁹, all rapporteurs asked for the analyzed institution to be included, although they used different terms for it (usually provisional entry into force to distinguish full entry).¹⁰ Two rapporteurs, i.e. G. Fitzmaurice¹¹ and H. Waldock¹², presented specific drafts taking into account international

⁷ Dalton, *Provisional Application of Treaties*, 224-226.

⁸ See also annexes to the Report on the Law of Treaties by J.L. Briery, Special Rapporteur, A/CN.4/23, *Yearbook of the International Law Commission 1950*, vol. II, pp. 243-248.

⁹ See the summary of the works of the ILC and the Diplomatic Conference: International Law Commission, *Provisional application of treaties*, Memorandum by the Secretariat, 1 March 2013, A/CN.4/658, pp. 4 ss.

¹⁰ Dalton, *Provisional Application of Treaties*, 226. More about the work of the Commission: Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature*, 28-44.

¹¹ See Article 42 (1) of the 1956 draft: 1. Entry into force is definitive, unless it is provided that the treaty shall cease to be in force on the non-occurrence of some event considered to be essential to its operation. A treaty may, however, provide that it shall come into force provisionally on a certain date, or upon the happening of a certain event, such as the deposit of a specified number of ratifications. In such cases an obligation to execute the treaty on a provisional basis will arise, but, subject to any special agreement to the contrary, will come to an end if final entry into force is unreasonably delayed or clearly ceases to be probable. Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur, A/CN.4/101, *Yearbook of the International Law Commission 1956*, vol. II, p. 116. The author explained that the provisional entry into force was to be a way of counteracting undue prolongation of the waiting period for the entry into force of the treaty (p. 127).

¹² See especially Article 20 (6): Mode and date of entry into force: Notwithstanding anything contained in the preceding paragraphs of this Article, a treaty may prescribe that it shall come into force provisionally on signature or on a specified date or event, pending its full entry into force in accordance with the rules laid down in this Article, and Article 21 (2) (a, b): Legal effects of entry into force: 2. (a) When a treaty lays down that it shall come into full force provisionally upon a certain date or event, the rights and obligations contained in the treaty shall come into operation for the parties to it upon that date or event and shall continue in operation upon a provisional basis until the treaty enters into full force in accordance with its terms. (b) If, however, the entry into full force of the treaty is unreasonably delayed and, unless the parties have concluded

practice in this matter. Nevertheless, the ILC only responded ultimately to Waldock's draft, and partially negatively (as to the expiry of the temporary entry into force). Moreover, the reaction of some states was restrained, if not hostile (e.g. the United States¹³). Most, however, opted for keeping the provisions of the future Convention, albeit in a form modified in relation to Waldock's draft. According to Article 22 of the ILC draft,

Article 22. Entry into force provisionally (within the section 3: Entry into force of treaties):

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.

In a relatively brief comment, the Commission explained¹⁴ that this provision took account of current practice, which happens "with some frequency to-day".¹⁵ The Commission justified that the inclusion of Article 22 to the draft results from the necessity to take into account urgent situations, when the treaty should act before the end of the national procedures of the conclusion of a treaty. It noticed that the problem could be the basis for the provisional entry into force of the treaty (the treaty itself or the subsidiary agreement), without however settling the issue.

a further agreement to continue the treaty in force on a provisional basis, any of the parties may give notice of the termination of the provisional application of the treaty; and when a period of six months shall have elapsed, the rights and obligations contained in the treaty shall cease to apply with respect to that party. The author points out that the contemporary practice of provisional entry into force of the treaty is not "infrequent". First Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur, A/CN.4/144 and Add. 1, Yearbook of the International Law Commission 1962, vol. II, pp. 68-73.

¹³ As stated Nahlik, *Kodeks prawa traktatów*, 172, the United States demanded that the provision that was to be the basis for the provisional entry into force of the treaty be deleted as redundant (because it was covered by the previous provision, i.e. concerning its entry into force) and harmful (because it leads to interpretation difficulties). Japan, Malaysia and South Vietnam took a similar position.

¹⁴ Draft Articles on the Law of Treaties with commentaries 1966, Yearbook of the International Law Commission 1966, vol. II, p. 210.

¹⁵ According to Aust, *Modern Treaty Law and Practice*, 139, the analyzed institution was rarely used, and even today it is not used very often.

The ILC stressed that there was no doubt, however, that the treaty clauses concerning this (or their alternatives in the form of additional agreements or exchange of letters or in some other form) had legal effect and that they were binding on a provisional basis. The Commission also noted that the provisional entry into force of the treaty may concern parts of the treaty.¹⁶

The issue of PATs was also taken into account by the Vienna Conference on the Law of Treaties (1968-1969).¹⁷ Various amendments were tabled in the course of work on the Convention. In particular, at the very first stage of the negotiations, the Czechoslovak-Yugoslav proposal, according to which the treaty should be “applied provisionally” (as a certain factual situation, not a legal one) and cannot “provisionally enter into force”, was accepted (H. Waldock himself was skeptical, however). The United Kingdom delegation explained that the goal of the change was to highlight that countries that agree to provisional application have no discretion but that the *pacta sunt servanda* rule applies.¹⁸ Moreover the convergent Belgian and Polish-Hungarian amendments aimed at adding a paragraph on discontinuing provisional application were included (as paragraph 2; also in the case of Waldock’s objection, who otherwise consistently believed that something that did not enter into force could not expire). During the second phase, however, attempts were made to undermine PATs and exclude them from the Convention. Among other things, arguments relating to its inconsistency with state constitutions were raised (Guatemala, Costa Rica, Cameroon, Greece, Uruguay, Canada, Colombia).¹⁹

Ultimately, PATs are included in Article 25 of the Convention: “Provisional application” (section 3: “Entry into force and provisional application of treaties”). The decision adopted by the Vienna Conference

¹⁶ The ILC concluded: “No less frequent today is the practice of bringing into force provisionally only a certain part of a treaty in order to meet the immediate needs of the situation or to prepare the way for the entry into force of the whole treaty a little later”.

¹⁷ See Quast Mertsch, *Provisionally Applied Treaties*, 44-62; Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 353.

¹⁸ Dalton, *Provisional Application of Treaties*, 228-229. Yugoslavia also proposed to include in the Convention a statement that the treaty is applied provisionally and ‘must be performed in good faith’. However, the Drafting Committee found the latter to be self-evident and there was no need to highlight the obligation (p. 230), which could be considered highly questionable.

¹⁹ Nahlik, *Kodeks prawa traktatów*, 174.

was not met with excessive enthusiasm.²⁰ It was pointed out that the temporary use itself was not defined in the conventional glossary, it was vague and laconic, it lacked precision. The effects and legal implications of this institution were not indicated. It was also argued that even though the practice of PATs has been known since the 19th century, it is still relatively limited and new, with little academic interest.²¹

Undoubtedly, Article 25 VCLT can hardly be considered the pinnacle of treaty law. However, it is an expression of a problem that has gradually intensified in treaty practice. As J.M. Gómez-Robledo points out, according to the UNTS Treaty Section, 1783 treaties were registered in the years 1946-2015 that can be provisionally applied, as well as 1349 cases of provisional application in practice.²² On the other hand, A. Quast Mertsch, referring to the statements of the UN General Secretariat concerning treaties and international agreements registered in the United Nations, that approximately 3% of registered treaties annually are applied provisionally.²³ R.E. Dalton also adds that there are treaties that indicate jurisdiction in disputes concerning PATs (the Energy Charter Treaty as the first treaty, Article 45).²⁴ PATs take place in direct bilateral and multilateral treaty relations between states or international organizations, especially integration ones, and also in the case of treaties concluded by member states within international organizations (such as the UN, IMO, UNESCO).²⁵

The growing practical importance of PATs, as well as the legal problems arising from it, prompted the International Law Commission to take up the subject and formulate draft Guidelines. The work of the ILC is not completed, although its first stage has been completed (the first reading of the draft

²⁰ However, neither the International Law Commission nor the Diplomatic Conference working on the Articles relating to the law of treaties concluded between states and international organizations and between international organizations agreed to the different terms of Article 25 of the 1986 Vienna Convention. See also International Law Commission, Provisional application of treaties, Memorandum by the Secretariat, 25 November 2014, A/CN.4/676.

²¹ According to Mathy, commentary to Article 25 VCLT, 641, it was these matters that caused the difficulties in the conventional regulation of the provisional application of the treaty.

²² Gómez-Robledo, "The Provisional Application of Treaties", 186.

²³ Quast Mertsch, Provisional Application of Treaties and the Internal Logic of the 1969 Vienna Convention, 306.

²⁴ Dalton, Provisional Application of Treaties, 241-245.

²⁵ Examples: Provisional application of treaties. Memorandum by the Secretariat, 24 March 2017, A/CN.4/707.

containing 12 Guidelines has taken place). The Special Rapporteur for the topic is J.M. Gómez-Robledo, who prepared five reports (in 2013-2016 and in 2018). In addition, the Secretariat-General developed three memoranda (in 2013, 2014, 2017). The first reading of the draft Guide took place in 2018. The draft has been assessed by countries and some other actors. The last discussion in the plenary of the Commission took place in July 2019.²⁶ In 2020, comments and observations from governments and international organizations on the entire Guide prepared by the ILC were published.²⁷ In 2021 the ILC published the final version of the draft guidelines and draft annex constituting the Guide to Provisional Application of Treaties with commentaries thereto (the 2021 Guide)²⁸.

2. Functions of the Provisional Application of Treaties

The practical significance of a specific legal institution is evidenced by the functions it can perform. They have not yet been clearly systematized in international law. Against the background of Article 25 VCLT and international practice related to it, an extensive set of such functions was presented in the commentary to the Convention by H. Krieger.²⁹ He pointed out that the provisional application of the treaty could be: 1) an emergency tool, e.g. in the context of an armed conflict or an ecological crisis; 2) a guarantee of preserving the sensitive compromises reached in the course of negotiations; 3) a confidence-building measure between signatories (e.g. in the field of arms control); 4) encouraging ratification; 5) a measure to prevent loopholes in obligations generated by consecutive treaties (thus ensuring legal certainty and enabling an efficient transition between treaty regimes, e.g. between resource treaties); 6) a measure

²⁶ Analytical Guide to the Work of the International Law Commission, https://legal.un.org/ilc/guide/1_12.shtml

²⁷ International Law Commission, Provisional application of treaties. Comments and observations received from Governments and international organizations, 14 February 2020, A/CN.4/737 (hereinafter as: ILC. Provisional application of treaties. Comments and observations).

²⁸ A/76/10, https://legal.un.org/ilc/texts/instruments/english/commentaries/1_12_2021.pdf

²⁹ Krieger, commentary to Article 25 VCLT, 408-411. See also Villiger, *Commentary on the 1969 Vienna Convention*, 352; Mathy, commentary to Article 25 VCLT, 643.

preventing the conflict of obligations in the event of amendments or changes to the treaties; 7) an instrument to avoid political obstacles to being bound by a treaty at the national level or when there is certainty of ratification after some time; 8) a measure to prepare for the entry into force of the treaty, when it is necessary to establish a preparatory commission.³⁰

On the other hand, looking at PAT in a more constructive way, A. Quast Mertsch notes that reference to it occurs when two criteria are met: 1) there is a gap between, on the one hand, the conclusion of the treaty and, on the other hand, its entry into force (the treaty does not enter into force on the date of its signature – the provisional application of the treaty is a bridge between the two regimes); 2) states are not willing, for various reasons, to wait for the entry into force of the treaty (Quast Mertsch lists such reasons, however, including: the urgency of the matter – the treaty is a response to a current or imminent crisis; treaties on the same subject; when the ratification of a treaty is expected with high certainty or with great uncertainty).³¹

In turn, the Special Rapporteur J.M. Gómez-Robledo gives four main reasons for PATs.³² They include: 1) emergency situations: in the author's view, provisional application clauses are especially useful in the event of natural disasters or other exceptional cases (treaties on nuclear accidents, conventions on anti-personnel mines or cluster weapons); 2) flexibility: states' needs can make it desirable to speed up treaty implementation, and these needs cover a myriad of difficult-to-classify situations (Syria, chemical weapons); 3) precaution: states resort to provisional application when they reach an agreement of a very strong political nature and try to build the necessary confidence to prevent states from changing their

³⁰ See also Azaria, *Provisional Application of Treaties*, 229.

³¹ Quast Mertsch, *Provisional Application of Treaties*, 306.

³² Gómez-Robledo, "The Provisional Application of Treaties", 188-191. See also First report on the provisional application of treaties, Juan Manuel Gómez Robledo, Special Rapporteur, points 27-35, A/CN.4/664, 3 June 2013, pp. 7-9, where the special rapporteur mentions: 1) urgency; 2) flexibility; 3) precaution; 4) transition to imminent entry into force; 5) others (speeding up implementation, creating incentives for ratification, avoiding delays in ratifying a treaty). In its general comments on Article 25, Germany rightly underlines that "a provision on provisional application is not considered a routine clause to be included in every treaty, and to underline the importance of carefully assessing international needs of urgency in regulating a certain situation as a prime reason necessitating provisional application and national limits thereto emanating from domestic legislation". ILC. *Provisional application of treaties. Comments and observations*, p. 6.

positions during the ratification process (Open Skies Treaty, U.S.-Cuba Sea Border Treaty of 1977, Comprehensive Nuclear Test Ban Treaty); 4) transitional: the treaty is about to enter into force (agreement on Part XI of UNCLOS).

The International Law Commission, in its commentary on the 2021 draft Guide on the provisional application of the treaties³³, in turn indicated that:

Provisional application is a mechanism available to States and international organizations to give immediate effect to all or some of the provisions of a treaty prior to the completion of all internal and international requirements for its entry into force. Provisional application serves a practical purpose, and thus a useful one, for example, when the subject matter entails a certain degree of urgency or when the negotiating States or international organizations want to build trust in advance of entry into force, among other objectives. More generally, provisional application serves the overall purpose of preparing for or facilitating the entry into force of the treaty. It must, however, be stressed that provisional application constitutes a voluntary mechanism which States and international organizations are free to resort to or not, and which may be subject to limitations deriving from the internal law of States and rules of international organizations.

Without going into too much detail the problem of the function of PAT, it can be assumed that it is an instrument increasing the flexibility of international law. At the Vienna Conference, the representative of Costa Rica argued in this context that PAT is an intermediate measure between a simplified treaty and a treaty that only enters into force after all final binding requirements have been met.³⁴ Regardless of the accuracy of this assessment, the fact remains that PAT enables a treaty to operate in whole or in part, and therefore to produce legal effects, before it formally enters into force and before it is formally binding to a particular signatory. This can be important both for relations at the international level and where the agreement is intended to be implemented at the national level.

³³ General Commentary to the Draft, point 3, A/76/10.

³⁴ Mathy, commentary to Article 25 VCLT, 641-642. The author also argues that PAT can be even used to modify the provisions of an earlier convention without undergoing an amendment procedure (p. 643).

3. Provisional Application of Treaties in the 1969 Vienna Convention

3.1. Structural Elements and Drawbacks of the Regulation of the Provisional Application of Treaties in Article 25 of the Convention

Article 25 VCLT states:

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.

What is the content of Article 25 VCLT, and what issues does it not regulate? First, the Convention provides that PAT is within the scope of the treaty freedom. This means that it only works if the parties have agreed so in one way or another (paragraph 1) and for as long as they agree to it. Secondly, with Article 25 VCLT, it can be read (rather implicitly) that provisional application may apply to the whole treaty or part of it. Third, the Convention states that, if the parties have not so agreed, the termination of provisional application follows a notification of intention not to be bound by the treaty.

Neither Article 25 nor the Convention as such define PAT, and in particular do not formally regulate the initial date of provisional application (from when – from the point of view of the procedure for negotiating and concluding a treaty – it is possible) and the legal consequences of this legal situation.³⁵ Consequently, it is not clear whether PAT can be applied to all categories of provisions of a treaty, or to what extent the provisions of the Vienna Convention can be invoked for provisional application.

³⁵ Already in the First report on the provisional application of treaties, point 36, p. 10, the special rapporteur emphasized that Article 25 VCLT “does not contain the entire legal regime that applies to this issue”.

3.2. Legal Basis for the Provisional Application of Treaties in terms of Article 25 of the Convention

In the course of work on the draft VCLT, there was some debate to whether to speak of provisional entry into force or PATs. This dilemma was related not only to linguistic logic, but also to the legal basis of PAT. In any case, the argument in favor of the first solution was the belief that the basis for the provisional operation of the treaty is an agreement (treaty or subsidiary/collateral agreement). However, it is not the temporary applied treaty that comes into force, but the treaty to which it relates. The argument in favor of the second solution was the conviction that it is difficult to talk about a provisional entry into force (the agreement does not come into force or not), and that, before the “proper” entry into force, the treaty cannot be in force. However, the essence of provisional application is the operation of a treaty or parts of it before its entry into force. So what is the basis for such action?

There is no doubt that for a treaty to have effect before it comes into force, there must be some legal basis. It cannot be a treaty provision providing for such action, as it is an integral part of a treaty not yet in force. It is also difficult to find a customary rule. On the other hand, the inclusion of such a provision in the treaty (it is not a *sine qua non* condition for its provisional application; the intention of provisional application may also be expressed “otherwise” as determined by the negotiating parties) shows the intention of the parties to authorize provisional application. Thus, a legal clinch with no good solution appears. Under these conditions, there is no other option (also in view of the non-constitutive nature of a treaty provision on provisional application), but recognizing that PAT is based on an ancillary agreement that confirms or, in a sense, implements the intention expressed in the treaty or otherwise. Its parties are the subjects of international law negotiating the treaty to which the provisional application applies.

In this context, the view that the concept of a subsidiary agreement is based on a fiction must be rejected. In fact, without an agreement on the provisional application there is no question of such an application. It is also defective to say that if there is no formal agreement on PAT, its legal basis is the consent to provisional application expressed by states at the time of adopting the text. This is because such consent must be common,

even regardless of how many countries decide to apply provisionally. This conclusion is not changed by Article 24(4) VCLT,³⁶ according to which:

The provisions of a treaty regulating the authentication of its text, the 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.

Their application must also be based on the agreement of the parties, confirmed by the provisions of the treaty. It is difficult to assume that the provisions listed in Article 24(4) of the Convention are in force as part of a treaty not yet in force³⁷.

3.3. Legal Status of Article 25 of the Convention

The legal status of Article 25 VCLT is debatable. The ambiguity of the legal basis of PAT existed at the time of its inclusion in the Convention, but it has not disappeared until today. The question is whether Article 25 progressively developed international law in this area, or was its codification. Or else, whether it was/is an expression of a customary rule, or it was/is valid only as a convention rule. There is no uniform position in the doctrine on this

³⁶ The extensive presentation of these theories: Quast Mertsch, *Provisionally Applied Treaties*, 142-158. See also Villiger, *Commentary on the 1969 Vienna Convention*, pp. 347-348. The author maintains that the legal basis for the application of the clauses listed in Article 24 (4) could also be considered customary law. However, what (normative content) would then practice and *opinio iuris* concern? When would such a custom with regard to specific clauses of a particular treaty take shape?

³⁷ However, a different conclusion can be drawn from the point 5 of the commentary to guideline 5 (Commencement of PAT) of the ILC Guide on the provisional application of treaties (2021). The Commission said: "Draft guideline 5 is without prejudice to article 24, paragraph 4, of the 1969 and 1986 Vienna Conventions, which stipulates that certain provisions regarding matters arising necessarily before the entry into force of a treaty apply from the time of the adoption of its text. Such matters include the authentication of the text of the treaty, the establishment of consent to be bound by the treaty, the manner or date of its entry into force, reservations, or the functions of the depositary. Those provisions thus apply automatically without the need to agree specifically on their provisional application and might be relevant to the commencement of the provisional application of a treaty". Nonetheless, PAT is not mention in Article 24 (4) VCLT.

matter. Some authors (e.g. M.E. Villiger³⁸) consider that already at the time of signing the 1969 Convention, PAT was a customary rule. Most of the doctrine appears to be more reserved (at least on paragraph 2 of this provision). At the same time, it is more inclined to admit that Article 25 now expresses the customary rule.³⁹

There is no doubt that the practice of provisional entry into force/application of treaties had already appeared before the work on the treaty law was started in the International Law Commission. This was mentioned during the work of the Commission, however, it was pointed out that this practice is not very common and therefore also not intensive.⁴⁰ One can

³⁸ Villiger, *Commentary on the 1969 Vienna Convention*, 357, referring to the 1982 Aminoil arbitration award. See also convergent Germany's opinion on that issue (relying on Villiger's view). Nevertheless, Germany pointed out that Article 25 is also silent on several important matters (for instance, the decision on the scope and conditions of provisional application). In addition, Germany expressed dissatisfaction that the draft Guide did not contain sufficiently detailed solutions for mixed treaties (esp. free trade agreements) concluded by the European Union and its members with third parties. ILC. Provisional application of treaties. Comments and observations, pp. 5-7.

³⁹ Dalton, *Provisional Application of Treaties*, 231-232; Mathy, commentary to Article 25 VCLT, 640-641. On the other hand, Krieger, commentary on Article 25 VCLT, 413, considers that also para. 1 was an expression of the crystallization of customary law, not its codification.

⁴⁰ The United States, commenting on the draft Guide, observed that in some areas the guidelines and accompanying commentary are not supported by state practice. As a result, they "risk creating confusion about the state of law and undermining the draft guidelines' purpose". They noted: "the United States notes that the value of the draft guidelines depends principally on the extent to which the Commission has compiled examples of State practice to support them. Where the Commission has compiled such examples, the guidelines can usefully illustrate how States have approached particular issues. For clarity, it would be helpful for the Commission to indicate any instances in which it believes such State practice and accompanying opinio juris meets the standard required to establish a customary law rule, and to distinguish those from instances in which there is insufficient practice and/or opinio juris to establish a customary rule. Even where no customary rule exists, the Commission's work to compile relevant practice in the area may nonetheless be helpful to States, as such practice may prove persuasive as they make their own decisions about how to handle analogous circumstances. The draft Guide that is supported by limited or no State practice has much less utility, and the United States encourages the Commission to consider carefully whether they merit inclusion in the project at all. Guidelines not supported by significant State practice can only be understood as reflecting the Commission's own views for the progressive development of the law, and should be clearly identified as such if the Commission decides to include them". ILC. Provisional application of treaties. Comments and observations, pp. 10-11.

also doubt whether it is justified to associate it with a coherent opinion on this matter at the time. Moreover, the conceptual discrepancies that also persisted during the Vienna Conference (and sometimes even continue to this day, as evidenced also by the work of the ILC on the Guide for the provisional application of the treaties, launched in 2013), testify against a positive conclusion. Another problem is the internal regulatory weakness of Article 25, which contains few constructive elements for making the customary rule.

Even accepting that PAT is now a customary rule, this conclusion is of little practical importance. What was it supposed to regulate? Authorized temporary use? Or maybe it should specify the date of its commencement or legal consequences? This is highly unlikely. A necessary condition for provisional application is the determination of the intention of the subjects negotiating the treaty each time. Article 25, as a source of rights and obligations of the parties applying the treaty provisionally, adds little in this matter. Only paragraph 2 could be of some importance in the context of the termination of provisional application.

3.4. Article 25 and certain other Provisions of the 1969 Vienna Convention

One of the issues discussed in connection with Article 25 VCLT is its relation to other provisions of the Convention. It was not the subject of too detailed analyses of the ILC rapporteurs (apart from the issue of the provisional application and provisional entry into force), nor the subject of the Commission's comment on the draft Articles of the Vienna Convention. Only during the Commission's latest work on the Guide on PATs was this issue looked at with greater attention in the Third Report of the Special Rapporteur (with reference to Article 11 of the Convention – methods of expressing consent to be bound by a treaty, Article 18 – obligation not to defeat the object and purpose of the treaty, Article 24 – entry into force, Article 26 – *pacta sunt servanda*, Article 27 – domestic law and observance of treaties).⁴¹ Issues related to the relationship of Article 25 to various Convention provisions will be of interest in later parts of the study.

⁴¹ International Law Commission, Third report on the provisional application of treaties, Juan Manuel Gómez Robledo, Special Rapporteur, A/CN.4/687, 5 June 2015, pp. 7-15.

4. ILC Guide to Provisional Application of Treaties (2021)

The unsatisfactory provisions of PATs in Article 25 VCLT, in the conditions of developing international practice in this area, resulted in the commencement of works in the International Law Commission on rules that could clarify and to a large extent also supplement the Convention regulation. The Commission prepared a draft guidelines and draft annex constituting the Guide for the Provisional Application of Treaties (2021). The Guide includes 12 Guidelines and a draft commentary. The Annex includes examples of PAT provisions, relating them to bilateral and multilateral treaties and to various aspects of the existence of provisional application clauses⁴². This is not a legally binding instrument.⁴³

Formally, the purpose of the Guide is to provide guidance on the law and practice on PATs under Article 25 of the Convention and other rules of international law (Guideline 2). According to the Commission, PAT is also subject to the rules of international law other than treaties, including customary rules applicable to it.⁴⁴ The International Law Commission explained in the commentary on Guideline 1 (point 2) that the intention of the Guide is to provide greater clarity to the interpretation of article 25 of both Vienna Conventions. The ILC highlights:

The Guide consistently uses the term “provisional application of treaties”. In practice, the extensive use of other terms, such as “provisional entry into force” as opposed to definitive entry into force, has led to confusion regarding the scope and the legal effect of the concept of the provisional application of treaties. In the same vein, quite frequently, treaties do not use the adjective “provisional”, but speak instead of “temporary” or “interim” application. Consequently, the framework of article 25 of the 1969 and 1986 Vienna Conventions, while constituting the legal basis for the exercise of provisional application, lacks detail and precision and can thus benefit from further clarification.

⁴² A/76/10. Text available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_12_2021.pdf

⁴³ General Commentary to the Draft, point 3. Boisson de Chazournes, *The International Law Commission in a Mirror – Forms, Impact and Authority*, 137, wrote: “The choice of form is a good indicator of the Commission’s intention regarding the future of a final product. A report or guide is not intended to become a conventional instrument.”

⁴⁴ Commentary to Guideline 2, point 3.

The Guidelines cover the scope of the Guide, its purpose, the general rule of PAT, the form of the agreement, the commencement of provisional application, its legal effects, reservations, responsibility for violations, termination and suspension of provisional application, the relationship between the national law of states and the rules of international organization, and compliance with treaties provisionally applied, the internal provisions of states/international organizations on the competence to consent to the provisional application, and finally limitations arising from the national law of the states or the rules of the organization with regard to the agreement on PAT.

Moreover, in its general comment on the draft Guide, the Commission (point 4) explained that:

It is of course impossible to address all the questions that may arise in practice and to cover the myriad of situations that may be faced by States and international organizations. Yet, a general approach is consistent with one of the main aims of the present draft Guidelines, which is to acknowledge the flexible nature of the provisional application of treaties and to avoid any temptation to be overly prescriptive. In line with the essentially voluntary nature of provisional application, which always remains optional, the Guide recognizes that States and international organizations may agree on solutions not identified in the Guide that they consider more appropriate to the purposes of a given treaty. Another essential character of provisional application is its capacity to adapt to varying circumstances.⁴⁵

The International Law Commission has also developed several model clauses on PATs.⁴⁶ They refer to the commencement and termination of provisional application, the form of an agreement, opt-in/opt-out clauses on provisional application, limitation to provisional application deriving from internal law of states or rules of international organizations.

As noted by Special Rapporteur J.M. Gómez-Robledo,⁴⁷ the proposed model clauses concern elements which reflect the unequivocal practice of states and international organizations, avoiding elements that are vague and legally imprecise. No model clause is taken literally from an existing

⁴⁵ As a matter of fact, they can also ignore guidelines if they do not reflect international law. It is not necessary to conclude any agreement in order to set aside the invented ILC guidelines.

⁴⁶ A/74/10.

⁴⁷ Gómez-Robledo, *The Provisional Application of Treaties*, 188.

treaty. Rather, their purpose is to fill gaps and detect weaknesses in the provisional application clauses under examination. In its general comment on the draft Guide (point 5), the ILC also indicated that the model clauses are not intended “to limit the flexible and voluntary nature of provisional application of the treaties, and the examples do not seek to address the whole range of situations that may arise, nor are they characterized as anything more than examples”.

5. Provisional Application of Treaties as an Institution of International Law: beyond the Vienna Convention and the ILC Guide

5.1. Concept of Provisional Application of Treaties

5.1.1. Legal Nature of the Provisional Application of Treaties

PAT can be regarded as an institution of treaty law, and perhaps even, more broadly, as an institution of international law (if it is considered to apply to sources of law other than treaties, such as legally binding resolutions). However, neither the 1969 Vienna Convention nor the Guide define it. The Guide only clarifies the legal effect of provisional application (Guideline 6).

There is no doubt that provisional application applies to treaties, i.e. agreements concluded at least between states, between them and international organizations and between international organizations concluded in writing and governed by international law. It can be assumed that this element of PATs is not debatable. Nevertheless, it can be noticed, following Article 3 of the Vienna Convention, that this finding does not call into question the application of PATs to oral or written agreements, governed by international law, but concluded, *inter alia*, with subjects other than those mentioned. Moreover, going beyond the framework of the law of the treaties, one can successfully consider the problem of the provisional application of legally binding resolutions or even unilateral acts. However, not all sources are “suitable” for provisional use. In particular, it would be difficult to consider customary law or general principles of law as suitable for provisional application.

The treaty as a legal instrument does not express the specificity of PAT. This is articulated by two additional and inseparably related elements, i.e. temporality and application. In general, the application of legal rules relates to them in so far as they are already in force. The duty to apply

legal rules is directed to state or international organization bodies and expresses the command to guarantee the practical operation of the rules. The application of the legal rules essentially deals with individual cases. Consequently, it is about ensuring the operation of a legal rule in relation to specific subjects in a specific situation. In the sphere of national law, a distinction is made between administrative and judicial application of law.

In the field of international law, the application of a treaty should not be understood too narrowly, in the same way as under national law. In particular, if it is understood as ensuring the operation of a legal rule, then in the case of international law it also includes taking implementing measures by international law bodies (including by establishing general norms, and not only individual norms). In this context, perhaps a more appropriate term to describe a situation more comprehensively would be a treaty operation. In any event, when a treaty is applied, it produces legal effects in almost the same way as if the treaty had been in force, “except to the extent that the treaty provides otherwise or it is otherwise agreed” (Guideline 6).

However, the ILC stressed in its commentary to Guideline 6 of the Guide (point 6) that, unlike the entry of a treaty into force, not all rules of treaty law were applicable to PAT. As a consequence, a treaty applied provisionally does not have the identical legal effect as a treaty that has entered into force. However, the Commission has not specified which rules of treaty law it has in mind⁴⁸.

The question, then, is what is the real difference between PAT and when it entered into force? This difference is expressed in the concept of temporariness (provisionality). This concept should be understood not so much and not only in the sense that the treaty is applied for a relatively short period of time before its entry into force. Treaties may also be in force for a specified period, not necessarily long. For a change, provisional application can last – contrary to first impression – quite a long time, even years.⁴⁹ So what is the essence of provisionality? It is to be seen, on the one hand, of uncertainty as to how long the provisional application will last (whether it will not be interrupted at some point by the interested party) and, on the other hand, of uncertainty as to whether the treaty will enter into force as such and/or whether it will come into force in relation

⁴⁸ See, however, the Guideline 9 and points 7 and 8 of the commentary to it.

⁴⁹ The good example of this practice was the use of GATT47. See Kolb, *The Law of Treaties. An Introduction*, 56.

to a specific subject of international law. In other words, this uncertainty is expressed in the provisional consent to the application of the treaty (it remains in effect until the treaty enters into force or notification of its resignation), and in the permissibility of unilaterally suspending or terminating the application of the treaty, unless the negotiating parties exclude this possibility (Article 25 (2) of the Vienna Convention, Guideline 9(2)).⁵⁰

5.1.2. Freedom of States/International Organizations to arrange the Provisional Application of Treaties

PAT is a matter of freedom to conclude treaties. As a result, in particular, the parties negotiating the treaty may (do not have to) decide whether, when and between which parties the provisional application of the treaty is to take place,⁵¹ determine the form in which the decision is to be expressed, and determine its content (the date of provisional application of the treaty, its scope, admissibility of suspension or termination of provisional application). They can also define the legal consequences of PAT in the international and domestic sphere. The freedom of the treaties with regard to their provisional application is reaffirmed in more general way in Article 25 (1) of the Convention (in the context of the necessary agreement; a treaty “is provisionally applied” ... if the parties so agree) and in Guideline 3 of

⁵⁰ See also the award of the ad hoc arbitral tribunal in the case of the Government of the State of Kuwait v. American Independent Oil Company (Aminoil) of March 24, 1982, where it was stated that the agreement on the provisional application of the treaty was not intended to last forever (para. 34). Text: <https://jusmundi.com/en/document/decision/en-the-american-independent-oil-company-v-the-government-of-the-state-of-kuwait-final-award-wednesday-24th-march-1982>. The United States stated on the following: “At its core, provisional application means that a State agrees to apply the treaty, or certain provisions thereof, on a legally binding basis prior to the treaty’s entry into force for that State. It differs from entry into force of a treaty in one seminal respect: as a general matter, a State or international organization may terminate obligations arising from the provisional application of a treaty more easily than terminating the treaty after its entry into force”. ILC. Provisional application of treaties. Comments and observations, p. 10.

⁵¹ States have the option to decide on the provisional application of a treaty at any time, but after it has been authenticated and before it enters into force, also between certain negotiating states. See Villiger, *Commentary on the 1969 Vienna Convention*, 354-355.

the ILC draft Guide (“if the treaty so provides, or if in some other manner it has been agreed”).

The freedom to decide on PAT may be subject to limitations. They may result from the common arrangements of the parties or their internal solutions (national law, less often from the rules of organization). In particular, constitutional provisions of states may exclude PATs.⁵²

5.1.3. Agreement on the Provisional Application of Treaties: its Parties, Content and Form

When talking about an agreement on PAT, one should refer to its legal nature, the subjects concluding it (parties to the agreement), the possibility of modification of the agreement and its form. As indicated, the decision on the provisional application of the treaty takes the form of an agreement. However, from a subjective point of view, two situations should be distinguished here. The first is when a new treaty is being negotiated. In such a case, the parties negotiating in one way or another agree that it will be applied provisionally. The second case is less obvious and neither provided *expressis verbis* in the Vienna Convention nor in the Guide.⁵³ The latter situation may arise when a treaty has already entered into force, and the acceding state has not yet finally bound itself to it, and therefore the treaty has not entered into force with respect to it. Then, an agreement on PAT may also be concluded between the parties to the treaty (finally bound or provisionally applying a treaty) and the acceding state (provisionally applying a treaty). There is no other legal basis for provisional application by the acceding state. At the same time, in both cases, if the negotiating entities decide to include the provisional application clause in the treaty, the agreement on this issue should materially correspond to the content

⁵² This was indicated, among others, by Brazil, Colombia, Costa Rica, Guatemala, Peru, making reservations to Article 25 of the Convention. Some states raised objections to their reservations (Austria, Denmark, Finland, Sweden, Germany). However, they were not of a qualified nature. See Krieger, commentary to Article 25 VCLT, 408; Villiger, *Commentary on the 1969 Vienna Convention*, 356.

⁵³ See the United States critically on this issue. ILC. Provisional application of treaties. Comments and observations, p. 16-17. See also Azaria, *Provisional Application of Treaties*, 234-236. As it is observed, however, the Vienna Convention relates to “negotiating States”, while the Guide refers to “States or international organizations concerned” (Guideline 4).

of such a clause, possibly specify or supplement it. In a situation where the treaty is in force, the agreement must by definition correspond to the content of the clause.

Another question is whether the admissibility of the provisional application of the treaty implies the obligation of its application by its parties. This all depends on the content of the agreement. If the negotiating parties so agree, or it can be shown otherwise that their intention was to make the treaty provisionally applicable, that might be the case. However, the negotiators may well decide that PAT would require an additional declaration from the party concerned. Then it will depend on its submission whether such an obligation is updated. As a result, a situation may arise where not all negotiating parties will be obliged to apply the treaty provisionally, but only those that choose to do so (however, then it will be their obligation, not a right).⁵⁴ Also, some states may not be able to apply a treaty on a provisional basis for constitutional reasons. A similar effect may also occur when individual negotiating entities decide that they are not interested in being bound by the treaty.⁵⁵

It is not entirely clear whether PAT is based on the principle of reciprocity, i.e. whether the parties that do not apply a treaty provisionally can expect the parties applying the treaty provisionally to actually do so, or they can claim a breach of the treaty by the parties applying it provisionally.⁵⁶ Considering the temporary factor and the consequent legal uncertainty, it can be inferred that even in the case of non-reciprocal treaties, such non-performance should be ruled out. The entity relying on the treaty does not apply it (it is not a party *in spe*), nor is it a party to it (not bound by it). This distinguishes PAT from a situation when the treaty has entered into force. On the other hand, there is no obstacle that a breach of obligations by a party applying a treaty provisionally is alleged by a party to the treaty (a party that has already been bound by a treaty that has entered into force) and *vice versa*. The provisional application of

⁵⁴ According to some states commenting on the draft Guide, the voluntary nature of the provisional application of treaties is of a fundamental character. For instance Turkey accentuated that “it would be more suitable for the concept of provisional application to be included in treaties as a voluntary option which States can choose to apply by making a declaration to that end, and not as a legal obligation which States would have to opt out of or make reservations to”. ILC. Provisional application of treaties. Comments and observations, p. 8.

⁵⁵ See also Wyzozumska, *Umowy międzynarodowe. Teoria i praktyka*, 266.

⁵⁶ See also point 7 of this study.

the treaty by an entity is therefore the minimum condition for raising an allegation of infringement of the treaty (failure to fulfill an obligation arising therefrom).

The content of the agreement on PAT is not unequivocally clear. It is only implicit in Article 25 VCLT that an agreement may prejudice the full or partial PAT.⁵⁷ In other words, the agreement may stipulate that all or only some treaty obligations are to be performed. In addition, however, the agreement may stipulate, according to the freely expressed will of the parties, that application will be an obligation or a right, and that it will be possible between certain parties, that provisional application cannot be unilaterally terminated, etc.

An agreement on PAT may take various forms. Article 25 of the VCLT states in this respect that it can be a written, oral or even tacit agreement. This agreement is usually in a simplified form.⁵⁸ The ILC Guide, referring to the question of the form of an agreement (Guideline 4, *Form of agreement*), states:

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 between the States or international organizations concerned through:

- (a) a separate treaty; or
- (b) any other means or arrangements, including:
 - (i) a resolution, decision or other act adopted by an international organization or at an intergovernmental conference, in accordance with the rules of such organization or conference, reflecting the agreement of the States or international organizations concerned;

⁵⁷ Germany, commenting on the guideline 3, pointed out that this solution is important in the case of the EU mixed agreements (the provisional application of a treaty by the Union). ILC. Provisional application of treaties. Comments and observations, pp. 14-15.

⁵⁸ As Krieger points out in the commentary to Article 25 VCLT, p. 414 that the form of the agreement may vary. It can be a protocol, an attachment, a separate agreement, an exchange of letters, a consensus. The arbitral tribunal in the award in the *Aminoil* case even stated that the simplified form of such an agreement constitutes a *raison d'être* of an agreement on the provisional application of a treaty, referred to in the ruling as an interim agreement an interim agreement as opposed to a final agreement (para. 33). Text: <https://jsumundi.com/en/document/decision/en-the-american-independent-oil-company-v-the-government-of-the-state-of-kuwait-final-award-wednesday-24th-march-1982>.

- (ii) a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

Apart from the fact that the Commission recognized that the treaty provision on its provisional application is the basis for this type of action, in Guideline 4, it certainly does not formalize the agreement, even allowing a resolution of an international organization, and thus an act formally adopted by a legal subject separated from the member states (but how can it be showed that common consent of the negotiating parties has been reached here? The resolution can, however, be accepted in this role as an act of the organization approved by other parties to the treaty).⁵⁹

The basis for PAT may also be an agreement in the form of a unilateral declaration accepted by other parties (provisionally applying the treaty or finally already bound by it). It is aptly argued in this context that such acceptance cannot be presumed. There must be evidence of the conclusion of the agreement in this manner.⁶⁰ An agreement on PAT, like any international agreement, may be amended and even terminated. Basically, it depends on what the negotiating parties agree.

In concluding the discussion of Guideline 4, it is worth noting that although the solutions contained therein concern the form of a PAT agreement, they in fact confirm that the basis for provisional application

⁵⁹ The United States expressed a strong opposition to the inclusion resolutions adopted by an international organization or at an intergovernmental conference in guideline 4. According to them, this creates “confusion as to the applicable standard for an agreement to apply a treaty provisionally. In particular, the draft guideline suggests that there is some particular significance to resolutions adopted at international conferences for the purposes of establishing valid agreements for the provisional application of treaties. An agreement to apply a treaty provisionally requires the consent of all States (and international organizations) assuming rights and obligations pursuant to that provisional application. A resolution adopted at an international conference can establish provisional application obligations only if all such States express their consent to its adoption. Resolutions adopted by an international conference that do not reflect the consent of all States assuming the rights and obligations pursuant to provisional application – such as those adopted without the participation of or without the consent of all relevant States – would not establish a valid agreement for provisional application in respect of those States. The key consideration is not the mechanism through which States reach an agreement to apply a treaty provisionally, but rather whether all the necessary parties have consented to the agreement”. ILC. Provisional application of treaties. Comments and observations, pp. 21-22.

⁶⁰ Azaria, *Provisional Application of Treaties*, 236-237.

can only be a separate agreement from the treaty to be provisionally applied. At the same time, this does not undermine the finding that it can take any form, including a tacit agreement. This finding is consistent with the earlier analysis of Article 25 of the VCLT⁶¹.

5.1.4. Decision to Apply a Treaty Provisionally

An agreement on PAT must be distinguished from a decision on the matter. The latter is taken by each interested legal subject (state, international organization) individually, in accordance with its law. This is influenced by various factors which, in principle, do not enter into international law. On the other hand, as in the case of binding by treaties, it is significant whether the decision was valid, that is, that it was not taken with a violation of domestic law.

In the case of a conclusion of treaties, the authors of the 1969 Vienna Convention adopted a rebuttable presumption of prohibition against relying on one's own internal law to invalidate the decision to ultimately be bound by a treaty. At the same time, it was established that this presumption may be revoked if it is shown that the violation was obvious and related to an internal rule of fundamental importance (Article 46). A similar solution was adopted by the International Law Commission with regard to the decision on PAT.⁶² As a result, as stated in Guideline 11 of the Guide (*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

⁶¹ See point 3.3.

⁶² See commentary on Guideline 11, in the Guide to Provisional Application of Treaties and commentaries thereto, point 2. See also Azaria, *Provisional Application of Treaties*, 248-250; Wyrozumska, *Umowy międzynarodowe*, 269.

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.

The breach of a rule of domestic law must be obvious, which should be understood as a breach objectively visible “at first glance” to other parties provisionally applying the treaty in good faith,⁶³ not requiring special proof. It must deal with a rule of fundamental importance, which can be understood as a constitutional rule for states and a statutory rule for international organizations.

As in the case of the conclusion of a treaty, where a treaty may be signed or finally bound with a reservation, reflecting an internal decision of the party concerned (Article 19 of the 1969 Vienna Convention), when deciding on PAT, a reservation may also be formulated relating to the exclusion or modification of the legal effect of the treaty during its provisional application. The ILC, which formulated Guideline 7 in this respect, states that its guidelines “are without prejudice to any question concerning reservations” relating to PAT. In fact, it commands the application of the 1969 VCLT on an analogous basis (however, not limited to it; “the ILC Guide to Practice on Reservations to Treaties⁶⁴, while not expressly addressing reservations formulated in connection with provisional application, may nevertheless provide guidance⁶⁵), but taking into account the existing differences (*mutatis mutandis*) between these legal situations (signing or conclusion, and provisional application).⁶⁶ At the same time, the Commission emphasized the difference between reservations and interpretative declarations, which may also be made during PAT. However, the ILC was not unanimous on the regulation of

⁶³ See commentary on Guideline 11, in the draft Guide to provisional application of treaties and commentaries thereto, point 4.

⁶⁴ Yearbook of the International Law Commission 2011, vol. II, Part Three, pp. 23 ss.

⁶⁵ Point 3 of the commentary to the guideline 7.

⁶⁶ The draft Guideline 7 has been criticized in the comments of some countries. In particular, the United States expected this guideline to be removed from the draft. The main argument is the lack of practice of states in this matter and no basis “in any actual legal authority” (the guideline and the commentary to it “instead represent the Commission’s speculative thoughts on essentially academic questions”). ILC. Provisional application of treaties. Comments and observations, p. 30. However, from a formal point of view, there are no grounds for the parties not to be able to make reservations to the provisions on PATs.

reservations to PAT, despite the fact that, in principle, the view was accepted that there were no obstacles to the formulation of such reservations.

Moreover, what is more specific to the provisional application of the treaty itself, the ILC has accepted that it is permissible to agree to provisional application with limitations resulting from national law or rules of an international organization, respectively. Such restrictions may be included in a treaty provisional application clause, in a treaty provisional application or otherwise formulated and affect all or part of a treaty applied provisionally (Guideline 12).⁶⁷

5.1.5. Commencement and Termination of the Provisional Application of a Treaty

5.1.5.1. General Remark

PAT takes place over a specific period of time, which has a commencement and an ending/termination. The provisional application is therefore an action that takes place within a certain period of time. However, for PAT to take place at all, it is necessary to distinguish between the starting point and the end point, i.e. to establish that between the commencement and the ending/termination of provisional application there is a certain period of time during where provisional application is possible. In other words, PAT could not take place if the starting and ending dates were the same or very near. As a consequence, PAT cannot in principle take place where, for example, the signature of a treaty is also a form of being bound by it, or where the conclusion of a treaty is effected through accession, by which the treaty is bound and domestic procedures are very close to going through from the date of accession. The lack of a time frame for PAT may occur when there is automatic succession or even singular (non-automatic)

⁶⁷ In its commentary on the draft Guideline 12, footnote 306, the Commission stated that examples include free trade agreements between EFTA countries and many other countries, e.g. Albania, Bosnia and Herzegovina, Canada, Chile, Egypt, Former Yugoslav Republic of Macedonia, Georgia, Korea, Lebanon, Mexico, Montenegro, Philippines, Peru, Serbia, Singapore, Tunisia, Central American States, the Gulf Cooperation Council or the Customs Union of South African States. These agreements use a variety of clauses, including the following: “if its constitutional requirements permit”, “if its respective legal requirements permit” or “if their domestic requirements permit” (www.efta.int/free-trade/free-trade-agreements).

succession, and the date of notification and internal procedures are not too distant in time.

5.1.5.2. Commencement of Provisional Application

Article 25 VCLT does not indicate the initial moment of PAT. It merely states that it takes place “pending its entry into force”. At the same time, it is imprecise in that – as has already been mentioned several times – the entry into force of the treaty does not interfere with the possibility of its provisional application to a state interested in its subsequent accession to the treaty, or with the possibility of taking over treaty obligations under succession.

Nevertheless, logically, a treaty as a document must exist in order to be provisionally applied. Moreover, given that provisional application is to ensure the operation of the treaty before it enters into force and that it takes place during the course of action aimed at its entry into force, it should be presumed that the treaty should be a closed document (the stage of the treaty’s authentication within the meaning of Article 10 of the Vienna Convention), which are not subject to further negotiation (thus PAT should not take place at the stage of negotiation or even adoption of the text in the sense given to Article 9 of the Convention).

However, the ILC Guide is rather enigmatic on this matter. Indeed, Guideline 5 states that PAT begins on a date fixed by the treaty or otherwise agreed (and under the conditions and procedures set out in the treaty or otherwise agreed). This means that the fixing of the starting date is a matter of international contractual freedom. However, the guideline does not indicate what the beginning of the provisional application will be if the parties do not agree on it. According to the ILC, that guideline confirms the international practice (point 3 of the commentary). However, it is not unequivocal. The most common starting date for provisional application is the date of signing the treaty. Nevertheless, there are also cases when provisionally applies a treaty only adopted or from a date that is determined by the provision of a treaty or a decision of an international organization.⁶⁸

⁶⁸ Krieger, commentary to Article 25 VCLT, 415. Also, some states commenting on the draft Guide, are of the opinion that the proper moment for the commencement of provisional application of a treaty can be the adoption of its text. See ILC. Provisional

5.1.5.3. *The End/Termination of Provisional Application*

PAT may be come to the end by the determination of the invalidity of the treaty provisionally applied or by the nullity of an agreement relating to PAT, and by the termination of either of them. The ILC addressed the issue of invalidity in Guideline 11, focusing only on the validity of the consent for provisional application, while ignoring at the same time other possible defects in the declaration of will and other grounds for nullity. It would be useful to refer here to the grounds for invalidity set out in the Vienna Convention and relate them to the legal bases of provisional application or the treaty to be provisionally applied.

As far as the termination of PAT is concerned it may be undertaken as prescribed by the treaty (the agreement on provisional application) or by the subjects negotiating or applying it provisionally. In the absence of any specific regulation on this matter, PAT ends when the treaty provisionally applied enters into force (Guideline 9(1)). In addition, as Article 25(2) of the Vienna Convention and the Guideline 9(2) state,

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 an international organization shall be terminated if that State or international organization notifies the other States or international organizations concerned of its intention not to become a party to the treaty.

Moreover, the Guideline 9(3) provides that:

Unless the treaty otherwise provides or it is otherwise agreed, a State or an international organization may invoke other grounds for terminating provisional application, in which case it shall notify the other States or international organizations concerned.

A first general observation on the termination of provisional application is that, except in the case of the entry into force of a treaty for parties applying it provisionally, the determination of when provisional application ends falls, like its commencement, within the scope of international contractual freedom. It includes not only when provisional

application of treaties. Comments and observations, p. 13 (Finland and other Nordic countries).

application to a particular party will terminate, but also what reasons for termination will be acceptable.

In a commentary to this section of Guideline 9 (point 8), the International Law Commission indicated that despite the lack of significant practice and taking into account the flexibility provided for in Article 25(2) of the Convention, it is useful to add a rule that would allow for the termination or suspension of provisional application in situations not covered by the Vienna Convention. In any event, this confirms the possibility of ending the provisional application of the treaty both by unilateral notification of the interested party and by agreement of all parties applying the treaty, or even in another manner not provided for by the Convention⁶⁹. The reasons for terminating PAT can be varied. They may result from international or internal, legal and non-legal conditions in which the party is situated.⁷⁰ With respect to a party provisionally applying a treaty, the termination of provisional application may take place at any time, unless otherwise specified by the applying parties.

There are few and specific exceptions to the described rules for terminating the provisional application of the treaties. They concern in particular investment treaties. These treaties sometimes contain provisions under which, even after the end of their validity, the parties are required to perform their obligations for a specified period of time (survival clauses). Clauses such as Article 45(3) of the Energy Charter Treaty of December 17, 1994, sometimes stipulate that after the termination of provisional application, obligations with regard to investments made during provisional application continue and expire only after a certain period of time (in the case of the Energy Charter Treaty, it is as much as 20 years from the actual end of the provisional application).

⁶⁹ The Commission gave the following examples: “a State or international organization may seek to terminate provisional application of a multilateral treaty while still maintaining its intention to become a party to the treaty. Another scenario is that in situations of material breach, a State or international organization may only seek to terminate or suspend provisional application vis-à-vis the State or international organization that has committed the material breach, while still continuing to provisionally apply the treaty in relation to other parties. The State or international organization affected by the material breach may also wish to resume the suspended provisional application of the treaty after the material breach has been adequately remedied” (point 8).

⁷⁰ Second report on the provisional application of treaties, Juan Manuel Gómez Robledo, Special Rapporteur, point 79, A/CN.4/675, 9 June 2014, p. 15.

Termination of PAT means that the provisional duty to fulfill all obligations resulting from the treaty for the party expires ex nunc and on conditions described in Article 70 VCLT.⁷¹ As the Guideline 9(4) stipulates, termination of PAT “does not affect any right, obligation or legal situation created through the execution of provisional application prior to its termination” (Guideline 9(4))⁷².

5.2. Legal Consequences of the Provisional Application of Treaties

5.2.1. Introductory Note

From the point of view of the autonomy of PAT as a legal institution, as well as understanding its practical significance, it is of fundamental importance to determine the consequences of provisional application. In this context, three main issues arise: 1) whether PAT generates obligations under international law; 2) whether the *pacta sunt servanda* rule is applied during the provisional application of the treaty; 3) what is the issue of responsibility for internationally wrongful acts committed during PAT; 4) what internal consequences may have a treaty provisionally applied?

5.2.2. Legal Nature of the Provisional Application of Treaties

Undoubtedly, the period of the provisional application of the treaty precedes its duration. However, during this period, the treaty is provisionally, and sometimes not fully operational. Does this mean that it generates legal obligations for signatories that have decided to apply on a provisional basis? So, at the time of provisional application, does the treaty which, in whole or in part, bind the parties, in fact bind them? The answer to these questions is not easy.

Previous analyzes show⁷³ that the treaty is to be applied. Although Article 25 VCLT does not expressly state it in this matter, this must mean

⁷¹ As noted by Azaria, *Provisional Application of Treaties*, 252-253, some provisional application agreements contain a sunset clause which allows the agreement to be applied after its termination or after the withdrawal from the provisional application agreement. It remains mandatory for the parties.

⁷² The ILC highlights that this rule is modelled on Article 70(1)(b) VCLT.

⁷³ See point 5.1.1.

that the treaty produces legal effects on the parties, and therefore that their treaty rights and obligations become legally actual.⁷⁴ This issue is clarified by the International Law Commission, which in Guideline 6 (*Legal effect*) formulated the following characteristics of the 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 between the States or international organizations concerned, except to the extent that the treaty provides otherwise or it is otherwise agreed. Such treaty or part of a treaty that is being applied provisionally must be performed in good faith.

As a rule, it follows that a treaty provisionally applied, as regards its application, should have the same legal effects as a treaty that is already binding, unless the parties agree on other solutions in this matter. Thus, the issue is also covered by contractual freedom. In the absence of specific arrangements between the parties, the Guideline states that the treaty generates obligations for the parties and these are complete legal obligations (*obligationes perfectae*; they include a legal claim and responsibility).⁷⁵ The legal effects of a treaty applied provisionally are not temporary or precarious but definitive, unless the parties agree otherwise⁷⁶. As a result, the notification of the lack of the intention to bind does not cause *ex tunc* effects, unless otherwise agreed (which, moreover, also expresses legal uncertainty).⁷⁷

⁷⁴ Second report on the provisional application of treaties, points 44–68, pp. 10–14.

⁷⁵ See the decision of the ICSID arbitration tribunal on jurisdiction (under Article 45 of the Energy Charter Treaty), Ioannis Kardassopoulos v. Georgia, 6 July 2007, points 209–223, ICSID Case No. ARB/05/18, pp. 56–59. The Court rejected Georgia’s argument that provisional application is only of an aspirational (non-binding) nature. Text: <https://www.italaw.com/sites/default/files/case-documents/ita0444.pdf> See also Dalton, Provisional Application of Treaties, 243–244.

⁷⁶ In the ILC’s commentary to the Guideline 6 (point 4), the Commission accepts that the parties “may provide an alternative legal outcome”. Unfortunately, it does not explain this expression.

⁷⁷ Similarly and rightly, Villiger, *Commentary on the 1969 Vienna Convention*, 355–356.

5.2.3. Application of the Pacta Sunt Servanda Rule to the Provisional Application of Treaties

The recognition that a provisionally applied treaty is in fact in force and generates legal obligations raises the problem of the operation of the *pacta sunt servanda* rule. Article 25 of the Vienna Convention does not prejudice the application of this rule to PAT.⁷⁸ In turn, this rule, expressed in Article 26 of the Convention stipulates that a treaty that is in force is binding on its parties and must be performed in good faith. It therefore refers to a situation where the treaty has entered into force. From that date, the parties are obliged to perform their obligations under it in good faith. No wonder then that the operation of the *pacta sunt servanda* rule for a treaty provisionally applied is not obvious.⁷⁹

It is worth noting, however, that already during the work of the International Law Commission on the law of treaties, the belief was expressed that the *pacta sunt servanda* rule was effective during the provisional entry into force of the treaty (this term was used by the Commission). Moreover, in the commentary to the then Article 23 of the draft Articles, the Commission noted certain problems with the inclusion of the term “in force” in the provision on the rule in question. At the same time, it emphasized that there was no doubt that it also covered the case of the temporary entry into force of the treaty. So the *pacta sunt servanda* rule works in this case.⁸⁰

⁷⁸ Pending the Vienna Conference on the Law of Treaties, only India had doubts as to the application of the *pacta sunt servanda* rule to the period of provisional application of treaties. See Azaria, *Provisional Application of Treaties*, 239.

⁷⁹ See Dalton, *Provisional Application of Treaties*, 238-241. Villiger, *Commentary on the 1969 Vienna Convention*, 357, he noted that sometimes whether the *pacta sunt servanda* rule is applied is debatable (D. Vignes), but most of the doctrine supports the operation of this rule in relation to treaties applied provisionally.

⁸⁰ Commentary to Article 23, point 3. Yearbook of the International Law Commission 1966, vol. II, p. 211. According to states commenting on the draft Guide, there is no doubt that the *pacta sunt servanda* rule applies to the provisional application of treaties. See consistently: Argentina, Germany, Slovenia: ILC. *Provisional application of treaties. Comments and observations*, p. 4 (Argentina: for this state, the draft helps provide legal certainty, as they reflects the obligation to perform treaties in good faith), p. 6, 25 (Germany: the principles of *pacta sunt servanda* and good faith shall apply to provisional application), p. 11-12 (Slovenia: for this state, for the purpose of the operation of the *pacta sunt servanda* rule, there is no difference between provisional application of a treaty and its entry into force).

In the course of work on PAT, the Special Rapporteur, in his second report (2014), clearly expressed himself in favor of the *pacta sunt servanda* rule until PAT.⁸¹ In its third report (2015), it confirmed this position and added (paragraph 57) that⁸²:

The regime of provisional application presupposes that the obligations arising from the provisionally applied treaty will be complied with in full until the treaty enters into force, or until its provisional application is terminated by mutual agreement of the States among which the treaty is being applied provisionally, or until the State notifies the other States provisionally applying the treaty of its intention not to become a party to the treaty.

The rapporteur added that (point 58):

Provided that it is valid, provisional application produces the same legal effects as any other international agreement and is therefore subject to the rule *pacta sunt servanda*. Its legal effects are definite and enforceable and cannot subsequently be called into question in view of the provisional nature of the treaty's application.

In the final version of Guideline 6, the ILC did clearly confirm the operation of the *pacta sunt servanda* rule, saying that “the treaty being applied provisionally must be performed in good faith”. The commentary (point 5) explains that:

This sentence reflects the good faith obligation (*pacta sunt servanda*) stipulated in article 26 of the 1969 and 1986 Vienna Conventions. Article 26 of the Vienna Conventions refers to several legal effects.

Moreover, the Commission provides in Guideline 10 that it is inadmissible to raise arguments from the domestic law of a party applying a treaty provisionally in order to justify its non-performance. That rule was modelled on Article 27 of the Vienna Convention,⁸³ which is a natural extension and protection of the *pacta sunt servanda* rule.⁸⁴ This Guideline (*Internal law of States and rules of international organizations, and the observance of provisionally applied treaties*) reads as follows:

⁸¹ Second report on the provisional application of treaties, point 65, p. 13.

⁸² Third report on the provisional application of treaties, Juan Manuel Gómez Robledo, Special Rapporteur, point 56-59, A/CN.4/687, 5 June 2015, pp. 12-13.

⁸³ Commentary to Guideline 10, point 2.

⁸⁴ Third report on the provisional application of treaties, points 60-70, pp. 13-15.

1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.
2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

Guideline 10 only mentions the prohibition of invoking national provisions. However, applying *per analogiam* principles concerning the *pacta sunt servanda* rule, this also includes the prohibition of invoking national procedures, as well as the internal structure of the state or the dependencies between its organs.⁸⁵ Although the Guideline is silent on the matter, an exception to the principle expressed in it follows from Guideline 11 (*Provisions of internal law of States and rules of international organizations regarding competence to agree on the provisional application of treaties; validity of consent to PAT*).

There is therefore no doubt that the *pacta sunt servanda* rule applies during the provisional application of the treaty and between the parties provisionally applied a treaty.⁸⁶ It applies both to the obligations arising from a treaty provisionally and from an agreement on provisional application. At the same time, in the first case, it relates only to the scope of the treaty in which it is provisionally applied and under the conditions and in accordance with the procedures agreed by the parties for the provisional application of the treaty.

⁸⁵ See WTO Appellate Body in its report on United States – Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan of 18.8.2009, Report of the Appellate Body, WT/DS322/AB/RW, para. 182; Rudisa Beverages and Juices N.V. Caribbean International Distribution Inc v. The State of Guyana of 8.5.2014, CCJ Application No. OA 003 of 2013, paras. 17-19. The text of the judgment: <https://ccj.org/wp-content/uploads/2014/05/OA-003-of-2013-RUDISA-JUDGMENT-REVISED-6-7May14-2.pdf>

⁸⁶ Point 7 of the Commentary to Guideline 6. See also Azaria, Provisional Application of Treaties, 239-240.

5.2.4. Responsibility for Internationally Unlawful Acts and Provisional Application of Treaties

The natural consequence of recognizing that the subjects applying the treaty have full legal obligations during PAT is also that, in the event of a breach of these obligations, responsibility for an internationally wrongful act arises. This issue was consciously not regulated in Article 25 of the Vienna Convention (Article 73 VCLT). However, confirmation of this finding was reflected in Guideline 8 (*Responsibility for breach*) of the ILC Guide. One can read here that:

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.

The parties deciding on PAT cannot completely exclude (contract out) this responsibility, as it would mean that their obligations lose their legal character. On the other hand, they can modify its various elements, especially in the way defined by the Draft articles on the responsibility of the state and international organization for internationally wrongful acts (2001, 2011). They may e.g. change the conditions of responsibility, extend or modify the range of circumstances excluding state responsibility, or arrange the issue of pursuing claims in a specific way and remedy the damage. In addition, the parties may narrow down responsibility by establishing that only part of the treaty is provisionally applied.

It is also worth noting that the principle of responsibility for a breach of treaty obligations in force during the period of PAT implies that a party may not invoke its domestic law or its breach in order to discharge itself from responsibility.⁸⁷ An exception to this rule can only be found in Guideline 12. However, the reservation relating to respect for the obstacles deriving from domestic law would have to be formulated in connection with the decision to apply the treaty provisionally.⁸⁸

⁸⁷ See also Third report on the provisional application of treaties, points 60 and 61, p. 13.

⁸⁸ Commentary to Guideline 10, points 3 and 4.

5.2.5. Internal Consequences of the Provisional Application of Treaties

As the Special Rapporteur on the subject noted, PAT generates consequences not only in the international sphere, but also internally for those applying the treaty provisionally.⁸⁹ In principle, international law does not enter into this issue, although individual clauses or agreements concerning provisional application may provide for solutions in this matter. However, in general, it is for the party's domestic law (domestic law, internal organization rules) to determine the legal consequences of PAT.

Nevertheless, in accordance with general principles resulting from the *pacta sunt servanda* rule, the party provisionally applying a treaty should take appropriate internal implementation measures (legislative measures, and even, if necessary, allow the internal application of relevant treaty rules in its legal order), unless it is contrary to the rules relating to PAT. If there is no provision in the treaty to that effect, a party should formulate an appropriate reservation/declaration in this matter. In its absence, the internal effects of the treaty should in principle be the same as in the case of its entry into force.⁹⁰

However, the treaty can contain a clause, according to which PAT depends on the consistency with the internal law of a party. This is a case of the so-called Limitation Clause contained in Article 45(1) of the Energy Charter Treaty. The Article 45(1), called the Limitation Clause, 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.

In this case, the issue is, *inter alia*, whether, due to the clause, the provisional application should apply to the whole Treaty or to parts of it (provisions consistent with national law).

In the Yukos case⁹¹ the arbitral tribunal pointed out that the *pacta sunt servanda* rule and Article 27 of the VCLT prohibit a State from invoking

⁸⁹ First report on the provisional application of treaties, point 37, p. 10.

⁹⁰ See point 5.1.4.

⁹¹ See Yukos Universal Ltd (Isle of Man) v. Russian Federation, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, points 312-338, <https://pcacases.com/web/sendAttach/421> See also: Hulley Enterprises Ltd (Cyprus)

its internal legislation as a justification for failure to perform a treaty. According to the award:

Allowing a State to modulate (or, as the case may be, eliminate) the obligation of provisional application, depending on the content of its internal law in relation to the specific provisions found in the Treaty, would undermine the principle that provisional application of a treaty creates binding obligations.

International and domestic law, the tribunal continues, should not be combined by means of a limitation clause. It would mean that the performance of international obligations depends on national law. “This would create unacceptable uncertainty in international affairs”. It adds:

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. That is not the case with Article 45(1) of the ECT.

A treaty regime that allows a State to modulate its obligations depending on national law should be expressed in clear and unambiguous terms. Article 45(1) does not meet this regulatory standard. Nevertheless, the right to invoke national law is limited by the temporal condition: a State may raise its law to the extent it existed at the time of the ECT was signed. In the Yukos case, the tribunal finally decided that the national law of Russia is not inconsistent with the ECT’s provisional application.

The Yukos award shows some additional flexibility that is not present when the treaty is in force. It makes clear that it is possible, within the framework of treaty freedom, to make the obligation to perform treaty obligations conditional on compliance with domestic law, albeit only law that existed on the date on which the provisional application mechanism started to operate. By its very nature, such an arrangement will operate only as long as provisional application operates (until the decision to terminate it or until the treaty comes into force for a party).

The internal application (implementation) of a treaty and its scope will also depend on the nature of the obligations deriving from a treaty. It

v. the Russian Federation, Interim Award on Jurisdiction and Admissibility, 30 November 2009, point 394, PCA Case No. AA 226; Veteran Petroleum Limited (Cyprus) v. The Russian Federation, Interim Award on Jurisdiction and Admissibility, 30 November 2009, point 394, PCA Case No. AA 226.

may be that the treaty does not require internal action, or it only requires it to a very limited extent.

6. Provisional Application of Treaties and the Structure of Treaties: Scope of Provisional Application

With Article 25 VCLT, it becomes apparent that the treaty may be applied provisionally in whole or in part, as determined by the parties concerned. They may also theoretically decide to make the entire treaty subject to provisional application, but in the course of it may, for example by unilateral declaration, terminate only some of the obligations under the treaty. The others will continue to be applied provisionally. Hypothetically, it may also happen that the parties provisionally applying part of the treaty decide to extend the scope of application to the entire treaty. This means that the scope of the provisional application of the treaty may evolve. Unless otherwise provided, such changes may be made at any time during PAT.

PAT can also be viewed differently. Given the internal structure of a treaty, one may wonder in particular whether there are provisions that cannot be applied temporarily. In simplified terms, it can be assumed that the treaty consists of the following elements: a preamble, general provisions (e.g. objectives, principles, scope of regulations), sometimes including definitions, provisions governing the rights and obligations of the parties, institutional provisions (establishing international bodies dealing with the implementation, and interpretation of the treaty, and even control of its performance), provisions on compliance, provisions on dispute settlement, final provisions (depository, amendments, revision and modification, validity, entry into force, termination, territorial application, authentic languages, registration and publication).⁹²

It is not entirely clear whether all these clauses can be applied provisionally. Substantive provisions are the most susceptible to temporary application. Certain doubts, however, may concern institutional clauses (the creation and operation of bodies on the basis of treaties), especially when

⁹² In the Final Clauses of Multilateral Treaties. Handbook, United Nations 2003, Text: <https://treaties.un.org/doc/source/publications/FC/English.pdf>, there are five types of final clauses. They concern: 1. the conclusion of a treaty; 2. its application; 3. modifications; 4. duration; 5. termination.

the treaty is not binding or when it does not apply to all parties applying it. It is difficult to create temporary treaty institutions that may not come into existence in the end because the treaty will not enter into force, or those whose composition will be fluid due to the waiver of provisional application by certain parties applying the treaty (e.g. provisions on establishing courts, regular bodies of international organizations for which the treaty is a statute). *There is no doubt, however, that under provisional application, such treaty bodies may be established which serve its later full operation, such as various types of preparatory commissions. Sometimes the provisional application of provisions goes beyond this scheme, making it possible to eventually establish permanent treaty bodies and implement some of their powers.*⁹³ Moreover, it is noted that not all final clauses are in fact subject to provisional application. In particular, A. Quast-Mertsch, against the background of Article 24 (4) of the Vienna Convention, notes that the provisional application of the treaty does not apply to clauses relating to application, amendment, duration and termination, they enter into force upon adoption, unless otherwise agreed.⁹⁴

This analysis shows that a decision to apply a treaty provisionally in its entirety does not necessarily mean that all of its provisions will actually be applied. Some of them are unsuitable because their application would be premature, others are not suitable for provisional application at all.

⁹³ See Article 22 of the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems, O.J. of the European Union L 322 of the 7 December 2017, p. 3. According to that provision, Articles 11-13 of the Agreement are provisionally applied, it means provisions on coordination activities of the parties and on the Joint Committee (but not on its powers in the field of dispute settlement).

⁹⁴ Quast Mertsch, *Provisional Application of Treaties*, 309-311.

7. Provisional Application of Treaties and Selected Provisions of the Vienna Convention on the Law of Treaties

7.1. Introductory Note

PAT is also analyzed from the perspective of its relation to certain provisions of the Vienna Convention on the Law of Treaties.⁹⁵ For the purposes of this study, the analysis will be carried out in relation to those provisions of the Convention that are related to the situation prior to the entry into force of the treaty (Article 18 – obligation not to defeat the object and purpose of the treaty, Article 11 et seq. – consent to be bound, Articles 19 et seq. – reservations and objections), as well as the implementation of treaties (Article 30 – conflict of treaties), possible amendments to them (Article 39-41) and suspension of treaty operation (Article 57 et seq.).

7.2. Provisional Application of Treaties and the Period until the Entry into Force of the Treaty

Provisional application as a legal problem arises when the treaty already exists as an agreed document. From this perspective, the previous steps taken in the process of shaping the treaty do not matter for PAT, including in particular the decisions to initiate negotiations and the negotiations themselves up to the moment of adopting the text, and in principle giving it its final form (authentication of the text). PAT usually works from the date it is signed. In this situation, the first “clash” between the legal institutions of the treaties and PAT arises in the context of ensuring the obligation not to frustrate the object and purpose of the treaty (Article 18 VCLT) and consent to be bound by the treaty (Article 11) and related rules for reservations (Article 19 et seq.). This issue was considered by the Special

⁹⁵ According to Argentina’s general comments to the draft Guide, “While the particular issues arising from provisional application should be considered, it must be borne in mind that a treaty applied provisionally has legal effects just as if it were in force, and consequently the other provisions of the Vienna Convention are applicable *mutatis mutandis*. It is therefore important to take into consideration the relationship between provisional application and other provisions of the Vienna Convention”. ILC. Provisional application of treaties. Comments and observations, p. 4.

Rapporteur in the course of the work of the International Law Commission in his third report.

As regards the obligation not to defeat the object and purpose of a treaty (and therefore its key provisions, those that define its *raison d'être*), it should be noted that it operates from the moment the treaty is signed until its entry into force, including after the final binding by a treaty by a party, as long as it does not enter into force (Article 18). It would therefore seem natural that it applies to PAT. However, if the parties decide to apply the treaty provisionally in its entirety, then taking into account the fact that the legal effects of provisional application are in principle the same as those of its entry into force, it is hard to deny that the obligation not to defeat the object and purpose is then absorbed (as more limited, conservative and negative) by the obligation to perform all the obligations of a treaty applied provisionally, in accordance with the *pacta sunt servanda* rule (*a maiori ad minus* reasoning).⁹⁶ For a change, when provisional application only concerns part of the treaty, in so far as the essential provisions of the treaty fall under provisional application, they are absorbed by the duty to perform obligations that are also non-essential, though not all. And if provisional application concerns a part of a treaty that does not (or partially covers) the essential provisions, the obligation not to defeat the rest of the treaty obligations. On the other hand, if the subject of law decides to terminate PAT, but does not withdraw from the subsequent conclusion of the treaty, it is only required, after provisional application, not to defeat the object and purpose of the treaty.

The Special Rapporteur also stressed the need to distinguish between the different means of expressing consent to be ultimately bound by a treaty (Article 11 VCLT) from decisions on its provisional application. He argued that, while the final means of being bound by the treaty, including in a simplified form, were related to its entry into force, provisional application applies to the situation prior to its entry into force. Nevertheless, the rapporteur pointed out that a decision on PAT may be expressed in various ways flexibly. Moreover, he stated that the means of expressing consent to be bound by the treaty could be used to express consent to its provisional application.⁹⁷

⁹⁶ Third report on the provisional application of treaties, points 50-52, p. 11.

⁹⁷ Third report on the provisional application of treaties, points 32-44, especially points 35, 43, 44, pp. 8-10. However, the rapporteur is wrong thinking that a document becomes a treaty only after consenting to be bound by it (point 36). A treaty already

Another issue that raises doubts in relation to the period of PAT is the question of raising objections to a treaty applied provisionally. As it follows from Article 19 of the Vienna Convention, reservations may be formulated already at the stage of signing a treaty (which may be a form of its authentication), and thus before being bound by the treaty, and also at the time of final binding to the treaty, even if it has not yet entered into force, but has been provisionally applied unless the reservations are prohibited at all in relation to some provisions of the treaty or are contrary to the object and purpose of the treaty.

In this regard, it should be noted that, in the event of a reservation being made, a party deciding to apply the treaty provisionally may, together with such a decision, make a reservation to the treaty, to which other parties applying provisionally, including those who have already consented to be definitively bound by the treaty, may raise objections, also qualified.⁹⁸ At the same time, the termination of PAT means that reservations formulated when the treaty was signed also terminate. On the other hand, if the treaty becomes binding, a reservation made in connection with PAT may or may not be upheld. They could only be useful for provisional application purposes.

In a number of considerations, there has been a thread concerning the relationship between PAT and its entry into force. It has a special meaning

comes into being when the text of the document has been adopted and then declared authenticated. From that moment on, the treaty is capable of producing certain effects (not *per se*, of course, but, for example, as a result of consent to its provisional application). After signing the treaty, the obligation not to frustrate the object and purpose of the treaty is also updated.

⁹⁸ According to the special rapporteur, “a State may formulate reservations with respect to a treaty that will be applied provisionally if that treaty expressly so permits and if there are reasons to believe that the entry into force will be delayed for an indefinite period of time.” He emphasized that – so far – there has been no practice of formulating reservations when deciding on the provisional application of a treaty on the basis of explicit treaty clauses allowing such action. On the other hand, there is no obstacle to the formulation of reservations when a treaty provisionally applied is silent. See Fourth report on the provisional application of treaties, Juan Manuel Gómez Robledo, Special Rapporteur, points 33, 34, 36-38, A/CN.4/699, 23 June 2016, p. 8.

in the context of the defective phrase “provisional entry into force” of the treaty,⁹⁹ used also today, despite the criticism of the doctrine.¹⁰⁰

Regardless of the terminological problems, it is important to distinguish between the moment when a party is becoming definitely bound by a treaty (which may, albeit not necessarily, coincide with a decision on provisional application) from the entry into force of a treaty. In the case of both multilateral treaties and bilateral treaties, some parties (one of the parties in the case of bilateral treaties) may finally be bound by a treaty that has not yet entered into force. A multilateral treaty does not enter into force until a minimum threshold of ratification has been reached (in some cases when ratification by all parties concerned is undertaken). A bilateral treaty does not enter into force until the termination of the period agreed by the parties after the exchange of the instruments expressing final consent to be bound. Nevertheless, in both cases, these treaties can be provisionally applied.¹⁰¹ In such a situation (until the moment of the entry into force), however, those parties which were definitely bound by the treaty can no longer unilaterally decide to terminate its provisional application under Article 25 VCLT. In their case, it is only possible to denounce or withdraw from the treaty or terminate the binding in any other manner agreed in the treaty.¹⁰² By no means unilaterally.

7.3. Provisional Application of Treaties and Treaty Performance

The relationship between the fulfilment of a treaty and its provisional application concerns at least three issues: the conflict of obligations between

⁹⁹ Treaty Handbook Prepared by the Treaty Section of the Office of Legal Affairs, United Nations 2012, pp. 23, 66-67. The Guide explains: “It is noted, nevertheless, that some treaties [amongst others, commodity agreements – CM] include provisions for their provisional entry into force. This enables States that are ready to implement the obligations under a treaty to do so among themselves, without waiting for the minimum number of ratifications necessary for its formal entry into force, if this number is not obtained within a given period” (p. 23).

¹⁰⁰ Amongst others, Aust, *Modern Treaty Law*, 139.

¹⁰¹ However, in the United Kingdom’s opinion, the draft Guide as well as model clauses should be more sensitive regarding the problem of the provisional application of bilateral and multilateral treaties. See ILC. Provisional application of treaties. Comments and observations, p. 9.

¹⁰² See also Treaty Handbook, p. 11.

earlier and later treaties, especially in the absence of an abrogation clause, treaty amendment, and the suspension of the treaty operation.

7.3.1. The Issue of Provisional Application of Treaties in Conditions of a Conflict of Treaty Obligations

The issue of the conflict of treaty obligations is important for multilateral and bilateral treaties, although it is much more complex in the first case. The following legal situations may occur here: 1) earlier and later treaties are bilateral treaties between the same parties, where theoretically both (which, however, is a rather complete hypothesis) or one of them (usually later), may be provisionally applied; 2) the earlier or the later treaty is a bilateral treaty and the other a multilateral treaty, and the parties to the bilateral treaty are the same as some of the parties to the multilateral treaty. Both treaties may be provisionally applied, or one of them (usually a later one, but such a treaty can be both a bilateral and a multilateral treaty, the latter may already be binding on some parties, or only some parties may be finally bound by it); 3) the earlier and the later treaty are multilateral treaties, one or both of which are applied provisionally, and they may still be non-binding or binding on some parties. One or both treaties may also enter into force and be binding only on some parties, while others will apply them provisionally. What can complicate the situation is that these treaties may be concluded between the same parties, but may also be partially subjectively non-identical. Moreover, the later treaty (whether in force or provisionally) may be a special treaty, and the earlier treaty may be a general treaty (*lex generalis* relation).

There may also be cases where the parties conclude a bilateral treaty or a multilateral treaty and decide to apply it provisionally, but it is in full or partial conflict with the UN Charter or with a treaty containing a supremacy or primacy clause (Article 30 VCLT). In the latter case, either the treaty containing the supremacy or primacy clause or a later treaty or both may be provisionally applied. Moreover, provisionally applied treaties may be applied in this way in whole or in part, which may further complicate the assessment of the situation.

The easiest solution can be found in the case of the UN Charter, because the primacy (supremacy) of the Charter or certain treaties (e.g. statutes of regional integration organizations) exclude the legality of decisions on PATs contrary to them, and sometimes even allow steps to be taken, e.g. to establish a breach of membership obligations. If the legal

status (rank) of conflicting treaties is the same, provisionally applied treaties must be treated the same as binding treaties (Article 30 of the VCLT should be applied *per analogiam*).

The remaining cases are a great deal more difficult to analyze and determine their legal status. However, the most troublesome situation is when a treaty (earlier and/or later) is already in force between some parties, but is applied provisionally by other interested parties. In such an arrangement, there are three types of legal obligations: 1) between the parties applying the treaty provisionally, 2) between them and the parties bound by the treaty, 3) between the latter. From the point of view of these considerations, first and foremost, obligations of the first and second type are important. However, there may be a situation where the parties to the treaties in question are not wholly identical, and that the earlier and/or later treaty will be applied provisionally in whole or in part. This leads to a complex system of relations in which two parties to an earlier and a later treaty may apply the treaty provisionally, one may apply the treaty provisionally, and the other may be bound by it or may already be in force with it. Despite this complexity, the rules of Article 30 (3-5) VCLT, which means that to the extent that the parties apply the treaty provisionally, they must be considered as being in a position as if they were bound by it. However, this does not eliminate all problems. It is necessary to bear in mind the specific uncertainty generated by the situation of PAT, in particular the fact that the decision on provisional application may be relatively easily changed.

There can also be conflict with treaties, at least one of which is already provisionally applied. There may therefore be cases where a treaty in force becomes subordinate to a treaty which has given supreme position and which is only provisionally applied (possibly both are applied provisionally). A conflict may also occur between an earlier treaty in force or provisionally applied and a later treaty provisionally applied. Finally, a contradiction may arise between a more general treaty already in force and a specific treaty specific provisionally applied. These conflicts may prove embarrassing especially if some or all of the parties applying the treaty would provisionally give up its further application and would not intend to be bound by it in the future. These are hypothetical situations which, however, cannot be excluded from international practice.

7.3.2. Provisional Application of Treaties and Treaty Change

PAT does not preclude amendments to treaties that are not yet binding or already binding. Part IV of the Vienna Convention (Amendments and Modification of the Treaties; Articles 39-41) is fully applicable here.¹⁰³ Different situations can be imagined in this context. Thus, a treaty and amendments can be provisionally applied or only amendments can be provisionally applied. It is worth pointing out in this context that it is logically rather not possible for amendments to enter into force and only provisionally to apply the treaty to which such amendments are made. In addition, however, the treaty to be amended can be in force, but in the case of multilateral treaties not all parties (the others apply it only provisionally), and amendments that enter into force are adopted (as long as the treaty does not make their entry into force conditional upon the binding of all parties to the treaty).

7.3.3. Provisional Application of Treaties and Suspension of the Operation of a Treaty

Formally, there are no obstacles to suspend the operation of a treaty provisionally applied. The concept of treaty operation is not clarified in the Vienna Convention, but can be assumed to cover both the time when the treaty is in force and when it is only provisionally applied. In this regard, Article 57 VCLT, which provides that the operation of a treaty (or some of its provisions as part of the severability of a treaty – Article 44 of the Convention) may be suspended both in relation to all its parties and some of them not only on the basis of expressly defined Convention provisions, but also by consent of all parties and at any time, after consulting other parties. In the case of a multilateral treaty, it is also possible to suspend PAT between some of its parties on the terms set out in Article 58, and therefore on the basis of an agreement between them, the intention to conclude and the scope of the suspended provisions should be notified to the other parties. There is also no obstacle to the suspension or even termination of provisional application as a result of a fundamental breach of a treaty (in force between certain parties or provisionally applied between all or some of the parties), under Article 60 VCLT. A similar effect, within the framework defined by the Convention and common law, may have a

¹⁰³ The ILC rightly observed in the commentary on Guideline 6 of the Guide, point 7.

subsequent impossibility to execute a treaty (Article 61) and a fundamental change of circumstances (Article 62).

8. Provisional Application of Treaties and Armed Conflicts

In the work of the ILC on PATs, the issue of the application of treaties on a provisional basis in the event and during an armed conflict was not of particular interest. There is no comment on this issue in the Guide. Interestingly, this issue was also not specifically investigated during the work of Commission on the draft Articles on the effects of armed conflicts on treaties (2011). The only reference appears in the commentary to the scope of the Articles (the simple reference to Article 25 of the VCLT). This position was taken even though several states (Netherlands, Malaysia, Romania, Burundi) had suggested to the Commission that it should nevertheless formulate a more explicit position¹⁰⁴

This can be also read in the way that, according to the Commission, the general rule is that there will be no automatic termination or suspension of provisionally applied treaties in the event of an armed conflict – both between states and in a non-international conflict (Article 3). This can also be understood as accepting the principle that some treaties identified by the ILC in an annex to the 2011 draft Articles enjoy a presumption of continued operation, in whole or in part, in the case of both kinds of armed conflicts (Article 7).¹⁰⁵

¹⁰⁴ See point 3 of the commentary to Article 1 of the Draft Articles on the Effects of Armed Conflicts on Treaties of 2011, Yearbook of the International Law Commission 2011, vol. II, p. 109.

¹⁰⁵ The annex contains the indicative list of treaties including: (a) treaties on the law of armed conflict, including treaties on international humanitarian law; (b) treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries; (c) multilateral law-making treaties; (d) treaties on international criminal justice; (e) treaties of friendship, commerce and navigation and agreements concerning private rights; (f) treaties for the international protection of human rights; (g) treaties relating to the international protection of the environment; (h) treaties relating to international watercourses and related installations and facilities; (i) treaties relating to aquifers and related installations and facilities; (j) treaties which are constituent instruments of international organizations; (k) treaties relating to the international settlement of

Indeed, the extraordinary situation of an armed conflict means that sometimes it should even be expected that the treaty will start operating as soon as possible, even if only on a provisional basis (e.g. concerning the limitations in the use of arms in an armed conflict, but also the protection of persons, the environment or cultural goods). After all, the belligerents will not be interested (or one of them) at least in that such treaties should be applied provisionally, because violations of their obligations can be e.g. the basis for finding a violation of international law by a party or even international criminal liability. Nor will the parties be interested in the continuation of the operation of a treaty that applied before the conflict. Moreover, the situation of applying provisionally a treaty in non-international conflicts would need to be clarified in a situation where the non-governmental party did not explicitly state whether it applies the treaty provisionally or not (and whether it has the right to make such a declaration). In these circumstances, it is therefore regrettable that the International Law Commission limited itself to a simple indication of the operation of Article 25 of the Vienna Convention in armed conflicts.

Conclusions

PAT (Provisional Application of Treaties) can be regarded as an expression of legal and political pragmatism, as it is the challenges, needs, and interests of the parties to the treaties that induce them to apply the agreement in full or in part before it enters into force. However, PAT is not a simple mechanism to use. It raises a number of doubts both at the international level and in the internal sphere of parties provisionally applying the treaty.

The scope of legal regulation of PAT can be considered fragmentary. There is a lack of adequate norms concerning the legal basis, the manner of use of PAT, its beginning and end, the mechanics of operation, legal effects, including the operation of the *pacta sunt servanda* rule and responsibility for breach of treaty obligations during the period of provisional application. There are also no rules for conflicts of obligations, amendments to treaties, armed conflicts. The International Law Commission is trying to fill these

disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement; (l) treaties relating to diplomatic and consular relations.

gaps by adopting a Guide on the subject. However, it is not entirely uncontroversial or complete.

The findings of this study lead to the conclusion that PAT is a legal institution of treaty law based on an international agreement that is ancillary to a provisionally applicable treaty. It is an agreement closely related to the main agreement and in its validity and operation dependent on that treaty to some extent. The principle of *pacta sunt servanda* applies to both. However, unlike in the case of treaties in force, the parties may exceptionally agree that performance of the obligations will be subject to compliance with the party's internal law existing on the date of provisional application. Furthermore, in the case of provisional application, it may be terminated unilaterally if a party has not previously been bound by the treaty or has not agreed otherwise, or if the provisional application agreement or the basic treaty has not been declared invalid. An issue that requires case by case analysis is the conflict between treaties provisionally applied and between them and those already in force. However, except where the collision concerns the UN Charter or treaties to which the parties have given primacy/supremacy, treaties provisionally applied should be treated as treaties in force. Provisional application is possible in times of peace as well as in times of armed conflict. The commencement of hostilities does not automatically lead to suspension or termination of provisional application.

From a functional point of view it may be argued that, in particular, the prolonged periods of PAT may be regarded as one of the specific manifestations of the more general tendency to deformalization of international law. The provisional application is a situation where a treaty is already operational, that is, it produces legal effects, at least in the international sphere, although it is not yet formally binding. This may lead to the question of whether the definite conclusion of the treaty is still needed in such a situation. Even if PAT is not a sign of circumventing the law (international and domestic), it is certainly a symptom of limiting the role of the parties' formal consent to be bound by a treaty.

A positive consequence of PAT is that it allows its operation before the treaty binding procedures are completed, which, under appropriate legal conditions, can be used by both parties to the treaty and domestic entities. On the other hand, a negative consequence of PAT is certainly the state of uncertainty it generates especially when only some parties have decided to take such a step.

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