

The purpose of this study is to examine the feature of the law of treaties¹ permitting the provisional application of international agreements² prior to their formal entry into force,³ and to review the operation of this rule in practice, with special reference to arms control, disarmament and non-proliferation instruments.

When a treaty or international agreement enters into force, it becomes binding on the parties to it and its substantive provisions produce dispositive effect.⁴ While entry into force of a treaty may be brought about by signature,⁵ treaties frequently require ratification, acceptance or approval by all, or a specified number, of parties in order to enter into force.⁶ Where ratification is required, there is usually a temporal gap between the finalization of the text of a treaty and its subsequent ratification and entry into force. This gap may be caused by the need for the executive to consult internally, to obtain the approval of the legislature, or to prepare domestic implementing legislation.⁷ Given the complexity of the modern democratic state and the large number of international agreements it is expected to conclude, the procedural safeguard provided by the requirement of ratification – at least of the more important treaties – would appear indispensable.

¹On the law of treaties in general, see, for example, Aust *Modern Treaty Law and Practice* (2000); Elias *The Modern Law of Treaties* (1974); Reuter *Introduction to the Law of Treaties* (1995); McNair *The Law of Treaties* (1961); Menon *The Law of Treaties between States and International Organizations* (1992); Rosenne *S Developments in the Law of Treaties 1945-1986* (1989); Sinclair *The Vienna Convention on the Law of Treaties* (1984).

²In this study the term ‘international agreement’ is used synonymously with the term ‘treaty’. A 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties (1969 Vienna Convention) defines a treaty to mean “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Treaties may therefore include instruments variously called accords, agreements, conventions, protocols, compacts, charters, acts, declarations, arrangements, minutes, agreed minutes, memoranda of agreement, memoranda of understanding, exchanges of notes, exchanges of letters, letters of agreement, etc.

³A 24 of the 1969 Vienna Convention, which deals with entry into force of treaties, provides as follows:

- “1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.
2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.
3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.
4. 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.”

⁴A 26 (*Pacta sunt servanda*) of the 1969 Vienna Convention provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”

⁵A 12 of the 1969 Vienna Convention.

⁶In accordance with a 2(1)(b) of the 1969 Vienna Convention ‘ratification’, ‘acceptance’ and ‘approval’ mean in each case the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty. A 14 lists the conditions under which the consent of a state to be bound by a treaty will be established by ratification, acceptance or approval.

⁷Aust (n 1) 81-82.

Although the act of ratification remains discretionary under international law, there may at times be circumstances of an urgent political, economic or administrative nature which dictate the need to apply some or all of the terms of a treaty as early as possible. In such cases the negotiating parties may agree to an interim or provisional application of the treaty in question. The possibility to apply a treaty provisionally pending its entry into force is recognized in article 25 of the Vienna Convention on the Law of Treaties of 23 May 1969⁸ (1969 Vienna Convention), and in article 25 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986⁹ (1986 Vienna Convention). Article 25 of the 1969 Vienna Convention reads as follows:

- “1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
 - (a) the treaty itself so provides; or
 - (b) the negotiating States have in some other manner so agreed.
2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.”

The inspiration for this study is twofold. The first source of inspiration has been the conclusion during the last decade of important arms control, disarmament and non-proliferation treaties with complex preparatory arrangements that appear to possess the characteristics of a provisional or interim application of certain terms of the treaty concerned. The treaties in question are the Chemical Weapons Convention¹⁰ (CWC) and the Comprehensive Nuclear-Test-Ban Treaty¹¹ (CTBT). In both of these cases the signatory states established temporary entities with the task of preparing for the entry into force of the treaty and the establishment of a permanent intergovernmental organization. These entities were or are the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons (OPCW), and the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO). The existence of these two preparatory commissions raises several questions: Is the establishment of a preparatory commission evidence of a provisional application of all or part of a treaty containing the constituent instrument of an international organization? Did the negotiating states intend to apply the respective treaties, or parts of them, on a provisional basis, pending their entry into force? If so, for how long? What is the relationship between the obligations of members of a preparatory commission and the obligations flowing from article 25 of the 1969 Vienna

⁸1115 UNTS 331.

⁹UN doc A/CONF.129/15 dated 20 March 1986.

¹⁰See s 6.4.1 below.

¹¹See s 6.4.2 below.

Convention? what is the status of a preparatory commission under international law? Given the fact that the Preparatory Commission for the CTBTO has already entered its eighth year of existence, these questions have considerable topical relevance.

The second source of inspiration for this study was the millennium initiative of the United Nations aimed at increasing adherence to treaties for which the secretary-general of the United Nations is depositary.¹² This initiative was intended to address the accumulating backlog in signatures and ratifications of important multilateral instruments deposited with the secretary-general.¹³ The need for the initiative focused attention, once again, on the “deplorable fact” that “the number of ratifications of, and/or accessions to, some multilateral treaties adopted under the auspices of the United Nations has remained below expectation”.¹⁴ In 1980, the government of the United States formulated the problem thus:

“Whether a State becomes a party to a treaty is a decision that each State must take as an exercise of its sovereign will. Nevertheless, the entire process of drafting and adopting treaty texts becomes fruitless if the resulting treaties are not ratified, and a less effective process if the ratifications do not come about with sufficient reach and rapidity that treaties come into force within a reasonable period of time after their completion...”¹⁵

Not infrequently, then, there is a considerable delay between adoption of the text of a treaty and its entry into effect.¹⁶ This perennial problem leads one to consider the legal

¹²On 15 May 2000, the UN secretary-general wrote to all heads of state or government in connection with the millennium summit which took place in New York from 6 to 8 September 2000. In his letter the secretary-general recalled that special facilities would be provided at the summit for heads of state or government or foreign ministers to add their signatures to any treaty or convention for which he was the depositary. The letter identified 25 core treaties representing the key objectives of the UN and invited heads of state or government to consider signing and ratifying or acceding to those treaties if their state was not a party to them. See *UN Millennium Summit Multilateral Treaty Framework: An Invitation to Universal Participation* (2000). On an earlier initiative in the area of human rights treaties, see Weissbrodt ‘A New United Nations Mechanism for Encouraging the Ratification of Human Rights Treaties’ 1982 (76) *AJIL* 418.

¹³The secretary-general is depositary of 506 treaties. (See <http://untreaty.un.org>.)

¹⁴UN *Review of the Multilateral Treaty-Making Process* (A/35/312/Add.1 dated 28 August 1980) 9 (reply of Austria).

¹⁵A/35/312/Add.1 39 (reply of the US). The backlog in signature and ratification of multilateral treaties appears to have been caused not only by problems of acceptance but by the ability of states to deal with the increase in the number of international agreements. Serious concerns have been expressed for some time that the conclusion of an ever-increasing number of treaties, especially multilateral treaties, places a strain on the diplomatic, administrative and legislative capacities of many, if not most, states. See Rogoff & Gauditz ‘The Provisional Application of International Agreements’ 1987 (39) *Maine LR* 29 32-3; Roucouas ‘Uncertainties Regarding the Entry into Force of Some Multilateral Treaties’ in Wellens (Ed) *International Law: Theory and Practice* (1998) 179. The problem of a low rate of ratifications is not confined to multilateral treaties concluded under the auspices of the UN. For example, an impressive number of unperfected signatures have been collected by the director-general of WIPO, which administers some 23 treaties in the field of intellectual property. Among them is the Trademark Law Treaty, which was opened for signature on 27 October 1994 and entered into force on 1 August 1996. Ten years later (October 2004), 30 of the original 51 signatories have yet to deposit their instruments of ratification. See *WIPO Contracting Parties of Treaties Administered by WIPO* available at <http://www.wipo.int/treaties>; WIPO TLT Notifications No. 1 and 7.

¹⁶To cite a prominent example, the 1969 Vienna Convention took over ten years to enter into force. Although concluded almost twenty years ago, the 1986 Vienna Convention has still not entered into force, despite requiring the deposit of a relatively modest 35 instruments of ratification or accession (a 85).

devices that may be used either to avoid or reduce the delay, or to increase the commitment of states during the period before a treaty enters into force. The technique of provisional application is an important interim mechanism that can contribute to ensuring that the application of useful international norms is not delayed pending the entry into force of a treaty.¹⁸ This also raises some questions, the answers to which are not as simple as at first sight. For example, what are the permissible purposes for provisional application? What are the formal requirements for an agreement on provisional application? What is the legal effect of such an agreement? How long can an international agreement be applied on a provisional basis? What is the relationship between provisional application and national law, in particular the competence to conclude treaties?

In order to answer these questions, the first five chapters of this study will examine in detail the rules on provisional application in international law. Chapter 1 will provide an overview of the negotiating history of article 25; chapter 2 will consider the purpose or use of provisional application; chapter 3 will examine the content of article 25; chapter 4 will review the status of provisional application under customary international law, as well as its possible origins; and chapter 5 will survey the relationship between provisional application and municipal law, especially South African law. The final chapter, chapter, 6 will examine examples of provisional application in the context of arms control, disarmament and non-proliferation instruments.

This study is thus pertinent to three main areas of public international law. To the extent that it concerns the provisional application of international agreements, it of course concerns the law of treaties; to the extent that it deals with the preparatory arrangements for new international organizations, it is relevant to the law of international organizations; and, finally, to the extent that it examines arms control, disarmament and non-proliferation instruments, it is applicable to the field of international law dealing with such agreements.

¹⁷Besides the practical suggestion of employing sufficient jurists to process the instruments necessary for a state to become a party to a treaty and implement its provisions, other treaty-based mechanisms have been suggested to facilitate the entry into force of a treaty. These include (1) the possibility to formulate reservations, thereby facilitating the acceptability of the treaty; (2) the use of an 'opting-out' procedure in the final clauses, which would stipulate that the treaty would enter into force for all negotiating states at a specified date except for those that declare otherwise; (3) the treaty might oblige the signatories to present it to the relevant authorities for a decision on whether or not the state should become a party. See A/35/312/Add.1 26 (reply of the Netherlands).

¹⁸Roucounas (n 15) 186-191.

The negotiating history of article 25

Before analyzing the purpose and content of the rule reflected in article 25, it is instructive to recall the history of the lengthy negotiations that led to the adoption of the Vienna Conventions dealing with the law of treaties. The complex drafting history of article 25, first in the International Law Commission and then at the Vienna conference on the law of treaties, provides an essential background for a full understanding of the conventional law of provisional application. As we shall see in later chapters, the negotiating history of article 25 also provides clues on the status of provisional application under customary international law and the relationship between provisional application and municipal law.

1.1 Three Vienna Conventions

The first inter-governmental effort to codify and develop the whole field of international law occurred under the auspices of the League of Nations.¹⁹ On 22 September 1924, the Assembly of the League passed a resolution envisaging the creation of a standing organ, the committee of experts for the progressive codification of international law. A codification conference, which was attended by representatives of forty-seven governments, was convened at The Hague from 13 March to 12 April 1930.²⁰ However, the results of this conference were slim, and it was only following the Second World War that the renewed efforts at codification met with success.

Article 13, paragraph 1, of the Charter of the United Nations requires the General Assembly to initiate studies and make recommendations for the purpose of, *inter alia*, encouraging the progressive development of international law and its codification. In order to pursue this task, the General Assembly adopted resolution 174 (II) on 21 November 1947, thereby establishing the International Law Commission (ILC) and approving its Statute, article 18 of which requires the ILC to survey the whole field of international law with a view to selecting topics for codification.²¹ The ILC began work on the topic of the law of treaties in 1949 and appointed James Brierly as its first special rapporteur on the

¹⁹For a discussion of earlier efforts of individuals, learned societies and governments, see UN *Work of the International Law Commission* (1996) 1-2. One of the most significant developments in the inter-war years was the Harvard Law School's draft articles on the law of treaties.

²⁰On the work and influence of the League of Nations on the development of the law of treaties, see Rosenne (n 1) 353-358.

²¹The Statute of the ILC, which has been amended by four further resolutions of the general assembly, is reproduced at <http://www.un.org/law/ilc/introfra.htm>

subject. Progress was slow at first because the ILC was occupied with other matters and because of the complexity of the task at hand. Nevertheless, Brierly produced two reports and the special rapporteurs appointed during the 1950's, Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice, produced, respectively, two and five reports each. Fitzmaurice considered the topic suitable for an expository code, rather than an international convention, but this approach encountered difficulties, particularly from members of the ILC who came from civil law jurisdictions.²³ Sir Humphrey Waldock, who was appointed as Fitzmaurice's successor in 1961, proposed working on a multilateral convention, a course of action the ILC quickly endorsed.

Professor Rosenne²⁴ has noted the "refined character" of the procedure followed by the ILC at its sessions in the 1960's, which were mainly held at the *Palais des Nations* in Geneva.²⁵ The objective was to formulate draft articles on the law of treaties which captured the essential principles and rules of treaty practice in the most concise and general terms possible.²⁶ Almost invariably, the ILC held a general debate, article by article, on the basis of the special rapporteur's proposals, which were thereafter referred to the drafting committee with a general directive to re-examine them in the light of the debate and to report back. The plenary retained the right to amend or reject any text proposed by the drafting committee and a formal vote on a particular proposal was normally only taken at a late stage.²⁷ Governments and international organizations could also submit formal written comments on the proposals for draft articles and commentaries thereon contained in the ILC's annual reports. Strong support for the work of the ILC came from the General Assembly, which passed several resolutions on the question. From 1962, delegates to the Sixth Committee of the General Assembly also made substantive comments on individual articles.²⁸ The entire process – from the consideration of proposals in the ILC to the soliciting of comments from governments and the debate in the Sixth Committee – ensured an exhaustive consideration of all issues and all positions.

A second reading of the ILC's draft articles was conducted in 1965 and 1966.²⁹ At the end of its eighteenth session in 1966, the ILC was sufficiently advanced in its work to

²²Rosenne (n 1) 365.

²³Sinclair (n 1) 3-4.

²⁴Rosenne (n 1) at 367.

²⁵The second part of the seventeenth session, held from 3 to 28 January 1966, was held in Monaco.

²⁶Sinclair (n 1) 5.

²⁷A 16 of the ILC Statute sets out the procedure to be followed in cases where the General Assembly refers to it a proposal for the progressive development of international law.

²⁸Rosenne (n 1) 367.

²⁹In 1965, members of the ILC included such eminent scholars as Ago, Elias, Reuter, Rosenne, Tunkin, Verdross and Waldock.

recommend the convening of an international conference of plenipotentiaries to study the draft articles it had adopted and to conclude a convention on the subject.³⁰ It was proposed to have just one main committee, the committee of the whole, in order to preserve the unity of the subject.³¹ The conference was to be divided into two sessions, separated by approximately a year, with the interval to be used for further consideration and consultation.

In 1966 the General Assembly endorsed the proposal of the ILC and decided to convene an international conference of plenipotentiaries to consider the law of treaties and to embody the results of its work in an international convention and such other instruments as it deemed appropriate.³² In 1967 the General Assembly decided to convene the first session of the United Nations conference on the law of treaties at Vienna in March 1968.³³ Pursuant to the General Assembly's resolution, the first session of the conference met at the *Neue Hofburg* from 26 March to 24 May 1968 and the second session from 9 April to 22 May 1969.³⁴ Among the documents the conference had before it was the text of the draft articles on the law of treaties with commentaries, as adopted by the ILC at its eighteenth session. On 22 May 1969 the conference adopted the 1969 Vienna Convention, a Final Act and three resolutions annexed to the Final Act.³⁵ The second resolution, which related to article 1 of the Vienna Convention, was adopted so as to meet the concerns of many delegations that treaties with and between international organizations should have been included in the scope of the Convention.³⁶ It was this resolution that led eventually to the adoption of the 1986 Vienna Convention. The 1969 Vienna Convention was opened for signature on 23 May 1969 and entered into force some ten years later, on 27 January 1980, in accordance with article 84(1).³⁷

In the wake of the success of the negotiations for the 1969 Vienna Convention, the ILC and the United Nations made significant progress in the 1970's and 1980's in areas of

³⁰The decision was taken at the 892nd meeting of the ILC on 18 July 1966. See 1966 (II) *YILC* 177. The text of the draft articles on the law of treaties adopted by the ILC is reproduced in the same *Yearbook*.

³¹1966 (II) *YILC* 36. See also Rosenne (n 1) 375-6.

³²General Assembly resolution 2166 (XXI) of 5 December 1966.

³³General Assembly resolution 2287 (XXII) of 6 December 1967.

³⁴South Africa's credentials were accepted despite the reservations of Mali and the USSR (*United Nations Conference on the Law of Treaties Official Records A/CONF.39/11/Add.2* 4).

³⁵A/CONF.39/11 Add.2. The resolutions were as follows:

- (a) Declaration on Universal Participation in the Vienna Convention on the Law of Treaties,
- (b) Resolution relating to article 1 of the Vienna Convention on the Law of Treaties,
- (c) Resolution relating to article 66 and the annex thereto.

³⁶A 3 of the 1969 Vienna Convention deals with international agreements not within the scope of the Convention and provides, *inter alia*, that it does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law.

³⁷A 84(1) provides: "The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession."

the law of treaties outside the scope of the convention. The United Nations conference on the succession of states in respect of treaties was held in 1977 and 1978 and adopted the Vienna Convention on Succession of States in Respect of Treaties (1978 Vienna Convention) on 22 August 1978.³⁸ The 1978 Vienna Convention was opened for signature on 23 August 1978 and entered into force on 6 November 1996 in accordance with the provisions of article 49(1).³⁹ The United Nations conference on the law of treaties between states and international organizations or between international organizations was convened by the General Assembly at Vienna in 1986.⁴⁰ The resulting 1986 Vienna Convention was adopted on 21 March 1986 and opened for signature by states and international organizations invited to the conference until 30 June 1987. The convention has not yet entered into force.⁴¹

1.2 *Travaux préparatoires* of the 1969 Vienna Convention

What comprises the *travaux préparatoires* or preparatory work⁴² of the 1969 Vienna Convention? The official records of the Vienna conference on the law of treaties, which form part of the *travaux préparatoires*, have been published by the United Nations.⁴³ They provide valuable insight into the issues that dictated the final outcome of article 25 and are a useful supplementary means of interpreting the article,⁴⁴ which, in the view of some authors, “lacks legal precision”.⁴⁵

³⁸The Conference was convened pursuant to General Assembly resolution 3496 (XXX) of 15 December 1975. See *Work of the International Law Commission* (n 19) 79 ff.

³⁹A 49(1) provides: “The present Convention shall enter into force on the thirtieth day following the date of deposit of the fifteenth instrument of ratification or accession.” Aa 27-29 of the 1978 Vienna Convention deal with provisional application in the special context of state succession, which is outside the scope of this study.

⁴⁰General Assembly resolution 39/86 of 13 December 1984.

⁴¹A 85(1) of the 1986 Vienna Convention provides: “The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession by States or by Namibia, represented by the United Nations Council for Namibia.”

⁴²According to McNair ((n 1) 411), preparatory work is “an omnibus expression which is used rather loosely to indicate all the documents, such as memoranda, minutes of conferences, and drafts of the treaty under negotiation”.

⁴³UN *United Nations Conference on the Law of Treaties Official Records* (A/CONF.39/11 and A/CONF.39/11/Add.2).

⁴⁴In accordance with a 32 of the 1969 Vienna Convention, recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning resulting from the application of a 31 (which contains the general rule of interpretation) or to determine the meaning when the interpretation according to a 31(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable. The general rule contained in a 31 reads as follows:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Whether the *travaux préparatoires* of the 1969 Vienna Convention include, in addition to the records of the Vienna conference, the records, reports and other documents produced in the context of the work of the ILC, in particular the *Yearbooks* of the ILC, has not been definitively resolved. The question came up in a debate in the ILC in 1966.⁴⁶ Rosenne (Israel) doubted that the discussions in the ILC could be considered as part of the preparatory work because the ILC drafts were rather remote from diplomatic conferences and because members of the ILC did not represent states but acted in their individual capacities. However, there does not appear any legal reason why resort could not be had, in appropriate cases, to the work of the ILC as a supplemental means of interpreting article 25 together with the official records of the Vienna conference itself.⁴⁷

1.3 Negotiating history of article 25 of the 1969 Vienna Convention⁴⁸

1.3.1 Work of the ILC

1.3.1.1 1956 session of the ILC

Rogoff and Gauditz have traced the early development of article 25 in the ILC.⁴⁹ The term ‘provisional’ was used for the first time in an ILC draft in article 42(1) of the Fitzmaurice report of 1956, covering the case of provisional entry into force. Draft article 42(1) was formulated as follows:

“A treaty may... provide that it comes 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 the 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.”⁵⁰

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”

This approach to treaty interpretation is generally accepted as reflecting customary international law, as affirmed most recently by the ICJ in the *Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (2001 ICJ Rep [forthcoming] para 37).

⁴⁵Rogoff & Gauditz (n 15) 41.

⁴⁶1966 (I) YILC 201. See also Rosenne (n 1) 369-70.

⁴⁷The ICJ referred to the records of the ILC in the *North Sea Continental Shelf cases* in order to determine the customary law status of a treaty provision (1969 ICJ Rep 3 33).

⁴⁸A 25 of the 1969 Vienna Convention was simply inserted *mutatis mutandis* in the 1986 Vienna Convention.

⁴⁹Rogoff & Gauditz (n 15) 43-48.

⁵⁰1956 (II) YILC 127.

This article is notable for two reasons. First, it contained several elements that would eventually be reflected in the final formulation of article 25. In particular, the concept of “an obligation to execute the treaty on a provisional basis” is found in abbreviated form in article 25, which provides that a treaty or part of a treaty “is applied provisionally...”. In addition, the article prescribed how agreement on provisional coming into force was to be reached, namely in the treaty itself, a possibility reflected in paragraph 1(a) of article 25. Another similarity is that both articles contain clauses stipulating the circumstances – albeit in different terms – in which the provisional application of a treaty will be terminated. Secondly, by stating that a treaty might provide that it “comes into force provisionally”, draft article 42(1) initiated a terminological and doctrinal debate on the notion of provisional application and its legal effects that lasted until the approval of article 25 at the Vienna conference. If a treaty might come into force provisionally, the question inevitably arose as to what was the difference, if any, between the legal effects of provisional entry into force and of its final entry into force. Under draft article 42(1), the effect of a treaty coming into force provisionally was “an obligation to execute the treaty on a provisional basis”. In this sense, there would be no difference in effect between provisional and definitive entry into force, both phases attracting the obligation to implement or execute the terms of the treaty in good faith. Whether the provisional application of a treaty in accordance with article 25 also attracts such a fundamental obligation, is a question that can only be determined by continuing our analysis of the *travaux préparatoires*.

1.3.1.2 1962 session of the ILC

In 1962, Waldock produced his first report on the law of treaties, which contained two draft articles dealing with provisional entry into force. Draft article 20(6) stipulated that

“a treaty may prescribe that it shall come into force provisionally on signature or on a specific date or event, pending its full entry into force....”⁵¹

Draft article 21(2) attempted to circumscribe, with greater precision than Fitzmaurice’s 1956 draft, the legal effects of provisional entry into force and the manner of its termination.⁵² Article 21(2) read as follows:

⁵¹1962 (II) *YILC* 69.

⁵²Rogoff & Gauditz (n 15) 44.

(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 a treaty is unreasonably delayed and, unless the parties have concluded 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.’⁵³

For the first time in an ILC text, paragraph (b) of the article contained the term ‘provisional application’, which was already familiar from the practice of states.⁵⁴ Following a general debate and discussion of the proposal in the drafting committee, as well as a renumbering of the articles, draft article 24 (Provisional entry into force) of the 1962 report of the ILC read as follows:

“A treaty may prescribe that, pending its entry into force..., it shall come into force provisionally, in whole or in part, on a given date or on the fulfillment of specified requirements. In that case the treaty shall come into force as prescribed and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or the States concerned shall have agreed to terminate the provisional application of the treaty.”⁵⁵

Like earlier drafts, this article dealt with provisional entry into force in accordance with the terms of the treaty itself and attempted to regulate the effect of a treaty’s coming into force provisionally. The effect of coming into force provisionally was that “the treaty shall come into force as prescribed and shall continue in force on a provisional basis....” In other words, the treaty would be applied, during the provisional phase, as if it had entered into force. This led to Milan Bartos (Yugoslavia) recommending some explanation in the commentary to forestall the argument that there was “something illogical” in bringing a treaty into force provisionally and making it subject to exchange of instruments of ratification in order to have binding force.⁵⁶ Rosenne questioned whether the article was intended to cover situations where the parties agreed to put the treaty into force provisionally by means of a (separate) agreement in simplified form. The special rapporteur

⁵³1962 (II) *YILC* 71.

⁵⁴See chs 2 and 4 below below.

⁵⁵1962 (I) *YILC* 259.

⁵⁶1962 (I) *YILC* 259. The commentary on draft a 24 is contained in 1962 (II) *YILC* 182. It stated, *inter alia*, that “[t]his article recognizes a practice which occurs with some frequency today and requires notice in the draft articles. Owing to the urgency of the matters dealt with in the treaty or for other reasons the States concerned may provide in a treaty, which it is necessary for them to bring before their constitutional authorities for ratification or approval, that it shall come into force provisionally. Whether in these cases the treaty is to be considered as entering into force in virtue of the treaty or of a subsidiary agreement concluded between the States concerned in adopting the text may be a question. But there can be no doubt that such clauses have legal effect and bring the treaty into force on a provisional basis.”

confirmed that this was the case, although the language of the article did not specifically cover the point.⁵⁷

A novel feature of draft article 24 as contained in the 1962 report of the ILC was the phrase providing that a treaty might come into force provisionally “in whole or in part”. This qualification recognized the possibility to bring some, but not all, of the terms of a treaty into force on a provisional basis pending its definitive entry into force. Concerning the conditions that would bring about termination of provisional entry into force, draft article 24 differed somewhat from Waldock’s earlier proposal, which had provided that if final entry into force were unreasonably delayed, termination of provisional application with respect to a party might be effected six months after unilateral notice by that party. In the later text, termination could be brought about either by the definitive entry into force of the treaty or by the agreement of the states concerned. However, the commentary on draft article 24 stated that the provisional application of a treaty would terminate upon the treaty being duly ratified or approved or upon it becoming clear that the treaty was not going to be ratified or approved by one of the parties.⁵⁸ In its comments on the draft articles contained in the 1962 ILC report, the government of Sweden considered that the commentary came closest to reflecting the legal position underlying state practice in this regard.⁵⁹

Besides Sweden, comments on draft article 24 were also submitted by the governments of Japan and the United States. The United States questioned whether there was any need to include the article in a convention on the law of treaties, while the Japanese government was of the view that, unless the legal effect of provisional entry into force could be precisely defined, it would be better “to leave the question ... to the intention of the parties”.⁶⁰

1.3.1.3 1965 session of the ILC

Taking into account the comments of the Swedish government, and on the assumption that the ILC would want to retain an article on provisional entry into force “lest the omission be interpreted as denying it”,⁶¹ the special rapporteur revised the article as follows for the 1965 session of the ILC:

⁵⁷1962 (I) *YILC* 259.

⁵⁸1962 (II) *YILC* 182.

⁵⁹1965 (II) *YILC* 58.

⁶⁰*Ibid.*

⁶¹*Ibid.*

A treaty may prescribe, or the parties may otherwise agree that, pending its entry into force..., it shall come into force provisionally, in whole or in part, on a given date or on the fulfilment of specified requirements. In that case the treaty or the specified part shall come into force as prescribed or agreed, and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or it shall have become clear that one of the parties will not ratify or, as the case may be, approve it.”⁶²

That this text was drafted with bilateral treaties only in mind is evident from the final phrases, which provide that provisional entry into force would terminate when “it shall have become clear that one of the parties will not ratify or, as the case may be, approve it”.⁶³ In the light of the debate at the 1962 session of the ILC, the article expressly provides for the situation where, in addition to so prescribing in the text of the treaty itself, “the parties may otherwise agree” to bring a treaty into force provisionally. The special rapporteur is on record as stating that *otherwise* in this context was, “intended to cover the case in which there was no provision on the subject in the treaty itself, but the parties made a separate agreement, for example, by an exchange of notes. ” He added that “[t]hat agreement would itself constitute a treaty, but would not be the treaty whose provisional entry into force was in question.”⁶⁴

Waldock’s revised text was extensively debated at the 1965 session of the ILC. Of particular interest is intervention of Paul Reuter (France) on whether the institution in question involved ‘entry into force provisionally’ or ‘provisional application’. In Reuter’s opinion, which was widely endorsed,⁶⁵ “[t]he expression ‘provisional entry into force’ no doubt corresponded to practice, but it was quite incorrect, for entry into force was something entirely different from the application of the rules of a treaty.” He went on to argue that

“[t]he practice to which the article referred was not to bring the whole treaty into force with its conventional machinery, including, in particular, the final clauses, but to make arrangements for the immediate application of the substantive rules contained in the treaty.”⁶⁶

He then proposed such wording as “[a] treaty may prescribe, or the parties may otherwise agree that, pending its entry into force ... its rules shall be applied provisionally for a specified period”. According to Reuter, the ILC would thereby “not be taking a

⁶²1965 (I) *YILC* 105-6.

⁶³See remarks of Jiménez de Aréchaga, supported by Rosenne, 1965 (I) *YILC* 106 and 111.

⁶⁴1965 (I) *YILC* 107.

⁶⁵See, for example, the remarks of Verdross, Lachs, Briggs (1965 (I) *YILC* 106 108).

⁶⁶1965 (I) *YILC* 106.

position on the legal source of such application, but would avoid using an expression which was a contradiction in terms.”⁶⁷

Herbert Briggs (United States) remarked that it was incorrect to refer to ‘parties’ in this context since a state only became a party when it became bound by a treaty. He went on to state that “[i]f the provisional application was prescribed by the treaty itself, the States concerned could be said to be parties to an informal understanding on such application” and added that “[t]he legal nature of the operation could also be described by saying that one and the same instrument contained two transactions: the treaty itself and the agreement on provisional application pending its formal entry into force.”⁶⁸ Roberto Ago (Italy) was of the view that the article was of great importance in view of the practice of states but that the ILC “should not use such a formulation as: ‘pending its entry into force..., it shall come into force provisionally’, for entry into force could not occur twice.”⁶⁹

With regard to the manner of bringing provisional entry into force to an end, Grigory Tunkin (USSR) expressed his misgivings concerning the final proviso “or it shall have become clear that one of the parties will not ratify, or as the case may be, approve it.” In his view, which found some support among other members of the ILC,⁷⁰ a more rigid rule was required: the matter could not be left to a mere inference and some clear statement was necessary on the part of the state concerned.⁷¹

Although two members of the ILC supported the deletion of the article,⁷² there was general support for its retention and following a debate the drafting committee proposed the following text of draft article 24:

- “1. A treaty may enter into force provisionally if:
 - (a) The treaty itself prescribes that it shall enter into force provisionally pending ratification, accession, acceptance or approval by the contracting States; or
 - (b) The contracting States otherwise so agree.
2. A part of a treaty may also enter into force provisionally pending the entry into force of the treaty as a whole if the treaty so prescribes or the contracting States otherwise so agree.”⁷³

In commenting on the revised text, the special rapporteur stated as follows:

⁶⁷*Ibid.*

⁶⁸1965 (I) YILC 109.

⁶⁹*Ibid.*

⁷⁰Rosenne and Jiménez de Aréchaga.

⁷¹1965 (I) YILC 111.

⁷²Elias and Tsuruoka.

The Drafting Committee had named article 24 in terms of the entry into force provisionally of the treaty because that was the language very often used in treaties and by States. Moreover, it seemed to him that the difference between the two concepts – entry into force provisionally and application of the clauses of the treaty provisionally – was a doctrinal question.”⁷⁴

In view of the preceding debate, the article now devoted an entire paragraph, paragraph 2, to the rule that a part of a treaty may enter into force provisionally pending the entry into force of the treaty as a whole. Another noteworthy feature is that the provisions on termination had been deleted. This was because when the ILC had adopted draft article 24 in 1962, it had not yet drafted the provisions on termination of treaties now contained in part V, section 3, of the 1969 Vienna Convention.⁷⁵ The special rapporteur had therefore concluded that it was “somewhat inconsistent” that article 24 should be the only article in part I of the draft articles on the law of treaties which dealt with termination.⁷⁶ Following a brief debate, the article was again referred to the drafting committee, which proposed the following, slightly modified, text, which the seventeenth session of the ILC adopted by 17 votes to none on 2 July 1965:

- “1. A treaty may enter into force provisionally if:
 - (a) The treaty itself prescribes that it shall enter into force provisionally pending ratification, accession, acceptance or approval by the contracting States; or
 - (b) The contracting States have in some other manner so agreed.
- 2. The same rule applies to entry into force provisionally of part of a treaty.”⁷⁷

1.3.1.4 1966 session of the ILC

One minor amendment to article 24 was approved at the ILC’s eighteenth session in 1966,⁷⁸ and it was then adopted, without vote, on 18 July 1966.⁷⁹ Article 24 was later renumbered as article 22 (Entry into force provisionally) in the draft articles contained in the 1966 report, and submitted to the first session of the Vienna conference in 1968.⁸⁰ Draft article 22 read as follows:

⁷³1965 (I) YILC 274.

⁷⁴*Ibid.*

⁷⁵See explanation of Waldock, 1965 (I) *YILC* 113.

⁷⁶*Ibid* 275.

⁷⁷*Ibid* 285.

⁷⁸In para 1(b), the term ‘contracting States’ was changed to ‘negotiating States’ (1966 (I) *YILC* 293). An editorial amendment, for which there is no record of discussion, was made in para 2 (the definite article was placed before ‘entry into force’). On the proposal of Ago, the title of the article was also changed at the 1966 session, from “Entry into force of a treaty provisionally” to “Entry into force provisionally”.

⁷⁹1966 (I) *YILC* 327.

⁸⁰A/Conf.39/11/Add.2 30.

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.’⁸¹

The commentary noted that the article recognized a practice which occurred with some frequency and required notice in the draft articles and that paragraph 1 of the article provided for the two contingencies where a treaty provisionally enters into force in virtue of the treaty or a separate protocol or exchange of letters, or in some other manner.⁸² The commentary also stated that “[n]o 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.” Finally, it recalled that the text of the article, as provisionally adopted in 1962, contained a provision on termination of the application of a treaty which had been brought into force provisionally but that it had been decided to dispense with the provision and to leave the point to be determined by the agreement of the parties and the operation of the rule regarding termination of treaties.

Among the comments on the ILC’s final draft articles on the law of treaties were those of the government of Belgium on draft article 22. The Belgian government thought that it would be advisable to provide a means by which the provisional application of a treaty not yet ratified could be terminated unilaterally and questioned whether it would not be possible to include a clause, along the lines of what would become article 18 of the 1969 Vienna Convention,⁸³ saying that “provisional application shall continue until the State concerned shall have made its intention clear not to become a party to the treaty”.⁸⁴

1.3.2 Vienna conference on the law of treaties

At the Vienna conference, draft article 22 as submitted by the ILC was discussed in the committee of the whole in 1968, in the plenary in 1969 and in the drafting committee at both sessions. The official records of the conference only summarize the debate in plenary meetings and in the committee of the whole.

⁸¹1966 (II) *YILC* 210.

⁸²A/Conf.39/11/Add.2 30.

⁸³For the text of a 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force), see n 340 below.

⁸⁴UN doc A/6827 6 dated 31 August 1967.

The committee of the whole initially discussed draft article 22 at its twenty-sixth and twenty-seventh meetings on 17 April 1968.⁸⁵ The article was thereafter referred to the drafting committee, which submitted its report to the seventy-second meeting of the committee of the whole on 15 May 1968. During the course of the committee of the whole's considerations, twelve delegations submitted nine formal proposals to amend the article.⁸⁶ Some of these proposals were voted upon in the committee of the whole, while others were referred to the drafting committee.

Proposals for the deletion of paragraph 2 of draft article 22 were made in the first part of the amendment by Czechoslovakia and Yugoslavia and in the amendment by the Philippines. These proposals were rejected by 63 votes to 11, with 12 abstentions.⁸⁷ Another proposal, by the Republic of Korea, Viet-Nam and the United States, was to delete article 22 as a whole. The representative of the United States informed the committee of the whole at its twenty-seventh meeting that his delegation had proposed the deletion of the article, *inter alia*, because it “failed to define the legal effects of provisional entry into force and could give rise to difficulties of interpretation with respect to other articles of the convention, notably those on observance and termination of treaties.”⁸⁸ Following a debate in which many delegations expressed a preference for retaining the article, he requested that the proposal to delete article 22 not be put to a vote.⁸⁹

Much of the discussion in the committee of the whole focused on whether to describe the practice as ‘entry into force provisionally’, as used in draft article 22, or as ‘provisional application’. The United States was of the view that if article 22 was to be retained, the term provisional application should substitute provisional entry into force.⁹⁰ In this regard, an amendment proposed by Yugoslavia and cosponsored by Czechoslovakia, was particularly influential. The amendment read as follows:

“A treaty or a part of a treaty may be applied provisionally if:
(a) The treaty itself prescribed that it shall be applied provisionally pending ratification, acceptance, approval or accession by the contracting States; or

⁸⁵ A/Conf.39/11/Add.2 144.

⁸⁶ The nine proposals for amendments were submitted by (1) Belgium; (2) Bulgaria and Romania; (3) Czechoslovakia and Yugoslavia; (4) Greece; (5) Hungary and Poland; (6) India; (7) Philippines; (8) Republic of Korea, Viet-Nam and the US; and (9) Viet-Nam.

⁸⁷ A/Conf.39/11/Add.2 144.

⁸⁸ A/Conf.39/11 140.

⁸⁹ *Ibid* 145.

⁹⁰ *Ibid* 140.

According to the Czechoslovakian representative, the term ‘provisional application’ was preferred “because there could hardly be two entries into force.”⁹² In supporting the Yugoslav-Czechoslovak proposal, Sinclair (United Kingdom) explained that “it was the application rather than the entry into force of the treaty that was contemplated”.⁹³ In the view of the Ceylonese delegation, there was no great difference between the two terms; ‘provisional entry into force’ had no doubt been used because the article had been placed in section 3, relating to entry into force of treaties.⁹⁴ As expert consultant, Waldock unsuccessfully attempted to defend the use of the expression ‘entry into force provisionally’. He informed the committee of the whole that the ILC had adopted that phrase because it understood that the great majority of treaties dealing with the institution under discussion expressly used that term.⁹⁵ However, the Yugoslav and Czechoslovak amendment was widely supported,⁹⁶ and was adopted by 72 votes to 3, with 11 abstentions.⁹⁷

Another question debated in the committee of the whole was the termination of provisional application. Formal proposals for a provision on termination were made by the delegations of Belgium,⁹⁸ and Hungary and Poland,⁹⁹ while the United States introduced an oral amendment along the same lines.¹⁰⁰ The principle of including a new paragraph on

⁹¹ A/Conf.39/11/Add.2 144.

⁹² A/Conf.39/11 141.

⁹³ *Ibid* 142.

⁹⁴ *Ibid* 141.

⁹⁵ *Ibid* 145. The expert consultant went on to add that “[f]rom the point of view of juridical elegance, it also seemed preferable not to speak of application, since it was clear that before any treaty provisions could be applied, some international instrument must have come into force. That instrument might be the main treaty itself, or an accessory agreement such as an exchange of notes outside the treaty.”

⁹⁶ In particular, by Cambodia, Ceylon, Ecuador, Finland, France, Greece, India, Italy, Israel, Poland, Romania, Switzerland, Thailand, the UK and the US.

⁹⁷ A/Conf.39/11 146.

⁹⁸ A/Conf.39/11/Add.2 144. The Belgian amendment read as follows:

“Add a paragraph 3 reading as follows:

Unless otherwise provided or agreed, a State may terminate the provisional entry into force with respect to itself, by manifesting its intention not to become a party to the treaty.”

⁹⁹ *Ibid*. The Hungarian-Polish amendment was as follows:

“Add a new paragraph reading as follows:

The provisional application of a treaty is terminated:

(a) when the treaty enters into force; or

(b) when the States between which the treaty provisionally applied agree to such a termination; or

(c) upon notification by one of such States of its intention not to become a party to the treaty with respect to that State.”

¹⁰⁰ A/Conf.39/11 140. The US proposal was as follows:

“Provisional application of a treaty or part of a treaty may terminate as agreed by the States concerned or upon notification by one of those States to the other State or States that it does not intend to become definitively bound by the treaty.”

termination or provisional entry into force or provisional application was adopted by 67 votes to 1, with 20 abstentions.¹⁰¹

At the seventy-second meeting of the committee of the whole, the chairman of the drafting committee, Mustafa Yasseen (Iraq), introduced a report containing the text of draft article 22 as adopted by the drafting committee.¹⁰² This text was the final version of article 25. In explaining the amendments made by the drafting committee, its chairman noted that the committee had replaced the expression in the Yugoslav and Czechoslovak proposal “a treaty... *may be* applied provisionally” by the words “a treaty... *is* applied provisionally” (emphasis added). The drafting committee had considered that the former expression might be interpreted to mean that the parties were left free to apply the treaty, even when such application was prescribed by the treaty. Since paragraph 1, as redrafted by the drafting committee, now expressly referred to the provisional application of part of a treaty, the committee had deleted paragraph 2 of the ILC’s text, which had merely stipulated that the rule in paragraph 1 applied to the entry into force provisionally of part of a treaty.¹⁰³ It was true that the committee of the whole had rejected a proposal to delete paragraph 2 of the ILC’s text, but the idea contained in that paragraph was now included in paragraph 1 and the drafting committee had not therefore disregarded the wishes of the committee of the whole.¹⁰⁴ The committee of the whole then approved the text without a vote.¹⁰⁵

1.3.2.2 Plenary (1969)

The text discussed at the plenary meetings held during the second session of the Vienna Conference in 1969 was the text approved by the committee of the whole in 1968. During the course of a debate held on 30 April 1969, the delegation of Guatemala continued to press for the deletion of the article for internal constitutional reasons.¹⁰⁶ Other delegations made statements which are particularly helpful in understanding the scope of the article and its legal effects. Sir Francis Vallat (United Kingdom) made an interpretative declaration containing three important points. First, he said that his delegation understood that the inclusion of the phrase “pending its entry into force” in paragraph 1 of article 22 did not preclude the provisional application of a treaty by one or more states after the treaty had entered into force definitively between other states. Secondly, with reference to

¹⁰¹ A/Conf.39/11 146.

¹⁰² *Ibid* 426.

¹⁰³ A/Conf.39/11 426-7.

¹⁰⁴ *Ibid* 427.

¹⁰⁵ *Ibid*.

¹⁰⁶ A/Conf.39/11/Add.1 39. The statement is discussed in s 4.2.5 below.

paragraph 1(b), which foresees that a treaty or a part of a treaty is applied provisionally pending its entry into force if “the negotiating states have in some other manner so agreed”, it was his delegation’s understanding that the paragraph would apply equally to the situation where *certain of* the negotiating states (but not all) had agreed to apply the treaty or part of the treaty provisionally pending its entry into force.¹⁰⁷ Thirdly, and most importantly, he stated that it was his delegation’s understanding that the rule in what was then draft article 23 (*Pacta sunt servanda*) continued to apply equally to a treaty which was being applied provisionally, notwithstanding the minor drafting changes which had been made to the ILC’s text.¹⁰⁸

The representative of India agreed with the first two points made by the United Kingdom but took issue with the third. It was his view that the *pacta sunt servanda* rule applied only to a “treaty in force”. He was therefore inclined to the view that any obligations that might arise under article 22 would come under the heading of a general obligation of good faith on the basis of the then draft article 15 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) rather than of article 23 (*Pacta sunt servanda*).¹⁰⁹

Several delegations expressed uneasiness about the possibility for termination allowed by paragraph 2,¹¹⁰ in particular that it introduced an element of insecurity into treaty relations since it lacked a period of notice for termination, which would instead be immediate. Nonetheless, on 30 April 1969, the eleventh plenary meeting adopted article 22 by 87 votes to 1, with 13 abstentions.¹¹¹ On the proposal of Italy, the drafting committee was asked once again to reflect on paragraph 2 of the article. At the twenty-eighth plenary meeting, held on 16 May 1969, the chairman of the drafting committee made a formal statement on a number of articles, including article 22. He reported that the drafting committee considered that the suggestions regarding article 22 would not be any improvement and that the committee had not therefore proposed any change in the text

¹⁰⁷The same view was expressed by Sir Humphrey Waldock in the ILC in 1965: “If no provision was made in the treaty itself, States could not be prevented from bringing the whole or part of the treaty into force by separate agreement.” (1965 (I) *YILC* 275.)

¹⁰⁸*Ibid* 40.

¹⁰⁹*Ibid* 41. By contrast, at the 1968 session, the Indian delegation had been of the view that draft a 22 “was only a variant of article 21 [on entry into force], and the provisional entry into force would be the same as full entry into force....” (A/Conf.39/11 145)

¹¹⁰Iran, Italy and Poland.

¹¹¹While it is not recorded which delegations voted for or against the article it is likely from the debating record that Guatemala voted against the article. Costa Rica, Cameroon and the Republic of Korea announced their intention to abstain or gave an explanation of their decision to abstain after the vote.

adopted by the plenary. He also reported on a Yugoslavian proposal to insert a new article to follow article 22, which would read:

“Every treaty applied provisionally in whole or in part is binding on the contracting States and must be performed in good faith.”¹¹³

The objective of this proposal was to make the *pacta sunt servanda* rule expressly applicable to treaties being applied on a provisional basis. The proposal seems to have been made as a result of modifying the article to refer to ‘provisional application’ instead of ‘entry into force provisionally’, the applicability of the *pacta sunt servanda* rule in the latter case not being in doubt because of the use of the term ‘entry into force’.¹¹⁴ The response of the drafting committee to the proposal is particularly interesting in the light of the earlier statements by the United Kingdom and India. According to its chairman, the committee considered that the proposal was “self-evident”, that “provisional application also fell within the scope of article 23 on the *pacta sunt servanda* rule”, and that it would be better not to state such an obvious fact. In the view of the drafting committee, the principle of *pacta sunt servanda* was a general rule, and it could only weaken it to emphasize that it applied to a particular case.¹¹⁵ The committee therefore did not recommend the adoption of the proposed new article.

The significance of the chairman of the drafting committee’s statement lies in the fact that it was made by one of the officers of the conference in that capacity and was not contradicted by any delegation. It may therefore be accepted as reflecting the understanding of the negotiating states on the effect of an obligation assumed under article 25: the *pacta sunt servanda* rule applies. The statement thus went a long way to answering the criticism by the United States representative in the committee of the whole in 1968 that the article failed to define the legal effects of provisional application. Returning to the subject at the twenty-ninth plenary on 19 May 1969, the Polish representative reaffirmed, again without contradiction, that “the *pacta sunt servanda* principle was fully applicable to the case where a treaty was applied provisionally”.¹¹⁶ She added that the principle of good faith should likewise prevail when the provisional application of a treaty was terminated. This

¹¹²A/Conf.39/11/Add.1 157.

¹¹³*Ibid.*

¹¹⁴Yugoslavia had originally proposed to amend article 23 (*Pacta sunt servanda*) to make it clear that it applied equally to “a treaty partly or in whole provisionally applied” (A/Conf.39/11/Add.1 268). It is not surprising that the proposal should have come from an East European state. Marxist legal teaching held that the principle of *pacta sunt servanda* also covered cases where there was provisional application of treaties pending their entry into force. See Lukashik ‘The Principle of Pacta Sunt Servanda and the Nature of Obligation under International Law’ 1989 (83) *AJIL* 513 516.

¹¹⁵A/Conf.39/11/Add.1 157.

¹¹⁶A/Conf.39/11/Add.1 158.

concluded the debate on article 22, which was thereafter renumbered once again and finally adopted as article 25 of the 1969 Vienna Convention on 22 May 1969.

Table 1: Article 25 of the 1969 and 1986 Vienna Conventions

Article 25 of the 1969 Vienna Convention	Article 25 of the 1986 Vienna Convention
<p>1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:</p> <ul style="list-style-type: none"> (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed. <p>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.</p>	<p>1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:</p> <ul style="list-style-type: none"> (a) the treaty itself so provides; or (b) the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have in some other manner so agreed. <p>2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have 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 that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty.</p>

The purpose of provisional application

The fact that an article on provisional application was included in the 1969 and 1986 Vienna Conventions attests to the importance of the procedure in the law of treaties. However, the text of a treaty that is applied provisionally will seldom reveal why the negotiating parties chose to implement it immediately without waiting for it to be ratified and enter into force. Treaty negotiations are usually confidential and it is generally only in the case of multilateral treaties that a public record of some part of the negotiations is available. It may therefore be difficult, if not impossible, to ascertain from available sources the reason why it was decided to implement a particular treaty provisionally. Several general functions or uses for provisionally application may nevertheless be deduced from the literature and the practice of states and international organizations. For the sake of convenience, these functions or uses may be classified as follows:¹¹⁷

- Urgency: When the subject matter of the treaty is urgent, the parties may wish to avoid the possible delay caused by the requirement of ratification by applying it on a provisional basis.¹¹⁸
- Certainty of ratification: If the negotiators of a treaty are confident that it will receive the necessary domestic approval for ratification, this may be sufficient reason to apply it provisionally.¹¹⁹
- Legal continuity: In successive treaty regimes, the parties may provide for the possibility of provisional application in order to achieve continuity between one regime and the next.¹²⁰
- Legal consistency: When an amendment to or modification of a treaty does not enter into force for all participants simultaneously, certain parties may apply the amended instrument provisionally in order to achieve a consistency of obligations among themselves.¹²¹

¹¹⁷A comprehensive classification of the purposes of provisional application does not exist as such in the literature. The classification suggested here is derived in part from Lefeber, who identifies urgency and legal continuity as the main purposes behind the technique. (See Lefeber 'The Provisional Application of Treaties' in Klabbers and Lefeber *Essays on the Law of Treaties* (1998) 81-82-3) The other functions were either mentioned at the Vienna conference or in official studies, or have been deduced from state practice.

¹¹⁸See s 2.1 below.

¹¹⁹See s 2.2.

¹²⁰See s 2.3.

¹²¹See s 2.4.

- Circumvention of obstacles to entry into force. Where there are political or other obstacles to the entry into force of a treaty, some or all of the states concerned may resort to provisional application to bypass those obstacles.¹²²

In addition, provisional application plays a special and at times complex role in the context of treaties establishing new international institutions, especially international intergovernmental organizations:

- Preparatory arrangements for new international institutions: The interim preparatory arrangements for new international organizations and treaty regimes may involve, depending on the circumstances, the provisional application of the constituent instrument concerned.¹²³

This chapter considers each of these headings. In practice there may be several reasons for the provisional application of a particular treaty and it should therefore be borne in mind that it could fall into more than one category.

2.1 Urgency

Urgency is the reason for provisional application that arises most frequently in the practice of states and international organizations and is the reason most often mentioned in the literature.¹²⁴ The urgency of the content of an agreement was cited as the purpose behind article 25 on several occasions at the Vienna conference, particularly by the delegations of Romania and Venezuela.¹²⁵ In defending the expression ‘entry into force provisionally’, Waldock stated that it was very common for that institution to be used in cases where there was “considerable urgency” to put the provisions of the treaty into force. In those cases, he pointed out, ratification sometimes never took place, because the purpose of the treaty was actually completed before it could occur.¹²⁶ In 1980, the deputy legal adviser of the United States department of state, Mark Feldman, alluded to urgency as the

¹²²See s 2.5.

¹²³See s 2.6 below.

¹²⁴For example, Akehurst *A Modern Introduction to International Law* (1997) 135, Detter ‘The Organs of International Organizations Exercising their Treaty-Making Power’ 1962 (38) *BYIL* 421 439, Vignes “Une notion ambiguë: la mise en application provisoire des traités” 1972 (17) *Annuaire Francais de Droit International* 181 182.

¹²⁵A/Conf.39/11 141 and 144.

¹²⁶A 1992 letter of agreement between Spain and the ITU (1748 *UNTS* 341) illustrates the phenomenon of a treaty entering into force definitively after its purpose has been achieved. The agreement was concluded in February 1992 in order to regulate the arrangements for an ITU meeting hosted by Spain in March of that year. It came into force provisionally on 1 March 1992 and definitively on 11 June 1993, over a year after the meeting had ended.

main factor in deciding to apply a treaty provisionally. Following testimony before the senate committee on foreign relations in support of maritime boundary agreements with Mexico,¹²⁷ Cuba,¹²⁸ and Venezuela,¹²⁹ he stated the following in reply to certain written questions from a senator:

“The primary factor for determining the appropriateness of provisional application relates to the immediate need to settle quickly matters in the interest of the United States which are within the President’s domestic law competence.”¹³⁰

As implied in Feldman’s statement, the urgent circumstances need not pre-date the conclusion of the negotiations but may arise afterwards, in which case the agreement to apply a treaty provisionally may be reached in a separate instrument in accordance with paragraph 1(b) of article 25.

Occasionally, a treaty may expressly refer to the desirability of avoiding delay as the reason for its provisional application. The signatories to the 1954 Agreement concerning the International Institute of Refrigeration¹³¹ undertook, in accordance with article XXXIV, paragraph 3, to put the agreement into operation provisionally immediately on signature “in order to avoid any delay in its execution”. Similarly, the signatory states to the 1964 Convention on the Elaboration of a European Pharmacopoeia¹³² agreed in terms of article 17 to apply it provisionally from the date of signature, in conformity with their respective constitutions, “in order to avoid any delay in the implementation of the present Convention”. Decisions of the council of the European Union approving agreements concluded by the European Community may also refer to the urgent circumstances necessitating the provisional application of the agreement in question.¹³³

¹²⁷1978 Maritime Boundary Treaty (1117 UNTS 75).

¹²⁸The Maritime Boundary Agreement between the US and Cuba of 16 December 1977 (US senate doc S EXEC Doc No H (1979)) entered into force provisionally on 1 January 1978. Its provisional application has been extended biennially by exchanges of notes, most recently by an exchange of notes dated 16 and 30 December 2003, which entered into force on 30 December 2003. See US Department of State *2003 Treaty Actions (Updated March 2004)* available at <http://www.state.gov>. See also Rogoff & Gauditz (n 15) 35.

¹²⁹1978 Maritime Boundary Treaty (1273 UNTS 25).

¹³⁰Nash ‘U.S. Practice’ 1980 (74) *AJIL* 917 932. See also the study by the congressional research service of the library of congress entitled *Treaties and Other International Agreements: the Role of the United States Senate* (2001) 114.

¹³¹826 UNTS 192.

¹³²1286 UNTS 69.

¹³³For example, para 3 (preamble) of council decision 2003/457/EC concerning the signature of the Agreement on scientific and technical cooperation between the European Community and Israel (2003 (154) *OJ L* 0079) records that the provisional application of the agreement “would enable Israeli entities to participate in the first calls for proposals under the sixth framework programme [for research and technological development].”

The urgency of the circumstances may necessitate the provisional application of a treaty dealing with virtually any subject matter. It is nevertheless possible to identify certain categories of provisionally applied treaties under this heading.

2.1.1 International economic agreements

Urgency has been the determining factor in bringing into provisional operation a number of major multilateral treaties dealing with economic relations between states. It was in order to avoid any delay in improving the terms of global trade that the 1947 General Agreement on Tariffs and Trade (GATT)¹³⁴ was provisionally applied on and after 1 January 1948 by means of a Protocol of Provisional Application.¹³⁵ The GATT famously operated for nearly half a century on this ‘provisional’ basis.¹³⁶ In view of the gravity of the economic problems facing Europe at the time, the 1948 Convention for European Economic Co-operation,¹³⁷ which was intended to implement the Marshall plan, was put into operation on a provisional basis for all signatories from 16 April 1948 until it entered into force definitively on 28 July of that year.¹³⁸ The crude oil emergency in the early 1970’s prompted western governments to conclude the 1974 Agreement on an International Energy Programme and to agree to its provisional application from 18 November 1974, the date of signature, until it entered into force on 19 January 1976.¹³⁹ Likewise, the 1975 Treaty of the Economic Community of West African States (ECOWAS) was applied provisionally for the short period between its signature on 28 May 1975 and its definitive entry into force on 20 June 1975.¹⁴⁰ Following four and a half years of arduous negotiations among 50 states and the European Communities, the 1994 Energy Charter Treaty¹⁴¹ (which was intended “to catalyse economic growth by means of measures to liberalize investment

¹³⁴55 *UNTS* 187.

¹³⁵55 *UNTS* 308. In terms of para 1 of the Protocol of Provisional Application it was agreed to apply provisionally parts I and III of the Agreement and part II “to the fullest extent not inconsistent with existing legislation.”

¹³⁶On the GATT generally see, for example, Dam *The GATT, Law and International Organization* (1970); Hudec *The GATT Legal System and World Trade Diplomacy* (1990); Long *Law and its Limitations in the GATT Multilateral Trade System* (1985).

¹³⁷888 *UNTS* 141.

¹³⁸See Sinclair (n 1) 50.

¹³⁹1040 *UNTS* 271. See also Lefeber (n 117) 82.

¹⁴⁰1010 *UNTS* 17. The members of ECOWAS have an established practice of provisionally applying treaties concluded within the framework of the organization, including the 1978 General Convention on privileges and immunities of ECOWAS (1906 *UNTS* 35); the 1979 Protocol relating to free movement of persons, residence and establishment (1906 *UNTS* 57); the 1984 Protocol relating to Community enterprises (1906 *UNTS* 185); the 1985 Convention on the temporary importation of passenger vehicles into member states of ECOWAS (1906 *UNTS* 255).

¹⁴¹2080 *UNTS* 99.

and trade in energy) was provisionally applied by most signatories between its opening for signature on 17 December 1994 and its entry into force on 16 April 1998.

Urgency is likewise the usual reason for provisionally applying the large number of bilateral commercial agreements that make use of the facility.¹⁴³ The same is true of the numerous agreements on related subjects such as investment¹⁴⁴ and the avoidance of double taxation.¹⁴⁵

2.1.2 Transportation treaties

Provisional application has traditionally performed an especially useful function in the context of agreements governing air, road and maritime links, in particular bilateral air service agreements. The latter agreements may enter into force upon signature,¹⁴⁶ or exchange of instruments,¹⁴⁷ or on a specified date.¹⁴⁸ However, in urgent cases where constitutional constraints do not permit entry into force upon signature alone, the negotiating states may apply the agreement provisionally, thereby allowing the air services to commence immediately.¹⁴⁹ In the European Union, bilateral road transportation agreements concluded with non-members may also be applied provisionally.¹⁵⁰

¹⁴²Preamble, para 6.

¹⁴³For instance, the 1977 Trade Agreement between the Philippines and Indonesia, applied provisionally from 8 August 1974 until its definitive entry into force on 4 June 1975 (987 *UNTS* 311); the 1977 Basic Agreement on Economic and Industrial Co-operation between the UK and Venezuela, applied provisionally from 12 August 1977 until 9 November 1977 (1120 *UNTS* 275); the 1987 Trade Agreement between Cuba and Cyprus, applied provisionally from 27 February 1987 until 23 March 1988 (1509 *UNTS* 120); the 1996 Free Trade Agreement between Estonia and the Slovak Republic, applied provisionally from 1 July 1996 until 13 March 1998 (2063 *UNTS* 277). Very numerous trade, cooperation and association agreements concluded by the European Union and its predecessors have also been applied provisionally.

¹⁴⁴For example, the 1973 Agreement between France and Indonesia on the encouragement and protection of French investments in Indonesia, applied provisionally from 14 June 1973 until 29 April 1975 (985 *UNTS* 257); the 1993 Treaty between Germany and Uzbekistan for the promotion and reciprocal protection of investments, applied provisionally from 28 April 1993 until 23 May 1998 (2071 *UNTS* 23).

¹⁴⁵For instance, the 1948 Convention between Belgium and Luxembourg on the avoidance of double taxation with respect to taxes on capital, applied provisionally from 9 October 1948 to 7 February 1952 (123 *UNTS* 29).

¹⁴⁶For example, the 1970 Agreement between South Africa and Australia relating to air services (796 *UNTS* 155); the 1995 Agreement between the Republic of Korea and South Africa for air services between and beyond their respective territories (2032 *UNTS* 59).

¹⁴⁷For instance, the 1953 exchange of notes constituting an agreement to regulate air services between Israel and South Africa (192 *UNTS* 183).

¹⁴⁸For example, the 1954 Agreement between the South Africa and Switzerland relating to air services, came into force on 1 April 1955, the date stipulated in a 14 (216 *UNTS* 19).

¹⁴⁹Examples include the 1952 Civil Air Transport Agreement between the US and Japan, applied provisionally from 11 August 1952 until its entry into force on 15 September 1953 (212 *UNTS* 27); the 1959 Agreement relating to air services between South Africa and Switzerland, applied provisionally from 19 October 1959 to 19 September 1961 (559 *UNTS* 19); the 1964 Air Transport Agreement between Algeria and Czechoslovakia, applied provisionally from 9 March 1964 until 16 September 1964 (601 *UNTS* 265).

¹⁵⁰For example, the 2004 Agreements between the European Community and, respectively, Croatia, Slovenia, Switzerland and the former Yugoslav Republic of Macedonia concerning the transitional points system applicable to heavy goods vehicles travelling through Austria (2004 (057) *OJ L* 0013, 0016, 0019 and 0022).

The urgency of the situation may occasionally lead to the provisional application of agreements of a mainly political character. Thus, an exchange of letters constituting an agreement between the United Nations and Cyprus concerning the peacekeeping force sent to deal with unrest on the island in 1964 was in fact concluded after the arrival of the first troops. The agreement therefore had to be applied provisionally and with retroactive effect.¹⁵¹ A prominent recent example of a provisionally applied treaty of a primarily political nature is the 1996 Treaty on the Formation of the Community of Belarus and Russia.¹⁵²

Treaties of peace may also be applied provisionally pending ratification. Milan Bartos explained in the ILC in 1965 how the immediate application of peace treaties concluded by Yugoslavia had facilitated the return to normal life in that country after World War II:

“After the Second World War, Yugoslavia had concluded peace treaties with several countries which provided in identical terms first, that upon signature of the treaty the state of war between the two countries ceased and, secondly, that the treaty would be ratified. Immediately upon signature, therefore, the two countries had been able to establish diplomatic, commercial and maritime relations, conclude treaties, etc., and the solemn act of ratification of the peace treaty had not taken place until later. As between those two countries, the question of the state of peace or the state of war had depended upon a complicated parliamentary procedure, but under the pressure of the requirements of daily life they had rid themselves of everything connected with the state of war, even in the technical meaning of the term....”¹⁵³

2.1.4 Agreements for the prevention of drug trafficking and crime

Another class of agreements that may be of an urgent nature is those dealing with cooperation in the fight against drug trafficking and criminality. Recent Spanish practice well illustrates a new trend in this regard, with articles on provisional application having been included in bilateral agreements between the kingdom and (in order of conclusion) the United States,¹⁵⁴ Morocco,¹⁵⁵ Bolivia,¹⁵⁶ Malta,¹⁵⁷ Cuba,¹⁵⁸ and the Russian Federation.¹⁵⁹

¹⁵¹492 *UNTS* 57. The agreement came into force provisionally on 31 March 1964 and was deemed to have taken effect as from 14 March 1964, the date of the arrival of the first peacekeepers in Cyprus.

¹⁵²35 *ILM* 1190.

¹⁵³1965 (I) *YILC* 110.

¹⁵⁴The 1991 Agreement on co-operation to reduce the demand for narcotic drugs, applied provisionally from 25 November 1991 until its definitive entry into force on 7 May 1993 (1772 *UNTS* 241).

¹⁵⁵The 1997 Convention on judicial assistance in criminal matters, applied provisionally from 30 May 1997 until 1 August 2000 (2118 *UNTS* 145).

International organizations and other international institutions usually conclude headquarters agreements with their host states regulating matters such as their legal personality, premises and privileges and immunities.¹⁶⁰ There was considerable urgency to finalize the arrangements for the tribunal established by security council resolution 827 of 25 May 1993 to deal with serious violations of international humanitarian law committed in the territory of the former Yugoslavia. This consequently led to the provisional application of the 1994 Agreement between the Netherlands and the United Nations concerning the headquarters of the tribunal.¹⁶¹

2.1.6 Environmental treaties

Given the increasing importance and urgency of dealing with global environmental challenges at a multilateral level, provisional application has also been suggested as a technique to overcome the time-consuming process of ratification and entry into force of multilateral environmental conventions.¹⁶² States have generally been reluctant to follow this advice and the number of provisionally applied environmental treaties remains low.¹⁶³ Examples include the 1964 European Fisheries Convention,¹⁶⁴ the 1979 Geneva

¹⁵⁶The 1997 Agreement on cooperation in the prevention of the consumption of and the control of trafficking in narcotic drugs and psychotropic substances, applied provisionally from 10 November 1997 until 26 December 1998 (2050 *UNTS* 329).

¹⁵⁷The 1998 Agreement on co-operation on matters of prevention of the illicit use and the fight against the illicit trafficking of drugs and psychotropic substances, applied provisionally from 28 May 1998 until 27 November 1998 (2047 *UNTS* 557).

¹⁵⁸The 1998 Agreement on the execution of criminal sentences, applied provisionally from 23 July 1998 until 16 June 2000 (2123 *UNTS* 3).

¹⁵⁹The 1999 Agreement on cooperation in the fight against delinquency, applied provisionally from 17 June 1999 until 9 June 2000 (2109 *UNTS* 279).

¹⁶⁰Bekker *The Legal Position of Intergovernmental Organizations* (1994) 135.

¹⁶¹1792 *UNTS* 35. Other provisionally applied headquarters agreements (sometimes called seat or host country agreements) include: the 1957 Agreement between the IAEA and Austria regarding the headquarters of the Agency, applied provisionally from 1 January 1958 until its definitive entry into force on 1 March 1958 (339 *UNTS* 151); the 1975 Agreement concerning the legal status of the World Tourism Organisation in Spain, applied provisionally from 1 January 1976 until 2 June 1977 (1047 *UNTS* 85); the 1994 Headquarters Agreement between the African Export-Import Bank and Egypt, applied provisionally from 31 August 1994 until 11 April 1995 (1902 *UNTS* 3); the 1996 Agreement between the UN and Germany concerning the occupancy and use of the UN premises in Bonn, applied provisionally from 13 February 1996 (1911 *UNTS* 187); 1998 Agreement between the UN, the Government of the Federal Republic of Germany and the Secretariat of the UN Convention to Combat Desertification concerning the headquarters of the Convention Permanent Secretariat (2029 *UNTS* 315).

¹⁶²Dunoff 'From Green to Global: Toward the Transformation of International Environmental Law' in 1995 (19) *Harvard Environmental LR* 241 248-9; Sand 'Lessons Learned in Global Environmental Governance' in 1991 (18) *Boston College Environmental Affairs LR* 213 237-8.

¹⁶³One reason for this may be that environmental treaties have tended to require a low number of ratifications for entry into force. See Sands *Principles of International Environmental Law* (2003) 133.

¹⁶⁴581 *UNTS* 76. The Convention was provisionally applied, by Ireland and the UK, by means of the Protocol of Provisional Application of the Fisheries Convention of 9 March 1964.

Convention on Long-range Transboundary Air Pollution, the 1991 Protocol on Environmental Protection to the Antarctic Treaty (in part),¹⁶⁶ and the 1998 Agreement on the International Dolphin Conservation Programme.¹⁶⁷ Although article 41 of the 1995 Fish Stocks Agreement¹⁶⁸ provided for the possibility of provisionally applying the agreement prior to its entry into force on 11 December 2001, no state notified the depositary of its wish to do so.¹⁶⁹ An example of a bilateral environmental treaty that was applied provisionally pending its entry into force is the 1980 Agreement of co-operation between Mexico and the United States regarding pollution of the marine environment by discharge of hydrocarbons and other hazardous substances.¹⁷⁰

2.2 Certainty of ratification

Where the subject matter of a treaty is not particularly urgent, the certainty of its approval by the government, or by parliament if required, may encourage the negotiators to propose that it be applied provisionally upon signature or some other condition. This is most likely to happen in the case of bilateral treaties that concern technical or administrative issues within the competence of the executive, or that conform to the established practice or policy of the state. Waldock referred to this second use of provisional application at the Vienna conference on the law of treaties in the following terms:

“States might also resort to the process of provisional application when it was not so much a question of urgency, as that the matter was regarded as manifestly highly desirable and almost certain to obtain parliamentary approval.”¹⁷¹

¹⁶⁵1302 *UNTS* 217. The signatories to the Convention, which was the first treaty to deal with problems of air pollution on a broad regional basis, decided by separate resolution to “initiate, as soon as possible and on an interim basis, the provisional implementation” of the Convention (UNECE doc E/ECE/HLM.1, annex II).

¹⁶⁶1991 *ILM* 1455.

¹⁶⁷See Bache ‘Current Legal Developments: 1998 Agreement on the International Conservation Program with Appendix’ 2000 (15) *International J of Marine and Coastal Law* 393. The agreement aims at limiting incidental dolphin mortalities caused by tuna fishing in the eastern Pacific Ocean. In authorizing the provisional application of the 1998 Agreement by the European Community, the council of the European Union was motivated not so much by the urgency of its conservational measures as by the desire “to protect the interests of Community vessels fishing in the region during the interim period.” See para 9 (preamble) of decision 1999/386/EC (1999 (147) *OJ L* 0023).

¹⁶⁸Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (2167 *UNTS* 6).

¹⁶⁹UN *Oceans and the Law of the Sea: Law of the Sea, Report by the Secretary-General* (A/52/487 dated 20 October 1997) para 21.

¹⁷⁰1241 *UNTS* 234. The Agreement was provisionally applied from 24 July 1980 until its definitive entry into force on 30 March 1981.

¹⁷¹A/Conf.39/11/Add.1 43.

Classes of provisionally applied treaties that could typically fall into this category are bilateral agreements on friendship and cooperation¹⁷² and on cultural, educational and scientific exchanges.¹⁷³ By their very nature these agreements are usually both manifestly highly desirable and likely to obtain the necessary approval for ratification. In some international organizations, a relationship or cooperation agreement with another organization may likewise be applied provisionally upon signature if the secretariat considers it useful to do so and expects that the relevant governing organs will endorse the text at a later date.¹⁷⁴

It is interesting to note that there have been instances of governments or plenipotentiaries agreeing to the provisional application of a treaty at a time when the domestic organs of the state were temporarily prevented by war or military occupation from exercising their constitutional functions with regard to ratification. Examples of such treaties date from World War II. In the circumstances, there was a clear expectation that consent to be bound by these agreements would be expressed as soon as the government or parliament concerned was able to resume its functions. Thus, the 1943 Monetary Convention,¹⁷⁵ which was signed in London by the governments-in-exile of Belgium, Luxembourg and the Netherlands, entered into force provisionally on the date of signature. The 1944 Agreement¹⁷⁶ between the United States and Denmark relating to air transport services was concluded towards the end of the war by means of an exchange of notes between the American secretary of state and the Danish minister in Washington. The agreement stipulated that it would enter into force provisionally on 1 January 1945 and definitively “upon confirmation by a free Danish Government when such Government shall have been established following the liberation of Denmark.”¹⁷⁷

¹⁷²For example, the 1978 Treaty of friendship and co-operation between the Comoros and France, applied provisionally from 10 November 1978 until 2 February 1983, (1306 *UNTS* 263); the 1979 Treaty of friendship and co-operation between Brazil and the Ivory Coast, applied provisionally from 14 September 1979 until 11 April 1986 (1427 *UNTS* 237).

¹⁷³For instance, the 1973 Agreement on cultural, educational and scientific cooperation between Denmark and Egypt, applied provisionally from 29 October 1972 until 23 May 1973 (923 *UNTS* 145); the 1984 Agreement between Cyprus and Mongolia on co-operation in the fields of culture, science and education, applied provisionally from 20 March 1984 until 22 June 1984 (1365 *UNTS* 121).

¹⁷⁴For example, the 1992 Agreement between WIPO and the OIC (1442 *UNTS* 337); the 1997 Agreement between the UN and the International Seabed Authority (1967 *UNTS* 255); the 2000 Agreement between the UN and the OPCW (2160 *UNTS* 207).

¹⁷⁵21 *UNTS* 293.

¹⁷⁶10 *UNTS* 213.

¹⁷⁷*Ibid* 222.

Provisional application is often used to avoid a gap between one treaty regime and another. As the Protocol to the Fisheries Agreement¹⁷⁸ between the European Community and Côte d'Ivoire was set to expire on 30 June 2004, an Agreement in the form of an exchange of letters was concluded for the provisional application of the revised Protocol from 1 July 2004. The decision by the council of the European Union approving the agreement on provisional application stated:¹⁷⁹

“The Protocol in question must be applied at the earliest opportunity if fishing activities by Community vessels are not to be interrupted. To that end, the two parties initialled an Agreement in the form of an exchange of letters providing for the provisional application of the initialled Protocol from the day following that on which the Protocol in force expired....”¹⁸⁰

A prominent example of the use of provisional application to ensure legal continuity is article 7, paragraph 1, of the 1994 Agreement Relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea.¹⁸¹ The 1994 Agreement, which was adopted by the general assembly on 28 July 1994 to modify certain controversial provisions of the 1982 Convention, had to be applicable by the time the convention entered into force on 16 November 1994.¹⁸² It was therefore applied provisionally from 16 November 1994 until its definitive entry into force on 28 July 1996.¹⁸³ The transitional provisions in the 1967 Convention¹⁸⁴ establishing WIPO also fall into this category.¹⁸⁵ The purpose of the provisions was to facilitate the smooth transfer from one international organization, the United International Bureau for the Protection of Intellectual Property (known by its French acronym, BIRPI), to its successor, WIPO. Article 21, paragraph 2(a), of the Convention enabled a state that had not become a party to the Convention (and hence

¹⁷⁸1990 (379) *OJ* L 3.

¹⁷⁹Decision 2003/838/EC (2003 (319) *OJ* L 0017) para 4 (preamble).

¹⁸⁰Similar reasons were offered for the provisional application of EU fisheries agreements with, for example, Angola (2002 (351) *OJ* L 0091), Cape Verde (2002 (047) *OJ* L 0024), Gabon (2002 (073) *OJ* L 0018), Guinea (2004 (099) *OJ* L 0011), Guinea-Bissau (2004 (127) *OJ* L 0027), Madagascar (2001 (296) *OJ* L 0009), Mauritania (2001 (341) *OJ* L 0127), São Tomé and Príncipe (2002 (351) *OJ* L 0079), Senegal (2002 (349) *OJ* L 0045), and the Seychelles (2002 (134) *OJ* L 0039). As a matter of routine, fisheries agreements concluded by the EU, mostly with developing states, are applied provisionally pending their entry into force.

¹⁸¹1836 *UNTS* 3. For the text of a 7(1), see s 3.1.1.5 below.

¹⁸²Lefebvre (n 117) 83, Roucounas (n 15) 187.

¹⁸³By July 1995, 123 states had agreed to apply the 1994 Agreement provisionally. See Linnan *et al* ‘Implications for Fisheries Management of U.S. Acceptance of the 1982 Convention on the Law of the Sea’ 1995 (89) *AJIL* 819 821. See also Sohn ‘Law of the Sea Forum: The 1994 Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea: International Law Implications of the Agreement’ 1994 (88) *AJIL* 696; De Marffy-Mantuano ‘Current Development: The Procedural Framework of the Agreement Implementing the 1982 United Nations Convention on the Law of the Sea’ 1995 (89) *AJIL* 814.

¹⁸⁴828 *UNTS* 4.

¹⁸⁵A/35/312/Add.1 27 (reply of the Netherlands).

was not a member of the new organization) to exercise the same rights as if they had become a party for a period of five years from the date of entry into force of the Convention. This amounted to a facility for *de facto* provisional application of the Convention in respect of non-parties.

Commodity agreements are a well-known instance of successive treaty regimes using the stopgap of provisional application. These agreements generally expire after a fixed period. However, their requirements for entry into force are so stringent that they routinely include procedures whereby states may submit notifications of provisional application and bring the agreements into force provisionally among themselves. This practical approach allows a greater opportunity for an agreement to be applied earlier since the time period stipulated for its definitive entry into force is generally too short.¹⁸⁶ Table 2 illustrates the functioning of this system with reference to the various International Sugar Agreements concluded since 1953. The agreements were generally concluded for a period of five year, although the life of some was prolonged or extended by decision of the International Sugar Council. Of the eight agreements listed, three came into force provisionally before their definitive entry into force, while a further three did not enter into force but relied solely on their provisional application for legal effect. By making use of provisional application the parties were able to ensure that the regulation of the international sugar trade was not hindered by the termination of the previous instrument and the delay in entry into force of the subsequent agreement or its failure to enter into force at all.

Recent commodity agreements containing articles permitting their provisional application include the 1993 Protocol Extending the 1986 International Agreement on Olive Oil and Table Olives,¹⁸⁷ the 1994 International Tropical Timber Agreement,¹⁸⁸ the 1994 International Natural Rubber Agreement,¹⁸⁹ the 1999 Food Aid Convention,¹⁹⁰ the 2001 International Cocoa Agreement,¹⁹¹ and the 2001 International Coffee Agreement.¹⁹²

¹⁸⁶UN *Final Clauses of Multilateral Treaties* (2003) 66.

¹⁸⁷1763 *UNTS* 319. The protocol entered into force provisionally on 26 January 1994 and definitively on 25 March 1994.

¹⁸⁸1955 *UNTS* 81. The Agreement entered into force provisionally on 1 January 1997.

¹⁸⁹1964 *UNTS* 3. The agreement entered into force provisionally on 6 February 1997 and definitively on 14 February 1997.

¹⁹⁰2073 *UNTS* 137. The convention entered into force definitively on 1 July 1999.

¹⁹¹UNCTAD doc TD/COCOA.9/7 dated 13 March 2001. The agreement entered into force provisionally on 1 October 2003. Of the six consecutive International Cocoa Agreements since 1972, five have not entered into force definitively.

Table 2. International Sugar Agreements, 1953-1992

International Sugar Agreements	Provisional entry into force	Definitive entry into force
1953 International Sugar Agreement	–	15 December 1953 and 1 January 1954
1958 International Sugar Agreement	–	1 January 1959
1968 International Sugar Agreement	1 January 1969	*
1973 International Sugar Agreement	1 January 1974	15 October 1974
1977 International Sugar Agreement	1 January 1978	2 February 1980
1984 International Sugar Agreement	1 January 1985	*
1987 International Sugar Agreement	24 March 1988	*
1992 International Sugar Agreement	20 January 1993	1 January 1999

* The depositary does not record the agreement entering into force definitively.

2.4 Legal consistency

When multilateral conventions are amended or modified, some parties may become bound by the new rules, while others remain bound by the old, both the old and the new provisions continuing to exist side by side. This situation may be most apparent when the amended treaty contains the constitution of an international organization whose secretariat monitors the varying legal obligations of the member states vis-à-vis the organization and each other.

It was in order to avoid an inconsistency in obligations among the members of the International Telecommunication Union that the ITU plenipotentiary conference adopted an unusual resolution in Kyoto in 1994.¹⁹⁴ The resolution noted that although the amended 1992 Constitution and Convention¹⁹⁵ of the ITU had entered into force on 1 July 1994 between members having deposited their instruments of ratification, acceptance, approval or accession before that date, only 56 out of the 184 members of the organization had deposited their respective instruments of consent to be bound by the two treaties. The plenipotentiary conference considered it “indispensable, for the proper functioning of the Union as an intergovernmental organization, that it be governed by one single set of

¹⁹²2161 *UNTS* 308. The agreement entered into force provisionally on 1 October 2001.

¹⁹³*UNTS*.

¹⁹⁴Resolution 69 (Kyoto, 1994) entitled ‘Provisional application of the Constitution and Convention of the International Telecommunication Union (Geneva, 1992) by Members of the Union which have not yet become States Parties to those instruments’.

¹⁹⁵1825 *UNTS* 3. Subsequently, instruments amending the Constitution and Convention of the ITU were adopted at Kyoto in 1994, Minneapolis in 1998 and Marrakesh in 2002.

provisions and rules as contained in its basic instrument.... The Conference therefore resolved

“to appeal to all Members of the Union which have not yet become States Parties to the Constitution and Convention of the International Telecommunication Union (Geneva, 1992) provisionally to apply the provisions thereof, until such time as they have become States Parties thereto by depositing with the Secretary-General [of the ITU] their respective instruments of consent to be bound by the two treaties....”¹⁹⁷

2.5 Circumvention of obstacles to entry into force

Political impediments to the entry into force of a treaty may occasionally arise following its conclusion, particularly if the treaty is a multilateral convention requiring ratification by a large number of states. In recent years, such a fate has befallen the 1996 Comprehensive Nuclear-Test-Ban Treaty,¹⁹⁸ and the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change.¹⁹⁹ It has been argued that provisional application is a “potentially useful device to bypass extraordinary, temporary or unanticipated political obstacles associated with entry into force provisions”, and that provisional application “can give greater authority to a treaty than if it is left in indefinite limbo with the entry into force requirements unfulfilled.”²⁰⁰ Sir Francis Vallat referred to this function of provisional application in the following terms at the Vienna conference:

“There were instances in international practice where the text of a general multilateral convention had been adopted but where the necessary number of ratifications required for entry into force had not subsequently been forthcoming. If that situation occurred, certain of the negotiating States, but not necessarily all of them, might come together and agree that the treaty or part of the treaty should be applied provisionally between them....”²⁰¹

This practice has been institutionalized in the framework of international commodity agreements. Thus, in accordance with the provisions of paragraph 3 of Article 45 of the 2001 International Coffee Agreement,²⁰² a meeting of 16 signatories held in London in September 2001 decided to put the agreement into force provisionally among themselves as of 1 October 2001.²⁰³ In the context of bilateral treaties, provisional application has served as a practical measure to settle the maritime boundaries between the

¹⁹⁶Para 4.

¹⁹⁷Para 5. Whether any member state actually responded to this appeal is unknown.

¹⁹⁸See n 592 and s 6.4.2 below.

¹⁹⁹1998 (37) *ILM* 22.

²⁰⁰Johnson ‘Beyond Article XIV: Strategies to Save the CTBT’ 2003 (73) *Disarmament Diplomacy* 1 3-4.

²⁰¹A/Conf.39/11/Add.1 40.

²⁰²N 193 above. A 45(3) stipulated, *inter alia*, that if the agreement had not entered into force definitively or provisionally on 1 October 2001, those governments which had deposited instruments of ratification, acceptance, approval or accession or made notifications containing an undertaking to apply the agreement provisionally might, by mutual consent, decide that it should enter into force among themselves.

United States and two of its neighbours when political obstacles have prevented the entry into force of the agreement in question. The 1977 Maritime Boundary Agreement²⁰⁴ between the United States and Cuba has been provisionally applied for over a quarter of a century. The 1990 Agreement on the Maritime Boundary between the United States and the USSR,²⁰⁵ which has been approved by the United States senate,²⁰⁶ but not the Russian duma, is nevertheless being observed in terms of an exchange of letters effected on the date the agreement was signed.

2.6 Preparatory arrangements for new international institutions

A sixth area in which provisional application has found a useful purpose is in the preparatory arrangements for new international institutions such as intergovernmental organizations and treaty regimes. Owing to their provisory nature, the importance of these preparatory arrangements and their relationship to the law of provisional application is sometimes overlooked. However, in view of the role they play in practice it is worthwhile considering them in some depth.

2.6.1 Establishing a new international organization or treaty regime

A new international organization or treaty regime usually comes into being when the treaty containing the text of its constitution enters into force,²⁰⁷ most commonly by ratification or other formal act of confirmation. Article 5 of both the 1969 and the 1986 Vienna Conventions provides that the convention applies “to any treaty which is the constituent instrument of an international organization”. Notwithstanding Rosenne’s warning that the constituent instrument of an international organization displays so many unique features that at some point it ceases to be the kind of treaty to which the Vienna Conventions apply,²⁰⁸ it is generally accepted, not least by states themselves, that most instruments establishing international organizations are treaties.

The setting up of a new international organization and the entry into force of its constitution often requires elaborate preparations. These may include, for example,

²⁰³See UN ‘Status of Multilateral treaties Deposited with the Secretary’ <http://untreaty.un.org>.

²⁰⁴See n 128 above.

²⁰⁵Agreement to abide by terms of maritime boundary agreement of 1 June 1990, pending entry into force, listed in US Department of State *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2003* available at <http://www.state.gov>.

²⁰⁶See US senate doc S EXEC REPT 102-13 (1991).

²⁰⁷Schemers & Blokker *International Institutional Law* (1995) 1011.

²⁰⁸See Rosenne (n 1) 181-258.

preparing the draft agenda and rules of procedure for the first session of the governing organs, undertaking studies regarding the location of the headquarters of the organization, making recommendations for the election of its officers, appointing the staff, preparing a draft budget and financial and staff regulations, and other substantive tasks which it is desirable to perform before the organization comes into existence.²⁰⁹ The responsibility for these preparations is occasionally assumed by a government,²¹⁰ or by another international organization.²¹¹ However, by the very nature of things a government has neither the independence nor the impartiality expected of an international secretariat, while other international organizations seldom have the requisite mandate or resources. It is therefore useful if the constitution of the new organization can be put into force provisionally and if its organs, including the secretariat, can begin the preparatory work immediately.

Another possibility is for the negotiating states to establish a temporary entity, often called an interim committee or a preparatory commission, which is especially tasked with preparing for the establishment of the new organization and the entry into force of its constitution.²¹² This procedure has been used frequently for international organizations of a universal character.²¹³ Interim committees or preparatory commissions were established for the United Nations and its specialized and related agencies in the 1940's and 1950's,²¹⁴ and continue to be created today. A preparatory commission may be brought into existence either in terms of the treaty establishing the new organization,²¹⁵ or by separate agreement, usually in simplified form. A simplified agreement often used in practice is a resolution adopted by a conference of states.²¹⁶

²⁰⁹See Schemers & Blokker (n 207) 1012.

²¹⁰For example, the International Jute Study Group, the successor of the International Jute Organization was administered by the government of Bangladesh in the interim period before the entry into force of the 2001 Agreement establishing the Terms of Reference of the International Jute Study Group.

²¹¹Schemers & Blokker (n 207) 1012. For example, the UN secretariat serviced the Preparatory Commission for the International Criminal Court. Although not an international organization as such, the court is an international institution established by states. With the establishment of the permanent secretariat of the assembly of states parties to the Rome Statute, the UN secretariat ceased to serve as the secretariat of the assembly in December 2003.

²¹²A preparatory commission for the establishment of a new international organization is to be distinguished from a preparatory committee set up by states to prepare for an international conference.

²¹³Schemers & Blokker (n 207) 1012-1014.

²¹⁴See para 2.6.2 below.

²¹⁵For example, the Annex to the 1956 Statute of the IAEA established the Preparatory Commission of the IAEA. The Annex took effect when the Statute opened for signature on 26 October 1956 (276 *UNTS* 3). Reuter ((n 1) 68) classifies clauses providing for the immediate setting up of a commission to prepare the constitution and operation of an organization in treaties creating an international organization as among the rules concerning "its genesis as a juristic act" governed by a 24(4) of the 1969 Vienna Convention.

²¹⁶For example, the resolution embodying the Statute of the Preparatory Commission of IFAD was adopted by the UN conference of plenipotentiaries on the establishment of an international fund for agricultural development (1976 (15) *ILM* 916); resolution I of the third UN conference on the law of the sea established the Preparatory Commission for the International Seabed Authority (1982 (21) *ILM* 1253); resolution I of the multilateral high-level conference on the conservation and management of the highly migratory fish stocks in the western and central Pacific Ocean established a Preparatory Conference for the establishment of a permanent Commission (2001 (40) *ILM* 278).

However established, preparatory commissions have important functions especially when the work of the organization must begin before its official coming into being.”²¹⁷ In other words, the work of a preparatory commission may involve, to a greater or lesser degree, the provisional application of the treaty containing the constitution of the new organization. Besides allowing the work of the new organization to begin on a provisional basis, a preparatory commission may facilitate a seamless transition from the provisional regime to the permanent body. Whether and to what extent a preparatory commission entails the provisional application of the constituent instrument of the new organization will depend on three main factors. These are: (1) the terms of the instrument establishing the preparatory commission; (2) the provisions of any decisions or resolutions adopted within the framework of the preparatory commission; and (3) the practice of the states (and international organizations, if relevant) participating in the preparatory commission. Of these factors, the instrument establishing the preparatory commission will initially be the most important. Should the preliminary arrangement persist for some time, the practice and decisions of the members of the preparatory commission may assume added significance.

2.6.2 View of the United Nations

The conclusion that the work of a preparatory commission may involve the provisional application of the constituent instrument of the new organization was supported in a report produced in 1973 by the secretary-general of the United Nations.²¹⁸ Eight examples of precedents of the provisional application of multilateral treaties establishing international organizations or regimes were highlighted in the report. The arrangements considered in detail in the report are listed in Table 3.²¹⁹ Paragraph 5 of the report reads as follows:

“5. In the case of the specialized agencies and the International Atomic Energy Agency (IAEA),^[220] it was considered desirable, pending establishment of the permanent body, to adopt a separate instrument which would enter into force at once or within a short time, providing for the establishment of a body which might act as a preparatory organ for the new organization and, to an extent which varied according to the nature of the case, perform some of its functions. An arrangement of this kind, in which there were two instruments, normally both of them treaties, one (the constitution) dependent on ratification or other act

²¹⁷Schemers & Blokker (n 207) 1013.

²¹⁸UN *Examples of Precedents of Provisional Application, Pending their Entry into Force, of Multilateral Treaties, Especially Treaties which have Established International Organizations and/or Regimes* (A/AC.138/88 dated 12 June 1973).

²¹⁹As noted on p 3 of the report, preparatory commissions were also set up for the UN itself and for UNESCO, though these are not studied in detail in the report.

²²⁰The IAEA is not a specialized agency reporting to ECOSOC but a ‘related’ organization reporting directly to the UN general assembly. See Sands & Klein *Bowett’s Law of International Institutions* (2001) 112.

or subsequent approval, and the latter, capable of early application, specifying the preparatory arrangements to be made until the major instrument came into operation, is distinct from the procedure whereby the main treaty is itself formally brought into provisional effect....” (Emphasis added.)

Paragraph 12 of the report went on to explain:

“12. In most cases the provisional bodies studied were designed either to carry out the preparations necessary for the establishment of the future machinery and the smooth functioning of the permanent régime, or actually to commence, on a provisional basis, the execution of the responsibilities of the permanent body. The exact mixture of functions varies from case to case....” (Emphasis added.)

According to the report, the Preparatory Committee of the IMCO and the Preparatory Commission of the IAEA performed functions which came closest to being merely ‘preparatory’ in character. The provisional arrangements for ICAO, IRO and the WHO were more extensive in that besides making administrative arrangements for the permanent body, some of the substantive functions of the latter were also assumed. The report notes that in the case of the 1968 International Sugar Agreement the full range of functions was assumed during the provisional period.²²¹

2.6.3 View of the United States

The view of the United Nations secretariat that preparatory arrangements for a new international organization may involve the provisional application of the instrument establishing that organization was endorsed in 1974 in a report prepared for the sub-committee on international organizations and movements of the United States house of representatives.²²² The report, prepared by the congressional research service of the library of congress, stated the following:

“A review of precedents discloses differences in the uses made of the provisional application format. In some instances the purpose is purely preparatory; this procedure is particularly useful when an international institution is being created by the treaty. In some instances this preparatory entity also has stop-gap or interim operational functions. On other occasions provisional application actually brings the institution and or regime into operation, pending sufficient ratifications for definitive entry into force of the treaty....”²²³

The ten precedents studied in the report are listed in Table 3.

²²¹ A/AC.138/88 8.

²²² Congressional Research Service *Law of the Sea Treaty: Alternative Approaches to Provisional Application* 1974 (13) *ILM* 454.

²²³ *Ibid.*

Table 3. Precedents of provisional application of treaties establishing international organizations or regimes examined in reports prepared by the United Nations and the Library of Congress.

United Nations document A/AC.138/88 (1973)	'Law of the Sea Treaty: Alternative Approaches to Provisional Application' (1974)
1. Provisional International Civil Aviation Organization (ICAO)	1. Provisional International Civil Aviation Organization (ICAO)
2. Preparatory Committee of the Inter-Governmental Maritime Consultative Organization (IMCO)*	2. Preparatory Commission of the Inter-Governmental Maritime Consultative Organization (IMCO)*
3. Preparatory Commission of the International Refugee Organization (IRO)	3. Preparatory Commission of the International Refugee Organization (IRO)
4. Interim Commission of the World Health Organization (WHO)	4. Interim Commission of the World Health Organization (WHO)
5. Preparatory Commission of the International Atomic Energy Agency (IAEA)	5. Preparatory Commission of the International Atomic Energy Agency (IAEA)
6. 1968 International Sugar Agreement	6. Preparatory Commission of the United Nations
7. 1964 European Fisheries Convention	7. Interim Arrangements for Comsat** and the International Telecommunications Satellite Organization (Intelsat)
8. European Central Inland Transport Organization	8. General Agreement on Tariffs and Trade (GATT)
	9. 1962 and 1968 International Coffee Agreements
	10. 1971 International Wheat Agreement

* The name of the IMCO was changed to IMO in 1982.

** Global commercial communications satellite system.

2.6.4 Examples of preparatory organizational arrangements

In order to illustrate the functioning of provisional application during the transitional period prior to the establishment of a new international organization, let us briefly examine the preparatory arrangements for two major specialized agencies, the World Health Organization (WHO) and the failed International Trade Organization (ITO).

2.6.4.1 World Health Organization

Following the international health conference held in 1946, the Constitution²²⁴ of the WHO was opened for signature at New York on 22 July 1946. As the Constitution provided that it would not enter into force until 26 members of the United Nations had become parties to it, an Arrangement²²⁵ for the establishment of the Interim Commission of the WHO was concluded on the same date. The Arrangement entered into force for all signatories on the date it was signed. The Interim Commission comprised 18 states and was empowered to establish its own committees. An executive secretary, who was authorized to appoint such technical and administrative staff as might be required, was elected by the Interim Commission to act as its chief technical and administrative officer. The Arrangement provided that the Interim Commission would cease to exist upon resolution of the first world health assembly.

The purpose of the Interim Commission was to make the necessary preparations for the first world health assembly and to carry on certain essential tasks which could not be interrupted or delayed pending the entry into force of the WHO Constitution and the establishment of the organization. These essential tasks included, among others, consideration of urgent health problems brought to its notice by any governments, to give technical advice in regard thereto, to bring urgent health needs to the attention of governments and organizations in a position to assist, and to take such steps as might have been desirable to coordinate any assistance so provided. The Arrangement establishing the Interim Commission was thus the legal basis for the provisional application, in part, of the WHO Constitution prior to its entry into force. It was originally expected that the Interim Commission would exist for only a short period, but owing to delays in depositing instruments of consent to be bound by the Constitution, it remained in existence for almost two years.²²⁶

2.6.4.2 International Trade Organization

While the transitional period for the WHO lasted an unexpectedly long time, the provisional arrangements for the International Trade Organization (ITO) of the United Nations acquired a degree of permanence that is unparalleled in international law. The United Nations conference on trade and employment, held in Havana in 1947, adopted the

²²⁴14 *UNTS* 185.

²²⁵9 *UNTS* 3.

initiated Havana Charter for the ITO which was meant to establish a multilateral trade organization. At the same time, the Havana conference adopted a resolution, annexed to the Final Act of the conference, establishing an Interim Commission of the ITO (ICITO). The mandate of the ICITO, which was headed by an executive secretary (whose title was later changed to director-general), was to prepare for the entry into force of the Havana Charter and the establishment of the fully-fledged organization. The ICITO would cease to exist upon the appointment of the director-general of the ITO.

Pending the establishment of the ITO, a mechanism was needed to implement and protect the tariff concessions negotiated in Havana in 1947. It was therefore decided to take the chapter on commercial policy of the Havana Charter and convert it, with certain additions, into the GATT. As we have already seen, a Protocol of Provisional Application was drawn up to bring the GATT into force quickly.²²⁸ The GATT was intended to be an interim agreement that would later become part of the ITO.²²⁹ For various reasons, in particular the decision by the United States not to ratify it, the Havana Charter failed to enter into force. The two arrangements – the ICITO and the Protocol of Provisional Application of the GATT – therefore existed side by side for 47 years until the establishment of the World Trade Organization (WTO) and the incorporation of the 1947 GATT into the Uruguay Round agreements by the modified 1994 GATT.²³⁰ During this long ‘provisional’ period the relationship between the GATT and the ICITO was complex and symbiotic. The GATT was administered, *de jure*, by the ICITO, with the staff of the GATT being the staff of the ICITO. The ICITO, which would otherwise have had no reason to continue in existence, provided an organizational setting for the contracting parties of the GATT, with the executive secretary of the ICITO simultaneously fulfilling the office of director-general of the GATT.²³¹

2.6.5 Excursus: the status of preparatory commissions

The legal personality and status of preparatory commissions under international law remains unclear. However, the existence of so many preparatory commissions, at times for extended periods, and their close relationship to the law of provisional application, raises

²²⁶A/AC.138/88 22-25; *Law of the Sea Treaty: Alternative Approaches to Provisional Application* (n 222) 5.

See also Schemers & Blokker (n 207) 1013.

²²⁷For the text of the Havana Charter see <http://www.wto.org>.

²²⁸See n 135 above and associated text.

²²⁹Berrisch ‘The Establishment of New Law Through Subsequent Practice in GATT’ 1991 (16) *North Carolina J of International Law and Commercial Regulations* 497 499-500.

²³⁰See <http://www.wto.org>.

several questions. Does a preparatory commission have international personality that is separate and distinct from that of the organization it precedes? Or does its legal personality simply derive from that of the main organization? In other words, is a preparatory commission an international organization in its own right or is it simply a subsidiary organ of the fully-fledged organization?

Although the ICJ has had occasion to refer to the work of the Preparatory Commission of the United Nations, most notably in the advisory opinion of 1971 on *Namibia*,²³² it has not been necessary for the court to make a finding on the status or personality of the Preparatory Commission. In the 1949 advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*,²³³ the ICJ held that the United Nations itself was an international person. According to the court, this meant that the United Nations “is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.”²³⁴ What the ICJ held in relation to the United Nations is a statement of general principle that may apply equally to other international organizations.²³⁵

Amerasinghe identifies five basic characteristics that distinguish a public international organization from other international actors: (1) establishment by some kind of international agreement among states; (2) possession of what may be called a constitution; (3) possession of organs separate from its members; (4) establishment under international law; and (5) generally but not always an exclusive membership of states or governments. To these he adds two further elements: international personality as distinct from that of their member states and treaty-making capacity.²³⁶ Most preparatory commissions easily comply with the five main conditions listed by Amerasinghe. They are established by agreement among states, often by a treaty in simplified form; they possess their own constitutions listing their functions and capacities; they have organs that are distinct from their member states and from the organizations they precede; they are

²³¹See Schemers & Blokker (n 207) 1013; Weiss ‘From Havana to Marrakesh: Treaty Making for Trade’ in Klabbbers & Lefeber (n 117) 155-159.

²³²*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 1971 ICJ Rep 16 paras 68-69.

²³³1949 ICJ Rep 174.

²³⁴*Ibid* 179. See also Amerasinghe *Principles of the Institutional Law of International Organizations* (1996) 77-100; Kirgis *International Organizations in Their Legal Setting* (1993) 7-13.

²³⁵*Oppenheim’s International Law* (1996) by Jennings & Watts (eds) 18-20.

²³⁶Amerasinghe (n 234) 9-10. Cf Schemers and Blokker ((n 207) 23-31), who list three elements: (1) establishment by an international agreement, (2) at least one organ with a will of its own, and (3) establishment under international law. Sands and Klein ((n 220) 16) identify the following distinguishing characteristics: (1) membership composed of states and/or other international organizations, (2) establishment by treaty, (3) autonomous will and legal personality, and (4) capability of adopting norms addressed to its members.

established under international rather than domestic law, and their membership comprises states and occasionally other subjects of international law. If a preparatory commission is endowed with all these attributes, its international personality would appear to flow automatically. This leaves only the possible requirement of treaty-making power to consider.

In terms of article 6 of the 1986 Vienna Convention the capacity of an international organization to conclude treaties is governed by the rules of the organization.²³⁷ Unlike states, therefore, international organizations do not seem to possess an inherent power to conclude treaties, this power instead being determined by the rules of the organization.²³⁸ Indeed, Amerasinghe himself argues that although the characteristics of international personality and treaty-making capacity are shared by all public international organizations, “it is doubtful whether they are intrinsic to the definition of a public international organization.” Rather, “they are to be regarded as consequences of being a public international organization.”²³⁹

Preparatory commissions seldom conclude international agreements in their own right. Most exist for a comparatively short period of time and it is usually not necessary or even desirable for them to enter into treaty commitments. It is nevertheless possible for them to do so.²⁴⁰ The ICITO clearly enjoyed a distinct treaty-making capacity in its own right. This was the case even though the ICITO was not expressly endowed with such a capacity by its constitution, the resolution annexed to the Final Act of the Havana conference. The *United Nations Treaty Series* has reproduced the texts of several bilateral and multilateral agreements concluded by the ICITO, or by the ICITO together with the contracting parties of the GATT. Most of these agreements dealt with administrative arrangements between the ICITO and other international organizations.²⁴¹ But there is also an exchange of notes, concluded in 1971, constituting an agreement between the United

²³⁷In accordance with a 2(1)(j) of the 1986 Vienna Convention ‘rules of the organization’ means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.

²³⁸On the background to a 6 of the 1986 Vienna Convention and the various theories regarding the capacity of international organizations to conclude treaties, see Menon (n 1) 19-24.

²³⁹Amerasinghe (n 234) 10.

²⁴⁰Szasz points to the international legal capacity of the Preparatory Commission for the IAEA, which concluded a host country agreement with Austria granting it privileges and immunities. See Szasz *The Law and Practices of the International Atomic Energy Agency* (1970) 48.

²⁴¹The 1957 Agreement for the admission of the ICITO to the UNJSPF (1121 *UNTS* 425); the 1972 Inter-Organization Agreement concerning transfer, secondment or loan of staff among the organizations applying the UN common system of salaries and allowances (1416 *UNTS* 295); the 1979 Special Agreement extending the jurisdiction of the Administrative Tribunal of the UN to the ICITO/GATT with respect to applications by staff members of the ICITO/GATT alleging non-observance of the regulations of the UNJSPF (1127 *UNTS* 443).

Kingdom and the ICITO concerning exemption from taxation to be accorded to officials of the ICITO on their salaries and emoluments.²⁴² This agreement is doubly significant. Not only does it demonstrate the treaty-making capacity of the ICITO; it also manifests the recognition by a member state that the ICITO itself was an international organization.

It is arguably true that preparatory commissions do not possess the same prestige or reputation as fully-fledged international organizations. This is evident, for example, in the special terminology used to distinguish them from their successors. Thus, the executive heads of preparatory commissions often bear functional titles such as executive director or executive secretary rather than the more exalted director-general or secretary-general reserved for the head of the permanent body. Nonetheless, in principle there is nothing to prevent a preparatory commission from being vested with international personality distinct from that of the main organization or from occupying the same status under international law as an international organization. In practice most preparatory commissions possess international personality and all the attributes necessary for them to be classified as international organizations in their own right, albeit with limited and temporary functions. Whether a particular preparatory commission is to be considered an international person and an international organization will depend, it is submitted, on the terms of the agreement by which it was established and the decisions and practice of its member states.

This conclusion may well be disputed on the grounds that an international organization can only be established in terms of a treaty requiring ratification or other formal act of acceptance.²⁴³ If preparatory commissions were indeed international organizations, the argument may run, their establishment by simplified instruments such as resolutions of international conferences would manifestly breach the national constitutional requirements of certain states for the conclusion of treaties.

The problem with such an objection is that it would not accord with the actual practice of states. No state has ever claimed that its consent to be bound by an agreement establishing a preparatory commission has been expressed in violation of a provision of its internal law regarding competence to conclude treaties.²⁴⁴ This may perhaps be because

²⁴²980 *UNTS* 289.

²⁴³According to Sands and Klein ((n 220) 16), for example, an international organization “must be established by treaty”.

²⁴⁴In accordance with a 46(1) of the 1969 Vienna Convention, a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent to be bound unless that violation was manifest and concerned a rule of its internal law of fundamental importance. In terms of a 46(2), a violation is considered to be manifest

representatives always act within their authority or because states do not consider instruments such as resolutions to be treaties as such (or at least not treaties requiring approval under national law before the state expresses its final consent to be bound). Even so, while it may be usual practice for an international organization to be established by treaty, international law does not seem to require that it must be so established, let alone by a treaty subject to ratification, acceptance, approval or accession. Indeed, such a requirement would amount to an unwarranted interference in the freedom of action of states. Article 5 of the 1969 and 1986 Vienna Conventions reflects no such precondition but merely affirms that the conventions apply to any treaty which is the constituent instrument of an international organization. In the *Reparation for Injuries* case the ICJ simply referred to the “constituent documents” of entities such as the United Nations,²⁴⁵ a formulation that appears to leave open the question of the status of those documents. According to Amerasinghe, “*some kind of international agreement among States*” (emphasis added) is required to establish an international organization. Similarly, Schemers and Blokker state that an international organization is established by an international agreement and that the “most usual form of the agreement creating an organization is a treaty”.²⁴⁶ To this the authors add the following qualification:

“But these agreements can also be expressed in other ways. Government representatives, assembled in a conference, may decide to establish an international organization without using a treaty and without the usual proviso for subsequent ratification.”²⁴⁷

Whether or not the instrument establishing a preparatory commission is considered to be a treaty is thus not directly relevant to the question whether or not that preparatory commission possesses international personality and can be classified as an international organization. If the instrument is a treaty, this may strengthen the claim of the preparatory commission to be an international organization with legal personality; if the instrument is not a treaty, this will not make it any less of an international organization for that fact.

if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith. See s 3.5.4 below.

²⁴⁵ See n 233 above.

²⁴⁶ Schemers & Blokker (n 207) 23.

²⁴⁷ *Ibid.*

Article 25 of the 1969 and 1986 Vienna Conventions

Having traced the negotiating history of article 25 in chapter 1, we have seen that its two paragraphs respectively stipule how an undertaking to apply a treaty provisionally is established and how it may be terminated. We have also discovered some clues as to the intended legal consequences of provisional application. In particular, we learned that the chairman of the drafting committee at the Vienna conference expressed the understanding of the committee, and indeed of the conference as a whole, that the rule of *pacta sunt servanda* applies whenever a treaty is placed into provisional operation. Although the functional uses for provisional application were studied in chapter 2, we have yet to examine the technical workings of article 25 in practice. Several questions remain to be addressed. What, for instance, are the possible sources of an obligation to apply a treaty provisionally in accordance with article 25? By what means may the negotiating states or international organizations agree to apply a treaty provisionally if it does not include an article on provisional application? When does provisional application in fact commence? Which parties are obliged to apply a treaty provisionally? What is the legal nature or character of an agreement to apply a treaty provisionally? Are there any limits on provisional application? Are reservations permissible in respect of an agreement on provisional application? Is the *pacta sunt servanda* rule actually observed in practice?

This chapter will attempt to provide answers to these questions and others by examining the content, scope and effect of article 25 and its relationship with other articles in the 1969 and 1986 Vienna Conventions. In order to illustrate the various aspects of the article, reference will mainly be made to treaties concluded by states following the entry into force of the 1969 Vienna Convention for those states. That is, to treaties in respect of which the Convention applies (in the case of bilateral agreements) or to treaties in respect of which the Convention applies between some or all of the parties (in the case of plurilateral or multilateral agreements).²⁴⁸ Although the 1986 Vienna Convention has not

²⁴⁸ A 4 of the 1969 Vienna Convention reads as follows:

“Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.”

The meaning if this rule in relation to bilateral treaties is clear. With regard to multilateral treaties concluded since 27 January 1980, the date of entry into force of the 1969 Vienna Convention, the convention will apply as between those states that are parties to the convention on the date on which the multilateral treaty is concluded. See Aust (n 1) 8; Vierdag ‘The Law Governing Treaty Relations Between Parties to the Vienna Convention on the Law of Treaties and States not Party to the Convention’ 1982 (76) *AJIL* 779. See also Sinclair (n 1) 8-9.

yet entered into force, it may be useful occasionally to refer to agreements concluded by international organizations.

3.1 Source and nature of the obligation to apply a treaty provisionally

Paragraph 1 of article 25 provides that a treaty or part thereof is applied provisionally pending its entry into force in two distinct situations: first, if the treaty so provides, and secondly, if the negotiating states have agreed in some other manner. The obligation to apply a treaty provisionally may thus arise from the terms of the treaty itself or, alternatively, in the manner the negotiating states have agreed.

3.1.1 Provisional application in terms of the treaty itself

3.1.1.1 Final provisions

Where a treaty expressly provides for its provisional application or for the provisional application of certain of its provisions, the clause so stipulating will usually be among the final provisions of the treaty.²⁴⁹ As such, it will often form part of articles on entry into force and duration. Paragraph 1 of article VII (duration) of the 1984 Agreement²⁵⁰ on tourism co-operation between Canada and Mexico provides:

“This Agreement shall be applied provisionally from the date of its signature, and shall enter into force on the date on which the Parties shall have notified the other by Diplomatic Note that they have completed their respective formalities.”

Article 26 (final provisions) of the 1996 Treaty²⁵¹ between the Russian Federation, Belarus, Kazakhstan and Kyrgyzstan on economic and humanitarian integration provides as follows:

“This Treaty shall be applied provisionally from the date of its signature and shall enter into force from the date of the transmission to the depositary – which shall be the Russian Federation – of the notifications confirming the completion by the Parties of the internal formalities necessary for the entry into force of the Treaty.”

Another possibility is for the negotiating states or international organizations to agree to a separate article dealing exclusively with provisional application. Article 10 of the

²⁴⁹See, for example, *Final Clauses of Multilateral Treaties* (n 186) 42-4.

²⁵⁰1398 *UNTS* 246.

²⁵¹2014 *UNTS* 15.

1990 Foreign Workers Agreement between the Federal Republic of Germany and Poland is an example of such a distinct provision. It simply stipulates that:

“This Agreement shall be implemented provisionally from the date of its signature.”²⁵³

Paragraph 14 of the exchange of letters,²⁵⁴ concluded in 1998, constituting an agreement between Australia and France relating to the movement of nationals between the two countries provides that:

“While awaiting entry into force, the agreement between our two Governments shall be implemented on a provisional basis from 1 August 1998.”

3.1.1.2 Protocol or annex forming part of the treaty

An article on provisional application may also be placed in a protocol or annex that forms an integral part of the treaty itself. Whether a protocol or annex is to be considered as forming an integral part of the treaty will depend on the terms of the treaty or of the protocol or annex. The protocol or annex will usually be concluded at the same time as the treaty but may also be concluded at a later date. The 1988 Agreement²⁵⁵ between Sweden and the Soviet Union on the delimitation of the continental shelf was signed on 18 April 1988 and came into force provisionally on 16 May 1988, in accordance with the protocol of 18 April 1988 annexed thereto. Similarly, the 1994 Agreement²⁵⁶ concerning cultural cooperation between Germany and Kazakhstan entered into force provisionally on 16 December 1994 by means of the protocol to the Agreement, which was concluded on the same date as the Agreement itself.

3.1.1.3 Notification or declaration of provisional application

When multilateral treaties provide for their provisional application, this is commonly upon notification or declaration of the participating states. In such cases, the

²⁵²Agreement concerning the employment of workers to improve their vocational and linguistic abilities (1708 *UNTS* 361).

²⁵³Similar provisions are found in, for example, a 12 of the 1990 Agreement between Germany and Romania concerning Romanian workers (1705 *UNTS* 301); a 9 of the 1992 Agreement on road transport between Belgium, Estonia Latvia, Lithuania, Luxembourg and the Netherlands (2068 *UNTS* 109); a 26 of the 1992 Free Trade Agreement between Estonia and Norway (1752 *UNTS* 381); a VII of the 1992 Agreement between Spain and Chile on cooperation in legal matters (1717 *UNTS* 250); a 20 of the 1994 Agreement on international road transport between Lithuania and Spain (1890 *UNTS* 79).

²⁵⁴1999 *ATS* 11.

²⁵⁵Agreement on the delimitation of the continental shelf and of the Swedish fishery zone and the Soviet economic zone in the Baltic Sea (1557 *UNTS* 275).

²⁵⁶2144 *UNTS* 141.

source of the obligation during the provisional period is not the treaty but the notification or declaration, unilaterally made in accordance with the relevant treaty provision and following completion of any necessary domestic formalities. Article 15 of the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency²⁵⁷ provides as follows:

“A State may upon signature or on any later date before this Convention enters into force for it, declare that it will apply this Convention provisionally.”²⁵⁸

Article 13 of the 1986 Convention on Early Notification of a Nuclear Accident²⁵⁹ contains exactly the same provision. Similarly, article 40, paragraph 4, of the 1992 Central European Free Trade Agreement²⁶⁰ specifies that:

“Any party may already at the time of signature declare that, during the initial phase it shall apply the Agreement provisionally if the Agreement cannot enter into force in relation to that Party by 1 March 1993.”

Among the states that provisionally applied the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea²⁶¹ were those that consented to its provisional application by notifying the depositary in writing, in accordance with article 7, paragraph 1(c), of the agreement.²⁶² Likewise, article 31 of the 1997 Agreement²⁶³ on the privileges and immunities of the International Tribunal for the Law of the Sea provides that:

“A State which intends to ratify or accede to this Agreement may at any time notify the depositary that it will apply this Agreement provisionally for a period not exceeding two years.”

²⁵⁷1457 *UNTS* 133.

²⁵⁸According to the depositary (1457 *UNTS* 133), this was a case of “*de facto* application” because the Convention did not provide that it enters into force provisionally. The better view is that the Convention was provisionally applied by and among those states that made the declaration envisaged in a 15. Besides making provision for a declaration as opposed to a notification to the depositary, a 15 is in essence similar to provisional application clauses found in the various commodity agreements and in the Protocol of Provisional Application of the 1964 European Fisheries Convention (n 164 above), which are widely accepted as cases of provisional application rather than so-called *de facto* application.

²⁵⁹1439 *UNTS* 175.

²⁶⁰1995 (34) *ILM* 3. The original parties were the Czech Republic, Hungary, Poland and the Slovak Republic.

²⁶¹N 181 above and s 3.1.1.5.

²⁶²The text of a 7(1) is reproduced in s 3.1.1.5 below. The states concerned were the Russian Federation and the Solomon Islands. The Russian Federation had abstained from voting on the agreement in the general assembly, while the Solomon Islands had been prevented from doing so for failing to pay its dues. See Linnan *et al* (n 183) 823.

²⁶³2002 *ATS* 4.

Commodity agreements traditionally make use of such an opting-in facility. Article 57, paragraph 1, of the 2001 International Cocoa Agreement²⁶⁴ provides that:

“A signatory Government which intends to ratify, accept or approve this Agreement or a Government which intends to accede to the Agreement, but which has not yet been able to deposit its instrument, may at any time notify the depositary that, in accordance with its constitutional procedures and/or its domestic laws and regulations, it will apply this Agreement provisionally either when it enters into force in accordance with article 58 or, if it is already in force, at a specified date....”

Where there is a provision on *notification* of provisional application to the depositary, it seems that a simple *declaration* of provisional application would be insufficient.²⁶⁵ To have legal effect, the notification should be made directly by the state or government concerned to the depositary.²⁶⁶ As depositary of the 1975 International Cocoa Agreement,²⁶⁷ the United Nations secretary-general had occasion to consider whether a notification of “intention to apply the treaty provisionally” is legally equivalent of a notification that a signatory “will apply the agreement provisionally”, but did not provide a definitive answer.²⁶⁸

3.1.1.4 Implied provisional application

A clause on provisional application need not be express but may also be implied.²⁶⁹ Implied clauses, which do not refer to provisional application or implementation *per se*, have become perhaps fewer since the conclusion of the 1969 and 1986 Vienna Conventions but are not unknown. A recent inter-organizational example is to be found in the 2000 Agreement between the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization and the World Meteorological Organization,²⁷⁰ article XIII of which reads as follows:

“1. This Agreement shall come into force on its approval by the [CTBTO Preparatory] Commission and by the Congress of the Organization [i.e. the WMO].

²⁶⁴N 192 above.

²⁶⁵1976 *UNJY* 222.

²⁶⁶*Ibid.*

²⁶⁷1023 *UNTS* 253.

²⁶⁸Letter to the executive director, International Cocoa Organization, reproduced in 1976 *UNJY* 222-3.

²⁶⁹Blix and Emerson (*The Treaty Maker's Handbook* (1973) 85) refer to two instances of implied provisional application. The 1949 Air Transport Agreement between Czechoslovakia and Finland provided in a 12 for entry into force upon notification by exchange of letters of its approval and that its provisions “shall be applied from the date of signature”. The 1947 Air Transport Agreement between Chile and the US provided in a 12 that “[t]his agreement shall be approved by each contracting party in accordance with its own law and shall enter into force upon an exchange of the respective instruments ... indicating such approval. Both contracting parties shall undertake to make effective the provisions of this agreement, within their respective administrative powers, from the date on which it is signed.” (Emphasis added.)

²⁷⁰CTBTO Preparatory Commission doc CTBT/PC-13/1/Annex II/Appendix IV dated 28 November 2000.

2. Upon the approval of this Agreement by the Commission and its endorsement by the Executive Council of the Organization, and pending its approval by the Congress of the Organization, the Executive Secretary of the Commission and the Secretary-General of the Organization may implement provisional measures consistent with this Agreement.” (Emphasis added.)

This clause effectively grants the two executive heads the authority to implement the agreement on a provisional basis.

3.1.1.5 Treaty amendments and modifications

In modern practice, it is not uncommon for a treaty to be amended from time to time or even at regular intervals.²⁷¹ When modifying or amending a treaty, the parties may decide, for reasons of urgency or for other reasons, to apply the provisions of the modified instrument on a provisional basis before it enters into force definitively.²⁷² The amendment or modification may be applied provisionally irrespective whether the original treaty is being or has been applied provisionally.²⁷³ It is also not an obstacle to the provisional application of an amendment that the main treaty contains a clause which subjects the entry into force of amendments to the treaty to ratification or other formal act of approval. The obligation to apply the amendment or protocol provisionally does not affect the requirement that it be ratified.²⁷⁴

In 1992, the additional plenipotentiary conference of the International Telecommunication Union held that year resolved to apply provisionally those parts of the 1992 ITU Constitution and Convention²⁷⁵ that provided for a new structure and more efficient working methods for the Union.²⁷⁶ Another provisionally applied agreement amending a major multilateral treaty is the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea,²⁷⁷ article 7, paragraph 1, of which provides as follows:

²⁷¹ See aa 39-41 of the 1969 Vienna Convention on amendment and modification of treaties.

²⁷² Another solution to avoid delays in the entry into force of amendments or modifications is the tacit acceptance or tacit consent procedure used, for example, in the technical conventions negotiated under the auspices of the IMO. The amendment procedures contained in the first IMO conventions were so slow that some amendments adopted have never entered into force (see <http://www.imo.org>). A similar procedure is used to amend the annexes to the ICAO Convention.

²⁷³ Lefeber (n 117) 84.

²⁷⁴ *Ibid.*

²⁷⁵ N 195 above.

²⁷⁶ Resolution 1 (Geneva, 1992) entitled ‘Provisional Application of Certain Parts of the Constitution and Convention of the International Telecommunication Union (Geneva, 1992)’. See also White & Lauria ‘The Impact of New Communication Technologies on International Telecommunication Law and Policy: Cyberspace and the Restructuring of the International Telecommunication Union’ 1995 (32) *California Western LR* 1 11-12.

²⁷⁷ N 181 above.

1. If on 16 November 1994 this Agreement has not entered into force, it shall be applied provisionally pending its entry into force by:

- (a) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which before 16 November 1994 notifies the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing;
- (b) States and entities which sign this Agreement, except any such State or entity which notifies the depositary in writing at the time of signature that it will not so apply this Agreement;
- (c) States and entities which consent to its provisional application by so notifying the depositary in writing;
- (d) States which accede to this Agreement.”²⁷⁸

In 2001, the states parties to the 1973 Treaty of Chaguaramas establishing the Caribbean Community and Common Market agreed to nine protocols amending the treaty, which were consolidated into the 2001 Revised Treaty of Chaguaramas. Following a decision by the prime ministerial sub-committee of the organization that the revised treaty should be signed and provisionally applied before 31 December 2001, the members of the Community concluded the 2002 Protocol on the Provisional Application of the Revised Treaty.²⁷⁹

The parties to a treaty may also agree that any future amendment to a treaty will be applied provisionally. Article 18 of the 1994 Air Services Agreement²⁸⁰ between Australia and the Russian Federation provides for this contingency as follows:

- “1. This Agreement may be amended by agreement in writing between the Contracting Parties.
- 2. Any amendment shall be applied provisionally from the date of its signature and enter into force once all necessary procedures have been completed and when confirmed by an exchange of diplomatic notes....”

Similarly, the parties may agree that amendments to subsidiary instruments will be applied provisionally in certain circumstances. In accordance with article 54, paragraph 1, of the Constitution of the ITU,²⁸¹ the administrative regulations of the organization are “binding international instruments”. Pursuant to article 54, paragraph 3^{enter}, ITU member states agree that amendments to the regulations will be applied provisionally, subject to the right of each member to object at the time of signature:

“Any revision of the Administrative Regulations shall apply provisionally, as from the date of entry into force of the revision, in respect of any Member State that has signed the revision and has not notified the Secretary-General of its consent to be bound.... Such

²⁷⁸The article is an excellent example of the tendency, in the interests of universality, towards greater complexity in clauses on provisional application.

²⁷⁹The texts of the Revised Treaty and Protocol are available at <http://www.sice.oas.org>.

²⁸⁰1994 ATS 21.

²⁸¹N 195 above.

3.1.1.6 Legal character of a treaty clause on provisional application

It has been argued that while the treaty itself does not enter into force, a clause on provisional application in the final provisions of a treaty forms a complementary agreement in simplified form which enters into force upon signature or exchange of instruments.²⁸² This view, which divides a single instrument into more than one treaty with differing entry into force requirements, seems rather artificial, even if it may have its uses for domestic constitutional purposes.²⁸³ The preferred view is that, being among the final provisions of a treaty, clauses on provisional application take effect from the moment of adoption of the text.²⁸⁴ This approach conforms with article 24 of the 1969 and 1986 Vienna Conventions, paragraph 4 of which reads as follows:

“The provisions of a treaty regulating the authentication of its text, the establishment of the consent of the States to be bound by the treaty, the manner or date of its entry into force ... and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.” (Emphasis added.)

Since provisional application is necessarily a matter arising before entry into force, clauses dealing with provisional application take effect upon adoption of the treaty in question. A signature is thus not an absolute necessity for a treaty to be applied provisionally.²⁸⁵ Although clauses on provisional application take effect from the moment of adoption of the text, this is not to say that the provisional application itself commences from that moment (see section 3.4 below).

3.1.2 Provisional application by some other manner

3.1.2.1 Separate or collateral agreement

Where a treaty does not contain a clause on provisional application the negotiating states and international organizations may arrive at a separate or collateral agreement to apply some or all of its terms on a provisional basis. They can do so at the time the main

²⁸²Vignes (n 124) 184 and 192. Similar views were expressed in the ILC in 1965. See 1965 (I) *YILC* 108-12 and s 1.3.1.3 above.

²⁸³Under municipal law, agreements on provisional application may be classified as agreements in simplified form, which may not require legislative approval. See s 5.1.1 below.

²⁸⁴Sinclair (n 1) 46.

²⁸⁵Lefeber (n 117) 84-5.

treaty is concluded or at any other time before it enters into force. The 1993 Treaty between Germany and Uzbekistan for the promotion and reciprocal protection of investments was brought into provisional operation by a separate exchange of notes concluded on 28 April 1993, the day the treaty itself was signed.²⁸⁷ The 1993 Treaty²⁸⁸ between Germany and Georgia on the same subject-matter followed the same procedure. Agreements on provisional application concluded by the European Community routinely take the form of international agreements in simplified form. An instance of this practice is the provisional application of the 1996 Agreement between the European Community and New Zealand on sanitary measures applicable to trade in live animals and animal products.²⁸⁹ An exchange of letters²⁹⁰ concerning the provisional application of certain provisions of the 1996 Agreement was concluded on the same day as the agreement itself, 17 December 1996, and took effect on 1 January 1997 in accordance with its terms. The same method is used to achieve the provisional application of the Community's numerous fisheries agreements.²⁹¹

The negotiating states and international organizations may also agree that they will come to an understanding on the provisional application of a treaty at a later date. The later understanding will constitute an agreement “in some other manner” for the purposes of article 25, paragraph 1(b). A post-1980 example of such a clause has not been found but the possibility is illustrated by the 1965 Templar Agreement²⁹² between Australia and the Federal Republic of Germany regarding the division of compensation paid by Israel for German secular property in Israel. An exchange of letters between representatives of the two states, concluded on the same day as the agreement itself, provided as follows:

“... In the negotiations conducted in connection with the above mentioned Treaty it has been agreed that the Governments of the Contracting States will come to an understanding as to the provisional application of the said Treaty in the unexpected event of its ratification not being achieved before the expiration of the present period of legislation of the German Bundestag.”²⁹³ (Emphasis added.)

²⁸⁶2071 UNTS 23.

²⁸⁷A successor state to the USSR, Uzbekistan acceded to the 1969 Vienna Convention in 1995.

²⁸⁸2071 UNTS 193.

²⁸⁹1997 (057) OJ L 0005.

²⁹⁰Agreement in the form of an exchange of letters concerning the provisional application of the Agreement between the European Community and New Zealand on sanitary measures applicable to trade in live animals and animal products (1997 (057) OJ L 0002).

²⁹¹See n 178 and n 180 above for examples of such agreements.

²⁹²598 UNTS 25

Treaties may also be applied provisionally as a matter of practice without a treaty clause or other agreement to that effect. Since states and international organizations are presumed to implement treaty provisions voluntarily and intentionally, it would not be unreasonable to construe their consent to apply a treaty provisionally from their conduct in doing so. By their conduct in applying a treaty before it has entered into force, the negotiating parties may be said to have tacitly agreed to its provisional application. The implementation of a treaty pending ratification may also be interpreted as constituting consent to be bound by a supplemental agreement on provisional application of the main treaty.

In the absence of a clause on provisional application, another approach is to view the conduct of a state in implementing an unratified treaty, not as a tacit agreement, but as tacit acquiescence in the provisional application. If state A provisionally implements an unratified treaty between it and state B and the latter does not object, B may be said to have tacitly acquiesced in the provisional application. This approach found some official support in Canada as a result of questions concerning the implementation of the 1977 Interim Reciprocal Fisheries Agreement²⁹⁴ between Canada and the United States. In considering whether there had been a material breach by the United States of the agreement, the legal bureau of the Canadian foreign ministry issued an opinion in 1977 stating *inter alia* that:

“... the Interim Agreement is not yet in force.... In the meantime both Parties appear to have acted as though the Agreement is being applied provisionally although there has been no formal action (such as an exchange of notes) confirming that it is to be applied provisionally.... While the signatory states have not formally agreed that the Interim Agreement should be applied provisionally pending its entry into force, their conduct reflects tacit acquiescence that the Agreement should be applied provisionally. It is only on this basis that Canada could allege a breach....”²⁹⁵ (Emphasis added.)

Whether by tacit agreement or tacit acquiescence, it is clear that the conduct of a state in implementing a treaty provisionally can amount to the provisional application of the treaty by that state for the purposes of paragraph 1(b) of article 25.

²⁹³ *Ibid.* The expression ‘understanding as to the provisional application’ suggests that a formal agreement or treaty undertaking was not intended.

²⁹⁴ This agreement does not appear to be reproduced in the *UNTS* but was referred to by the ICJ in the *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (1984 ICJ Rep 246). The ICJ confirmed in its judgement (para 69) that the Interim Agreement was “provisionally implemented” pending its entry into force on 26 July 1977.

²⁹⁵ Memorandum dated 31 May 1977 reproduced in part in the 1978 (LXI) *Canadian Yearbook of International Law* 366.

Paragraph 1(b) of article 25 does not prescribe the manner by which the negotiating states and international organizations may agree on provisional application. The expression ‘some other manner’ appears to allow them the widest freedom in the matter.²⁹⁶ Whether contemporaneous or subsequent, the separate or collateral agreement can take any form the parties choose, including a ‘formal’ treaty such as a self-standing protocol, a simplified treaty such as a resolution of a diplomatic conference,²⁹⁷ an exchange of letters or *notes verbales*, or an informal written arrangement. In the case of a resolution of a diplomatic conference, a state which does not vote in favour of the resolution or does not join the consensus is under no obligation to apply the treaty provisionally.²⁹⁸ The parties are, however, not restricted to an instrument that is itself a treaty under international law and could, for instance, record their agreement on provisional application in a non-binding text such as a memorandum of understanding.²⁹⁹ Another possibility would be for them to agree to make parallel undertakings or promises to apply the treaty provisionally.

The possibility of an agreement on provisional application in non-treaty form gives rise to several questions. What is the legal character or status of a separate or collateral agreement that is not itself a treaty under international law? Is it to be considered simply as a non-binding ‘political’ agreement? If so, can it be a sufficient basis for so important an undertaking as the obligation to apply the treaty, albeit on a provisional basis? And if a ‘political’ agreement is the source of a binding legal obligation, is it not in fact a treaty?

The answer to these questions lies in the practical necessities of provisional application. In keeping with the main purpose of the procedure – the avoidance of delay associated with ratification – paragraph 1(b) of article 25 does not prejudge the means by which states and international organizations can reach agreement on provisional application. Their choice of method will depend on the type of treaty they intend to apply provisionally, relevant constitutional restrictions, the treaty-making practice of the parties

²⁹⁶The word *agreed* in the English text of para 1(b) of a 25 could support the argument that an international agreement is required, but the use of *convenus* in the French text suggests that the negotiating states and international organizations are free to reach agreement by means other than a treaty.

²⁹⁷Aust (n 1) 139.

²⁹⁸*Ibid.* It is submitted that a consensus decision to apply a treaty provisionally – that is, one in which there is no voting – may create a rebuttable presumption that a state will apply the treaty provisionally.

²⁹⁹Doctrinal uncertainties persist whether or not memoranda of understanding are treaties under international law. Aust argues that they are not *inter alia* because “[t]here is no principle or rule in the law of treaties or general international law that requires that every transaction between states has to be legally binding, or, more particularly, a treaty” (Aust n 1 42). Klabbbers convincingly concludes that, in general, agreements should be presumed to be legally binding unless the opposite can be proved, on a case by case basis (Klabbbers ‘Informal

and the surrounding circumstances. Even if the instrument of transaction in question is not a treaty, it is still recognized under article 25 as a sufficient and proper basis for the provisional obligation and does not make the obligation any less valid for that fact.

The provisions of the 1969 and 1986 Vienna Conventions on the conclusion and entry into force of treaties will naturally apply to any supplementary or associated agreement on provisional application that is itself a treaty. It will thus enter into force in such manner and upon such date as it may provide or as the negotiating states may agree.³⁰⁰ Failing any such provision or agreement, it will enter into force as soon as consent to be bound has been established for all the negotiating states.³⁰¹ The consent of a state or international organization to be bound by such a treaty may, in theory, be expressed by any of the means foreseen in article 11 of the two Vienna Conventions.³⁰² However, in view of the fact that the avoidance of delay is the principal purpose of provisional application, signature or exchange of instruments constituting a treaty are naturally the most likely methods to be chosen.

3.2 Authority to agree to provisional application

Article 8 of the 1969 and 1986 Vienna Conventions provides that an act relating to the conclusion of a treaty performed by a person who cannot be considered as authorized to represent a state or international organization for that purpose is without legal effect unless confirmed afterwards. As acts relating to the conclusion of a treaty, signature and adoption may also bring a treaty into provisional operation. It is therefore important to establish when a representative of a state or international organization will be considered duly authorized and in particular whether he or she will require express authorization or full powers in order to agree to the provisional application of a treaty.

Article 7 of the 1969 and 1986 Vienna Conventions deals with the authority of a representative of a state or international organization for the purposes of adopting or

Agreements in International Law: Towards a Theoretical Framework' 1994 (V) *Finnish Yearbook of International Law* 267 385). See also Klabbers *The Concept of Treaty in International Law* (1996).

³⁰⁰A 24(1).

³⁰¹A 24(2).

³⁰²A 11 of the 1969 Vienna Convention provides that consent to be bound may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed. For international organizations the act of ratification is known as the act of formal confirmation (a 11 of the 1986 Vienna Convention). The 'other means' of expressing consent to be bound appear to be subject to certain requirements: these include that the parties to a treaty unanimously express their consent to be bound by it, that they took some active step to express that consent, and that the provisions to which they consented were in existence and were known to them (Fitzmaurice 'Expression of Consent to be Bound by a Treaty as Developed in Certain Environmental Treaties' in Klabbers & Lefeber (n 117) 59 64).

authenticating the text of a treaty or for the purpose of expressing the consent of the state to be bound by a treaty. In terms of article 7, paragraph 1, of the 1969 Vienna Convention,

“A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

- (a) he produces appropriate full powers; or
- (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.”

In accordance with article 7, paragraph 2(a), heads of state and government and ministers for foreign affairs are considered to represent the state in virtue of their functions and without having to produce full powers.³⁰³ The same is true of heads of diplomatic missions accredited to a state or an international organization for the purpose of adopting the text of a treaty with that state or international organization.³⁰⁴ In accordance with article 2, paragraph 1 (c), “full powers” means a document emanating from the competent authority of a state designating a person or persons to represent the state for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.³⁰⁵ The corresponding provision in the 1986 Vienna Convention extends this definition to the full powers of representatives of international organizations.

Whether appropriate full powers will, at least in theory, be required for the purposes of coming to an agreement on provisional application will depend on the manner by which such an agreement is reached. For provisional application in terms of article 25, paragraph 1(a) (where the treaty itself so provides), the representative of a state or international organization may be requested to produce full powers to adopt the text of the treaty, unless he or she is exempted by office from producing them or it appears from practice or from other circumstances that it was intended to dispense with full powers. While it is of course possible to issue full powers specifically granting authority to agree to the provisional application of a treaty or part of a treaty, it is of course not necessary to do so. Full powers to adopt the treaty imply authority to agree to its provisional application in whole or in part. Similarly, full powers to express the consent of the state to be bound by the treaty imply authority to agree to its provisional application pending its entry into force.

³⁰³See, generally, Watts ‘The Legal Position in International Law of Heads of States, Heads of Government and Foreign Ministers’ 1994 III (247) *RC* 114.

³⁰⁴A 7(2)(b) and (c) of the 1969 and 1986 Vienna Conventions.

³⁰⁵On full powers in general, see Blix & Emerson (n 269) 34-7; Sinclair (n 1) 29.

whether full powers may be required for provisional application in terms of article 25, paragraph 1(b) (where the negotiating states or international organizations have agreed to provisional application in some other manner) will depend on the circumstances. If the associated or supplementary agreement on provisional application is itself a treaty, appropriate full powers with regard to the separate agreement on provisional application may be requested. Such a request could arise where the agreement on provisional application is concluded at a later date. But where the two instruments – the main treaty and the agreement on provisional application – are contemporaneous, it seems more likely that appropriate full powers to conclude the main treaty would be considered as encompassing authority to conclude the associated or supplementary agreement on provisional application. On the other hand, if the negotiating states or international organizations reach agreement in some manner other than a treaty, the question of full powers need not arise.

3.3 Date of commencement of provisional application

While paragraph 1 of article 25 regulates the manner by which states and international organizations may reach agreement to apply a treaty provisionally, it does not expressly deal with the questions when or upon what conditions the provisional application will commence.³⁰⁶ As a matter of practice, a clause on provisional application will usually provide for the date on which the provisional application will commence, which is generally the date of signature of the treaty.³⁰⁷ For example, article 13 of the 1986 Agreement³⁰⁸ on technical co-operation between Argentina and Italy, which was signed on 30 September 1986, provided that the Agreement “shall be provisionally applied as from today....” Article 13 of the 1997 Agreement³⁰⁹ between Luxembourg and Slovenia on cooperation in the fields of education, culture and science stipulated that it should be applied provisionally “beginning with the date of signature.” An example of a multilateral treaty containing a similar clause is the 1993 Mir Agreement,³¹⁰ article 15, paragraph 1, of which provided that “[t]his Agreement shall be applied provisionally from the date of its signature.”

³⁰⁶*Ibid.*

³⁰⁷*Ibid.*

³⁰⁸1502 *UNTS* 63.

³⁰⁹2118 *UNTS* 410.

³¹⁰The Agreement on international legal guarantees for the free and independent operation of the Inter-State Television and Radio Broadcasting Company Mir (1971 *UNTS* 11). Its parties are Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Russian Federation, Tajikistan and Uzbekistan.

instead of the date of signature, a treaty may be applied provisionally from the date of adoption or whatever the negotiating states can agree on.³¹¹ Possibilities include a specified date, the date of exchange of instruments or the happening of a certain event. The 1999 Agreement³¹² between Spain and Lithuania on the reciprocal abolition of visas provided that it would apply provisionally “on the expiration of the 30-day time limit after the date of signature”. Article 20 of the 1998 Agreement³¹³ between Spain and Cuba on the execution of criminal sentences provided for its entry into force provisionally “the day after signature”.

The date of commencement of provisional application may even precede the date of the treaty. An example of such a retroactive provision is found in the 1990 Treaty³¹⁴ between Germany and the Soviet Union on conditions for the temporary stay in and modalities for the phased withdrawal of Soviet forces from the territory of Germany. Article 27 of the treaty, which was signed on 12 October 1990, provided that it “shall have been applied provisionally since 3 October 1990.”

That provisional application may also commence *after* the definitive entry into force of the treaty was confirmed in Sir Francis Vallat’s interpretative declaration at the Vienna conference.³¹⁵ The phrase “pending its entry into force” in paragraph 1 of the then-article 22 did not, he said, preclude the provisional application of a treaty by one or more states after the treaty had entered into force definitively between other states. An example of provisional application following the entry into force of a treaty will be provisional application by an acceding state, whether in terms of the treaty itself or with the agreement of the negotiating parties.³¹⁶

When a multilateral treaty foresees provisional application upon notification, the date of commencement of the provisional application may, depending on the clause in question, be the date of notification, the date of entry into force of the agreement or the

³¹¹Aust (n 1) 139.

³¹²2126 *UNTS* 523

³¹³N 158 above.

³¹⁴1707 *UNTS* 209.

³¹⁵See s 1.3.2.2 above.

³¹⁶See a 18 of the 1997 Ottawa Convention (s 6.3.4 below).

date specified in the notification. Thus, article XXIX, paragraph 1, of the 1970 Agreement on the International Dolphin Conservation Programme³¹⁸ provides:

This Agreement shall be applied provisionally by a State or regional economic integration organization which consents to its provisional application by so notifying the Depositary in writing. Such provisional application shall become effective from the date of receipt of the notification.³¹⁹ (Emphasis added.)

In the case of provisional application by declaration, unless otherwise stipulated, the date of commencement of the provisional application for a state exercising the right to make such a declaration would be the date of the declaration or the date mentioned in the declaration.

Although unlikely, it is conceivable that the negotiating states may fail for some reason to stipulate expressly when provisional application should commence. Where the treaty itself provides for provisional application but omits the date or condition of commencement, the provisional application will commence as soon as the relevant clause takes effect. This, in accordance with article 24, paragraph 4, of the 1969 and 1986 Vienna Conventions, will be upon adoption of the treaty in question. Where the omission occurs in an ancillary or subsidiary agreement that is itself a treaty, the provisional application will begin as soon as that agreement enters into force, unless the signatories agree otherwise.

3.4 Parties obliged to apply the treaty provisionally

Article 25 does not limit the provisional application of a treaty or part of a treaty to provisional application by all negotiating states or international organizations. In fact, article 25 is silent on the question which parties are concerned by the provisional application.³²⁰ Self-evidently, this must be answered by the terms of the treaty itself or by the negotiating states in some other manner. In practice, the treaty usually provides that it will be applied provisionally by all its signatories pending its entry into force.³²¹ Such is also the case when the negotiating states or international organizations conclude a separate or collateral agreement on provisional application. Should a treaty clause be expressed to

³¹⁷In accordance with advice given by the UN secretary-general to the executive director of the International Cocoa Organization on the provisional application of the 1975 International Cocoa Agreement, “[a]ny notification would of course have to mention either the date of entry into force of the Agreement or some later date as the beginning of ‘provisional application’.” See n 268 above and associated text.

³¹⁸N 167 above. To date, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, the US and Venezuela have ratified the agreement.

³¹⁹According to the depositary government (the US), the agreement is being applied provisionally by Bolivia, Colombia, the European Union and Vanuatu. See <http://www.nmfs.noaa.gov>.

³²⁰Vignes (n 124) 190.

apply only to signatory states, it will not apply to negotiating states until they have signed the treaty.³²²

Occasionally, a bilateral treaty may provide that just one of the parties shall provisionally apply some or all of its provisions. Thus, article 15, paragraph 2, of the Agreement³²³ between the Netherlands and Romania on the export of social security benefits provides that:

“The Netherlands shall apply Article 4 [export of benefits] of this Agreement provisionally from the first day of the second month following the date of signature.”

Certain negotiating states may not be in a position to apply a treaty provisionally for constitutional reasons or because of the need to change their municipal law beforehand. Where it is desirable to apply a multilateral treaty on a provisional basis, the negotiators may attempt to get round the difficulties posed by national law in a number of ways. The first possibility is that those states that are able to do so reach a separate agreement on provisional application. As pointed out by the United Kingdom at the Vienna conference,³²⁴ there is nothing to prevent some of the signatories from coming together and agreeing to apply a treaty provisionally. Paragraph 1(b) of article 25 is therefore understood to apply equally to the situation where *certain of* the negotiating states, but not all, agree to apply the treaty or part of the treaty provisionally pending its entry into force.

Another possibility, referred to already, is for a multilateral treaty to make provision for a notification or declaration of provisional application. In addition to such ‘opting-in’ clauses, the negotiating states or international organizations may agree to an ‘opting-out’ clause, in terms of which the signatories are given an opportunity to give notice that they will *not* apply the treaty provisionally.³²⁵ Thus, article 7, paragraph 1, of the 1994 Agreement³²⁶ relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea provided for its provisional application *inter alia* by states which had agreed to its adoption, or had signed it, “unless they notified the depositary otherwise”.³²⁷ Similarly, article 45, paragraph 2 (c), of the 1994 Energy Charter Treaty³²⁸

³²¹Lefeber (n 117) 84.

³²²Aust (n 1) 139.

³²³Feb 2003 *UNTS* 381.

³²⁴See s 1.3.2.2 above.

³²⁵Lefeber (n 117) 85.

³²⁶N 181 above.

³²⁷For the text of a 7(1), see s 3.1.1.5 above. By July 1995, Brazil, Bulgaria, Cameroon, Cyprus, Denmark, Iran, Ireland, Jordan, Mexico, Morocco, Poland, Portugal, Romania, Saudi Arabia, Slovenia, Spain, Sweden and Uruguay had notified the depositary of their non-acceptance of provisional application. See Linnan *et al* (n 183) 822-3.

provided that any signatory might, when signing, deliver to the depositary a declaration that it was not able to accept provisional application of the treaty. The clause also provided that any such signatory may at any time withdraw that declaration by written notification to the depositary. Having opted out, states were permitted to revisit the situation and to opt in. The same formula was included in the 1998 Amendment to the trade-related provisions of the Energy Charter Treaty,³²⁹ and a similar procedure is envisaged in article 3 of the Additional Protocols³³⁰ to the 1992 Central European Free Trade Agreement.³³¹

Where accession to a treaty is foreseen, the treaty may allow an acceding state to declare or to notify the depositary that it will apply the treaty provisionally pending its accession.³³² Article 45, paragraph 2, of the 1994 Energy Charter Treaty provides for such a procedure, as does article 7, paragraph 1(d) of the 1994 Agreement Relating to the implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea. Similarly, article XXIII, paragraph (c), of the 1999 Food Aid Convention³³³ provides that:

“(c) Any Government acceding to this Convention ... or whose accession has been agreed by the [Food Aid] Committee ... may deposit with the depositary a declaration of provisional application of this Convention pending the deposit of its instrument of accession....”

In the absence of a clause on provisional application prior to accession, unilateral application by an acceding state will amount to provisional application in accordance with article 25, paragraph 1(b), if the negotiating states (and negotiating organizations) agree to the provisional application. As we have seen, such agreement may be express or tacit.³³⁴ Indeed, article 25, paragraph 1(b), appears to cover all situations where a treaty has already entered into force and a non-party unilaterally undertakes, with the agreement of the parties, to implement the treaty provisionally pending its entry into force for that non-party.

³²⁸N 141 above.

³²⁹The text of the 1998 Amendment is reproduced at <http://www.encharter.org>. Twenty-four states applied the amendment provisionally as of 10 December 2003.

³³⁰The text of Additional Protocols No. 8 (1999) and 9 (2000) are reproduced at <http://www.cefta.org>.

³³¹N 260 above.

³³²Lefeber (n 117) 85.

³³³N 191 above.

³³⁴Where there is no agreement on provisional application as required by a 25(1)(b), there is no objection in principle to an acceding state's making a unilaterally undertaking of provisional application pending accession if the treaty stipulations to be applied entail an *obligation* as opposed to a *right*. This little-used possibility

3.5.1 *Pacta sunt servanda*

The effect that provisionally applied treaties have under international law is a question of considerable importance for the stability and certainty of treaty relations and the usefulness of article 25 in practice. The placement of article 25 immediately following the article on entry into force (article 24) and prior to that on the *pacta sunt servanda* rule (article 26) gives a clear contextual hint as to the legal consequences of provisional application. So too does the usual placement of clauses on provisional application alongside or within articles on entry into force. It therefore comes as no great surprise that the understanding of the states negotiating the 1969 Vienna Convention, or at least the vast majority, was that it was “self-evident” that the rule of *pacta sunt servanda* applies to obligations assumed under article 25.³³⁵ Acceptance of the provisional application of a treaty is thus similar to an act of ratification.³³⁶ Obligations assumed during the provisional period are binding and must be performed in good faith until the treaty enters into force or the provisional application is lawfully terminated.

A 1971 exchange of notes³³⁷ constituting an agreement between Colombia and Brazil for the reciprocal exemption from double taxation of shipping and air transport enterprises of the two countries well illustrates the operation of the *pacta sunt servanda* principle during the provisional period. Paragraph VIII of the exchange of notes reads as follows:

“This agreement shall enter into force provisionally on the date of the note of response from Your Excellency and definitively on the date on which the two Governments notify each other of the fulfillment in each country of the requirements related to its ratification. In the event that one of the parties notifies the other that it has not been possible to obtain such ratification, both parties shall be free to require the shipping or air transport enterprises of the other party to pay the taxes which were not collected while the agreement was in force provisionally.” (Emphasis added.)

Without this provision, the parties, being bound by the terms of the agreement during the period of provisional application, would not have been able to charge taxes on each other’s shipping and air transport companies in the event of a failure to ratify the agreement. More directly, decisions of the council of the European Union approving

could be of particular value in the context of normative environmental, human rights and humanitarian treaties.

³³⁵See n 115 and associated text.

³³⁶Linnan *et al* (n 183) 822

agreements on provisional application at times refer to the binding effect of such agreements. Thus, the council decision endorsing a 2003 Agreement³³⁸ with Egypt stipulates that:

“The President of the Council is hereby authorised to designate the person(s) empowered to sign this Agreement so as to bind the Community during the period of provisional application.”³³⁹ (Emphasis added.)

Yet for Rogoff and Gauditz, who in 1987 wrote the first journal article on provisional application to appear in the English language, the matter had not been settled. Having reviewed the record of the Vienna conference, they concluded that owing to the inherent ambiguity of the term *applied provisionally*, there are two possible views regarding the nature of the obligation that a regime of provisional application imposes on states. Either the obligations assumed during the provisional period are ‘definitive’ and subject to the rule of *pacta sunt servanda*, or they are merely analogous to the obligation not to defeat the object and purpose of the treaty prior to its entry into force (article 18).³⁴⁰ The learned authors seem to attach equal validity to both views.³⁴¹ However, any ambiguity in the term *applied provisionally* should be regarded as having been settled by the statement of the chairman of the drafting committee at the Vienna conference, by the context of article 25, and, most significantly, by the practice of states. In coming to their conclusion, Rogoff and Gauditz refer to none of these factors. As Lefeber correctly points out, “[t]here can ... be no doubt that a provisionally applicable treaty constitutes a binding legal instrument between states which is enforceable.”³⁴²

³³⁷ 1997 *Tax Notes International* 239 (doc 97-32946).

³³⁸ Agreement in the form of an Exchange of Letters concerning the provisional application of the trade and trade-related provisions of the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part (2003 (345) *OJ L* 0115). The agreement entered into force on 21 December 2003.

³³⁹ A 4 of doc 2003/913/EC (2003 (345) *OJ L* 0113).

³⁴⁰ Rogoff & Gauditz (n 15) 80. A 18 of the 1969 Vienna Convention provides:

“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”

³⁴¹ Hillgenberg argues that “even treaties can entail not only contractual obligations to perform or abstain, but also concomitant duties which will not have such strict consequences if they are infringed”. As examples of ‘concomitant duties’ he mentions (though without citing any authority) the obligation not to defeat the object and purpose of a treaty (a 18) and an agreement to apply a treaty provisionally pending its entry into force. See Hillgenberg ‘A Fresh Look at Soft Law’ 1999 (10) *EJIL* 499 508.

³⁴² Lefeber (n 117) 90. His conclusion is reinforced by other authorities, including Aust ((n 1) 139), who refers to the “obligation” to apply a treaty provisionally. Akehurst ((n 124) 134-5) and Oppenheim ((n 235) 1238) respectively deal with provisional application under the headings “Entry into force” and “Effects prior to entry into force”. The view of the US state department is that a provision on provisional application “itself constitutes a binding international agreement”. See Nash (n 130) 931.

Regrettably, the United Nations handbook *Final Clauses of Multilateral Treaties*, published in 2003, reflects continued uncertainty as to the legal consequences of provisional application. In dealing with provisional application by a state after the entry into force of a treaty, the publication states:

“Provisional application is possible even after the entry into force of a treaty. This option is open to a State that may wish to give effect to the treaty without incurring the legal commitments under it. It may also wish to cease applying the treaty without complying with the termination provisions.”³⁴³ (Emphasis added.)

The intention may have been to refer only to unilateral application in the absence of any kind of agreement on provisional application by or among the negotiating states. Nevertheless, the phrase “without incurring the legal commitments under it” appears to suggest that where a state undertakes to apply a treaty provisionally after the treaty has entered into force, it could not be legally bound by it. This view would certainly be incorrect where the treaty foresees provisional application in advance of accession or where the negotiating parties agree to the provisional application by an acceding state.³⁴⁴ It would also be incorrect in other situations where a state unilaterally undertakes, with the agreement of the negotiating parties, to implement provisionally a treaty that has already entered into force, pending its entry into force for that state.³⁴⁵ In all of these cases, the *pacta sunt servanda* rule will apply.

3.5.2 Possible theoretical difficulties

There remain, however, certain possible theoretical difficulties due to the applicability of the rule of *pacta sunt servanda* during the period of provisional operation. Explanations for these questions should be found in the interests of achieving a coherent and consistent theoretical framework to the law of provisional application and the law of treaties in general.

3.5.2.1 Unilateral notification of termination

The first theoretical difficulty is that if paragraph 2 of article 25 allows a state or international organization to terminate provisional application unilaterally, how (so the argument might run) can it be said that provisionally applied treaties are binding and must be observed in good faith? This apparent anomaly vexed the representative of Iran at the

³⁴³ *Final Clauses of Multilateral Treaties* (n 186) 44.

³⁴⁴ See s 3.4 above.

vienna conference, who questioned whether the possibility of withdrawal by a state from a provisionally applicable treaty did not undermine the maxim *pacta sunt servanda*. Paragraph 2, he observed, seemed to enable a state to withdraw from a treaty which it had signed and perhaps ratified.³⁴⁶

This theoretical difficulty concerns the seeming contradiction caused by the existence, in parallel with the obligation to implement the treaty in good faith, of the entitlement to terminate provisional application unilaterally. The explanation for this ambiguity is to be found in the relationship between the law of provisional application, on the one hand, and the principle of discretionary ratification (or acceptance, approval or accession, as the case may be), on the other. Treaty obligations assumed during the provisional period are obviously not definitive and are subject to ratification. The law of provisional application must therefore take account of the possibility that the negotiating parties may wish, or indeed be obliged, to release themselves from the provisional engagement if the ratification process is unsuccessful.³⁴⁷ In other words, being subject to a resolute condition, a provisional undertaking “by definition can only be precarious”.³⁴⁸

The withdrawal clause in paragraph 2 of article 25 thus reflects the principle that ratification is a discretionary act. Without the right of withdrawal, there would be no practical or legal distinction between the provisional undertaking and the expression of final consent to be bound. Indeed, but for the possibility of withdrawal the very purpose of provisional application would be defeated as the negotiators of a treaty may be unable to agree to its provisional application until it had been subjected to the same process of domestic approval that precedes ratification. The termination provision in article 25 therefore does not conflict with or undermine the *pacta sunt servanda* rule. Rather, it should be viewed as a narrow exception, based on the intrinsically refutable nature of an undertaking to apply a treaty provisionally, to the “general presumption against unilateral termination”³⁴⁹ that is inherent in the *pacta sunt servanda* rule.

³⁴⁵*Ibid.*

³⁴⁶A/Conf.39/11/Add.1 40 41.

³⁴⁷Provisional application does not give rise to any kind of obligation to ratify a treaty. It is nevertheless possible to argue that it places a greater duty on the executive to submit the treaty to the necessary authorities within a reasonable period of time so that a decision on ratification may be taken. A greater responsibility regarding ratification was, for example, assumed in terms of the 2001 Agreement establishing the Terms of Reference of the International Jute Study Group (doc TD/JUTE.4/6). A 23(b) of the agreement provides that any state

“...which has notified its provisional application of these Terms of Reference shall endeavour to complete its internal procedures as soon as possible, and shall notify the depositary of its definitive acceptance of these Terms of Reference”.

³⁴⁸Reuter (n 1) 68.

The second possible theoretical difficulty concerning the application of the *pacta sunt servanda* rule in the provisional phase arises from the manner by which states and international organizations may agree on provisional application. Pursuant to paragraph 1 of article 25, an engagement to apply a treaty provisionally need not be made by an agreement in the form of a treaty. It may instead arise through a non-binding ‘political’ instrument or indeed practice. The obvious question is how the most basic duty in all the law of treaties can be said to exist if the transaction upon which it is based is not itself a treaty?

On the face of it, there does seem something incongruous about imputing binding legal effect to treaty provisions via a transaction that is not a treaty. As Aust has pointed out in a wider context, there are risks in using a non-binding memorandum of understanding instead of a treaty, including the danger that “there may sometimes be a temptation not to take the commitments in it so seriously.”³⁵⁰ Could a state wishing to avoid an undertaking to apply a treaty provisionally shelter behind the excuse that the relevant agreement on provisional application, not being a treaty, is not legally binding? It is submitted that it could not. The principle of good faith foresees that instruments or transactions that are not treaties may, depending on the intention of the parties and on the circumstances, have binding effect. Even a unilateral declaration may bind the party making it.³⁵¹ The obligatory nature of the provisionally applicable treaty is therefore not dependent on the treaty-status of the agreement on provisional application. Rather, it is based on the principle of good faith as reflected in the law of provisional application. Regardless of the manner by which a state or international organization engages itself to apply a treaty provisionally, good faith requires the *pacta sunt servanda* rule to prevail.

3.5.3 Estoppel and provisional application

Given the doctrinal uncertainties regarding the effect of provisionally applied treaties it is necessary to consider whether the doctrine of estoppel has any relevance to the law of provisional application. Although originally derived from Anglo-Saxon jurisprudence,³⁵² the rules of estoppel in international law differ from those under

³⁴⁹McNair (n 1) 493.

³⁵⁰Aust (n 1) 39.

³⁵¹Aust (n 1) 46; *Nuclear Tests case (Australia v France)* 1974 ICJ Rep 268 para 46.

³⁵²Bowett ‘Estoppel before International Tribunals and its Relation to Acquiescence’ 1957 (33) *BYIL* 176 176; Kolb ‘Aperçus sur la bonne foi en droit international public (deuxième partie)’ 2001 (54) *Revue Hellénique de Droit International* 383 384.

municipal law. Under international law, estoppel is a substantive rule which is broader and less technical than under municipal law, being founded on the principle that good faith must prevail in international relations.³⁵³ Bowett defines estoppel as operating so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit.³⁵⁴ Although the exact scope of the international law doctrine remains unsettled, Aust reasonably concludes that

“... in general it may be said that where a clear statement or representation is made by one state to another, which then in good faith relies upon it *to its detriment*, the first state is estopped (precluded) from going back on its statement or representation.”³⁵⁵

The essential elements of an international estoppel appear to be (1) a clear and unambiguous statement or representation, (2) which is voluntary, unconditional and authorized, and (3) which is relied upon in good faith by the other state to its detriment or to the advantage of the state making the representation.³⁵⁶ Doubts have been expressed, most prominently by McNair,³⁵⁷ whether it is a requirement of international law that the party raising estoppel should have suffered a detrimental change in position as a result of the representation or behaviour of the other party. In arguing that international law does have such a requirement, Kolb point out that the law seeks to avoid injury to others and not to sanction its subjects for their inconsistent behaviour.³⁵⁸ On the other hand, some authorities simply view estoppel as imposing a general duty on states to refrain from engaging in inconsistent conduct vis-à-vis other states and do not refer to the element of detrimental reliance.³⁵⁹ Thus expressed, international estoppel bears a close resemblance to the civil law maxim *venire contra factum proprium non valet*.³⁶⁰

In general, estoppel plays a limited role in the context of the law of treaties. The obligations imposed by a treaty derive their binding force from the treaty itself and not

³⁵³ Aust (n 1) 46; Bowett (n 352) 176.

³⁵⁴ Bowett (n 352) 176. In the case of the *Temple of Préah Vihear (Cambodia v. Thailand)*, the court stated that estoppel “operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself.” (1962 ICJ Rep 6 143-4.)

³⁵⁵ Aust (n 1) 46.

³⁵⁶ Bowett (n 352) 188-194.

³⁵⁷ McNair (n 1) 487.

³⁵⁸ Kolb (n 352) 388.

³⁵⁹ Schachter ‘Non-Conventional Concerted Acts’ in Bedjaoui *International Law: Achievements and Prospects* (1991) 265, 267-8; Franck *Fairness in International Law and Institutions* (1995) 52.

³⁶⁰ Kolb (n 352) 385.

from a notion that a party is estopped from repudiating them. However, the doctrine of estoppel may supplement treaty obligations “in that statements of fact which condition and render meaningful these obligations are, by that doctrine, deemed to be binding on the parties to the agreement.”³⁶² According to McNair, the descriptive phrases and statements contained, for example, in the preamble to a treaty may have legal effect by way of estoppel. On this basis a party may be estopped from alleging that a legal or factual situation exists which is contrary to that reflected in a treaty. In the case concerning the *Legal Status of Eastern Greenland*³⁶³ Denmark challenged the legality of a Norwegian declaration of occupation of that territory promulgated in 1931. The PCIJ held *inter alia* that Norway had debarred herself from contesting Danish sovereignty over the island and, in consequence, from proceeding to occupy it, by virtue of certain bilateral and multilateral agreements, including the Universal Postal Conventions of 1920, 1924 and 1929, which recognized the whole of Greenland as part of Denmark. It is unclear whether the same principle would apply in the case of a treaty that has not yet entered into effect.

Applying the principles of estoppel to a dispute relating to article 25 will not be straightforward. As in the case of a treaty that has entered into force definitively, a state should be prevented from asserting that a legal or factual situation exists which differs from that described or reflected in a treaty that the state is applying provisionally. But an obligation to apply a treaty provisionally will not come about through the operation of estoppel if the agreement on provisional application takes the form of a clause in the treaty or a separate agreement that is also a treaty: in such situations the legal obligation exists by virtue of the treaty or separate agreement. However, a state’s consent to provisional application may also be found in a non-treaty instrument or arrangement, or given by unilateral declaration or implied by practice. Good faith demands that states that agree to implement a treaty provisionally in such circumstances should not be permitted to act as if they had not given the commitment. It seems reasonable to conclude that in certain cases this preclusion may have the character of an estoppel. Thus, where state A makes a clear statement or representation to state B that it will provisionally apply a treaty between them (for example, in a non-binding document, in a unilateral declaration or by implementing the treaty in practice), and B relies upon A’s statement or representation to its detriment or to A’s advantage (such as by itself implementing the treaty provisionally), A should be estopped or otherwise barred by its statement or conduct from claiming as against B that

³⁶¹ McNair (n 1) 486. See also Kolb (n 352) 388.

³⁶² Bowett (n 352) 181.

³⁶³ 1933 *PCIJ A/B* 53 22 68. McNair (n 1 487) notes that the court did not use the word estoppel but that the case can be “fairly described as an estoppel.”

the treaty is without legal effect prior to its entry into force. Whether estoppel can play such a role in practice remains to be seen.

3.5.4 Article 46 and the *pacta sunt servanda* rule

The applicability of the rule of *pacta sunt servanda* means that a state may not invoke the provisions of its internal law as justification for its failure to perform a provisionally applicable treaty.³⁶⁴ Likewise, an international organization may not invoke the rules of the organization as justification for its failure to perform an international agreement that it has agreed to apply on a provisional basis.³⁶⁵ The one narrow exception to this general rule is contained in article 46 of both the 1969 and 1986 Vienna Conventions. Article 46 concerns the invalidity of a treaty due to a violation of the internal law of a party regarding competence to conclude treaties. In accordance with article 46, paragraph 1, of the 1969 Vienna Convention, therefore, a state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent to be bound unless that violation was manifest and concerned a rule of its internal law of fundamental importance. By virtue of article 46, paragraph 2, of the 1986 Vienna Convention, the same rule applies to treaties concluded by international organizations. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.³⁶⁶ In applying article 46 to the subject matter at hand, one may conclude the following:

A party may not invoke the fact that its undertaking to apply a treaty provisionally has been expressed in violation of a provision of its internal law regarding competence to conclude treaties (including competence to agree to provisional application) as invalidating its agreement on provisional application unless that violation was both manifest and concerned a rule of its internal law of fundamental importance.³⁶⁷ This rule applies both to states and international organizations. Even if a constitutional constraint on the competence to agree to provisional application could be considered “a rule of fundamental importance”, it is difficult to imagine the circumstances in which the violation of such a rule would be “manifest”.³⁶⁸ According to Lefeber, domestic limitations to the provisional application of

³⁶⁴ A 27 of the 1969 Vienna Convention and a 27(1) of the 1986 Vienna Convention.

³⁶⁵ A 27(2) of the 1986 Vienna Convention.

³⁶⁶ A 46(2) of the 1969 Vienna Convention.

³⁶⁷ See Lefeber (n 117) 90.

³⁶⁸ In its judgement of 10 October 2002 in the *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria*, the ICJ noted – in circumstances where Nigeria had argued that Cameroon ought to have known that the Nigerian head of state could no longer bind the state without consulting the government

treaties mean that the competent organ should abstain from expressing its consent to be bound by the agreement on provisional application. If it does not, it will either have to comply with the treaty or face liability for an internationally wrongful act.³⁶⁹

3.5.5 Limiting provisions

Articles on provisional application frequently contain a phrase in terms of which the provisional application is made subject to national law or even national regulations.³⁷⁰ The practice of including such limiting provisions in clauses on provisional application is generally restricted to treaties concluded between states. In terms of paragraph 1 of the Protocol of Provisional Application of the GATT,³⁷¹ the signatories agreed to apply provisionally parts I and III of the Agreement and part II “to the fullest extent not inconsistent with existing legislation.” More recently, the 1994 Agreement Relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea³⁷² was provisionally applied in accordance with “national or internal laws or regulations”. Article 45, paragraph 1, of the 1994 Energy Charter Treaty³⁷³ 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.”

Limiting provisions also occur in bilateral treaties. Article 16, paragraph 2 of the 1997 Agreement between Germany and Mongolia concerning cultural cooperation³⁷⁴ provides as follows:

“The Government of the Federal Republic of Germany and the Government of Mongolia shall provisionally apply this Agreement from the date of signature in accordance with their national law.”³⁷⁵ (Emphasis added.)

At times limiting provisions go even further than a simple reference to national laws or regulations. A case in point is the 1991 Protocol on Environmental Protection to the

– that “there is no general legal obligation for states to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States.” (2002 *ICJ Rep* [forthcoming] para 266.) On the constitutional authority to agree to provisional application, see s 5.1.1 below.

³⁶⁹Lefeber (n 117) 91.

³⁷⁰On limiting provisions generally, see Lefeber (n 117) 89.

³⁷¹N 135 above.

³⁷²N 181 and s 3.1.1.5.

³⁷³N 141 above.

³⁷⁴2071 *UNTS* 79.

³⁷⁵The same provision is found in the 1994 Protocol to the Agreement between Germany and Kazakhstan concerning cultural cooperation (2144 *UNTS* 141). Unfortunately, the official translation into English in the *UNTS* does not reflect his concordance.

Antarctic Treaty. The implied agreement of the Antarctic Treaty consultative parties to apply the annexes to the protocol provisionally was recorded in the final act of the eleventh Antarctic Treaty special consultative meeting:

“Pending entry into force of the Protocol it was agreed that it was desirable for all Contracting Parties to the Antarctic Treaty to apply Annexes I-IV, in accordance with their legal systems and to the extent practicable, and to take individually such steps to enable it to occur as soon as possible.”³⁷⁷ (Emphasis added.)

The purpose of such limiting provisions is to allow greater participation by negotiating states in the provisional application of a treaty. They enable states to agree to provisional application despite the possible incompatibility of treaty provisions with their municipal law or even possible constitutional restrictions on the power of the executive to agree to provisional application. States are thereby not obliged to modify the conflicting provisions in order to bring them into line with the provisions of the treaty until the treaty has entered into full force. In other words, national law will prevail during the period of provisional application. According to Vignes,³⁷⁸

This practice, which has a rather dualist air, avoids all complications that could arise from the creation of an international agreement that has not entered into force in the normal manner.³⁷⁹

Limiting provisions are thus similar in their effect to reservations: they modify for the negotiating states in their relations *inter se* the provisions of the treaty to the extent foreseen in the limiting provision.³⁸⁰ Vignes has also argued that one of the features of a separate or collateral agreement on provisional application (as opposed to provisional application by means of the treaty itself) is that it is an engagement by states to comply, *in so far as permitted by their constitution*, with the provisions of the main treaty.³⁸¹ This argument is not unique. The United Nations secretariat has published the view that provisional application in the context of commodity agreements may mean only that, pending ratification, states will do their best, within their existing legislation, to apply the agreement.³⁸² This conclusion is apparently reached because

³⁷⁶N 166 above.

³⁷⁷1991 (30) *ILM* 161 para 5.

³⁷⁸Vignes (n 124) 184-5.

³⁷⁹*Ibid* (author's translation). The original reads:

“Cette pratique, au parfum plutôt dualiste, évite toute difficulté pouvant résulter de la naissance d'un engagement international non régulièrement entré en vigueur.”

³⁸⁰See s 3.5.6 below.

³⁸¹*Ibid* 192. The phrase the author uses is “dans le mesure de leur Constitution”.

³⁸²1976 *UNJY* 222.

... [the United Nations] are unaware... that any complaint has ever been made, or that any dispute has arisen, in a commodity organization because of incomplete application of an agreement by a State which has made a notification of provisional application but has not ratified.”³⁸³

This line of argument, which seems to suggest that a limiting provision is implicit in an undertaking of provisional application, is problematic. The absence of complaints concerning incomplete application does not necessarily justify a conclusion that states regard provisional application as an undertaking only to do their best, within their existing legislation, to apply the agreement. It could mean that there have in fact been no cases of incomplete application or that states have elected to overlook such cases. The existence of express limiting provisions is strong evidence that states regard such provisions as essential if they wish national law to prevail in the event of a conflict between municipal and international law. In the absence of a limiting provision, it would not be possible for a state to raise its domestic law as an excuse for breaching the terms of a provisionally applicable treaty. The only courses of action available to it would be to modify its domestic law to bring it into line with the treaty, terminate the provisional application, obtain the sanction of its treaty partners for the breach, or accept responsibility for an internationally wrongful act.

Despite their prevalence in state practice, the use of limiting provisions is open to criticism. For a start, concepts such as ‘national law’, ‘internal laws’ and especially ‘regulations’ are vague and open to interpretation. Moreover, by permitting unilateral deviation from the terms of a treaty during the provisional period, limiting provisions have the potential to deprive it of much of its value. Not only may they detract from the certainty and reciprocity of the treaty undertakings, they also undermine the age-old custom that a state may not raise its internal law as an excuse for its failure to meet an international obligation. Furthermore, if national law were to conflict with the object and purpose of a treaty, a signatory could risk breaching its obligation under article 18 of the 1969 and 1986 Vienna Conventions. Notwithstanding these theoretical difficulties, it is undoubtedly true that limiting provisions have enabled, and continue to enable, a wider participation in provisional treaty arrangements than would otherwise be the case.

3.5.6 ‘Reservations’ in respect of provisional application

In accordance with article 2, paragraph 1(d), of the 1969 and 1986 Vienna Conventions a reservation is a unilateral statement, however phrased or named, made when signing, ratifying, accepting, approving or acceding to a treaty, whereby a state or

³⁸³ *Ibid.*

international organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to themselves. Article 19 of the two conventions provides that a state or international organization may formulate a reservation when signing, ratifying, accepting, approving or acceding to a treaty, unless (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) the reservation is incompatible with the object and purpose of the treaty.

The question to be considered is whether a state or international organization may make what may be termed a reservation in respect of provisional application in terms of which it purports to exclude or modify the legal effect of certain provisions of the treaty during the period of provisional application. In practice, the question of reservations in respect of provisional application is most likely to arise where the treaty requires notification or declaration of provisional application and the state includes a reservation in the notification or declaration.

An early example of such a reservation is to be found in the provisional application by the United States of the 1962 International Coffee Agreement.³⁸⁴ Article 64 of the Agreement provided for notifications by signatories of an undertaking to seek ratification or acceptance, with the understanding that notifying governments would apply the Agreement provisionally. Article 66 of the Agreement prohibited reservations with respect to any of the provisions of the agreement. In its notification the United States declared that until its congress had enacted implementing legislation, it could not require certificates of origin for imports, nor could it prohibit or limit imports from non-members. That notification was nevertheless counted towards provisional entry into force of the Agreement and there appear to have been no objections to the notification.³⁸⁵ This case may be an indication that states will accept a reservation in respect of provisional application that would not be permitted when a state expresses its final consent to be bound. However, in keeping with the *pacta sunt servanda* principle, a reservation in respect of the provisional application of a treaty should only be permissible to the extent that the reservation is permissible to the treaty itself.

³⁸⁴469 UNTS 169.

We saw in chapter 1 that the Vienna conference adopted the term *provisional application* rather than *entry into force provisionally*, which had been proposed by the ILC. According to the most modern authority, to speak of provisional entry into force is confusing and could mislead one into believing that the treaty is already in force, albeit on some kind of conditional basis.³⁸⁶ Although it is arguable that recent practice has achieved a greater consistency in the use of the terminology of provisional application, many treaties concluded since 1969 continue to refer to provisional entry into force.³⁸⁷

In its handbook, *Final Clauses of Multilateral Treaties*, the United Nations rather misleadingly devotes entirely separate sections to provisional application and provisional entry into force,³⁸⁸ although it notes that the latter is a mechanism usually employed in commodity agreements.³⁸⁹ Commodity agreements sometimes employ both terms, providing for notifications of provisional application in one article and for provisional entry into force in another. The provisional application is thus a two-stage process, requiring a certain number of notifications of provisional application or of final consent to be bound, followed by the provisional entry into force from a specified date. The date specified as the date of entry into force provisionally, is the date upon which provisional application by the notifying states takes effect. A recent example of this procedure is found in the 2001 International Cocoa Agreement,³⁹⁰ articles 57 and 58 of which provide as follows:

“Article 57
Notification of provisional application

1. A signatory Government which intends to ratify, accept or approve this Agreement or a Government which intends to accede to the Agreement, but which has not yet been able to deposit its instrument, may at any time notify the depositary that, in accordance with its constitutional procedures and/or its domestic laws and regulations, it will apply this Agreement provisionally either when it enters into force in accordance with article 58 or, if it is already in force, at a specified date....

“Article 58
Entry into force

1...
2. This Agreement shall enter into force provisionally on 1 January 2002 if by such date Governments representing at least five exporting countries accounting for at least 80 per cent of the total exports of countries listed in annex A and Governments representing

³⁸⁵1976 UNJY 222.

³⁸⁶Aust (n 1) 139.

³⁸⁷For example, a 62(1) of the Treaty of the Economic Community of West African States (ECOWAS) and the treaties concluded by ECOWAS states in the framework of the organization (n 140).

³⁸⁸*Final Clauses of Multilateral Treaties* (n 186) 42-4 and 66-7.

³⁸⁹*Ibid* 66.

³⁹⁰N 192 above.

importing countries having at least 80 per cent of total imports as set out in annex B have deposited their instruments of ratification, acceptance, approval or accession, or have notified the depositary that they will apply this Agreement provisionally when it enters into force....” (Emphasis added.)

Article 45, paragraph 2, of the 2001 International Coffee Agreement³⁹¹ contains a similar provision:

“(2) This Agreement may enter into force provisionally on 1 October 2001. For this purpose, a notification by a signatory Government or by any other Contracting Party to the International Coffee Agreement 1994 as extended, containing an undertaking to apply this new Agreement provisionally, in accordance with its laws and regulations, and to seek ratification, acceptance or approval in accordance with its constitutional procedures as rapidly as possible, which is received by the Secretary-General of the United Nations not later than 25 September 2001, shall be regarded as equal in effect to an instrument of ratification, acceptance or approval....” (Emphasis added.)

The appearance of both the term provisional application and entry into force provisionally in commodity agreements may be for reasons of precedent, with their final clauses being based on agreements concluded prior to 1969.³⁹² However, the continued use of the expression *entry into force provisionally* or *provisional entry into force* in contemporary practice raises an important question: is provisional entry into force really a separate juridical institution from provisional application or is it subsumed under article 25? Vignes has argued that even though the 1969 Vienna Convention abandoned the use of the term entry into force provisionally, this does not mean it has pronounced itself against the practice of entry into force immediately (upon signature) subject to ratification (the absence of which is a resolute condition). This practice would relate, he argues, not to article 25, but to article 24 on entry into force.³⁹³ Here Vignes was apparently dealing with ambiguous clauses on entry into force, which were more common prior to the conclusion of the 1969 Vienna Convention. But he continues,

In any event, the conference did not condemn the practice of entry into force provisionally. It did not deal with it because it seemed not to be a separate issue. On the other hand, the practice of provisional application appeared to merit its own provision.³⁹⁴

³⁹¹N 193 above.

³⁹²See, for example, the successive entry into force provisions of the agreements preceding the 2001 International Coffee Agreement: a 64(2) of the 1962 International Coffee Agreement (n 384); a 62(2) of the 1968 International Coffee Agreement (647 *UNTS* 3); a 61(2) of the 1976 International Coffee Agreement (1024 *UNTS* 3); a 61(2) of the 1984 International Coffee Agreement (1333 *UNTS* 119); a 40(2) of the 1994 International Coffee Agreement (1827 *UNTS* 3).

³⁹³Vignes (n 124) 190.

³⁹⁴*Ibid* (author’s translation). The original reads:

“De toute façon, la Conférence n’a pas condamné la pratique de l’entrée en vigueur à titre provisoire, elle n’en a pas traité parce qu’elle lui a semblé ne pas présenter de spécificité. En revanche la pratique de l’application à titre provisoire lui a paru mériter une disposition.”

it is submitted that this conclusion, in so far as it views entry into force provisionally and provisional application as separate and unrelated processes, is borne out neither by official practice nor the negotiating history of article 25. Even from a theoretical viewpoint no purpose is served by distinguishing between the two phrases since the *pacta sunt servanda* rule would apply in both instances. In amending the draft text proposed by the ILC, the Vienna conference selected the term that it believed corresponded most closely to state practice, while at the same time preserving the distinction between application on a provisional basis and definitive entry into force. There is little in the negotiating record to suggest that states believed the concept of entry into force provisionally to be an aspect of article 24 on entry into force and, as such, distinct from the practice described in article 25. It is true that the United States and others initially proposed deleting what would become article 25 because the article on entry into force already specified that a treaty entered into force in the manner prescribed. But that stance was soon abandoned in the face of support for a separate article.³⁹⁵ Several authorities, including the United Nations,³⁹⁶ the United States library of congress,³⁹⁷ and Lefeber³⁹⁸ have subsequently cited examples of commodity agreements that provide for their provisional entry into force as examples of provisional application.

3.7 Ending provisional application

Article 25 anticipates that provisional application may be ended (1) by entry into force of the treaty, (2) by agreement among the negotiating states or international organizations and (3) by unilateral termination.

3.7.1 By entry into force of the treaty

The passage from the provisional to the definitive period of application of a treaty that is a necessary consequence of its entry into force is foreseen in paragraph 1 of article 25, which stipulates that a treaty or part of a treaty is provisionally applied “pending its entry into force”.

However, the situation with regard to bilateral and multilateral treaties must be distinguished. The provisional application of a bilateral treaty or part of a bilateral treaty usually ends upon the definitive entry into force of the treaty in accordance with its terms.

³⁹⁵See n 89 and associated text.

³⁹⁶See n 218 above.

³⁹⁷See n 222 above.

in the case of a multilateral treaty, the provisional application may continue after entry into force among those states which have not by then ratified it.³⁹⁹ As Lefeber puts it, it is “self-evident” that if a treaty enters into force while not all states that apply it provisionally have expressed their consent to be bound, provisional application for those states does not come to an end.⁴⁰⁰ It will be recalled that the representative of the United Kingdom made an interpretative statement at the Vienna conference in which he expressed his understanding that “the inclusion of the phrase ‘pending its entry into force’ in paragraph 1 did not preclude the provisional application of a treaty by one or more States after the treaty had entered into force definitively between other States”.⁴⁰¹ This statement encountered no objection and was even supported by India and Greece.⁴⁰²

Where the undertaking to apply a treaty provisionally is contained in a separate instrument, that instrument will, to the extent that it regulates the provisional application, cease to have legal effect upon entry into force of the treaty.⁴⁰³ Where a state provisionally applies a treaty that has already entered into force prior to its accession to the treaty, the provisional application will end upon the entry into force of the treaty for that state; that is, upon accession.

3.7.2 By agreement

The opening proviso to paragraph 2 of article 25 (“Unless the treaty otherwise provides or the negotiating states have otherwise agreed...”) foresees that provisional application may be brought to an end by agreement or in accordance with the terms of the treaty. The parties may thus decide on the date of termination of the provisional application in the treaty itself, in the separate or collateral agreement on provisional application, or in some other manner. The agreement on termination need not precede the actual commencement of provisional application.

Agreement to terminate the provisional application of a treaty may be implied if all the negotiating parties conclude a later treaty relating to the same subject matter. In accordance with article 59, paragraph 1, of the 1969 and 1986 Vienna Conventions:

³⁹⁸Lefeber, (n 117) 83.

³⁹⁹Aust (n 1) 139; Sinclair (n 1) 46-7; Vignes (n 124) 191.

⁴⁰⁰Lefeber (n 117) 86.

⁴⁰¹See s 1.3.2.2 above.

⁴⁰²A/Conf.39/11/Add.1 40-1.

⁴⁰³Vignes (n 124) 183-4.

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:
- (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
 - (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.”

There are possible advantages to regulating the termination of provisional application in the treaty itself. Definitive entry into force within a reasonable period may be considered a test of a treaty’s acceptability. The parties may therefore wish to provide for the multilateral termination of provisional application if the treaty has not entered into force by a specified date.⁴⁰⁴ The signatories may also want to encourage each other to take a final decision on ratification and thereby avoid a prolonged provisional period. This will prevent a party from enjoying the benefits of a treaty for an indefinite period while at the same time retaining the option unilaterally to terminate the provisional application at any time.

Article 7, paragraph 3, of the 1994 Agreement Relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea⁴⁰⁵ stipulated that the provisional application of the Agreement would terminate on 16 November 1998 if by that date the agreement had not entered into force or been ratified by seven states, of which at least five were developed states. Article XVIII, paragraph (c), of the 2000 Amendments to the 1971 Agreement relating to the International Telecommunications Satellite Organisation (INTELSAT)⁴⁰⁶ regulates the termination of provisional application of the instrument in some detail:

“(c) Upon entry into force of this Agreement ... it may be applied provisionally with respect to any State whose Government signed it subject to ratification, acceptance or approval if that Government so requests at the time of signature or at any time thereafter prior to the entry into force of this Agreement. Provisional application shall terminate:

- (i) upon deposit of an instrument of ratification, acceptance or approval of this Agreement by that Government;
- (ii) upon expiration of two years from the date on which this Agreement enters into force without having been ratified, accepted or approved by that Government; or
- (iii) upon notification by that Government, before expiration of the period mentioned in subparagraph (ii) of this paragraph, of its decision not to ratify, accept or approve this Agreement....”

3.7.3 By unilateral notification of termination

In accordance with paragraph 2 of article 25, unless a treaty otherwise provides or the negotiating states have otherwise agreed, the provisional application of a treaty or a part

⁴⁰⁴Lefeber (n 117) 87.

⁴⁰⁵See n 181 and s 3.1.1.5 above.

of a treaty with respect to a state shall be terminated if that state notifies the other states between which the treaty is being provisionally applied of its intention not to become a party to the treaty.⁴⁰⁷ Paragraph 2 of article 25 thus permits unilateral notification of termination of provisional application unless the treaty provides otherwise or the negotiating states have otherwise agreed.

Notifications made under the 1969 and 1986 Vienna Conventions, which include notifications in accordance with article 25, paragraph 2, are governed by article 78 of the two conventions.⁴⁰⁸ Matters relating to termination by notification that may be regulated in the treaty itself include the date the notification takes effect, the place of notification and possible transitional arrangements. For example, the 1994 Energy Charter Treaty⁴⁰⁹ provides in article 45, paragraph 3(a), *inter alia* that

“Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory’s written notification is received by the Depositary.”⁴¹⁰

The option to terminate provisional application is available only to states that have not yet expressed their consent to be bound by the treaty. The notification may not have retroactive effect: rights and obligations that arose prior to the termination must be fulfilled unless agreed otherwise. In the absence of a specified future date on which the provisional application will be terminated, the date of termination will be the date on which the notification is received by the other signatories between which the treaty is being applied provisionally.⁴¹¹

The possibility for states and international organizations to give notice of termination of provisional application has the potential to give rise to complications in

⁴⁰⁶For the text of the 2000 Amendments see <http://www.austlii.edu.au>.

⁴⁰⁷On termination of provisional application, see Lefeber (n 117) 86-8 and Rogoff & Gauditz (n 15) 51-3.

⁴⁰⁸A 78 of the 1969 Vienna Convention provides as follows:

“Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

(a) if there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1 (e) [on functions of depositaries].”

⁴⁰⁹N141 above.

⁴¹⁰The 1974 Agreement on an International Energy Programme (n 139) and the Protocol of Provisional Application of the GATT (n 135) also provided that provisional application could be terminated 60-day after notification of termination, as does the 1975 Agreement between the International Energy Agency and Norway concerning the participation of Norway in the work of the Agency (1975 (14) *ILM* 641).

⁴¹¹A 78 (n 408).

practice. A difficult question is whether the inclusion of a provision regulating termination will prevent a state or international organization from giving notification of termination under article 25, paragraph 2. In other words, does the express regulation of the termination of provisional application deprive a state of its residual right to give notification of termination? For instance, could states that had adopted the 1994 Agreement Relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea⁴¹² give notice of termination of provisional application even though article 7 of the Agreement expressly stipulated how provisional application would end? The answer to this question is unclear and differing views have been expressed. The president of the Vienna conference (Ago) thought as follows:

“... it was difficult to understand the opening proviso of paragraph 2, ‘Unless the treaty otherwise provides’. If a state which was applying a treaty provisionally decided that it did not wish to become a party to the treaty, the provisional application of the treaty would have to end, regardless of any provision of the treaty itself. It would seem very strange for a treaty to provide that it would apply provisionally to a state which was not, and would not become, a party to it.”⁴¹³

Lefebvre, however, holds a different view:

“There is an interesting caveat for the drafters of a treaty hidden in Article 25(2) VCLT. If they decide to explicitly provide for the termination of the provisional application of a treaty in relation to its entry into force, the rule on unilateral termination of Article 25(2) does no longer apply as the negotiating states ‘have otherwise agreed’. In such a case, unilateral termination should be explicitly provided for in the treaty itself.”⁴¹⁴

Although Lefebvre’s argument better conforms to the *pacta sunt servanda* principle, it remains to be seen which view will prevail in practice.

Another question is whether the intention not to become a party that has been expressed in accordance with paragraph 2 is to be taken as final. At the Vienna conference the representative of Greece pointed out that in a parliamentary system it was possible for a government to change its mind and to express a different intention at a later stage.⁴¹⁵ Accordingly, he argued, a state which had accepted the provisional application of a treaty would be able to suspend the application by expressing the intention not to become a party, although that intention need not be final. The Vienna conference did not answer the question.⁴¹⁶

⁴¹²See n 181 and s 3.1.1.5 above.

⁴¹³A/Conf.39/11/Add.1 40.

⁴¹⁴Lefebvre (n 117) 87.

⁴¹⁵A/Conf.39/11/Add.1 41.

⁴¹⁶Rogoff & Gauditz (n 15) 52.

The international law advisers to the Canadian government have taken the position that in the event of a material breach of a provisionally applied treaty, the affected party could invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part in accordance with article 60, paragraph 1, of the 1969 Vienna Convention.⁴¹⁷ This argument, which is a logical consequence of the applicability of the *pacta sunt servanda* rule during the provisional phase, treats a provisionally applicable treaty as subject to the same rules on termination as apply to treaties that have entered into force definitively.⁴¹⁸ Termination of a provisionally applicable treaty on such grounds would obviously have the effect of terminating the provisional application.

3.8 Period of provisional application

At the Vienna conference the representative of Austria argued that provisional application ought not to become an established legal institution offering a state the possibility of making use of the advantages of a treaty while at the same time giving it the opportunity of ending its application of the treaty unilaterally at any time. The Austrian delegation therefore suggested that article 25 be amended by the inclusion of a new paragraph 3 providing that the provisional application of a treaty did not release a state from its obligation to take a position within an adequate time-limit regarding its final acceptance of the treaty.⁴¹⁹ In reaction to the Austrian proposal, the representative of India thought that it would “probably be desirable to lay down some time-limit, so that provisional application of a treaty might not be perpetuated.”⁴²⁰ Although the Austrian proposal was not accepted, it does raise the question of the duration of provisional application. How long do states and international organizations have either to ratify the treaty so that it enters into force, or to decide to terminate the provisional application? The practice of states in the context of the GATT suggests that the provisional period may continue almost indefinitely. The 1961 Air Transport Agreement⁴²¹ between Sweden and Guinea was applied provisionally from 17 June 1961, the date of signature, until it entered into force some 35 years later on 1 January 1999. Other provisionally applicable treaties,

⁴¹⁷Memorandum dated 31 May 1977 ((n 295) 367).

⁴¹⁸The rules on termination of a treaty in force are contained in a 54 ff of the 1969 and 1986 Vienna Conventions.

⁴¹⁹A/Conf.39/11/Add.1 40.

⁴²⁰*Ibid* 41.

⁴²¹465 UNTS 235.

such as the 1977 Maritime Boundary Agreement between the United States and Cuba, have not entered into force at all. As Lefebvre notes,

“There is a friction here for it could mean that the provisional application of a treaty by a state continues even if the state concerned is not in a position to ratify the treaty, e.g. because parliamentary approval has not been obtained.”⁴²² (Footnote omitted.)

That just such a situation has arisen in relation to the Comprehensive Nuclear-Test-Ban Treaty will be seen in chapter 6 below.

⁴²²Lefebvre (n 117) 87.

Provisional application under customary international law

Although the two Vienna Conventions on the law of treaties are the natural starting point for a consideration of any topic on the law of treaties, there are notable limitations to their reach. With 99 parties, just half the total number of eligible states had ratified or acceded to the 1969 Vienna Convention by November 2004 and many years are likely to pass before it approaches universal adherence. Several states that have traditionally contributed to the development of international law in general and the law of treaties in particular have yet to adhere to the convention, including France and the United States. Only 17 of 53 African states have become parties, the most recent being Gabon, which deposited its instrument of accession in 2004. Besides South Africa, other non-parties include Brazil, India, Indonesia, Israel and Turkey. Even for states that are bound by the convention, the principle of non-retroactivity contained in article 4 means that it applies only to treaties concluded after its entry into force for that state.⁴²³ Moreover, the 1986 Vienna Convention has not entered into force at all and binds none of its 39 contracting states and international organizations. The conventional law of treaties consequently does not apply to a large number of international agreements, including many that are provisionally applied. Instead, these treaties remain governed by customary international law, whose codification the two Vienna Conventions brought about and which continues to operate alongside the two instruments.

The preambles to both conventions recall that they achieve a codification and a progressive development of the law of treaties. Many provisions of the 1969 Vienna Convention have been cited in judgements and in state practice as accurate statements of the customary rules relating to treaties.⁴²⁴ The fact that an article on provisional application was included in the 1969 Vienna Convention therefore alerts one to the possibility, even likelihood, of a pre-existing rule of customary international law with the same or similar content as article 25. However, the opposition to the article at the Vienna conference means that the relationship between article 25 and customary international law is not self-evident. Did article 25 really represent a codification of an established customary rule or did the elaboration of the article rather assist in the crystallization of a customary norm that was

⁴²³See n 248 above.

⁴²⁴Akehurst (n 124) 130. For a list of the more important cases, see Brownlie *Principles of Public International Law* (2003) 580 and Akehurst 'Custom as a source of International Law' 1974-5 (47) *BYIL* 1 46. In its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* ((n 232) 46-47), the ICJ held that "[t]he rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject."

only in its formative phase? Did any aspects of article 25 reflect a development or even modification of existing custom? And finally, what is the state of contemporary customary law regarding provisional application and does it differ in any respect from the provisions of article 25?

Before answering these questions, it may be useful to recall briefly how general rules of customary international law are established, in particular permissive rules that authorize a certain course of conduct rather than impose it.

4.1 Establishing the existence of a rule of customary international law

The Statute of the ICJ famously lists among the sources of international law “international custom, as evidence of a general practice accepted as law”. It is generally accepted that the existence of a rule of customary international law is established with reference to two elements: (1) a general state practice or *usus*, and (2) an *opinio iuris sive necessitatis* (or simply *opinio iuris*) related to that practice.⁴²⁵ The ICJ has held that for a practice to constitute a custom, it should be “both extensive and virtually uniform”.⁴²⁶ The practice of a small number of states may, however, be sufficient to create a customary rule where no other practice conflicts with it.⁴²⁷ Evidence of state practice may be found in a variety of sources, whose utility will vary according to the circumstances, including newspaper articles and other media reports, press releases, interventions by government representatives at international fora and elsewhere, statements by members of the government or legislature, judicial decisions, official legal opinions, domestic laws, decisions and resolution of international organizations and conferences and officially published information, including that available on official Internet sites.⁴²⁸ It is generally accepted that treaties themselves can constitute evidence of customary international law,⁴²⁹ especially multilateral treaties intended to be declaratory of customary law or to codify customary law.⁴³⁰ In addition, the rules in a treaty may become binding on non-parties if

⁴²⁵See, for example, Akehurst (n 124) 39; Brownlie (n 424) 6; Cassese *International Law* (2001) 119; Danilenko *Law-Making in the International Community* (1993) 75; Oppenheim (n 235) 27; Shaw *International Law* (2003) 70.

⁴²⁶*North Sea Continental Shelf cases* (n 47) 43.

⁴²⁷Akehurst (n 124) 41-3.

⁴²⁸See, for example, Akehurst (n 124) 39; Brownlie (n 424) 6; Oppenheim (n 235) 26, Shaw (n 425) 77-80.

⁴²⁹Akehurst (n 124) 40; Baxter ‘Multilateral Treaties as Evidence of Customary International Law’ 1965-66 (41) *BYIL* 275. See also Villiger *Customary International Law and Treaties* (1985) 183-98; Wolfke ‘Treaties and Custom: Aspects on Interrelation’ in Klabbers & Lefeber (n 117) 31.

⁴³⁰Akehurst (n 124) 40.

they establish themselves as rules of customary international law independently of the treaty.⁴³¹

The meaning and the method by which the existence *opinio iuris* is proved remain controversial.⁴³² It is sufficient for the purposes of this study to note the traditional definition of *opinio iuris* as a conviction felt by states that a certain form of conduct is required or, in the case of permissive customary rules, permitted by international law.⁴³³ *Opinio iuris* is usually inferred from the actual conduct of states,⁴³⁴ including from the conclusion of treaties, attitudes to resolutions of international organizations and statements made by state representatives.⁴³⁵

A permissive rule of customary international law can be proved by showing that some states have acted in a particular way (or have claimed that they are entitled to act in a particular way) and that other states, whose interests were affected by such acts or claims, have not protested that such conduct or claim is illegal.⁴³⁶ In the case of a permissive rule, *opinio iuris* need not take the form of an express statement but may be inferred from that states do act in a particular way.⁴³⁷

Once established, general customary rules are normally binding upon all members of the world community, including those that have not participated in the formative practice.⁴³⁸ Inactive states are sometimes said to have given their tacit acceptance or consent to the practice concerned. The traditional view of custom, as recognized by the ICJ in the *Fisheries* case, holds that a state may object to the applicability of a customary rule during its formation and thereby avoid being constrained by a rule to which it objects.⁴³⁹ This view is now questioned,⁴⁴⁰ and the matter is probably unsettled.⁴⁴¹ As we shall shortly

⁴³¹ A 38 of the 1969 Vienna Convention provides that none of its preceding articles (which concern the relevance of treaties for third states) precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such.

⁴³² For an overview of theoretical approaches to *opinio iuris*, see Akehurst 'Custom as a source of International Law' (n 424) 31-42; Mendelson 'The subjective element in customary international law' 1995 (66) *BYIL* 177.

⁴³³ Akehurst (n 124) 44.

⁴³⁴ Akehurst (n 124) 44; Oppenheim (n 235) 28.

⁴³⁵ Oppenheim (n 235) 28.

⁴³⁶ Akehurst (n 124) 44.

⁴³⁷ Akehurst 'Custom as a source of International Law' (n 424) 43.

⁴³⁸ Cassese (n 425) 119; Oppenheim (n 235) 29.

⁴³⁹ In the *Fisheries case (UK v Norway)* the ICJ held that although a particular customary rule was not recognized, it would in any event "appear to be inapplicable as against Norway, inasmuch as she always opposed any attempt to apply it to the Norwegian coast." (1951 *ICJ Rep* 116 131) See also Akehurst (n 124) 48; Brownlie (n 424) 11.

⁴⁴⁰ Cassese (n 425) 118-9 and 123-4.

⁴⁴¹ Shaw (n 425) 85.

see, the question of the persistent objector is of some relevance to the practice of provisional application.⁴⁴²

4.2 The custom of provisional application prior to 1969

The question whether article 25 reflects a pre-existing customary rule requires an examination of the practice of states prior to the adoption of the 1969 Vienna Convention and of their *opinio iuris* with regard to that practice. Such an enquiry will also provide an opportunity to explore the history and development of the practice of provisional application, a subject on which the literature is largely silent.⁴⁴³ This section will accordingly consider the origins of provisional application prior to World War I, developments in state practice between the two world wars and from 1946 to 1969, and the *opinio iuris* of states with regard to this practice, including indications of *opinio iuris* emanating from the Vienna conference. In view of the paucity of literature on the subject and the importance of the early cases of provisional application in circumscribing the content of the practice, the reader may find it of interest if these are described as comprehensively as space will permit.

4.2.1 Origins of provisional application: state practice prior to 1919

Certain early peace treaties, such as the 1648 Treaty of Osnabrück and the treaty of 1779 known as the Peace of Teschen, involved the application of certain clauses prior to ratification, in particular the clause bringing an end to hostilities between the parties.⁴⁴⁴ However, the practice of provisional application only gained ground after the mid-nineteenth century.⁴⁴⁵ By then the act of ratification meant more than simply the confirmation of a plenipotentiary's signature and had acquired a new function and theory as

⁴⁴²On the concept of the persistent objector generally, see Charney 'The Persistent Objector Rule and the Development of Customary International Law' 1985 (56) *BYIL* 15; Colson 'How Persistent Must the Persistent Objector Be?' 1986 (61) *Washington LR* 957; Stein 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' 1985 (26) *Harvard International LJ* 457.

⁴⁴³According to Sinclair, the inclusion in treaties of clauses providing for the provisional application of the whole or part of the treaty "is a relatively recent development" (Sinclair (n 1) 46). Similarly, Aust has lately concluded that provisional application clauses were "relatively rare" when the 1969 Vienna Convention was adopted (Aust (n 1) 139). Provisional application has, however, long been recognized in continental doctrine. In 1930, Nisot drew attention to the possible binding force of treaties that have been signed but not yet ratified (Nisot 'La force obligatoire des traités signés, non encore ratifiés' 1930 (57) *Journal du Droit International* 878 879). In 1934, Kraus described a new type of bilateral commercial treaty he called the 'provisionally applicable treaty' ('traité provisoirement applicable') (Kraus 'Système et Fonctions des Traités Internationaux' 1934 IV (50) *RC* 312 358-60). Kraus and Nisot do not consider the origins of provisional application. Nor do more recent authors such as Vignes (n 124), Rogoff & Gauditz (n 15) and Lefebvre (n 117), who naturally focus on a 25.

⁴⁴⁴Krenzler *Die vorläufige Anwendung völkerrechtlicher Verträge* (doctoral thesis, Heidelberg, 1963) 16. See also s 2.1.3 above.

the act of consent itself, with treaties that were made subject to the procedure taking effect from the moment of their ratification.⁴⁴⁶ The greater emphasis on ratification and the slow means of communication increased the potential for delay in the entry into force of international agreements. Moreover, with the increasing prevalence of parliamentary democracy, ratification was for many states no longer the exclusive prerogative of the sovereign but required the prior approval of the legislature.⁴⁴⁷ Where the value of a particular treaty depended on its immediate implementation, the mechanism of provisional application or entry into force allowed a government to give prompt effect to the treaty without technically breaching its constitutional requirements regarding ratification.⁴⁴⁸

4.2.1.1 1840 Treaty for the Pacification of the Levant

In July 1840 the representatives of Austria, Great Britain, Prussia and Russia, gathered in London with representatives of the Ottoman Empire to conclude of the ‘Quadruple Alliance’ Treaty for the Pacification of the Levant of 15 July 1840.⁴⁴⁹ The object of the convention was to render assistance to the Sublime Porte in its struggle to regain control over Syria from the pasha of Egypt. The convention provided *inter alia* that Austria and Great Britain would intercept all communication by sea between Egypt and Syria. In a document attached to the convention, entitled ‘The Reserved Protocol’, it was laid down that, inasmuch as “the state of affairs in Syria, the interests of humanity and grave considerations of European policy” made it desirable that active operations should begin with as little delay as possible, the naval measures to which Austria and Great Britain were pledged would be initiated at once, without waiting for the ratification of the convention.⁴⁵⁰

⁴⁴⁵Krenzler (n 444) 16.

⁴⁴⁶Charme ‘The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma’ 1991 (25) *George Washington J of International Law and Economy* 71 87.

⁴⁴⁷For example, in accordance with a 11 of the German constitution of 1871, treaties were concluded by the emperor, but treaties relating to any of the subjects which belonged to the sphere of federal legislation required for their conclusion the consent of the *Bundesrat* and for their validity the acceptance of the *Reichstag*. See Masters *International Law in National Courts: A Study of the Enforcement of International Law in German, Swiss, French, and Belgian Courts* (1932) 27.

⁴⁴⁸Another way of avoiding the strictness of the new approach to ratification was to resort to clauses providing for (definitive) entry into force upon signature as well as for ratification. In such cases, the absence of ratification would function as a resolutive condition (Vignes (n 124) 182). With the evolution of practice, such ambiguous clauses fell into disfavour. For examples of treaties containing such clauses see the commercial agreements concluded by South Africa between 1935 and 1939 with, respectively, France (189 *LNTS* 41), Czechoslovakia (198 *LNTS* 97), the Economic Union of Belgium and Luxembourg (182 *LNTS* 247), Brazil (198 *LNTS* 289), and Egypt (198 *LNTS* 295). See also the 1880 International Convention on Morocco (s 4.2.1.3 below).

⁴⁴⁹Martens *Nouveau Recueil Général de Traités* (1843-) vol 1 156.

⁴⁵⁰Hall *England and the Orleans Monarchy* (1912) 277. See also Krenzler (n 444) 17 20.

4.2.1.2 1875 Convention for the Establishment of an International Bureau of Weights and Measures

An international conference on the standardization of weights and measures was held in Paris in 1875, resulting in the conclusion on 20 May of that year of the Convention for the Establishment of an International Bureau of Weights and Measures.⁴⁵¹ The convention provided for the establishment of an international bureau, an international committee and a general conference, the latter to be composed of the delegates of all the contracting governments.⁴⁵² In terms of article 14, the convention took effect on 1 January 1876. However, appendix 2 to the convention contained several transient provisions, including article 6, which reads as follows:

“The immediate formation of the international committee is authorized, and that body, when formed, is hereby empowered to make all necessary preparatory examinations for the carrying into effect of the convention, without, however, incurring any expense before the exchange of the ratifications of the said convention.”

While not expressly providing for provisional application,⁴⁵³ article 6 authorized the establishment and limited preparatory functioning of an organ whose formation would otherwise have had to await the entry into effect of the convention itself.⁴⁵⁴ As such, the article foreshadowed the more elaborate preparatory arrangements for international organizations in the twentieth century.

4.2.1.3 1880 International Convention on Morocco

On 3 July 1880 the representatives of several western powers signed a multilateral convention with the Sultan of Morocco concerning the protection and privileges of their agents and nationals in Morocco.⁴⁵⁵ Despite providing for its ratification, article XVIII of the convention stipulated that it would enter into force upon signature. On the proposal of

⁴⁵¹Dietl & Knipping *The United Nations System and Its Predecessors* vol 2 (1997) 84.

⁴⁵²The text of the convention is reproduced in Dietl & Knipping (n 451) 84.

⁴⁵³On implied provisional application see s 3.1.1.4 in ch 3.

⁴⁵⁴This procedure appears to have been unique at the time. Other administrative unions established in the nineteenth century, including the General Postal Union, the International Telegraph Union, the International Union for the Protection of Industrial Property and the International Union for the Protection of Literary and Artistic Works, did not adopt this expedient. For the texts of the conventions establishing these unions, see Dietl & Knipping (n 451) 78ff.

⁴⁵⁵The other parties were Austria-Hungary, Belgium, Denmark, France, Germany, Italy, the Netherlands, Portugal, Spain, Sweden and Norway, the UK and the US.

the representative of Austria-Hungary, the article made it clear that this was an exceptional procedure:

“The convention shall be ratified. The ratifications shall be exchanged at Tangier with as little delay as possible. By exceptional consent of the high contracting parties the stipulations of this convention shall take effect on the day on which it is signed at Madrid.”⁴⁵⁷ (Emphasis added.)

4.2.1.4 1897 Treaty between Great Britain and Ethiopia

The 1897 Treaty between Great Britain and Ethiopia was concluded during a British diplomatic mission to Ethiopia, at a time when an Anglo-Egyptian expeditionary force had already begun its re-conquest of neighbouring Sudan from an Islamic fundamentalist regime known as the Mahdists.⁴⁵⁸ Due to the urgency of the prevailing circumstances, the treaty stipulated as follows:

“VI. His Majesty the Emperor Menelek II, King of Kings of Ethiopia, engages himself towards the Government of Her Britannic Majesty to do all in his power to prevent the passage through his dominions of arms and ammunition to the Mahdists, whom he declares to be the enemies of his Empire....

The present treaty shall come into force as soon as its ratification by Her Britannic Majesty shall have been notified to the Emperor of Ethiopia, but it is understood that the prescriptions of Article VI shall be put into force from the date of its signature.” (Emphasis added.)⁴⁵⁹

4.2.2 State practice from 1919 to 1945

If the instances of provisional application prior to 1918 do not allow any definitive conclusions to be drawn regarding the emerging practice of provisional application, the situation is different with respect of the years following World War I.

4.2.2.1 1919 Treaty of Versailles

The basis of modern international labour law was laid at the Paris peace conference in 1919.⁴⁶⁰ The constitution of the new International Organisation of Labour (ILO), which was to be an autonomous organization in close cooperation with the League of Nations, was

⁴⁵⁶Krenzler (n 444) 18.

⁴⁵⁷*Martens Nouveau Recueil Général de Traités* 2nd series by Samwer & Hopf (1876-) vol VI 624.

⁴⁵⁸Louis & Porter (eds) *The Oxford History of the British Empire* vol 3 (1998) 644.

⁴⁵⁹1898 *BTS* quoted in McNair (n 1) 193. See also Detter *Essays in the Law of Treaties* (1967) 31.

⁴⁶⁰Dietl & Knipping (n 451) 709.

incorporated as part XIII of the Treaty of Versailles of 28 June 1919, and in the other Peace Treaties of Saint-Germain, Trianon and Neuilly.⁴⁶² In terms of article 388, the ILO was to consist of an annual conference of member states and a permanent secretariat, the international labour office. The first international labour conference met in Washington from 29 October to 2 November 1919 in accordance with article 424, one of several transitory provisions relating to part XIII:

“The first meeting of the Conference shall take place in October, 1919. The place and agenda for this meeting shall be as specified in the Annex hereto. [Emphasis added.]”⁴⁶³ Arrangements for the convening and the organisation of the first meeting of the Conference will be made by the Government designated for the purpose in the said Annex [i.e. the government of the United States]. That Government shall be assisted in the preparation of the documents for submission to the Conference by an International Committee constituted as provided in the said Annex....”

Thus, although the constitution of the ILO only entered into force in January 1920, the organization had already been convened in 1919 and begun its substantive work, with the Washington conference adopting the first six international labour conventions.⁴⁶⁴ All this was achieved through the expedient of an implied provisional application of article 388 of the Treaty of Versailles.

4.2.2.2 1924 Convention concerning the Territory of Memel

Having been made a free city under French administration, the former Prussian port of Memel was occupied by Lithuanian troops in January 1923 following a staged insurrection that led to the withdrawal of the French garrison.⁴⁶⁵ After protracted negotiations, the Memel Convention was concluded on 8 May 1924,⁴⁶⁶ establishing Memel and its adjacent territory as an autonomous region under Lithuanian sovereignty and setting out its statute. In view of the urgency of resolving the situation, the parties signed the following transitory provision at the time of concluding the convention:⁴⁶⁷

⁴⁶¹The text of the Treaty of Versailles is reproduced at <http://www.yale.edu/lawweb/avalon>; the constitution of the ILO is reproduced at <http://www.ilo.org>.

⁴⁶²Dietl & Knipping (n 451) 709.

⁴⁶³The Annex fixed the place of the conference as Washington. The agenda included the most pressing labour problems of the day, such as unemployment, women's employment and maternity rights, and the minimum age of employment.

⁴⁶⁴See the official history of the ILO is available at <http://www.ilo.org>.

⁴⁶⁵For an account of the Memel dispute, see Hatvany & Kellor *Security against War* vol 1 (1924) 264-284.

⁴⁶⁶29 *LNTS* 86.

⁴⁶⁷29 *LNTS* 115. See Nisot (n 443) 882. Although associated with the convention, the transitory provision was not part of it and appears to be a treaty in simple form, entering into force upon signature.

Lithuania, immediately on ratifying the Convention concluded this day with the British Empire, France, Italy and Japan, and pending its ratification by the other Parties thereto, shall, without delay, commence and continue to give effect to all the provisions of the Convention and its Annexes. [Emphasis added.]

The British Empire, France, Italy and Japan declare that, on the ratification of the said Convention by Lithuania, they will recognise as lawful such acts of sovereignty on the part of the Lithuanian Government in the Memel Territory as are necessary to put into effect the engagements of the said Convention and to preserve public order.”⁴⁶⁸

4.2.2.3 1931 Protocol concerning the suspension of payments by Germany

The Protocol concerning the suspension of payments by Germany was signed in London on 11 August 1931.⁴⁶⁹ In consideration of the prevailing economic situation in that country, article 5 of the protocol provided for its provisional application with retroactive effect:

“Immediately on the signature of the present Protocol and before its entry into force in accordance with Article 7, its provisions will be applied provisionally with retroactive effect to 1 July 1931 by each of the signatory Governments.”⁴⁷⁰

4.2.2.4 1936 Convention regarding the Régime of the Straits between the Mediterranean and the Black Sea

Having resolved to replace the 1923 Lausanne Convention relating to the Régime of the Straits,⁴⁷¹ the negotiating states agreed that the modified regime contained in the 1936 Montreux Convention⁴⁷² should be applied provisionally by the Turkish government from the date specified in a separate protocol.⁴⁷³ The protocol stipulated as follows:

“At the moment of signing the Convention bearing this day’s date, the undersigned Plenipotentiaries declare for their respective Governments that they accept the following provisions:

(1)...

(2) As from the 15th of August, 1936, the Turkish Government shall provisionally apply the régime specified in the said Convention.

(3) The present Protocol shall enter into force as from this day’s date.”

The convention entered into force on 9 November 1936 and remains in force.⁴⁷⁴

⁴⁶⁸Lithuania ratified the convention on 27 September 1924.

⁴⁶⁹1931 ATS 11. According to its preamble, the protocol was concluded in respect of an arrangement on German war debt signed in 1930 (104 LNTS 422).

⁴⁷⁰The 1930 Agreement in regard to the German Government International 5 % Loan (112 LNTS 237) was also applied provisionally.

⁴⁷¹28 LNTS 115.

⁴⁷²173 LNTS 214.

⁴⁷³173 LNTS 241. See McNair (n 1) 192-3; Blix & Emerson (n 269) 84.

The purpose of the 1937 International Whaling Agreement⁴⁷⁵ was to “secure the prosperity of the whaling industry and... to maintain the stock of whales.”⁴⁷⁶ Article 20 of the agreement contained a clause providing for the provisional entry into force of the agreement to the extent to which the signatories were respectively able to enforce it. The same article also provided for the termination of provisional application in the event of failure to ratify:

“The present Agreement shall come into force provisionally on 1 July 1937, to the extent to which the signatory Governments are respectively able to enforce it; provided that if any Government within two months of the signature of the Agreement informs the Government of the United Kingdom that it is unwilling to ratify it the provisional application of the Agreement in respect of that Government shall thereupon cease....”⁴⁷⁷

The 1938 Protocol⁴⁷⁸ amending the 1937 International Whaling Agreement also entered into force provisionally but did not expressly regulate the possibility of withdrawal from provisional application.⁴⁷⁹

4.2.2.6 Commercial agreements

During the 1920's and 1930's an increasing number of commercial treaties were applied provisionally pending their definitive entry into force.⁴⁸⁰ During the years of economic crisis in the late 1920's and early 1930's provisional application of these agreements developed from an exception to the rule.⁴⁸¹ The practice in this area mainly

⁴⁷⁴See Jia *The Regime of Straits in International Law* (1998) 111-5.

⁴⁷⁵190 *LNTS* 79.

⁴⁷⁶Preamble to the agreement. The nine parties to the agreement were: Argentina, Australia, Germany, Ireland, New Zealand, Norway, South Africa, the UK and the US.

⁴⁷⁷This clause uses both the terms “come into force provisionally” and “provisional application” in the sense that once the treaty had come into force provisionally it was provisionally applied. The agreement may thus be cited as an early indication that states do not draw a distinction between the institutions of entry into force provisionally and provisional application. The 1931 Convention for the Regulation of Whaling (155 *LNTS* 349) did not provide for provisional application.

⁴⁷⁸196 *LTSN* 131.

⁴⁷⁹The omission of a clause providing for withdrawal from provisional application within a specified period implied an unrestricted right of withdrawal prior to ratification.

⁴⁸⁰According to Krenzler, the practice in the 1920s may be traced to the nineteenth century. The 1869 Treaty of Friendship, Trade and Shipping between Austria-Hungary and Japan was subject to ratification but provided for its application upon signature. A similar procedure was followed in the case of the treaties of 1858 and 1868 on the same subject matter concluded between Japan and, respectively, France and Spain. A *Reichsgesetzblatt* of 1883 noted that the commercial agreement of that year between Germany and Spain would be “applied provisionally”. Commercial agreements from the early twentieth century such as those of 1906 and 1908 between Austria-Hungary and, respectively, Switzerland and Serbia were also made subject to the procedure. See Krenzler (n 444) 30-31.

⁴⁸¹*Ibid* 18.

involved European states such as France, Belgium, and the Netherlands. Germany had concluded over 100 treaties of this kind by 1934 and had passed a law in 1933 expressly authorizing the minister for foreign affairs to approve the provisional application of bilateral economic treaties in case of urgent economic necessity.⁴⁸⁵ According to Kraus,

This type of treaty has become so common that one may justly speak of a regime of provisionally applicable treaties in the area of international economic life today.⁴⁸⁶

Significantly, the practice also included new states in the Baltic,⁴⁸⁷ the successor states to the Austro-Hungarian monarchy,⁴⁸⁸ and the Soviet Union. Table 4 lists 27 treaties provisionally applied by the USSR prior to 1945, mostly concerning the country's economic and commercial relations. Of these, nine date from the 1920's, while 14 were concluded between 1935 and 1940, suggesting an increasing reliance on the technique. Although multilateral economic agreements were uncommon at this time, there is evidence of provisional application in this area too. In terms of a protocol of signature (itself a treaty in simplified form), the parties to the 1937 Agreement for the Promotion of Commercial Exchanges agreed as follows:⁴⁸⁹

"Pending the deposit of the instruments of ratification as prescribed in Articles VII and VIII of the Agreement signed this day, the Governments of Belgium, Denmark, Finland, Luxembourg, Norway, the Netherlands and Sweden have agreed to put the arrangements made in this Agreement into force provisionally as from July 1st, 1937."

⁴⁸²Commercial agreements applied provisionally by France include the 1921 Commercial Convention between France and Finland (29 *LNTS* 447); the various commercial conventions and related agreements concluded between France and Estonia in 1922 (62 *LNTS* 10), 1929 (89 *LNTS* 382), 1933 (141 *LNTS* 44), and 1937 (183 *LNTS* 42); the 1923 Commercial Convention between France and Czechoslovakia (44 *LNTS* 22); the 1924 Commercial Convention between France and Poland (44 *LNTS* 128); the 1924 Commercial Arrangement between France and Greece (43 *LNTS* 481); the 1925 Commercial Agreement between France and Portugal (44 *LNTS* 198); the 1926 Supplementary Agreement to the 1925 Commercial Convention between France and Hungary (67 *LNTS* 256); the 1937 Exchange of Notes between France and Australia constituting a Commercial Agreement (177 *LNTS* 301).

⁴⁸³For example, the 1924 Commercial Agreement between the Economic Union of Belgium and Luxembourg and France (44 *LNTS* 215), as well as the 1929 Additional Arrangement thereto (96 *LNTS* 42); the 1934 Agreement for the Settlement by Means of Compensation of Commercial Debts between the Economic Union of Belgium and Luxembourg and Turkey (150 *LNTS* 278).

⁴⁸⁴For example, the 1926 Commercial Convention between the Netherlands and Greece (61 *LNTS* 296).

⁴⁸⁵Kraus (n 443) 359.

⁴⁸⁶*Ibid.* (author's translation). The original reads:

"Cette espèce de traité est actuellement devenue si fréquente que l'on peut justement parler d'un régime de traités provisoirement applicables, dans le domaine de la vie économique internationale d'aujourd'hui."

⁴⁸⁷For example, the 1933 Protocol modifying the 1933 Provisional Commercial Agreement between Estonia and Lithuania (41 *LNTS* 29). Also see n 482 above for examples of provisionally applied treaties between Estonia and France.

⁴⁸⁸See, for instance, the 1923 Commercial Agreement between Czechoslovakia and Norway (20 *LNTS* 56); the 1928 Additional Agreement to the 1925 Commercial Convention between Czechoslovakia and Spain (98 *LNTS* 66); the 1935 Commercial Agreement between Hungary and Czechoslovakia (171 *LNTS* 402) and 1936 Additional Agreement thereto (179 *LNTS* 74); the 1937 Agreement regulating Commercial Exchanges between Czechoslovakia and Italy (193 *LNTS* 170).

⁴⁸⁹180 *LNTS* 6. The preceding agreement, the 1930 Convention of Economic Rapprochement (126 *LNTS* 342) did not provide for its provisional application.

Table 4. Treaties entering into force provisionally for the USSR prior to 1945

Treaty	Parties	Date of conclusion
Convention concerning direct rail communications for passengers and freight	RSFSR and Estonia	17 September 1920
Treaty concerning rafting timber	RSFSR and Estonia	9 May 1922
Agreement concerning navigation by Finnish merchant and cargo vessels on the Neva between Lake Ladoga and the Gulf of Finland	RSFSR and Finland	5 June 1923
Convention concerning postal communications	USSR and Estonia	27 June 1924
Convention concerning telephone communications	USSR and Estonia	27 June 1924
Convention concerning telegraph and radiotelegraph communications	USSR and Estonia	27 June 1924
Agreement concerning exchange of postal money orders	USSR and Estonia	27 June 1924
Exchange of notes amending the 1923 Convention regarding the navigation of Finnish merchant and cargo vessels on the Neva	RSFSR and Finland	2 September 1927
Exchange of notes modifying the regulations annexed to the 1924 Convention regarding the through carriage of passengers and goods by rail	USSR and Finland	17 November 1928
Protocol concerning customs duties and reciprocal recognition of certificates of origin	USSR and Germany	28 May 1932
Customs Convention	USSR and Italy	6 May 1933
Convention concerning floating timber in border rivers	USSR and Poland	19 June 1933
Provisional Commercial Agreement	USSR and France	11 January 1934
Treaty of commerce and navigation	USSR and Czechoslovakia	25 March 1935
Agreement concerning reciprocal protection of rights to industrial property	USSR and Czechoslovakia	25 March 1935
Provisional Commercial Convention	USSR and Belgium	5 September 1935
Commercial Agreement prolonging and modifying the 1934 Commercial Agreement	USSR and France	4 January 1936
Agreement concerning regulation of the production and marketing of sugar	Multilateral	6 May 1937
Supplementary Agreement to the 1936 Commercial Agreement	USSR and France	21 January 1936
Agreement regarding the legal status of the commercial Representation of the USSR in Poland	USSR and Poland	14 June 1936
Agreement prolonging the 1934 and January 1936 Commercial Agreements	USSR and France	17 December 1936
Treaty of commerce and navigation	USSR and Turkey	6 October 1937
Agreement prolonging the 1934 and 1936 Commercial Agreements	USSR and France	31 December 1937
Agreement prolonging the 1934, 1936 and 1937 Commercial Agreements	USSR and France	30 December 1938
Convention modifying the 1922 Railroad Convention	USSR and Turkey	5 June 1939
Treaty of commerce and navigation	USSR and Bulgaria	5 January 1940
Treaty of commerce and navigation	USSR and Iran	25 March 1940

⁴⁹⁰The sources for this table are Shapiro Soviet Treaty Series: A Collection of Bilateral Treaties, Agreements and Conventions, Etc., Concluded between the Soviet Union and Foreign Powers vols 1 and 2 (1950), and Slusser & Triska Calendar of Soviet Treaties, 1917-1957 (1959).

The terminology used to establish the provisional obligation in commercial agreements varied considerably.⁴⁹¹ Some, such as the 1937 Commercial Convention between France and Estonia,⁴⁹² used the modern language of provisional application. Article 35 of that convention provided as follows:

“The present Convention shall be ratified and the ratifications exchanged at Tallinn. The present Convention shall come into force fifteen days after the exchange of ratifications. The High Contracting Parties agree, however, to apply it provisionally as from December 1st, 1937....” (Emphasis added.)

More common was the language of entry into force provisionally, or similar phrases, as in the 1928 Additional Agreement to the 1925 Commercial Convention between Czechoslovakia and Spain,⁴⁹³ article VII of which stated:

“The present Agreement... shall be ratified and shall come into force fifteen days after the exchange of ratifications, which shall take place at Madrid as soon as possible. It shall be put in force provisionally as from January 1st, 1929....” (Emphasis added.)

Other agreements used both terms, suggesting that from the outset there was no practical or legal distinction between the concepts of provisional application and entry into force provisionally.⁴⁹⁴ Some commercial agreements contained limiting provisions of the kind in the 1937 International Whaling Agreement.⁴⁹⁵ In terms of such limiting provisions, the parties were obliged to apply the treaty provisionally only to the extent not requiring previous parliamentary sanction;⁴⁹⁶ or in so far as no legal obstacles prevented it;⁴⁹⁷ or in so far as this was permissible under the laws in force in their respective countries.⁴⁹⁸ Other provisional application clauses did not actually oblige the parties to apply the treaty provisionally but merely authorized them to do so. Such clauses stated, for instance, that the parties might by mutual consent put the agreement into force provisionally;⁴⁹⁹ that they reserved the right to put the treaty into force provisionally at an earlier date than the date of

⁴⁹¹See s 3.6 in ch 3.

⁴⁹²See n 482 above.

⁴⁹³See n 488 above.

⁴⁹⁴See, for example, the 1921 Commercial Convention between France and Finland (n 482 above).

⁴⁹⁵See s 4.2.2.5 above. On limiting provisions generally, see s 3.5.5.

⁴⁹⁶A 36 of the 1928 Commercial Agreement between Austria and France (88 LNTS 22).

⁴⁹⁷Final Protocol to the 1925 Additional Agreement to the Commercial Treaty of 1923 between Germany and Lithuania (85 LNTS 357).

⁴⁹⁸A VIII of the 1928 Additional Agreement to the Commercial Treaty of 1925 between Austria and Serbia (85 LNTS 294).

⁴⁹⁹A IX of the 1936 Supplementary Agreement to the 1921 Commercial Agreement between Austria and Czechoslovakia (180 LNTS 243).

ratification, following its acceptance by their legislatures, or that they might bring the treaty temporarily or provisionally into force if authorized by their laws to do so.⁵⁰¹

4.2.2.7 Concluding observations on state practice from 1919 to 1945

The numerous examples of provisional application from this period demonstrate that the procedure was a well-developed feature of treaty practice by the time states began registering their international agreements with the League of Nations. The adoption of provisional application by the many new states in central and eastern Europe and the fact that it also featured in treaties concluded by states such as Argentina, Iran, Turkey, the Soviet Union, and the United States, is strong, if not conclusive, evidence of its entrenched customary status. The methods of provisional application already corresponded to those envisaged under article 25. Usually the parties chose to regulate the matter expressly, either in the treaty or an attachment forming part of the treaty, or in a separate agreement on provisional application, itself a treaty in simplified form. Although a terminological diversity was evident, this served to enrich the practice rather than to distract from its broad uniformity. Lastly, there can be no doubt that, subject to possible limiting provisions, clauses on provisional application were viewed as creating a binding legal obligation for the duration of the provisional period.⁵⁰²

4.2.3 Practice from 1946 to 1969

Some of the large number of provisionally applied bilateral and multilateral treaties concluded between 1946 and 1969 have already been noted in chapter 2. Our survey of practice in this period may therefore be confined to noting those features that reinforced its customary character. Although remaining an exceptional procedure, the range and number of states applying treaties provisionally increased significantly after 1945. While the European states continued to be its most active exponents, the value of the technique was acknowledged by the newly independent states of Africa and Asia, who adopted it not only in their treaty relations with western states but among themselves.⁵⁰³ International

⁵⁰⁰A V of the 1928 Second Additional Agreement to the 1922 Commercial Treaty between Austria and Hungary (79 *LNTS* 18).

⁵⁰¹A III of the 1924 Additional Agreement to the 1921 Commercial Agreement between Austria and Czechoslovakia (42 *LNTS* 322); a IV(2) of the 1927 Supplementary Agreement to the 1921 Commercial Agreement between Austria and Czechoslovakia (81 *LNTS* 8).

⁵⁰²See Kraus (n 443) 359.

⁵⁰³For example, the 1953 Agreement between Australia and the Lebanon for the establishment of air services (2105 *UNTS* 339); the 1959 Air Transport Agreement between the Netherlands and Morocco (826 *UNTS* 45); the 1961 Agreement between the Lebanon and Liberia for the establishment and operation of air services (794 *UNTS* 201); the 1961 Agreement relating to scheduled air transport services between

organizations too made regular use of provisional application clauses for the first time. Such clauses also appeared in new areas such as air services and commodity agreements.⁵⁰⁵ Since provisional application is a permissive as opposed to binding procedure, the possibility that some states may be shown not to have applied any treaties provisionally in this period obviously does not detract from the value of this practice. Indeed, one need only refer to the Protocol of Provisional Application of the GATT to demonstrate its almost universal acceptance.⁵⁰⁶ As in the period before 1945, the terminology used to establish the provisional obligation continued to vary,⁵⁰⁷ without affecting the binding nature of such undertakings,⁵⁰⁸ or detracting from the general consistency of the practice.

4.2.4 *Opinio iuris* prior to 1969

The extensive body of practice prior to 1969 is arguably ample proof in and of itself of the existence of an *opinio iuris* on the part of those participating in it (in other words, almost all states) that they were legally entitled to do so. In the light of this practice, it is somewhat surprising that the ILC's draft article on provisional application should have provoked such a divergence of views at the Vienna conference.⁵⁰⁹ While the controversy should not be over-emphasized, it cannot simply be brushed aside. After all, statements made by representatives of governments at international conferences are traditionally regarded as possible evidence of *opinio iuris*.⁵¹⁰ The record of the Vienna conference thus prevents us from accepting, without further enquiry, the existence of an *opinio iuris* on the part of all states in favour of the custom of provisional application.

Yugoslavia and Guinea (796 *UNTS* 3); the 1962 Agreement on air transport between Ghana and Tunisia (563 *UNTS* 243); the 1965 Trade Agreement between Denmark and Madagascar (735 *UNTS* 105); the 1966 Agreement between the Netherlands and Singapore for air services between and beyond their respective territories (917 *UNTS* 257); the 1966 Air Transport Agreement between Tunisia and Niger (728 *UNTS* 133).

⁵⁰⁴For example, the 1947 Agreement between the UN and the ITU (30 *UNTS* 315); the 1956 Revised Standard Agreement between the UN and the specialized agencies and Yugoslavia concerning technical assistance (253 *UNTS* 13); the 1957 Agreement regarding the Headquarters of the IAEA (n 161 above). See also Detter (n 124) 425.

⁵⁰⁵See s 2.1.2 and 2.3 above.

⁵⁰⁶See n 135 and accompanying text.

⁵⁰⁷The negotiating states often used the expression enter into force provisionally or a variation thereof. (See, for example, the 1946 Trade Agreement between Canada and Mexico (230 *UNTS* 183), the 1949 Economic Co-operation Agreement between the US and Germany (92 *UNTS* 269), the 1955 Agreement relating to the 1922 International Convention for Regulating the Police of the North Sea Fisheries (310 *UNTS* 145)). Of course, expressions such as applied provisionally or provisionally applied, as used in the 1948 Agreement concerning the exchange of commodities between Norway and Sweden (26 *UNTS* 35), were by no means uncommon.

⁵⁰⁸Writing in 1963, Krenzler ((n 444) 141-2) concluded that an agreement on provisional application obliges the states parties to apply the treaty in full and that this obligation may only be limited by express reservation.

⁵⁰⁹It will be recalled that a proposal was made at the first session in 1968 to delete the article and that several delegations continued to oppose the article in plenary in 1969. Although the majority of states represented at the conference supported its retention (87) and only one voted against it, a relatively high number abstained (13). See s 1.3.2.2 above.

⁵¹⁰Akehurst 'Custom as a source of International Law' (n 424) 45.

The question to be considered is whether the proposal to delete article 25 (then still article 22) and the statements opposing the article at the Vienna conference should be taken as evidence that the states concerned believed the article did *not* reflect a permissive rule of customary international law. In other words, did the dissenting voices indicate an *opinio non iuris* of those states with regard to the practice of provisional application? If this were the case, it might be possible to argue that article 25 reflected not the codification of a long-established and universal rule, but rather the crystallization of a nascent customary norm or even a progressive development. In order to judge the weight of the various views opposing article 25, it is necessary to evaluate them in the context of statements to the contrary and the specific practice of the states concerned.

The first possible indication of an *opinio non iuris* at the Vienna conference was the tri-partite proposal to delete article 25, which was introduced by the Republic of Korea, the United States and Viet-Nam at the first session in 1968.⁵¹¹ In response to the proposal, delegation after delegation intervened in favour of retaining the article as a reflection of established practice, thereby prompting the United States to announce its withdraw. But in clarifying its proposal, the United States did not argue that provisional application was unconstitutional or contrary to international law. Rather, it considered, *inter alia*, that a separate article on provisional application was unnecessary since it

“... merely affirmed a procedure which was possible in the absence of the article. [Article 24] already provided that a treaty entered into force ‘in such manner’ as the negotiating States might agree.”⁵¹²

Thus, one of the justifications for the proposal actually supported the right of states to apply treaties on a provisional basis before their definitive entry into force. The proposal could therefore not be cited as evidence of the absence of an *opinio iuris* on the part of any of its sponsors concerning the practice of provisional application.⁵¹³ In the case of the United States, there is other documentary evidence supporting the existence of an *opinio iuris* in favour of the custom of provisional application before 1969. The practice was recognized in United States law,⁵¹⁴ and in numerous international agreements concluded by

⁵¹¹See s 1.3.2.1 above.

⁵¹²A/Conf.39/11 140. The other two reasons advanced by the US were that the article failed to define the legal effects of provisional application and that, as then drafted, it left unanswered the question how provisional application might be terminated.

⁵¹³Similarly, the Japanese suggestion to delete a 25, which was first made in 1965 (A/CN.4/175) and repeated at the 1968 session of the Vienna conference, was made because “the Japanese delegation regarded [the practice] as already covered by article 21, paragraph 1 [on entry into force]” (A/Conf.39/11 142).

⁵¹⁴Tentative Draft No. 1 *Foreign Relations Law of the United States (Revised)* 116. See also the views of the department of state reprinted in 1980 (74) *AJIL* 931, and the account of provisional application in US practice in Rogoff & Gauditz (n 15) 63-80.

the United States prior to 1969. The same is true, but on a more modest scale, for the two other co-sponsors of the proposal to delete article 25, the Republic of Korea,⁵¹⁶ and Viet-Nam.⁵¹⁷

At the plenary session in 1969, the main reason for opposing article 25 was the view that provisional application was incompatible with national constitutional limitations on the conclusion of treaties.⁵¹⁸ The principal exponent of this view was Guatemala, whose representative is recorded as commencing the debate with the following statement:

“Mr. MOLINA ORANTES (Guatemala) said that his delegation opposed article 22 [i.e. article 25]. Guatemala’s Constitution precluded its Government from contracting international obligations by means of treaties unless such treaties were first approved by the Legislature. That was in order to ensure that such obligations did not conflict with Guatemala’s internal legislation or vital interests. Legislative approval meant that there was no such conflict and that consequently the treaty could be ratified by the Executive and enter into force.

... The provisional application provided for under article 22 would have the effect of creating obligations for the signatory State without prior approval of the legislature; although the government might subsequently decide not to participate in the treaty, the obligations created during the period of provisional application would have given rise to legal relations whose validity would be questionable, and that might lead to objections on the ground of their unconstitutional character.”⁵¹⁹

The statement by Guatemala was endorsed by two African states, Cameroon and Uganda.⁵²⁰ However, it also gave numerous delegations the opportunity to point out that the draft article in question was an expression of established international practice.⁵²¹ Even states whose constitutional formalities made it difficult for them to resort to provisional application acknowledged its validity. Thus, although constitutional difficulties meant his country would be obliged to abstain from voting on the article, the representative of Costa

⁵¹⁵Treaties provisionally applied by the US prior to 1969 include the 1948 Protocol of Provisional Application of the GATT (n 135); the 1949 Economic Co-operation Agreement between the US and the Federal Republic of Germany (92 *UNTS* 269); the 1952 Civil Air Transport Agreement between the US and Japan (n 149); the 1953 Agreement between the US and Brazil for a co-operative program of agriculture (336 *UNTS* 241); the 1963 Agreement between the US and Senegal concerning investment guaranties (696 *UNTS* 267); the 1964 Air Transport Agreement between the US and the United Arab Republic (531 *UNTS* 229); the 1968 Exchange of notes constituting an agreement between the US and Switzerland relating to social security (915 *UNTS* 225).

⁵¹⁶For example, the 1966 International Tin Agreement (616 *UNTS* 317). The Republic of Korea continued to conclude provisionally applicable agreements until its ratification of the Vienna Convention in 1977. See, for example, the 1970 International Tin Agreement (824 *UNTS* 229); the 1974 Agreement between the Republic of Korea and the Economic Union of Belgium and Luxembourg on the encouragement and reciprocal protection of investments (1026 *UNTS* 397); the 1975 Agreement between the Republic of Korea and Switzerland relating to regular air transport (1048 *UNTS* 370); the 1977 Exchange of notes constituting an agreement between the US and the Republic of Korea relating to trade in textiles (1135 *UNTS* 63).

⁵¹⁷For example, the 1967 exchange of letters constituting an Agreement between the Netherlands and Viet-Nam concerning the anti-tuberculosis campaign in Viet-Nam (610 *UNTS* 62).

⁵¹⁸On the relationship between provisional application and municipal law, see ch 5.

⁵¹⁹A/Conf.39/11/Add.1 39.

⁵²⁰*Ibid* 41 and 43.

Rica thought it gave expression to a new practice which should be commended on the grounds of flexibility".⁵²² After noting that provisional application also conflicted with his country's constitution, under which the consent of the legislature was essential for every international agreement that had been concluded by the executive, the representative of Uruguay continued as follows:

"He realized, however, that the constitutional system of his country was one thing, while international practice in the provisional application of treaties – which was most important and could not be disregarded – was something else. Perhaps the solution was for countries which, like Uruguay, had a constitutional system incompatible with the international practice in question was not to sign or conclude treaties which contained provisions stating that they would be applied provisionally once they had been signed."⁵²³

Coming in response to earlier statements, this was a salutary statement of the obvious. The representative of Canada went on to point out that there was nothing in article 22 that would force a country which for constitutional reasons could not contemplate becoming bound provisionally by a treaty to get into such a position.⁵²⁴ Colombia's representative said that his country's constitution was similar to that of several other Latin American countries, so that his delegation might be expected to have the same objections to article 25 as those raised by previous speakers. Nonetheless, after studying the article carefully, "his delegation had decided that those objections were more apparent than real" and agreed that article 25 "did not force the parties to a treaty to agree to its provisional entry into force".⁵²⁵ Plainly, the Guatemalan argument that article 25 could not be supported because it might be unconstitutional failed to convince the majority, for whom provisional application was compatible with both national and international law. The support the article received from most states at the Vienna conference, together with the extensive pre-existing practice, demonstrates the existence of a widely held conviction regarding the legality of that practice. Article 25, paragraph 1, of the 1969 Vienna Convention may therefore be accepted as a codification of the customary rule permitting the provisional application of a treaty or part of a treaty.

The same conclusion may be reached concerning paragraph 2 of article 25 on termination of provisional application. As the 1937 International Whaling Agreement

⁵²¹ See the statements (in sequential order) by the UK, Austria, India, Greece, Canada, Italy, Poland (A/Conf.39/11/Add.1 39-43). See also Vignes (n 124) 188.

⁵²² A/Conf.39/11/Add.1 40-1.

⁵²³ *Ibid* 41.

⁵²⁴ *Ibid* 42.

⁵²⁵ *Ibid*. According to Vignes ((n 124) 188), the position of the Latin American states explains the 13 abstentions in the vote on a 25.

illustrates, the termination of provisional application was sometimes regulated in the treaty itself. As an aspect of provisional application that went hand in hand with the discretion to ratify, the ILC had early on proposed a rule on unilateral termination, although no such provision was included in the final ILC report to the Vienna conference. It will be recalled, however, that the principle of including a new paragraph on termination of provisional application was adopted in the committee of the whole by 69 votes to 1, with 20 abstentions.⁵²⁷ Although doubts were expressed about the compatibility between the right of termination and the obligation of *pacta sunt servanda*,⁵²⁸ it seems likely that paragraph 2 represents the codification of a state's customary right to terminate the provisional application of a treaty with respect to itself should it decide not to ratify the treaty.

4.2.5 Guatemala as a possible 'persistent objector'

Assuming that the right of a state to establish itself as a 'persistent objector' actually exists, could the statement made by Guatemala at the Vienna conference be used as evidence of its 'persistent' objection with regard to the custom of provisional application? It is submitted that it could not for three reasons. First, in order to be valid, an objection must be raised at the moment of the formation of the custom and not long afterwards.⁵²⁹ As the illustrations of state practice dating back to the 1920's and even earlier show, the right in question had been settled for generations and could scarcely be considered new or at the moment of formation in 1969. Moreover, since article 25 is a reflection of established practice, it cannot be argued that Guatemala's objection is valid because of the article's innovatory character. Secondly, even supposing Guatemala's objection was not time-barred, it is submitted that the concept of a persistent objector has no place in the formation of a permissive rule of customary international law of the kind in question. The purpose of a permissive custom is to permit, not to compel, subjects of international law to act in a certain manner. On the other hand, the purpose of an objection is to avoid some compulsory limitation on a state's existing freedom of action. Since a permissive custom such as that of provisional application obviously does not imply any general restriction on the rights or interests of states but rather the reverse, it is not clear that there is anything against which a purported persistent objector could validly object. Thirdly, although statements opposing a customary rule might normally carry some weight, Guatemala's position at the Vienna conference cannot be viewed as manifesting an absence of *opinio iuris* for the reason that its actual practice strikingly contradicts the assertions of its representative. By 1969

⁵²⁶See s 4.2.3.5 above.

⁵²⁷See n 87 and associated text.

⁵²⁸See s 3.5.2.1 above.

Guatemala had provisionally applied several treaties and use of the procedure was intensified thereafter.⁵³⁰ In the case of the commodity agreements, provisional application was often achieved by notification to the depositary, a procedure that presumably followed compliance with the relevant constitutional requirements and did not breach them. In short, given the actual practice of Guatemala, the statement of its representative at the Vienna conference cannot be considered as evidence of an *opinio non iuris* or of an objection, persistent or otherwise, with regard to the custom of provisional application.

4.3 Provisional application under contemporary customary international law

In examining the content of the modern customary rule permitting provisional application it is convenient to consider state practice since the conclusion of the 1969 Vienna Convention and especially since its entry into force in 1980. In this regard the practice of non-parties to the convention is especially relevant for it cannot be said that in agreeing to apply treaties provisionally they are exercising a right granted under article 25. The practice of international organizations is important too as the agreements they conclude are also subject to the customary law of treaties.

As we have seen, provisional application is an accepted feature of the treaty practice of the United States.⁵³¹ Though the incidence of provisional application varies from state to state, the situation is similar with the other non-parties mentioned earlier, including Brazil,⁵³² France,⁵³³ India,⁵³⁴ Indonesia,⁵³⁵ Israel,⁵³⁶ and Turkey.⁵³⁷ No distinction is evident

⁵²⁹Brownlie (n 424) 11.

⁵³⁰The annex includes a list of treaties provisionally applied by Guatemala.

⁵³¹See n 514 and 515 and accompanying text. The 2001 study by the library of congress on *Treaties and Other International Agreements: the Role of the United States Senate* ((n 130) 113) quotes a 25, apparently as reflecting the current state of international law. See also Charney 'U.S. Provisional Application of the 1994 Deep Seabed Agreement' 1994 (88) *AJIL* 705; Rogoff & Gauditz (n 15) 63-80.

⁵³²Brazil signed the 1969 Vienna Convention on 23 May 1969 but has not ratified it. For treaties applied provisionally by Brazil since 1969, see, for example, the 1976 Agreement on scheduled air transport between Brazil and Morocco (1287 *UNTS* 33); the 1976 Air Transport Agreement between Brazil and the Netherlands (1066 *UNTS* 25); the 1978 Trade Agreement between Brazil and China (1137 *UNTS* 135); the 2001 International Coffee Agreement (n 193 above).

⁵³³Examples of provisionally applied treaties concluded by France are referred to in n 482 above. More recent examples include the 1975 Agreement concerning air services between France and Kuwait (1072 *UNTS* 353), the 1983 International Tropical Timber Agreement (1393 *UNTS* 67); the 1986 International Cocoa Agreement (1446 *UNTS* 103), the 1992 Agreement between France and the Ukraine on the international carriage of goods by road (1823 *UNTS* 285); the 1998 Exchange of letters constituting an agreement between Australia and France relating to the movement of nationals between the two countries (2076 *UNTS* 417).

⁵³⁴Treaties provisionally applied by India include the 1983 International Tropical Timber Agreement (n 533); the 1983 Agreement on economic and technical co-operation between India and the Netherlands (1524 *UNTS* 185); the 1984 International Sugar Agreement (1388 *UNTS* 3); the 1987 Air Transport Agreement between India and Spain (1539 *UNTS* 3); the 1994 Agreement Relating to the Implementation of Part XI of the 1982 UN Convention on the Law of the Sea (n 181).

⁵³⁵A series of agreements concluded in 1974 between Indonesia and the Philippines were all applied provisionally. The agreements dealt with coconut and coconut products (987 *UNTS* 275), economic and technical co-operation (987 *UNTS* 283), technical and scientific co-operation (987 *UNTS* 289), fisheries (987

between the practice of such states and that of parties to the 1969 Vienna Convention. This leads one to the conclusion that the content of the contemporary custom of provisional application is identical to that of article 25. Indeed, many multilateral treaties are provisionally applied by parties and non-parties to the convention, a prominent example being the 1994 Agreement Relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea. Although a number of states notified the depositary pursuant to article 7, paragraph 1,⁵³⁸ that they would not apply the Agreement provisionally, there is no indication that they did so because of reservations about the legality of the practice of provisional application on the international plane.⁵³⁹

As with article 25 of the 1969 Vienna Convention, article 25 of the 1986 Vienna Convention is a codification of the customary law of provisional application with respect to treaties concluded between states and international organizations and between international organizations. There is a substantial body of practice confirming this customary status. Several international agreements that have been provisionally applied by international organizations were referred to in chapter 2. The United Nations and its related agencies have in particular made extensive use of the technique, a recent instance being the 1997 Agreement between the Russian Federation and the ILO, which was applied provisionally from 5 September 1997 until its definitive entry into force on 24 September 1998.⁵⁴⁰

UNTS 297), forestry (987 *UNTS* 303), and trade (987 *UNTS* 311). Other examples of treaties provisionally applied by Indonesia are the 1982 Agreement between Indonesia and Spain on scientific and technical co-operation (1315 *UNTS* 53) and the 1987 International Natural Rubber Agreement (1521 *UNTS* 3).

⁵³⁶Israel has applied the following international agreements on a provisional basis: the 1971 Trade Agreement between Israel and Romania (820 *UNTS* 107), the 1986 Agreement between Israel and Canada on air transport (1460 *UNTS* 153); the 1989 Air Transport Agreement between Israel and Spain (1580 *UNTS* 3).

⁵³⁷Treaties provisionally applied by Turkey since 1969 include: the agreements concerning international road transport concluded in 1977 with, respectively, Switzerland (1110 *UNTS* 245), Sweden (1260 *UNTS* 123) and the UK (1126 *UNTS* 125); the 1981 International Road Transport Agreement between Turkey and Czechoslovakia (1299 *UNTS* 147); and the 1986 International Agreement on olive oil and table olives (1445 *UNTS* 13).

⁵³⁸For the text of a 7(1), see 3.1.1.5 above.

⁵³⁹The states concerned are listed in n 327 above. Linnan *et al* ((n 183) 822-3) imply that the reason for the notifications of non-provisional application was that “[l]egally, some constitutions prevent states from being bound by treaties on a provisional basis.” This explanation requires qualification, particularly when it is recalled that some of the states concerned (for example, Bulgaria, Portugal, Spain and Sweden) were amongst the first to establish the practice of provisional application as a rule of customary international law and that the others have also at some stage agreed to apply treaties provisionally. A reason for the notifications of non-provisional application may have been the nature of the 1994 Agreement as an agreement modifying a convention requiring ratification, which meant that it too needed parliamentary approval before a commitment on provisional application could be given. In addition, the controversial history of the 1982 Convention may well have meant that governments judged it prudent to seek legislative support for the 1994 Agreement before binding the state in any way.

⁵⁴⁰2058 *UNTS* 30. Other examples include the agreements between the UN, its agencies and programmes and the Netherlands on operational or technical assistance to overseas parts of the Netherlands (in particular Surinam and the Netherlands Antilles) concluded in 1954 (201 *UNTS* 75), 1967 (598 *UNTS* 123), and 1969 (684 *UNTS* 347); the 1979 Agreement between the ILO and Spain on the joint development of programmes on technical co-operation among Latin American countries (1162 *UNTS* 227); the 1983 Agreement on the legal status and functioning of the Regional Office for the Americas of the WMO in the Republic of Paraguay (1418 *UNTS* 203); the various Basic Cooperation Agreements concluded by UNIDO in 1988 and 1989 with,

Even though the modern custom of provisional application may be easily identified and described, the issue is complicated somewhat by the existence of several reservations to article 25 made by Latin American states, the most recent dating from 2000.⁵⁴¹ Since actions by states in adhering to treaties may be evidence of *opinio iuris* concerning customary international law and the reservations in question have been interpreted as calling into question “well-established and universally accepted norms”,⁵⁴² they require close study.

4.4 Latin American reservations to article 25

Neither of the two Vienna Conventions prohibits the making of reservations to the convention itself.⁵⁴³ A total of 35 states have accordingly made declarations and/or reservations to the 1969 Vienna Convention upon signing or ratifying it, including four similar reservations in respect of article 25 made by Colombia, Costa Rica, Guatemala and Peru.

In view of the stance adopted by its delegation at the Vienna conference, it should come as no surprise that Guatemala made a reservation upon signing the convention in 1969 to the effect that it would not apply article 25 in so far as it was contrary to the provisions of its constitution. Upon ratifying the convention in 1997, Guatemala confirmed the reservation with respect to the non-application of article 25 “insofar as [it is] incompatible with provisions of the Political Constitution currently in force”.⁵⁴⁴ Colombia and Costa Rica, which ratified the convention in 1985 and 1996 respectively, also made reservations that their Political Constitutions did not recognize the provisional application of treaties. Upon its ratification of the convention in 2000, Peru made the reservation that article 25, among others, “must be understood in accordance with, and subject to, the process of treaty signature, approval, ratification, accession and entry into force stipulated by its constitutional provisions.”

respectively, Sudan (1570 UNTS 103), Morocco (1570 UNTS 123), Bolivia (1570 UNTS 163), the United Arab Emirates (1570 UNTS 193), Lebanon (1570 UNTS 233), Cameroon (1570 UNTS 273), Ecuador (1570 UNTS 293), and Mauritania (1570 UNTS 323); the Basic Cooperation Agreements concluded between 1994 and 2000 between UNICEF and Croatia, the Maldives, Tajikistan, Barbados, Burkina Faso, Ukraine, Jordan, and Gabon (these agreements are subject to limited publication in the UNTS). Many similar cooperation agreements have been concluded by the UNDP and the UNHCR, mainly with developing countries.

⁵⁴¹For the text of the reservations, see <http://www.untreaty.org>.

⁵⁴²Objections by Austria and Germany to the reservation of Guatemala.

⁵⁴³A 19 of the 1969 Vienna Convention provides that a state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) the reservation is incompatible with the object and purpose of the treaty.

The reservations of Guatemala and Peru elicited objections from six European states.⁵⁴⁵ Austria and Germany were of the view that the Guatemalan reservations “refer almost exclusively to general rules... many of which are solidly based on international customary law”;⁵⁴⁶ while Denmark pointed out that it is in the common interest of states that they be “prepared to undertake any legislative changes necessary to comply with their obligations under the treaties”.⁵⁴⁷ With the exception of Belgium, the objecting states expressed the view that the reservations raised doubts about their compatibility with the object and purpose of the convention or, more categorically, that they were not compatible with its object and purpose. The three objections to the Peruvian reservations, which were made by Austria, the Netherlands and Sweden, stated that in the absence of further clarification the reservation by Peru raised doubts as to the commitment of Peru to the object and purpose of the convention and recalled that in accordance with the convention, a reservation that is incompatible with the object and purpose of a treaty is not permitted. However, as the objection by Austria had been received more than 12 months after it had been notified of the Peruvian reservation,⁵⁴⁸ the government of Peru notified the depositary that it considered the Austrian communication to be without legal effect.

The reason certain Latin American states made reservations to article 25 apparently lies in the history of the law of treaties in the western hemisphere, where some states have traditionally held views on the relationship between the law of treaties and their domestic political constitutions that emphasize compliance with the latter. Article 1 of the 1928 Pan-American Convention on Treaties, also known as the Havana Convention, provided as follows:

“Treaties will be concluded by the competent authorities of the States or by their representatives, according to their respective internal law.”⁵⁴⁹ (Emphasis added.)

⁵⁴⁴Reservation of Guatemala.

⁵⁴⁵Austria, Belgium, Denmark, Finland, Germany and Sweden.

⁵⁴⁶Objections of Austria and Germany to the reservation of Guatemala.

⁵⁴⁷Objection of Denmark to the Guatemalan reservation.

⁵⁴⁸In accordance with a 2(1)(d) of the 1969 Vienna Convention, a reservation is a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to itself. A 20(5) of the 1969 Vienna Convention stipulates that unless the treaty otherwise provides, a reservation is considered to have been accepted by a state if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later. See Aust (n 1) 100-130; Bowett ‘Reservations to Non-restricted Multilateral Treaties’ 1976-7 (48) *BYIL* 67; Gamble ‘Reservations to Multilateral Treaties: A Macroscopic View of State Practice’ 1980 (74) *AJIL* 372; Shaw (n 425) 821-831. In December 1993, the General Assembly endorsed the ILC’s decision to include the topic of the law and practice relating to reservations to treaties on its agenda. The draft guidelines on reservations adopted by the ILC are available at www.un.org.

⁵⁴⁹Hudson (ed) *International Legislation* vol 4 2378. According to the *Multilateral Treaties Index and Current Status* (1984) by Bowman and Harris, Peru became a party to the 1928 Havana Convention on 21 June 1945. Colombia, Costa Rica and Guatemala signed it on 20 February 1928 but failed to ratify.

Blix (who does not share the view himself) notes that article 1 of the 1928 Havana Convention could carry some weight in favour of the view that constitutional provisions on treaty-making competence are internationally relevant.⁵⁵⁰ By stating that treaties will be concluded “according to... internal law”, the article could even be interpreted as allowing a state to avoid any treaty that were concluded in violation of domestic constitutional provisions. Article 1 may thus reflect a view on the pre-eminence of national constitutional provisions that goes far beyond what is permitted under international law. Whatever its precise meaning, the general approach to treaty-making power it reflects provides an interesting background to the position of the Latin American states at the Vienna conference and their reservations to article 25.⁵⁵¹

From a legal perspective, the reservations to article 25 serve no obvious purpose. The technique of provisional application, being optional, quite obviously does not oblige a state to agree to the provisional application of a treaty or part of a treaty. As pointed out elsewhere in this chapter, article 25 poses no conceivable risk to a state if its constitution does not foresee provisional application or if provisional application happens to be contrary to its established practice or policy. If the position of the reserving states is premised on the reasoning that agreement on provisional application is not possible because it would require the same constitutional approvals as ratification, this argument is patently flawed. There is no impediment under international law – and it is difficult to conceive of any under constitutional law either – to a government’s agreeing to provisional application *after* completing the requisite domestic procedure to approve the treaty. Although this may

⁵⁵⁰Blix *Treaty-Making Power* (1960) 353. According to Reuter ((n 1) 19-20), the cumbersome rules on treaty-making in Latin American constitutions were designed to prevent representatives from yielding to some foreign threat or enticement.

⁵⁵¹At the Vienna conference, nine Latin American states introduced an amendment to ILC draft a 10 on consent to be bound expressed by signature (a 12 of the 1969 Vienna Convention), which emphasized the role of national law on the international plane. In terms of the proposal, states could express their consent by signature (a) when the treaty so provides or (b) when in conformity with the internal law of the state the treaty is an administrative or executive agreement. (See Bolintineanu ‘Expression of Consent to be Bound by a Treaty in the Light of the 1969 Vienna Convention’ 1974 (68) *AJIL* 673 678.) The proposal, which would have made the international validity of some agreements in simplified form dependent on national rather than international law, was rejected by 60 votes to 10, with 16 states abstaining. The Latin American viewpoint was also articulated at the Vienna conference by the delegation of El Salvador, which stated that “El Salvador considered that its Constitution took precedence over all treaties” (A/Conf.39/11/Add.1 44). The reader will recall, however, that in terms of a 27 of the 1969 Vienna Convention a party may not invoke the provisions of its internal law (which obviously includes its constitution) as justification for its failure to perform a treaty. The principle that even a constitution is no defence against the failure to perform a treaty was confirmed by the PCIJ in its advisory opinion on the *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory*, in which the court held that “a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.” (1937 *PCIJ A/B44* 24.)

reduce the flexibility of the technique, designed as it is for urgent cases, it would still be useful in certain circumstances.⁵⁵²

What then is the effect of the Latin American reservations and the objections to them? Pursuant to a 20(4)(b) of the 1969 Vienna Convention, an objection by another contracting state to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving states unless a contrary intention is definitely expressed by the objecting state.⁵⁵³ In this case, the objecting states expressly affirmed that their objections would not preclude the entry into force of the convention between the reserving and objecting states.⁵⁵⁴ Our focus, however, is not on the effect of the reservations on the treaty relations of the parties *inter se*, but on their possible dispositive effect, as expressions of *opinio iuris*, with respect to the custom of provisional application. Taken at face value, the reservations are a firm indication that the states concerned do not condone and do not participate in the practice of provisional application. The reservations could thus be cited as evidence that the states making them do not consider the practice of provisional application to be based on a permissive rule of customary international law, or, if it is, that the rule does not apply to them.⁵⁵⁵ The question to be answered, therefore, is whether the reservations, like the statements against article 25 made at the Vienna conference, indicate an *opinio non iuris* on the part of the reserving states with regard to the practice of provisional application.

It is submitted that they do not. To begin with, none of the reservations expressly states or implies that the reserving state believes that the practice of provisional application is not permitted under international law. Rather, the reservations are based solely on constitutional grounds: that the political constitution of the state “does not recognize the provisional application of treaties” (Colombia), or “does not permit the provisional application of treaties” (Costa Rica), or that article 25 is “incompatible with the provisions of the Political Constitution currently in force” (Guatemala), or that the application of

⁵⁵²For example, where the treaty envisages that both notifications and acts expressing final consent to be bound are counted for the purposes of provisional application, as in the case of some commodity agreements and the 1994 Agreement Relating to the Implementation of Part XI of the 1982 UN Convention on the Law of the Sea (n 181 and s 3.1.1.5).

⁵⁵³According to Redgwell, the legal effect of an objection to a reservation on the basis that it is incompatible with the object and purpose of the treaty remains unclear. See Redgwell ‘Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties’ 1993 (64) *BYIL* 245.

⁵⁵⁴In their objection to Guatemala’s reservation, Denmark, Finland and Sweden added that the convention would become operative in their treaty relations with Guatemala without the latter benefiting from its reservations. Austria and Sweden included similar observations in their objections to the reservations by Peru.

⁵⁵⁵Baxter ((n 429) 290) suggests that where a treaty is expressed to be declaratory of customary international law this may create a presumption that it does so, “while allowing the State... against whom the treaty is proffered the right to demonstrate that a particular treaty provision invoked does not correctly express the law.”

article 25 must be understood in accordance with, and subject to, the process of treaty signature, approval, ratification, accession and entry into force stipulated by its constitutional provisions” (Peru). More importantly, the actual practice of the states concerned indicates that provisional application must indeed be possible under their respective constitutions and that they are able to apply treaties provisionally when necessary.⁵⁵⁶ The 1973 Statute of the Latin American Civil Aviation Commission,⁵⁵⁷ article 23 of which provided that it would enter into force provisionally upon signature, was provisionally applied by Colombia, Costa Rica and Peru from 14 December 1973. The representative of Guatemala, however, signed the convention *ad referendum*.⁵⁵⁸ Guatemala deposited its instrument of ratification of the convention on 29 August 1975, shortly before it entered into force on 21 October 1975,⁵⁵⁹ by which act Guatemala also consented to the provisional application of the convention for the remainder of the interim period. In addition, all four states have agreed to the provisional application of important commodity agreements, a recent example being Colombia’s notification of provisional application of the 2001 International Coffee Agreement,⁵⁶⁰ which was deposited with the secretary-general of the United Nations on 20 June 2001. Contrasted with the claims made in the reservations, this considerable body of actual practice is no minor inconsistency. As in the case of Guatemala’s statement against article 25 at the Vienna conference, the practice serves to negate any possible effect the reservations may otherwise have had on the status of the custom of provisional application with respect to the reserving states and operates instead to validate and reinforce the very custom which the reservations purported to proscribe.

Although the Latin American reservations in respect of article 25 appear to be of political rather than legal significance, they highlight once again the importance for provisional application of national constitutional procedures concerning the approval and ratification of treaties. These procedures will be considered in the coming chapter, which deals with the relationship between the law of provisional application and municipal law.

⁵⁵⁶The annex to this study contains an illustrative list of treaties published in the *UNTS* that have been provisionally applied by Colombia, Costa Rica, Guatemala and Peru.

⁵⁵⁷1241 *UNTS* 185.

⁵⁵⁸A signature *ad referendum*, by which a representative signals that the instrument so signed requires the approval of his or her authorities, does not obligate the state unless and until it is confirmed. Under a 12(2)(b) of the 1969 Vienna Convention, a signature *ad referendum* of a treaty by a representative, if confirmed by his state, constitutes a full signature of the treaty.

⁵⁵⁹1241 *UNTS* 189.

⁵⁶⁰N 193 above.

Provisional application under municipal law

While international law establishes the possibility for its subjects to apply their treaties provisionally, whether a particular state is able to exercise this right in a particular case is a question not of international law but of the domestic or municipal law of the state concerned.⁵⁶¹ Just as municipal law allocates the competence and establishes the domestic procedure for exercising the state's ordinary treaty-making authority, so too does it determine whether and in accordance with which domestic procedure the state may be engaged to apply a treaty provisionally.⁵⁶² It is not only in respect of the power to apply a treaty provisionally that provisional application is of relevance to municipal law. A provisionally applied treaty is of course binding on the international plane. However, its effectiveness during the provisional phase may depend on the attitude adopted by national legal systems. It must therefore be considered whether it is necessary and possible for a provisionally applied treaty to be part of domestic law and, if so, whether the organs of the state concerned, including the courts, can actually apply it.

An analysis of provisional application under municipal law is most meaningful when related to the law of a particular state. In South Africa, new formalities for concluding treaties were established by the 1996 Constitution.⁵⁶³ In view of the enhanced status the Constitution accords to international law, it is of particular relevance to consider South African law with respect to the formation and domestic effect of provisionally applicable treaties. For example, does the government have the authority to apply a treaty provisionally? Can a treaty that South Africa is applying provisionally have any legal effect under South African law? When could such a treaty be relied upon as a basis for a right or interest before a South African court? If a provisionally applied treaty supersedes a pre-existing treaty that is part of the law of the land, which one will prevail? And if the courts do not apply a provisionally applicable treaty, what consequences will this have for South Africa's international obligations? In South Africa, as elsewhere, provisional application raises questions relating to the separation of powers and the reception of international law in municipal law, questions that must be addressed if the procedure is to be a useful accessory to the treaty-making power.

⁵⁶¹In this study, 'domestic law', 'national law', 'internal law' and 'municipal law' are used interchangeably.

⁵⁶²This chapter deals with the relationship between provisional application and the municipal law of states. With regard to international organizations, the question whether and in accordance with which procedure an international organization is able to apply a treaty provisionally must be determined with reference to the internal law of the organization concerned.

⁵⁶³Act 108 of 1996; 1997 (36) *ILM* 744.

Before examining the situation in South Africa, let us examine how provisional application is treated generally under municipal law.

5.1 Treaty-making power and provisional application

5.1.1 Constitutional authority to agree to provisional application

In practice, provisional application may be more or less useful depending on each state's constitutional arrangements for concluding treaties. In Australia, Canada, the United Kingdom and most other Commonwealth countries, the power to negotiate, sign, ratify and accede to international agreements rests solely with the executive. This applies to all treaties, whether 'formal' (and requiring ratification or approval), or in simplified form (and entering into force upon signature or exchange of instruments without subsequent act of confirmation). As a rule, such states do not regulate provisional application expressly: the power to apply a treaty provisionally is inherent in the general power to enter into binding treaty commitments. With such wide treaty-making authority, provisional application may be a less attractive device, there being no need to apply a treaty provisionally that can be made to enter into effect upon signature or rapidly ratified without prior legislative approval.

In some states, the provisional application of some or all treaties, while not actually prohibited, may be restricted by the constitution.⁵⁶⁴ Thus, if legislative approval of treaty obligations is required before they bind the state, this requirement may be an obstacle to provisional application in the absence of such approval. The requisite approval must therefore be obtained before the executive can agree to apply a treaty provisionally. A treaty that is provisionally applied in breach of the relevant procedures will be unconstitutional.⁵⁶⁵ It will nevertheless bind the state internationally unless the state may raise article 46 of the 1969 Vienna Convention or until the provisional application is terminated.⁵⁶⁶ On the other hand, many states have constitutional requirements for the approval of treaties by the legislature as well as provision for entering into treaties in simplified form. Agreements on provisional application, whether in the main body of the treaty or in a separate or collateral agreement, may be regarded as agreements in simplified form for the purposes of constitutional law. In the United States, for example, treaties must

⁵⁶⁴Lefeber (n 117) 89.

⁵⁶⁵Krenzler identified numerous treaties provisionally applied in breach of a 59 of the German *Grundgesetz* of 1949 (requiring *inter alia* the approval of certain treaties by the legislature). See Krenzler (n 444) 107-111.

⁵⁶⁶See s 3.5.4 above.

be submitted to the senate for advice and consent, while a practice has evolved and been recognized by the courts of concluding executive agreements, including agreements to apply a treaty provisionally.⁵⁶⁷ Such states may find the technique of provisional application particularly convenient, as the executive will be able to agree to the provisional application of a treaty while nevertheless respecting the constitutional requirement that it be submitted to the legislature for approval prior to ratification. If the treaty is not approved, the executive can terminate it in accordance with the provisions of paragraph 2 of article 25, or customary international law, whichever is applicable.

Several states expressly regulate provisional application in their laws dealing with the conclusion of treaties. In the Netherlands, the executive is permitted in terms of section 15(1) of the 1994 State Act on the Approval and Publication of Treaties to apply a treaty provisionally if the interest of the kingdom so requires.⁵⁶⁸ The provisional application must be communicated to parliament forthwith. In accordance with section 15(2) of the same law, provisional application of a treaty that is subject to parliamentary approval is not permitted, in so far as provisions of such a treaty conflict with the constitution or national laws or will result in such conflict.⁵⁶⁹ Under the Swiss Constitution, the treaty-making power of the confederation is vested in the federal council. If the matter is urgent, the federal council may apply a treaty provisionally, but must seek the approval of the federal assembly before ratifying it.⁵⁷⁰ Article 24 of the Treaty on European Union, as amended by the Treaty of Nice of 26 February 2001,⁵⁷¹ regulates the possible provisional application of certain agreements concluded by its members:

⁵⁶⁷ According to Rogoff and Gauditz ((n 15) 56), “[a]n agreement with another nation to apply provisionally a treaty or part of a treaty, as provided for in article 25 of the Vienna Convention, is in essence an executive agreement under American law.” In 1980, the deputy legal adviser of the department of state advised the senate that “[a] treaty applied provisionally has the same legal status as any agreement of the United States concluded by the President on his own authority.” (See n 130 932.) The reaction of the senate committee on foreign relations to this statement indicates that the matter may not be settled, at least with regard to treaties (as opposed to international agreements so defined under US law). In recommending that the senate give its advice and consent to three maritime boundary treaties, the committee expressed its concern about provisional application as follows:

“The Administration has argued in its responses to Senator Javits that the President may apply a treaty provisionally in advance of Senate advice and consent so long as ‘the obligations undertaken’ are ‘within the President’s competence under U.S. law.’ This phrase simply begs the question of how broad such competence might be. While the Committee does not dispute the practical necessity of reaching limited practical accommodations between treaty signatories prior to Senate action, it does not accept the broad and vague assertions made by the Administration in its response.” (US senate doc S EXEC REP 96-49 (1980) 4.)

See Nash ‘Current Developments: U.S. Maritime Boundaries with Mexico, Cuba, and Venezuela’ 1981 (75) *AJIL* 161-2. On the power to conclude treaties and international agreements under US law generally, see, for example, Byrd *Treaties and Executive Agreements in the United States* (1960); Henkin *Foreign Affairs and the United States Constitution* (1996) 175-230.

⁵⁶⁸ Klabbbers ‘The New Dutch Law on the Approval of Treaties’ 1995 (44) *ICLQ* 629 636. See also Lefeber (n 117) 92.

⁵⁶⁹ This is because Dutch treaties have force of law at the municipal level. See ss 5.2.1-2 below.

⁵⁷⁰ Aust (n 1) 149.

⁵⁷¹ 2001 (080) *OJ C* 0001.

1. When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this Title [on a common foreign and security policy], the Council may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency....

5. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally.”

More often, the power of the executive to conclude provisionally applicable treaties is assumed by constitutional construction and practice rather than by express provision. As has been pointed out in a different context, constitutional silence will often translate into greater executive discretion.⁵⁷²

5.1.2 Potential abuse of provisional application

What is at times viewed as the potential for abuse inherent in the technique of provisional application should perhaps be noted here as it has caused some concern in the past and could be perceived as affecting the legitimacy of the practice *per se*. At the Vienna conference, for instance, the representative of Malaysia said that the then article 22

“... tended to encroach upon the true functions of [the then] articles 11 and 12, which clearly indicated ratification, acceptance, approval and accession as the methods whereby a State declared its consent to be bound by a treaty. The option which article 22 gave a State to avoid compliance with the usual machinery and to fall back on the clause on provisional entry into force might ultimately render traditional forms of consent null and void....”⁵⁷³

From the perspective of constitutional law, this scenario, however fanciful, raises the question whether provisional application does not have the effect of usurping the powers of the legislature.⁵⁷⁴ As Rogoff and Gauditz have put it, “[a]lthough international lawyers may applaud the added flexibility afforded by the provisional application option, domestic parliamentarians may not be similarly enthusiastic.”⁵⁷⁵ It may not always be opportune for parliament to reject a proposal for the approval and ratification of a treaty that is already applied provisionally, or to force the executive to terminate the provisional application. Theoretically, a government might even agree to apply a treaty provisionally in the knowledge that the legislature will not approve the treaty, or continue to apply a treaty provisionally after the legislature has disapproved it. However, in such exceptional

⁵⁷²Yoo ‘Participation in the Making of Legislative Treaties; The United States and other Federal Systems’ 2003 (41) *Columbia J of Transnational Law* 455 463.

⁵⁷³A/Conf.39/11 144.

⁵⁷⁴See s 2.5 above.

⁵⁷⁵Rogoff & Gauditz (n 15) 54.

circumstances, it is for municipal law to provide an appropriate mechanism, such as legislation or recourse to the courts, to compel the executive to adhere to the will of the legislature.⁵⁷⁶

5.2 Effect of provisionally applied treaties under municipal law

At its 1965 session, the chairman of the ILC, Milan Bartos (Yugoslavia), addressed the domestic effect of provisionally applied treaties as follows:

“... If the treaty had truly entered into force, its provisions automatically prevailed over those of internal law in the increasingly numerous countries which acknowledged the supremacy of international law. If, on the other hand, the treaty was applied only provisionally, most legal systems would regard that situation as a practical expedient which did not introduce the rules of international law into internal law.”⁵⁷⁷

But is it correct that provisional application is merely “a practical expedient which [does] not introduce the rules of international law into internal law”? Is there no obligation on states to bring their domestic law into conformity with a provisionally applied treaty? If a provisionally applied treaty is given the force of domestic law, what rank or hierarchy will it enjoy? Can it create rights for individual that may be enforced by national courts? Before identifying the considerations relevant to answering these questions, let us recall the various approaches taken by municipal legal systems to the establishment and effect of international agreements.⁵⁷⁸

5.2.1 Domestic effect of treaties in force

Many treaties, in particular human rights treaties, prescribe or proscribe certain conduct that must be made applicable under municipal law, in so far as it is not already applicable, if the state is to comply with its international obligations. How this is achieved, and the status treaties enjoy domestically, is left to each state to determine in accordance with its own rules.⁵⁷⁹ In states that follow a monist approach,⁵⁸⁰ treaties to which the state is

⁵⁷⁶Lefebvre (n 117) 87-8

⁵⁷⁷1965 (I) *YILC* 110.

⁵⁷⁸See, generally, Akehurst (n 124) 65-8; Aust (n 1) 143-161; Cassese ‘Modern Constitutions and International Law’ 1985 *III* (192) *RC* 331; Jackson ‘Status of treaties in Domestic Legal Systems: A Policy Analysis’ 1992 (86) *AJIL* 340.

⁵⁷⁹Aust (n 1) 145.

⁵⁸⁰In accordance with monist theory, there is no division between international law and municipal law, which form part of a single system of law. The most famous exponent of monism has been Kelsen, who argued that the validity of all law derived from the supreme *Grundnorm* of international law. Monism is counterpoised by the dualist school of thought, which holds that international law is not superior to municipal law but that the two are completely separate legal systems. Rules of international law therefore do not apply as such within the domestic legal order but only to the extent that they may be incorporated into domestic law. In reality, neither

party do not require special legislation to be received in municipal law. In practice, degrees of monism vary. Some states may automatically incorporate all treaties in force for the state into their internal law, while others will only regard treaties that have received legislative assent as so incorporated. The most developed form of the doctrine is apparently found in Switzerland.⁵⁸¹ A treaty that has entered into force for Switzerland is part of Swiss law and need not be formally incorporated, regardless of whether or not the federal assembly has approved it.⁵⁸² In Mexico, treaties concluded by the executive and approved by the senate achieve national status and are equated with national legislative acts. This is in accordance with article 133 of the Mexican constitution, which provides as follows:

“This Constitution, the laws of the Congress of the Union that stem therefrom, and all treaties that are in accordance with it, made or which shall be made by the President of the Republic, with approval of the Senate, shall be the Supreme Law throughout the Union. The judges of every State shall be bound by the said Constitution, laws, and treaties, any provisions to the contrary that may appear in the Constitutions or laws of the States notwithstanding.”⁵⁸³

Other states adopting a monist approach to some or all of their international agreements include Belgium,⁵⁸⁴ France,⁵⁸⁵ Germany,⁵⁸⁶ Greece,⁵⁸⁷ Japan,⁵⁸⁸ Namibia,⁵⁸⁹ the Netherlands,⁵⁹⁰ Poland,⁵⁹¹ and the Russian Federation.⁵⁹²

theory operates in pure form and “states show a considerable flexibility in the procedures whereby they give effect within their territories to the rules of international law” (Oppenheim (n 235) 54). For an overview of the monist and dualist theories, see Akehurst (n 124) 63-4; Brownlie (n 424) 31-4; Oppenheim (n 235) 53-4; Shaw (n 425) 121-4. Starke’s 1936 treatise on monism and dualism in the theory of international law is perennially relevant and has been reproduced in Litschewski *et al Normativity and Norms: Critical Perspectives on Kelsenian Themes* (1998) 537-52, along with other valuable essays on the theme.

⁵⁸¹ Akehurst (n 124) 64; Aust (n 1) 145.

⁵⁸² Aust (n 1) 150. See also Oppenheim (n 235) 69-70; Yoo (n 572) 473-7.

⁵⁸³ Quoted in Cicero ‘International Law in Mexican Courts’ 1997 (30) *VJTL* 1035.

⁵⁸⁴ In Belgium, treaties that have received the assent of parliament and are capable of direct application to individuals can be directly invoked before the courts and prevail over earlier and later national law. See Oppenheim (n 235) 64; Yoo (n 572) 468-9.

⁵⁸⁵ Under French law, self-executing provisions of treaties published in the *Journal Officiel* prevail over existing or later legislation, subject to reciprocity. See Aust (n 1) 146-7; Oppenheim (n 235) 65-6; Shaw (n 425) 156-7.

⁵⁸⁶ The 1949 *Grundgesetz* of the Federal Republic of Germany makes general international law superior to legislation and directly invocable by individuals. Certain treaties need the approval of the legislature. The law approving the ratification of a treaty also makes the treaty part of German law with effect from the date of entry into force of the treaty for Germany. A separate law has to be enacted if the treaty affects existing laws or needs implementing legislation. See Aust (n 1) 147; Oppenheim (n 235) 64-5; Shaw (n 425) 155; Stein ‘International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?’ 1994 (88) *AJIL* 427 428.

⁵⁸⁷ Under the Greek constitution, international conventions are an integral part of Greek law and prevail over contrary provisions from the time that they enter into force following any necessary constitutional approvals. See Oppenheim (n 235) 67.

⁵⁸⁸ In Japan, the predominant view holds that international law, including treaties approved by the diet and promulgated by the emperor, have the force of law. See Iwasawa *International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law* (1998) 28-9; Shaw (n 425) 160.

⁵⁸⁹ A 144 of the Namibian Constitution states that “unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.” See Erasmus ‘The Namibian Constitution and the application of international law’ 1989/90 (15) *SAYIL* 81.

in dualist states, treaties have no special status and do not confer any rights or duties under municipal law unless and until those rights and duties are transposed or translated into municipal law by legislation.⁵⁹³ In the United Kingdom and other Commonwealth states, the executive retains the crown prerogative to sign and ratify treaties without the approval of parliament. An act of incorporation is therefore essential to give effect to the treaty at the municipal level because without it the executive could amend the law of the land simply by concluding international agreements.⁵⁹⁴

Once part of national law, whether incorporated automatically or transposed by legislative act, the hierarchy of a treaty within the domestic legal order will vary from state to state. Treaties may be subject to the constitution and national legislation, have the same status as national laws, or even take precedence over national laws and, exceptionally, the constitution.⁵⁹⁵ Municipal law increasingly recognizes the concept of self-executing and directly applicable treaty provisions, which are distinguished from those that require further legislative intervention before creating enforceable rights and duties.⁵⁹⁶

5.2.2 Domestic effect of provisionally applied treaties

Rules governing the establishment and effect of treaties under municipal law are generally premised on the assumption that the treaties in question are in force for and binding on the state concerned. Bearing in mind that provisionally applied treaties also create binding international obligations, let us now consider the effect of provisionally applied treaties under municipal law.

⁵⁹⁰In the Netherlands, treaties need not be incorporated into municipal law by legislation in order to have legal effect and take precedence over national law, including the constitution. See Aust (n 1) 148; Lefeber (n 117) 92; Oppenheim (n 235) 69; Stein (n 586) 429.

⁵⁹¹In accordance with the Polish Constitution of 1997, a treaty in force for Poland that has been published in the official gazette applies directly in Poland unless its application depends on the enactment of a law.

⁵⁹²Pursuant the Russian Constitution of 1993, the international treaties of the Russian Federation constitute part of its legal system. See Akehurst (n 124) 68; Aust (n 1) 149; Shaw (n 425) 159.

⁵⁹³Aust (n 1) 150.

⁵⁹⁴Warbrick 'Current Developments: Public International Law' 2000 (49) *ICLQ* 944 945. See also Aust (n 1) 151-4; Brownlie (n 424) 44-5; Oppenheim (n 235) 58-61; Shaw (n 425) 135-9.

⁵⁹⁵In 1931, the Spanish republican constitution became the first to adopt the precedence of treaties over ordinary legislation, enforceable by a constitutional court (Stein (n 586) 428). More recently, a 15(4) of the Constitution of the Russian Federation of 1993 provides that if an international treaty of the Russian Federation establishes other rules than those stipulated by law, the rules of the treaty apply (Shaw (n 425) 159). In Switzerland international agreements also prevail over all inconsistent law (Aust (n 1) 150), as is the case in the Netherlands (see *infra*).

⁵⁹⁶In the US, for example, treaties made with the advice and consent of the senate are part of the supreme law of the land, binding on judges and superseding earlier or later state laws and state constitutions, as well as earlier, but not later, federal statutes. However, treaty provisions will only be applied as such by courts if they are self-executing and do not conflict with the constitution. See Akehurst (n 124) 66; Oppenheim (n 235) 75-7; Shaw (n 425) 150-1. For an overview of the concept of self-execution, see Olivier 'Exploring the *doctrine of self-execution* as enforcement mechanism of international obligations' 2002 (27) *SAYIL* 99; Vázquez 'The Four Doctrines of Self-Executing Treaties' 1995 (89) *AJIL* 695.

in the Netherlands, the legislature has regulated not only the power to conclude provisionally applicable treaties, but also their effect under Dutch law. In accordance with section 15(3) of the State Act on the Approval and Publications of Treaties, a provision of a treaty that is apt to bind all persons by virtue of its contents shall become binding after the treaty has been published in the *Tractatenblad* together with a note that it will be applied provisionally. A provisionally applied treaty may accordingly be invoked before a national court if the treaty or some of its provisions are self-executing.⁵⁹⁷ Provisionally applied treaties thus appear to be accorded the same treatment as treaties that are in full force for the Netherlands. In the case of *Asylum Seeker 'X'*,⁵⁹⁸ the district court of The Hague had occasion to consider the effect of a treaty that was applied provisionally by the parties upon signature. The treaty in question was the 1994 Agreement between the Netherlands and Vietnam on Vietnamese Citizens in the Netherlands who have come from the former Czech and Slovak Republic.⁵⁹⁹ The agreement regulated the repatriation to Vietnam of certain Vietnamese citizens in the Netherlands whose applications for refugee status or for permanent residence had been rejected. In reviewing *inter alia* an administrative decision to decline X's application for a Dutch residence permit, the court held that the authorities could not invoke the 1994 Agreement to justify their decision. The sole reason for this was that "no value can be attached to the provision that the treaty is applied provisionally as of the date of its signature – also because the defendant [i.e. the administration] could not explain what this provision means."⁶⁰⁰ This case has been described as a "stunning public example of a court evading its responsibilities" in respect of provisional application.⁶⁰¹ For Lefeber,

"[a] national court, as an organ of the state, is responsible for the discharge of the state's obligations and that includes the provisional application of a treaty to which the competent organ has agreed within the limits of its powers."⁶⁰²

It is submitted that the fact that a treaty is applied provisionally should not in itself be a barrier to implementing the treaty under municipal law. As in the case of international

⁵⁹⁷Lefeber (n 117) 92. Since provisional application of treaty provisions is not permitted where the provisions deviate from the law or necessitate such a deviation, those provisions that do so deviate will be separable from those that conform to the law. (See Klabbers (n 568) 636.) However, where the treaty deviates from the constitution, such separability is not possible, which presumably means that an unconstitutional provisionally applied treaty will have no domestic effect even if its provisions would otherwise be regarded as self-executing.

⁵⁹⁸Referred to without citation by Lefeber, (n 117) 91-95.

⁵⁹⁹1994 *Tractatenblad* 121. The Agreement eventually became obsolete and was not submitted to parliament for approval. See Lefeber (n 117) 92.

⁶⁰⁰Para 9 of the judgement, quoted in Lefeber (n 117) 93.

⁶⁰¹Lefeber (n 117) 91-2.

⁶⁰²*Ibid* 94. However, Krenzler ((n 444) 88-9) cites a case decided by the *Hoge Raad* in the Hague on 10 December 1954, in which the court assumed the applicability of a treaty of commerce of 28 May 1935

agreements that have entered into force definitively, the application of a provisionally applied treaty may be achieved at a national level if existing law or legislation already implements it or can be interpreted to comply with the treaty.⁶⁰³ In the absence of any express stipulation, it is suggested that as a general rule the domestic effect and hierarchy of a provisionally applied treaty should be determined in accordance with the rules that apply to treaties in force definitively for the state. Such an approach would best ensure a uniform implementation of the maxim *pacta sunt servanda* at the municipal level. For example, where legislative approval is a condition for incorporation, a provisionally applied treaty would become part of domestic law once the necessary constitutional formalities have been completed, unless the legislature decides otherwise. If legislative assent is required but not obtained, the treaty would not be established under municipal law. Where treaties must be translated into national law by legislative act, a treaty that is being provisionally applied could be given domestic effect in the same manner without waiting for it to enter into force. If there are uncertainties whether or not a particular treaty will in fact enter into force, domestic effect could be delayed by postponing the incorporating legislation. Needless to say, the state will remain internationally responsible for any breaches of a provisionally applied treaty resulting from the failure to implement it domestically.

Once part of municipal law, the direct effect of particular provisions of a provisionally applied treaty may depend on whether or not they are considered self-executing. If not, further legislation may be required. Whether a provisionally applied treaty that is incorporated into national law supersedes an earlier or later law – including another incorporated treaty – will depend on the law of the forum on the hierarchy of treaties. However, an ambiguous national law should be interpreted so as to give effect to a provisionally applied treaty in accordance with the general presumption against conflict between international law and domestic law.⁶⁰⁴

Finally, there remains to be noted the possible domestic effect of a provisionally applied treaty containing a clause making the provisional application “subject to national laws” or a similar limitation.⁶⁰⁵ Such a clause will allow the executive to agree to the provisional application of a treaty without incurring the obligation to amend domestic laws that conflict with the treaty during the provisional phase. A limiting provision may cause

between the Netherlands and France, which had been provisionally applied by the signatories since 31 May 1935 but never ratified by France.

⁶⁰³For example, if customary international law forms part of the law of the land and the treaty gives expression to a particular custom.

⁶⁰⁴On this presumption generally, see Oppenheim (n 235) 81-2. On the functioning of the presumption in the law of the UK, see Aust (n 1) 155; Brownlie (n 424) 45.

⁶⁰⁵See s 3.5.5 above.

complications when found in a self-executing or directly applicable treaty that becomes part of municipal law. In those states in which treaties prevail over national laws, it could be argued that a limiting provision leads to the reversal of the normal hierarchy during the provisional period since the parties intended that this should be permitted. On the other hand, it could also be argued that the limiting provision is irrelevant for the purposes of national law because national law stipulates that treaty rules prevail. In case of doubt as to whether there is a discrepancy between a particular clause of a treaty and domestic legislation, a limiting provision should never negate the general presumption against conflict between international and national law.

5.3 Provisional application under South African law

An examination of provisional application under South African law focuses on two main issues: first, the constitutionality of provisional application and secondly, the domestic legal effect of provisionally applied treaties. By way of introduction to these questions, it is necessary to recall how South African law regulates the conclusion and status of treaties generally.

5.3.1 Treaties under South African law

In South Africa, the executive enjoyed exclusive treaty-making prerogative prior to 1994. The power to negotiate and conclude treaties, as well as the power to express the final consent of the state to be bound, vested in the head of state, who exercised this authority through ministers and officials. Thus, section 6(3)(e) of the 1983 Constitution,⁶⁰⁶ referred to the power of the head of state to sign and ratify international conventions, treaties and agreements. In traditional dualist fashion, treaties did not become the law of the land unless and until incorporated by legislative act.⁶⁰⁷ Legislative incorporation was achieved by inserting treaty provisions in an act of parliament, by annexing a treaty as a schedule to an act, or by an enabling statute authorizing the executive to make the treaty part of municipal law by means of proclamation in the *Government Gazette*.⁶⁰⁸

⁶⁰⁶ Act 110 of 1983.

⁶⁰⁷ *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* (1965 (3) SA 150 (A)).

⁶⁰⁸ On the conclusion and incorporation of treaties prior to 1994, see Dugard 'The Treaty-Making Process' 1968 (85) *SALJ* 1; Dugard *International Law: A South African Perspective* (1994) 51-7; Schaffer 'The Inter-Relationship between Public International Law and the Law of South Africa: an Overview' *ICLQ* 1983 (32) 277.

The exclusive allocation of treaty-making competence to the executive was considered unsuitable for South Africa's new parliamentary democracy. The drafters of the interim Constitution, which came into effect on 27 April 1994, therefore introduced several significant changes.⁶⁰⁹ In accordance with section 82(1)(i) of the 1993 Constitution, the president was competent to sign and negotiate treaties. In terms of section 231(2), parliament was "competent to agree to the ratification of and accession to an international agreement negotiated and signed in terms of section 82(1)(i)." There was disagreement on whether the president could conclude agreements in simplified form, entering into force upon signature alone. The prevailing view, also followed in practice, was that he could.⁶¹⁰ In order to facilitating the incorporation of international agreements into domestic law,⁶¹¹ section 231(3) provided that where parliament had agreed to the ratification of or accession to a treaty, it was binding on the Republic and formed part of South African law, provided parliament expressly so provided and such agreement was not inconsistent with the Constitution.⁶¹²

However, a drawback of the procedure foreseen in the 1993 Constitution was that it tended to make the ratification of treaties more cumbersome than previously, and few treaties ratified by parliament were incorporated into municipal law.⁶¹³ The constitutional assembly convened to draft the final constitution hence decided to retain the requirement for parliamentary approval of the ratification of treaties but to adjust the provisions on incorporation of treaties into municipal law. The final Constitution was adopted on 8 May 1996 and entered into effect, following its review by the constitutional court and amendment by the constitutional assembly, on 10 December 1996. The first three paragraphs of section 231 of the 1996 Constitution deal with the negotiation, signing and approval of international agreements:

⁶⁰⁹For a general critique of these changes, see Devine, 'Some problems relating to treaties in the Interim South African Constitution and some suggestions for the definitive constitution' 1995 (20) *SAYIL* 1; Dugard 'International law and the 'final' constitution' 1995 (11) *SAJHR* 241; Olivier 'The status of international law in South African municipal law: section 231 of the 1993 Constitution' 1993/94 (19) *SAYIL* 1.

⁶¹⁰Dugard (n 608) (1994) 344; Olivier (n 609) 8. This view was set out in a letter dated 13 June 1994 from the minister of foreign affairs to his colleagues entitled 'Procedures for the Conclusion of International Agreements'. Contra: Devine (n 609) 9-10. See also s 5.3.4 below.

⁶¹¹Dugard 'International Law and the South African Constitution' 1997 (8) *EJIL* 77 79.

⁶¹²Devine's reading of ss 231(2) and (3) was that parliament had to approve the ratification of or accession to a treaty negotiated and signed under s 82(1)(i), and confirm it by act of parliament in order for it to bind South Africa internationally. See Devine 'The relationship between international law and municipal law in the light of the interim South African Constitution 1993' 1995 (44) *ICLQ* 1 8-9, 15. However, it is submitted that only parliamentary approval was required, pursuant to s 231(2), in order to bind the state on the international plane. S 231(3) concerned the international and domestic effect of treaties and did not establish an additional constitutional requirement for their entry into force.

⁶¹³Botha 'Incorporation of Treaties under the Interim Constitution: A Pattern Emerges' 1995 (20) *SAYIL* 196; Dugard (n 611) 79; Keightley 'Public International Law and the Final Constitution' 1996 (12) *SAJHR* 405 411.

231. (1) The negotiating and signing of an international agreement is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.”

Thus, the position in South Africa today is that the national executive has the power to negotiate treaties and to sign them on behalf of the state.⁶¹⁴ The power to negotiate treaties naturally includes the power to negotiate their provisions on entry into force. From the perspective of constitutional law, this means that the executive, at least in theory, determines which treaties require ratification and which do not. In practice, however, this leeway will be limited. Treaties that entail an amendment of municipal law or that impose financial obligations will usually require ratification, as will most multilateral treaties.⁶¹⁵ Pursuant to section 231(2) of the 1996 Constitution, international agreements that require ratification, accession or other formal international act of confirmation must be approved by resolution of both chambers of parliament.⁶¹⁶ Although the constitution is silent on who has

⁶¹⁴In practice this power will be exercised, as in the past, through the minister for foreign affairs and other authorized ministers and officials.

⁶¹⁵It is still open to parliament to pass a law stipulating which treaties require ratification and which may enter into force upon signature alone. The office of the chief state law adviser (international law) lists as requiring parliamentary approval in terms of section 231(2) of the 1996 Constitution international agreements that (1) require ratification or accession (usually multilateral agreements); (2) have financial implications that require an additional budgetary allocation from parliament; or (3) have legislative or domestic implications (e.g. require new legislation or legislative amendments). See Department of Foreign Affairs *Practical Guide and procedures for the conclusion of Agreements* 13).

⁶¹⁶Keightley argues that parliamentary agreement “would have the effect of ratification” and that “the treaty would have no international effect without parliament’s assent”. (Keightley (n 613) 409.) Regarding s 231(2) of the 1993 Constitution (which is substantially similar to s 231(2) of the 1996 Constitution), Devine contends, with reference to a 46 of the 1969 Vienna Convention, that “unless parliamentary assent is present, a ratification or accession to a treaty will not bind South Africa in international law.” The non-observance of the procedure in s 231(2) would, he argues, result in a void treaty. (Devine (n 612) 8-9.) These views call for several observations. First, as Olivier points out, “acts of national parliaments are not a recognised way for states to become party to international agreements.” (Olivier (n 596) 116.) Secondly, if the executive ratified a treaty without obtaining parliamentary approval, that ratification would remain valid and would only be *voidable* if the conditions of a 46(1) of the 1969 Vienna Convention were fulfilled. A South African court might declare unconstitutional the act of ratification absent parliamentary approval, which may or may not entail political consequences domestically, but the court’s ruling would not in itself affect the lawfulness of the ratification on the international plane. Parliament could, for example, remedy the unconstitutionality by granting *ex post facto* approval of the treaty. Thirdly, Devine’s view does not adequately reflect the fact that in order for a state to invoke a 46(1), the violation of its internal law must not only concern a provision of “fundamental importance” (which s 231(2) undoubtedly is); the violation in question must also be *manifest*. A violation will be manifest if it is “objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith” (a 46(2)). This, as has already been noted (s 3.5.4 above), is a formidable test, particularly considering the principle articulated by the ICJ in the case of *Cameroon v Nigeria* (n 368) that “there is no general legal obligation for states to keep themselves informed of legislative and constitutional developments in other States which are or may become important for the international relations of these States.” If a government were to ratify a treaty in the mistaken belief that parliament had approved it, or possibly even in disregard of the rights of parliament, it would be difficult for the state to invoke a 46 successfully. The effect of a 46(1) was considered by the constitutional court in the case of *Harksen*, in which

the power to sign and deposit or exchange instruments of ratification, this function falls naturally to the executive as a corollary of the power to sign treaties and to conduct the foreign relations of the state.⁶¹⁷ The executive is not compelled to ratify a treaty that parliament has approved.⁶¹⁸ In accordance with section 231(3), technical, administrative or executive treaties and treaties which do not require either ratification or accession need not be approved by parliament before entering into force but they must be tabled in parliament within a reasonable period. An agreement of a technical, administrative or executive nature that requires ratification or other formal act of approval need not be submitted to parliament before the executive expresses the final consent of the state to be bound by it. As has been pointed out, “whether a treaty is in fact one of a ‘technical, administrative or executive nature’ remains a question of interpretation.”⁶¹⁹

On the effect and hierarchy of treaties under South African law, section 231(4) of the 1996 Constitution is predominantly dualist:

“(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

In accordance with section 231(4), therefore, treaties must now be incorporated into law by act of parliament before they may be applied by the courts, with the exception of self-executing provisions of treaties approved by parliament, which apply unless inconsistent with the Constitution or an act of parliament.⁶²⁰ However, since all law in

Goldstone J opined by way of *obiter dictum* that “[i]t is unlikely that an international agreement entered into in breach of the provisions of a national constitution that govern international agreements would constitute anything but a ‘manifest’ violation concerning a law of ‘fundamental importance’.” (See *Harksen v President of the Republic of South Africa and Others* 2000 (5) BCLR 478 (CC) para 27.) However, in coming to this conclusion, the court unfortunately failed to refer to the stringent requirements of a 46(2), in terms of which “[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”

⁶¹⁷Cf Devine ((n 609) 11-14) on the signing and deposit of instruments of ratification under the 1993 Constitution.

⁶¹⁸Devine (n 612) 8; Devine (n 609) 13. The executive could, however, be compelled by act of parliament to ratify a particular treaty. As “an aspect of foreign policy which is essentially the function of the executive”, the decision of the executive whether or not to ratify a treaty should be subject only to limited judicial review in accordance with the principles recently established by the constitutional court in *Kaunda and others v President of the Republic of South Africa* (CCT23/04).

⁶¹⁹Keightley (n 613) 414. Practical guidelines for determining whether an agreement falls within the ambit of section 231(3) are listed in the *Practical Guide and procedures for the conclusion of Agreements* ((n 615) 12). These are that the agreement (1) does not require ratification or accession; (2) has no extra-budgetary financial implications; and (3) does not have legislative implications.

⁶²⁰On the concept of self-executing treaties in South Africa, see Olivier (n 596). Olivier argues that s 231(2) indirectly reinforces the notion of self-executing treaties and that its use of the word ‘binds’ “recognises the fact that international agreements approved by parliament are binding in South Africa in terms of South African law”. (Olivier (n 596) 116.) However, the preferred view is that s 231(2) prescribes the national procedure for the approval of treaties as a condition for their ratification and is not concerned with the effect of such treaties under municipal law, which is laid out in s 231(4). See Stemmet ‘The Influence of Recent

South Africa must comply with the Constitution, a treaty enacted into law by national legislation will only be applicable in so far as it is constitutional.

Under the 1996 Constitution, treaties may also serve an interpretative function. In accordance with section 233, when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. Furthermore, section 39(1) stipulates that when interpreting the bill of rights,⁶²² a court, tribunal or forum *inter alia* must consider international law. For the purposes of both these sections ‘international law’ self-evidently includes treaties.

5.3.2 Constitutionality of provisional application in South Africa

5.3.2.1 Prior to 1994

Prior to 1994, the executive enjoyed unfettered power to select the method of entry into force of international agreements in accordance with international law. Treaties could be made to come into force upon signature or ratification or exchange of instruments, or in accordance with whatever formula the circumstances required. The power of the head of state to sign and ratify international conventions, treaties and agreements in accordance with section 6(3)(e) of the 1983 Constitution also implied the power to agree to the provisional application or entry into force provisionally of a treaty or part of a treaty, pending its entry into force definitively.

5.3.2.2 1993 Constitution

The interim Constitution of 1993 did not expressly regulate the power to agree to the provisional application of a treaty. Several of its provisions are, however, relevant by implication. Pursuant to section 231(4), “the rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic.” This provision in essence confirmed the situation

Constitutional Developments in South Africa on the Relationship Between International Law and Municipal Law’ 1999 (33) *International Lawyer* 47 57.

⁶²¹In accordance with the section 2 of the 1996 Constitution, the “Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

⁶²²Ch 2 of the 1996 Constitution contains the bill of rights.

under the common law. In accordance with section 231(4), therefore, it would appear that the customary international law of treaties as a whole was law in South Africa in so far as it was consistent with the Constitution and national legislation.⁶²⁴ Although section 231(4) was described as “a great improvement from the point of view of clarity”,⁶²⁵ it is not free from ambiguity. By referring to rules of customary international law that are *binding* on South Africa, the question arises whether section 231(4) introduced a distinction between compulsory rules of customary international law, which are of course binding, and those customary rules that are merely permissive or elective, which are not binding as such.⁶²⁶ If this were the case, then section 231(4) would not have made the customary international law of provisional application part of the law of South Africa.

It is submitted, however, that the phrase ‘binding on the Republic’ should not be interpreted to mean that permissive rules of general customary international law were not part of South African law to the extent permitted by the 1993 Constitution. Rather, the term *binding* in section 231(4) distinguished between, on the one hand, binding rules of general customary international law and customary rules to which South Africa had consented, and, on the other hand, non-binding customary norms, such as emerging customs, inapplicable regional customs, and, possibly, customs to which South Africa had persistently objected.⁶²⁷ To describe permissive customary rules as not binding would be an inappropriate simplification. While states may not be obliged to make use of permissive customs, once they do so they are bound to act in accordance with the content of the rule in question. Finally, it would be strange indeed if section 231(4) were interpreted to mean that only compulsory rules of customary international law were part of South African law but not beneficial permissive norms that afford the state a right or an opportunity rather than an obligation.

⁶²³See Dugard (n 608) (1994) 43. See also Devine (n 612) 2, 14. Booysen reaffirmed his earlier doubts about the common law position in Booysen ‘The administrative law implications of the ‘customary international law is part of South African law’ doctrine’ 1997 (22) *SAYIL* 46.

⁶²⁴Olivier (n 609) 4-5.

⁶²⁵Devine (n 612) 12.

⁶²⁶Under English law there is authority for distinguishing between the municipal application of those rules of customary international law which prohibit or dictate a certain course of conduct and those which are permissive. According to Oppenheim ((n 235) 57), “[t]he existence of such a permissive rule of international law does not necessarily mean that an English court will assume that English law will contain rules to the full extent permitted by international law.”

⁶²⁷Devine (n 612) 12. Stemmet ((n 620) 53) argues that the inclusion of the phrase ‘binding on the Republic’ could not have been to make the persistent objector principle applicable in South Africa since “[i]t is a clear principle of international law that a state is not bound by the rules of international law against which it has persistently objected.” Similarly, Botha argues that the phrase ‘binding on the Republic’ is tautologous as “there is no way in which a state will be bound by a custom it opposes consistently”. See Botha ‘International Law and the South African Interim Constitution’ 1994 (9) *South African Public Law* 245 255.

provided that provisional application was not otherwise inconsistent with the 1975 Constitution, section 231(4) confirmed that under South African law the *state* might enter into an agreement applying all or part of a treaty provisionally pending its definitive entry into force.⁶²⁸ It will be recalled that in accordance with section 231(2), parliament had to agree to the ratification of or accession to treaties negotiated and signed by the president pursuant to section 82(1)(i). Taking into consideration that provisional application produces the same effects as ratification on the international plane, it might be argued that parliamentary approval was a prerequisite for agreeing to provisional application. That it was nevertheless constitutional for the executive to bind the state to apply a treaty provisionally without seeking prior parliamentary approval may be inferred from the same sections, sections 82(1)(i) and 231(2). Since agreement on provisional application is generally reached during the negotiation of a treaty and is often achieved by signing it, section 82(1)(i) by implication empowered the president to agree to the provisional application of a treaty upon signature alone.⁶²⁹ Many agreements on provisional application are themselves treaties in simplified form which become binding without subsequent act of approval. Inasmuch as section 231(2) established a role for parliament only with respect to those treaties actually requiring ratification or accession,⁶³⁰ the executive could validly enter into agreements on provisional application in simplified form without breaching the Constitution. The authority of the legislative branch was not compromised thereby: if parliament failed to approve a provisionally applied treaty, ratification would not have been possible and the executive could have been compelled to terminate the provisional application.

5.3.2.3 1996 Constitution

The situation prevailing under the 1993 Constitution is essentially the same under the Constitution of 1996. The customary right of the state to enter into provisionally applicable treaties is recognized by section 232 of the Constitution, which stipulates that “[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”⁶³¹ Unless the agreement on provisional application

⁶²⁸It cannot be argued that, because customary international law is the law of the land, the *executive* has a right to agree to the provisional application of a treaty. Under international law it is the *state* that enjoys such a right. The executive represents the state in exercising that right only to the extent authorized by municipal law.

⁶²⁹Of course, if an agreement on provisional application itself stipulated that it must be ratified, a theoretical possibility never found in practice, the approval of parliament would have been required before the provisional application could commence.

⁶³⁰See n 610 above and related text.

⁶³¹In *Harksen's* case (n 616 para 26), Goldstone J held that although the extent to which the 1969 Vienna Convention reflects customary international law is by no means settled, he would assume in favour of the

itself requires ratification, the power of the executive to agree to the provisional application of a treaty without prior parliamentary approval is established by section 231(1) and section 231(3) of the 1996 Constitution. Under section 231(1), the executive is authorized to negotiate and sign international agreements, which includes the power to negotiate and sign agreements on provisional application. That the provisional application may commence without parliamentary consent is inferred from section 231(3). In accordance with that section an “agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession” binds the state without legislative approval but must be tabled in parliament within a reasonable time. Section 231(3) thus sanctions provisional application in three circumstances: (1) where the treaty that is provisionally applied is of a technical, administrative or executive nature; (2) where the agreement on provisional application of a treaty is itself an agreement of a technical, administrative or executive nature; and (3) where the agreement on provisional application of a treaty is one that requires neither ratification nor accession. Each approach arguably encompasses the various methods by which a state may agree to apply a treaty provisionally, including a provision in the treaty itself, an agreement in simplified form, a resolution of a conference, or a notification or declaration of provisional application.⁶³² Whatever form it takes, an agreement on provisional application must be tabled in the national assembly and the national council of provinces within a reasonable time. Failure to do so may constitute a breach of the Constitution.

5.3.3 Effect of provisionally applied treaties under South African law

In accordance with the principle set out in the *Pan American World Airways* case,⁶³³ treaties could become law in South Africa prior to 1994 only by incorporation through legislative act. Although the question never came before the courts, this principle probably pertained as much to provisionally applied treaties as to treaties that had entered into force definitively for South Africa. Under of the 1993 Constitution, there were two methods by which an international agreement could become part of South African law. As before, parliament had the power to incorporate a treaty, including any provisionally applied treaty, by legislation. Thus incorporated, a provisionally applied treaty achieved the same status as national legislation. In addition, where parliament had agreed to the ratification of or accession to a treaty, that treaty formed part of South African law provided parliament so provided and the treaty was not inconsistent with the Constitution (section 231(3)). The

appellant that the provisions of a 46(1) of the convention do reflect customary international law and are accordingly part of South African law.

⁶³²See ss 3.1.1 and 3.1.2.

determining factor being the intention of parliament and not the status of the treaty, a provisionally applied treaty whose ratification parliament had approved could also have become law in South Africa if parliament so provided and the treaty was not inconsistent with the Constitution.⁶³⁴ In that case, the treaty would have the status of an act of parliament: in the event of a conflict it would prevail over an earlier statute, but would of course be subject to the Constitution and subsequent amending legislation.

Section 231(4) of the 1996 Constitution stipulates that any international agreement becomes law in South Africa when it is enacted into law by national legislation.⁶³⁵ However, a self-executing provision of an agreement that has been approved by parliament is law in South Africa unless it is inconsistent with the Constitution or an act of parliament. It is noteworthy that section 231(4) does not make the definitive entry into force of a treaty for South Africa a condition for its enactment into domestic law. Rather, it speaks of *any* international agreement, which could include an international agreement to which South Africa is not a party. From the provisions of section 231(4) one may therefore conclude the following: (1) the provisional application of a treaty is not a constitutional impediment to its enactment into South African law; (2) a provisionally applied treaty enacted into law by parliament will become law in South Africa on the date fixed by the legislator or by the executive pursuant to enabling legislation; (3) a provisionally applied treaty enacted into law will have the status of an act of parliament and will be law in South Africa whether or not it continues to be provisionally applied thereafter;⁶³⁶ (4) a self-executing provision of a provisionally applied treaty that has been approved by parliament (but not enacted into legislation) will be law in South Africa in so far as it is consistent with the Constitution and earlier and subsequent acts of parliament; (5) where a provisionally applied treaty approved by parliament (but not enacted into legislation) contains a limiting provision, for example, making the provisional application subject to national law,⁶³⁷ the effect of any self-executing provisions it contains will be the same as under (4) since section 231(4) already makes the direct application of treaty provisions subject to the Constitution and acts of

⁶³³N 607 above.

⁶³⁴Commenting on s 231(3) of the 1993 Constitution, Devine argued that only treaties actually ratified and therefore binding under international law should be incorporated into South Africa law. See Devine (n 609) 16. It is submitted that since a provisionally applied treaty is also binding under international law, its provisional status should in principle not be an obstacle to its incorporation.

⁶³⁵In the case of *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* (1996) (8) BCLR 1015 the constitutional court held that “[i]nternational conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment.”

⁶³⁶The provisional application of a treaty may continue after South Africa has ratified it, pending ratification by the other party or parties.

⁶³⁷See ss 5.2.2 and 3.5.5 above.

parliament, (b) since, however, section 231(4) omits any reference to subordinate legislation, a self-executing provision of a provisionally applied treaty approved by parliament will take precedence over such legislation, probably also where there is a provision in the agreement making the provisional application subject to national laws and/or regulations.

What would occur if the executive decided not to ratify a provisionally applied treaty that is part of South African law? Circumstances in which the executive may decline to ratify a treaty approved by parliament include the refusal of the other party or parties to ratify it, the obsolescence of the entire treaty or the need to renegotiate some of its terms. In deciding not to ratify the treaty, the executive could choose either to terminate its provisional application (provided the agreement on provisional application did not actually prohibit this) or to allow the provisional application to continue. Where the treaty had been enacted into South African law, parliament could be invited to repeal or amend the relevant incorporating legislation, which would of course remain valid until it did so. The situation would be more complex when dealing with self-executing provisions of a treaty approved by parliament. If the executive terminated the provisional application, would the self-executing provisions of the treaty preserve their validity as law in South Africa? In principle, they should not but the intervention of parliament might be necessary to deprive them of that status.

In accordance with section 233 of the 1996 Constitution, when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. In this context, it is submitted that ‘international law’ includes not only treaties that have entered into force for South Africa but also those treaties that it applies provisionally, both of which impose obligations on the international plane. Although human rights instruments are not usually subject to the procedure, for the purposes of section 39(1) on the interpreting the bill of rights, ‘international law’ should include any relevant treaty being applied provisionally.

5.3.4 Provisional application in South African treaty practice

One of the first treaties to be provisionally applied by South Africa was the 1937 International Whaling Agreement.⁶³⁸ Recourse to provisional application has, however,

⁶³⁸See s 4.2.2.5 above.

only occasionally been necessary in South African treaty practice. The governments of the Union of South Africa and of the Republic prior to 1994 enjoyed a flexibility in signing and ratifying treaties that rendered the procedure largely unnecessary. In urgent cases, an agreement in simplified form could be used instead. Where provisional application was utilized, this seems to have been at the instance of the other party or parties. Thus, article 11, paragraph 1, of the 1959 Agreement relating to air services between South Africa and Switzerland,⁶³⁹ stipulates as follows:

“This agreement shall be applied provisionally as from the date on which it is signed and it will enter into force on the day on which the Swiss Federal Council notifies its ratification to the Government of the Union of South Africa.”⁶⁴⁰

Other treaties provisionally applied by South Africa prior to 1994 include the 1947 General Agreement on Tariffs and Trade;⁶⁴¹ the 1954 International Agreement concerning the Institute of Refrigeration;⁶⁴² the 1992 Constitution and Convention of the ITU;⁶⁴³ the 1993 bilateral air transport agreement between South Africa and France;⁶⁴⁴ and several of the International Sugar Agreements.⁶⁴⁵ South Africa also became an original member of the Preparatory Commissions for the OPCW and the CTBTO.⁶⁴⁶

Under the 1993 Constitution, the executive agreed to the provisional application of several international agreements. President Mandela himself signed the Basic Agreement concerning assistance by the United Nations Development Programme to the Government of South Africa⁶⁴⁷ in New York on 3 October 1994. Article XIII, paragraph 1, of the agreement provides *inter alia*:

⁶³⁹N 149 above.

⁶⁴⁰Under South Africa’s constitutional arrangements signature alone sufficed to bind the state, whereas Switzerland needed to submit the treaty to its internal process of approval before ratifying it.

⁶⁴¹See s 2.1.1 above. South Africa signed the Protocol of Provisional Application of the GATT (n 135) on 13 June 1948.

⁶⁴²See n 131 above. South Africa provisionally applied the agreement from the date of signature on 1 December 1954 until ratifying it on 20 December 1955.

⁶⁴³For one day only. The 1992 Constitution and Convention of the ITU (n 195 above) came into force provisionally on 1 May 1993 for all members of the ITU in accordance with resolution 1 of the ITU plenipotentiary conference concerning the provisional application of the provisions of the constitution and convention relating to the new structure and working methods of the ITU. South Africa acceded to the 1992 Constitution and Convention on 30 June 1994 and the two instruments entered into force definitively one day later on 1 July 1994.

⁶⁴⁴1916 UNTS 157. The agreement entered into force provisionally on 8 October 1993 by signature and definitively on 26 April 1995, the date on which the parties notified each other of the completion of the constitutional requirements, in accordance with a 21.

⁶⁴⁵The International Sugar Agreements of 1968, 1973, 1977 and 1992, following the deposit of instruments of ratification. South Africa signed the 1984 and 1987 International Sugar Agreements but the depositary does not record South Africa’s having ratified them.

⁶⁴⁶See ss 6.4.1-2 and 6.4.3 below.

⁶⁴⁷1828 UNTS 157.

This Agreement shall be subject to ratification by the Parliament of the Republic, and shall come into force upon receipt by the UNDP of the notification from the Government of its ratification. Pending such ratification, it shall be given provisional effect by the Parties.”

The 1994 Agreement Relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea was provisionally applied by South Africa from 3 October 1994 until the Republic ratified it on 23 December 1997. South African provisionally applied the 1995 Grains Trade Convention⁶⁴⁸ from 16 August 1995 until acceding to it on 14 November 1996. In that case, provisional application was achieved by notification in accordance with article 26 of the convention.

Under the 1996 Constitution, one of the most notable treaties to be applied provisionally was the 1997 Ottawa Convention banning anti-personnel land mines.⁶⁴⁹ South Africa signed the convention on 3 December 1997. Upon ratifying it on 26 June 1998, South Africa made a declaration of provisional application of the basic prohibitions contained in article 1, paragraph 1 of the convention. More recently, three crucial agreements concluded with European Community have been applied provisionally. These are the Agreement on Trade, Development and Cooperation,⁶⁵⁰ which was signed at Pretoria on 11 October 1999, and two agreements dealing with trade in wine and spirits respectively, which were signed (appropriately enough) at Paarl on 28 January 2002.⁶⁵¹ In each case provisional application was achieved by means of an associated agreement in the form of letters exchanged on the same day.⁶⁵² In approving the exchanges of letters provisionally applying the agreements on trade in wine and spirits, the council of the European Union specified that provisional application was necessary “pending the completion of the procedures required by South Africa to bring the Agreement into force.”⁶⁵³

⁶⁴⁸1882 *UNTS* 197. Together with the Food Aid Convention, the Grains Trade Convention forms part of the International Grains Agreement.

⁶⁴⁹See s 6.3.4 below. The convention was incorporated into South African law in terms of the Anti-Personnel Mines Prohibition Act (No 36 of 2003).

⁶⁵⁰Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part (1999 (311) *OJ L* 0003), provisionally applied in part from 1 January 2000 until its entry into force on 1 May 2004.

⁶⁵¹Agreement between the European Community and the Republic of South Africa on trade in wine (2002 (028) *OJ L* 0004); Agreement between the European Community and the Republic of South Africa on trade in spirits (2002 (028) *OJ L* 0113).

⁶⁵²(1) Agreement in the form of an exchange of letters concerning the provisional application of the Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part (1999 (311) *OJ L* 0002); (2) Agreement in the form of an exchange of letters providing for the provisional application of the Agreement between the European Community and the Republic of South Africa on trade in wine as from 28 January 2002 (2002 (028) *OJ L* 0130); (3) Agreement in the form of an exchange of letters providing for the provisional application of the Agreement between the European Community and the Republic of South Africa on trade in spirits as from 28 January 2002 (2002 (028) *OJ L* 0132).

⁶⁵³Preamble, para 1, of council decisions 2002/53/EC (2002 (028) *OJ L* 0130) and 2002/54/EC (2002 (028) *OJ L* 0131). Similarly, the decision approving the exchange of letters on the provisional application of the

The agreements with the European Community and especially the 1995 GATS Trade Convention and the 1997 Ottawa Convention perhaps reflect a new approach to provisional application in South African practice. In each case, provisional application was agreed not, as in the past, simply because the other party or parties had requested it. Rather, provisional application of these international agreements served as a means of gaining some immediate advantage for the country internationally in circumstances where the agreement in question required parliamentary approval before it could enter into force. Nevertheless, South Africa's use of the technique of provisional application may remain limited. International agreements of a technical, administrative or executive nature, such as bilateral air services agreements, are exempt from parliamentary approval. Such agreements are very often applied provisionally to accommodate domestic constitutional requirements, but in South Africa's case this will not be necessary unless proposed by the other party or parties. In addition, section 231(1) and section 231(3) of the Constitution together grant the executive the authority to elect the manner of entry into force of international agreements. While this power will not affect the usual practice of requiring ratification of multilateral treaties, many bilateral treaties can be made to enter into force without ratification, thereby reducing the need for South African negotiators to make proposals for clauses on provisional application. Nonetheless, if there is a desire to enhance the role of parliament in the treaty-making process without delaying the benefits of a treaty, the possibility of providing for provisional application should not be overlooked.

1999 Agreement on Trade, Development and Cooperation stated that provisional application was necessary to provide a comprehensive framework of cooperation between the Community and South Africa "pending the completion of the procedures required to bring the said Agreement into force." See preamble, para 2, of council decision 1999/753/EC (1999 (311) *OJ L* 0001). The proposal for provisional application of the agreements on wine and spirits appears to have originated from the European Commission, negotiating on behalf of the Community. Speaking in the national assembly on 16 February 2000, the minister for trade and industry stated that:

"... this morning we received a letter from the president of the European Commission, President Prody, putting forward a proposal on this agreement. It contains three elements: firstly, that the provisional application will be implemented; secondly...." (Emphasis added.) See *Hansard* 16 February 2000.

The provisional application of arms control, disarmament and non-proliferation instruments

Having conducted an overview of the law of provisional application in general, let us now examine provisional application in the branch of international law governing arms control, disarmament and non-proliferation, or arms control for short.⁶⁵⁴ Although treaties dealing with the limitation of armaments have been an important objective of state policy for nearly two centuries,⁶⁵⁵ the law of arms control has not been as well studied as other areas of international law.⁶⁵⁶ Despite this comparative neglect, it must now be accepted that the law of arms control occupies an important place in international law, not least because of its supportive role in efforts to achieve international peace and security. Nuclear weapons, the ultimate weapons of mass destruction, have been the subject of a celebrated advisory opinion by the ICJ of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*.⁶⁵⁷ The importance of the law of arms control was also dramatically highlighted by the events leading to the invasion of Iraq in March 2003, when the Iraqi government's alleged breach of its disarmament and non-proliferation obligations became the *casus belli*.⁶⁵⁸

The principal focus of efforts to achieve arms control has traditionally been to conclude binding international agreements. It has even been suggested that “the supremacy

⁶⁵⁴The term ‘arms control’ is a comprehensive expression meaning to limit, regulate or otherwise restrain the quantity and quality of weapons of war. Synonymous expressions include ‘arms limitation’ and ‘arms regulation’. ‘Disarmament’ simply means a reduction in fighting capacity (McLean (ed) *The Concise Oxford Dictionary of Politics* (1996) 142). Disarmament may be forced upon a vanquished enemy as part of a peace settlement or mutually agreed among two or more powers. Although the concepts of arms control and disarmament largely overlap, they are not identical. Disarmament measures may include mandatory restrictions on, for instance, the possession, manufacture or acquisition of weapons, which amount to measures of arms control. Disarmament may also mean limits on military personnel, fortifications and naval installations, which are not weapons as such and therefore fall outside the ambit of arms control. On the other hand, arms control includes the possible regulation of the use and transfer of weapons, which are not the objectives of disarmament. The expression ‘non-proliferation’ refers to prohibitions on the transfer mainly of non-conventional weapons or weapons of mass destruction, as well as of the knowledge, skills, components and delivery systems relating to such weapons. Weapons of mass destruction include in particular nuclear, biological and chemical weapons, whose vast destructive potential distinguishes them from conventional weapons.

⁶⁵⁵For a history of disarmament efforts in the nineteenth century, see Wehberg *The Limitation of Armaments: A Collection of the Projects Proposed for the Solution of the Problem* (1921).

⁶⁵⁶Textbooks on international law seldom devote much space to the topic. As recently as 1991, one observer noted that the failure to investigate this branch of international law had resulted in a hiatus in the science of international law. (See Feldman ‘The Place of Arms Control and Disarmament in the System of International Law’ in Dahlitz and Dicke (eds) *The International Law of Arms Control and Disarmament* (1991) 35.). It has also been pointed out that there is no complete list of relevant treaties and that existing lists vary. (See Kolasa *Disarmament and Arms Control Agreements – A Study on Procedural and Institutional Law* (1995) 1.)

⁶⁵⁷1996 ICJ Rep 226.

⁶⁵⁸Press conference held by the heads of state or government of Portugal, Spain, the UK and the US on 16 March 2003 at their summit on the Azores, reported in the *Guardian* of 17 March 2003.

of treaties has crystallized as a new basic principle of customary international law, at least in the field of arms limitation".⁶⁵⁹ The law of arms control is thus mainly a synthesis of rules and principles contained in various multilateral and bilateral arms control treaties regulating conventional and non-conventional weapons. Besides treaties, other sources of arms control law include customary international law,⁶⁶⁰ general principles of law,⁶⁶¹ resolutions of international organizations,⁶⁶² unilateral commitments,⁶⁶³ and non-treaty instruments giving rise to international collaboration.⁶⁶⁴ Experience suggests that the importance of these subsidiary sources is increasing with time.⁶⁶⁵ Nevertheless, the law of arms control remains primarily treaty-based.⁶⁶⁶ The place of international agreements in the law of arms control gives the technical rules of treaty making a particular significance in this branch of international law. Little consideration is given in the literature to the provisional application of arms control treaties.⁶⁶⁷ Given the delays in the entry into force of certain arms control treaties, it is more relevant than ever to consider what role provisional application can and does play in this field.

6.1 Characteristics of arms control treaties

Arms control treaties exhibit a number of special features that collectively distinguish them from other types of treaties. Prominent among these are their

⁶⁵⁹Dahlitz 'The Role of Customary Law in Arms Limitation' in Dahlitz & Dicke (n 656) 157-170.

⁶⁶⁰For example, the prohibition on the use of chemical weapons contained in the 1925 Geneva Protocol (n 675 below), the ban on atmospheric and under water nuclear tests contained in the PTBT (n 685 below), and the principle of the demilitarization of the Antarctic contained in the 1959 Antarctic Treaty (402 *UNTS* 71).

⁶⁶¹For example, the principle prohibiting the employment in armed conflicts of weapons of a nature to cause superfluous injury or unnecessary suffering, a principle that also forms the basis of much international humanitarian law.

⁶⁶²Several UN Security Council resolutions containing decisions pursuant to ch VII of the UN Charter establish binding arms control norms. By resolution 1284 of 17 December 1999, the Security Council decided to establish a subsidiary body, the UN Monitoring, Verification and Inspection Commission, to verify compliance by Iraq with its disarmament obligations under earlier Security Council resolutions. In terms of resolution 1540 of 28 April 2004, the Security Council decided *inter alia* that "all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery." See also Fleck 'Developments of the Law of Arms Control as a Result of the Iraq-Kuwait Conflict' 2002 (13) *EJIL* 105.

⁶⁶³Unilateral commitments may gain treaty recognition. This occurred with the renunciation of atomic, biological and chemical weapons by the Federal Republic of Germany, which was incorporated as a 1 of Protocol No III on the Control of Armaments of 23 October 1954 to the Brussels Treaty on the Western European Union (211 *UNTS* 364).

⁶⁶⁴For example, the 1996 'Initial Elements' establishing the Wassenaar Arrangement on export controls for conventional arms and dual-use goods and technologies (see <http://www.wassenaar.org>); and the 1999 Vienna Document, a compendium of confidence- and security-building measures adopted by OSCE members (see <http://www.osce.org>).

⁶⁶⁵This is the case at least with non-binding sources: see Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (2000) ch 8 'Multilateral Arms Control' 465.

⁶⁶⁶See 2000 (69) *ILA Rep* 224.

⁶⁶⁷Kolasa (n 656) does not mention the possibility of provisional application in his study (1995) of the institutional and procedural law of disarmament and arms control agreements.

requirements for entry into force, which will be examined in greater detail than the general characteristics mentioned below.

6.1.1 General

As a rule, arms control treaties deal with subjects of great sensitivity and national importance to states. They may affect the security of the state and the interests of powerful domestic actors such as the armed forces and armaments producers. To protect the concerns of all the negotiating parties, decision-making in multilateral arms control negotiations is usually by consensus. The rules of procedure of the conference on disarmament in Geneva, for example, provide that the conference “shall conduct its work and adopt its decisions by consensus.”⁶⁶⁸ Bearing in mind the maxim *dolus latet in generalibus*, arms control treaties tend to describe all matters arising under the treaty in great detail, frequently in protocols, annexes and associated agreements of a highly technical nature. This practice avoids ambiguity and ensures that there is no possibility of inferred consent or implied agreement among the parties.⁶⁶⁹ The specific measures of control agreed upon vary from treaty to treaty and may, *inter alia*, include a prohibition or restriction on the acquisition, development, production, testing, placement, stockpiling, transfer, use and/or destruction of particular armaments.

Many arms control treaties establish mechanisms to monitor or verify the parties’ compliance with the limits imposed by the treaty. Verification techniques vary in intrusiveness depending on the technologies available and the subject matter of the treaty. Non-intrusive measures such as reporting requirements are typically designed to establish confidence and cooperation among the parties. Where the treaty sets up a complex verification system including permanent sensors and on-site inspections, this system will provide the assurance that the treaty is in fact being observed and present a deterrent against possible breaches by making the detection of such breaches highly probable.⁶⁷⁰ In the case of complaints about non-compliance, verification measures may enable the party

⁶⁶⁸S 18 of the rules of procedure of the CD (CD doc CD/8/Rev.8 dated 17 August 1999). This rule resulted in the inability of the CD to adopt the text of the CTBT in 1996, mainly due to the opposition of India. The Indian position is recorded in CD doc ‘Report of the Conference on Disarmament to the General Assembly of the United Nations’ (CD/1436 dated 12 September 1996) 27-30. A group of states led by Australia thereupon resorted to the novel expedient of transmitting the final version of the treaty to the UN secretary-general for submission to the general assembly, where it was adopted by resolution 50/245 on 10 September 1996.

⁶⁶⁹Dahlitz ((n 659) 162) even refers to an “obsession to anticipate every trivial application of detail in ever longer treaty texts”!

⁶⁷⁰On verification of compliance with arms control treaties generally, see Dekker *The Law of Arms Control: International Supervision and Enforcement* (2002); Potter *Verification and Arms Control* (1985); Szasz

whose conduct is in issue to demonstrate conclusively its observance of the treaty. The verification measures may be implemented by the parties unilaterally or collectively, or by an international bureaucracy mandated to do so under the treaty.⁶⁷¹ The stringency, complexity, intrusiveness and expense of verification of compliance are features unique to arms control treaties.

The parties to arms control treaties are generally not permitted to make reservations. This facilitates adherence to the treaty by guaranteeing a strict reciprocity of undertakings. Arms control treaties normally do not provide for compulsory adjudication or arbitration.⁶⁷² Whereas earlier agreements lacked clauses for settling disputes,⁶⁷³ multilateral arms control treaties now provide for dispute settlement procedures in accordance with the Charter of the United Nations, with possible reference to the security council.⁶⁷⁴

6.1.2 Requirements for entry into force

Many governments would be reluctant to commit themselves to implementing any limit on the nation's defence capabilities without prior parliamentary approval. As a result, arms control agreements usually require ratification or a similar act of approval. Sometimes the measures foreseen in a multilateral arms control treaty are of such widely acknowledged benefit that the treaty requires the ratification of only a limited number of states in order to enter into force. Thus, the 1925 Geneva Protocol,⁶⁷⁵ which prohibited the use in war of poison gas and bacteriological methods of warfare, provided for the simplest mode of entry into force consistent with the requirement of ratification:

“The present Protocol will come into force for each signatory Power as from the date of deposit of its ratification, and, from that moment, each Power will be bound as regards other Powers which have already deposited their ratifications.”

Administrative and Expert Monitoring of International Treaties (1999) part 3 ‘Nuclear Safety and Disarmament’ 193.

⁶⁷¹Szasz has even suggested there is a ‘clutter’ of arms control regimes and arrangements. See Szasz ‘The Proliferation of Arms Control Organizations’ in Blokker & Schemers *Proliferation of International Organizations* (2001) 135-149.

⁶⁷²Dahlitz (n 659) 160.

⁶⁷³Kolasa (n 656) 5, who refers to the PTBT, NPT and the Inhumane Weapons Convention (see n 681 below).

⁶⁷⁴2000 (69) *ILA Rep* 233. See, for example, a XIV of the CWC and a VI of the CTBT.

⁶⁷⁵The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925 (94 *LNTS* 66). The protocol is the principal surviving arms control treaty from the period between the two world wars.

Similarly, article XXV of the 1997 Inter-American Convention against the illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials⁶⁷⁶ provides:

“This Convention shall enter into force on the 30th day following the date of deposit of the second instrument of ratification....”

In the case of multilateral arms control treaties, the number of ratifications required will frequently reflect a balance of considerations such as a desire to bring the treaty into force as rapidly as possible (the higher the number of ratifications, the longer the period), and the need to give the treaty a sense of legitimacy (the lower the number of ratifications, the lower the legitimacy). Given that the 1992 Chemical Weapons Convention⁶⁷⁷ introduced an absolute prohibition of chemical weapons and established a new international organization, article XXI, paragraph 1, of the convention provided for the deposit of 65 instruments of ratification in order for it to enter into force.⁶⁷⁸ Article 17, paragraph 1, of the 1997 Ottawa Convention⁶⁷⁹ called for the deposit of instruments of ratification, acceptance or approval by 40 states.⁶⁸⁰ Reflecting its humanitarian origins, the 1980 Inhumane Weapons Convention⁶⁸¹ stipulated in article 5 that it would enter into force six months after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession. The same number of ratifications were needed for the entry into force of the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD),⁶⁸² in terms of article IX, paragraph 3, of the convention. Among the regional treaties establishing nuclear weapon free zones, the 1985 Treaty of Rarotonga⁶⁸³ stipulated in article 15, paragraph 1, that the treaty would enter into force on the deposit of the eighth instrument of ratification, while article 16, paragraph 1, of the 1995 Treaty of Bangkok⁶⁸⁴ required the ratification of seven states in order to enter into force.

⁶⁷⁶The text of the treaty is available at <http://disarmament2.un.org>.

⁶⁷⁷Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 3 September 1992 (1974 *UNTS* 45). See s 6.4.1 below.

⁶⁷⁸This formula resulted in the convention's entering into force with at least one major possessor of chemical weapons (the Russian Federation) not having ratified it.

⁶⁷⁹The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 18 September 1997 (2056 *UNTS* 211). See 6.3.4 below.

⁶⁸⁰A US proposal for 60 ratifications, including those of the permanent members of the UN security council, was not accepted. See 1997 (22) *UNDY* 116. Three permanent members of the security council (China, the Russian Federation and the US) have not become parties to the treaty. Nor have other major mine-producing states such as India and Pakistan.

⁶⁸¹Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 10 October 1980 (1342 *UNTS* 137).

⁶⁸²1108 *UNTS* 151.

⁶⁸³South Pacific Nuclear Free Zone Treaty of 6 August 1985 (1445 *UNTS* 177).

⁶⁸⁴Treaty on the Southeast Asia Nuclear Weapon-Free Zone of 15 December 1995 (1981 *UNTS* 129).

what distinguishes several major arms control treaties is that in addition to or instead of the ratification of a certain number of states, their entry into force is made conditional upon the adherence of the states that are militarily the most significant to the subject-matter of the treaty. This objective may be achieved by providing for the ratification of all the negotiating states, certain named states or a category of states, or by using some other formula devised to include the most relevant players. The reason for this requirement is simple. An arms control treaty that did not attract the adherence of the states actually possessing the weapons it circumscribed would be of little practical value. It might even compromise the security of those states that became parties to it while others were able to pursue a strategic advantage by remaining outside. Article III, paragraphs 2 and 3, of the 1963 Partial Test Ban Treaty⁶⁸⁵ thus provided for the entry into force of the treaty upon its ratification by all the then-nuclear weapon states:

“2. This Treaty shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the Original Parties – the United States of America, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist republics – which are hereby designated the Depositary Governments.
3. This Treaty shall enter into force after its ratification by all the Original Parties and the deposit of their instruments of ratification.”

Likewise, the 1968 Non-Proliferation Treaty⁶⁸⁶ required the ratification of the three depositary governments and 40 other states to enter into force in accordance with article IX, paragraphs 2 and 3:

“2. This Treaty shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics, which are hereby designated the Depositary Governments.
3. This Treaty shall enter into force after its ratification by the States, the Governments of which are designated Depositaries of the Treaty, and forty other States signatory to this Treaty and the deposit of their instruments of ratification....”

Article XIV, paragraph 3, of the 1972 Biological Weapons Convention⁶⁸⁷ made ratification by the same three depositary governments and 22 other governments a condition for its entry into force. The same formula had already been used in article X,

⁶⁸⁵Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water of 5 August 1963 (480 *UNTS* 43).

⁶⁸⁶Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968 (729 *UNTS* 161).

⁶⁸⁷Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 10 April 1972 (1015 *UNTS* 163).

paragraph 3, of the 1971 Sea-Bed Treaty. Given its objectives and area of application, the 1990 Treaty on Conventional Armed Forces in Europe⁶⁸⁹ required the ratification of all the negotiating states in order to enter into force. Article XXII, paragraph 2, of the treaty stipulated:

“This Treaty shall enter into force 10 days after instruments of ratification have been deposited by all States Parties listed in the Preamble.”

Article VII, paragraph 2, of the 1992 Treaty on Open Skies⁶⁹⁰ provided for the adherence of the most important states using the following unique formula:

“2. This Treaty shall enter into force 60 days after the deposit of 20 instruments of ratification, including those of the Depositaries [i.e. Canada and Hungary], and of States Parties whose individual allocation of passive quotas as set forth in Annex A is eight or more.”⁶⁹¹

In accordance with article XIV, paragraph 1, of the 1996 Comprehensive Nuclear-Test-Ban Treaty,⁶⁹² the treaty will enter into force 180 days after it has been ratified by the 44 states listed in annex 2 to the treaty.⁶⁹³ Anticipating complications in reaching this target, the negotiating states adopted a proposal to hold diplomatic conferences to facilitate the entry into force of the treaty.⁶⁹⁴ Article XIV has been described as “the hottest item of the negotiations” after that on the scope of the test ban.⁶⁹⁵ The foreign minister of Pakistan explained the thinking of the nuclear powers in respect of the entry into force provisions of the treaty as follows:

⁶⁸⁸Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof of 11 February 1971 (955 *UNTS* 115).

⁶⁸⁹1990 (30) *ILM* 1. See s 6.3.1 below.

⁶⁹⁰The text of the treaty is reproduced in UN *Status of Multilateral Arms Regulation and Disarmament Agreements* (1992) vol 2 5.

⁶⁹¹The passive quota determines the number of overflights a party is obliged to receive per annum under the treaty. See s 6.3.2 below.

⁶⁹²UN general assembly doc A/50/1027.

⁶⁹³The 44 states listed in annex 2 are:

Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Democratic People’s Republic of Korea, Egypt, Finland, France, Germany, Hungary, India, Indonesia, Iran, Israel, Italy, Japan, Mexico, the Netherlands, Norway, Pakistan, Peru, Poland, Romania, Republic of Korea, the Russian Federation, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, the UK, the US, Viet Nam, and Zaire.

In accordance with annex 2 the list comprises: members of the CD on 18 June 1996 which formally participated in the work of the 1996 session of the conference and which appear in table 1 of the IAEA’s April 1996 edition of *Nuclear Power Reactors in the World* and in table 1 of the IAEA’s December 1995 edition of *Nuclear Research Reactors in the World*. This formula, originally proposed by the Russian Federation, was a diplomatic means to avoid singling out specific nuclear capable states.

⁶⁹⁴See Ramaker *et al* *The Final Test: A History of the Comprehensive Nuclear-Test-Ban Treaty Negotiations* (2003) 247.

⁶⁹⁵*Ibid* 235.

we must not contemplate a solution where one or more States, capable of conducting nuclear explosions, are not a party to the Treaty. Pakistan's signature and adherence to the CTBT will be dependent on our confidence that all nuclear weapon States and nuclear capable States will join the Treaty.”⁶⁹⁶

The strict entry into force requirements of the CTBT will ensure that no nuclear weapon state can become definitively bound by the treaty until all others are too – including both the nuclear weapon states acknowledged under the NPT⁶⁹⁷ and the *de facto* nuclear weapon states.⁶⁹⁸

Besides ratification, disarmament treaties may establish other conditions for their entry into force. In addition to the deposit of instruments of ratification by signatory states, article 28, paragraph 1, of the 1967 Treaty of Tlatelolco⁶⁹⁹ lists several further requirements. These are the ratification of Protocol I to the treaty by states administering territories in the zone of application of the treaty, the ratification of Protocol II “by all powers possessing nuclear weapons”, and the conclusion by the signatories of bilateral or multilateral safeguards agreements with the IAEA. The strictness of these requirements has been alleviated by the provisions of paragraph 2 of article 28, which states that all signatories have the imprescriptible right to waive, wholly or in part, the requirements laid down in paragraph 1. This they may do by means of a declaration annexed to their instrument of ratification, which may be formulated at the time of deposit of the instrument or subsequently. For those states that exercise this right, the Treaty enters into force upon deposit of the declaration, or as soon as those requirements have been met which have not been expressly waived.⁷⁰⁰

Sometimes the entry into force of one arms control treaty is made conditional upon the entry into force of another. In terms of article VII, paragraph 1 of the 1972 SALT I Interim Agreement⁷⁰¹ on strategic offensive arms, the interim agreement entered into force upon exchange of written notices of acceptance between the United States and the USSR. This exchange was required to take place simultaneously with the exchange of instruments

⁶⁹⁶Statement by the foreign minister of Pakistan to the plenary of the conference on disarmament, 28 March 1996. See also Asada ‘CTBT: Legal Questions Arising from its Non-Entry-into-Force’ 2002 (7) *J of Conflict and Security Law* 85 86-7.

⁶⁹⁷In terms of a IX(3) of the NPT, a nuclear-weapon state is one which had manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967 (ie China, France, the Russian Federation, the UK and the US).

⁶⁹⁸India, Israel and Pakistan.

⁶⁹⁹Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean of 14 February 1967 (634 *UNTS*).

⁷⁰⁰A memorandum by the secretary-general of OPANAL (S/Inf.871 Rev dated 16 June 2003) reproduces the texts of declarations of waiver made by states parties, mostly upon ratifying the convention.

⁷⁰¹Interim Agreement on certain measures with respect to the limitation of strategic offensive arms of 26 May 1972 (944 *UNTS* 3).

of ratification of the 1972 Anti-Ballistic Missile Treaty. The 1993 START II Treaty on further reductions in strategic offensive arms provided in article VI, paragraph 1, that it would enter into force upon the exchange of instruments of ratification between the United States and the Russian Federation. The same paragraph added the further condition that the treaty would not enter into force prior to the entry into force of its predecessor, the START Treaty.

6.2 Role of provisional application in the context of arms control, disarmament and non-proliferation instruments

The interim period between the signature and entry into force of an arms control treaty is one of particular sensitivity. The signatory states may have made important concessions during arduous negotiations in order to arrive at an acceptable compromise. They will usually wish to ensure that nothing undermines the treaty prior to its entry into force and will therefore keenly observe each other's conduct, which may have an important influence over whether or not they decide to ratify the treaty. A signatory's obligation of good faith not to defeat the object and purpose of a treaty, as reflected in article 18 of the 1969 Vienna Convention, will have special significance.⁷⁰⁴ Not surprisingly, one of the earliest treaties expressly suggesting such an obligation was an arms control agreement, the 1919 Convention of St Germain on the Control of Trade in Arms and Ammunition,⁷⁰⁵ the Protocol to which stipulated as follows:

“At the moment of signing the Convention of even date relating to the trade in arms and ammunition, the undersigned Plenipotentiaries declare in the name of their respective Governments that they would regard it as contrary to the intention of the High Contracting Parties and to the spirit of this Convention that pending the coming into force of the Convention a Contracting Party should adopt any measure which is contrary to its provisions.”

Another illustration of the importance of the interim period before ratification of an arms control treaty is the 1922 Treaty on Limitation of Naval Armament,⁷⁰⁶ article XIX of which provided that the United States, the British Empire and Japan

⁷⁰²Treaty on the Limitation of Anti-Ballistic Missile Systems of 26 May 1972 (944 *UNTS* 13). The SALT I Interim Agreement and the ABM Treaty are together known as the SALT I agreements.

⁷⁰³Treaty on Further Reduction and Limitation of Strategic Offensive Arms of 3 January 1993, reproduced at <http://www.armscontrol.org/treaties>.

⁷⁰⁴For the text of a 18, see n 340 above.

⁷⁰⁵7 *LNTS* 332. See also Charme (n 446) 79.

⁷⁰⁶25 *LNTS* 201.

agree that the *status quo* at the time of the signing of the present Treaty, with regard to fortifications and naval bases, shall be maintained in their respective territories and possessions specified hereunder....”

This article has been described as establishing “a significant signatory obligation to adhere to the terms of the treaty”.⁷⁰⁷ Although the nature of article XIX is somewhat ambiguous, it does reflect the importance that the act of signature may have in an arms limitation agreement.⁷⁰⁸ A more recent instance in which the parties expressly provided for the interim obligation of good faith in an arms control treaty is the SALT I agreements.⁷⁰⁹ At the time of concluding the agreements, the United States and the USSR signed certain common understandings, among which was Common Understanding E (‘Standstill’). It reads as follows:

“On May 6, 1972, [the Soviet representative] made the following statement:

In an effort to accommodate the wishes of the U.S. side, the Soviet Delegation is prepared to proceed on the basis that the two sides will in fact observe the obligations of both the Interim Agreement and the ABM Treaty beginning from the date of signature of these two documents.

In reply, the U.S. Delegation made the following statement on May 20, 1972:

The United States agrees in principle with the Soviet statement made on May 6 concerning observance of obligations beginning from date of signature but we would like to make clear our understanding that this means that, pending ratification and acceptance, neither side would take any action prohibited by the agreements after they had entered into force. This understanding would continue to apply in the absence of notification by either signatory of its intention not to proceed with ratification or approval.

The Soviet Delegation indicated agreement with the U.S. statement.” (Emphasis added.)

While the Soviet proposal was, in effect, for the provisional application of the two agreements, the understanding that was reached was more in the nature of an interpretation of the obligation to refrain from conduct that would defeat the object and purpose of a treaty prior to its entry into force.⁷¹⁰

⁷⁰⁷Charme (n 446) 78.

⁷⁰⁸A XIX established when the undertaking to maintain the status quo regarding fortifications and naval bases arose (ie upon signature). It is thus possible to view the article not as an a 18-type obligation, but (1) as a substantive provision which, by implication, became binding from the moment of signature, or (2) an example of implied provisional application. Failure to observe the article from the date of signature would not merely have defeated the object and purpose of the treaty, but would have entailed a violation of its material stipulations.

⁷⁰⁹See n 701 and n 702 above. See also Charme (n 446) 79.

⁷¹⁰In 1980 the US state department’s view on the relationship between aa 18 and 25 of the 1969 Vienna Convention was as follows:

“There is no direct relationship between provisional application and the obligation of treaty partners not to take actions prior to ratification that would defeat the object and purpose of the treaty. Provisional application means that treaty terms are applied temporarily pending final ratification. The obligation not to defeat the object and purpose of the treaty prior to ratification could, in theory, necessitate pre-ratification application of provisions, if any, where non-application from the date of signature would defeat the object and purpose of the treaty. Such provisions are rare. In the majority of cases the obligation not to defeat the object and purposes of the treaty means a duty to refrain from taking steps that would render impossible future application of the treaty when ratified.” (See Nash (n 130) 933.)

IN VIEW OF THE INHERENT SENSITIVITY OF ARMS CONTROL TREATIES AND THE NEED FOR signatories to safeguard their positions during the interim period before a treaty enters into force, the possibility of provisionally applying a particular treaty can offer several advantages. Besides affording the possibility of implementing measures generally acknowledged as urgent or beneficial, provisional application may effectively guarantee that that limits and restrictions so laboriously negotiated will not be undermined before the treaty enters into force. By maintaining the goodwill and momentum of the negotiations, the provisional application of a treaty may reduce the risk that one of the parties will reconsider its position following signature and refuse to ratify it. The procedure will also enable the signatories to test the practical merits of their accord; if the provisional application proves successful, this may provide an additional incentive to ratify the treaty. In addition, if the treaty foresees a monitoring or verification system, that system may need to be operational by the time the treaty enters into force, necessitating some arrangement to apply the treaty or part of the treaty provisionally upon signature or shortly thereafter. Once the treaty has entered into force, provisional application may be an appropriate mechanism for later modifications or amendments to the original treaty. Similarly, subsidiary agreements implementing the main treaty could also be applied provisionally. In the disarmament area, perhaps more so than any other, the question whether to apply a treaty provisionally is a delicate one. Proposals on provisional application are sometimes made but not accepted, as in the case of the Inhumane Weapons Convention⁷¹¹ and the CTBT.⁷¹² Whether provisional application will be appropriate in a particular case is a question that cannot be answered in the abstract but will depend on various factors such as the provisions of the treaty, the state of relations between the parties and their constitutional procedures. Ultimately, the decision will be as much one of policy as of law.

The arms control and disarmament committee of the International Law Association has postulated that the signatories to an arms control treaty are under a more stringent obligation than is normally the case, actually being obliged to implement the treaty in advance of its ratification and entry into force. In its 1998 report the committee argues that

“... the special requirements of arms control lead to the application of a general rule that a State signatory will observe the treaty provisions pending ratification and entry into force.

⁷¹¹ A Dutch proposal on provisional application of the convention, which was not accepted, is reproduced in UN doc A/CONF.95/WG/L.9 dated 25 September 1979.

⁷¹² Austria introduced two proposals for the provisional application of the CTBT during the negotiations. See Ramaker *et al* (n 694) 243, 245. In accordance with the first of the proposals, an state party could request a meeting of the conference of states parties, which could decide by simple majority under which conditions the treaty could be provisionally applied between them and any state that ratified thereafter.

it is a fact that signatory States in this field invariably so conducted themselves.
(Emphasis added.)

Much as one would like to believe that such a rule existed, the committee's conclusion would appear to be unfounded. It is true, as we have seen, that the nature of arms control treaties leads to a heightened awareness of the obligation of good faith in the interim period following signature, especially of the obligation not to defeat the object and purpose of a treaty pending its entry into force. It may also be true that in some cases the obligation not to defeat the object and purpose of a treaty will be indistinguishable from the obligation to observe the treaty in question. An example of such a situation would be a prohibition of conduct, such as the ban on nuclear test explosions contained in article I of the CTBT.⁷¹⁴ However, there is no evidence of any special rule that endows the act of signature of an arms control treaty with different consequences from that of treaties in general. Quite the contrary, such a rule would make it difficult to explain why states agree to apply provisionally arms control treaties or parts of such treaties if they were under a general obligation to observe them anyway. That states increasingly find provisional application useful in the context of arms control treaties is illustrated by the examples considered below.

6.3 Provisional application of arms control treaties where the treaty itself so provides

Under this heading come arms control treaties, which contain clauses on provisional application in the main body of the treaty or in a protocol forming part of the treaty.

6.3.1 1990 Treaty on Conventional Armed Forces in Europe (CFE Treaty)

The 1990 Treaty on Conventional Armed Forces in Europe⁷¹⁵ was negotiated in Vienna in 1989 and 1990 by the members of the North Atlantic Treaty Organization and the Warsaw Pact in the framework of the Conference (now Organization) on Security and Cooperation in Europe. The treaty was opened for signature in Paris on 19 November 1990. It entered into force on 9 November 1992 and currently has 30 parties. The objectives of the treaty as set out in the preamble include the prevention of military

⁷¹³1998 (68) *ILA Rep* 177-8.

⁷¹⁴This is because only by testing nuclear devices would a state be certain that they would function or be able to improve their design, thereby defeating the non-proliferation objectives of the CTBT as set out in its preamble. See s 6.4.2 below.

conflict in Europe and the achievement of greater stability and security on the continent, as well as the elimination of the capability for launching surprise attacks and large-scale offensive action.

The area of application of the treaty is Europe from the Atlantic to the Urals, including adjacent island territories.⁷¹⁶ The treaty sets aggregate and individual limits on conventional armaments and equipment within the area of application.⁷¹⁷ It specifies detailed rules for the counting of such armaments and equipment,⁷¹⁸ for their storage,⁷¹⁹ and for the destruction or conversion for non-military purposes of equipment in excess of the established limits.⁷²⁰ For the purpose of ensuring verification of compliance with the provisions of the treaty each state party is obliged to provide notifications and exchange information pertaining to its conventional armaments and equipment in accordance with the Protocol on Information Exchange.⁷²¹ Furthermore, each state party has the right to conduct, and the obligation to accept inspections, including aerial inspections, which are conducted in accordance with the provisions of the Protocol on Inspection.⁷²² National or multinational technical means of verification are also permitted, provided they are consistent with generally recognized principles of international law.⁷²³ Article XVI establishes a standing joint consultative group to administer the implementation of the treaty and, *inter alia*, to address questions relating to compliance with or possible circumvention of the provisions of the treaty.

Among the protocols to the treaty is the Protocol on the Provisional Application of Certain Provisions of the Treaty on Conventional Armed Forces in Europe, which entered into force upon the signature of the treaty. The purpose of the protocol, as set out in its preamble, was simply to promote the implementation of the treaty. According to Johnson, the protocol was concluded because there were concerns that the break-up of the Warsaw

⁷¹⁵N 689 above.

⁷¹⁶A II(1)(B). See Clarke 'The Conventional Armed Forces in Europe Treaty: Limits and Zones' 1991 (2) *Report on Eastern Europe* 35.

⁷¹⁷In terms of a IV(1), the aggregate limits in the area of application are 40,000 battle tanks, 60,000 armoured combat vehicles, 40,000 pieces of artillery, 13,600 combat aircraft and 4,000 attack helicopters. Each group of states (i.e. NATO and former Warsaw Pact states) may possess no more than half these aggregate numbers. In accordance with a VI, the maximum limits for any one state party are set at 13,300 battle tanks, 20,000 armoured combat vehicles, 13,700 pieces of artillery and 5,150 combat aircraft.

⁷¹⁸A III.

⁷¹⁹A X.

⁷²⁰A VIII.

⁷²¹A XIII.

⁷²²A XIV.

⁷²³A XV.

fact would cause complications for the entry into force of the treaty that might not be speedily resolved.⁷²⁴ The mechanism of provisional application was therefore

“... primarily a confidence-building measure, in part designed to convince congressional and parliamentary members whose approval was needed for national ratification that the Treaty had a firm legal and security basis, pending resolution of the questions raised by the Warsaw Pact’s dissolution. Provisional application relieved some of the political pressures on the CFE and prevented a hold-up in national ratifications.”⁷²⁵

The protocol contains a precise list of the provisions of the treaty to be applied provisionally. It was originally agreed that the protocol would remain in force for one year and that it would terminate earlier if the treaty entered into force or if a signatory notified the other participants that it did not intend to become a party to the treaty. The decision of one state alone could thus have terminated the provisional application between all the others. The protocol, which also foresaw an extension of the period of provisional application upon the decision of the states parties, reads as follows:

“1. Without detriment to the provisions of Article XXII of the Treaty [on entry into force following ratification], the States Parties shall apply provisionally the following provisions of the Treaty:
[there follows a list (A) to (M) of provisions of the treaty and its various protocols]
2. The States Parties shall apply provisionally the provisions listed in paragraph 1 of this Protocol in the light of and in conformity with the other provisions of the Treaty.
3. This Protocol shall enter into force at the signature of the Treaty. It shall remain in force for 12 months, but shall terminate earlier if:
(A) the Treaty enters into force before the period of 12 months expires; or
(B) a State Party notifies all other States Parties that it does not intend to become a party to the Treaty.
The period of application of this Protocol may be extended if all the States Parties so decide.”

Among the provisions provisionally applied were the obligation of each state party to provide notifications and exchange information on conventional armaments (article VII, paragraph 2, and article XIII); the provisions on notification of reduction liabilities (article VIII, paragraph 6); the decommissioning provisions (article IX); and the provisions on the joint consultative group (article XVI). These articles were provisionally applied between the date of signature of the CFE Treaty on 19 November 1990 and its entry into force some

⁷²⁴Johnson (n 200) 4.

⁷²⁵*Ibid.*

two years later on 9 November 1992. The first conference to review the operation of the treaty concluded an Addendum to the Treaty on Conventional Armed Forces in Europe. Article VI, paragraph 1, of the addendum provisionally applied certain parts of the addendum, mainly relating to limits applicable to the Russian Federation and the Ukraine:

“This Document shall enter into force upon receipt by the Depositary of notifications of confirmation of approval by all States Parties. Section II, paragraphs 2 and 3, Section IV and Section V of this Document are hereby provisionally applied as of 31 May 1996 through 15 December 1996. If this Document does not enter into force by 15 December 1996, then it shall be reviewed by the States Parties.”

An Agreement on Adaptation of the CFE Treaty,⁷²⁷ signed in Istanbul on 19 November 1999, was not applied provisionally.

6.3.2 1992 Treaty on Open Skies

A treaty allowing military aerial observation was first proposed by President Eisenhower in 1955 as an early warning mechanism. With the end of the Cold War, the Treaty on Open Skies⁷²⁸ was opened for signature at Helsinki on 24 March 1992 by the then-members of NATO and the Warsaw Pact.⁷²⁹ The treaty entered into force some eight years later on 1 January 2002 and currently has 30 parties. The objective of the treaty is to contribute to the further development and strengthening of peace, stability and co-operative security in Europe by the creation of an open skies regime.⁷³⁰ This regime allows aerial observation flights by states parties over the territories of other states parties.⁷³¹ Strictly speaking, the treaty is not an arms control or disarmament treaty but a confidence-building and transparency measure that assists in the monitoring of compliance with other arms-control commitments. The treaty specifies that the entire territory of a state party is open to observation.⁷³² Active and passive observation quotas are awarded to each state party and maximum flight distances established.⁷³³ The quota system determines the maximum number of overflights that a party is obliged to receive per annum (passive

⁷²⁶By 2002, 59,000 pieces of conventional armaments and equipment had been reduced, and more than 3,300 on-site inspections and observation visits conducted to verify compliance with the provisions of the treaty and its associated documents. See s 2 of the formal conclusions of the second conference to review the operation of the treaty, available at <http://www.osce.org>.

⁷²⁷For the text of this agreement, see <http://www.osce.org>.

⁷²⁸N 690 above.

⁷²⁹Nash ‘Contemporary Practice of the United States Relating to International Law’ 1994 (87) *AJIL* 96.

⁷³⁰Preambular para 4.

⁷³¹A I.

⁷³²A II (2).

⁷³³A III and Annex A.

quota) and the maximum number of overflights that it may itself conduct over the territory of other states parties (active quote). The treaty regulates the sensors that may be used during the observation flights,⁷³⁴ the choice of observation aircraft, the conduct of the flights and mission planning.⁷³⁵ Data collected under the open skies regime must be made available to all states parties.⁷³⁶ An open skies consultative commission, based in Vienna, is responsible for promoting the objectives and facilitating the implementation of the treaty.⁷³⁷

Section I of Article XVIII of the treaty deals with the provisional application of certain of its provisions “in order to facilitate the implementation of this Treaty”. The section, which resembles the Protocol on the Provisional Application of Certain Provisions of the CFE Treaty, provides:

“1. Without detriment to Article XVII [on entry into force], the signatory States shall provisionally apply the following provisions of this Treaty:

[there follows a list (A) to (F)]

2. This provisional application shall be effective for a period of 12 months from the date when this Treaty is opened for signature. In the event that this Treaty does not enter into force before the period of provisional application expires, that period may be extended if all the signatory States so decide. The period of provisional application shall in any event terminate when this Treaty enters into force. However, the States Parties may then decide to extend the period of provisional application in respect of signatory States that have not ratified this Treaty.”

The provisionally applied clauses included provisions on the notification of diplomatic clearance numbers for open skies observation flights (article VI, section I, paragraph 4); provisions on the establishment and functioning of the open skies consultative commission (Article X, paragraphs 1, 2, 3, 6 and 7 and Annex L); provisions on the designation of, and objection to, the personnel conducting observation flights (Article XIII, Section I, paragraphs 1 and 2); and the article designating the Benelux states as a single state party for the purposes of the treaty (Article XIV). It is evident from the scope of these provisions that their provisional application served the twin purposes of confidence building and preparation for the full implementation of the open skies regime upon the entry into force of the treaty. A declaration adopted by the foreign ministers of the states participating in the Conference on Security and Cooperation in Europe on the occasion of the conclusion of the treaty also acknowledges a role for non-parties to the treaty during the provisional period:

⁷³⁴A IV.

⁷³⁵A VI.

⁷³⁶A IX(4).

The Foreign Ministers of the participating States of the Conference on Security and Co-operation in Europe...

Noting the interest expressed by a number of States not full participants in the negotiations, and believing that their adherence to the Treaty as well as signature by all the newly independent States... would enhance the effectiveness of the Open Skies régime,

1. Recognize the significant contribution to the Open Skies negotiations made by a number of participants in the CSCE who are not original signatories to the Treaty on Open Skies,
2. Recognize also that these States may participate, on the basis of the active and passive quotas they would hold as State Parties, in the implementation of the Treaty and that they may take part in discussions regarding practical arrangements for the régime which will continue in Vienna within the framework of the Open Skies Consultative Commission during the period of provisional application....⁷³⁸

In practical terms, this declaration amounted to an invitation to the non-signatories to participate in the provisional institutional arrangements brought about by the provisional application of certain provisions of the treaty.

6.3.3 1993 Treaty on Further Reduction and Limitation of Strategic Offensive Arms (START II)

The 1993 Treaty between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms⁷³⁹ was signed by the presidents of the two nations at a summit in Moscow on 2 January 1993. The conclusion of START II was another clear signal that the Cold War had ended. On 15 January of the same year, President Bush transmitted the treaty to the United States senate for its advice and consent. In his letter of transmittal, the president noted:

“The START II Treaty builds upon and surpasses the accomplishments of the START Treaty by further reducing strategic offensive arms in such a way that further increases the stability of the strategic nuclear balance. It bans deployment of the most destabilizing type of nuclear weapons system – landbased intercontinental ballistic missiles with multiple independently targetable nuclear warheads. At the same time, the START II Treaty permits the United States to maintain a stabilizing sea-based force.”⁷⁴⁰

The principal limit in the treaty was the requirement that each party reduce its holdings of deployed inter-continental ballistic missiles and deployed submarine-launched

⁷³⁷ A X.

⁷³⁸ CSCE Declaration on the Treaty on Open Skies, available at <http://www.osce.org>.

⁷³⁹ N 703 above.

⁷⁴⁰ Reproduced in Nash ‘U.S Practice: Contemporary Practice of the United States Relating to International Law’ 1993 (87) *AJIL* 258.

ballistic missiles to 3,000–3,500 warheads by 1 January 2003. The treaty thus intended to reduce the overall deployments of strategic nuclear weapons on each side by more than two-thirds from the levels at the time of signature.⁷⁴² START II drew upon the original START Treaty for definitions, counting rules, prohibitions and verification provisions, which are only modified as necessary to meet the unique requirements of the later treaty.⁷⁴³ START II was therefore built upon START I and its entry into force was, as already noted, made subject to the entry into force of that treaty.⁷⁴⁴

Paragraph 8 of article II of START II commits both parties not to transfer heavy inter-continental ballistic missiles to any recipient whatsoever, including any other party to START I. In accordance with paragraph 2 of article VI, this non-proliferation obligation was applied provisionally from the date of signature of the treaty. A report submitted by the United States secretary of state to the president on 12 January 1993 explained that the provisional application of article II, paragraph 8,

“... provides a useful collateral constraint since there are SS-18 silo launchers located outside Russia, and such transfers by Russia to the other Parties to the START Treaty – Belarus, Kazakhstan, and Ukraine – are not prohibited by the START Treaty.”⁷⁴⁵

The United States senate ratified START II on 26 January 1996.⁷⁴⁶ In the Russian Federation, however, matters progressed slowly and the treaty became embroiled in controversy. Opposition parliamentarians first threatened to block its ratification if NATO accepted new members from eastern and central Europe. Subsequently, they linked the ratification to, among other issues, the nuclear tests conducted by India and Pakistan in 1998 and to United States policy towards Iraq.⁷⁴⁷ The Russian legislature eventually passed a federal law on the ratification of START II in April 2000.⁷⁴⁸ Article 2 of the

⁷⁴¹ A I(3). A Protocol signed in New York on 26 September 1997 extended this time limit to 31 December 2007.

⁷⁴² Nash (n 740) 258.

⁷⁴³ *Ibid* 260.

⁷⁴⁴ START I entered into force on 12 May 1994.

⁷⁴⁵ *Ibid* 267. The SS-18 is a multiple-warhead inter-continental ballistic missile.

⁷⁴⁶ On the senate resolution of ratification, see Nash ‘Contemporary Practice of the United States Relating to International Law’ 1996 (90) *AJIL* 263 270.

⁷⁴⁷ See ‘Duma Postpones START II Ratification Decision’ 1998 (27) *Disarmament Diplomacy*; ‘START Vote Delayed Over Iraq’ 1998/9 (33) *Disarmament Diplomacy*, both available at <http://www.acronym.org.uk>.

⁷⁴⁸ Federal Law on Ratification of the Treaty between the Russian Federation and the United States of America on Further Reduction and Limitation of Strategic Offensive Arms, adopted by the дума on 14 April 2000 and the federation council on 19 April 2000. President Putin signed the resolution of ratification of START II on 4 May 2000.

federal law provided that among the extraordinary events that would give rise to a right on the part of the Russian Federation to withdraw from the treaty was the withdrawal of the United States from the 1972 Anti-Ballistic Missile Treaty.⁷⁴⁹ This stipulation had been included as a consequence of United States proposals to construct a national missile defence system, which was prohibited under the ABM Treaty and which, it was feared, would have a disrupting effect on strategic stability.⁷⁵⁰ Although both parties had completed their internal procedures, instruments of ratification were not exchanged. Instead, the Russian side awaited American intentions concerning the ABM Treaty,⁷⁵¹ which eventually became apparent when on 13 December 2001 the United States issued a six-month notice to withdraw from that treaty. The withdrawal took effect at midnight on 13 June 2002.⁷⁵² The very next day President Putin declared that the Russian Federation would not become a party to START II. According to a terse statement issued by the foreign ministry,

“... the USA refused to ratify the START II Treaty and the New York understandings. Moreover, on June 13, 2002, the United States withdrew from the ABM Treaty, with the result that this international legal act, which served for three decades as the cornerstone of strategic stability, has ceased to be in force. Taking into account the aforesaid actions of the USA and proceeding from the provisions of the Federal Law on Ratification of the START II Treaty, the Russian Federation notes the absence of any prerequisites for the entry of the START II Treaty into force, and does not consider itself bound any longer by the obligation under international law to refrain from any actions which could deprive this Treaty of its object and goal.”⁷⁵³

This decision had a further juridical consequence. In so far as article II, paragraph 8, of the treaty was still being applied provisionally between the parties, notification of the decision to the United States would have terminated the provisional application of that paragraph in accordance with the customary rules on provisional application governing their relations.⁷⁵⁴ Immediately before the United States withdrawal from the ABM Treaty took effect, the parties had concluded the Strategic Offensive Reductions Treaty (SORT)

⁷⁴⁹N 702 above.

⁷⁵⁰Russian concerns were reflected in several foreign ministry statements (for example, doc 1094-18-10-2000 dated 18 October 2000 and doc 1098-19-10 dated 19 October 2000).

⁷⁵¹For a discussion of the legal issues involved, see Müllerson ‘The ABM Treaty: Changed Circumstances, Extraordinary Events, Supreme Interests and International Law’ 2001 (50) *ICLQ* 509.

⁷⁵²‘Beyond the ABM Treaty’ *Wall Street Journal* 14 June 2002.

⁷⁵³Russian foreign ministry statement ‘On Legal Status of the Treaty Between Russia and the USA on Further Reduction and Limitation of Strategic Offensive Arms’ (doc 1221-14-06-2002 dated 14 June 2002).

⁷⁵⁴The termination would appear to have had no practical consequence inasmuch as Belarus, Kazakhstan, and Ukraine (to whom the Russian Federation was not permitted to transfer certain inter-continental ballistic missiles in terms of the a II(8) of START II) had acceded to the NPT as non-nuclear weapon states and therefore came under the non-proliferation obligations of that treaty.

on 24 May 2002. Article I of SORT allows each party to deploy no more than 1,700–2,200 strategic warheads by the end of 2012.⁷⁵⁶ While the SORT Treaty mitigates the effects of the collapse of START II, the failure of that treaty underscores the often considerable challenges facing an arms control treaty before it can enter into force – a contingency that cannot be taken for granted.

6.3.4 1997 Convention on the Prohibition of Anti-Personnel Mines (Ottawa Convention)

The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction⁷⁵⁷ was adopted in Oslo on 18 September 1997 at the diplomatic conference on an international total ban on anti-personnel land mines.⁷⁵⁸ The convention was opened for signature at Ottawa on 3 December 1997 and entered into force a mere 15 months later on 1 March 1999, following the deposit of the fortieth instrument of ratification. By November 2004, the convention had 143 parties.⁷⁵⁹

The Ottawa Convention reaffirms the close link between the founding principles of international humanitarian law and the law of arms control.⁷⁶⁰ The final preambular paragraph proclaims that in concluding the convention the states parties were

“[b]asing themselves on the principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited, on the principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and on the principle that a distinction must be made between civilians and combatants”.⁷⁶¹

⁷⁵⁵For the text of SORT, see <http://www.armscontrol.org/treaties>.

⁷⁵⁶Unusually, SORT contains no provisions for verification of compliance.

⁷⁵⁷N 679 above.

⁷⁵⁸The chairman of the conference was the South African permanent representative in Geneva, Ambassador Jacob Selebi. For an overview of the negotiations, see Velin 1997 (18) ‘Stage Three of the Ottawa Process: The Oslo Diplomatic Conference’ *Disarmament Diplomacy* available at <http://www.acronym.org.uk>.

⁷⁵⁹South Africa signed the convention on 3 December 1997 and deposited its instrument of ratification on 26 June 1998.

⁷⁶⁰The link between arms control and humanitarian law has been evident at least since the 1868 St Petersburg Declaration. The preamble to the declaration stated its objective as fixing certain “technical limits at which the necessities of war ought to yield to the requirements of humanity” and acknowledged the principle that the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable, is “contrary to the laws of humanity”.

⁷⁶¹Cf preambular paras 2 and 3 of the 1980 Inhumane Weapons Convention (n 681). It has been argued that the use of anti-personnel mines, being both indiscriminate and disproportional, is prohibited by *ius cogens*. See Araujo ‘Anti-Personnel Mines and Peremptory Norms of International Law: Argument and Catalyst’ 1997 (30) *VJTL* 1.

The general obligations of the states parties to the Ottawa Convention are set out in article 1, which provides that states parties may never under any circumstances use anti-personnel mines; develop, produce, otherwise acquire, stockpile, retain or transfer anti-personnel mines; or assist, encourage or induce anyone to engage in any such prohibited activity.⁷⁶² In terms of the same article each state party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of the convention.⁷⁶³ Certain limited exceptions to the basic obligations are permitted for the purposes of training in mine detection and mine clearance techniques, while anti-personnel mines may also be transferred for the purposes of destruction.⁷⁶⁴ Each state party undertakes to destroy any stockpiled anti-personnel mines within four years of the entry into force of the convention for that state party.⁷⁶⁵ Anti-personnel mines in mined areas under the jurisdiction or control of a state party must be destroyed within ten years of the entry into force of the convention for that state party.⁷⁶⁶ The convention provides for national implementation measures, including penal sanctions for breaches of the convention,⁷⁶⁷ and sets annual reporting requirements, *inter alia*, on these national measures, on mines retained for training purposes, on progress in destroying stockpiles of mines and on the location of mined areas within the country.⁷⁶⁸ Procedure for states parties to resolve questions of compliance with the convention include the possibility of a special meeting of states parties,⁷⁶⁹ and a fact-finding mission authorized by the meeting of states parties or invited by a state party.⁷⁷⁰ As regards institutional arrangements, regular meetings of the states parties are foreseen to examine the status of the treaty and to review its implementation.⁷⁷¹ A review conference, scheduled for five years after the entry into force of the convention,⁷⁷² will be held in Nairobi in December 2004.

Article 18 of the convention provides for the provisional application of article 1, paragraph 1, in the following terms:

⁷⁶² A 1(1).

⁷⁶³ A 1(2).

⁷⁶⁴ A 3.

⁷⁶⁵ A 4.

⁷⁶⁶ A 5.

⁷⁶⁷ A 9.

⁷⁶⁸ A 7. For South Africa's annual reports see <http://disarmament.un.org>.

⁷⁶⁹ A 8(5).

⁷⁷⁰ A 8(8). On verification of the convention, see Woodward 'Verifying the Ottawa Convention' in VERTIC *Verification Yearbook 2001* 99.

⁷⁷¹ A 11. A practice has now been established of holding the meetings of the states parties annually, alternately in a mine-affected country and in Geneva. The first meeting took place in Maputo in 1999.

⁷⁷² A 12.

Any state may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally paragraph 1 of Article 1 of this Convention pending its entry into force.”

The reason for this provision was plainly the urgency of addressing the causes of the humanitarian catastrophe produced by landmines. Upon ratifying the convention Austria, Mauritius, South Africa, Sweden and Switzerland submitted declarations of provisional application to the depositary, the secretary-general of the United Nations.⁷⁷³ In accordance with article 18, these states were obliged, during the period of provisional application, not to use, develop, produce, otherwise acquire, stockpile, retain or transfer anti-personnel mines, or to assist, encourage or induce anyone to engage in any activity prohibited under the convention. It will be noted that these undertakings are all negative obligations or prohibitions of conduct. During the provisional period the states concerned were not under any positive obligations, such as that to destroy or ensure the destruction of anti-personnel mines (article 1, paragraph 2). Simultaneously, all signatories were under the duty to refrain from conduct that would defeat the object and purpose of the convention prior to its entry into force, as reflected in article 18 of the 1969 Vienna Convention and customary international law. It could be argued that this duty obliged signatories to respect most, if not all, of the prohibitions contained in article 1, paragraph 1.⁷⁷⁴ This being so, there would be no material difference between the obligations assumed by provisionally applying that paragraph and those binding on all signatories as a matter of good faith. Be that as it may, the declarations of provisional application had the advantage of removing any doubts that may have existed concerning the extent of the more general obligation of good faith.

A less felicitous feature of article 18 must, however, be noted. The article foresees that declarations of provisional application may be made by states upon their ratification, acceptance, approval or accession of the convention, but does not mention *signature*. This omission implies – *inclusio unius est exclusio alterius* – that a declaration of provisional application made upon signature would not have been accepted by the depositary.⁷⁷⁵ Given the sense of urgency that attended the negotiation of the convention, this exclusion seems

⁷⁷³ Although the convention has now entered into force, signatories depositing their instruments of ratification, accession or approval, or acceding states, could still submit declarations of provisional application. Given that article 17(2) provides that the convention enters into force for such states on the first day of the sixth month after the deposit of the requisite instrument, provisional application remains a valid option for such states.

⁷⁷⁴ Angola's continued use of landmines after it had signed the Ottawa Convention led to much criticism. See Klabbers 'How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent' 2001 (34) *VJTL* 283 284.

⁷⁷⁵ A state making a declaration of provisional application upon ratification could not, however, be prevented from giving that declaration retroactive effect, for example, to the date of signature.

curious to say the least. Had there been a concern that the convention could not be applied provisionally without states' first completing their internal procedures, the period of two-and-a-half months between the adoption of the text in Oslo and the signing ceremony in Ottawa would have presented an opportunity for them to do so. By requiring a state to express its final consent to be bound as a condition for provisionally applying the convention, article 18 sets an unfortunate precedent. And this, paradoxically, in an area in which the urgency of the measures foreseen could hardly have been more compelling.

6.3.5 Subsidiary arms control agreements

Several major arms control treaties foresee the conclusion of bilateral agreements between states parties and the international agency responsible for overseeing implementation of the treaty. Examples of such subsidiary agreements, which are themselves treaties under international law, are the safeguards agreements concluded between the International Atomic Energy Agency and the states parties to the NPT, the bilateral agreements on privileges and immunities of the Organization for the Prohibition of Chemical Weapons concluded between that organization and the states parties to the Chemical Weapons Convention, and the 'facility' agreements concluded between the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization and the states hosting monitoring stations under the CTBT. Occasionally, an implementing agreement may be applied provisionally if it is urgent or the procedure is agreeable to the state concerned. The model for the Additional Safeguards Protocol,⁷⁷⁶ which is aimed at strengthening the effectiveness and improving the efficiency of the IAEA's safeguards system,⁷⁷⁷ foresees that the protocol may be applied provisionally between the IAEA and the state concerned. Paragraphs b and c of article 17 of the model provide:

"b. ... [name of state] may, at any date before this Protocol enters into force, declare that it will apply this Protocol provisionally.

c. The Director General [of the IAEA] shall promptly inform all Member States of the Agency of any declaration of provisional application of, and of the entry into force of, this Protocol."⁷⁷⁸

In addition to such a provision, the parties may agree to apply the additional protocol provisionally in some other manner. The importance of this latter possibility will be appreciated when it is realized that the states recently pledging to apply their additional

⁷⁷⁶Model Protocol Additional to the Agreement(s) between State(s) and the IAEA for the Application of Safeguards (IAEA doc INFCIRC/540 (Corrected)). On the legal framework of the safeguards system, see Stoiber et al *Handbook on Nuclear Law* (2003) 121-135. See also Rockwood 'The IAEA's Strengthened Safeguards System' 2002 (7) *Journal of Conflict and Security Law* 123.

⁷⁷⁷2000 (69) *ILA Rep* 225.

protocols pending entry into force are the Islamic Republic of Iran (18 December 2003) and the Libyan Arab Jamahiriya (10 March 2004).⁷⁷⁹ The pledges of these two states seem to be implied agreements on the provisional application of the protocols in question from the date of their signature. The recent activity of the IAEA in both states has thus been facilitated by the technique of provisional application, as was implied in the very first paragraph of Iran's comments on a report submitted by the director-general of the IAEA to the board of governors of the agency:

"Iran's implementation of the Additional Protocol prior to its ratification by the Parliament, which is a clear indication of a voluntary political undertaking for utmost cooperation and transparency, has been omitted from... [the director-general's] report."⁷⁸⁰

'Facility' agreements concluded by the Preparatory Commission for the CTBTO may also be applied provisionally pending their entry into force. In accordance with article 22 of the 2000 Agreement⁷⁸¹ between the Commission and Spain, the agreement was applied provisionally from the date of its signature on 14 September 2000 until it entered into force on 12 December 2003.

6.4 Provisional application of arms control treaties where the negotiating states have in some other manner so agreed

Under this heading we find two arms control treaties certain provisions of which have, by implication, been applied provisionally in terms of a separate agreement that does not form part of the treaty itself.

6.4.1 1992 Chemical Weapons Convention

Negotiations for a treaty prohibiting chemical weapons began in earnest in the conference on disarmament in 1984 with the establishment of an *ad hoc* committee for that purpose. Some eight years later, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction⁷⁸² was adopted on 3 September 1992 at the 635th plenary meeting of the conference.⁷⁸³ On 30

⁷⁷⁸The IAEA *Annual Report 2002* 102 notes Ghana as applying its additional protocol provisionally.

⁷⁷⁹See IAEA 'Strengthened Safeguards System: Status of Additional Protocols' dated 13 October 2004, available at <http://www.iaea.org>.

⁷⁸⁰IAEA doc INFCIRC/628 Annex dated 5 March 2004 1.

⁷⁸¹Agreement between the Preparatory Commission for the CTBTO and Spain on the conduct of activities, including post-certification activities relating to international monitoring facilities for the CTBT (CTBTO Preparatory Commission doc CTBT/LEG.AGR/21 dated 19 December 2003).

⁷⁸²N 677 above.

⁷⁸³For a history of the negotiations, see ch 1 of 1992 (17) *UNDY* 17.

NOVEMBER 1992, the convention was commended by the United Nations general assembly.⁷⁸⁴ At the invitation of the government of France, a ceremony to sign the convention was held in Paris from 13 to 15 January 1993. Thereafter, it remained open for signature at the headquarters of the United Nations in New York until its entry into force on 29 April 1997. On 19 November 2004, 167 states will have become parties to the convention.

The CWC reaffirms and complements the prohibition on the use of chemical weapons contained in the 1925 Geneva Protocol.⁷⁸⁵ Article 1 of the convention lists the general or basic obligations of the states parties. In terms of paragraph 1 of that article these obligations include the obligation never under any circumstances to develop, produce, otherwise acquire, stockpile or retain or transfer chemical weapons; to use chemical weapons or to engage in any military preparations to use chemical weapons;⁷⁸⁶ or to assist, encourage or induce anyone to engage in any activity prohibited under the convention. Each state party undertakes to destroy its chemical weapons or chemical weapons that it abandoned on the territory of another state party, in accordance with the provisions of the convention.⁷⁸⁷ Each state party is furthermore obliged to destroy its chemical weapons production facilities and not to use riot control agents as a method of warfare.⁷⁸⁸

The CWC was the first multilateral arms control treaty to provide for the eradication of an entire class of weapons of mass destruction under a universal system of international control. Unlike the 1972 Biological Weapons Convention, the CWC contains detailed provisions on the verification of the parties' compliance with the convention. The verification measures are set out in article III (on declarations by states parties), article IV (on chemical weapons), article V (on chemical weapons production facilities), article VI (on activities not prohibited under the convention), and in several annexes, which form an integral part of the convention. These are the Annex on Chemicals, the Annex on Implementation and Verification (Verification Annex), and the Annex on the Protection of Confidential Information (Confidentiality Annex). The verification measures concern both the military sector and the civilian chemical industry, and may include routine on-site inspections of declared sites and short-notice challenge inspections in accordance with

⁷⁸⁴UN general assembly resolution A/RES/47/39.

⁷⁸⁵See CWC preambular paras 3,4 and 6, and a XIII.

⁷⁸⁶In terms of a common understanding adopted by the conference on disarmament together with the draft convention, "the scope of the prohibition of use of chemical weapons includes prohibitions of use against States not Parties to the Convention." See Tabassi (n 798) 519.

⁷⁸⁷A I(2)-(3).

⁷⁸⁸A I(4)-(5).

article IX. Each state party must provide access to its chemical weapons destruction facilities and their storage areas for the purpose of systematic verification through on-site inspection and monitoring with on-site instruments.⁷⁸⁹ In accordance with article VI, certain restrictions are placed on the production, transfer and consumption of sensitive ‘dual use’ chemicals of varied toxicity, which are listed in schedules 1, 2 and 3 to the Annex on Chemicals.⁷⁹⁰ The convention also contains procedures to assist a state party attacked or threatened with attack by chemical weapons,⁷⁹¹ and provisions promoting trade in chemicals and related equipment among states parties.⁷⁹² Article XII provides for measures to redress a situation of non-compliance with the convention, including sanctions. In cases of particular gravity, the matter must be brought to the attention of the general assembly and the security council of the United Nations.⁷⁹³ The convention, which is of unlimited duration,⁷⁹⁴ is not subject to reservations, while the annexes to the convention are not subject to reservations incompatible with its object and purpose.⁷⁹⁵ An international organization is established to oversee the implementation of the convention, the Organization for the Prohibition of Chemical Weapons.⁷⁹⁶ The OPCW, which has its seat in The Hague, came into being upon the entry into force of the convention. Its principal organs are the conference of the states parties, which meets annually; the 41-member executive council, which meets quarterly; and a technical secretariat headed by a director-general.

The establishment and operation of such an elaborate verification regime required equally elaborate preparations. In order to generate trust in the system and to guarantee compliance with the CWC from the outset, it was necessary to complete these preparations and to ensure that the system was by and large functional by the time the convention entered into force. As is usual when founding a major new international organization,⁷⁹⁷ the negotiating states decided to set up a preparatory body, comprising all signatory states, to undertake the necessary groundwork before the convention entered into force. The Resolution Establishing the Preparatory Commission for the OPCW was accordingly adopted by the states signatories on 13 January 1993 at the signing ceremony in Paris. Annexed to the resolution was the constituent document of the Commission, the Text on

⁷⁸⁹ A IV(5).

⁷⁹⁰ A VI.

⁷⁹¹ A X.

⁷⁹² A XI.

⁷⁹³ A XII(4).

⁷⁹⁴ A XVI(1).

⁷⁹⁵ A XXII.

⁷⁹⁶ A VIII.

⁷⁹⁷ See s 2.6.1 above.

the establishing a Preparatory Commission for the OPCW. The Preparatory Commission held its first session in The Hague from 8 to 12 February 1993 and altogether held 16 sessions before the CWC entered into force.

In accordance with paragraph 1 of the Text, the Commission was established

“... for the purpose of carrying out the necessary preparations for the effective implementation of the Convention... and for preparing for the first session of the Conference of the States Parties to that Convention.”

The principal organs of the Preparatory Commission were a plenary of states signatories and a provisional technical secretariat. Besides specifying the tasks of the Commission relating to its own functioning,⁷⁹⁹ the Text lists the Commission’s substantive preparatory responsibilities in considerable detail, with frequent cross-references to clauses of the CWC and its annexes. Among many others, the Commission’s responsibilities included: the elaboration of a detailed staffing pattern for the technical secretariat;⁸⁰⁰ the preparation of financial and staff regulations and rules;⁸⁰¹ the preparation of the programme of work and budget of the first year of activities of the OPCW;⁸⁰² the recruitment and training of staff;⁸⁰³ the development of arrangements to facilitate the election of 20 members of the Executive Council;⁸⁰⁴ the development of draft agreements between the future organization and its member states on privileges and immunities;⁸⁰⁵ the development of other draft agreements such as models for facility agreements covering detailed inspection procedures for chemical facilities producing chemicals posing a high risk to the object and purpose of the convention (chemicals listed in schedule 1 to the Annex on Chemicals);⁸⁰⁶ the preparation of draft guidelines to determining the number, intensity, duration, timing and mode of inspections of facilities producing schedule 1 chemicals;⁸⁰⁷ the development of draft guidelines for the release and classification of confidential data and information, and recommendations for procedures to be followed in

⁷⁹⁸The Resolution and Text establishing the preparatory commission are reproduced in Tabassi (ed) *OPCW: The Legal Texts* (1999) 523.

⁷⁹⁹Pursuant to para 8, these included the election of its chairman and other officers, the adoption of rules of procedure, the appointment of an executive secretary, the establishment of a provisional technical secretariat and the adoption of its own financial regulations.

⁸⁰⁰Para 10(a).

⁸⁰¹Para 10 (c) and (f), and 11(d).

⁸⁰²Para 11(a).

⁸⁰³Para 10(d).

⁸⁰⁴Para 11(e).

⁸⁰⁵Para 12(c).

⁸⁰⁶Para 12(r).

⁸⁰⁷Para 12(s) and Part VI(30) of the Verification Annex.

the case of breaches or alleged breaches of confidentiality, and the elaboration of the draft headquarters agreement between the OPCW and the host country.⁸⁰⁹

As noted by the delegation of Cuba in a working paper submitted to the first session of the Preparatory Commission in 1993, these functions made it ‘necessary to take the required steps to establish the Verification Department [of the future OPCW] and to recruit its staff, virtually from the time the Preparatory Commission begins its activities.’⁸¹⁰ Had the Preparatory Commission not been set up, the various preparatory tasks entrusted to it would of necessity have been performed by the OPCW itself. Viewed from this perspective, the conclusion is inescapable that the Text establishing the Commission amounted to an implied agreement on the provisional application of parts of the CWC in accordance with article 25, paragraph 1(b), of the 1969 Vienna Convention and the corresponding rule of customary international law. All signatories to the CWC were thus under two complementary obligations during the interim period between the signature and entry into force of the convention. The first was the obligation, in accordance with article 18 of the 1969 Vienna Convention, to refrain from acts which would defeat the object and purpose of the CWC pending its entry into force. This obligation, it may be argued, required states actually to observe most of the basic prohibitions of conduct contained in article I, paragraph 1, of the convention, including the obligation not to develop, produce, otherwise acquire, transfer or use chemical weapons.⁸¹¹ The second interim obligation upon signatories was to carry out the preparations foreseen in the text establishing the Commission, which in many instances amounted to the provisional implementation, for preparatory purposes, of certain provisions of the CWC. This interim regime lasted over four years, from the time of the adoption of Paris Resolution until the CWC entered into force on 29 April 1997.

6.4.2 1996 Comprehensive Nuclear-Test-Ban Treaty

Since 1945, seven states have conducted 2,045 nuclear test explosions in the atmosphere, underground and under water.⁸¹² The significance of the Comprehensive

⁸⁰⁸Para 12(u)-(w).

⁸⁰⁹Para 13.

⁸¹⁰OPCW Preparatory Commission doc ‘Views of Cuba on the Work of the Preparatory Commission Relating to the Verification Department of the Technical Secretariat of the Organization for the Prohibition of Chemical Weapons’ (PREPCOM/I/WP.3 dated 3 February 1993) 1.

⁸¹¹See Klabbbers ‘Strange Bedfellows: ‘The “Interim Obligation” and the 1993 Chemical Weapons Convention’ in Myjer (ed) *Issues of Arms Control Law and the Chemical Weapons Convention* (2001) 12.

⁸¹²Athanasopulos *Nuclear Disarmament in International Law* (2000) 143.

Nuclear-Test-Ban Treaty is outlined in its preamble, in which the states parties recognize that

“... the cessation of all nuclear weapon test explosions and all other nuclear explosions, by constraining the development and qualitative improvement of nuclear weapons and ending the development of advanced new types of nuclear weapons, constitutes an effective measure of nuclear disarmament and non-proliferation in all its aspects”.

The CTBT consists of a preamble, 17 articles, two annexes and a protocol with two annexes, all of which form an integral part of the treaty. As its name suggests, the CTBT prohibits all nuclear test explosions in all environments and for all purposes. Article I, paragraph 1, of the treaty provides:

“Each State Party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control.”⁸¹⁴

The treaty thus builds on earlier prohibitions contained in the 1963 Partial Test Ban Treaty,⁸¹⁵ the 1967 Outer Space Treaty,⁸¹⁶ and two bilateral treaties between the United States and the USSR concluded in the 1970's.⁸¹⁷ Article II of the CTBT provides for the establishment of the Comprehensive Nuclear-Test-Ban Treaty Organization in Vienna. The CTBTO, which will come into existence upon the entry into force of the treaty, will ensure the implementation of the treaty, including its provisions for international verification of compliance with it, and provide a forum for consultation and cooperation among the states parties. The organization's principal organs will be a conference of the states parties, an executive council composed of 51 members, and a technical secretariat. Annex 1 to the treaty divides all states among six geographical regions for the purposes of elections to the executive council. States parties are required to implement the CTBT internally by means of national implementation measures, including penal legislation.⁸¹⁸

⁸¹³N 692.

⁸¹⁴The scope of this prohibition includes so-called peaceful nuclear explosions but does not include simulated, computer-based tests, sub-critical tests entailing no nuclear fission, or preparations for nuclear test explosions.

⁸¹⁵N 685 above.

⁸¹⁶The 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (610 *UNTS* 205), which prohibited the testing of any type of weapons on celestial bodies.

⁸¹⁷The 1974 Treaty on the Limitation of Underground Nuclear Weapon Tests (1714 *UNTS* 123) and the 1976 Treaty on Underground Nuclear Explosions for Peaceful Purposes (1714 *UNTS* 387), both of which entered into force in 1990. The 1974 Treaty, which limited nuclear test explosions to 150 kilotons, was itself a significant achievement: the largest explosion, conducted by the USSR in October 1961, measured some 50 megatons. See Ramaker *et al* (n 694) 6.

⁸¹⁸A III.

in terms of article IV, the treaty's verification regime comprises four interrelated elements: (1) a global network of sensors, known as the International Monitoring System (IMS), which is supported by an International Data Centre (IDC);⁸¹⁹ (2) a consultation and clarification process;⁸²⁰ (3) on-site inspections;⁸²¹ and (4) confidence-building measures.⁸²² Of these, the IMS and on-site inspections are the most elaborate and are designed to detect clandestine nuclear tests.⁸²³ Detailed provisions on the functions of the International Monitoring System (IMS) and the International Data Centre (IDC) are set out in the protocol to the treaty, along with the rules governing preparation for, conducting of and reporting on on-site inspections. Article V provides for measures to redress a situation contravening the provisions of the treaty and to ensure compliance with it. These include sanctions and possible referral of the matter to the United Nations. In the event of a dispute concerning the interpretation or application of the treaty, the parties concerned must consult with a view to the expeditious settlement of the dispute.⁸²⁴ A dispute may also be considered by the executive council or the conference of the states parties, which are separately empowered, subject to authorization from the United Nations general assembly, to request an advisory opinion from the ICJ.⁸²⁵ Article XV specifies that the articles and annexes of the treaty are not subject to reservations, while the provisions of the protocol and its annexes are not subject to reservations that are “incompatible with the object and purpose of this Treaty”.

The general confidence of states in the verification regime established under the CTBT naturally has an influence on whether or not they adhere to the treaty. This is especially true of the states whose interests are most closely affected by the treaty, namely those capable of conducting nuclear test explosions. An aspect of this confidence is the functional readiness of the regime at the time the treaty enters into force. Article IV, paragraph 1, of the treaty therefore provides *inter alia* that

⁸¹⁹ A IV(16). The IMS comprises the 321 seismic, infrasound, hydroacoustic and radionuclide monitoring stations listed Annex 1 to the Protocol to the CTBT, as well as 16 radionuclide laboratories. Data from the stations is transmitted to the IDC via a satellite-based global communications infrastructure. The stations are hosted by 89 states and many are located in remote and inaccessible places, including the Chatham Islands, Spitsbergen and Tristan da Cunha. South Africa hosts five facilities: a primary seismic station at Boshof; an infrasound station, also at Boshof; an auxiliary seismic station at Sutherland; a radionuclide station on Marion Island; and a radionuclide laboratory at Pelindaba. A joint German-South African auxiliary seismic station is located at the South African National Antarctic Expedition (SANAE) base.

⁸²⁰ A IV(29)-(33).

⁸²¹ A IV(34)-(67).

⁸²² Part III of the Protocol.

⁸²³ Asada (n 696) 103.

⁸²⁴ A VI(2).

⁸²⁵ A VI(3)-(5).

capable of meeting the verification requirements of this Treaty.”⁸²⁶

The treaty does not expressly state what is meant by the phrase “capable of meeting the verification requirements of this Treaty” or how this objective is to be achieved. It does, however, refer in several places to “the Preparatory Commission”, assuming the commission’s existence as a matter of fact.⁸²⁷ The mechanism used to establish the Preparatory Commission for the CTBTO was similar to that used to establish the Preparatory Commission for the OPCW. The negotiations for the founding document of the Commission and its host country arrangements proceeded in parallel with the final stages of the negotiations for the CTBT itself.⁸²⁸ Shortly after the treaty was opened for signature on 24 September 1996, the depositary (the secretary-general of the United Nations) convened a meeting of states signatories at the headquarters of the United Nations in New York. On 19 November 1996, the meeting adopted a decision to establish the Commission, the Resolution establishing the Preparatory Commission for the CTBTO. Annexed to this resolution was the constitution of the Commission, the Text on the establishment of a Preparatory Commission for the CTBTO.⁸²⁹

The Text provides that the mandate of the Commission is to carry out the necessary preparations for the effective implementation of the CTBT and to prepare for the first session of the conference of the states parties to the treaty.⁸³⁰ In particular, the Commission must undertake “all necessary preparations to ensure the operationalization of the Treaty’s verification regime at entry into force pursuant to article IV, paragraph 1”.⁸³¹ It must also “supervise and coordinate, in fulfilling the requirements of the Treaty and its Protocol, the development, preparation, technical testing and, pending their formal commissioning,

⁸²⁶Asada ((n 696) 104-6) argues that this stipulation is *sui generis*, providing the legal basis for the establishment of the IMS prior to entry into force.

⁸²⁷The references to the preparatory commission in the treaty are found in a II(10) (which provides for the financial contributions of states parties to the preparatory commission to be deducted in an appropriate way from their contributions to the regular budget of the CTBTO); a II(26) (which provides that the conference of the states parties shall consider and approve at its initial session any draft agreements, operational manuals, and other documents recommended by the preparatory commission); and a II(49) (which stipulates, *inter alia*, that the first director-general of the CTBTO shall be appointed by the conference of the states parties at its initial session upon the recommendation of the preparatory commission). There are further references to the work of the preparatory commission in the protocol.

⁸²⁸In the CD, two ‘friends of the chair’ were appointed to conduct consultations on the preparatory commission and ‘host country commitments’. See CD doc CD/1436 10.

⁸²⁹UN doc CTBT/MSS/L.1 dated 17 October 1996. Aust ((n 1) 22, 24 and 90) cites the Text as an example of (1) a supplemental treaty with an unusual name, (2) a treaty not requiring signature, and (3) a treaty entering into force *instantly* for all adopting states. The resolution has been published in the *United Kingdom Treaty Series*, 1999 UKTS 46. Asada ((n 696) 105-13) argues that the text is only a political document but that some of its provisions may have binding effect.

⁸³⁰Para 1.

⁸³¹Para 13.

provisional operation as necessary of the IDC and IMS (names added). Several other provisions of the Text contain references to provisions of the CTBT, implying implementation, at least in part, of those provisions prior to the entry into force of the treaty. These include provisions on the funding of the IMS;⁸³³ the principles regarding the selection and service conditions of the staff of the organization;⁸³⁴ and the development “in accordance with the Treaty and Protocol” of operational manuals for the IMS, IDC and on-site inspections.⁸³⁵ In addition, the Appendix to the Text contains an indicative list of “verification tasks” of the Commission. Thus, although not actually mandated to verify compliance with the CTBT, the Commission must build up an operational readiness of the IMS that will enable it to do so in practice.⁸³⁶

In order to conduct its activities in the field, the Commission concludes ‘facility’ agreements with states hosting monitoring facilities forming part of the IMS. While paragraph 8 of the Text foresees that such agreements will be in *draft* form for the approval of the future conference of the states parties, the practice of the Commission is to conclude such agreements in its own name.⁸³⁷ The legal basis for these agreements is therefore not the Text.⁸³⁸ Rather, it is the implied provisional application in practice of part I, paragraph 4, of the Protocol to the CTBT, which stipulates that host states and the technical secretariat shall agree and cooperate in establishing, upgrading, financing and maintaining monitoring facilities in accordance with appropriate agreements or arrangements. By October 2004, some 55 per cent of the monitoring stations were operational and the IMS was already providing global coverage.⁸³⁹ This ongoing work has been achieved through the implied provisional application of certain terms of the CTBT in

⁸³²It should be noted that the “provisional operation” does not extend to on-site inspections, the strict procedural requirements for which mean that they cannot be conducted until the treaty enters into force. Para 5(c) provides that the Commission shall use funds provided by states signatories to establish and, pending their formal commissioning, “to operate provisionally as necessary” the IDC and IMS.

⁸³³Para 5(c).

⁸³⁴Para 8(c).

⁸³⁵Paras 14(b) and 15(a).

⁸³⁶On the work to establish the verification regime, see the annual reports of the CTBTO Preparatory Commission, available at <http://www.ctbto.org>.

⁸³⁷See, for example, the 1999 Agreement between the Preparatory Commission for the CTBTO and South Africa on the conduct of activities, including post certification activities, relating to international monitoring facilities for the CTBT (2123 UNTS 93). Similar agreements include agreements or arrangements between the Commission and Australia (2123 UNTS 41); the Cook Islands (2123 UNTS 111); Finland (2123 UNTS 27); Jordan (2123 UNTS 59); and Kenya (2123 UNTS 74).

⁸³⁸Para 7 of the Text does, however, state that the Commission has authority to enter into “agreements”, without specifying the nature of such agreements.

⁸³⁹CTBTO press release PI/2004/23 dated 21 October 2004.

accordance with the text establishing the Preparatory Commission and as reinforced by the practice of the Commission.⁸⁴⁰

On 13 October 1999 the United States senate declined by 51 votes (against) to 48 (in favour) to give its advice and consent to the ratification of the CTBT.⁸⁴¹ Subsequently, the United States announced that it would not become a party to the treaty. A footnote appended to a resolution entitled ‘Inter-American Support for the Comprehensive Nuclear-Test-Ban Treaty’,⁸⁴² which was adopted by the general assembly of the Organization of American States at its thirty-fourth session, held from 6 to 8 June 2004, explains the position of the United States in clear terms:

“The United States does not support the CTBT and will not become a party to it. The United States will continue to work, as appropriate, with the working groups of the CTBTO PrepCom and with its Provisional Technical Secretariat on the International Monitoring System (IMS) and IMS-related activities. The United States continues to observe its nuclear testing moratorium and has no plans to conduct a nuclear explosive test....”

Having “made its intention clear not to become a party” to the CTBT in various fora, the United States would appear to have fulfilled the requirements of article 18, paragraph (a), of the 1969 Vienna Convention to bring an end to its obligation not to defeat the object and purpose of the treaty.⁸⁴³ Whether this obligation really has come to an end, however, may be doubted. It is inconceivable that a state may continue to apply a treaty or part of a treaty provisionally while at the same time not be under a duty of good faith in respect of that treaty. The statements concerning the CTBT were not sufficient – and were not intended – to terminate the United States’ participation in the provisional arrangements for the CTBT. To achieve this, the country would be obliged either to *notify* all other signatories of its intention not to become a party to the treaty, as foreseen in paragraph 2 of article 25 of the 1969 Vienna Convention, or to withdraw formally from the

⁸⁴⁰ A recent proposal for the provisional application of the CTBT by Johnson (n 200) is misconceived in that it is based on the assumption that the treaty is not being applied provisionally already. Asada ((n 696) 118-21) reviews possibilities for the provisional application of the on-site inspection regime.

⁸⁴¹ See Deibel ‘The Death of a Treaty’ 2002 (81) *Foreign Affairs* 142, Asada (n 696) 95.

⁸⁴² OAS doc AG/doc.4284/04 dated 25 May 2004.

⁸⁴³ Under President Clinton’s administration, the secretary of state had informed foreign governments that the US would continue to act in accordance with its obligations as a signatory under international law despite the senate’s rejection of the CTBT. See Asada (n 696) 96. Asada’s conclusion (at 101-3) that the US remained under an a-18 obligation was reached before the explicit statements by the executive that the US would not become a party to the treaty. If the US has not ‘unsigned’ the treaty as it did with the Rome Statute on the International Criminal Court, this is reported to be because the president does not enjoy the power to withdraw a treaty pending before the senate. See ‘White House Wants to Bury Pact Banning Tests of Nuclear Arms’ *New York Times* 7 July 2001.

Commission. The United States will thus continue to contribute to and benefit from the provisional arrangements until such time as the required notification is sent or it withdraws from the Commission. While somewhat anomalous, this situation does not exclude the possibility that the decision not to become a party to the treaty may in time be reversed.

Despite this and other setbacks, the CTBT had been signed by 174 states by November 2004 and ratified by 120, including 33 of the 44 states whose ratification is required for the treaty to enter into force. Among the 11 states whose ratification remains outstanding, several have yet to sign the treaty.⁸⁴⁵ The provisional arrangements for the CTBT thus have every appearance of continuing indefinitely.⁸⁴⁶ This prolonged uncertainty highlights the value of the provisional application of the treaty over and above its purely preparatory function. As the arms control and disarmament committee of the International Law Association recently concluded:

“The provisional application, as a confidence-building mechanism, reinforces the legal standing of the CTBT, encourages further ratifications, and deters any State from conducting nuclear tests in the future.”⁸⁴⁷

A similar point was made by the foreign minister of Japan in her statement at the third ‘article XIV’ conference in September 2003, when she said that

“... the norm has taken root that all types of nuclear tests should be banned. Thus the CTBT, even before entering into force, is playing an important role as a strong deterrent against nuclear testing....”⁸⁴⁸

These views raise an important question. What is the present status of the comprehensive ban on nuclear test explosions contained in article I of the CTBT? The longer the provisional regime for the CTBT lasts, the more pertinent this question becomes. The basic obligations of the treaty set out in article I are not among those referred to in the Text establishing the Commission and therefore do not appear to be provisionally applied as such. On the one hand, it could be argued that the observance of article I prior to entry into force is assumed under the Text. It would hardly be likely that the signatory states intended to construct an elaborate and costly system to verify compliance with that article while simultaneously permitting violations of it. However,

⁸⁴⁴ A 78(a) of the 1969 Vienna Convention stipulates that the notification be sent to the depositary. See n 408 above.

⁸⁴⁵ Democratic People’s Republic of Korea, India and Pakistan.

⁸⁴⁶ Three ‘article XIV’ conferences on facilitating the entry into force of the CTBT have been held: in Vienna (1999), New York (2001) and Vienna (2003).

⁸⁴⁷ 2004 *ILA Rep* (available at <http://www.ila-hq.org>.)

⁸⁴⁸ Reproduced in 2003 (3) *CTBTO Spectrum* 3.

such an interpretation, based as it is on implied agreement, could be open to challenge by a nuclear power determined to resume testing.

Alternatively, it could be argued that a signatory's obligation not to conduct any nuclear test explosions in the provisional period derives from its obligation of good faith towards the treaty. Such an obligation includes the duty not to defeat the object and purpose of the treaty prior to its entry into force (article 18 of the 1969 Vienna Convention).⁸⁴⁹ It also includes a general obligation of good faith towards a treaty that is being applied provisionally in whole or in part. However, reliance on a duty of good faith as a source of an obligation not to conduct nuclear test explosions has obvious limits. First and foremost among these is that a state may terminate such a duty simply by ending its participation in the provisional arrangements for the CTBT.⁸⁵⁰ In the absence of an express stipulation, some might also challenge whether the treaty is being applied provisionally at all. In the circumstances, it would seem desirable to identify another legal basis restraining the nuclear capable states from conducting test explosions. Specifically, it would appear useful to explore whether the preparatory regime for the CTBT may support the emergence of a rule of customary international law prohibiting all nuclear test explosions in all environments.⁸⁵¹ Such a customary norm, whether applying to all states equally or only to those not objecting to it, would buttress the provisional arrangements for the treaty and counterbalance its failure to enter into force.

Although a handful of important players maintain their distance from the treaty, it has been signed by nearly all states and ratified by the majority. Indeed, the membership of the Preparatory Commission for the CTBTO, which comprises all signatories to the treaty,

⁸⁴⁹The existence of the obligation of good faith in the interim period is implicit in the final declarations of the three 'article XIV' conferences. In para 8 to the final declaration of the conference held in 2003, the ratifying states called on *all* states "to refrain from acts which would defeat the object and purpose of the Treaty pending its entry into force." (CTBTO Preparatory Commission doc CTBT-Art.XIV/2003/5 dated 11 September 2003). See also para 8 of the final declaration of the 1999 conference (CTBT-Art.XIV/1999/5 dated 8 October 1999) and para 13 of the final declaration of the 2001 conference (CTBT-Art.XIV/2001/6 dated 15 November 2001).

⁸⁵⁰In addition, in accordance with a 18(b) of the 1969 Vienna Convention, a state that has expressed its consent to be bound by a treaty is under the obligation not to defeat the object and purpose of that treaty prior to its entry into force *provided that such entry into force is not unduly delayed*. The obvious question is whether the entry into force of the CTBT, which has remained open for signature for over eight years, has been unduly delayed. If so, its many ratifying states, which include three nuclear powers, could arguably have been released from the obligation of good faith reflected in a 18. Whether or not the entry into force of the CTBT has been unduly delayed is a matter of opinion. It should be noted, however, that the IMS and other elements of the verification regime probably do not yet meet the level of functionality expected under a IV(1) of the treaty as a prerequisite for its entry into force. But what if the provisional state of affairs persists for another eight years or in any event beyond the completion by the Preparatory Commission of its preparatory tasks? Can the obligation of good faith based on a 18 continue indefinitely in respect of the CTBT?

⁸⁵¹A 38 of the 1969 Vienna Convention recognizes that a rule set forth in a treaty may become binding upon a third state as a customary rule of international law, recognized as such.

is greater than that of the IAEA and the OPCW. It is not unreasonable to conclude that many of the states adhering to the treaty and subsidising the work of the Commission – most of which are in any event not permitted to possess nuclear devices much less test them – support a general norm prohibiting all nuclear test explosions in all environments and for all purposes. After all, the basic obligations of the CTBT supplement and reaffirm existing treaty prohibitions that have themselves in all probability achieved customary status, namely the ban on tests in the atmosphere, under water and in outer space (the 1963 Partial Test Ban Treaty),⁸⁵³ the prohibition of tests on celestial bodies (the 1967 Outer Space Treaty),⁸⁵⁴ and the rules of the nuclear non-proliferation regime (the 1968 Non-Proliferation Treaty and numerous other treaties).⁸⁵⁵ As far as customary international law is concerned, therefore, only the prohibition of underground nuclear explosive tests remains in doubt.⁸⁵⁶ While the evidence is inconclusive at this stage,⁸⁵⁷ the longer the provisional arrangements for the CTBT persist, the more likely it is that a new customary norm will emerge encompassing a ban on such underground tests. Even if the entry into force provisions of the CTBT prevent it from ever coming into force, the establishment of the Preparatory Commission for the CTBTO has to some degree enabled states signatories to circumvent this obstacle and to demonstrate their support for a norm prohibiting all nuclear test explosions. Any state wishing to conduct a test explosion in future may well have to establish itself as a ‘persistent objector’ with respect to that norm and accept the universal condemnation this may entail.⁸⁵⁸

⁸⁵²The CTBTO Preparatory Commission has 174 member states, compared to 137 in the IAEA and 167 in the OPCW (November 2004).

⁸⁵³N 685 above. The customary prohibition on atmospheric nuclear tests is based on principles of international environmental law. See Sands (n 163) 319-222. In the 1996 advisory opinion on *Nuclear Weapons*, the ICJ (n 657 para 29) held that “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”

⁸⁵⁴N 816 above.

⁸⁵⁵N 686 above. It is noteworthy that even India, which has not acceded to the NPT and could be considered a ‘persistent objector’, acknowledges an obligation not to proliferate nuclear weapons. See, for example, UN press release GA/DIS/3274 dated 7 October 2004, reporting on a statement made by the Indian representative to the first committee of the UN general assembly:

“... Declaring that his country shared the world’s growing concern over the proliferation of weapons of mass destruction, he insisted that States were responsible for preventing the spread of such arms, along with their related materials and technologies, to both non-State actors and other States. That was why India, as a possessor of nuclear weapons, had put in place a system of export controls and maintained an “impeccable” record with regards to preventing proliferation.”

⁸⁵⁶The test explosions conducted by India and Pakistan in 1998 were conducted underground.

⁸⁵⁷Asada ((n 696) 92-4) concludes that a customary rule not to conduct nuclear tests in all environments is yet to be established. With reference to the nuclear tests conducted by India and Pakistan in May 1998, he notes that among the statements, resolutions and communiqués condemning the tests, there were none that accused the two countries of breaching international law. He also notes that if the comprehensive test ban had already become a customary rule, it would not have been necessary for these statements, resolutions and communiqués to urge them to sign and ratify the CTBT.

⁸⁵⁸The security council resolution (S/RES/1172 dated 6 June 1998) condemning the nuclear tests conducted by India and Pakistan *inter alia* demanded that they refrain from further nuclear tests and called upon all states not to carry out any nuclear weapon test explosion or any other nuclear explosion in accordance with the provisions of the CTBT.

In chapter 2 consideration was given to whether a preparatory commission for a new international organization is itself an international organization. The conclusion was reached that, as a rule, the status of a particular preparatory commission will be determined by its founding document and the decisions and practice of its members.⁸⁵⁹ It remains to be seen whether the Preparatory Commission for the OPCW was, and whether Preparatory Commission for the CTBTO is, an international organization in its own right. The Text establishing the OPCW Preparatory Commission did not expressly endow it with the status of an international organization, stating merely that it “shall have such legal capacity as necessary for the exercise of its functions and the fulfilment of its purpose.”⁸⁶⁰ However, the structure, functions and composition of the Commission all point to its possessing full international legal personality. During the four years of its existence it operated and appears to have been generally accepted by its membership as an international organization in its own right, albeit one with a temporary and limited mandate. Member states accredited representatives to the Commission, elected its officials and paid their dues, while the host government accorded it functional privileges and immunities typical of those enjoyed by intergovernmental organizations.⁸⁶¹ With the entry into force of the CWC on 29 April 1997, the OPCW came into being. However, the Preparatory Commission continued to exist in terms of paragraph 17 of its establishing text until the conclusion of the first session of the conference of the states parties on 23 May 1997. The distinct international legal personality and treaty-making power of the Commission was confirmed in its final act prior to dissolution. This was the conclusion of a Protocol Regarding the Transfer of Assets, Liabilities, Records and Functions from the Preparatory Commission for the OPCW to the OPCW.⁸⁶² The protocol was approved by the governing organs of both organizations before being signed by the newly appointed director-general of the OPCW and the outgoing executive secretary of the Commission.

In the case of the Preparatory Commission for the CTBTO, its establishing text expressly suggests that it is an international organization. Paragraph 7 of the text reads as follows:

⁸⁵⁹See s 2.6.5 above.

⁸⁶⁰Para 7.

⁸⁶¹1993 Agreement between the Preparatory Commission for the OPCW and the Netherlands Concerning the Headquarters of the Commission (OPCW Preparatory Commission docs PC-VI/6 dated 23 February 1994 and PC-VI/6/Add.1 and Add.2 dated 20 June 1996).

⁸⁶²OPCW doc C-I/DEC/4 dated 14 May 1997, reprinted in Tabassi (n 798) 536.

The Commission shall have standing as an international organization, authority to negotiate and enter into agreements, and such other legal capacity as necessary for the exercise of its functions and the fulfilment of its purposes.” (Emphasis added.)

What is meant by the phrase *standing as* an international organization is clarified in paragraph 22 of the same document, which stipulates:

“The Commission as an international organization, its staff, as well as the delegates of the States Signatories shall be accorded by the Host Country such legal status, privileges and immunities as are necessary for the independent exercise of their functions in connection with the Commission and the fulfilment of its object and purpose.” (Emphasis added.)

In practice, the Commission functions as a fully-fledged international organization.⁸⁶³ It has concluded a Seat Agreement⁸⁶⁴ with Austria, in terms of which the Commission, its officials and representatives to the Commission are granted the same privileges and immunities as those held by the other United Nations-related organizations located in Vienna. The bilateral ‘facility’ agreements concluded with states hosting monitoring facilities generally apply the 1946 Convention on Privileges and Immunities of the United Nations⁸⁶⁵ to the activities of the Commission. In addition, the Commission has committed several juridical acts, unique for an entity of its kind, which confirm beyond doubt that it is an international organization in its own right. It signed a formal relationship agreement with the United Nations on 26 May 2000,⁸⁶⁶ and on 11 June 2002 became the first and only preparatory commission to adhere to the 1986 Vienna Convention. In 1999 the Commission recognized the jurisdiction of the administrative tribunal of the International Labour Organization for the purposes of adjudicating disputes between the Commission and members of its staff. A memorandum, submitted by the international labour office to the committee charged with making a recommendation on the matter to the ILO governing body, considered the question whether a treaty is required to establish an intergovernmental organization.⁸⁶⁷ The memorandum reads, in part, as follows:

“... the Commission was established by virtue of a resolution, as opposed to a formal international treaty, authenticated, signed and ratified, or acceded to by States or other subjects of international law. This is the normal legal basis for an entity to qualify as an intergovernmental organization entitled to recognize the jurisdiction of the Tribunal. The important legal element is however that subjects of international law should have agreed

⁸⁶³Asada (n 696) 109.

⁸⁶⁴1997 Agreement between the Preparatory Commission for the CTBTO and Austria Regarding the Seat of the Commission (1998 *UNTS* 3). A I(1)(c) of the agreement defines the Commission as “having the status of an international organization”.

⁸⁶⁵1 *UNTS* 15 and 90 *UNTS* 327.

⁸⁶⁶UN doc A/54/884 dated 26 May 2000. The agreement entered into force on 15 June 2000 upon its approval by the general assembly. Other relationship agreements have been concluded with the WMO (n 270 above), OPANAL and the European Centre for Medium-Range Weather Forecasts.

⁸⁶⁷In s 2.6.5 above the conclusion was reached that the constitutive instrument of an international organization need not be a treaty.

on an act conveying their clear intention to establish such an organization with immediate effect. The resolution establishing [the] CTBTO PrepCom, and endowing it with attributes pertaining to intergovernmental organizations, including the necessary privileges and immunities, should be considered as constituting such an act, especially as it has been implemented in the host State by an agreement granting the Commission immunity from legal process. It will be recalled, in this regard, that the Interim Commission for the International Trade Organization (ICITO/GATT) which recognized in 1957 the jurisdiction of the Administrative Tribunal of the ILO had also come into existence on the basis of a resolution adopted in 1948 in the context of the Havana Conference.’⁸⁶⁸

Whether or not one agrees with the ILO legal adviser’s assumption that the Commission’s constituent instrument is not a treaty,⁸⁶⁹ it is evident from this passage that the ILO accepted the Commission’s declaration of recognition of jurisdiction of the tribunal as a declaration by an intergovernmental organization.

6.5 Concluding remarks

Since the early 1990’s provisional application has played a limited but important role in the law of arms control. The fact that the instances of provisional application in this area are all so recent suggests that the procedure requires a certain minimum trust between the parties, a trust made possible by end of the Cold War. In some respects provisional application in the area of arms control mirrors the practice in other branches of international law. The agreement on provisional application may be found in a clause in the treaty (START II, the Ottawa Convention), a protocol or annex forming part of the treaty (the CFE Treaty, the Treaty on Open Skies), or in a separate instrument (the CWC and the CTBT). Provisional application may be express (the CFE Treaty, the Treaty on Open Skies and the Ottawa Convention) or implied (the CWC and the CTBT). Some clauses expressly regulate the termination of provisional application (the CFE Treaty, the Treaty on Open Skies), while others do not (START II, the Ottawa Convention). Where an arms control agreement establishes a new international organization, the provisional arrangements are implemented under the umbrella of a preparatory commission (CWC and CTBT).

In other respects provisional application in the field of arms control treaties demonstrates certain differences due to the special nature of such instruments. Arms control treaties are invariably applied provisionally in part only (the CFE Treaty, the Treaty on Open Skies, START II, the CWC, the CTBT, the Ottawa Convention). Most

⁸⁶⁸ILO doc ‘Recognition of the Tribunal’s jurisdiction by the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom)’ (GB.276/PFA/15 dated November 1999) para 5.

⁸⁶⁹See n 829 above.

often those parts applied provisionally are of a preparatory and institutional nature, the Ottawa Convention being an exception in this respect. An extensive practice of voluntary notifications or declarations of provisional application is unlikely to develop in multilateral arms control treaties. Such declarations or notifications result in differing obligations on signatories in the interim period, whereas states will usually be concerned to maintain reciprocal arms control obligations at all times. In this respect, the Ottawa Convention was again somewhat exceptional. In that case declarations of provisional application posed no risk to the states involved but rather provided a mechanism to reinforce their commitment to the ban on anti-personnel mines.

Perhaps the most noteworthy feature of provisional application in the field of arms control is its use as a confidence-building measure, as is evident in the provisional arrangements with respect to the CFE Treaty and the Treaty on Open Skies, as well as the CWC and the CTBT. In these cases the provisional application of certain treaty provisions demonstrated their effectiveness, promoted trust and confidence among the parties and encouraged ratification of the treaty. Given the innate sensitivity of arms control agreements, the value of such a function should not be underestimated. However, this specialized role should not allow one to overlook another potential purpose of provisional application, which is suggested in the provisional application of the Ottawa Convention. This is where the treaty is “manifestly highly desirable and almost certain to obtain parliamentary approval”.⁸⁷⁰ The Treaty of Pelindaba,⁸⁷¹ for example, was opened for signature in Cairo on 11 April 1996. To date just 19 of the required 28 instruments of ratification of the treaty have been deposited with the depositary. Its signatories no doubt support the treaty but a combination of factors, unrelated to the treaty, has significantly delayed its entry into force. In this case, provisional application would have been a fitting way of underlining the commitment of African states to the long advanced ideal of an African nuclear weapon free zone.

⁸⁷⁰See n 171 above and associated text.

⁸⁷¹African Nuclear-Weapon-Free-Zone Treaty (1996 (35) *ILM* 698).

Article 25 of the 1969 and 1986 Vienna Conventions reflects a procedure whereby some or all of the negotiating parties may agree in terms of a treaty or another instrument to apply provisionally some or all of the provisions of the treaty prior to its entry into force. This flexible procedure combines the advantages of entry into force upon signature with the functions of ratification, allowing a treaty to be implemented immediately while the parties pursue the domestic measures necessary to give their final consent to be bound. In principle any treaty may be applied provisionally. Categories of treaties most often made subject to the procedure include economic agreements and air service agreements. The reasons for provisionally applying a treaty include the urgency of its subject matter and the certainty that it will be ratified in due course. Provisional application may also be used to achieve legal continuity between successive instruments or legal consistency when amending a treaty, to circumvent obstacles to the entry into force of a treaty, or to prepare for the establishment of a new intergovernmental organization. In the latter case provisional application often occurs in the context of a preparatory commission with its own international legal personality.

The modern focus on article 25 of the 1969 Vienna Convention has obscured the long history of provisional application, which began in Europe in the nineteenth century in response to the need to avoid the delays inherent in the requirement of ratification. By the 1920's the practice, variously described as entry into force provisionally and provisional application, had achieved the status of a permissive rule of customary international law. Although article 25 has the merit of codifying state practice precisely, the negotiating process provoked concerns about the constitutionality of the practice, which led to several Latin American states making reservations in respect of article 25. However, the practice of the vast majority of states – including the states making the reservations – demonstrates beyond doubt that article 25 continues to reflect a well-established customary norm.

Doctrinal uncertainties persist about the nature and effects of provisional application. Such uncertainties are generally not shared by states. The record of the Vienna conference on the law of treaties and state practice reveal that the provisional application of a treaty gives rise to the obligation under international law to perform the treaty in question. The principle of *pacta sunt servanda* thus applies during the provisional period. This obligation is, however, subject to the possibility to terminate the provisional application by notice to the other states between which the treaty is being applied provisionally. A narrow

exception to the obligation to perform a provisionally applied treaty is found in article 40 of the 1969 Vienna Convention: where an agreement on provisional application is given in violation of the constitutional provisions of a state, that state may be able to raise this violation as invalidating the agreement on provisional application provided the violation was manifest and concerned a rule of fundamental importance.

Municipal law plays an important role in the law of provisional application. It determines the competence of the executive of a state to agree to apply a treaty or part of a treaty provisionally, the national procedures that must be followed beforehand, and the effect of a provisionally applied treaty on the domestic plane. In principle, a provisionally applied treaty should be subject to the same rules on incorporation or translation into domestic law that govern treaties in force definitively for the state. In South Africa, the executive has always enjoyed the constitutional authority to apply any treaty provisionally. Under the Constitution of 1996 the source of the power of provisional application is (1) the power to negotiate and sign all treaties and (2) the power to express the consent of the state to be bound by treaties that enter into force without ratification. Greater use could be made of the technique of provisional application in South African practice in order to enhance the role of parliament in the treaty-making process.

Since the 1990's provisional application has played a limited but useful role in arms control treaties. The nature of these agreements enhances the importance of the period between signature and ratification. This has led to the development of a practice whereby certain parts of the treaty are provisionally applied as a confidence-building measure and in order to prepare for the implementation of the treaty's verification mechanisms upon entry into force. In the case of the CTBT, the implied provisional application of certain parts of the treaty has contributed to the establishment of a provisional treaty regime that deters further nuclear explosive test and facilitates the development of a general norm prohibiting all such tests.

**Treaties provisionally applied by Latin American states
making reservations to article 25 of the 1969 Vienna Convention
(Colombia, Costa Rica, Guatemala and Peru)**

State	Date of signature (S) and ratification (R) of the 1969 Vienna Convention	Treaty	UNTS reference
Colombia	23 May 1969 (S); 10 April 1985 (R)	1947 General Agreement on Tariffs and Trade	55 <i>UNTS</i> 187
		1951 Air Transport Agreement between Colombia and Spain	216 <i>UNTS</i> 73
		1953 Air Transport Agreement between Colombia and France	973 <i>UNTS</i> 191
		1956 Air Transport Agreement between Colombia and the United States	476 <i>UNTS</i> 77
		1957 Agreement between Colombia and the United States for financing certain educational exchange programs	462 <i>UNTS</i> 151
		1962 International Coffee Agreement	469 <i>UNTS</i> 169
		1964 Agreement concerning the provision of Netherlands volunteers for work in Colombia	54 <i>UNTS</i> 289
		1966 Agreement concerning technical co-operation between Colombia and the Netherlands	591 <i>UNTS</i> 201
		1967 Exchange of notes constituting an agreement between Colombia and Argentina concerning the elimination of double taxation on profits derived from the operation of ships and aircraft	670 <i>UNTS</i> 173
		1968 International Coffee Agreement	647 <i>UNTS</i> 3
		1968 International Sugar Agreement	654 <i>UNTS</i> 3
		1971 Agreement between Switzerland and Colombia concerning scheduled air transport	972 <i>UNTS</i> 131

Colombia (continued)		services	
		1972 Basic Agreement between Colombia and Argentina on co-operation in scientific research and technological development	1549 <i>UNTS</i> 109
		1972 International Cocoa Agreement	882 <i>UNTS</i> 67
		1973 Statute of the Latin American Civil Aviation Commission	1241 <i>UNTS</i> 185
		1974 Agreement concerning assistance by the United Nations Development Programme to the Government of Colombia	936 <i>UNTS</i> 217
		1975 Air Transport Agreement between Colombia and Mexico	1364 <i>UNTS</i> 249
		1975 International Cocoa Agreement	1023 <i>UNTS</i> 253
		1976 International Coffee Agreement	1024 <i>UNTS</i> 3
		1978 Convention on co-operation for the restructuring of the Latin American Institute for Educational Communication	1253 <i>UNTS</i> 95
		1983 International Coffee Agreement	1333 <i>UNTS</i> 119
		1992 International Sugar Agreement	1703 <i>UNTS</i> 203
		1994 International Coffee Agreement	1827 <i>UNTS</i> 3
		1994 International Tropical Timber Agreement	1955 <i>UNTS</i> 81
		2001 International Coffee Agreement	Resolution 393 of the International Coffee Council
Costa Rica	23 May 1969 (S); 22 November 1996 (R)	1947 General Agreement on Tariffs and Trade	55 <i>UNTS</i> 187
		1966 Convention on Spanish-Costa-Rican social cooperation	1194 <i>UNTS</i> 53
		1968 International Coffee Agreement	647 <i>UNTS</i> 3
		1973 Statute of the Latin American Civil Aviation Commission	1241 <i>UNTS</i> 185
		1976 International Coffee Agreement	1024 <i>UNTS</i> 3

Costa Rica (continued)		1977 International Sugar Agreement	1004 <i>UNTS</i> 219
		1978 Convention on co-operation for the restructuring of the Latin American Institute for Educational Communication	1253 <i>UNTS</i> 95
		1979 Air Transport Agreement between Costa Rica and Spain	1237 <i>UNTS</i> 157
		1982 Trade Agreement between Costa Rica and Mexico	1398 <i>UNTS</i> 185
		1983 International Coffee Agreement	1333 <i>UNTS</i> 119
		1984 International Sugar Agreement	1388 <i>UNTS</i> 3
		1987 International Sugar Agreement	1499 <i>UNTS</i> 31
		1994 International Coffee Agreement	1827 <i>UNTS</i> 3
Guatemala	23 May 1969 (S), July 1997 (R)	1947 General Agreement on Tariffs and Trade	55 <i>UNTS</i> 187
		1960 Agreement between Guatemala and the United Nations Special Fund concerning assistance from the Special Fund	383 <i>UNTS</i> 67
		1962 International Coffee Agreement	469 <i>UNTS</i> 169
		1963 Agreement on telecommunications between Guatemala and Mexico	1367 <i>UNTS</i> 101
		1968 International Coffee Agreement	647 <i>UNTS</i> 3
		1968 International Sugar Agreement	654 <i>UNTS</i> 3
		1972 International Cocoa Agreement	882 <i>UNTS</i> 67
		1973 International Sugar Agreement	906 <i>UNTS</i> 69
		1973 Statute of the Latin American Civil Aviation Commission	1241 <i>UNTS</i> 185
		1975 International Cocoa Agreement	1023 <i>UNTS</i> 253
		1976 International Coffee Agreement	1024 <i>UNTS</i> 3
		1977 International Sugar Agreement	1064 <i>UNTS</i> 219
		1978 Convention on co-operation for the restructuring of the Latin American Institute for Educational Communication	1253 <i>UNTS</i> 95

Guatemala (continued)		1983 International Coffee Agreement	1333 <i>UNTS</i> 119
		1984 International Sugar Agreement	1388 <i>UNTS</i> 3
		1984 Partial Agreement between Guatemala and Mexico	1512 <i>UNTS</i> 83
		1986 Agreement concerning financial co-operation between Guatemala and the Federal Republic of Germany	1540 <i>UNTS</i> 233
		1987 International Sugar Agreement	1499 <i>UNTS</i> 31
		1992 International Sugar Agreement	1703 <i>UNTS</i> 203
		1994 International Coffee Agreement	1827 <i>UNTS</i> 3
Peru	23 May 1969 (S), 14 September 2000 (R)	1947 General Agreement on Tariffs and Trade	55 <i>UNTS</i> 187
		1952 Bilateral Air Transport Agreement between Peru and the Netherlands	255 <i>UNTS</i> 49
		1954 Agreement between Peru and Spain for air services between and beyond their respective territories	232 <i>UNTS</i> 65
		1954 Agreement between Peru and Canada for air services between and beyond their respective territories	411 <i>UNTS</i> 63
		1959 Agreement between Peru and Nicaragua for air services between their respective territories	392 <i>UNTS</i> 303
		1959 Agreement between Peru and Switzerland relating to air services	411 <i>UNTS</i> 97
		1959 Air transport Agreement between Peru and France	1142 <i>UNTS</i> 107
		1960 Bilateral Air Transport Agreement between Peru and Norway	497 <i>UNTS</i> 207
		1966 Agreement between Peru and the United Kingdom on technical co-operation	817 <i>UNTS</i> 157
		1968 International Coffee Agreement	647 <i>UNTS</i> 3
		1968 International Sugar Agreement	654 <i>UNTS</i> 3
		1973 Statute of the Latin American Civil Aviation Commission	1241 <i>UNTS</i> 185

Peru (continued)	1975 International Cocoa Agreement	1023 <i>UNTS</i> 233
	1976 International Coffee Agreement	1024 <i>UNTS</i> 3
	1976 Agreement between Peru and Brazil on reciprocal assistance for the repression of the illicit traffic in habit-forming drugs	1131 <i>UNTS</i> 91
	1976 Agreement on the establishment of a Joint Brazilian-Peruvian Sub-Commission for Amazonia	1330 <i>UNTS</i> 203
	1980 International Cocoa Agreement	1245 <i>UNTS</i> 221
	1983 International Coffee Agreement	1333 <i>UNTS</i> 119
	1984 Supplemental Agreement between Peru and Spain on technical co-operation for the development of social work and social welfare programs in Peru	1439 <i>UNTS</i> 149
	1983 International Tropical Timber Agreement	1393 <i>UNTS</i> 671
	1987 International Sugar Agreement	1499 <i>UNTS</i> 31
	1993 International Cocoa Agreement	1766 <i>UNTS</i> 3
	1994 International Tropical Timber Agreement	1955 <i>UNTS</i> 81

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