THE PROVISIONAL APPLICATION OF INTERNATIONAL TREATIES

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The present article deals with a provisional application of international treaties. This issue has important implications both in international law and in constitutional law of the states. The main point of the article is that there is not a provisional entry into force of the international treaties but a provisional application of certain provisions of the international treaties prior to its entry into force. The provisional application of the international treaties implies a lot of problems in practice and that's why this issue is under work of the UN International Law Commission.

Keywords: codification, international treaties, provisional application, International Law Commission, Vienna Convention on the Law of Treaties.

1. INTRODUCTION

The present study deals with a provisional application of international treaties. This subject-matter implies a need to use both the perspective of international law and the perspective of constitutional law. As a matter of fact, the Czech Republic lacks a precise national legal regulation of the provisional application of international treaties or a legislative delegation of powers in this matter to the Government. However, a similar situation seems to exist in the Slovak Republic and a number of other European States. From the point of view of international law, codified in Article 25 of the Vienna Convention on the Law of Treaties (1969), "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."

The provisional application of a treaty thus does not mean a "provisional entry into force" but it sets up just certain legal effects of such treaty[1]. Put differently, it refers not to the provisional validity but only to the application of the treaty[2]. It should be pointed out that a treaty becomes binding on contracting States after its entry into force but it may have some effects before that date[3]. However, Article 25 of the Vienna Convention is relatively brief and general provision which leaves many questions open. At the same time, provisional application is used in treaty practice of many States. This is one of the reasons why, in 2012, the UN International Law Commission (ILC) decided to include the topic in its programme of work[4].

2. CODIFICATION HISTORY

In the past, this issue was less clear in the past than it appears now. Some authors considered the content of Article 25 of the Vienna Convention as a new rule of international law of treaties[5]. However, the closer study of writings shows evidence that the provisional application of treaties took place, although rather exceptionally, already in the 19th century. The first documented example of a provisional application was the 1840 London Agreement concluded between some European Powers (Austria, Prussia, Russia and the Great Britain) and the Ottoman Empire[6]. The main reason for the provisional application was said to be a geographical distance between States parties, which could make the exchange of ratification instruments more complicated.

At later stage and at present, the main reason for the provisional application has been the need to introduce into application certain treaties or certain provisions of them pending the relatively long process of internal discussion and approval. The key issue is that in modern democratic States (both constitution monarchies and republics) the Head of State needs to have the consent of Parliament for the ratification of treaties[7].

It is interesting to note that while the doctrine in the pre-war Czechoslovakia (1918-1938) did not pay much attention, if any, to the provisional application[8], the cotemporaneous practice knew the legislative regulation of "provisional application" or "provisional entry into force" of certain, namely trade agreements[9]. Probably the most known example of provisional application concerns the General Agreement on Tariffs and Trade (GATT 1947), signed in Geneva on 30 October 1947. On the same day, negotiating States also adopted the Protocol on provisional entry into force of the GATT, which was then used terminology for provisional application. Since the envisaged Habana Charter never entered in force, the GATT was provisionally applied until 1994.

Codification history of the provision which became today's Article 25 of the Vienna Convention was relatively complex[10]. The draft article underwent significant formal and terminological changes during the drafting within the International Law Commission. The first draft article which corresponds by and large to the present Article 25 appeared already in the First report of the Special Rapporteur Fitzmaurice (1956)[11]. The next Special Rapporteur Waldock referred in his First report (1962) to the concept (in a different wording) of provisional application in the then draft Article 20 (Mode and date of entry into force) and Article 21 (Legal effects of entry into force)[12]. The report of the ILC merged principles contained therein into a single provision of the renumbered draft Article 24 (Provisional entry into force), adopted on the first reading[13]. After a length consideration and discussion in 1965 the Commission finally adopted this provision under Article 22 (1966)[14].

It is clear that the main difference resides in terminology, as the ILC draft Article 22 referred to "Provisional entry into force" instead of the provisional application of treaties. In addition, the Art. 22, para. 2, was focused on the provisional entry into force of part of a treaty only. However, this provision did not reach a unanimous acceptance in the ILC. For example, P. Reuter, the French member of the ILC, called the wording as incorrect[15].

The 1966 draft by the Commission faced to the resistance mainly during the Vienna Conference (1968/1969). Delegations of several States raised a proposal to delete Article 22 (e.g. USA, Korea and Viet Nam), but this did not have a larger support. Instead, the Conference has redrafted considerably the original Article 22. The content of the former paragraph 2, which singled out the provisional application (entry into force) of part of a treaty, became a part of the present Article 25, para. 1.

The most important amendment, based on a modified version of the proposal by Czechoslovakia and Yugoslavia, was thus renaming of the controversial "provisional entry into force" to the "provisional application"[16]. The Conference also introduced the new paragraph 2 referring to the termination of the provisional application of a treaty. This amendment followed the proposal by Belgium, supported by Hungary and Poland[17].

According to this paragraph "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 terminated if this State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty". This provision offers protection in particular to the State whose legislative body fails to approve the treaty which is already being provisionally applied[18].

The amended Article 25 was adopted at the Vienna Conference by 87 votes to 1, with 13 abstentions. In particular, several Latin American States abstained for reasons of conflict with their Constitutions. They feared that Article 25 could imply obligations for signatory States without the consent of their Parliaments[19]. Colombia and some other States of the region (Costa Rica, Guatemala and Peru) raised a reservation to Article 25, according to which the Constitution precludes a provisional application of treaties[20].

Article 25 is an important provision which presents a necessary starting point for any legal analysis. It is interesting that the Vienna Convention does not include a definition of the concept of provisional application. It is neither in Article 2, nor in Article 25 itself. It seems that, and flaws concerning the terminology used during the preparation of this provision within the ILC confirm it, the present Article 25 was incorporated into the Convention in order to take into account the existing State practice without the will to establish a precise legal regime[21].

3. LEGAL BASIS FOR AND NATURE OF THE PROVISIONAL APPLICATION

Article 25, para. 1, provides for a provisional application of a treaty pending its entry into force. It is a kind of simplified procedure of consent which has to ensure an application of a treaty or part of a treaty if the negotiating States expressed their interest in such application. The consent to the provisional application may be expressed either in the treaty itself or otherwise, i.e. in another agreement[22]. In practice, it could be a case of collateral agreement that provides for the provisional application of the main treaty. This seems to be prevailing view in the doctrine.

Already the Special Rapporteur Waldock explained that the word "otherwise" was intended to cover the case in which there was no provision on the provisional application in the treaty itself, but the parties made a separate agreement, for example, by an exchange of notes[23].

The text adopted by the Commission referred to the provisional entry into force where the treaty itself prescribed, or where the negotiating States had in some other manner so agreed. The commentary indicated that an alternative procedure having the same effect was for the State concerned, without inserting a clause in the treaty, to enter into an agreement in a separate protocol or exchange of letters, or in some other manner, to bring the treaty into force provisionally[24].

From the point of view of international law, the consent of contracting States is decisive. If the State expressed its consent to the agreement on provisional application included in a provision of the treaty itself or agreed in some other manner, it may not invoke the provisions of its internal law (including its Constitution) as justification for its failure to perform international obligations. In case of an inconsistency clause it is important, in the light of the recent international investment arbitrations, to invoke a direct inconsistency with the internal laws. The State should declare whether and to what extent it is not able to apply provisionally the treaty. It is worth

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[1]Cf. Aust, A.: Modern Treaty Law and Practice, Cambridge, 2000. P. 139-140.

[2]Cf. Týč, V.: O vnitrostátní přímé závaznosti mezinárodních smluv [On internal direct applicability of international treaties]. Brno. 1996. P. 86.

[3]The Jennings, R. – Watts, A. (eds.): Oppenheim's International Law, London/New York, 1992, p. 1238: "Although a treaty only becomes binding upon the contracting states when it has come into force, it is not always without effect before its entry into force – typically, during the interval between signature and ratification. …a treaty may provide, or the negotiating states may otherwise agree, that it is wholly or partly to be applied provisionally pending its entry into force."

[4]The the First report on the provisional application of treaties (J.M. Gómez-Robledo, Special Rapporteur), doc. A/CN.4/664 (2013).

[5]The Sinclair, I.: The Vienna Convention on the Law of Treaties. 2nd ed. Manchester University Press. 1984. P. 46.

[6]The Geslin, A.: La mise en application provisoire des traités. Paris: Pedone, 2005. P. 6.

[7]Srov. Seidl-Hohenveldern, I.: Mezinárodní právo veřejné [Public International Law]. Praha: Codex Bohemia, 1999. P. 50-51, 63.

[8]Srov. Hobza, A.: Úvod do mezinárodního práva mírového [Introduction to Public International Law] . Praha. 1933. P. 298-299.

[9]The Acts of Czechoslovak Parliament No. 637/1919, No. 158/1923 and No. 66/1949. The last Act has been never derogated. Arguably this act is still in force, although according to some views it may lack the constitutional basis in the present legal order of the Czech Republic.

[10]Cf. Villiger, M.E.: Commentary on the 1969 Vienna Convention on the Law of Treaties, MNP, Leiden/ Boston. 2009. P. 353.

[11]Article 42, par. 1, in: YILC, 1956, Vol. II, p. 116 a 127: „A treaty may, however, provide that it shall come into force provisionally on a certain date, or upon the happening of a certain event, such as the deposit of a specified number of ratifications. In such cases an obligation to execute the treaty on a provisional basis will arise, but, subject to any special agreement to the contrary, will come to an end if final entry into force is unreasonably delayed or clearly ceases to be probable."

[12]The YILC. 1962. Vol. II, p. 68 ff.: „6. Notwithstanding anything contained in the preceding paragraphs of this article, a treaty may prescribe that it shall come into force provisionally on signature or on a specified date or event, pending its full entry into force in accordance with the rules laid down in this article."

[13]The YILC. 1962. Vol. II. P. 182.

[14]YILC. 1966. Vol. II, p. 210: "Article 22 – Entry into force provisionally:
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."

[15]The YILC. 1965.Vol. I. P. 106.

[16]The doc. A/CONF.39/C.1/SR.27, Official Records, Documents. P. 144, § 224.

[17]The doc. A/CONF.39/C.1/SR.26 a SR.27. Ibid. P. 142, 144.

[18]The Villiger, M. E.: Commentary…, op. cit. P. 355.

[19]The, e.g., the statement of the delgation of Guatemala, OR Plenary. 1969. P. 39, § 53.

[20]The Villiger, M.E.: Commentary…, op. cit. P. 356.

[21]The Geslin, A.: La mise en application provisoire des traités. Paris: Pedone. 2005. P. 111.

[22]The e.g. Protocol of Provisional Application of the GATT (1949).

[23]A/CN.4/SR.790, § 90.

[24]YILC. 1966. Vol. II. P. 210. Article 22. Para. 2.

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noting also another view according to which a provisional application is not based on agreement but rather on a unilateral act. It was the approach maintained in the past by the Dutch Government that the application could be based on a unilateral declaration of the interest to apply de facto a treaty depending on existing constitutional and legislative possibilities[25]. However, this minority view seems to be eventually abandoned.

Yet another issue concerns the juridical nature of provisional application. In other words, it is the question whether an agreement on (consent to) provisional application results in an obligation to execute the treaty. According to view of the Special Rapporteurs Fitzmaurice and Waldock who dealt with the question of the provisional application (entry into force) of treaties, they deal with the arrangement as a species of the entry into force, with all the legal consequences that followed[26]. In contrast to the earlier statements of G. Scelle or A. Verdross, for example, M. Bartoš was convinced that the provisional entry into force really conferred validity and a legal obligation. Even if the treaty subsequently lapsed owing to lack of ratification, that dissolution of the treaty would not be retroactive and did not prevent the treaty from having been in force during a certain time[27].

The juridical nature of provisional application of treaties could be and indeed was in the context of the principle of pacta sunt servanda. The commentary to Article 23 (formerly article 55), adopted by the ILC in 1966, confirmed that the words "in force" covered also treaties in force provisionally under Article 22[28]. At the Vienna Conference in 1968, an exchange of views was held as to whether the shift from "provisional entry into force" to "provisional application", in Article 22, had modified the juridical nature of the rule in Article 23 (Pacta sunt servanda). On the one hand, the United Kingdom indicated its understanding that the rule in Article 23 continued to apply equally to a treaty which was being applied provisionally under Article 22[29]. On the other hand, India took the view that any obligations that might arise under the provisional application would come under the heading of the general obligation of good faith on the basis of Article 15 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force)[30]. Colombia and Yugoslavia proposed amendments to draft Article 23 with a view to ensure that the wording of the article should cover treaties applied provisionally[31]. The Yugoslav amendment was referred to the Drafting Committee. The Chair of the Drafting Committee later indicated that it had considered the Yugoslav amendment to be self-evident and that provisional application also fell within the scope of article on the pacta sunt sevanda rule[32].

It is interesting that treaties applied on a provisional basis were also referred to in the course of the discussion on the good faith obligation to refrain from the frustration of the object of the treaty. In 1962, the Special Rapporteur Waldock included in the proposed article 9 (Legal effects of a full signature), para. 2 (c) also an obligation "to refrain from any action calculated to frustrate the object of the treaty or to impair its eventual performance"[33]. Some members of the ILC suggested that the provisions of subparagraph (e) could be useful to cover the question of provisional entry into force[34]. However, the Drafting Committee later proposed a new article (renumbered as article 17, later 15) which was restricted to the general good faith obligation. The provisional application of treaties was not raised during the consideration of Article 15 at the Vienna Conference[35].

Indeed, provisional application is provisional just from the temporal point of view, but it creates definite obligations. Even after the termination of the provisional application, the effects of provisionally applied rules are the same as in case of application of the treaty in force[36]. Therefore, provisional application goes well beyond the mere obligation not to frustrate the object and purpose of the treaty under Article 18 of the Vienna Convention.

This conclusions has been confirmed by recent investment arbitrations, in particular in cases Kardassopoulos v. Georgia[37] and Yukos v. Russian Federation[38].

4. RESTRICTIONS AND CONDITIONS OF PROVISIONAL APPLICATION

While the legal basis for the provisional application is always in an agreement, the expression of consent or intention of States to apply provisionally a treaty or its certain provisions may take different forms. Sometimes the consent of States may include restrictions and conditions of provisional application.

From the legal point of view it is not too important whether the agreement on provisional application is incorporated in a provision of a treaty or appears in a separate agreement concerning the main treaty. Examples of the first case include Article 7 of the Protocol on the Provisional Application of Certain Provisions of the Treaty on Conventional Armed Forces in Europe[39] or Article 45 of the Energy Charter Treaty (ECT)[40]. Examples of the second case include, in particular, the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea (UNCLOS). Sometimes the parties may express their intention to apply a treaty provisionally, by way of declaration, e.g. according to Article 23 of the 2013 Arms Trade Treaty: "Any State may at the time of signature or the deposit of instruments of its ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State."[41]

In other cases the provisional application may be based on tacit acceptance. For example, Article 45, para. 1 of the Energy Charter Treaty provides that the Treaty shall apply provisionally "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations". This provision also gives an example of limitations of provisional application. The so-called consistency clause means that, in this particular case, international law does not enjoy automatic primacy but the application is subject to national laws.

However, States may also make declaration to the contrary, i.e. that a treaty shall not be apply provisionally. Again, the ECT provides an example in Article 45, para. 2: "(a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depositary."

An example of tacit acceptance of provisional application can be found in Article 7, para. 1 (a), of the 1994 Agreement relating to the implementation of Part XI of the UNCLOS:

"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 depository 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."

5. TERMINATION OF PROVISIONAL APPLICATION

Termination of provisional application is in general terms covered by Article 25, para. 2, of the Vienna Convention as follows:

"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 of the treaty."

This provision seems to confirm a general thrust of Article 25 to leave a large flexibility for negotiating States. They may, of course, incorporate a different regulation into the specific treaty subject to provisional application or into the agreement on provisional application.

The usual way of termination is a unilateral notification. For example, Article 45, para. 3, of the Energy Charter Treaty mentions the possibility of terminating provisional application under the following terms: "Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository."

However, it is not unusual that provisional application terminates on the date of the entry into force of a treaty. In addition, provisional application may terminate according to a special arrangement reached between the parties. For example, Article 7, para. 3, of the Agreement relating to the implementation of Part XI of the UNCLOS provides: "Provisional application shall terminate upon the date of entry into force of this Agreement. In any event, provisional application shall terminate on 16 November 1998 if at that date the requirement in article 6, paragraph 1, of consent to be bound by this Agreement by at least seven of the States (of which at least five must be developed States) referred to in paragraph 1 (a) of resolution II has not been fulfilled." Termination of the provisional application of the Agreement thus does require a declaration by the State[42].

6. COMPARATIVE VIEW ON NATIONAL LAWS AND PRACTICE CONCERNING PROVISIONAL APPLICATION

As it was pointed out at the very beginning, provisional application of treaties, while being governed by international law, is also a matter of constitutional law and practice of States. Yet the situation in various States differs. Some States have special laws on international treaties which sometimes (but not always) also refer to provisional application. Other States do not have such laws, so the internal aspects of negotiation, conclusion and application of treaties are governed by constitutions and internal instructions (which is also the case of the Czech Republic). With respect to provisional application of treaties, it is possible to divide States, in principle, in three groups. Most information was based on documents of of the Committee of Legal Advisers on Public International Law (CAHDI) and other bodies of the Council of Europe in relation to the provisional application of the Protocol No. 14 to the European Convention on Human Rights[43].

(A) The first group which seems to include most States has the position that the preliminary application of a treaty may decide the organ which has the competence to conclude such treaty. This covers mostly those treaties which may be concluded and implemented by the executive branch without the participation of parliament, i.e. governmental or executive agreements. It is interesting that the dividing line does not follow the approach to relationship between international and internal law, as the group includes both some States with the dualistic tradition (such as Italy and the UK) and monistic States (such as France and the Netherlands).

Italy allows for provisional application only exceptionally and only with respect to treaties that do not require the consent of the Parliament. In the Netherlands the Government may decide on provisional application of treaties if the treaty falls into the competence of the executive. Despite certain uncertainties, the Dutch Government decided on the provisional application of the Protocol No. 14 to the ECHR.

France allows for provisional application of a treaty exceptionally, on condition that it has been included in the treaty or agreed otherwise. Internally, provisional application is not regulated in legislation but just in internal instruction. It is not possible if ratification and approval by the Parliament are needed. For example, the Protocol No. 14 did not apply provisionally but the Energy Charter Treaty did[44].

In Belgium the entry into force of treaties is linked to the consent of both chambers of the parliament. Since provisional application is not expressly

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[25]The Panhuys, H.F et al. (eds.): International Law in the Netherlands. Vol. 1. 1978. P. 355.
[26]The Doc. A/CN.4/658 (2013). P. 22.
[27]The A/CN.4/SR.791. § 24.
[28]The YILC. 1966. Vol. II. P. 211, § 3.
[29]Official Records of the UN Conference on the Law of Treaties, vol. II, 11th plenary meeting. § 58.
[30]Ibid. § 70.
[31]Ibid. Vol. II. 12th plenary meeting. § 45 and 50.
[32]Ibid. Vol. II. 28th plenary meeting. § 47.
[33]A/CN.4/144 and Add. 1.
[34]A/CN.4/SR.645. § 18.
[35]The A/CN.4/658. P. 26.
[36]The Diez de Velasco, M.: Instituciones de Derecho Internacional Público (18 ed., dir. C. Escobar Hernández), Madrid: Tecnos, 2013, p. 177: „Dicha aplicación provisional se mantendrá hasta que los Estados manifesten su consentimiento – en cuyo caso el Tratado dejará de aplicarse provisionalmente, pero su aplicación prosional habrá producido plenos efectos jurídicos mientras así estuvo acordado por los Estados." Cf. also Villiger, M. E.: Commentary…, op. cit. P. 355-356.
[37]ICSID Case No. ARB/05/18.
[38]PCA Case No. 227, Yukos Universal Limited (Isle of Man) v. The Russian Federation, Interim Award on Jurisdiction and Admissibility (30 November 2009).
[39]United Nations, Treaty Series. Vol. 2441. No. 44001.
[40]Text see at: http://www.encharter.org/fileadmin/user_upload/document/EN.pdf.
[41]The Doc. A/CONF.217/2013/L.3 (27.3.2013). P. 12.
[42]The doc. A/CN.4/664 (2013). P. 13.
[43]For examples of countries cf. Expression of consent by states to be bound by a treaty. Analytical report and country reports. Committee of legal advisors on public international law (CAHDI). Council of Europe. CAHDI (2001) 3. Strasbourg, 23 January 2001. Other information cf. also CDDH Reflection Group (CDDH-S-GDR): CDDH opinion on putting into practice certain procedures to increase the court's case-processing capacity. Compendium of information received to date from States in response to the request made at and following the 4th meeting. DH-S-GDR(2009)013. Strasbourg. 3 March 2009.
[44]As reported by Prof. A. Pellet, French expert in arbitration Yukos v. Russian Federation, provisional application of a treaty is possible in France only if the object of the treaty belongs to the competence of executive power or the provisional application was approved by the Parliament.

regulated in law, it is possible in practice only exceptionally if there are urgent reasons for it. Such provisional application must not create direct effects for natural persons or a burden for a State budget.

The UK is able to accept provisional application of a treaty if there is no need of transformation into internal law or national legislation has been already adopted. Therefore the UK did so with respect to the Protocol No. 14. Poland does not exclude provisional application of treaties if their application may be ensured only by the executive power.

Finland does not have constitutional provisions on provisional application of treaties, but it is applied in practice if the parties agreed upon. National procedures for provisional application are the same as for adoption of a treaty. Decision is adopted by President on proposal of the Government and with the consent of the Parliament, where necessary (if the treaty includes such provisions which are reserved to law).

Austria also does not have constitutional rules on the issue which organ decides on provisional application of treaties. In practice, provisional application starts only after the completion of internal procedures necessary for the expression of consent to be bound by a treaty which usually includes the consent of the Parliament. According to Foreign Affairs Act of Slovenia, if ratification of the treaty falls within the competence of the Government, the delegation may, with the permission of the Government, accept a clause stipulating that the treaty shall be provisionally applied prior to its entry into force.

(B) The second group forms those States which attribute the agreement on provisional application to the executive power even where the conclusion of a treaty requires consent of the Parliament. Provisional application is excluded only with respect to such international treaties which provisions would be in conflict constitutional rules.

In Germany, for example, provisional application of treaties is not governed by law but just by the Guidelines of the Federal Ministry of Foreign Affairs on international treaties. Provisional application of a treaty is possible if its application does not require a law (act of Parliament), internal legal conditions for its application already exist or provisional application will be done in conformity with national law. If the constitutional limits are respected, the Federal Government is able to decide on provisional application.

In Switzerland, the Federal Council decides on provisional application pending the procedures usual for obtaining consent of the Parliament if this application is necessary for securing national interests or adoption of urgent measures.

In Spain, Decree (Decreto 801/72) deals with provisional application of treaties. The provisional application must be approved by the Council of Ministers and the Parliament shall be informed about that decision in case the treaty requires the authorization of the Parliament before ratification. Should the Council of Minsters approves the provisional application, the treaty shall be published in the Official Journal (Boletin Oficial del Estado).

In Greece, provisional application does not have background in the Constitution but it is possible in practice, although rarely, if the respective provision is a part of an international treaty. If the treaty requires consent by the Parliament, the Government must ask for it.

Croatia is able to apply provisionally a treaty on the basis of the decision of the President or the Government, if the President delegated the power to it or the conclusion of the treaty is in the competence of the Government.

The Russian Federation has the legal regulation in the Federal Law on International Treaties[45]. According to Article 23, provisional application of a treaty is possible if this is provided in the treaty or its signatories have reached an agreement on it. The decision on provisional application adopts the organ which decided on the signature of the treaty. If an international treaty which validity requires adoption by way of federal law needs a provisional application, it must be submit to the State Duma within six months from the beginning of provisional application.

Similarly, the Law on International Treaties of the Republic of Kazakhstan provides in Article 18 that international treaties or their parts apply provisionally to the extent which is not contrary to the law of the Republic of Kazakhstan, pending their entry into force, if this is provided in the international treaty itself or the negotiating States have so agreed[46].

The Czech Republic does not have a special law on international treaties and constitutional rules do not address directly the issue of provisional application. Instead, internal rules are included in the Guidelines of the Government for negotiation, internal discussion, application and termination of international treaties[47]. Under its Article 27, "in accordance with the Vienna Convention on the Law of Treaties, it is possible to agree in a treaty a provision on provisional application of the treaty or some parts of it pending its entry into force. Provisional application may be agreed only with respect to the treaty or its provisions if they are in conformity with laws of the Czech Republic. The treaty or its provisions which are not in conformity with laws of the Czech Republic cannot be provisionally applied." The situation in the Slovak Republic is similar to those in the Czech Republic, due to the fact that it follows the earlier Czechoslovak treaty practice.

(C) Finally, the third group includes States which do not allow provisional application of treaties at all. This is a case of certain Latino-American countries. In particular, Guatemala, Colombia and Costa Rica which raised reservation to Article 25 of the Vienna Convention, justified by inconsistence with their constitutional rules, prohibiting the Government to enter into international obligations without consent of legislative bodies.

In Portugal, provisional application of treaties is hindered by the constitutional rule that limits internal legal effects only to the international treaties ratified or approved, after their official publication.

In Cyprus, provisional application is entirely excluded if the treaty includes provisions inconsistent with law or if their provisions concern individuals.

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[45] Federal Law on International Treaties of the Russian Federation of 15 July 1995, no. 101-FZ, as amended by the federal law of 1st December 2007. No. 318-FZ.

[46] Law of the Republic of Kazakhstan of 30 May 2005. No. 54.

[47] Resolution of the Government of the Czech Republic. No. 131. Of 11 February 2004.

It is very interesting that even some Latino-American countries which raised reservations to Article 25 of the Vienna Convention have recently agreed on provisional application. The most recent example is the Trade Agreement between the European Union and its member States, of the one part, and Colombia and Peru, of the other part, signed in June 2012. According to Article 330, para. 3, "the Parties may provisionally apply this Agreement fully or partially. Each Party shall notify the Depository and all other Parties of the completion of the internal procedures required for the provisional application of this Agreement."[48] The EU and Peru have been applied the agreement bilaterally since the beginning of March 2013. The provisional application between all three parties (including Colombia) starts on 1 August 2013[49].

This agreement follows the example of the 2010 Free Trade Agreement between the EU and the Republic of Korea, which Article 15.10, para. 5, provides for its provisional application[50].

7. CONCLUSIONS

All the above mentioned information seems to support the conclusion that provisional application is a useful institution, relatively frequently used in the modern treaty practice of States. That is why the decision of the International Law Commission to include the topic in its programme of work was a timely response to needs of State practice. The main reason of the provisional application of a treaty is to ensure that the treaty or its part is applied provisionally pending its entry into force, i.e. before the completion of internal procedures, namely ratification, in all negotiating States.

Provisional application of treaties has important implications both in international law and in constitutional law. However, international law plays a primordial role. The starting point of any interpretation must be in Article 25 of the Vienna Convention on the Law of Treaties, although this provision is quite brief and leaves certain issues open. Its codification history also shows certain theoretical inconsistencies and fluctuations from "provisional entry into force" to the present "provisional application". From the point of view of international law, the consent of States is decisive. If the State expressed its consent to the agreement on provisional application included in a provision of the treaty itself or agreed in some other manner, it may not invoke the provisions of its internal law (including its Constitution) as justification for its failure to perform the international obligation[51].

Constitutional law may, however, limit considerably the ability of States to accept provisional application of all or certain categories of treaties. The situation in various States differs at least from two points of view. First, some States have special acts on international treaties, including sometimes also an article on provisional application, while other States do not have legislation but just internal instructions. Second, the internal law and practice reveal three groups of States. The first one includes those States where the consent on provisional application belongs to the organ competent to conclude the treaty in question, the second includes States where the executive branch (Government) alone is able to approve provisional application, and the third one presents States which are not able, for constitutional reasons, to apply treaty provisionally.

In any case, it seems that provisional application and its termination provide enough flexibility that States may apply certain treaties or parts thereof, if they find it necessary, subject to their constitutional rules.

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However, in the light of recent international investment arbitrations, it is important for States to invoke a direct inconsistency of the treaty provisions with their internal laws or not to accept provisional application as such. Otherwise, the provisional application also creates legal rights and obligations and, in case of their violation, entails international responsibility.

П. Штурма: Халықаралық келісімшарттарды уақытша қолдану.

Бұл мақаланың пәні халықаралық келісімшарттарды уақытша қолданудың мүмкіндіктері болып табылады. Көптеген жылдар бойы бұл мәселе халықаралық құқық пен мемлекеттердің конституциялық құқығында көкейкесті болып келеді. Автордың халықаралық келісімшарттарды уақытша қолдану оларды қолданысқа уақытша енгізу дегенді білдірмейді, тек мұндай келісімшарттар күшіне енгенге дейін оның жекелеген ережелерінің уақытша қолданылуын анықтайды деген пікірі қарастырылып отырған мәселеге қатысты пайымдауының шыққан төркіні болып табылады. Халықаралық келісімшарттарды уақытша қолдану көптеген теориялық және тәжірибелік проблемаларды туындатады, және осыған байланысты Біріккен Ұлттар Ұйымының халықаралық құқық Комиссиясының кодтандыру пәні болып табылады.

Түйінді сөздер: кодификация, халықаралық келісімшарттар, уақытша қолдану, халықаралық құқық Комиссиясы, халықаралық келісімшарттардың құқығы туралы Вена конвенциясы.

П. Штурма: Временное применение международных договоров.

Предметом настоящей статьи является возможность временного применения международных договоров. На протяжении многих лет данный вопрос остается актуальным в международном праве и в конституционном праве государств. Отправной точкой размышлений автора относительно рассматриваемого вопроса представляется утверждение, согласно которого временное применение международных договоров не означает их временное введение в действие, а определяет лишь временное применение отдельных положений таких договоров до вступления их в силу. Временное применение международных договоров порождает множество теоретических и практических проблем, и в этой связи является предметом кодификации Комиссии международного права Организации Объединенных Наций.

Ключевые слова: кодификация, международные договоры, временное применение, Комиссия международного права, Венская конвенция о праве международных договоров.

[48] OJ L 354, 21.12.2012. P. 3, at 96.

[49] http://trade.ec.europa.eu/doclib/press/index.cfm?id=953

[50] OJ L 127, 14.5.2011. P. 6.

[51] The possible application of Article 46 of the Vienna Convention of the Law of Treaties to provisional application of a treaty i sone of questions which merit a further research.