

THE PROVISIONAL APPLICATION OF INTERNATIONAL AGREEMENTS

Martin A. Rogoff*

Barbara E. Gauditz**

I. INTRODUCTION

The last few decades have seen a tremendous increase in the number of international agreements¹ concluded² by states and interna-

* Professor of Law, University of Maine School of Law. B.A., Cornell University; M.A., University of California (Berkeley); LL.B., Yale University.

** Candidate for J.D., University of Maine School of Law. B.A., Hunter College of the City University of New York.

1. As used in this Article, "international agreement" is the generic term for voluntarily undertaken bilateral or multilateral international legal obligations of states and international organizations. The term "international agreement" thus includes treaties, conventions, protocols, and agreements in simplified form. See generally *Nuclear Tests (Austl. v. Fr.)* 1974 I.C.J. 253, 267 (Judgment of Dec. 20) (unilateral acts or declarations may create binding international legal obligations if made publicly with an intent to be bound); C. PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 29 (1965); *RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 301 comment a, § 303 comment a (Tent. Draft No. 6, 1985); Brandon, *Analysis of the Terms "Treaty" and "International Agreement" for Purposes of Registration Under Article 102 of the United Nations Charter*, 47 *AM. J. INT'L L.* 49 (1953); Fawcett, *The Legal Character of International Agreements*, 30 *BRIT. Y.B. INT'L L.* 381 (1953); Widdows, *What is an Agreement in International Law?* 50 *BRIT. Y.B. INT'L L.* 117 (1979).

The term "treaty" is used in the narrower American constitutional sense as an international agreement that must be submitted to a domestic ratification process, not in the generic sense employed in the Vienna Convention on the Law of Treaties, which defines a treaty as "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." Vienna Convention on the Law of Treaties, art. 2(1)(a), *opened for signature* May 23, 1969, U.N. Doc. A/CONF.39/27 (in force Jan. 27, 1980), *reprinted in United Nations Conference on the Law of Treaties*, Documents of the Conference 287 (First and second sessions: Vienna, 26 March-24 May 1968 & 9 April-22 May 1969), U.N. Doc. A/CONF.39/11/Add.2, and in 63 *AM. J. INT'L L.* 875 (1969) [hereinafter *Vienna Convention*]. See also International Law Commission, *Commentary to Article 2 of the Draft Articles on the Law of Treaties*, *United Nations Conference on the Law of Treaties*, Documents of the Conference 8-9 (First and second sessions: Vienna, 26 March-24 May 1968 & 9 April-22 May 1969), U.N. Doc. A/CONF.39/11/Add.2 [hereinafter *United Nations Conference*, Documents]; CONGRESSIONAL RESEARCH SERVICE, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, A STUDY PREPARED FOR THE FOREIGN RELATIONS COMMITTEE, 98TH CONG., 2D SESS.* 45 (Comm. Print 1984) [hereinafter *FOREIGN RELATIONS COMMITTEE STUDY ON THE ROLE OF THE SENATE*].

The term "agreement in simplified form" is used to designate those international agreements that under domestic law do not require ratification.

2. The term "concluded" is used to refer to agreement on an authenticated text of an international agreement and the means of bringing it into force.

tional organizations.³ The pace of concluding international agreements is accelerating and will most likely continue to accelerate at an increasing rate.⁴ The growing reliance on international agreements by the members of the world community is of course a response to rapidly expanding international interactions and interdependencies.⁵ Until the latter part of the nineteenth century, international agreements dealt primarily with political matters: peace treaties, treaties of alliance and friendship, neutrality treaties, and treaties settling territorial claims.⁶ Today, international agreements deal not only with political matters, but with legal, social, cultural, economic, technical, and administrative matters as well.⁷ Perhaps most significant is the growing use of multilateral agreements, whereby nations codify or create norms of international law or es-

3. A significant number of international agreements are now entered into by international organizations. An international convention held under the auspices of the United Nations has recently adopted a convention governing such agreements. Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, done Mar. 21, 1986, U.N. Doc. A/CONF.129/15, reprinted in 25 INT'L LEGAL MATERIALS 543 (1986) (not yet in force). See also Detter, *The Organs of International Organizations Exercising Their Treaty-Making Power*, 38 BRIT. Y.B. INT'L L. 421 (1962); See also Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, 1980 I.C.J. 73 (Advisory Opinion of Dec. 20).

4. THE U.S. DEP'T OF STATE, CATALOGUE OF TREATIES: 1814-1918 (1964) lists 3,318 treaties that entered into force in the 104 years between 1814 and 1918. From 1920 through 1946, there were 4,834 treaties registered with the League of Nations, a significant number of which had been concluded and entered into force prior to 1920. L.N.T.S., GENERAL INDEX (1920-1946). During its first 26 years of operation, there were 12,259 treaties registered with the United Nations, with relatively few antedating 1946. As of June 1985 there had been over 23,000 treaties registered with the United Nations. U.N.T.S. (1946-June, 1985). The registration requirement of the United Nations Charter applies to "[e]very treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force." U.N. CHARTER art. 102, para. 1. See generally Brandon, *supra* note 1, at 49; Rosenne, *United Nations Treaty Practice*, 86 RECUEIL DES COURS 281 (1954); Tabory, *Recent Developments in United Nations Treaty Registration and Publication Practices*, 76 AM. J. INT'L L. 350, 351 (1982).

5. "The growth of international organizations in the last decades has facilitated contact among States at the regional or universal level. Such contact has given rise to an increase in the number of multilateral treaties . . ." J. RUDA, THE FINAL ACCEPTANCE OF INTERNATIONAL CONVENTIONS 5 (The Stanley Foundation, Occasional Paper No. 10, 1976). See also van Son, *The Treaty Power of the European Economic Community*, 12 DEN. J. INT'L L. & POL'Y 183 (1983).

6. J. RUDA, *supra* note 5, at 6.

7. See, e.g., U.S. DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1986 *passim* (1986).

The preamble to the Vienna Convention recognizes "the ever-increasing importance of treaties as a source of international law and as a means of developing peaceful co-operation among nations, whatever their constitutional and social systems . . ." Vienna Convention, *supra* note 1, preamble.

establish international organizations.⁸ Indeed, the International Law Commission has recently observed that "the conclusion of multilateral agreements has become the main device in the legal regulation of the relations between States."⁹

Given the prominence of international agreements of all sorts for the orderly and effective operation of the international legal system, it is central to the mission of international law to provide the legal framework for the expeditious conclusion and entry into force¹⁰ of legally meaningful international agreements. Unfortunately, problems are often encountered with the entry into force of international agreements that are negotiated and concluded in good faith. Some concluded agreements never do enter into force.¹¹ Others enter into force only after long delay.¹² Some multilateral agreements that do enter into force never obtain the number of adherences hoped for so that they do not attain the intended universal or near-universal application;¹³ or adherences to such agreements may be delayed for

8. See INDEX TO MULTILATERAL TREATIES 50, 112, 251 (V. Mostecky ed. 1965) (lists 947 multilateral treaties between 1596 and 1918, 971 between 1919 and 1945, and 1,941 between 1946 and 1963); M. BOWMAN & D. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS (1984) (compiles information on parties, scope, and current status of 833 of the most significant multilateral treaties, and status information in note form for 150 others).

Exact information on the number and status of multilateral treaties is not readily available. See Sprudz, *Status of Multilateral Treaties—Researcher's Mystery, Mess or Muddle?* 66 AM. J. INT'L L. 365 (1972).

9. *Review of the Multilateral Treaty-Making Process, Addendum 1, Observations of the International Law Commission, Report of the Secretary-General*, at 16, U.N. Doc. A/35/312/Add.2 (Aug. 28, 1980).

10. See *infra* notes 22-32 and accompanying text.

11. 1-5 UNPERFECTED TREATIES OF THE UNITED STATES: 1776-1976 (C. Wiktor ed. 1980) (for a complete collection through 1919 of treaties that the United States has concluded but which have not entered into force). See also W. HOLT, TREATIES DEFEATED BY THE SENATE (1964). For examples of recently concluded United States treaties that have not entered into force, see TREATY ON THE LIMITATION OF STRATEGIC OFFENSIVE ARMS AND PROTOCOL THERETO, S. EXEC. DOC. NO. Y, 96th Cong., 1st Sess. (1979) [hereinafter SALT II Treaty]; Agreement on East Coast Fishery Resources with Canada, S. EXEC. DOC. NO. U, V, 96th Cong., 1st Sess. (1979).

12. For examples of treaties that have entered into force after long delay, see Vienna Convention, *supra* note 1 (opened for signature May 23, 1969, entered into force Jan. 27, 1980); Convention on the Registration of Inland Navigation Vessels, *concluded* Jan. 25, 1965, U.N. Doc. E/ECE/579 (E/ECE/Trans/540) (entered into force June 24, 1982); Convention on the Reduction of Statelessness, *concluded* Aug. 30, 1961, 989 U.N.T.S. (entered into force Dec. 13, 1975); Convention on the International Maritime Organization, *done* Mar. 6, 1948, 9 U.S.T. 621, T.I.A.S. No. 4044, 289 U.N.T.S. 3 (entered into force Mar. 17, 1958).

13. For examples of multilateral treaties in force that have fewer than hoped for adherences see Vienna Convention, *supra* note 1; Convention on the Reduction of Statelessness, *supra* note 12; Convention on Fishing and Conservation of the Living Resources of the High Seas, *opened for signature* Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285. Although 110 states took part in the final meeting of the Vienna Convention, only 47 states were parties as of December 31, 1985.

considerable periods of time.¹⁴ Although some international agreements, because of domestic political opposition, do not enter into force or obtain many adherences, others simply run afoul of the often cumbersome and time-consuming national processes required for ratification.¹⁵

The problem of final acceptance of multilateral agreements has been recognized by the League of Nations¹⁶ and the United Nations¹⁷ and has been the subject of discussion¹⁸ and study.¹⁹ Re-

U.N., MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GEN., STATUS AS OF 31 DEC. 1985, at 731, U.N. Doc. ST/LEG/SER.E/4, U.N. Sales No. E. 86.V.3 (1986) [hereinafter MULTILATERAL TREATIES]. As of December 31, 1985, only 14 states were parties to the Convention on the Reduction of Statelessness. *Id.* at 191. By December 31, 1985, 36 states were parties to the Convention on Fishing and Conservation of Living Resources of the High Seas. *Id.* at 692.

14. Two examples of treaties where adherence by additional states was delayed for considerable periods of time after entry into force are the International Convention on Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, and the Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277. Of the 96 parties to this latter Convention, 27 states were parties when the Convention entered into force on January 12, 1951; 35 states became parties between January 12, 1951 and 1960; and 34 states became parties between 1961 and 1985. MULTILATERAL TREATIES, *supra* note 13, at 93-94. Of the 122 parties to the former Convention, 27 states were parties when the Convention entered into force on January 4, 1969; 54 states became parties between January 4, 1969 and 1974; and 41 states became parties between 1975 and 1985. *Id.* at 101-102.

The United States Senate has only recently advised ratification of the Genocide Convention, 132 CONG. REC. 51377-78 (daily ed. Feb. 19, 1986).

15. See, e.g., U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS?, *supra* note 14 (discussing problems of United States ratification of human rights conventions).

16. See *Report of the Committee Appointed to Consider the Question of Ratification and Signature of Conventions Concluded Under the Auspices of the League of Nations*, League of Nations Doc. A.10.1930 (1930) (suggesting methods of expediting ratifications).

17. Frequent resolutions urge member states to ratify or accede to treaties promulgated by the General Assembly in the area of human rights. See, e.g., G.A. Res. 32/130, 32 U.N. GAOR Supp. (No. 45) at 150, U.N. Doc. A/32/45 (1977). See generally Weissbrodt, *A New United Nations Mechanism for Encouraging the Ratification of Human Rights Treaties*, 76 AM. J. INT'L L. 418 (1982).

18. See Ago, *Review of the Commission's Programme and Methods of Work*, [1968] 2 Y.B. INT'L L. COMM'N 171, U.N. Doc. A/CN.4/SER.A/1968/Add.1 (the final stage of the codification of international law). The Commission's discussions of this memorandum are recorded at [1968] 1 Y.B. INT'L L. COMM'N 97, 179, 191-92, 198-205, U.N. Doc. A/CN.4/SER.A/1968. See also *Report of the Commission to the General Assembly*, [1968] 2 Y.B. INT'L L. COMM'N 224, U.N. Doc. A/CN.4/SER.A/1968/Add.1 (Commission's discussions of Ago's memorandum "focused on the desirability of expediting the process of ratification of or accession to codification conventions in order to shorten the final stage of codification of international law."). No action was taken by the General Assembly. J. RUDA, *supra* note 5, at 3.

19. O. SCHACHTER, M. NAWAZ & J. FRIED, *TOWARD WIDER ACCEPTANCE OF U.N. TREATIES* (1971).

cently, the United Nations General Assembly requested the Secretary-General to prepare a report "on the techniques and procedures used in the elaboration of multilateral treaties."²⁰ The report expresses "an increasing concern with the non-ratification or the slow ratification of multilateral treaties, resulting in delays in their entry into force, in restricting the number of participating States for an excessive number of years, and even in the failure of certain treaties to enter into force at all."²¹

The period between the conclusion of international negotiations and the definitive entry into force of treaty obligations is a particularly sensitive one. The momentum of negotiations and the cooperative relationships established during negotiations must continue. To this end, it is extremely helpful if the successful outcome of the negotiating process can be given immediate legal protection. The law of provisional application is an important mechanism developed by states to afford such protection. This Article describes and discusses the mechanism of provisional application.

In order for an international agreement to impose binding legal obligations on a state, that international agreement must enter into force for that state.²² Increasing use is now being made of agreements in simplified form,²³ which may enter into force upon signature by duly authorized governmental officials. In contrast, treaties and conventions, the instruments that are usually employed for the most important international undertakings, require ratification or accession²⁴ for entry into force. Most contemporary bilateral treaties

20. G.A. Res. 32/48, reprinted in 16 UNITED NATIONS RESOLUTIONS 681 (D. Djonovich ed. 1984).

21. *Review of the Multilateral Treaty-Making Process, Report of the Secretary-General*, at 25, U.N. Doc. A/35/312 (Aug. 27, 1980).

22. Article 26 of the Vienna Convention provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention, *supra* note 1, art. 26. See generally Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39 AM. J. INT'L L. 180 (1945). Treaties do not generally have retroactive effect. Article 28 of the Vienna Convention provides:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Vienna Convention, *supra* note 1, art. 28. See generally Jones, *The Retroactive Effect of the Ratification of Treaties*, 29 AM. J. INT'L L. 51 (1935).

23. See *supra* note 1.

24. Ratification and accession are "international act[s] . . . whereby a state establishes on the international plane its consent to be bound by a treaty." Vienna Convention, *supra* note 1, art. 2(1)(b). The domestic act whereby officials of a state are authorized to "ratify" or "accede" to a treaty should not be confused with the ratification or accession itself. See, for example, the Senate Resolution of Ratification of the Treaty with Canada to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area: "Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratifica-

provide that they will enter into force only upon ratification by the states that are to become parties²⁵ to the agreement. Multilateral treaties, or conventions, usually provide that they will enter into force upon the ratification or accession of a stipulated number of states.²⁶ A state is under no legal obligation to ratify a treaty, even one that it has signed.²⁷ Ratification is discretionary with signatory states and may be withheld for any reason.²⁸ Accession²⁹ also is a voluntary and discretionary act on the part of a state. Once a treaty does enter into force, the principle *pacta sunt servanda* imposes the legal obligation on the parties to carry out the agreement in good faith.³⁰

There have developed several exceptions to the rule that treaties lack obligatory force prior to their entry into force. Those provisions of the agreement relating to the submission of the treaty for ratification in accordance with the internal law of the signatories and those provisions relating to the exchange of ratifications or their deposit do enter into force upon signature.³¹ Also, an obligation arising from

tion of the Treaty" 97th Cong., 1st Sess., 127 CONG. REC. 7679 (1981).

For a discussion of the distinction between the use of the term "ratification" at the international and domestic levels, see Fitzmaurice, *Do Treaties Need Ratification?*, 15 BRIT. Y.B. INT'L L. 113, 113-16 (1934). See also L. WILDHABER, *TREATY-MAKING POWER AND CONSTITUTION* 82-85 (1971).

25. "Party" means a state or an international organization that has consented to be bound by an international agreement and for which the international agreement is in force. See Vienna Convention, *supra* note 1, art. 2(1)(g); Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, *supra* note 3, art. 1(g).

26. See, e.g., SALT II Treaty, *supra* note 11, art. XIX ("This treaty shall be subject to ratification in accordance with the constitutional procedures of each Party. This Treaty shall enter into force on the day of the exchange of instruments of ratification . . ."). See also Vienna Convention, *supra* note 1. Article 84 of the Vienna Convention provides:

1. 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.
2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Id. art. 84.

27. "The stream of unratified treaties since 1920 has established beyond doubt that the contemporary rule of practice is that ratification is discretionary, and that no reasons need be given for refusing to ratify a treaty." J.M. JONES, *FULL POWERS AND RATIFICATION* 79 (1949).

28. *Id.*

29. "Accession" generally refers to subsequent adherence to a treaty by non-signatory states. See 14 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 93-107 (1970).

30. See *supra* note 22.

31. Article 24(4) of the Vienna Convention provides:

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

general international law not to defeat the object and purpose of a signed but unratified treaty appears now to be generally accepted, although the contours of this obligation are not yet clearly defined.³²

That treaties do not create binding legal obligations prior to their entry into force, even for signatory states, creates potential problems. Often there is a pressing need for the immediate application of the provisions of a signed but unratified treaty or for their application to a non-party (whether a signatory or not) of a multi-lateral treaty that has already entered into force with respect to other states. For instance, there may be an immediate need to settle the location of a particular maritime boundary,³³ or to put into ef-

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.

Vienna Convention, *supra* note 1, art. 24(4). See generally Nisot, *La force obligatoire des traités signés, non encore ratifiés*, 57 JOURNAL DU DROIT INTERNATIONAL 878 (1930).

32. Article 18 of the 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.

Vienna Convention, *supra* note 1, art. 18. See generally Hassan, *Good Faith in Treaty Formation*, 21 VA. J. INT'L L. 443 (1981); Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 MAINE L. REV. 263 (1980).

33. See, e.g., Maritime Boundary Agreement between the United States of America and the Republic of Cuba, signed Dec. 16, 1977, S. EXEC. DOC. NO. H, 96th Cong., 1st Sess., art. V (1979). Article V specifies that the agreement will enter into force provisionally for two years beginning January 1, 1978, and will enter into force permanently on the date of the exchange of instruments of ratification. *Id.* Ratification has not yet occurred, and the provisional application of this agreement has since been extended for four additional two-year periods. Agreement Extending the Provisional Application of the Agreement of December 16, 1977, Dec. 27-28, 1979, United States-Cuba, 32 U.S.T. 840, T.I.A.S. No. 9732; Agreement Extending the Provisional Application of the Agreement of December 16, 1977, as Extended, Dec. 16-28, 1981, United States-Cuba, T.I.A.S. No. 10327; Agreement Extending the Provisional Application of the Agreement of December 16, 1977, as Extended, Dec. 27 and 30, 1983, United States-Cuba, T.I.A.S. No. ____; Agreement Extending the Provisional Application of the Agreement of December 16, 1977, as Extended, Dec. 3, 1985, United States-Cuba, T.I.A.S. During Senate debate on ratification, amendments were introduced to link the treaty's entry into force to removal of all Soviet weapons from Cuba, and with presidential certification that Cuba was no longer "exporting revolution." 126 CONG. REC. 25, 722-23 (statements of Sen. Helms).

The maritime boundaries between the United States and Mexico have been in effect provisionally since 1976, Agreement Concerning Certain Maritime Boundaries, Nov. 24, 1976, United States-Mexico, 29 U.S.T. 196, T.I.A.S. No. 8805, pending the "necessary technical work" entailed in permanently delimiting the maritime boundaries to conform with laws on the 200-mile limit. *Id.* at 199. The boundaries were made

fect the provisions of an international commodity or trade agreement,³⁴ or to commence the preparatory work for a new international organization,³⁵ or to create uniformity in newly-developed substantive rules of international law.³⁶

The new law of the sea treaty provides several examples of problems that arise from the lack of binding legal force of the provisions of a treaty prior to its entry into force, and from the lack of binding legal force with respect to a non-party of the provisions of a treaty that has entered into force.³⁷ The Convention on the Law of the Sea³⁸ provides that it "shall enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession."³⁹ The number of ratifications or accessions required is extremely high in light of past international practice,⁴⁰ and given the

permanent in Treaty on Maritime Boundaries between the United States of America and the United Mexican States, signed May 4, 1978, S. EXEC. DOC. NO. F, 96th Cong., 1st Sess. (1979). However, this treaty has not been ratified by the Senate, and the provisional agreement of 1976 is still in force. See Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 917, 931-33 (1980). See generally SENATE COMM. ON FOREIGN RELATIONS, THREE TREATIES ESTABLISHING MARITIME BOUNDARIES BETWEEN THE UNITED STATES AND MEXICO, VENEZUELA, AND CUBA, S. EXEC. REP. NO. 49, 96th Cong., 2d Sess. (1980) [hereinafter S. EXEC. REP. NO. 49]; Lagoni, *Interim Measures Pending Maritime Delimitation Agreements*, 78 AM. J. INT'L L. 345, 358-60 (1984).

34. See, e.g., International Sugar Agreement, opened for signature Dec. 1, 1958, 10 U.S.T. 2189, T.I.A.S. No. 4389, 385 U.N.T.S. 137. See also 14 M. WHITEMAN, *supra* note 29, at 87-89 (1970); *Examples of Precedents of Provisional Application, Pending Their Entry Into Force, of Multilateral Treaties, Especially Treaties Which Have Established International Organizations and/or Regimes, Report of the Secretary-General*, at 30-33, U.N. Doc. A/AC.138/88 (1973) [hereinafter *Report of the Secretary-General, Examples of Precedents of Provisional Application*]. See also K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 341-44 (1970); J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 60-63 (1969); K. KHAN, *THE LAW AND ORGANISATION OF INTERNATIONAL COMMODITY AGREEMENTS* 344-47 (1982).

35. See, e.g., Arrangement Concluded by the Governments Represented at the International Health Conference, July 22, 1946, 61 Stat. 2349, T.I.A.S. No. 1561, 9 U.N.T.S. 33. See *Report of the Secretary-General, Examples of Precedents of Provisional Application*, *supra* note 34, at 22-25.

36. See, e.g., *infra* note 43 and accompanying text.

37. See, e.g., *infra* notes 42 & 45 and accompanying text. Professor Bilder suggests that provisional application may be used to provide a trial or experimental period for an international cooperative arrangement without the nations involved having to undertake fully binding international legal obligations. R. BILDER, *MANAGING THE RISKS OF INTERNATIONAL AGREEMENT* 51 (1981).

38. United Nations Convention on the Law of the Sea, done Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), reprinted in 21 INT'L LEGAL MATERIALS 1261 (1983).

39. *Id.* at art. 308(1).

40. Note, *Wrapping Up the UNCLOS III "Package": At Long Last the Final Clauses*, 20 VA. J. INT'L L. 347, 409-11 (1980). See generally Oxman, *The Third United Nations Conference on the Law of the Sea: The Eighth Session* (1979), 74 AM. J. INT'L L. 1, 32-45; Rosenne, *Reflections on the Final Clauses in the New Law of the Sea Treaty*, 18 VA. J. INT'L L. 133 (1977).

complicated and politically-charged provisions of the Convention, eventual entry into force may not occur until perhaps a decade after agreement on a text.⁴¹ Furthermore, it is quite foreseeable that even after entry into force, important nations may not yet be parties. One major difficulty is that the Convention represents a "package deal," which involved hard bargaining and major trade-offs, and unless the entire treaty comes into force for all potential parties at the same time, the interests of some participants may be prejudiced, at least temporarily, to the advantage of others.⁴² Also, the Convention establishes an international organization for the exploitation of the resources of the "sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction."⁴³ Difficulties may arise with the composition of that organization if states that are entitled to representation have not yet ratified the treaty.⁴⁴ Finally, the Convention establishes a comprehensive regime for the regulation of the oceans. Confusion would undoubtedly result from the simultaneous operation of the new treaty, in force for some states, and the 1958 Geneva Conventions on the Law of the Sea, which might still be binding on other states that are not parties to the new treaty.⁴⁵

In response to the problems caused by non-ratification or by delays in the ratification and accession processes, commentators have proposed changes in the international and domestic legal rules concerning entry into force.⁴⁶ In particular, the need for ratification after signature has been criticized.⁴⁷ Although basic change in this area appears unlikely, some nations have acted to facilitate agreements in simplified form through either constitutional change⁴⁸ or

41. See Note, *supra* note 40, at 413.

42. *Id.* at 408-409. See also J. SEBENIUS, *NEGOTIATING THE LAW OF THE SEA* 80-81 (1984).

43. United Nations Convention on the Law of the Sea, *supra* note 38, arts. 1, 156-85.

44. Note, *supra* note 40, at 404.

45. Rosenne, *supra* note 40, at 137.

46. See, e.g., K. HOLLOWAY, *MODERN TRENDS IN TREATY LAW* 40-101 (1967). See also Glennon, *Treaty Process Reform: Saving Constitutionalism Without Destroying Diplomacy*, 52 U. CIN. L. REV. 84 (1983).

47. Kaye Holloway writes that "[t]he number of treaties which come into force upon signature is increasing so fast that the time is not far when ratification will most probably be looked upon as an outmoded concept." K. HOLLOWAY, *supra* note 46, at 70.

48. For example, the French Constitution of 1958 enumerates the categories of treaties subject to legislative assent, acknowledges the legality of agreements in simplified form, and generally decreases the role of the National Assembly as a check on the executive. See L. WILDHABER, *supra* note 24, at 41, 44, 126. The 1953 amendments to the Netherlands Constitution, although putting the treaty-making power of the crown more strictly under parliamentary control, also provide a more flexible procedure for parliamentary approval of international agreements, through a mechanism for tacit approval and by enumerating exceptions to the approval requirement in cases of an urgent nature or for short-term agreements. See van Panhuys, *The*

judicial decision.⁴⁹ Nevertheless, negotiating states are still faced with the prospect of uncertainty or delay in the entry into force of their most important international undertakings, those obligations that ordinarily must be assumed by the treaty route. As a consequence, states have developed a number of practices to create some form of obligation pending formal ratification, ranging from "the most stringent to some containing only extremely loose obligations."⁵⁰ These practices include the immediate entry into force of certain provisions of a treaty by means of a separate agreement or protocol;⁵¹ the entry into force of the treaty upon signature, but subject to subsequent ratification by the parties;⁵² the unilateral declaration by each state affirming its intention to follow a certain line of conduct;⁵³ and the provisional application of the treaty or parts of the treaty prior to its entry into force.⁵⁴ Each of these practices raises difficult questions concerning the character or extent of the obligations imposed by international law, as well as concerning the legal status of the obligation in terms of the state's domestic political institutions.

While each of these practical solutions raises interesting theoretical questions, perhaps the most problematic is the practice of provisional application, in which a treaty or certain parts of a treaty are applied on a provisional basis prior to its entry into force. Although the resulting situation has been characterized as "anomalous and not easy to define with precision"⁵⁵ and the practice itself described as "awkward . . . because it cut[s] across the dividing line between international law and internal law,"⁵⁶ it is also generally recognized that "provisional application [meets] real needs in international re-

Netherlands Constitution and International Law, 47 AM. J. INT'L L. 537, 547-49 (1953); van Panhuys, *The Netherlands Constitution and International Law — A Decade of Experience*, 58 AM. J. INT'L L. 88, 92-96 (1964).

49. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

50. *Summary Records of the 791st Meeting*, [1965] 1 Y.B. INT'L L. COMM'N 111, U.N. Doc. A/CN.4/SER.A/1965 (comments of P. Reuter).

51. For an example, see the agreement cited *supra* in note 35.

52. This method has been variously utilized: the treaty may remain in force (even for extended periods) until a decision *not* to ratify is made, or the treaty may contain a provision to the effect that it will lapse in the event of non-ratification within a specified period of time. See *Summary Records of the 790th Meeting*, [1965] 1 Y.B. INT'L L. COMM'N 107, U.N. Doc. A/CN.4/SER.A/1965 (comments of A. de Luna).

53. See, e.g., Rogoff, *supra* note 32, at 280 nn.56-57. See also McRae, *The Legal Effect of Interpretative Declarations*, 1978 BRIT. Y.B. INT'L L. 155; Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1 (1977).

54. See *infra* note 58 and accompanying text.

55. Waldock, Special Rapporteur, *Law of Treaties*, [1965] 2 Y.B. INT'L L. COMM'N 58, U.N. Doc. A/CN.4/SER.A/1965/Add.1.

56. *United Nations Conference on the Law of Treaties*, Summary Records 142 (First session: Vienna, 26 March-24 May 1968), U.N. Doc. A/CONF.39/11 (comments of P. Ruegger) [hereinafter *United Nations Conference*, First session].

lations."⁵⁷ The practice now appears well-established. Significantly, the Vienna Convention on the Law of Treaties includes an article on provisional application, article 25, which provides:

1. A treaty or 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.⁵⁸

Since the process whereby a state assumes international legal obligations has both international and domestic aspects,⁵⁹ this Article deals with both the international and domestic law of provisional application as well as the relationship between the two. An examination of the provisional application of treaties sheds light on the often complex interrelationship between the actions of a state on the international level whereby the state enters into international legal obligations and the domestic legal requirements for assuming such obligations. Most forcefully, the issue often raised by provisional application is whether domestic political institutions will accept the binding character of these agreements, or whether they will instead seek to undercut international treaty obligations not yet formally ratified. An examination of the reaction of the United States Con-

57. *Id.* at 141 (comments of R. Carmona). An example of the utility of the device of provisional application is found in the Vienna Convention on Succession of States in Respect of Treaties, *opened for signature* Aug. 23, 1978, U.N. Doc. A/CONF.80/31, *reprinted in* 17 INT'L LEGAL MATERIALS 1488 (1978) (not yet in force). This Convention provides, in article 16, that a newly independent state is not required to maintain the treaty obligations of its predecessor. However, international stability is enhanced by the provisions of articles 27 and 28 which enable a successor state to apply treaties provisionally, pending a decision to make a formal notification of succession or termination.

58. Vienna Convention, *supra* note 1, art. 25.

59. The agreement-making process will be considered as a series of successive functional steps which take place partly on the international, partly on the municipal, plane:

1. international and/or municipal decision to negotiate an agreement;
2. municipal discussion of the principles which shall guide negotiators;
3. formulation of the agreement during the (international) negotiations;
4. municipally relevant decision;
5. internationally binding declaration of the municipally relevant decision (it must be understood that 5 may precede 4!);
6. municipal performance of the agreement.

L. WILDHABER, *supra* note 24, at 6-7. See also FOREIGN RELATIONS COMMITTEE STUDY ON THE ROLE OF THE SENATE, *supra* note 1, at 10-14.

gress to a number of the provisional agreements into which the United States has entered reveals that domestic political institutions generally accept the provisional obligations and have developed means through which they can express their acceptance more informally than through consent to ratification, and thereby confer a degree of domestic legitimacy upon these agreements that might otherwise be lacking.

II. THE INTERNATIONAL LAW OF PROVISIONAL APPLICATION: ARTICLE 25 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

The provisional application of a treaty or part of a treaty pending its entry into force plays a prominent role today in the process whereby states undertake legally binding international commitments, especially in multilateral situations.⁶⁰ But in order for that role to be meaningful, in the sense that the international commitment undertaken is definite and is the product of domestic forces that have a true interest in abiding by that commitment, the international law of provisional application must clearly set forth how the regime of provisional application comes into being and how it ends, what are its legal consequences, and what is its relationship to the domestic law of treaty ratification. The international rules of provisional application should certainly be written and interpreted to facilitate agreement, but not at the price of confusion concerning the legal import of the agreement during its provisional phase, and not as a means of short-circuiting the domestic law of treaty ratification. That all negotiating states clearly understand how and when the provisional regime comes into effect and terminates, and what legal obligations are assumed by them during that phase, is an important element in avoiding later misunderstandings and frustrated expectations. Furthermore, allowing appropriate latitude for domestic ratification processes is also in the interest of all the states participating in a particular negotiation, not just the state whose inter-

60. As a convention in force, the Vienna Convention is, of course, binding on the parties to it. Vienna Convention, *supra* note 1. With respect to non-parties, the Convention may be regarded as "the authoritative guide to current treaty law and practice." President's Letter to the Senate Submitting the Vienna Convention on the Law of Treaties, S. EXEC. DOC. NO. L, 92d Cong., 1st Sess. 1 (1971), and as "presumptively codifying the customary international law governing international agreements." RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 1, at 2. See generally S. ROSENNE, THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION 29-94 (1970); Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970).

For discussions of article 25 see I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 46-47 (2d ed. 1984); T. ELIAS, THE MODERN LAW OF TREATIES 37-39 (1974); Nascimento e Silva, *Le facteur temps et les traités*, 154 RECUEIL DES COURS 215, 229-35 (1978). See also I. DETTER, ESSAYS ON THE LAW OF TREATIES 31 (1967); S. ROSENNE, *supra*, at 192-95; 14 M. WHITEMAN, *supra* note 29, at 326-28.

nal processes are at issue. As Professor Chayes has pointed out, "the formulation, negotiation, and ratification of a treaty is an elaborate bureaucratic and political affair . . . [which] tends to generate powerful [domestic] pressures for compliance, if and when the treaty is adopted."⁶¹ And of course compliance by all parties is of concern to all participating states.

Unfortunately, article 25 of the Vienna Convention on the Law of Treaties, which provides for the provisional application of a treaty or part of a treaty pending its entry into force, lacks legal precision. The Vienna Convention contains elaborate provisions on how a state incurs binding international obligations,⁶² and the legal consequences of binding obligations are clearly understood.⁶³ Nothing in the Convention, however, expressly defines "provisional" or "application," or indicates what it means for a treaty to be "applied provisionally." Article 25 is a good example of what Kearney and Dalton refer to as "the cosmetic method of disguising differences by a thick coating of undefined terms."⁶⁴

Furthermore, the article 25 version of provisional application may offer domestic executives a way to circumvent internal treaty ratification requirements.⁶⁵ If a treaty or part of a treaty creates legal obligations for a state prior to ratification, there may be no need for ratification at all.⁶⁶ Thus the state would be bound even if "its consent to be bound . . . has been expressed in violation of a provision of its internal law regarding competence to conclude treaties . . . unless that violation was manifest and concerned a rule of its internal law of fundamental importance."⁶⁷

The practice of provisional application would be on a firmer legal footing if it were clearly brought within the Convention's rules governing entry into force. Several delegates to the Vienna Conference

61. Chayes, *An Inquiry into the Workings of Arms Control Agreements*, 85 HARV. L. REV. 905, 919-20 (1972).

62. Vienna Convention, *supra* note 1, arts. 6-17. See generally Bolinteanu, *Expression of Consent to Be Bound by a Treaty in the Light of the 1969 Vienna Convention*, 68 AM. J. INT'L L. 672 (1974).

63. Vienna Convention, *supra* note 1, art. 26. See generally Kunz, *supra* note 22.

64. Kearney & Dalton, *supra* note 60, at 499.

65. See L. WILDHABER, *supra* note 24, at 38, 73, 91, for examples of the practice of several western European countries; and K. DAM, *supra* note 34, at 342, for a similar conclusion concerning the provisional application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

66. For example, the General Agreement on Tariffs and Trade has been applied provisionally since 1947, see K. DAM, *supra* note 34, at 341-44; and the Maritime Boundary Agreement between the United States and Cuba has been applied provisionally since 1978, see *supra* note 33.

67. Vienna Convention, *supra* note 1, art. 46(1). See generally Meron, *Article 46 of the Vienna Convention on the Law of Treaties (Ultra Vires Treaties): Some Recent Cases* 49 BRIT. Y.B. INT'L L. 175 (1978); Kearney, *Internal Limitations on External Commitments—Article 46 of the Treaties Convention*, 4 INT'L LAW. 1 (1969).

in fact interpreted article 25 in just this sense.⁶⁸ These delegates regarded legal obligations during the provisional period preceding entry into force as resting on an express or implied supplementary agreement, which itself had entered into force upon signature of the treaty or in some other way.

Article 25 is based on draft article 22, which was adopted in 1966 by the International Law Commission⁶⁹ and which itself was the product of prior drafts. The text that was eventually to emerge as draft article 22 underwent considerable modification between 1952, when it first appeared in a Commission report, and 1966, when it was adopted in final draft form by the Commission at its eighteenth session. Draft article 22 was then subjected to "rather radical"⁷⁰ amendments at the United Nations Conference on the Law of Treaties. The difficulties in arriving at a final text on provisional application are indicative of the fundamental theoretical and practical problems involved in providing legal definition for the practice. Discussion by the International Law Commission and later at the U.N. Conference focused primarily on the source and nature of the legal obligations undertaken by states when they seek to apply a treaty or part of a treaty on a provisional basis. There was also discussion of the termination of provisional application, the operation of provisional application in multilateral situations, and the domestic constitutional problems associated with provisional application. This Article next examines in turn each of these areas addressed by the Commission concerning the provisional application of treaties.

A. *The Source and Nature of Provisional Obligations*

Legal recognition of the practice that has variously been termed "provisional application" or "provisional entry into force" has arisen only relatively recently. The 1935 Harvard Research Draft Conven-

68. See the comments of Sir Humphrey Waldock, Expert Consultant, in explaining the reasons for the Drafting Committee's choice of the concept of "entry into force provisionally" over "provisional application" (which emerged from the Conference as the final form of the article):

From the point of view of juridical elegance, it . . . 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.

United Nations Conference, First session, *supra* note 56, at 145.

The Indian delegate expressed his understanding that "article 22 was only a variant of article 21, and the provisional entry into force would be the same as full entry into force, in which case there should be no difference as between the two articles so far as constitutional limitations were concerned." *Id.* at 145-46 (comments of S.P. Jagota). See also *infra* text accompanying notes 105-17.

69. *United Nations Conference*, Documents, *supra* note 1, at 30.

70. Nascimento e Silva, *supra* note 60, at 229.

tion on the Law of Treaties⁷¹ made no mention of the practice, and McNair, writing in 1961,⁷² referred to it only in passing. The International Law Commission, however, early in its consideration of the law of treaties, recognized that there are "frequent examples"⁷³ of treaties concluded subject to ratification that provide for entry into force prior to ratification. In recognition of this practice, article 6 of the 1952 report of the Special Rapporteur, Professor Brierly, provided: "A State is deemed to have undertaken a final obligation by its signature of the treaty . . . [i]f the treaty provides that it shall be ratified but that it shall come into force before ratification"⁷⁴ The Lauterpacht report of the following year contained a similar provision.⁷⁵

Strictly speaking, the Brierly and Lauterpacht texts are not provisional application or provisional entry into force provisions at all. They are more accurately characterized as rules of interpretation for ambiguous treaty provisions concerning entry into force. Professor Brierly cited several examples, none of which involved provisional application as it is understood today. For instance, the Balkan Entente of 1934 provided, in article 3, that it "shall come into force on the date of its signature by all the Contracting Parties, and shall be ratified as rapidly as possible."⁷⁶ A provision of this type does not condition entry into force on ratification; but presumably failure of timely ratification would be a condition subsequent which at some

71. *Research in International Law*, 29 AM. J. INT'L L. 653 (Supp. 1935) (Law of Treaties).

72. A. McNAIR, *THE LAW OF TREATIES* 192-93 (1961).

73. Lauterpacht, Special Rapporteur, *Law of Treaties*, [1953] 2 Y.B. INT'L L. COMM'N 90, 114, U.N. Doc. A/CN.4/SER.A/1953/Add.1.

74. Brierly, Special Rapporteur, *Law of Treaties*, [1952] 2 Y.B. INT'L L. COMM'N 53, U.N. Doc. A/CN.4/SER.A/1952/Add.1.

75. Article 6 of the 1953 draft provided: "In the absence of ratification a treaty is not binding upon a Contracting Party unless: . . . (b) The treaty, while providing that it shall be ratified, provides also that it shall come into force prior to ratification" Lauterpacht, Special Rapporteur, *supra* note 73, at 91.

76. Pact of Balkan Entente, Feb. 9, 1934, 153 L.N.T.S. 153, 157. Other examples cited by Professor Brierly include the Convention for the Settlement of the Right of Protection in Morocco, July 3, 1880, art. 18, 22 Stat. 817, T.S. No. 246 ("This convention shall be ratified. The ratifications shall be exchanged at Tangier with as little delay as possible. By . . . consent of the high contracting parties the stipulations of this convention shall take effect on the day on which it is signed at Madrid."); Treaty of Peace, Friendship, Commerce and Navigation, Aug. 21, 1873, Peru-Japan, art. 10, 146 Parry's T.S. 337 ("It is also agreed that this Treaty shall come into operation from the present date."); The Treaty of Rapallo, Apr. 16, 1922, Germany-Russia, art. 6, 19 L.N.T.S. 248 ("Articles 1(b) and 4 of this Agreement shall come into force on the day of ratification, and the remaining provisions shall come into force immediately."); Convention Regulating Native Labour, Railway Matters and Commercial Intercourse, Sept. 11, 1928, Union of South Africa-Portugal, arts. 54, 57, 98 L.N.T.S. 9 ("This Convention shall be in force for a period of 10 years from the date of signing thereof . . . [except that] the provisions of Articles [45] and [51] shall only come into operation after the exchange of ratifications . . .").

point would deprive the treaty of binding force.

Although the Lauterpacht text of 1953 is similar to the Brierly text of the previous year, Lauterpacht provided two examples that involved clear instances of provisional entry into force, not ambiguities in entry into force provisions.⁷⁷ Thus, Lauterpacht cited the Franco-Belgian Convention for the Avoidance of Double Taxation of 1947, which provided, in article 10, "The present Convention shall be ratified and the instruments of ratification shall be exchanged at Brussels as soon as possible. The Convention shall enter into force provisionally on the date of its signature."⁷⁸

The term "provisional" appeared for the first time in a Commission draft in article 42(1) of the Fitzmaurice report of 1956. The commentary to that article indicated that the "article covers the case of *provisional* entry into force . . ."⁷⁹ There was no discussion of the meaning of the word "provisional." Article 42(1) read as follows:

A treaty may . . . 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 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.⁸⁰

The 1962 report of the Special Rapporteur, Sir Humphrey Waldock, treated the subject in two separate articles in an attempt to formulate more clearly the legal effects of the provisional entry into force of a treaty. Article 20(6) provided that "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 . . ."⁸¹ Article 21(2) provided:

(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

77. Lauterpacht, Special Rapporteur, *supra* note 73, at 114-15. Lauterpacht cited the Trade and Payments Agreement, Dec. 14, 1948, Denmark-Argentina, 74 U.N.T.S. 41, 63 ("This Agreement shall enter into force provisionally fifteen days from the date of signature . . ."), and the Convention for the Avoidance of Double Taxation, Dec. 29, 1947, Belgium-France, art. 10, 46 U.N.T.S. 117 (providing for entry into force provisionally on the date of its signature).

78. Convention for the Avoidance of Double Taxation, Dec. 29, 1947, Belgium-France, art. 10, 46 U.N.T.S. 117.

79. Fitzmaurice, Special Rapporteur, *Law of Treaties*, [1956] 2 Y.B. INT'L L. COMM'N 127, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

80. *Id.* at 116.

81. Waldock, Special Rapporteur, *Law of Treaties*, [1962] 2 Y.B. INT'L L. COMM'N 69, U.N. Doc. A/CN.4/SER.A/1962/Add.1.

provisional basis until the treaty enters into full force in accordance with its terms.

(b) If, however, the entry into full force of the treaty is unreasonably delayed and, unless the parties have concluded 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.⁸²

After discussion by the Commission and reference to the Drafting Committee,⁸³ draft article 24 of the Commission's 1962 report once again dealt with provisional application in a single article, which provided:

A treaty may prescribe that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, 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.⁸⁴

In commenting on the revised draft, Milan Bartos (Yugoslavia) raised the concern that "there was something illogical in a treaty being brought into force provisionally and made subject to the exchange of instruments of ratification in order to have binding

82. *Id.* at 71.

83. *Summary Records of the 657th, 661st, 668th, and 672nd Meetings*, [1962] 1 Y.B. INT'L L. COMM'N 179-80, 212, 259, 291, U.N. Doc. A/CN.4/SER.A/1962.

84. *Report of the Commission to the General Assembly*, [1962] 2 Y.B. INT'L L. COMM'N 157, 182, U.N. Doc. A/CN.4/SER.A/1962/Add.1. The commentary to draft article 24 provided:

(1) This 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.

(2) Clearly, the "provisional" application of the treaty will terminate upon the treaty being duly ratified or approved in accordance with the terms of the treaty or upon it becoming clear that the treaty is not going to be ratified or approved by one of the parties. It may sometimes happen that the event is delayed and that the States concerned agree to put an end to the provisional application of the treaty, if not to annul the treaty itself.

force.”⁸⁵ In response to this concern, the Commission, in its commentary to draft article 24, made reference to the treaty itself and a subsidiary agreement as two possible theoretical bases for obligations provisionally assumed.⁸⁶ Thus, subsequent ratification would still be required if a treaty or part of a treaty were brought into force provisionally by means of a subsidiary agreement that explicitly or implicitly contained temporal limitations, as presumably it would.

Several governments submitted comments to the Special Rapporteur concerning draft article 24, illustrating the problematic nature of the concept of provisional application. Japan, for example, stated that the precise legal nature of provisional entry into force was unclear.⁸⁷ The United States recognized that the article accorded with present practice, but questioned whether there was any need to include it in a convention on the law of treaties.⁸⁸

Draft article 24 was extensively discussed at the seventeenth session of the International Law Commission in 1965.⁸⁹ Paul Reuter (France) objected to the expression “provisional entry into force” and suggested that some variant of provisional application would be preferable. He explained 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.”⁹⁰ Reuter maintained that if “provisional application” rather than “provisional entry into force” were used “the Commission would not be taking a position on the legal source of such application, but would avoid using an expression which was a contradiction in terms.”⁹¹ Herbert Briggs (U.S.A.) thought the legal nature of provisional application “could be . . . described by saying that one and the same instrument contained two transactions: the treaty itself and the agreement on provisional

85. *Summary Records of the 668th Meeting*, [1962] 1 Y.B. INT'L L. COMM'N 259, U.N. Doc. A/CN.4/SER.A/1962 (comments of M. Bartos).

86. See *supra* note 84.

87. Waldock, Special Rapporteur, *supra* note 81, at 58. The Japanese Government further commented: “Unless its legal effect can be precisely defined, the Japanese Government considers that the best course would be to leave the question of provisional entry into force to the intention of the parties . . .” *Id.*

88. *Id.* The Special Rapporteur responded to this concern by pointing out that provisional entry into force occurs with sufficient frequency in modern treaty practice to require inclusion in the draft articles. *Id.*

89. See *Summary Records of the 790th, 791st, 814th, and 816th Meetings*, [1965] 1 Y.B. INT'L L. COMM'N 105-13, 274-75, 285, U.N. Doc. A/CN.4/SER.A/1965.

90. *Id.* at 106. *But see id.* at 110-11 (Grigory I. Tunkin (U.S.S.R.) did “not agree . . . that the case was one of provisional application of certain clauses . . . rather than of its entry into force. The treaty itself entered into force, but . . . there were in fact two sets of final clauses.”).

91. *Id.* at 106.

application pending its final entry into force.”⁹² Roberto Ago (Italy) and Senjin Tsuroka (Japan) shared the same opinion.⁹³ The anomalous legal basis of provisional application was highlighted by the comment of Abdullah El-Erian (United Arab Republic) that the provision “represented a useful intermediate position between a treaty in simplified form and a treaty that entered into force only after all requirements as to ratification had been satisfied.”⁹⁴ In referring the article to the Drafting Committee, the Special Rapporteur indicated those situations to which the article referred:

The provisions of the article endeavoured to cover both the situation where the treaty itself provided for provisional entry into force and that in which a separate agreement was made to that effect. In dealing with those two situations in general terms, the Commission had perhaps overlooked the existence of a third situation, the one to which Mr. Reuter had drawn attention, where the intention of the parties was not to bring the treaty into force but to apply parts only of the treaty on a provisional basis. Article 24 should be drafted so as to cover the first two situations and the Drafting Committee should perhaps endeavour to cover the third as well, although [sic] it might not be easy to draft such a provision since the article was concerned with the provisional entry into force of the treaty rather than with the application of its clauses.⁹⁵

Manfred Lachs (Poland) voiced the view that the article should express the wide range of possibilities open to states and allow them maximum freedom to apply a treaty provisionally.⁹⁶ Sir Humphrey Waldock explained that the term “enter into force provisionally” was used because that is the term used in the practice of states, and dismissed the problem of distinguishing between “entry into force provisionally” and “application of the clauses of the treaty provisionally” as a “doctrinal question.”⁹⁷

Draft article 24 as approved by the Commission at its seventeenth session in 1965 provided as follows:

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 the entry into force provisionally of part of a treaty.⁹⁸

92. *Id.* at 109.

93. *Id.*

94. *Id.* at 108.

95. *Id.* at 113.

96. *Id.* at 112.

97. *Id.* at 274.

98. *Report of the Commission to the General Assembly*, [1965] 2 Y.B. INT'L L. COMM'N 157, 162, U.N. Doc. A/CN.4/SER.A/1965/Add.1. Article 24 was adopted by 17

With two minor modifications, this formulation was finally adopted by the Commission at its eighteenth session in 1966⁹⁹ and presented to the Vienna Conference as draft article 22.¹⁰⁰

The Commission's commentary to draft article 22 recognized the problematic legal nature of provisional entry into force¹⁰¹ but concluded that "there can be no doubt that such clauses have legal effect and bring the treaty into force on a provisional basis."¹⁰² The Commission made a similar point in its commentary to draft article 23, which provided, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." The Commission emphasized that "the words 'in force' of course cover treaties in force *provisionally* under article 22 as well as treaties which enter into force definitively under article 21."¹⁰³ According to this view, therefore, a treaty in force provisionally pending ratification establishes the same legal obligations for its parties as a treaty in force definitively after the required exchange or deposit of instruments of ratification.

Several amendments to draft article 22 were submitted at the First Session of Conference. Of principal importance were the Korean, Vietnamese, and United States submissions to delete the article as a whole,¹⁰⁴ proposals by Belgium and by Hungary and Poland to add a new paragraph concerning termination of provisional application,¹⁰⁵ and, most significantly, the Czechoslovakian and Yugoslav-

votes to none. *Summary Records of the 816th Meeting*, [1965] 1 Y.B. INT'L L. COMM'N 285, U.N. Doc. A/CN.4/SER.A/1965.

99. *Summary Records of the 887th and 892nd Meetings*, [1966] 1 Y.B. INT'L L. COMM'N 293, 327, U.N. Doc. A/CN.4/SER.A/1966. The modifications consisted of substituting the words "negotiating States" for "contracting States" in paragraph 1(b), *id.* at 293, and changing the title of the article from "entry into force of a treaty provisionally" to "entry into force provisionally," *id.* at 327.

100. Draft Articles of the International Law Commission, in *United Nations Conference*, Documents, *supra* note 1, at 30.

101. *Id.*

102. *Id.*

103. *Id.* at 31.

104. U.N. Doc. A/CONF.39/C.1/L.154 and Add.1, in *United Nations Conference*, Documents, *supra* note 1, at 143. The United States delegate explained that his delegation had proposed the deletion of article 22 for three reasons:

First, article 22 merely affirmed a procedure which was possible in the absence of the article . . . Secondly, article 22 failed to define the legal effects of provisional entry into force and could give rise to difficulties of interpretation with respect to other articles of the convention, notably those on observance and termination of treaties. Thirdly, it left unanswered the question how provisional force might be terminated. The article was therefore neither necessary nor desirable.

United Nations Conference, First session, *supra* note 56, at 140 (comments of C. Bevans).

105. U.N. Doc. A/CONF.39/C.1/L.194 (Belgian amendment), A/CONF.39/C.1/L.198 (Hungarian and Polish amendment), in *United Nations Conference*, Documents, *supra* note 1, at 144. See *infra* notes 118-30 and accompanying text.

ian proposal to amend the first paragraph by changing its references to "provisional entry into force" to "applied provisionally."¹⁰⁶ The proponents of the amendment to delete elected not to put the question to a vote, and the other amendments passed by overwhelming majorities.¹⁰⁷ Draft article 22 as it emerged from the Drafting Committee was approved at the seventy-second meeting of the Committee of the Whole,¹⁰⁸ adopted at the eleventh plenary meeting,¹⁰⁹ and eventually became article 25 in the Vienna Convention on the Law of Treaties.

The Czechoslovakian and Yugoslavian proposal to cast the article in terms of provisional application rather than provisional entry into force evoked considerable discussion in the Committee of the Whole regarding the nature and content of the legal obligations assumed by states during the provisional period.¹¹⁰ Discussion of these matters continued in the eleventh¹¹¹ and twenty-ninth¹¹² plenary meetings. Alicja Werner (Poland) thought that "the *pacta sunt servanda* principle was fully applicable to the case where a treaty was applied provisionally."¹¹³ S.P. Jagota (India), on the other hand, thought that "any obligations that might arise . . . 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) rather than of article 23 (*Pacta sunt servanda*)."¹¹⁴ Shabtai Rosenne (Israel) offered the opinion that

it was really the application of the treaty rather than its entry into force which was concerned. The word "provisionally" introduced a time element, and unless emphasis was placed on application rather than entry into force, it would be necessary to specify that the word "provisionally" referred to time and not to legal effects.¹¹⁵

Finally, Michel Virally (France) sought to sidestep the issue by simply recognizing the existing practice rather than adopting a particular position on the point.¹¹⁶

106. U.N. Doc. A/CONF.39/C.1/L.185 and Add.1, in *United Nations Conference, Documents*, *supra* note 1, at 144.

107. *United Nations Conference*, First session, *supra* note 56, at 145-46.

108. *Id.* at 426-27.

109. *United Nations Conference on the Law of Treaties*, Summary Records 43 (Second session: Vienna, 9 April-22 May 1969), U.N. Doc. A/CONF.39/11/Add.1 [hereinafter *United Nations Conference*, Second session].

110. *United Nations Conference*, First session, *supra* note 56, at 141-46.

111. *United Nations Conference*, Second session, *supra* note 109, at 39-43.

112. *Id.* at 158.

113. *Id.* (comments of Alicja Werner). Sir Francis Vallat (United Kingdom) shared this view. *Id.* at 40.

114. *Id.* at 41 (comments of S.P. Jagota). Article 15 became article 18 in the final Convention, and article 23 became article 26.

115. *United Nations Conference*, First session, *supra* note 56, at 142.

116. Professor Virally thought:

[T]he existence of a well-established practice, the value of which had been

The different views expressed by delegates at the plenary sessions are all possible interpretations of the "applied provisionally" language of article 25.¹¹⁷ This ambiguity is the principal problem with article 25. If the legal effect of the treaty or part of the treaty during its provisional period is regarded as governed by a binding supplemental agreement, whether embodied in the treaty itself or in some other form, then clearly the obligations assumed during the provisional period would be definitive and subject to the rule of *pacta sunt servanda* until provisional application is lawfully terminated. If, however, legal effect during the provisional period is not regarded as governed by a binding supplemental agreement because of, for example, the manifest constitutional inability of a contracting state to be bound before certain subsequent domestic action is taken, then prior to definitive entry into force the obligation would be limited to the sort described by Jagota, namely the obligation not to defeat the object and purpose of a treaty prior to its entry into force. It would be consistent with this view to regard the "application" terminology of article 25, with its reference to the actual terms of the treaty, as giving more precision to the obligation imposed by article 18. Finally, Rosenne is undoubtedly correct in emphasizing that "provisionally" refers to time and not to legal effect.

fully demonstrated, made it necessary for the convention to safeguard the freedom of States to agree that the treaty could enter into force provisionally until such time as they were able to give final confirmation. The deletion of article 22 might therefore raise more problems than it would solve, and it would be preferable to retain it. Its existing wording nevertheless created difficulties, in that the notion of provisional entry into force was difficult to define legally. It would be preferable to recognize existing practice rather than adopt a particular position on the point.

Id.

117. Other views, serving to cloud the issue further, were also expressed. For example, the Czech delegate introduced the term "entry into operation," which he distinguished from "entry into force," and then stated that "the term used should be 'provisional application' and not 'entry into force provisionally,' because there could hardly be two entries into force." *United Nations Conference, First session, supra* note 56, at 141 (comments of S. Myslíl). The Italian delegate contended that there was a substantive difference between "mere application, which was a question of practice, and entry into force, which was a formal legal notion. Mere physical application did not involve entry into force." *Id.* at 142 (comments of A. Maresca). The Ecuadorian delegate stated that "'provisional application' had a more legal connotation and was more accurate than 'entry into force provisionally.'" *Id.* at 145 (comments of H. Sevilla-Borja). And the Guatemalan delegate thought that provisional application

would have the effect of creating obligations for the signatory State without the 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.

United Nations Conference, Second session, supra note 109, at 39 (comments of A. Molina Orantes).

In one sense article 25 adds little to the Convention since the practice of provisional application is adequately covered either by the Convention's provisions concerning entry into force or by the provision of article 18 imposing the obligation not to defeat the object and purpose of a treaty prior to its entry into force. The real problem posed by the practice of provisional application is not simply to recognize its existence, as Professor Virally would contend, but to define it with legal precision. This the Convention fails to do.

B. Termination of Provisional Application

Subsection 2 of article 25 provides:

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.¹¹⁸

Although the Commission had included a termination clause in its 1956 and 1962¹¹⁹ proposed drafts, there was no termination clause in the final draft. Sir Humphrey Waldock advised the Commission that he and the Drafting Committee had decided to delete the termination provision because they thought that this article should deal only with "entry into force" and that any termination rules should be dealt with in that part of the Convention relative to termination of treaties.¹²⁰ The Committee of the Whole, however, quickly approved the addition of a termination provision in principle,¹²¹ after objections to its deletion by several delegations including the United States.¹²² The final termination provision was proposed by the Drafting Committee¹²³ and modeled on amendments introduced by Belgium¹²⁴ and by Hungary and Poland.¹²⁵

The Convention's termination provision differs significantly from the Commission's earlier proposed drafts. Article 25 apparently permits, in the absence of an agreement to the contrary, a negotiating state to withdraw from provisional application only upon an expression of its "intention not to become a party to the treaty." The proposed drafts in 1956 and 1962 focused on the potential problem of "unreasonable delay" in ratification and allowed a state to withdraw

118. Vienna Convention, *supra* note 1, art. 25(2).

119. See draft art. 42(1), *supra* text accompanying note 80; draft art. 21(2)(b), *supra* text accompanying note 81.

120. *Summary Records of the 814th Meeting*, [1965] 1 Y.B. INT'L L. COMM'N 275, U.N. Doc. A/CN.4/SER.A/1965.

121. *United Nations Conference*, First session, *supra* note 56, at 146.

122. *Id.* at 140 (comments of C. Bevens).

123. *Id.* at 426.

124. *United Nations Conference*, Documents, *supra* note 1, at 144.

125. *Id.*

from provisional participation without necessarily withdrawing from the treaty.¹²⁶ The Conference was apparently concerned with the potential for abuse under the earlier drafts, wherein a state could take advantage of some favorable elements of a treaty that was applied provisionally and then withdraw unilaterally from the remaining period of provisional application.¹²⁷ It is not clear, however, what the Conference accomplished in this regard. Article 25 still permits a state to make use of the advantages of provisional application and then to withdraw, by stating its intention not to become a party to the treaty.¹²⁸

It seems unlikely that a state would withdraw from provisional participation in an attempt to gain some short term advantage¹²⁹ while intending to become bound at some future date upon entry into force. On the other hand, a state that has a compelling reason to terminate provisional application, such as an internal political upheaval or a desire to pressure a procrastinating treaty partner, should not be forced to choose between acceptance of the status quo and withdrawal from the treaty.¹³⁰ Consequently, the elimination in

126. See *supra* text accompanying note 80, for the 1956 proposed draft of article 42(1) and *supra* text accompanying note 82, for the 1962 proposed draft of article 21(2)(b). Draft article 24, tentatively approved at the fourteenth session in 1962, was the last to deal with termination. It allowed for termination of provisional application only when "the States concerned shall have agreed to terminate the provisional application of the treaty." *Report of the Commission to the General Assembly*, [1962] 2 Y.B. INT'L L. COMM'N 182, U.N. Doc. A/CN.4/SER.A/1962/Add.1. Unilateral withdrawal, even in a case of "unreasonable delay," was not provided for.

127. See, e.g., *United Nations Conference*, Second session, *supra* note 109, at 40 (comments of S. Verosta (Austria)).

128. The Conference failed to answer the question, raised by the delegate from Greece, as to whether a state that expresses its intention "that it did not wish to become a party to the treaty" is thereby making a formal and final withdrawal from the treaty. *Id.* at 41 (comments of C. Eustathiades). Perhaps the answer is that under article 25, unlike the termination clauses in prior drafts, the implied obligation of good faith and duty not to defeat the object and purpose of a treaty prior to its entry into force is applicable. The Commission's early drafts related only to termination of provisional application, but article 25 implies limits on termination, since a state must exercise good faith in stating its intention to withdraw from the treaty under article 18.

129. The 1962 proposed draft article 21(2)(b) dealt with the possibility of a state seeking short term advantage by providing that the terminating state give notice of its withdrawal from provisional application. See *supra* text accompanying note 81. This notice requirement, abandoned by the I.L.C. drafting committee in 1962, was resurrected at the Conference by the delegate from Poland, who urged consideration of a six-month notice of withdrawal clause. *United Nations Conference*, Second session, *supra* note 109, at 42-43 (comments of E. Wyzner). However, this suggestion was quickly beaten down by Sir Humphrey Waldock, Expert Consultant and former Special Rapporteur, who "personally was unable to see all the bogeys which had been evoked during the debate." *Id.* at 43.

130. This is of particular concern in light of the uncertainties of the nature of the rights and obligations of the participating states under article 25. See *supra* text accompanying notes 71-117.

subsection 2 of a temporary withdrawal option during provisional application is salutary in appearance but, perhaps, not in effect.

C. Provisional Application in Multilateral Situations

Some interesting questions may arise from provisional application of a treaty involving several states.¹³¹ First, may some negotiating states opt for provisional application while others do not? The Commission seemed to accept this as a given,¹³² but in light of the amendment that altered the status from provisional entry into force to provisional application, there was some confusion on this point at the Conference.¹³³

The second question, closely related to the first, is whether provisional application may continue with respect to some negotiating states after the treaty has entered into force with respect to other states. Article 25 provides that a treaty may be applied provisionally "pending its entry into force." Some delegates were concerned about a situation in which the treaty entered into force as between state A and state B while state C had not yet ratified¹³⁴ but was a participant in a provisional application agreement.¹³⁵ The Conference did not resolve these issues.¹³⁶

III. PROVISIONAL APPLICATION AND THE DOMESTIC TREATY LAW OF THE UNITED STATES

Throughout the discussions of provisional application by the International Law Commission and at the Vienna Conference, Com-

131. There was some concern expressed in the Commission that the 1962 draft implied that provisional entry into force was limited to bilateral treaties. These concerns were addressed in 1965 by assurances from the Special Rapporteur that the provisions of article 24 were not intended to be confined to bilateral treaties. *Summary Records of the 791st Meeting*, [1965] 1 Y.B. INT'L L. COMM'N 113, U.N. Doc. A/CN.4/SER.A/1965 (comments of H. Waldock, Special Rapporteur).

132. See *Summary Records of the 814th Meeting*, [1965] 1 Y.B. INT'L L. COMM'N 275, U.N. Doc. A/CN.4/SER.A/1965 (comments of H. Waldock, Special Rapporteur).

133. The delegate from Greece suggested that the article be amended to "cover provisional application by agreement among some negotiating States only," but nothing came of this proposal. *United Nations Conference, Second session, supra* note 109, at 41 (comments of C. Eustathiades).

134. Of course, other combinations and permutations are possible including the possibility that none of the states participating in provisional application has become a party to the treaty, or the possibility that there would be three classes of states: those for which the treaty has entered into force, those participating only in provisional application, and those nonparticipants for which the treaty has not entered into force and is not being applied provisionally.

135. See *United Nations Conference, Second session, supra* note 109, at 39-41 (comments of Sir Francis Vallat and C. Eustathiades).

136. *Id.* The United Kingdom delegate expressed his "understanding" that the continuation of provisional application, after entry into force occurred between other states, was not precluded and that this "was not unknown in international practice." *Id.* at 39-40.

mission members and state representatives were aware that provisional application or provisional entry into force provisions were often used to avoid domestic ratification requirements. Thus, Antonio de Luna (Spain) referred to "provisional entry into force" as a "much more elegant means of overcoming the difficulties raised by constitutional requirements for ratification than the method of using a special terminology so as to avoid the terms 'treaty' and 'ratification.'" ¹³⁷ More pragmatically, Milan Bartos (Yugoslavia) stated, "International relations would be much easier if States were given the possibility of putting certain treaties into force provisionally, before ratification, not as a mere practical expedient but with all the legal consequences of entry into force." ¹³⁸

Although international lawyers may applaud the added flexibility afforded by the provisional application option, domestic parliamentarians may not be similarly enthusiastic. United States senators, for example, have expressed concern that the executive's use of provisional application may deprive the Senate of its constitutional role in the treaty-making process, ¹³⁹ and a House subcommittee report

137. *Summary Records of the 790th Meeting*, [1965] 1 Y.B. INT'L L. COMM'N 107, U.N. Doc. A/CN.4/SER.A/1965. In a similar vein, Professor Wildhaber has remarked: Governments do not only have the power to choose between formal treaty and agreement in simplified form. All too often they use such power in order to evade the otherwise required legislative approval, or to force the hands of the legislature by creating *faits accomplis*. A milder and more tolerable claim for governmental prerogative is the device of putting agreements into force provisionally, pending legislative approval.

L. WILDHABER, *supra* note 24, at 73 (citations omitted).

138. *Summary Records of the 791st Meeting*, [1965] 1 Y.B. INT'L L. COMM'N 110, U.N. Doc. A/CN.4/SER.A/1965. It was for this reason that Bartos opposed changing the "provisional entry into force" formulation to "provisional application"; in his view, if "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." *Id.*

See also the comments of Sir Humphrey Waldock, *Summary Records of the 657th Meeting*, [1962] 1 Y.B. INT'L L. COMM'N 180, U.N. Doc. A/CN.4/SER.A/1962 ("[I]t sometimes occurred that a treaty remained in force provisionally throughout its life, the device of provisional entry into force being used merely because there was no expectation of Parliamentary approval for ratification . . ."); and Eduardo Jiménez de Aréchega (Uruguay), *Summary Records of the 791st Meeting*, [1965] 1 Y.B. INT'L L. COMM'N 112, U.N. Doc. A/CN.4/SER.A/1965 ("The article would make it possible for a State to endeavour to solve its constitutional difficulties by agreeing to the provisional entry into force of the treaty.").

139. See, for example, the remarks of Senator McClure concerning the possible provisional application of the United Nations Convention on the Law of the Sea, 125 CONG. REC. 36,040-42 (1979); and the questions submitted for the record by Senator Javits to the administration concerning the provisional application of a maritime boundary treaty with Cuba, S. EXEC. REP. No. 49, *supra* note 33, at 25-28. Senator McClure's concern is even more notable in that at the time he made these remarks it was thought that the administration intended to seek the advice and consent of the Senate to the provisional entry into force of the treaty, or to seek legislation approving the provisional entry into force of the treaty. The gist of Senator McClure's con-

concerning "U.S. domestic requirements for entering into a provisional application arrangement" stressed the need for congressional participation in such arrangements.¹⁴⁰ Despite the concerns of domestic politicians that the executive might use the provisional application procedure as a means of circumventing the ratification process, an examination of the relationship between the President and Congress concerning a number of the provisional agreements to which the United States has been a party makes clear that in practice adequate means have emerged through which Congress can communicate its views regarding such provisional arrangements and thereby provide them with some degree of domestic legitimacy prior to the treaty's ratification. In addition, although United States constitutional law seems clearly to allow the President full authority on his own to enter into such binding provisional arrangements, in practice the chief executive has looked to Congress for its expression of approval and for the added domestic legitimacy this approval confers on the provisional agreement.

Part three of this Article next examines the legal authority of the United States President to enter into provisional agreements.¹⁴¹ Supreme Court decisions apparently support this authority as part of the inherent power of the President to conduct foreign affairs.¹⁴² The division of power in international affairs between the executive and legislative branches, however, is not sharply drawn, and the capacity of a President to act successfully on the international level often is determined by his capacity to act harmoniously with Con-

cern was that provisional application, however brought about domestically, would place the Senate in the position of having to give its advice and consent to definitive entry into force later. It should be noted that no constitutional problems are raised by this procedure, as provisional entry into force or provisional application is brought about according to the procedures established in the advice and consent clause of the Constitution if the Senate gives its advice and consent to provisional application, or according to accepted practice concerning congressional-executive agreements if legislation is involved.

140. CONGRESSIONAL RESEARCH SERVICE, LAW OF THE SEA TREATY: ALTERNATIVE APPROACHES TO PROVISIONAL APPLICATION, PREPARED FOR THE SUBCOMM. ON INT'L ORGS. & MOVEMENTS OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 93D CONG., 2D SESS. (Comm. Print 1974) [hereinafter HOUSE FOREIGN AFFAIRS COMMITTEE REPORT ON ALTERNATIVE APPROACHES TO PROVISIONAL APPLICATION].

141. Although the focus of this part is on the tension between Congress and the executive, the "internecine warfare" between the House and Senate regarding their proper roles in the approval of international agreements should not be overlooked. See L. JOHNSON, THE MAKING OF INTERNATIONAL AGREEMENTS: CONGRESS CONFRONTS THE EXECUTIVE 147-50 (1984); Frank, *Constitutional Practice Until Vietnam*, reprinted in 1984 A.B.A. Standing Committee on Law and National Security, CONGRESS, THE PRESIDENT, AND FOREIGN POLICY 22. See also *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir.) (members of House sought to block transfer of federal property—the Panama Canal Zone—through a self-executing treaty), *cert. denied*, 436 U.S. 907 (1978).

142. See *infra* note 153.

gress at home. The experience of the United States with provisional agreements, this Article suggests, highlights the way the President and Congress informally develop means to cooperate in the process of international negotiations and the assumption of international obligations.

A. The Legal Basis of Provisional Application in United States Treaty Law

A comment to the American Law Institute's draft revision of the Restatement of the Foreign Relations Law of the United States provides an apt summary of the legal basis of provisional application in United States treaty law: "If consent of the Senate or Congress is required for the conclusion of an agreement but has not yet been obtained, agreement by the United States for provisional effect must normally rest on the President's authority."¹⁴³ An 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.¹⁴⁴ An official in the Carter administration, for example, described the provisional application provision in the 1977 maritime boundary agreement with Cuba as constituting "an executive agreement contained within the text of the Treaty."¹⁴⁵ This view of the domestic legal basis of provisional

143. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 1, § 312 comment 1.

144. FOREIGN RELATIONS COMMITTEE STUDY ON THE ROLE OF THE SENATE, *supra* note 1, at 102. The domestic legal effect of provisional application is similar to that of executive agreements. The Supreme Court held in *United States v. Belmont*, 301 U.S. 324 (1937), that executive agreements carried out under the President's constitutional authority are the law of the land. Similarly, the State Department has taken the position that "[w]hile the President may not, through provisional application of treaties, change existing law, treaties applied provisionally within the President's authority have full effect under domestic law pending a decision with respect to ratification." S. EXEC. REP. No. 49, *supra* note 33, at 27 (responses of Mark B. Feldman, Deputy Legal Adviser, Department of State, to questions on provisional application submitted by Senator Javits). For discussions of the scope of executive agreements in domestic law, see RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 1, § 302 reporter's note 11, § 312 reporter's note 7; L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 184-87 (1972); CONGRESSIONAL RESEARCH SERVICE, EXECUTIVE AGREEMENTS: A SURVEY OF LEGAL AND POLITICAL CONTROVERSIES CONCERNING THEIR USE IN U.S. PRACTICE (D. Sale), in *Congressional Oversight of Executive Agreements-1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 466, 491-93 (1975) [hereinafter D. SALE, EXECUTIVE AGREEMENTS].

145. S. EXEC. REP. No. 49, *supra* note 33, at 26. Professor Briggs made the following remarks during consideration by the International Law Commission of a draft article on provisional entry into force:

[T]here existed an ancillary or collateral agreement on the provisional application of all or part of the clauses of the treaty, and . . . there were "parties" to that agreement. If the provisional application was prescribed by the treaty itself, the States concerned could be said to be parties to an

application raises the question of the scope of the President's constitutional power to enter into executive agreements with other nations to apply treaties temporarily, pending their entry into force following appropriate Senate action.

For example, even though boundary agreements are almost always entered into as treaties,¹⁴⁶ can the President conclude a maritime boundary treaty with another country and, by agreeing to its provisional application, bind the nation legally?¹⁴⁷ If the temporary nature of provisional application would lead to an affirmative answer, would this conclusion be any different if the Senate failed to take timely action on the treaty and the provisional regime continued for a decade or more?¹⁴⁸ Or, to take another example, can the President, without seeking the advice and consent of the Senate, agree to the provisional application of a set of comprehensive arrangements for the regulation of international tariffs and trade, including the de facto establishment of an international organization for that purpose, and maintain that agreement in effect provisionally for an extended period of time?¹⁴⁹

The scope of the President's power to enter into executive agreements is unclear.¹⁵⁰ Although the use of executive agreements has increased dramatically since World War II,¹⁵¹ the Constitution con-

informal understanding on such application. The 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.

Summary Records of the 791st Meeting, [1965] 1 Y.B. INT'L L. COMM'N 103, 109, U.N. Doc. A/CN.4/SER.A/1965 (comments of H. Briggs (United States)).

146. See S. EXEC. REP. No. 49, *supra* note 33, at 25-28.

147. "The establishment of permanent maritime boundaries is appropriately accomplished by treaty with the advice and consent of the senate to ratification." *Id.* at 26. Exceptions exist in the case of certain declarations, protocols, or exchanges of notes that merely verify, substantiate, or make specific the general terms of a previous treaty. See, e.g., Protocol Respecting Northwest Water Boundary, March 10, 1873, United States-Great Britain, 18 Stat. 369, T.S. No. 135; Act Approving Minute No. 228 Concerning Demarcation of New International Boundary, October 27, 1967, United States-Mexico, 18 U.S.T. 2836, T.I.A.S. No. 6372. Another exception to the boundary-by-treaty rule is the Agreement Concerning Certain Maritime Boundaries, *supra* note 33, which was effected by exchange of notes, but which makes reference to a future "definitive delimitation" to be accomplished by treaty.

148. See *supra* note 33 and accompanying text for discussion of provisional arrangements for maritime boundaries.

149. See *infra* text accompanying notes 175-241.

150. For a review of the extensive literature on executive agreements, see the bibliographies in L. JOHNSON, *supra* note 141, at 187-200; FOREIGN RELATIONS COMMITTEE STUDY ON THE ROLE OF THE SENATE, *supra* note 1, at 205-19; D. SALE, EXECUTIVE AGREEMENTS, *supra* note 144, at 495-501.

151. For statistics comparing the volume and content of recent treaties and executive agreements, see CONGRESSIONAL RESEARCH SERVICE, INTERNATIONAL AGREEMENTS: AN ANALYSIS OF EXECUTIVE REGULATIONS AND PRACTICES, PREPARED FOR THE SENATE COMM. ON FOREIGN RELATIONS, 95TH CONG., 1ST SESS. 20-34 (Comm. Print 1977) (R.

tains no explicit language concerning international agreements other than the "advise and consent" clause in article II.¹⁵² The Supreme Court, however, has upheld the validity of executive agreements on a variety of legal grounds,¹⁵³ but also because, as Professor Wildhaber points out, "the verdict of history and usage was simply too plain to permit any decision declaring unconstitutional hundreds of international agreements."¹⁵⁴

Most executive agreements made by the President rest on the prior authorization¹⁵⁵ or subsequent approval¹⁵⁶ of Congress; others

Majak) [hereinafter R. MAJAK, FOREIGN RELATIONS COMMITTEE STUDY ON INTERNATIONAL AGREEMENTS].

152. U.S. CONST. art. II, § 2. Diplomatic and technological changes that have taken place since the framing of the Constitution require more complete international arrangements than are explicitly provided for.

Domestic procedures for processing of treaties . . . were formulated in a time when the extent and speed of international events and diplomacy were much lower. Diplomacy was largely—almost exclusively—bilateral. Interdependence among nations was limited. . . . Time available for response to problems was greater

The situation today is reversed. Rapid response is technically feasible and often desirable. Diplomacy is increasingly multilateral. Interdependence among nations is extensive and seems to be expanding. . . .

These changes weigh heavily against the use of treaties and encourage the use of executive agreements. Agreement is often sought in a brief, or at least certain, time period. Domestic legal requirements for processing treaties in the United States and some other nations, however, make lengthy consideration likely and make both the duration and outcome of such consideration uncertain.

R. MAJAK, FOREIGN RELATIONS COMMITTEE STUDY ON INTERNATIONAL AGREEMENTS, *supra* note 151, at 16.

153. For examples of the types of executive agreement that have been upheld by the Court, and the legal bases the Court has found for their validity, see L. WILDHABER, *supra* note 24, at 111-13. *United States v. Belmont*, 301 U.S. 324 (1937), upholding the President's authority to conclude the Litvinov Assignment without the advice and consent of the Senate, seems to base the President's authority on a broad and exclusive control of all foreign policy, although the more narrow ground of the President's control over recognition of foreign governments has also been asserted as the basis for the decision. The broad scope of the President's foreign affairs power was reasserted in *United States v. Pink*, 315 U.S. 203 (1942). *But see United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955). In this case the court of appeals invalidated an executive agreement regulating the export of potatoes by Canada to the United States on the grounds that it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related. In addition to finding the agreement void in the face of an earlier inconsistent act of Congress, the opinion asserted that the power to regulate foreign commerce is not among the inherent powers of the President, since it had been expressly vested in Congress by the Constitution. For a critique of the *Capps* rationale, see L. HENKIN, *supra* note 144, at 180-82.

154. L. WILDHABER, *supra* note 24, at 113.

155. In 1972 hearings before the Senate Subcommittee on Separation of Powers, a State Department legal adviser asserted that of the large number of executive agreements then in force, "over 97 percent are . . . previously or subsequently authorized

are made pursuant to duly ratified treaties.¹⁵⁷ If the Senate or Congress as a whole authorizes or approves the President's agreement with another nation to apply provisionally a treaty requiring ratification, there would appear to be no constitutional infirmity.¹⁵⁸ Problems arise, however, when the President, without formal congressional approval or the advice and consent of the Senate, agrees to the provisional application of an international agreement that requires ratification.¹⁵⁹ Since article 25 of the Vienna Convention can

by statute." *Congressional Oversight of Executive Agreements: Hearing on S. 3475 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 249 (1972) (statement of Hon. John R. Stevenson, Legal Adviser, Dep't of State). Other State Department interpretations indicate that, of 6,045 executive agreements concluded between 1946 and 1972, 83.3% "are based at least partly on statutory authority." R. MAJAK, FOREIGN RELATIONS COMMITTEE STUDY ON INTERNATIONAL AGREEMENTS, *supra* note 151, at 22. For representative examples of agreements concluded with prior congressional authorization, see 1 D.P. O'CONNELL, INTERNATIONAL LAW 208-209 (2d ed. 1970). Some of the more common applications of such agreements occur in the areas of postal conventions, trade agreements, and various forms of foreign assistance agreements. See D. SALE, EXECUTIVE AGREEMENTS, *supra* note 144, at 468-69.

156. The most frequently cited examples concern subsequent congressional approval, often by joint resolution, of United States participation in an international organization. See 1 D.P. O'CONNELL, *supra* note 155, at 209; R. MAJAK, FOREIGN RELATIONS COMMITTEE STUDY ON INTERNATIONAL AGREEMENTS, *supra* note 151, at 23. See also Agreement Concerning Automotive Products, Mar. 9, 1965, United States-Canada, art. 1, 17 U.S.T. 1372, T.I.A.S. No. 6093 (entered into force provisionally Jan. 16, 1965 and definitively Sept. 16, 1966). This Agreement provided that the parties would seek legislation providing for the mutual reduction or elimination of tariffs on automotive products. When questioned as to why the executive branch did not get legislative authority first, "as is usual for trade agreements," the State Department replied that expeditious action was necessary because of actions previously taken unilaterally by Canada, and that in any case the principal obligation of the United States was only to seek the necessary authority, and that, pending enactment of the legislation, the agreement was only in force provisionally. *United States-Canadian Automobile Agreement: Hearings on H.R. 9042 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess. 64-65 (1965).

157. See, e.g., Agreement Regarding Facilities and Areas and the Status of United States Armed Forces in Korea, July 9, 1966, United States-Korea, 17 U.S.T. 1677, T.I.A.S. No. 6127; Agreement Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, United States-Japan, 11 U.S.T. 1652, T.I.A.S. No. 4510. See generally D. SALE, EXECUTIVE AGREEMENTS, *supra* note 144, at 474-78.

158. Moreover, "if there has already been Senate (or Congressional) consent to the agreement it may sometimes be plausible to infer also consent to provisional application of the agreement." RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 1, § 312 comment 1. See *supra* note 139.

159. See, for example, S. EXEC. REP. No. 49, *supra* note 33, at 25-27 for questions from the Senate Foreign Relations Committee regarding the legal basis and effect of provisional application of a maritime boundary treaty with Cuba that was before the Committee for its recommendation on Senate advice and consent to ratification. Although the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter General Agreement], has been applied provisionally since 1947 under authority of the Trade Agreements Act of 1934, there

be read as creating binding legal obligations during the provisional period, and since this in fact is the State Department's interpretation of article 25,¹⁶⁰ the President may be exceeding his constitutional authority.

Only a small number of executive agreements have been made on the sole authority of the President,¹⁶¹ but this category includes some extremely significant international undertakings.¹⁶² The limits of presidential power in this area are ill-defined, and, as Professor Henkin has recently observed, the Supreme Court has provided no guidance on the power of the President to make executive agreements on his own authority.¹⁶³ Despite this lack of direct precedent, it is probably safe to say that if the President agrees with another nation to apply a treaty provisionally pending ratification and definitive entry into force, and the Senate or Congress as a whole has not explicitly indicated its disapproval of either the particular agreement or its provisional application, or of a class of agreements¹⁶⁴ that includes the particular agreement, then the President's power to enter into a legally binding provisional arrangement will be up-

was considerable discussion during committee debates each time this Act was renewed concerning whether it served as sufficient constitutional authority for the General Agreement, or whether the General Agreement required the Senate's advice and consent, or whether authority for presidential application of the Agreement could be found in the President's constitutional power to conduct foreign affairs. *See generally* Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 259-75 (1967-1968).

160. In answer to a question submitted by Senator Javits during the Foreign Relations Committee hearing on the Cuba maritime boundary treaty, Mark Feldman, Deputy Legal Adviser of the Department of State, remarked that "[b]oth provisional application of treaties and the obligation not to defeat the object and purpose of treaties prior to ratification are recognized in customary international law . . . and in U.S. law." S. EXEC. REP. NO. 49, *supra* note 33, at 27.

161. *See* R. MAJAK, FOREIGN RELATIONS COMMITTEE STUDY ON INTERNATIONAL AGREEMENTS, *supra* note 151, at 22 (noting that only 5.5% of executive agreements concluded between 1946 and 1972 were based solely on executive authority).

162. *See* D. SALE, EXECUTIVE AGREEMENTS, *supra* note 144, at 478-88, for historical examples of international undertakings supported by the President's sole authority, including: the Rush-Bagot Agreement of 1817, United States-Great Britain, 8 Stat. 231, providing for mutual limitations of naval armed forces on the Great Lakes; the "Open Door" policy in China, initiated through notes to France, Germany, Great Britain, Italy, Japan, and Russia; and presidential agreements concluded during World War II which shaped the structure of the postwar world.

163. Henkin, *The Supreme Court and the Interpretation of the Foreign Affairs Power*, in CONGRESS, THE PRESIDENT, AND FOREIGN POLICY 28 (S. Soper ed. 1984).

164. For example, the Arms Control and Disarmament Act, 22 U.S.C. § 2573 (1982), provides

that no action shall be taken under this chapter or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except pursuant to the treaty making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States.

held in court. In addition to the usual reasons for upholding executive agreements,¹⁶⁵ a court would undoubtedly regard the temporal limitation of the provisional application regime and the ability of the United States unilaterally to terminate provisional application¹⁶⁶ as factors tending to sustain the exercise of presidential power.

Since most international legal obligations of the United States are undertaken pursuant to agreements in simplified form and not through the constitutional treaty-making process, the need for provisional application does not often arise.¹⁶⁷ Thus, the use of provisional application to avoid the constitutional treaty-making process, while certainly a possibility, is extremely rare, if in fact it has occurred at all. It would be useful to the President only in that very small number of situations where the treaty route is definitely mandated.¹⁶⁸ Although presidential circumvention of the constitutional treaty-making process through the use of provisional application has not been a problem in United States practice, the potential for conflict between Congress and the President concerning provisional application does exist; and if conflict were to occur, it would most likely involve agreements of the utmost importance, such as a disarmament agreement or an agreement committing the United States to participation in the preliminary work for the establishment of an international organization or an agreement having a major impact on foreign commerce.

165. See *supra* note 153.

166. See Vienna Convention, *supra* note 1, art. 25(2); *supra* text accompanying note 58 (provision quoted).

167. The United States has occasionally made use of the provisional application mechanism in agreements that were concluded as executive agreements on the part of the United States, but that required ratification by the *other country's* legislative body. See, e.g., Agreement on Arrangements Respecting Patents and Technical Information in Defense Programs, Oct. 3, 1952, United States-Italy, 12 U.S.T. 189, T.I.A.S. No. 4693 (entered into force provisionally Oct. 3, 1952, definitively Dec. 16, 1960); Agreement on Guaranty of Private Investments, Dec. 22, 1959, United States-Argentina, 12 U.S.T. 955, T.I.A.S. No. 4799 (entered into force provisionally Dec. 22, 1959, definitively May 5, 1961). An Air Transport Agreement with Uruguay concluded in 1946 is still being applied provisionally, apparently never having received the "approval in accordance with Uruguayan law" required by the Agreement to enter into force definitively. Air Transport Agreement, Dec. 14, 1946, United States-Uruguay, 15 U.S.T. 2115, T.I.A.S. No. 8562 (entered into force provisionally Dec. 14, 1946).

168. Professor Henkin speculates that "if Congress says no clearly, the president is going to lose." Henkin, *supra* note 163, at 33. But even if Congress were to say no clearly, as it has done in section 2573 of the Arms Control and Disarmament Act, *supra* note 164, might not the President still find authority for certain agreements in specific constitutional grants of power? See D. SALE, EXECUTIVE AGREEMENTS, *supra* note 144, at 493; Henkin, *supra* note 144, at 186; Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345, 381-82 (1955); McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 317-18 (1945).

Various constitutional provisions have been cited as authority for the President to enter into executive agreements on his own.¹⁶⁹ Complicating the analysis, however, are specific constitutional delegations of power to Congress in areas where the President has at times sought to act alone¹⁷⁰—Justice Jackson's "zone of twilight in which [the President] and Congress may have concurrent authority or in which its distribution is uncertain."¹⁷¹ Justice Jackson said that "[i]n this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."¹⁷²

While courts are on occasion called upon to provide the forum for the "actual test of power," the relationship between Congress and the President concerning the making of international agreements is continuously evolving as it responds to the ebb and flow of power in the political arena and to the exigencies of daily events. If Congress perceives the President as too disposed to act on his own in the making of international agreements, it will attempt to redress the balance. Sometimes Congress aims at effecting major changes in the process,¹⁷³ sometimes Congress is responding to particular situa-

169. The most specific provisions are U.S. CONST. art. II, § 2, which provides that the "President shall be Commander in Chief of the Army and Navy" and art. II, § 3, which empowers the President to receive ambassadors and from which the power of diplomatic recognition is derived. More generally, the provision in art. II, § 3 that the President "shall take Care that the Laws be faithfully executed" has been taken as authority to conclude agreements necessary for the execution of the laws, including treaty law, domestic law, and obligations under international law. See D. SALE, EXECUTIVE AGREEMENTS, *supra* note 144, at 489; Mathews, *supra* note 168, at 366-67; McDougal & Lans, *supra* note 168, at 248-51.

170. For example, U.S. CONST. art. I, § 8 delegates to Congress the power to declare war, raise and support armies, and to regulate foreign and interstate commerce. In addition, Congress's "power of the purse" can be seen as giving it some authority in any aspect of foreign affairs where appropriations are required.

171. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

172. *Id.* (footnote omitted).

173. For example, the "National Commitments Resolution" of 1969, as initially reported from the Senate Foreign Relations Committee in April, 1969, stated that "[a] national commitment by the United States to a foreign power necessarily and exclusively results from . . . action taken . . . through means of a treaty, convention, or other legislative instrumentality . . ." SENATE COMMITTEE ON FOREIGN RELATIONS, NATIONAL COMMITMENTS, S. REP. NO. 129, 91st Cong., 1st Sess. 1 (1969). The Senate eventually passed a limited version of the resolution that defined "national commitment" as the use of United States forces in a foreign country. *Id.* at 6.

The Case-Zablocki Act, enacted in 1972, requires that all international agreements other than treaties be transmitted to Congress within 60 days after their entry into force. 1 U.S.C. § 112b(a) (1982). In response to the Case-Zablocki Act, the State Department revised its "Circular 175" procedures governing the formulation of international agreements in an attempt to clarify guidelines as to whether an agreement should be concluded as a treaty, and to strengthen provisions on consultation with Congress. See R. MAJAK, FOREIGN RELATIONS COMMITTEE STUDY ON INTERNATIONAL

tions,¹⁷⁴ and on other occasions Congress will acquiesce in or even encourage an exercise of presidential power.

B. *Provisional Application in United States Practice*

An examination of United States practice in entering provisional arrangements makes clear that, whatever the possibility of executive circumvention of the ratification process, in fact the President has generally obtained some form of congressional approval of, or at least acquiescence in, provisional agreements binding the United States to international obligations. This informal process provides a good example of how domestic political institutions can conform their own governing procedures to meet the requirements of international activity perceived to be in the national interest. This section examines the interaction of the President and Congress on the General Agreement on Tariffs and Trade, on a number of international commodity agreements, and on the formation of certain international organizations.

AGREEMENTS, *supra* note 151.

Other attempts by Congress to limit the President's power to make executive agreements have failed. *See, e.g.*, S. 632 and S. 1251, 94th Cong., 1st Sess. (1975), which would have provided for congressional review of executive agreements, and the Treaty Powers Resolution, S. Res. 486, 94th Cong., 2d Sess., 122 CONG. REC. 22078 (1976), which would have expressed the understanding of the Senate that any "significant" international agreement should be submitted to the Senate as a treaty, and that the President should consult with the Foreign Relations Committee in determining whether an international agreement constitutes a treaty. *See* L. JOHNSON, *supra* note 141, at 140-47.

174. For example, S. Res. 214, 92d Cong., 2d Sess. (1972), expressed the understanding of the Senate that the 1971 agreements with Portugal and Bahrain regarding United States military bases in those countries should be submitted to the Senate as treaties. *See Executive Agreements with Portugal and Bahrain: Hearings on S. Res. 214 Before the Senate Comm. on Foreign Relations*, 92d Cong., 2d Sess. (1972). The administration chose merely to "note" this resolution and relied on its authority under the NATO Treaty to engage in mutual aid for defense purposes. *See* D. SALE, EXECUTIVE AGREEMENTS, *supra* note 144, at 476-77. Senator Case responded by inserting provisions in the Foreign Assistance Acts of 1972 and 1973 that no funds would be obligated or expended to implement the Portuguese agreement until it was submitted to the Senate as a treaty, or to both Houses of Congress for their approval through a resolution. These measures passed the Senate but failed in the House. *See* HOUSE COMMITTEE ON FOREIGN AFFAIRS, FOREIGN ASSISTANCE ACT OF 1972, H.R. REP. NO. 16029, 92d Cong., 2d Sess. 8-9 (1972); SENATE COMMITTEE ON FOREIGN RELATIONS, FOREIGN ASSISTANCE ACT OF 1973, S. REP. NO. 62, 93d Cong., 1st Sess. 23-25 (1973).

Congressional pressure on the executive was more successful in 1975, when President Ford agreed to submit the Sinai Accords to Congress for approval of the use of United States technicians in the operation of the agreement's early warning system. The agreements with Israel and Egypt provided that the proposal would not become binding until such approval was obtained. Early Warning System Agreement, Sept. 1, 1975, United States-Egypt; 26 U.S.T. 2278, T.I.A.S. No. 8156 (entered into force Oct. 13, 1975); Early Warning System Agreement, Sept. 1, 1975, United States-Israel, 26 U.S.T. 2271, T.I.A.S. No. 8155 (entered into force Oct. 13, 1975).

1. *GATT*: "C'est le provisoire qui dure."¹⁷⁵

The General Agreement on Tariffs and Trade¹⁷⁶ is the most comprehensive and far-reaching of any international agreement to make use of the provisional application mechanism. Although the *GATT*¹⁷⁷ has emerged as the central international trade institution of the postwar world,¹⁷⁸ it has achieved that prominence primarily because of needs created by the development of the international economy rather than through conscious planning. The General Agreement's provisional application provision has been a major factor allowing for the elasticity and creative evolution of the *GATT*.

Growth of international trade through elimination of trade discrimination is the basic goal of the General Agreement.¹⁷⁹ It accomplishes this goal primarily by the granting of general most-favored-nation treatment,¹⁸⁰ by tariff concession provisions,¹⁸¹ and by the regulation of nontariff barriers to trade such as antidumping and countervailing duties¹⁸² and quantitative restrictions.¹⁸³ The drafters

175. French adage, quoted in R. GARDNER, *STERLING-DOLLAR DIPLOMACY IN CURRENT PERSPECTIVE* xxv (1980).

176. General Agreement, *supra* note 159. The General Agreement was not signed as a separate document, but was attached to the Final Act of the United Nations Conference on Trade and Employment at which it was negotiated.

177. Since the General Agreement on Tariffs and Trade refers both to the document signed in 1947 and to the institution that has developed around it, the convention is to refer to the institution as the "*GATT*" and the document as the "General Agreement." K. DAM, *supra* note 34, at 3.

178. K. DAM, *supra* note 34, at 10. For a general analysis of the *GATT*'s development and legal aspects, see J. JACKSON, *supra*, note 34.

179. General Agreement, *supra* note 159, preface.

180. General Agreement, *supra* note 159, art. I.

181. See General Agreement, *supra* note 159, art. II and the schedules of specific concessions granted by each of the contracting parties (these schedules take up most of the Agreement's two volumes of the United States Statutes at Large—the general clauses, including annexes and interpretative notes, are contained in the first 90 pages of Part 5, Volume 61). The *GATT* as an institution has provided the framework for all major tariff conferences since 1948, with the results of such conferences being recorded as protocols to the General Agreement. See, e.g., Geneva (1967) Protocol to the General Agreement, June 30, 1967, 19 U.S.T. 1, T.I.A.S. No. 6425, 520-629 U.N.T.S. (incorporating the "Kennedy Round"); Geneva (1979) Protocol to the General Agreement, June 30, 1979, 31 U.S.T. 1015, T.I.A.S. No. 9629 U.N.T.S. (incorporating the "Tokyo Round").

182. General Agreement, *supra* note 159, art. VI. For an explanation of antidumping and countervailing duties see K. DAM, *supra* note 34, at 167-79.

183. General Agreement, *supra* note 159, arts. XI, XIII. These are merely highlights of the general clauses of the Agreement. Other clauses include National Treatment on Internal Taxation and Regulation (art. III); Formalities connected with Importation and Exportation (art. VIII); Marks of Origin (art. IX); Publication and Administration of Trade Regulations (art. X); Exchange Arrangements (in cooperation with the International Monetary Fund) (art. XV); and Subsidies (art. XVI). In addition, provisions are made for Restrictions to Safeguard the Balance of Payments (art. XII) and for various Exceptions (arts. XIV, XX, XXI). Arrangements are made for consultation among the contracting parties (art. XXII) and a Nullification and

intended the General Agreement to be an interim arrangement pending negotiations establishing an International Trade Organization (ITO), and provided that when the charter of the ITO entered into force, corresponding portions of the Agreement would be suspended.¹⁸⁴

The United States first proposed establishing the ITO¹⁸⁵ during the period of postwar idealism in which nations looked to planned economic growth and international organization as the means to a secure world.¹⁸⁶ Negotiations to establish the organization took place at a series of conferences between 1946 and 1948 in London, New York, Geneva, and Havana.¹⁸⁷ At these conferences delegates pursued the complex process of balancing free trade principles with various national needs and interests¹⁸⁸ to arrive at a comprehensive plan covering all aspects of international trade.¹⁸⁹ Meanwhile, the

Impairment clause (art. XXIII) is included to allow a party whose rights under the Agreement are impeded to seek resolution and if unsuccessful to suspend its own obligations as deemed appropriate.

184. General Agreement, *supra* note 159, art. XXIX.

185. *Proposals on World Trade and Employment*, Department of State Publication 2411 (1945), reprinted in 13 DEPARTMENT OF STATE BULLETIN 912 (1945). These proposals were the basis both of invitations to western nations to participate in negotiations for reduction of tariffs and other trade barriers and of a resolution introduced at the first meeting of the United Nations Economic and Social Council, providing for the calling of an International Conference on Trade and Employment. C. WILCOX, A CHARTER FOR WORLD TRADE 40 (1949).

186. *Membership and Participation by the United States in the International Trade Organization: Hearings on H.R.J. Res. 236 Before the House Comm. on Foreign Affairs*, 81st Cong., 2d Sess. 3, 10 (1950) (Message from President Truman Transmitting the Charter for ITO, S. Doc. No. 61, 81st Cong., 1st Sess. 1949) [hereinafter *ITO 1950 House Hearings*]. See also Meier, *The Bretton Woods Agreement—Twenty-five Years After*, 23 STAN. L. REV. 235, 237 (1971) (indicating that the GATT, as survivor of the International Trade Organization, along with the International Monetary Fund and the World Bank, was a part of the "Bretton Woods system," which envisioned regulation of all aspects of the postwar international economy); *International Trade Organization: Hearings on Trade Agreements System and Proposed International Trade Organization Charter Before the Senate Comm. on Finance*, 80th Cong., 1st Sess. 2 (1947) (statement of William S. Clayton, Under Secretary of State for Economic Affairs) [hereinafter *ITO 1947 Senate Finance Hearings*]; Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 LAW & POL'Y INT'L BUS. 21, 29 (1980).

187. K. DAM, *supra* note 34, at 10. For a history of the negotiations for the ITO and analysis of the charter that eventually emerged from the Havana Conference see W. BROWN, *THE UNITED STATES AND THE RESTORATION OF WORLD TRADE* (1950), and C. WILCOX, *supra* note 185. For a discussion of the ITO with emphasis on its relation to Anglo-American postwar financial and commercial collaboration and the shift from a bilateral to a multilateral approach, see R. GARDNER, *supra* note 175, at 348-80.

188. K. DAM, *supra* note 34, at 12-14.

189. Throughout the negotiations, work in the Preparatory Committee was divided into the six substantive areas that formed the chapters of the Charter: employment, industrial development, commercial policy, commodity policy, cartels, and the organization. W. BROWN, *supra* note 187, at 68.

General Agreement was drawn up separately at Geneva in 1947 in conjunction with negotiations for immediate tariff concessions among the participants.¹⁹⁰ In order to protect the value of these tariff concessions the General Agreement incorporated the commercial policy provisions of the ITO charter.¹⁹¹ Representatives of a number of participating governments, however, indicated that they might not be able to put the General Agreement into effect immediately, since their authority was limited to the negotiation of tariff reductions, and since they could not enact the nontariff provisions contained in the second part of the General Agreement without parliamentary approval.¹⁹²

To solve this dilemma, a number of delegates at the Geneva conference suggested postponing the General Agreement's entry into force until the completion of the ITO charter.¹⁹³ Other delegates opposed the delay, thinking that momentum would be lost and that political opposition to the tariff concessions might develop, with a consequent disruption of international trade.¹⁹⁴ Because these opponents feared that enacting the tariff concessions without nontariff means to protect them could lead to evasion of the provisions,¹⁹⁵ a committee recommended including a clause providing that the nontariff provisions corresponding to the commercial policy provisions of the ITO be applied "to the fullest extent not inconsistent with existing legislation."¹⁹⁶ This language was later included in the separate Protocol of Provisional Application, by which the signatories agreed to "apply provisionally on and after January 1, 1948: (a) Parts I & III of the General Agreement on Tariffs and Trade, and (b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation."¹⁹⁷

190. K. DAM, *supra* note 34, at 11. *See also* W. BROWN, *supra* note 187, at 131-34.

191. W. BROWN, *supra* note 187, at 237.

192. J. JACKSON, *supra* note 34, at 62 (citing U.N. Doc. EPCT/135 (1947)).

193. *Id.* (citing U.N. Doc. EPCT/TAC/4, at 8 (1947)).

194. *Id.* (citing U.N. Doc. EPCT/TAC/1, at 3 (1947)).

195. *Id.* (citing U.N. Doc. EPCT/TAC/1, at 24 (1947)).

196. *Id.* (citing U.N. Doc. EPCT/135, at 9 (1947)).

197. *Id.* (citing U.N. Doc. EPCT/196, (1947)). *See General Agreement, supra* note 159.

The protocol was signed by Australia, Belgium, Canada, France, Luxemburg, the Netherlands, the United Kingdom, and the United States, with provision for other conference participants to sign it within six months. Countries that have become contracting parties to the General Agreement in the ensuing years have done so through protocols of accession containing substantially the same language, with the cutoff date for "existing legislation" the date of the new country's accession, rather than October 30, 1947, which is the cutoff date for the original contracting parties. K. DAM, *supra* note 34, at 342; J. JACKSON, *supra* note 34, at 61. *See, e.g.*, Protocol for the Accession of Colombia to the General Agreement, *done* Nov. 28, 1979, ___ U.S.T. ___, T.I.A.S. No. 10121 (entered into force Oct. 3, 1981) (Colombia to apply provisionally Parts I, III, IV, and to apply Part II "to the fullest extent not inconsistent with its legislation existing on the date of this Protocol").

The GATT system, itself an interim mechanism pending completion and approval of the ITO, thus began its existence under the Protocol with a dual aspect of conditionality—at most, application of its terms was to be provisional until definitive entry into force of the General Agreement, and even this provisional application would not affect a contracting state's prior legislation that was inconsistent with the Agreement.¹⁹⁸

Five months after the GATT was put into force provisionally, a final charter for the ITO,¹⁹⁹ known as the Havana Charter, was submitted to its signatory governments for acceptance.²⁰⁰ At this point, congressional approval in the United States became crucial for the future of the GATT and the ITO.²⁰¹ Congressional reaction to both the Havana Charter²⁰² and the General Agreement now reflected growing disillusionment with internationalism²⁰³ and increasing sup-

198. In assessing the impact of the Protocol, more stress has been placed on the exception for "existing legislation" than on the provisional application mechanism itself. Professor Dam regards the "grandfathering" of prior inconsistent legislation as creating "one of the principal weaknesses of the General Agreement as a codification of a rule of law in economic affairs," while indicating that "[t]he fact that Parts I and III were applied only provisionally had no important operative significance." K. DAM, *supra* note 34, at 342. Professor Jackson has found "no instance in which the clause 'provisional application' has had any meaning in itself," but indicates that "even in the preparatory work for the protocol, the meaning of 'provisional application' tended to be equated with executive action as restricted by the 'existing legislation' clause." J. JACKSON, *supra* note 34, at 63 (citing U.N. Doc. EPCT/W/301, at 7 (1947)).

A body of GATT jurisprudence has developed to define the scope of the "existing legislation" clause by dealing with such questions as what the cutoff date is, whether it applies to all legislation or only mandatory legislation and whether amendments to qualifying existing legislation, which does not increase its GATT inconsistency, deprives it of its "grandfathered" status. See Roessler, *The Provisional Application of the GATT: Note on the Report of the GATT Panel on the "Manufacturing Clause" in the U.S. Copyright Legislation*, 19 J. WORLD TRADE L. 289, 291-92 (1985).

199. Havana Charter for an International Trade Organization and Final Act and Related Documents of the United Nations Conference on Trade and Employment, Mar. 24, 1948, U.N. Doc. E/Conf. 2/78 (1948), reprinted in U.S. DEP'T OF STATE, PUB. No. 3117 (Commercial Policy Series No. 113, 1947) [hereinafter *The Havana Charter*].

200. The Havana Charter provided that it would enter into force 60 days after "a majority of the governments signing the Final Act of the United Nations Conference on Trade and Employment have deposited instruments of acceptance" with the Secretary-General. *Id.* art. 103.

201. "[S]ince the United States was the strongest economy in the post-war world, and since the initiative for an agreement came from the United States, other countries waited to see if the United States would accept the ITO." J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 398 (1977).

202. The Charter was not sent to Congress until 1949, when President Truman asked for a joint resolution authorizing U.S. participation, and hearings were not held until 1950. W. DIEBOLD, *THE END OF THE I.T.O.* 6 (Essays in International Finance No. 16, 1952).

203. See, e.g., R. GARDNER, *supra* note 175, at 371-75.

port for protectionist trade measures.²⁰⁴

President Truman signed the Protocol of Provisional Application and proclaimed modifications of duties and import restrictions as specified in the General Agreement,²⁰⁵ citing the Tariff Act of 1930 as authority for entering the Agreement.²⁰⁶ The Tariff Act required renewal in 1948,²⁰⁷ and during congressional consideration of the Act there was much discussion of the pending ITO and the recently adopted General Agreement.²⁰⁸ Congress had raised concerns during the hearings about whether the previous versions of the Act granted the executive the authority to negotiate such comprehensive multi-lateral commitments as the General Agreement,²⁰⁹ and about whether the General Agreement had the effect of establishing the ITO without congressional approval.²¹⁰

204. See, e.g., S. REP. No. 1558, 80th Cong., 2d Sess. 1, reprinted in 1948 U.S. CODE CONG. SERV. 2079.

205. Proclamation No. 2761A, 3 C.F.R. 71 (1947), reprinted in 61 Stat. 1103 (1947).

206. An Act to Extend the Authority of the President Under Section 350 of the Tariff Act of 1930, As Amended, and for other Purposes, 59 Stat. 410 (1945) (amending 48 Stat. 943 (1934)) (current version at 19 U.S.C. §§ 1351-1367 (1983)). The statute stated:

Whenever [the President] finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States . . . [he] is authorized . . .

(1) To enter into foreign trade agreements with foreign governments . . .

(2) To proclaim such modifications of existing duties and other import restrictions . . . as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.

Id. The Act required that all such trade agreements be subject to termination after three years and that the President's authority would terminate after three years. *Id.* § 2. See generally Jackson, *supra* note 159, at 255-56.

207. Trade Agreements Extension Act of 1948, ch. 678, 62 Stat. 1053 (1948) (current version at 19 U.S.C. § 1351 (1983)).

208. See S. REP. No. 1558, 80th Cong., 2d Sess. 1, reprinted in 1948 U.S. CODE CONG. SERV. 2079; *Extending Authority to Negotiate Trade Agreements: Hearings on H.R. 6556 Before the Senate Comm. on Finance*, 80th Cong., 2d Sess. 7, 11-15, 466-73 (1948) [hereinafter *Senate Finance Hearings, 1948 Trade Agreements Act*].

209. *Senate Finance Hearings, 1948 Trade Agreements Act*, *supra* note 208, at 468-71. There was also a great deal of discussion and suspicion about whether the President had relied on his inherent power to conduct foreign affairs rather than on the Trade Agreements Act. *Id.* See *supra* notes 155, 159 and accompanying text.

210. *Senate Finance Hearings, 1948 Trade Agreements Act*, *supra* note 208, at 466 (statement of William L. Clayton, Special Adviser to the Secretary of State). The Finance Committee, however, reserved these questions for fuller consideration when the Charter for the ITO would be considered by Congress. S. REP. No. 1558, 80th Cong., 2d Sess. 1, reprinted in 1948 U.S. CODE CONG. SERV. 2079. Congress also used the prospect of an impending vote on the ITO to limit extension of the 1948 Act to one year instead of the customary three. *Id.* Congress also inserted in the new Act a limit on the President's authority "by the introduction of 'peril points' below which he could not reduce duties without explaining his action to Congress." W. DIEBOLD, *supra* note 202, at 8.

Similarly, the fact that the General Agreement was to be put into effect provisionally without congressional action was a cause of concern during preliminary consideration in 1947 of the proposed ITO.²¹¹ By the time preliminary hearings were held in 1950 on the joint resolution providing for United States membership and participation in the organization,²¹² the GATT had been operating for two and a half years under the Protocol,²¹³ and different objections were raised; opponents now claimed that the ITO was unnecessary because its functions were already being performed by the GATT.²¹⁴ Supporters of the ITO also relied on the GATT's existence, arguing that if the United States rejected the Charter, "the confidence of many of [the GATT] nations in the purposes of the United States and, therefore, their willingness to participate in GATT, would be seriously shaken."²¹⁵ Nevertheless, the General Agreement was an established fact and, for reasons that probably had little to do with the Agreement itself,²¹⁶ the ITO faded quietly away when a State Department press release of December 6, 1950 announced, without explanation or elaboration, that the Charter would not be resubmitted to Congress.²¹⁷ The GATT remained, though without a secure legal basis or permanent structure.

The Truman administration strongly supported the achievements of the General Agreement and said it would pursue the goal of an

211. In the hearings that took place after the General Agreement had been drafted and decided upon, but before the final draft of the ITO Charter was completed, Senate Finance Chairperson Milliken accused the administration of trying to do provisionally, without the consent of Congress, the same thing the administration had admitted must have the consent of Congress. *ITO 1947 Senate Finance Hearings*, *supra* note 186, at 73. The concern was not with the legal mechanism of provisional application, since this concept was not discussed in the hearings. Rather, Senator Milliken objected to putting a whole portion of the Charter into effect as an executive agreement pending acceptance by Congress of the main Charter, *id.* at 71, and that the GATT would "[set] up an international control organization duplicating the heart of [the] proposed organization," *id.* at 72.

212. *ITO 1950 House Hearings*, *supra* note 186. The delay in submitting and considering the ITO can be attributed to the administration's unwillingness to press for quick approval of what had become a controversial item, and to Congress's preoccupation with such important items as NATO. W. DIEBOLD, *supra* note 202, at 6.

213. An additional round of tariff negotiations had been conducted under GATT, Annecy Protocol of Terms of Accession to the General Agreement on Tariffs and Trade, *done* Oct. 10, 1949, 64 Stat. B139, T.I.A.S. No. 2100, and a third round had been scheduled at Torquay, England. See J. JACKSON, *supra* note 34, at 50.

214. *ITO 1950 House Hearings*, *supra* note 186, at 160-61 (statement of O.R. Strackbein, Chairman, Nat'l Labor Mgmt. Council on Foreign Trade Policy).

215. *Id.* at 125 (statement of William L. Batt, Chairman, Comm. for the Int'l Trade Org.).

216. See W. DIEBOLD, *supra* note 202; R. GARDNER, *supra* note 175, at 371-80, for analyses of the opposition to the ITO and the causes of its failure.

217. 23 *Dep't St. Bull.* 977 (1950). The GATT's achievement of "remarkable results," and the need for administrative machinery were recognized in the same press release. *Id.*

improved GATT organization by seeking legislative authority in connection with renewal of the trade agreements program.²¹⁸ Nothing came of this at the time of the 1951 renewal of the Trade Agreements Act,²¹⁹ and the Eighty-second Congress in fact "moved to assert its complete independence from the G.A.T.T. obligations."²²⁰

In spite of some continuing reservations in the United States Congress about the validity of the General Agreement,²²¹ the "GATT was able to play a highly effective institutional role" during its first

218. *Id.*

219. Neither the Trade Agreements Extension Act of 1951, Pub. L. No. 82-50, 65 Stat. 72 (1951), nor the committee reports, S. REP. No. 299, 82d Cong., 1st Sess., reprinted in 1951 U.S. CODE CONG. & ADMIN. NEWS 1465-72, mention any such attempt to provide authority for a strengthened GATT administration.

220. R. GARDNER, *supra* note 175, at 375. The Trade Agreements Extension Act of 1951 not only failed to strengthen the GATT's administrative machinery, but included a caveat: "The enactment of this Act shall not be construed to determine or indicate the approval or disapproval by the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade." Trade Agreements Extension Act of 1951, Pub. L. No. 82-50, 65 Stat. 72 (1951). The 1951 Act also reinstated the "peril point" reporting requirements that had been instituted in 1948 but removed in 1949. *Id.* Sections three and four provided for "escape clauses" prohibiting tariff concessions from continuing if injury to domestic industry was threatened, and amended section 22 of the Agricultural Adjustment Act, 7 U.S.C. § 624 (providing presidential authority to limit imports of agricultural products) to provide: "(f) No trade agreement or other international agreement heretofore or hereafter entered into by the United States shall be applied in a manner inconsistent with the requirements of this section." *Id.* § 8.

221. See, e.g., S. REP. No. 232, 84th Cong., 1st Sess. 15, reprinted in 1955 U.S. CODE CONG. & ADMIN. NEWS 2101, 2111 (individual views of Sen. Malone). In opposing the Trade Agreements Extension Act of 1955, Senator Malone challenged the Act as an unconstitutional delegation of congressional power and complained that the administration had used the GATT to enact the substantive provisions of the ITO without congressional approval: "Thus GATT survives although its twin, ITO, was stillborn, and it survives because the State Department preferred to withhold it from Congress after ITO was scuttled . . ." *Id.* at 30, 1955 U.S. CODE CONG. & ADMIN. NEWS 2128.

In addition to concerns about the legitimacy of the General Agreement, the GATT had to overcome an inherent problem of institutional weakness. There is no provision in the General Agreement for an organization comprised of the parties, as such. Instead, article XXV gives authority for joint action by the "CONTRACTING PARTIES," as the collectivity of contracting parties is referred to in the agreement: "Each contracting party shall be entitled to have one vote at all the meetings of the CONTRACTING PARTIES." General Agreement, *supra* note 159, art. XXV, para. 3. This nomenclature was used at the insistence of United States delegates to "remove any connotation of formal organization," which the U.S. was not authorized to enter or negotiate. J. JACKSON, *supra* note 34, at 120. Besides the votes of the CONTRACTING PARTIES, the GATT functions through such sub-bodies as an intersessional committee (renamed the Council in 1960), standing committees, and working parties. The development of these sub-bodies has led to the conclusion that "[t]he General Agreement and its practice can now be cited as an important precedent in international law for the development of the institutions necessary to carry out a multilateral treaty that makes no provision for those institutions." *Id.* at 153.

decade of existence.²²² Nevertheless, the makeshift arrangements that governed the administration of the GATT were in many ways unsatisfactory²²³ and in 1955 the contracting parties drafted an instrument to set up an Organization for Trade Cooperation (OTC),²²⁴ a simple international organization that would fulfill the purpose of administering the General Agreement.²²⁵ Once again, however, Congress failed to approve the organization,²²⁶ and members of Congress again expressed both doubt as to the extent of presidential authority to enter the General Agreement,²²⁷ and disappointment with the executive's unwillingness to take the opportunity presented by the proposed OTC to place before Congress the entire substantive General Agreement.²²⁸

In spite of this early congressional suspicion of GATT and of the President's motives in entering and administering the multilateral trade agreements program, Congress over time has acquiesced in, if not expressly approved, the General Agreement. Congress explicitly acknowledged the importance of the General Agreement in United States foreign policy when it authorized the President in 1974 to negotiate trade agreements at the "Tokyo Round" of multilateral

222. Gadbow, *The Outlook for GATT as an Institution*, in *MANAGING TRADE RELATIONS IN THE 1980's* 35 (S. Rubin & T. Graham, eds. 1983).

223. H.R. REP. No. 2007, 84th Cong., 2d Sess. 8 (1956).

224. 1 General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents (rev. ed. 1955) 75-82. The Agreement was drafted at the 1954-55 session of the contracting parties. See Bronz, *An International Trade Organization: The Second Attempt*, 69 HARV. L. REV. 440 (1956), for an analysis of the proposed agreement and its political implications.

225. H.R. Doc. No. 140, 84th Cong., 1st Sess. 1, reprinted in 1955 U.S. CODE CONG. & ADMIN. NEWS 953 (message from President Eisenhower recommending enactment of legislation authorizing United States membership in an organization for trade cooperation). The text of the proposed agreement is printed in the document. An article-by-article analysis of the text of the proposed agreement for an OTC is found in H.R. REP. No. 2007, *supra* note 223, at 93-107.

226. H.R. 5550, 84th Cong., 2d Sess. (1956), the legislation that would have provided for U.S. membership in the OTC, never came to a vote. The bill was reported to the House in H.R. REP. No. 2007, *supra* note 223, and then given to the Committee of the Whole House on the State of the Union, from which it did not emerge. See Jackson, *supra* note 159, at 266 n.82.

227. H.R. REP. No. 2007, *supra* note 223, at 36-40 (Supplemental Views of Rep. Thomas B. Curtis).

228. *Id.* at 44-45. Interestingly, Congressman Curtis's proposed solution to the perceived problem of the GATT's not being considered by Congress was to add another layer of "provisionality." As an alternative to committee rejection of the OTC legislation, he proposed to approve OTC provisionally, on the theory that for the very immediate future this nation stands

to gain from a more rigid enforcement of the present trade agreements made under GATT and that whatever defects there may be in the GATT and the manner in which Congress has delegated power to the Executive to enter into GATT can be corrected at a later date.

Id. at 36.

trade negotiations,²²⁹ and when it enacted the Trade Agreements Act of 1979,²³⁰ which implemented the results of those negotiations. The approval of the Tokyo Round negotiations authorized the President to seek specific GATT revisions²³¹ and for the first time authorized an appropriation for the United States share of GATT expenditures.²³² Nonetheless, Congress continued to caution that this "authorization does not imply approval or disapproval by the Congress of all articles of the General Agreement on Tariffs and Trade."²³³

The 1974 legislation also provided for congressional participation in the trade agreement process by requiring the President to consult with Congress prior to entry into trade agreements²³⁴ and to submit to Congress drafts of proposed agreements.²³⁵ As part of this legislation, Congress also streamlined its procedures for bills implementing trade agreements.²³⁶ This arrangement may well provide an effective compromise between Congress's desire to assert control over an area within its constitutional responsibility²³⁷ and the President's need for flexibility and discretion in conducting complex multilateral negotiations. When the Trade Agreements Act of 1979 implementing the Tokyo Round was enacted, the "unique constitutional experiment" embodied in the Trade Act procedures appeared to be a success.²³⁸ The constitutional and balance-of-power issues that arose because of GATT's tentative status seem to have been resolved through congressional acquiescence and active compromise.²³⁹

The history of executive and congressional interaction in relation to the General Agreement illustrates the informal means by which Congress provides support and legitimacy to an international agreement that has not been ratified when the agreement is perceived to advance United States interests overseas. What began as a provi-

229. Trade Act of 1974, Pub. L. 93-618, § 1, 88 Stat. 1978 (1974) (codified at 19 U.S.C. §§ 2107-2487 (1982)).

230. 19 U.S.C. §§ 2501-2582 (1982).

231. *Id.* § 2131(a).

232. *Id.* § 2131(d). Previously, the United States contribution had come from an undesignated State Department "Conferences and Contingency Fund," where GATT was designated a "provisional organization." See Jackson, *supra* note 159, at 271.

233. 19 U.S.C. § 2131(d) (1982).

234. *Id.* § 2112(c), (e).

235. *Id.* § 2112(d).

236. *Id.* § 2191.

237. Congress has power to regulate interstate and foreign commerce. U.S. CONST. art. I, § 8, cl. 3.

238. S. REP. NO. 249, 96th Cong., 1st Sess. 5, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 391. See Jackson, *United States Law and Implementation of the Tokyo Round Negotiation*, in IMPLEMENTING THE TOKYO ROUND 139, 162-68 (1984).

239. Jackson, *supra* note 159, at 269. Professor Jackson indicates that the majority of tariff cases at least mention the GATT, since most tariff rates proclaimed by the President are done pursuant to the GATT.

sional framework for international cooperation has grown into an enormously complex institution.²⁴⁰ Although not conceived as a treaty or international organization, the General Agreement now functions as both.²⁴¹ And despite never being formally approved by Congress, the General Agreement has gradually gained support and legitimacy in United States domestic law through congressional acquiescence in its existence and explicit declarations of support of its goals and structure.

2. *Participation in International Organizations.*

Although not employing the express language of provisional application, the agreements by which many international organizations and agencies have come into existence have often used similar mechanisms. During the postwar period international organizations employed such devices as interim agreements, preparatory commissions, and provisional organizations in order to assume various specified functions—often limited to administrative preparation, but at times substantive in nature—pending final acceptance by member governments and establishment of the permanent body.²⁴²

Most such provisional regimes enter into force immediately upon signature of separate instruments that specify only the interim functions to be performed and the provisions for dissolution when superseded by an agreement establishing the main organization.²⁴³ The legal authority for United States participation in such temporary ar-

240. Professor Jackson describes the GATT's origins and growing complexity in a colorful metaphor:

This invention is perhaps the least handsome of all the major international institutions of our time. It began as only one wheel of a larger machine, the ill-fated International Trade Organization, and, when that larger machine fell apart before leaving the assembly line, this wheel became a unicycle on which burdens of the larger machine were heaped. The unicycle, for reasons not quite fully understood, has continued to roll To be sure, it takes careful balance to keep it rolling and ad hoc repairs and tinkering have brought it to a point where the bailing wire and scrap metal which hold it together form an almost incomprehensible maze of machinery.

J. JACKSON, *supra* note 34, at 2-3.

241. See K. DAM, *supra* note 34, at 335 n.1 (quoting 1961 statement of former executive secretary of the GATT, Eric Wyndham White):

"The General Agreement on Tariffs and Trade, as its name clearly indicates, is, juridically speaking, a trade agreement and nothing more. But because it is a multilateral agreement and contains provisions for joint action and decision it had the potentiality to become, and has in fact become, an international 'organization' for trade cooperation between the signatory states."

242. See generally *Report of the Secretary-General, Examples of Precedents of Provisional Application*, *supra* note 34; HOUSE FOREIGN AFFAIRS COMMITTEE REPORT ON ALTERNATIVE APPROACHES TO PROVISIONAL APPLICATION, *supra* note 140.

243. *Report of the Secretary-General, Examples of Precedents of Provisional Application*, *supra* note 34, at 3.

rangements is similar to that for executive agreements generally and is often supplemented by prior or subsequent congressional approval.²⁴⁴

The United Nations serves as the organizing body for many of these specialized agencies.²⁴⁵ The U.N. itself initially operated through a Preparatory Commission, which was charged with making "provisional arrangements for the first session of the General Assembly, the Security Council, the Economic and Social Council, and the Trusteeship Council, for the establishment of the Secretariat, and for the convening of the International Court of Justice."²⁴⁶ The Interim Arrangement Agreement establishing the Preparatory Commission entered into force on signature, and was done by the United States as an executive agreement,²⁴⁷ in spite of the fact that the permanent organization to which it referred was to be ratified by the Senate.²⁴⁸ The executive authority for the interim agreement could be easily derived from extensive congressional support for the concept of a United Nations organization,²⁴⁹ and congressional participation in drafting the U.N. Charter.²⁵⁰ Perhaps because of this consultation and participation by Congress, or perhaps because the interim machinery was in effect for less than two months before

244. HOUSE FOREIGN AFFAIRS COMMITTEE REPORT ON ALTERNATIVE APPROACHES TO PROVISIONAL APPLICATION, *supra* note 140, at 3.

245. The U.N. Charter, article 57, provides that specialized agencies established by intergovernmental agreements be brought into relationship with the United Nations. See, for example, an Economic and Social Council Resolution of March 28, 1947, requesting the Secretary-General "to convene a conference of interested governments to consider the establishment of an inter-governmental maritime organization." Final Act of the United Nations Maritime Conference, Mar. 6, 1948, 289 U.N.T.S. 3, 4.

246. Interim Arrangement Agreement, June 26, 1945, 59 Stat. 1411, E.A.S. No. 461 (signed along with United Nations Charter at the conclusion of the United Nations Conference on International Organization). See HOUSE FOREIGN AFFAIRS COMMITTEE REPORT ON ALTERNATIVE APPROACHES TO PROVISIONAL APPLICATION, *supra* note 140, at 9.

247. HOUSE FOREIGN AFFAIRS COMMITTEE REPORT ON ALTERNATIVE APPROACHES TO PROVISIONAL APPLICATION, *supra* note 140, at 10. There was discussion at a meeting of the United Nations Conference on what to call the agreement establishing a Preparatory Commission. It was originally presented as a draft protocol, but Senator Vandenberg joined other delegates in preferring the term "resolution on" or "interim agreement" because the word "protocol" might "involve a discussion of the necessity of ratification, if not in this country, then in other countries." 1 DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS 1945 GENERAL: THE UNITED NATIONS 1144 (1967).

248. 91 CONG. REC. 8189-90 (July 28, 1945).

249. Both houses of Congress passed resolutions in 1943 expressing support for an international organization to maintain world peace and security. H.R. Res. 25, 78th Cong., 1st Sess., 89 CONG. REC. 7728-29 (1943), S. Res. 192, 78th Cong., 1st Sess., 89 CONG. REC. 9222 (1943).

250. See HOUSE FOREIGN AFFAIRS COMMITTEE REPORT ON ALTERNATIVE APPROACHES TO PROVISIONAL APPLICATIONS, *supra* note 140, at 10.

Congress voted on ratification, there was little congressional opposition to, or suspicion of, the Preparatory Commission's function.²⁵¹

Once the United Nations was established, member states used its resources and structure to create other specialized agencies of similar provisional status. One example of an international agency that assumed substantive functions pending entry into force of the agreement establishing its permanent organization was the Preparatory Commission of the International Refugee Organization (PCIRO).²⁵² This Commission took over some of the functions of existing agencies that had been set up by the wartime allies as a means of effecting an orderly transfer of those functions to the permanent body.²⁵³ The PCIRO itself was also empowered to take the necessary organizational steps to enable its successor, the IRO, to begin operation as soon as its constitution²⁵⁴ was accepted by the requisite number of signatories.²⁵⁵

There was no prior legislative authority for United States adherence to the interim agreement establishing the PCIRO as an executive agreement. Instead, a joint resolution²⁵⁶ that provided for United States membership and participation in the IRO and for authorized appropriations for the United States contribution to the IRO²⁵⁷ also acknowledged the PCIRO by authorizing contributions to it.²⁵⁸

251. A search of the Congressional Record debates on the U.N. Charter revealed no mention even of the existence of the Preparatory Commission. 91 CONG. REC. 6921-8067 *passim* (1945).

252. Agreement on Interim Measures to be Taken in Respect of Refugees and Displaced Persons, *opened for signature* Dec. 15, 1946, 61 Stat. 2525, T.I.A.S. No. 1583, 18 U.N.T.S. 122 (entered into force Dec. 31, 1946).

253. *Id.* at para. 3. The chief agency dealing with the refugee problem had been UNRRA (United Nations Relief and Rehabilitation Agency), which was set to expire on June 30, 1947. Other agencies dealing with the problem had included armed forces of the Allies, and the Inter-Governmental Committee on Refugees. The purpose of creating an IRO was to consolidate all of these functions in one international agency. See S. REP. No. 51, 80th Cong., 1st Sess. —, *reprinted in* 1947 U.S. CODE CONG. SERV. 1256, 1257.

254. Constitution of the International Refugee Organization, *opened for signature* Dec. 15, 1946, 62 Stat. 3037, T.I.A.S. No. 1846, 18 U.N.T.S. 3 (entered into force Aug. 20, 1948).

255. *Id.* art. 18. Under this provision the Constitution would come into force when 15 states, whose required contributions to the operational budget amounted to 75% of the total, had become parties. *Id.*

256. S.J. Res. 77, 80th Cong., 1st Sess., 61 Stat. 214 (1947).

257. *Id.* § 3.

258. *Id.* § 5:

During the interim period, if any, between July 1, 1947, and the coming into force of the constitution of the Organization, the Secretary of State is authorized from appropriations made pursuant to paragraph (a) of section 3, to make advance contributions to the Preparatory Commission for the International Refugee Organization, established pursuant to an agreement dated December 15, 1946, between the governments signatory to the consti-

The Interim Commission of the World Health Organization (WHO)²⁵⁹ served substantive as well as preparatory purposes by taking over functions of a variety of earlier health organizations, including regional and non-governmental bodies.²⁶⁰ In reporting on the resolution authorizing United States membership in the WHO,²⁶¹ the Senate Foreign Relations Committee expressed a sense of urgency resulting from wartime emergency conditions²⁶² and called attention to the fact that there was a prior Senate Joint Resolution "calling for the early formation of an international health organization" and requesting the President to urge the United Nations to form such an organization.²⁶³ Although this statement was not ex-

tution of the Organization.

This section of the Resolution is the subsequent legislation cited by the State Department as the authority for the Agreement on Interim Measures which created the Preparatory Commission. See HOUSE FOREIGN AFFAIRS COMMITTEE REPORT ON ALTERNATIVE APPROACHES TO PROVISIONAL APPLICATION, *supra* note 140, at 9.

259. Arrangement Concluded by the Governments Represented at the International Health Conference, July 22, 1946, 61 Stat. 2349, T.I.A.S. No. 1561, 9 U.N.T.S. 33.

260. *Report of the Secretary-General, Examples of Precedents of Provisional Application*, *supra* note 34, at 24.

261. S. REP. NO. 421, 80th Cong., 1st Sess., (1947), reprinted in 1948 U.S. CODE CONG. SERV. 1775.

262. The report cited an "urgent need for a strong international organization to deal with the many health problems . . . [many of which] arise in part from conditions created by . . . war." *Id.* at 1776. The Committee observed that other states were waiting to see what the United States would do about accepting the WHO constitution. *Id.* at 1782. In spite of this urgency, the Joint Resolution was not approved until June 14, 1948. The WHO entered into force on April 7, 1948, without the United States. See Constitution of the World Health Organization, *opened for signature* July 22, 1946, 62 Stat. 2679, T.I.A.S. No. 1808, 14 U.N.T.S. 185 (entered into force April 7, 1948).

The Foreign Relations Committee had expressed similar urgency in recommending participation in the International Refugee Organization. See S. REP. NO. 51, *supra* note 253, at 1259 (citing a need for speedy action and the United States' responsibility for assisting in the repatriation of those uprooted by the war).

263. S. REP. NO. 421, *supra* note 261, at 3, U.S. CODE CONG. SERV. 1777-78.

Even after postwar emergency conditions had passed, interim mechanisms continued to prove useful in making preliminary preparations for international organizations. The Statute of the International Atomic Energy Agency included an annex establishing a Preparatory Commission that would come into existence immediately upon the signing of the Statute. Statute of the International Atomic Energy Agency, *opened for signature* Oct. 26, 1956, 8 U.S.T. 1093, T.I.A.S. No. 3873, 276 U.N.T.S. 3 (entered into force July 29, 1957). The Preparatory Commission was created to convene the first session of the agency, make studies and reports on problems relevant to agency operations, and make recommendations concerning the location of agency headquarters. *Id.* The presence of members of Congress in the delegation to the conference which drafted the Statute (including the annex), as well as executive consultation with the Joint Committee on Atomic Energy in drafting the Statute, gave rise to the inference of congressional approval of, or at least acquiescence in, United States participation in the Preparatory Commission. See HOUSE FOREIGN AFFAIRS COMMITTEE REPORT ON ALTERNATIVE APPROACHES TO PROVISIONAL APPLICATION, *supra* note

explicitly offered as a justification for United States adherence to the Interim Commission, the fact that the Senate Committee included the statement in its report added a degree of legitimacy and legal support for establishing the Commission through an executive agreement.

3. *International Commodity Agreements.*

The provisional application mechanism has also proved useful in facilitating United States participation in international commodity agreements. Congress has generally acquiesced in provisional international obligations that advance important national trade interests.²⁶⁴

International commodity agreements commonly contain some form of provisional application mechanism, allowing parties to participate immediately in the agreement's quota system, buffer stock system, or other institutional arrangement, prior to formal ratification of the agreement.²⁶⁵ Provisional application is particularly helpful in administering commodity regimes because of the need to establish institutional arrangements, such as quotas or price systems, at the start of the particular commodity's quota year.²⁶⁶

140, at 8-9.

264. For general background and legal and economic analysis of the varying purposes, functions, and structure of international commodity agreements, see K. KHAN, *supra* note 34; A. LAW, *INTERNATIONAL COMMODITY AGREEMENTS* (1975); P. REYNOLDS, *INTERNATIONAL COMMODITY AGREEMENTS AND THE COMMON FUND* (1978).

265. These provisions may take the form of notification of an intent to ratify. See, e.g., International Sugar Agreement, 1977, *done* Oct. 7, 1977, art. 74, 31 U.S.T. 5135, 5191, T.I.A.S. No. 9664 ("A signatory . . . which intends to ratify . . . this Agreement . . . may . . . notify the Secretary-General . . . that it will apply this Agreement provisionally . . ."). International commodity agreements may include the requirement that the signatory undertakes to "seek . . . ratification . . . in accordance with its constitutional procedures as rapidly as possible," and include a deadline (subject to extension) for deposit of the instrument of ratification by a provisional member. See, e.g., Protocol for the Continuation in Force of the International Coffee Agreement, 1968, *approved* Sept. 26, 1974, art. 5, 27 U.S.T. 1655, 1659, T.I.A.S. 8277. In addition, an agreement may provide that provisional application will terminate if it does not become definitive by a specified date, or it may set up a mechanism to have the commodity organization "consider the position" in such a situation. See, e.g., International Tin Agreement, 1975, *done* June 21, 1975, art. 50, 28 U.S.T. 4619, 4674, T.I.A.S. No. 8607. Finally, an agreement may make no specific requirements, simply allowing a signatory to deposit a declaration of provisional application signifying that it will "provisionally apply this Protocol and be provisionally regarded as a party thereto." See, e.g., Protocols for the Further Extension of the Wheat Trade Convention and Food Aid Convention Constituting the International Wheat Agreement, 1971, *opened for signature* Mar. 25, 1975, art. 8, 27 U.S.T. 97, 105, T.I.A.S. No. 8227.

266. See *Report of the Secretary-General, Examples of Precedents of Provisional Application*, *supra* note 34, at 30 n.56. The report also notes that international commodity agreements typically are in effect for a specified, relatively short, duration of time and that provisional application facilitates continuity of successor agreements. *Id.*

Provisional application has allowed the United States to participate in commodity agreements either before their ratification by the Senate, or pending enactment of enabling legislation required to effectuate provisions of a ratified commodity agreement. There have been examples of both long- and short-term provisional application pending ratification of an agreement. The International Wheat Agreement of 1971²⁶⁷ imposed provisional obligations upon a signatory once the state had deposited a declaration of provisional application.²⁶⁸ The Agreement established a deadline of June 17, 1971²⁶⁹ for deposits of either ratifications or declarations of provisional application. Yet since copies of the Agreement were not available for the Senate until June 4,²⁷⁰ administration representatives met in executive session with an ad hoc subcommittee of the Senate Foreign Relations Committee and requested its consent to file declarations of provisional application, and thus "enable U.S. representatives to participate as full-fledged members, rather than observers, in the meeting of the International Wheat Council"²⁷¹ scheduled for later that month. The subcommittee held a public hearing and then approved the administration's request.²⁷² After the United States had deposited its notification of provisional application, Congress held additional hearings and the Senate advised ratification by July 12, 1971.²⁷³

267. International Wheat Agreement, 1971, *opened for signature* Mar. 29, 1971, 22 U.S.T. 820, T.I.A.S. No. 7144 (entered into force provisionally for U.S. June 18 and July 1, 1971, definitively July 24, 1971).

268. *Id.* art. 24.

269. *Id.* art. 23 (ratification, acceptance, approval), art. 26 (entry into force).

270. S. EXEC. REP. No. 7, 92d Cong., 1st Sess. 1 (1971).

271. *Id.* at 2. See HOUSE FOREIGN AFFAIRS COMMITTEE REPORT ON ALTERNATIVE APPROACHES TO PROVISIONAL APPLICATION, *supra* note 140, at 7-8.

Since the 1971 Wheat Agreement had been negotiated without the maximum and minimum pricing or purchase and supply obligations of previous agreements, this meeting of the Council (provided for in article 21) was one of the major substantive provisions of the Agreement. See S. EXEC. REP. No. 7, *supra* note 270, at 1, 2.

272. S. EXEC. REP. No. 7, *supra* note 270, at 1.

273. 117 CONG. REC. 24,566 (1971). At the same time, a Senate resolution was passed urging U.S. negotiators at the Council meeting to press for a new negotiating session to include pricing provisions. S. Res. 136, 92d Cong., 1st Sess., 117 CONG. REC. 24,556 (1971).

Unlike this short-term use of provisional application, which was effected only after consultation with a Senate committee and which resulted from a perceived need for expedited treatment, the International Sugar Agreement of 1977 was established provisionally for two years before entering into force definitively. International Sugar Agreement, 1977, *done* Oct. 7, 1977, 31 U.S.T. 5135, T.I.A.S. No. 9664 (entered into force provisionally for U.S. Jan. 1, 1978, definitively Jan. 2, 1980).

During the period of provisional application, the terms of the Agreement that required parties to restrict imports from non-members and to allocate import quotas among members were enforced by presidential proclamation. Proclamation No. 4610, 43 Fed. Reg. 56,869 (1978); Proclamation No. 4663, 44 Fed. Reg. 30,663 (1979). These proclamations were made under the Trade Agreement Act, which authorized the

The United States made use of the provisional application mechanism *after* the Senate had voted to advise ratification of the International Coffee Agreement.²⁷⁴ The Kennedy administration had stressed throughout the negotiations, and during Senate debate on ratification, that the Agreement would not be self-executing and that implementing legislation would be required following ratification to meet United States obligations.²⁷⁵ Congress had failed to enact such legislation by the summer of 1963, although the Senate had earlier recommended ratification. Because of the absence of such implementing legislation, the United States in June of that year brought the Agreement into effect provisionally by filing a declaration of intent to ratify. This declaration allowed the United States to participate in a meeting of the Coffee Council that summer and, more importantly, to effect the terms of the Agreement at the beginning of the commodity year in October.²⁷⁶

The United States notification of its intent to ratify stated that the Senate had advised ratification, but that without congressional passage of the implementing legislation, the United States could not constitutionally undertake obligations under the Agreement. Since Congress had still not enacted the necessary legislation by December 31, 1963, the deadline for definitive entry into force,²⁷⁷ the Johnson administration simply deposited the instrument of formal ratification so that the Agreement could enter into force as scheduled.²⁷⁸

Congress did not pass the implementing legislation until 1965.²⁷⁹ Nevertheless, in a Senate Finance Committee report on an earlier version of the Coffee Agreement Act, the Committee expressed its view that ratification of the Agreement made the United States "a provisional member pending the enactment of implementing legisla-

President to modify import duties or import restrictions when "required or appropriate" to carry out any trade agreement entered into under the Act. 19 U.S.C. § 1821(a)(2) (1983). The proclamations cited the International Sugar Agreement of 1977 as requiring the modifications. The 1979 Proclamation noted that the United States was applying this Agreement provisionally; the 1978 Proclamation did not. Thus, the United States was able to effectuate substantive provisions of the Agreement even though a Senate vote on ratification was subject to long delay.

274. International Coffee Agreement, *opened for signature* Sept. 28, 1962, 14 U.S.T. 1911, T.I.A.S. No. 5505, 469 U.N.T.S. 169 (entered into force Dec. 27, 1963).

275. See Bilder, *The International Coffee Agreement: A Case History in Negotiation*, 28 LAW & CONTEMP. PROBS. 328, 344, 372 (1963).

276. See *id.* at 373.

277. International Coffee Agreement, *supra* note 274, art. 64.

278. The Senate Finance Committee had begun consideration of the implementing legislation, but its deliberations were delayed because of a more pressing need to work on a tax bill. According to one member of this Committee, individual members were informed that the State Department would deposit the Coffee Agreement without the legislation and were asked if they had any objections. S. REP. No. 941, 88th Cong., 2d Sess. 50 (1964).

279. International Coffee Agreement Act of 1965, Pub. L. No. 89-23, 79 Stat. 112 (1965).

tion."²⁸⁰ A House Report the following year stated that the legislation was necessary because the treaty, although ratified, was not wholly self-executing.²⁸¹

These varying understandings of the legal status created by ratification of the international Agreement in combination with failure to approve the Agreement's implementing legislation highlight the ambiguity of a nation's recognized international obligations prior to the full acceptance of these obligations through the state's domestic political processes. Despite this ambiguity, Congress has generally acquiesced in the incurrence of such obligations. In the case of the International Coffee Agreement, actual consent to ratification by the Senate provided the President with a fairly clear statement of congressional support of the terms and goals of the Agreement. This general statement of support in turn strengthened the domestic legitimacy of presidential actions under the terms of the Agreement during its provisional period prior to the passage of implementing legislation.

IV. CONCLUSION

There are two views regarding the nature of the obligation that a regime of provisional application imposes on states. One view focuses on the temporal element and regards the treaty, or a part of the treaty, as actually in force and subject to the doctrine of *pacta sunt servanda* during the period in which it is provisionally applied. The other view regards the obligation as analogous to the obligation not to defeat the object and purpose of a signed but unratified treaty. No matter which approach is taken, the mechanism of provisional application appears to be compatible with domestic legal processes. The first approach leaves an option for termination under article 25(2) of the Vienna Convention, while the article 18 approach imposes only a negative obligation with limited domestic implications.

Furthermore, domestic legal processes appear to be harmonious with provisional application as it has developed in international law. As a study of United States practice indicates, domestic rules are flexible enough to allow the executive to take advantage of this mechanism. The potential for circumventing congressional participation in the assumption of international obligations, while theoretically present, has not proved to be a problem in practice. The need for implementing legislation, appropriations, or other constitutionally mandated congressional involvement has in the past provided Congress with ample opportunity to assert its prerogatives. Like-

280. S. REP. No. 941, *supra* note 278, at 2.

281. H.R. REP. No. 252, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 1553, 1555.

wise, political realities, coupled with the ambiguity of both the legal meaning of provisional application and the extent of the President's constitutional authority to undertake international obligations, dictate that the executive involve Congress at least to some extent before undertaking the provisional application of an agreement.

