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OBLIGATION OF A STATE NOT TO DEFEAT THE OBJECT AND PURPOSE OF A TREATY BETWEEN ITS SIGNATURE AND ENTRY INTO FORCE

Andrej Svetličič,
LL. M., minister plenipotentiary, Ministry of Foreign Affairs of the Republic of Slovenia

1. INTRODUCTION[1]

Signature of a treaty is one of the phases in the process treaty conclusion, marking the end of negotiations and the start of existence of a treaty, to which international law attributes certain effects.[2] Discussions in Slovenia on the effects of treaty signature before its entry into force demonstrate that awareness is often lacking,[3] in recent years this issue gained prominence in relation to the conclusion of the so-called ACTA.[4] This Article analyses the obligation of States under Article 18 of the Vienna Convention on the Law of Treaties

[1] This is an adapted translation of the article published in Pravnik, Ljubljana 2013, Vol. 68 (130), Nos. 3-4, pp. 227-251. The article does not necessarily express views of the institution where the author is employed.

[2] Simona Drenik: Praksa sklepanja mednarodnih pogodb v Republiki Sloveniji, in: Javna uprava, (2009) 1-2, p. 138; Danilo Türk: Temelji mednarodnega prava. GV Založba, Ljubljana 2007, pp. 248 and 250.

[3] S. Drenik, supra, p. 138.

[4] Anti-Counterfeiting Trade Agreement (<www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf>, 8. 4. 2015). With regard to the effect of ACTA signature see e.g. press release of the Ministry of Economic Development and Technology of the Republic of Slovenia, which states inter alia that "signature of ACTA by the Republic of Slovenia does not bring that treaty into force but rather an obligation under the VCLT arose not to act inconsistently with its object and purpose" (author's translation, <www.mgrt.gov.si/nc/si/medijsko_sredisce/novica/article//8149/>, 8. 4. 2015).

(VCLT) during the period between signature and entry into force of treaties.[5] Its second section first discusses the source and development of the interim obligation before VCLT, while the third section analyses this obligation as contained in Article 18 of the VCLT.

Generally, signature entails various implications, most commonly authentication of the text.[6] It can also entitle a State to ratify a treaty, whereas if it had not signed the treaty, it could only have become its party by accession. If a State does not sign a treaty, it cannot for example take part in certain post-signature activities, e.g. formation of treaty-established bodies. Signature can also enable a State to submit reservations at the time of signing or at the start of its provisional application.[7] In short, signature does bring certain rights or benefits to the State, and it is therefore appropriate that the latter would assume certain obligations at that time.[8] When a State consents by the act of signature alone to be bound by a treaty[9] and that treaty enters into force immediately after signature, there is no interval between signature and entry into force and thus all legal consequences of entry into force take effect instantly, i.e. the State is required to apply it in good faith (*pacta sunt servanda*).[10] By contrast, when signature implies merely authentication of the text of a treaty subject to ratification, or when it implies consent to be bound and the treaty is to enter into force only after a certain period, a certain interval between signature and entry into force arises, and that raises the question on the legal position of the State

[5] United Nations Treaty Series (UNTS) 1155, p. 331. The obligation under this Article has been referred to in the doctrine as "the interim obligation" (see e.g. Paul V. McDade: The Interim Obligation between Signature and Ratification of a Treaty, in: Netherlands International Law Review 32 (1985) 5; Joni S. Charme: The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma, in: George Washington Journal of International Law & Economy 25 (1992) 71; David S. Jonas in Thomas N. Saunders: The Object and Purpose of a Treaty: Three Interpretive Methods, in: Vanderbilt Journal of Transnational Law 43 (2010) 565, p. 594); the term has been used in the discussion on the VCLT draft Articles by Pal (Yearbook of the International Law Commission (YBILC), 1965, Vol. I, p. 92, para. 65), and will be referred to as such in this article.

[6] Article 10 of the VCLT.

[7] For other effects of signature see e.g. the First Report on the Law of Treaties by SR Humphrey Waldock (hereinafter referred to as "Waldock Report"), YBILC, 1962, Vol. II, doc. A/CN.4/144, p. 47, para. 7.

[8] First Report of SR Hersch Lauterpacht (hereinafter referred to as "the Lauterpacht report), YBILC, 1962, Vol. II, doc. A/CN.4/63, p. 109 and 110, para. 3.

[9] Article 12 of the VCLT. For a general overview of this effect of signature see e.g. Treaty Making – Expression of Consent by States to be Bound by a Treaty. Council of Europe and British Institute of International and Comparative Law (ed.), Kluwer Law International, Hague 2001, pp. 9-10.

[10] Article 26 of the VCLT.

during that period. That issue is addressed by Article 18 of the VCLT which 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 […] subject to ratification […], 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."

Signature of a treaty subject to ratification is thus not only a formality devoid of effect or obligation,[11] but it is not in itself generally sufficient for the State to be bound by the treaty.[12] The objective of Article 18 is to clarify its legal status, which falls between the two extremes,[13] however its meaning remains open to discussion.[14] By contrast, it appears that the rule is one of customary international law as an emanation of the general principle of good faith, codified by the VCLT.[15] States are required by general international law,[16] and in particular by the law of treaties, to act in good faith and it is the latter that is to be presumed rather than bad faith.[17] States do effectively in principle sign

[11] That had been noted already by the authors of the Harvard Draft Convention on the Law of Treaties (Part III, Law of Treaties, American Journal of International Law, 29 (supp. 1935) 657 (hereinafter referred to as "the Harvard draft)).

[12] D. Türk, op. cit., p. 248; Juraj Andrassy: Međunarodno pravo. 10th edition, Školska knjiga, Zagreb 1990, p. 329. See also the definition of signature in the Treaty Handbook, Treaty Section of the Office of Legal Affairs, United Nations Publication (2006), No. E.02. V2, <https://treaties.un.org/doc/source/publications/THB/English.pdf>, p. 64 (8. 4. 2015).

[13] J. Charme, op. cit., p. 88; David S. Jonas: The Comprehensive Nuclear Test Ban Treaty: Current Legal Status in the United States and the Implications of a Nuclear Test Explosion, in: International Law and Politics 39 (2006-2007), p. 1034.

[14] Already the Waldock report stated that the legal effects of signature of a treaty subject to ratification are not without uncertainty (op. cit., p. 46, para. 1), and this uncertainty apparently continues to exist, se e.g. Patrick Daillier and Alain Pellet: Droit International Public. 6th Edition, L.G.D.J., Paris 1999, p. 134, and Paolo Palchetti: Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?, in: Enzo Canizzaro, E. (ed): The Law of Treaties Beyond the Vienna Convention. Oxford University Press 2011, p. 26.

[15] Draft Articles on the Law of Treaties with Commentaries, YBILC, 1966, Vol. II, doc. A/6309/Rev.l, p. 202, para. 1. See also P. Palchetti, op. cit., pp. 25-26; Türk, op. cit., p. 250; P. Daillier and A. Pellet, op. cit., p. 134.

[16] Second paragraph of Article 2 of the UN Charter (UNTS 1).

[17] Generally see Tariq Hassan: Good Faith in Treaty Formation, in: Virginia Journal of International Law 21 (1981) 3, p. 450. The third paragraph of the VCLT's preamble states that the principle of good faith is generally recognised.

treaties in good faith so as to later ratify them and in order that those treaties enter into force and apply. There could be various reasons, however, for this usually benevolent attitude of individual States towards a signed treaty to deteriorate subsequently. That can occur especially in the case of multilateral treaties which have been negotiated on by many States whose interests have not all been taken on board and which are thus a result of a compromise among negotiating delegations.[18] The deterioration can also be due to internal reasons within the State. The Government can change after signature and the new government does not support the treaty,[19] there could be pressure within the State not to ratify the treaty because certain stakeholders were not involved in negotiations.[20] Such circumstances can constitute legitimate reasons not to ratify a treaty and are not required to be demonstrated under international law. Ratification is not obligatory under international law and falls within the discretion of States, the interim period between signature and ratification being intended precisely for consideration on the ratification.[21] That does not mean, however, that the State is allowed to prejudice in that interim period with its actions the subsequent entry into force or application of the treaty, e.g. by alienating assets or land which it should according to the signed treaty cede to another State,[22] to lay mines after signing a treaty on a mine ban,[23] to execute

[18] A State can partially "remedy" its dissatisfaction with the compromise by submitting reservations with which it modifies the content of treaty provisions in relation to itself. For more on reservations in general see e.g. D. Türk, op. cit., pp. 253–259.

[19] In relation to that it is worth mentioning the case with regard to the Rome Statute of the International Criminal Court (UNTS I-38544) which had been signed inter alia by the president of the United States Bill Clinton at the very end of his mandate on the 31 December 2000. Subsequently, in May 2002 the administration of the next US George Bush notified the Secretary General of the UN as the depositary of the said treaty that the US does not intend to become party to the treaty. Similarly, the US signed the so-called Kyoto Protocol but unlike in the case of the Rome Statute did not notify that it does not intend to become its party, but its representatives expressed at several occasions their negative views on the ratification of the protocol. For more on that see Curtis A. Bradley: Unratified Treaties, Domestic Politics, and the U.S. Constitution, in: Harvard International Law Journal 48 (2007) 2, pp. 311-312.

[20] With regard to ACTA, certain NGO's put pressure on the State to reconsider the ratification of the treaty while certain factors even directly demanded that is should not do so, see e.g. article in the daily newspaper Delo: <www.delo.si/druzba/infoteh/tudi-v-sloveniji-se-obeta-protestni-shod-proti-acti.html> (8. 4. 2015).

[21] See e.g. the Waldock report, op. cit., p. 47, para. 5; Martin A. Rogoff: The International Legal Obligations of Signatories to an Unratified Treaty, in: Maine Law Review 32 (1980), p. 267; D. Türk, op. cit., p. 248.

[22] See infra, note 30.

[23] Jan Klabbers: How to Defeat a Treaty's Object and Purpose Pending Entry Into Force: Toward Manifest Intent, in: Vanderbilt Journal of Transnational Law, 34 (2001), p. 285.

the death penalty after signing a treaty on its ban[24] etc..[25] A State could be held responsible for such acts under international law simply because the principle of good faith alone requires that the State refrains from acts having such effect, the interim obligation being an emanation of that principle.[26]

2. SOURCE AND DEVELOPMENT OF THE INTERIM OBLIGATION BEFORE THE VCLT

Already before the VCLT, the interim obligation had been recognised in state practice, international case law and doctrine.[27] With regard to state practice, the doctrine most often singles out Article 38 of the General Act of the Conference at Berlin of 26 February 1885,[28] which is mentioned as an example in the *travaux préparatoires* of the VCLT as well.[29] As for the international case law, it is worth mentioning two cases that have been featuring both in the doctrine and the *travaux préparatoires* of the VCLT as important sources on the interim obligation. In the case *Certain German Interests in Polish Upper Silesia*[30] before the Permanent Court of International Justice (PCIJ), in which Poland challenged the right of Germany to alienate certain assets after the signature and before entry into force of the Treaty of Versailles, the court ruled in favour of Germany who in its view had the right to dispose of its property and only an

[24] Judgment of the European Court of Human Rights in the case Öcalan v Turkey of 12 March 2003, No. 46221/99, para. 185.

[25] For more examples see the Harvard draft, op. cit., pp. 781-782.

[26] See e.g. the view of the SR Waldock that such an obligation is generally accepted in the relevant doctrine and state practice (the Waldock report, op. cit., p. 47, para. 6).

[27] For a general overview see e.g. T. Hassan, pp. 452–456, and J. Klabbers, op. cit. (2001), pp. 294–299.

[28] General Act of the Conference at Berlin of the Plenipotentiaries of Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Italy, the Netherlands, Portugal, Russia, Spain, Sweden and Norway, Turkey and the United States respecting: (1) Freedom of Trade in the Basin of the Congo; (2) the Slave Trade; (3) Neutrality of the Territories in the Basin of the Congo; (4) Navigation of the Congo; (5) Navigation of the Niger; and (6) Rules for Future Occupation on the Coast of the African Continent, (<www.austlii.edu.au/au/other/dfat/treaties/1920/17.html> (8. 4. 2015). The said Article provides even that signatories shall until ratification refrain from acts contrary to the provisions of the Act, which implies more than the interim obligation as it is understood currently and according to which States are require to "merely" refrain from acting incompatibly with the *object and purpose* of a treaty. For more on such provisions on the interim obligation in treaties see e.g. M. Rogoff, op. cit., p. 280, note 56; J. Charme, op. cit.. pp. 78-79.

[29] The Lauterpacht report, op. cit., p. 110, para. 4.

[30] *Certain German Interests in Polish Upper Silesia*, Permanent Court of International Justice, Series A, No. 7.

abuse of this right could mean a violation of the treaty.[31] One of the arguments of the Polish Government was that Germany abused its rights by alienating certain assets before ceding sovereignty over the relevant territory.[32] In this respect, the PCIJ *inter alia* confirmed indirectly that a signatory is not allowed to act contrary to the principle of good faith in certain circumstances and that its obligations under an unratified treaty could be violated as a consequence of the abuse of rights. It argued in this regard that since the treaty had not prevented Germany from alienating such assets after ratification, alienation between signature and ratification was not a violation of the good faith principle.[33] On the basis of this argumentation of the PCIJ it could be concluded that if Germany had no such right under the treaty after ratification, there would be an abuse of this right if alienation took place in the interval between signature and ratification. A direct reference to the interim obligation could, on the other hand, be found in the arbitration award in the case *Megalidis v Turkey* relating to the application of the Treaty of Lausanne, signed on 24 July 1923.[34] In this case, the Greek claimant claimed restitution of items taken from him by Turkish authorities allegedly in violation of Article 65 of the said treaty.[35] The arbitral tribunal ruled that the Turkish authorities acted in violation of international law because parties have from the treaty signature and before its entry into force an obligation to refrain from acts with which they would prejudice the treaty by narrowing the scope of its provisions.[36]

State practice, case law and doctrine have impacted on the Harvard draft[37] which provides in Article 9 that a State is in principle under no duty to perform the treaty obligations prior its coming into force but that under some circumstances "good faith may require that pending the coming into force of

[31] Ibid, p. 30.

[32] Ibid, p. 37.

[33] T. Hassan, op. cit., p. 454. The Court stated *inter alia*: "As regards this argument, the Court may confine itself to observing that, as, after its ratification, the Treaty did not, in the Court's opinion, impose on Germany such obligation to refrain from alienation, it is, a fortiori, impossible to regard as an infraction of the principle of good faith Germany's action in alienating the property before the coming into force of the Treaty which had already been signed«, and that »[i]n these circumstances, the Court need not consider the question whether, and if so how far, the signatories of a treaty are under an obligation to abstain from any action likely to interfere with its execution when ratification has taken place." PCIJ, op. cit., pp. 39 and 40.

[34] Treaty of Lausanne, 28 League of Nations Treaty Series (LNTS) 11. For a comprehensive analysis of the case see M. Rogoff, op. cit., p. 277.

[35] The Article provided that property of nationals of the allied States on the Turkish territory shall be immediately returned in the current state.

[36] Recueil des Décisions des Tribunaux Mixtes 8 (1928) 386, p. 395.

[37] Harvard draft, op. cit., pp. 783–786.

the treaty the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult."[38] The draft's authors considered, in line with the majority of the doctrine at the time,[39] that this is a moral obligation based on the good faith principle, the violation of which does not entail responsibility under international law. Their view was that a violation of such an obligation would cause international responsibility only if the obligation had been contained in a particular provision of a treaty.[40] That is an interesting and somewhat contradictory view because if the Harvard draft ever became a treaty it would have provided for such a general obligation of its parties, which is what occurred in the VCLT.

3. ANALYSIS OF THE INTERIM OBLIGATION UNDER THE VCLT

3.1. *Travaux préparatoires*[41]

It appears from the *travaux préparatoires* at the outset of the VCLT drafting that – despite preceding state practice, case law and the Harvard draft – no such provision had been included in the first draft provisions by the Special Rapporteur (SR) Brierly, and it appears as well that the International Law Commission (ILC) – as will be demonstrated below – discussed at length on the very basis of the interim obligation and consequently whether to include it in the VCLT. Brierly did subsequently in his Second Report include draft Article 7 based on Article 9 of the Harvard draft, however only for the purpose of discussion, and he shared the view of the Harvard draft authors that this provision contains a moral rather than a legal obligation.[42] ILC members'

[38] Harvard draft, op. cit., p. 778.

[39] See the views of Crandall, Cavaglieri, Anzilotti and Fauchille as contained in the Harvard draft (op. cit., pp. 783-784). These authors refer to the principle of good faith and the theory of the abuse of rights as the basis for the interim obligation.

[40] Harvard draft, op. cit., p. 787. The draft refers to the said Article 38 of the General Act of Berlin, op. cit..

[41] The purpose of this Section is to analyse the basic elements of the development of the interim obligation until adoption of the VCLT, while in the next Section individual elements of the travaux préparatoires will be used in the more comprehensive analysis of the interim obligation.

[42] Second Report on the Law of Treaties by SR James L. Brierly (hereinafter referred to as "Brierly Report"), YBILC, 1951, Vol. II, doc. A/CN.4/43, p. 73, commentary to Article 7. See also explanation of SR Brierly of Article 7 at the start of the discussion in the Article, YBILC, 1951, Vol. I, doc. A/CN.4/SR.86, p. 34, paras. 110- 112.

discussion demonstrates that this provision had been controversial. One of the main issues was the principle of good faith and the theory of the abuse of rights, whose main advocates were Yepes and Scelle. Scelle considered that a State should not refuse to ratify with the intention to cause harm to another State, e.g. by preventing the implementation of an agreement. He therefore supported a provision by which signature would entail a certain obligation before ratification but which would not oblige a State to ratify.[43] In his view, there was no State whose law would reject the theory of the abuse of rights and therefore no reason not to transpose it to international law since the latter itself is not absolute nor is State sovereignty, it is just a remnant of the past.[44] On the other hand, Yepes referred in relation to good faith to the second paragraph of Article 2 of the UN Charter and argued that it is on its basis that good faith became part of positive law and was not merely a moral category. In his view, States should not sign treaties lightly and the importance of signature should not be devalued.[45] It is interesting to note Cordova's view that the solution in Article 7 is reasonable and that the resulting obligation is both a moral and a legal one. Ultimately, draft Article 7 did not receive enough support and was (albeit with a narrow majority of 5 to 4) removed from the draft VCLT.[46]

The second SR Lauterpacht reintroduced the interim obligation in the draft Articles and – contrary to SR Brierly – considered the interim obligation to be a legal rather than a moral obligation. In his draft Article 5 of the VCLT the interim obligation was conceived as an obligation of the State before ratification to refrain in good faith from acts tending to significantly undermine the signed agreement.[47] According to the commentary to that provision, its purpose was to prevent acts in bad faith with which other signatories would be deprived of benefits legitimately expected by them under the treaty, except in the case of regular administrative activities of the State.[48] The SR specifically relied in this respect on the PCIJ judgment in the case *Certain German Interests in Polish Upper Silesia*. Additionally, it follows from the commentary to draft Article 5(a) that Lauterpacht with this provision essentially supported the

[43] YBILC, 1951, Vol. I, doc. A/CN.4/SR.86, p. 34, paras. 115-117.

[44] Ibid, p. 35, para. 132.

[45] Ibid, p. 35, para. 123.

[46] YBILC, 1951, Vol. I, doc. A/CN.4/SR.87, p. 42, para. 83.

[47] The exact text of draft Article 5(2)(b) provided in the relevant part: "[…] the signature, or any other means of assuming an obligation subject to subsequent confirmation, has no binding effect except that it implies an obligation, to fulfilled in good faith […] to refrain, prior to ratification, from any act intended substantially to impair the value of the undertaking as signed".

[48] YBILC, 1953, Vol. II, doc. A/CN.4/63, p. 110.

view that between signature and ratification the State should refrain from acts that are inconsistent with the purpose of the treaty.[49] The third SR Fitzmaurice generally followed the line taken by Lauterpacht with respect to the interim obligation but drafted the relevant Article 30 somewhat more cautiously, for example by stating that the signature "*may* involve an obligation […] not to take any action calculated to impair or prejudice the objects of the treaty" (emphasis added).[50] It is worth noting that, similar to Lauterpacht,[51] the second paragraph of the same Article lists certain other effects of signature, e.g. that signature does not entitle the signatory State to any "material" rights but rather certain rights deriving from the status of signatory such as the right to object to reservations, to object that other States sign the treaty, to demand respect of the ratification provisions of the treaty and to decide on the right of accession of other States, and rights in other "procedural" matters.[52] Fitzmaurice issued further four reports with respect to the VCLT that are, however, not relevant for the purposes of this Article.

The fourth SR Waldock in his First Report effectively summarised Lauterpacht's and Fitzmaurice's views. In his view the interim obligation, which he formulated in draft Article 9(2)(c) as an obligation of the State to refrain in the interval between signature and ratification from acts calculated to frustrate the objects of the treaty or to impair its subsequent application, was generally accepted by the doctrine and international case law, citing as relevant jurisprudence the cases *Certain German Interests in Polish Upper Silesia* and *Megalidis v Turkey*.[53] He additionally cited the International Court of Justice's (ICJ) Advisory Opinion in the case *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, in which the ICJ found that signature confers a "provisional status" on the State.[54] Waldock included in Article 9(3)(b) the interim obligation in the interval between signature as an expression of the consent to be bound by a treaty and its entry into force,[55] which other SRs omitted in their reports. He stated that since a State has a status of a "presumptive party" in this interval a corresponding interim obligation needs to

[49] Ibid. He used the term "*purpose* of the treaty" (emphasis added).

[50] YBILC, 1956, Vol. II, doc. A/CN.4/101, pp. 113 and 122. The exact wording of the draft Article 30(1)(c) was the following: "[…] the signature […] may involve an obligation […], pending a final decision about ratification, or during a reasonable period, not to take any action calculated to impair or prejudice the objects of the treaty" (emphasis added).

[51] Lauterpacht Report, op. cit., p. 109.

[52] Ibid, p. 113.

[53] Waldock Report, op. cit., pp. 46 and 47.

[54] See Ibid, p. 47, para. 7, for Advisory Opinion of the ICJ see ICJ Reports, 1951, p. 15.

[55] Ibid, pp. 47 and 48.

be established for this period. Unlike preceding SRs he analysed the temporal aspect of the interim obligation and suggested that the interim obligation applies until the signatory State informs other States of its decision on ratification or for a "reasonable period" if it does not do so. In the case of signature as an expression to be bound by a treaty, this obligation would apply until the treaty enters into force or, if the treaty does not enter into force in a "reasonable time" after signature, until the State informs that it does no longer consider itself bound by this obligation.[56] Waldock considered that a definition of the interim obligation's duration was justified because otherwise there would be an element of uncertainty is this rule, but has not decided to set a precise period due to the different circumstances surrounding various treaties.[57] Members of the ILC generally supported the interim obligation as drafted in Article 9, the most controversial part was the application of this obligation in the phase of negotiations, subsequently removed from the Article due also to the criticism of many States. It is worth noting at this point that in relation to the source of the interim obligation, some ILC members considered that the source cannot be a treaty not yet in force but rather a general principle or rule of international law.[58]

Generally it seems that the inclusion of the interim obligation in the VCLT was mostly influenced by the Lauterpacht report since both Fitzmaurice and Waldock subsequently referred to it and refined the interim obligation in response to the comments of ILC members and States. The prevailing view of the ILC members and States was that it is an international legal obligation of States that merits a provision in the VCLT.

3.2. Analysis of Article 18

3.2.1. Introductory part

The introductory part of Article 18 provides that signatory States should refrain from acting so as to defeat the *object and purpose* of the treaty. Clearly the provision cannot prohibit States from acting inconsistently with nor compel them to apply a treaty not yet in force,[59] it prohibits them from acting in

[56] Ibid, p. 46.

[57] Ibid, p. 47.

[58] See views of Yaseen, Bartoš, Briggs in YBILC, 1962, Vol. I, doc. A/CN.4/SR.644, pp. 92–94, paras. 65, 78 and 88 respectively.

[59] See e.g. Anthony Aust: Modern Treaty Law and Practice. Cambridge University Press, Cambridge 2000, p. 94, and Opinion of the Advocate General (AG) at the Court of Justice of the European Union (ECJ) Eleanor Sharpston of 1 June 2010 in case *Commission v Republic of Malta*, C-508/08, para. 72.

a manner which would defeat its object and purpose. The latter concept is mentioned several times in the VCLT, i.e. in Articles 19 and 20 (reservations), 31 and 33 (interpretation), 41 (amendment), 58 (suspension) and 60 (termination or suspension due to violation), however it is not defined anywhere nor do the VCLT commentaries by the ILC provide guidance in relation to it.[60] Importantly, the ILC did consider in its recently issued Guide to Practice on Reservations to Treaties[61] that this concept should be understood in the same sense in all the mentioned provisions and thus also in Article 18, which should consequently be interpreted in line with the uniform understanding of this term in the VCLT. The ILC simultaneously admitted that this does not solve the problem but merely sets a uniform criterion and does not define the term.[62] After having considered the *travaux préparatoires* of the VCLT, case law and doctrine, the ILC formulated guideline 3.1.5 which provides that "[a] reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenor, in such a way that the reservation impairs the *raison d'être* of the treaty."[63] The latter term corresponds to the one used in the ICJ Advisory Opinion on *Reservations to the Genocide Convention* in which the court defined the object and purpose as relating to the *raison d'être* of a treaty.[64] While some authors consider that Article 18 relates also to the object and purpose of each individual provision of a treaty,[65] others are of the view that a general approach would be appropriate and that the essence or the fundamental objective should be distilled from a

[60] Isabelle Buffard and Karl Zemanek: The 'Object and Purpose' of a Treaty: An Enigma?, in: Austrian Review of International and European Law, 3 (1998), p. 322.

[61] Guide to Practice on Reservations to Treaties (hereinafter referred to as "the Guide"), doc. A/66/10/Add.1, Report of the International Law Commission, Sixty-third session (2011), General Assembly Official Records, Sixty-sixth Session, Supplement No. 10, Guideline 3.1.5., p. 352. The Guide refers in this respect to the view of SR Waldock when comparing the interim obligation to reservations incompatible with the object and purpose of a treaty (Ibid).

[62] Ibid, p. 352.

[63] The ILC clarified that (1) the term "essential element" is not necessarily limited to a specific provision, it may be a norm, a right or an obligation which, interpreted in context, is essential to the general tenor of the treaty and whose exclusion or modification would compromise the treaty's *raison d'être*, (2) the general tenor means the balance of rights and obligations which constitute its substance or the general concept underlying the treaty (in French "*économie générale de traité*"), and the (3) it chose the adjective "necessary" in preference to the stronger term "indispensable", and decided on the verb "impair" (rather than "deprive") to apply to the *raison d'être* of the treaty (Ibid, pp. 358-359).

[64] ICJ Reports, op. cit., p. 23.

[65] See Mark E. Villiger: Commentary on the 1969 Vienna Convention on the Law of Treaties. Martinus Nijhoff Publishers, Leiden 2009, p. 249.

treaty.[66] It seems that the latter approach, which is also confirmed in the Guide, would be preferable since individual provisions of a treaty are, notwithstanding their possible specific object and purpose, a part of a treaty as a whole, and the interim obligation can only apply to those acts that frustrate the whole treaty. This view is corroborated also by the fact that the VCLT in all instances uses the expression object and purpose of the *treaty*, in Article 41(1)(b)(ii) even the treaty *as a whole,*[67] as well as by the fact that under the VCLT a treaty is in principle a uniform instrument whose provisions are generally separable only when States agree.[68]

The 1966 draft Article 15 referred only to the object of the treaty and not its purpose, although they featured together in other draft provisions of the VCLT at the time.[69] Some authors consider that the object and purpose are two separate terms, "object" relating to the immediate objective of the treaty and "purpose" to something more distant.[70] Consequently, object of a bilateral treaty on the construction of a bridge would be its construction itself while the purpose would be to facilitate movement of people and goods between the two States and thus to strengthen cooperation between populations of the two States.[71] Analysis of the *travaux préparatoires* of the VCLT demonstrates that the finally adopted text had been first proposed by Reuter (to be precise, he proposed object *or* purpose)[72] because he considered that the original term "objects" from

[66] See Guide to Practice on Reservations to Treaties and Commentaries Thereto, op. cit., p. 352, and Opinion of AG Sharpston, op. cit., para. 73.

[67] See Jan Klabbers: Some Problems Regarding the Object and Purpose of Treaties, in: Finnish Yearbook of International Law, VIII (1997), p. 151.

[68] See e.g. Article 44 of the VCLT.

[69] YBILC, 1966, Vol. II, p. 202.

[70] J. Klabbers, op. cit. (1997), p. 145. See the Guide, where doctrine has been cited as considering that the object refers to the actual content of a treaty and the purpose to its objective (op. cit., p. 356).

[71] See e.g. Agreement Between the Government of the Republic of Slovenia and the Government of the Republic of Croatia on the construction of a border bridge on the Sotla river at the international border crossing Imeno-Miljana, signed on 6 July 2010 (OG RS-MP, No. 3/11). The purpose would thus be expressed in the second and third paragraph of the preamble while the object would be expressed in Article 1 which provides *inter alia* that the parties agree to "jointly construct the new border road bridge across the river Sotla."

[72] He may have used the word "or" because he considered the two terms as separate, which could be inferred from his view on draft Article 55 on *pacta sunt servanda* where he considered that the object of an obligation is one thing and its purpose another (YBILC, 1964, Vol. I, doc. A/CN.4/167, p. 26, para. 77). Similarly, Türk refers to "object or purpose" in relation to Article 18 (op. cit., p. 250), however it is likely a drafting inconsistency since he states in the same book in relation to reservations under Article 19 (which is no different

SR Waldock's draft[73] raised precisely the question whether the term refers to all objects of the treaty or only part of them. On the other hand, he considered that the new formulation – despite being somewhat more balanced – was equally unclear but had been used by the ICJ in its Advisory Opinion on *Reservations to the Genocide Convention*.[74] The term "purpose" was added only subsequently by the Drafting Committee at the Vienna Conference for the adoption of the VCLT. The Chairman explained that the reason for that was that this wording has been used frequently in the Convention and absence of the term "purpose" could raise interpretation problems, and that this change should in no way prejudice the substance of the provision nor expand obligations of States under it.[75] On the basis of these considerations the two terms object and purpose should be understood as a whole, which is confirmed also by the view of the ILC in the Guide that the term "object and purpose" – which was expressly used together in brackets by the ILC – has the same meaning throughout the VCLT. The ILC also mentioned that attempts to split the two terms for the purpose of their easier definition were unsuccessful.[76]

Object and purpose is thus to be understood as a uniform term relating to the treaty as a whole, which has the same meaning throughout VCLT in line with guideline 3.1.5 of the Guide. In assessing a potential violation of the interim obligation it should accordingly be considered whether a State with its actions defeated an essential element of the treaty that is necessary to its general tenor, in such a way that the *raison d'être* of the treaty was impaired. The object and purpose of a particular treaty is generally determined on the basis of its title, preamble and introductory provisions.[77] For the purposes of the interim

from Article 18 in the relevant part) that a reservation can be incompatible with the "object and purpose" of a treaty.

[73] When asked by the representatives of Uruguay and Ghana on the meaning of the wording "*acts tending to frustrate the object of a proposed treaty"* he explained that it is a common phrase in English law (see United Nations Conference on the Law of Treaties, Vienna, Austria, First Session, 26 March – 24 May 1968, Meetings of the Committee of the Whole, doc. A/CONF.39/C.1/SR.20, para. 4, p. 102 (question by Uruguay), para. 23, p. 98 (question by Ghana), and para. 26, p. 104 (explanation by the Expert Consultant Waldock)). A part of that phrase is also the wording "object of a proposed treaty", which would be comparable to "object of a contract" in English law.

[74] YBILC 1965, Vol. I, doc. A/CN.4/SR.788, p. 91, para. 39. The view has been supported by Castrén, see YBILC, 1965, Vol. I, doc. A/CN.4/SR.789, p. 94, para. 8.

[75] United Nations Conference on the Law of Treaties, 1st Session, 26 March – 24 May 1968, Meetings of the Committee of the Whole, doc. A/CONF.39/C.1/SR.61, para. 101, p. 361.

[76] The Guide, op. cit., p. 356.

[77] On the identification of the object and purpose of a treaty see para. 3.1.5.1. of the Guide, op. cit., p. 359. Klabbers (op. cit. (1997), pp. 155–159) additionally notes that there

obligation, provisions on the entry into force would also be relevant in this respect.[78]

Regarding *acts* with which the object and purpose can be defeated, these are in principle actions that render the application of a treaty meaningless – according to some authors that does not include impossible[79] – or that would prevent the State to apply the treaty as a whole. The VCLT does not enumerate cases of such acts, some of which have been already mentioned in this article,[80] and they can include "physical" actions,[81] regulatory measures[82] or even another treaty.[83] It should, however, be mentioned that non-ratification of a treaty is not such an act since ratification is in the discretion of the State.[84] One of the key issues to be taken into account when assessing such acts is whether the intent of the State to defeat the object and purpose should be demonstrated. A plain textual reading of Article 18 leads to the conclusion that its authors decided for an objective test for the assessment of acts potentially defeating the object and purpose of a treaty. However, various drafts of this Article and discussion thereon demonstrate that a subjective element should also be present. SRs have thus in their reports used terms such as "intended substantially to impair",[85] "calculated to impair or prejudice"[86] or "calculated to frustrate",[87] which leads to the conclusion that SRs viewed the subjective element – intention to defeat object and purpose of a treaty – as necessary for the assessment of State con-

are other relevant elements for the identification of the object and purpose, and that the characteristics of the relevant treaty are to be taken into account.

78 P. Palchetti, op. cit., p. 29.

79 M. Villiger, p. 249, note 24. However, in Charme's view differentiation between acts that would render the application meaningless or impossible is problematic. (op. cit., p. 102). On the identification of State conduct for which the interim obligation applies see also Opinion of AG Sharpston, in which she considers *inter alia* that the interim obligation does not merely require refraining from action "as might defeat the whole object and purpose of the EU Treaties, or of the accession treaty – any action capable of doing so would have to be far-reaching indeed – but I consider that a single instance of conduct not fully compatible with one of the impending obligations […] would not normally be such as to lay the State open to subsequent Treaty infringement proceedings." (op. cit., para. 74).

80 Supra, notes 19-23. See also A. Aust, op. cit., p. 94.

81 Supra, note 22.

82 See e.g. judgment of the General Court of the European Union of 22 January 1997 in case *Opel Austria v Council of the European Union* (T-115/94, ECR, p. II-39, para. 92), which relates to adoption of a regulation by the Council, or P. Palchetti, op. cit., p. 34.

83 P. Palchetti, op. cit., p. 33.

84 M. Villiger, op. cit., p. 249.

85 Lauterpacht Report, op. cit..

86 Fitzmaurice Report, op. cit..

87 Waldock Report, op. cit..

duct. The final wording does not reflect the subjective element, which could be understood as the will of the authors to replace it with an objective test. That would effectively mean that it should be assessed whether the State in fact (objectively) defeated the object and purpose of a treaty and not its (subjective) attitude towards such conduct.[88] In terms of civil law, demonstration of a causal link and not also responsibility would suffice. However, such an interpretation is not entirely justified, as can be demonstrated on the basis of the *travaux préparatoires* of the VCLT. ILC member Ago, supported by another member de Luna, thus considered in this regard that the French language version of the term "calculated to" was inappropriate because the English language version included an element of intent and consequently the French version should have been "tendant à", in response to which the SR Waldock harmonised the two language versions by proposing to replace the English term with "tending to".[89] Subsequently, Australia and the US proposed at the Vienna Conference to replace "tending to" by "which would". The US delegate explained that the previous wording did not reflect sufficiently the element of intent and that the wording before that change, i.e. "calculated to", had been more adequate.[90] On the other hand, the Dutch delegate responded that the proposed change would have the opposite effect of diminishing the importance of intent which is the basic element of good faith.[91] Similarly, some authors consider in this context that the term "tending" is less subjective than "calculated."[92] Finally, when the Drafting Committee decided for the current wording "which would defeat" its

[88] This is also Aust's view: "the test is objective, and it is not necessary to prove bad faith" (op. cit., p. 94).

[89] YBILC, 1966, Vol. I, Part II, p. 326.

[90] United Nations Conference on the Law of Treaties, 1st Session, 26 March – 24 May 1968, Meetings of the Committee of the Whole, doc. A/CONF.39/C.1/SR.19, para. 10 (Australian proposal) in para. 13 (US proposal), p. 98. The proposals have been supported by Austria whose representative stated that they bring "more clarity" to the text, see Ibid, para. 50, p. 101.

[91] Ibid, para. 36, p. 99.

[92] J. Klabbers, op. cit. (2001), p. 312. Similarly, Morvay (Werner Morvay: The Obligation of a State not to Frustrate the Object of a Treaty Prior to its Entry into Force, Comments on Art. 15 of the ILC's 1966 Draft Articles on the Law of Treaties, <www.zaoerv.de/27_1967/27_1967_3_c_451_462.pdf> (8. 4. 2015), Max-Planck Institut für ausländisches Recht und Völkerrecht, 1967, p. 453, note 5) considers that the subjective element had been weakened in the English version by the change from "calculated to" to "tending to", according to him it would be best expressed by the wording "acts intended to". Morvay also considers that according to the 1966 draft VCLT and its commentary by the ILC the interim obligation can only be violated intentionally and not by unintentional acts, which does not clearly follow from the provision but from the said amendment of the text (Ibid, p. 458).

Chairman explained that it was merely a drafting change intended for greater clarity.[93]

On the basis of discussion within the ILC and subsequently at the Vienna Conference it could be observed that both the SRs and those expressing views on the conduct of the State in the sense of defeating the object and purpose of a treaty concur that this conduct must include a subjective element,[94] and that the trend of the discussion evolved in the direction of objectivisation, likely because it would be difficult to substantiate the subjective element in practice, but that the subjective element evidently remained present. This conclusion is confirmed by the doctrine which agrees that Article 18 presumably provides for an objective test[95] for the assessment of the State during the interval between signature and ratification. However, certain authors consider this test inadequate in certain circumstances, e.g. in the case of the so-called normative treaties such as multilateral human rights treaties,[96] and thus advocate a "manifest intent test," according to which the object and purpose of a treaty would be defeated by morally inacceptable conduct with respect to a treaty, regardless of whether legitimate expectations of partners or bad faith of the State, which constitute the other two possible tests for the assessment of such conduct.[97] This test appears reasonable, especially since it is in effect not realistic to expect that international tribunals would adopt an entirely objective test for State conduct, while as mentioned the *travaux préparatoires*, current case law[98] and cited doctrine demonstrate that a certain subjective element is required. However,

[93] United Nations Conference on the Law of Treaties (UNCLT), Vienna, Austria, First Session, 26 March – 24 May 1968, Meetings of the Committee of the Whole, doc. A/CONF.39/C.1/SR.61, para. 101, p. 361. Palchetti considers that the term "*defeat*" sets a rather high threshold with which the scope of the obligation has effectively been narrowed (op. cit., p. 29).

[94] For a summary of the discussion see e.g. J. Klabbers, op. cit. (2001), pp. 305–313.

[95] See also Hassan who explicitly refers to the travaux préparatoires in relation to the Article (op. cit., p. 448).

[96] J. Klabbers, op. cit. (2001), pp. 289–294. Klabbers additionally identified as such the UN Charter and Treaty on the Establishment of the European Community (now Treaty on the Functioning of the European Union), whose object and purpose is difficult to establish. In relation to such treaties see also Guideline 3.1.5.6. with respect to reservations to treaties that contain several interdependent rights and obligations.

[97] J. Klabbers, op. cit. (2001), pp. 330-331.

[98] See e.g. case *Tecnicas Medioambientales Tecmed S.A. v United Mexican States* (International Centre for Settlement of Investment Disputes, ARB (AF)/00/2, para. 71), in which the arbitral tribunal stated that in line with the doctrine the obligation under Article 18 of the VCLT does not include *intentional* acts only but also acts "which need not be intentional or manifestly damaging or fraudulent to go against the principle of good faith, but merely negligent or in disregard of the provisions of a treaty or of its underlying principles, or contradictory or unreasonable in light of such provisions or principles".

this test has been criticised from the perspective that it is not a more objective test but merely a version of the subjective one which does effectively lower the burden of proof while a certain level of bad faith would still be required.[99] Critics, while identifying further two possible tests (the "essential elements" and "impossible performance" tests), propose a "facilitation test" which would presumably be more objective since it concentrates on whether the State acted inconsistently with its obligations under a treaty and whether this conduct is new or it existed before signature.[100] This test as well is not without problems in the sense that it enables the State to e.g. continue executing death penalty after signing a treaty on its ban simply because capital punishment existed in its legislation before signature, which at least the European Court of Human Right would disapprove with,[101] while on the other hand ignoring the aforementioned *travaux préparatoires* in relation to Article 18 that demonstrates the requirements for a subjective element. In any case, the cited possible tests for the assessment of conduct with which a State defeats the object and purpose of a treaty are evidence of the level of difficulty of the issue, which is probably the most difficult and key issue when considering the interim obligation and which remains without a convincing answer in the doctrine.

Under Article 18, the State should *refrain* from the defeating acts, which would mean at first sight that it should abstain from acting or remain passive.[102] It would, however, be conceivable that the State would effectively take action at least in the sense of maintaining *status quo* of certain treaty regulated items and thus prevent their deterioration until the entry into force of the treaty after which it would be required to hand them over to the other party.[103] The Article does not require States to apply treaties since they are not in force that would render ratification meaningless.[104] Exceptionally, States would be required to apply such treaties when they provided for provisional application from signature until entry into force.[105] In this case, the issue of relation between the

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Irrespectively of the rather inconsistent enumeration of different modes of State conduct the underlying idea of that view is that the subjective element is required.

[99] D. Jonas and T. Saunders, op. cit., p. 602.

[100] Ibid, p. 603.

[101] See case *Öcalan v Turkey*, op. cit..

[102] Hassan considers that in comparison with Article 26 on *pacta sunt servanda* Article 18 contains a negative prohibition whereas Article 26 contains a positive requirement (op. cit., p. 452). See also Treaty Handbook, op. cit., p. 5, para. 3.1.3.

[103] Such a case was referred to by Ago during the ILC discussion on the VCLT, more specifically a treaty on the return of artistic works (YBILC, 1966, Vol. I, p. 92).

[104] The Guide states that such a view is "generally accepted", p. 352. See also Opinion of AG Sharpston, op. cit., para. 72.

[105] Article 25 of the VCLT.

interim obligation and provisional application would arise,[106] e.g. whether non-application of a treaty in accordance with the provision on the provisional application which relates to the whole treaty would also mean a violation of the interim obligation. If the treaty provides that the State should act in a certain manner from signature until entry into force and does not do so, and consequently subsequent implementation of the treaty would be prejudiced, that could be understood as a violation of the interim obligation. The State had namely signed a treaty and then "refrained" from acts that it should have performed and therefore frustrated its implementation after entry into force. However, such inaction would likely be qualified as a violation of the special provision on provisional application[107] and there would be no need to refer to the interim obligation.[108]

3.2.2. Point (a)

Article 18 lists two instances in which a State should refrain from acts with which it would defeat the object and purpose of the treaty, both of which relate to signature as well. In point (a) it thus provides that the interim obligation applies when a State signs a treaty that requires ratification until it shall have made its intention clear not to become party to the treaty, while in point (b) it provides that the obligation applies when a State consents to be bound by a treaty until it enters into force, if entry into force is not unduly delayed. It has already been mentioned that signature is one of the modes in which a State

[106] That the provisions on the provisional application and the interim obligation are linked can be inferred from the Austrian delegation's view at the Vienna Conference that the State should not use provisional application to enjoy benefits of the treaty which it would subsequently unilaterally terminate in violation of Article 15 (now Article 18). Indian delegation supported that view and considered that provisional application falls under a general obligation in Article 15. UNCLT, 11th Plenary Meeting, 30. April 1969, doc. A/CONF.39/SR.11, pp. 40-41, para. 59 (Austria) and 70 (India).

[107] The provision on provisional application is binding and requires application of a treaty which constitutes a much stronger obligation than the obligation in Article 18, and thus the latter would not be applicable in this case. See Frank Montag: Völkerrechtliche Verträge mit vorläufige Wirkungen. Duncker & Humblot, Berlin 1986, pp. 67-68.

[108] Klabbers (op. cit. (1997), p. 150) considers in this respect that analysis of the scope of the interim obligation should include identification of existence or not of the provision on the provisional application, and that the latter in his view justifies a "strict interpretation of the treaty's object and purpose for purposes of the interim obligation", which effectively goes in the same direction. An example of a simultaneous violation of the interim obligation and the provisional application is contained in the judgment of the General Court of the EU of 17 January 2007 in case *Hellenic Republic v Commission of the European Communities* (T-231/04, ECR II-0063, paras. 86 and 97-101), in which the said court held that Greece cannot, on the on hand, evade its obligations by arguing that the treaty had not been ratified, nor can it, on the other hand, "ignore the provisional application of the treaty."

can consent to be bound by a treaty, and in such a case the interim obligation would apply. In this regard it should be reminded that initialling can also constitute signature in certain circumstances and can have the effect of consent to be bound as well. In the case of signature *ad referendum*, the interim obligation would not apply immediately upon signature[109] but retroactively after its confirmation since subsequent confirmation does not have constitutive effect, unlike a situation in which a treaty would be initialled first and then signed. If the State does act in such a manner as to render Article 18 applicable the latter would apply for the said period as well, while if signature *ad referendum* had subsequently not be confirmed that would not be the case.

Under Article 18(a) the interim obligation applies until the State clearly expresses its intent not to become party to the treaty. Since that intention could be expressed anytime unilaterally, without e.g. the possibility of objections by other States, it is effectively a rather broad right of a State.[110] Although the provision does not define when the intent is deemed to be clearly expressed,[111] it should be understood in the sense that it should be expressed in a demonstrable manner, either explicitly or implicitly,[112] so that it could be readily established. The clearest manner would be e.g. if the State sent a diplomatic note or other form of written document[113] in which it informed the other States or depositary of its intention. A less clear manner of expressing it would be a long term delay in ratifying the treaty or if the competent internal institution (e.g. parliament) refused to ratify. Logically, in the first instance the issue of what constitutes appropriate time for ratification would arise, which would be for a dispute resolution body to decide in the potential dispute, taking into account all relevant circumstances.[114] If on the other hand the parliament would refuse

[109] YBILC 1962, Vol. I, p. 204, para. 4 (de Luna).

[110] Swaine considers this option to be an "ease of exit" which undermines the strength of the interim obligation (Edward T. Swaine: Unsigning, in: Stanford Law Review, 55 (2002–2003), p. 2083).

[111] Ibid, p. 2082.

[112] On implicit intent see e.g. judgment of the General Court of the European Union in case *Hellenic republic v Commission of the European Communities* (op. cit., paras. 36 and 95).

[113] One of the most publicised cases of notification is the mentioned statement of the US that it will not become party to the Rome Statute of the International Criminal Court, which had been sent as a diplomatic note to the Secretary General of the UN as the depositary of that treaty.

[114] See e.g. ACTA which has been signed by Slovenia and certain other States only to subsequently "freeze" ratification procedures thereof. In Slovenia, such a procedure effectively never started since the government adopted a decision that the procedure will not start "until further notice" (<http://www.vlada.si/si/delo_vlade/seje_vlade/sporocila_za_javnost/sporocila_za_javnost/article/6_redna_seja_vlade_rs_22211/>, 8. 4. 2015). Such a decision cannot be considered as a clear expression of the intention of Slovenia not to

to ratify, the government could attempt to adjust the treaty in cooperation with other States in a manner as to adapt it in line with the parliament's views, and could thus not immediately express the intention of the State not to become a party.[115] Again, assessment would depend on the actual circumstances. In relation to the expression of such intent the question could also arise whether acts defeating the object and purpose of a treaty are not by themselves such as to indicate the intent of the State not to become its party.[116] Such an interpretation would, however, not be consistent with the purpose of Article 18 which is precisely to prevent such acts while the purpose of the obligation to clearly express the intent not to become party is in defining the period of application of the interim obligation. The State should thus express such intent in a different manner.[117] A comparison with the termination of provisional application in accordance with Article 25(2) VCLT could be of assistance in this regard, in which a very similar provision differs from the one in Article 18 in that the State who wishes to terminate the provisional application between itself and other States is required to *notify* them of the fact that it does not intend to become a party, not merely *clearly express its intent*. That difference could additionally confirm the conclusion that the intent under Article 18 could be expressed implicitly.

Article 18(a) contains no indication on whether the expression of intent not to become party is revocable or not. That issue had been raised by Rosenne in relation to a different wording of the Article, according to which the interim obligation would apply until the State "renounced its right to ratify". He considered that to view the right to ratify as irrevocable would be exaggerated and thus the State could ratify a treaty in relation to which it previously renounced its right to ratify.[118] Apparently this part of the text had been changed to the expression of intent not to become party also because of these doubts as to the irrevocability of the renouncement to ratify, and thus a possibility became available to States to subsequently express its intent to become a party and therefore "revive" the interim obligation. The irrevocability of a similar notification arose within the framework of Article 25 VCLT which provides

become party to ACTA, in particular because the decision itself allows for the possibility to start the procedure if the circumstances would allow.

[115] See e.g. statement of the EU Commissioner for Trade Karl De Gucht in the European Parliament in which he stated *inter alia* that the European Commission will consult with partners on the way forward after receiving the opinion of the ECJ (<http://trade.ec.europa.eu/doclib/press/index.cfm?id=818>, 8. 4. 2015).

[116] M. Rogoff, op. cit., p. 296.

[117] M. Villiger, op. cit., p. 251.

[118] YBILC, 1965, Vol. I, doc. A/CN.4/SR.788, para. 53, p. 92.

for the notification on not becoming a party to a treaty that triggers the termination of the provisional application. A question was raised at the Vienna Conference whether such a notification was final since the government in a parliamentary system could change its view and express a different intention, thus the notification would act as a suspension of provisional application.[119] There is a view in the doctrine that such a notification should be deemed to be final to protect good faith, and that the government could – in the case of parliamentary refusal to ratify – abuse the procedure if it changed position and resumed with provisional application.[120] However, this view does not take into account the possibility that a different view on the treaty could also be expressed by the parliament, nor the legal trend towards greater flexibility and preference for solutions that enable participation of as many as possible parties in treaties.[121] Perhaps it would be reasonable to apply in this sense an analogy with the withdrawal of the instrument of ratification before entry into force of a treaty, which is possible.[122] A presumption could be made on this basis that if a State can withdraw its ratification at any time before the entry into force of a treaty – ratification being potentially a triggering factor for the application of the interim obligation (see next paragraph of this article) – it could in the case when it did not (yet) submit the ratification instrument withdraw the notification not to become a party and ratify the treaty. This would be all the more reasonable since (in particular in the case of multilateral treaties) it is in favour of participation of a larger number of States in the treaty and therefore its entry into force. It is, however, true that the situation may depend on the circumstances and that good faith, on which the VCLT is based, would require considering any abuse of this possibility by manipulating with the interim obligation incompatible with the good faith principle.

Another open issue is when the termination of the interim obligation takes effect when a State clearly expresses its intent not to become party to a treaty. This issue has not been raised during the drafting of Article 18 but did occur in relation to Article 25 on the provisional application. The Italian delegation asked whether termination of provisional application takes effect *ex tunc* or *ex nunc*.[123] It did not receive a reply at the conference, but there is a view in the doctrine that termination of provisional application applies *ex nunc* and thus

[119] UNCLT, 11th Plenary Meeting, 30 April 1969, doc. A/CONF.39/SR.11, para. 75, p. 41.

[120] Albane Geslin: La mise en application provisoire des traités. Éditions A. Pedone, Paris 2005, p. 310.

[121] D. Türk, op. cit., p. 253, which has been admitted also by Geslin (Ibid).

[122] A. Aust, op. cit., pp. 95-96. See also Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, 1999, doc. ST/LEG/7/Rev.l, p. 47.

[123] UNCLT, 11th Plenary Meeting, 30 April 1969, doc. A/CONF.39/SR.11, para. 84, p. 45.

not retroactively.[124] There does not appear any reason why this view could not apply to the interim obligation. The interim obligation does differ from provisional application *inter alia* in the sense – as mentioned – that it relates in principle to abstention while provisional application requires the State to apply the treaty before its entry into force, which means that the consequences of its retroactivity could be much more serious than in the case of the interim obligation. On the other hand, retroactivity of termination of the interim obligation would cause it to be ineffective until termination which would be illogical and would lead to the avoidance from State responsibility for acts in violation of the interim obligation before its termination, and that in turn confirms the view against retroactivity of its termination.

3.2.3. Point (b)

Article 18(b) relates to a situation in which a State already consented to be bound by a treaty and the treaty is not yet in force. If the State signed the treaty beforehand (see previous section), the interim obligation continues after expressing consent to be bound. A time interval can occur between the moment of expressing consent to be bound and entry into force of a treaty,[125] in particular in the case of treaties subject to ratification.[126] Signature too is one of the forms in which a State can consent to be bound by a treaty, but it is less likely that in that case any time interval would occur. That is particularly relevant for bilateral treaties where both States express their consent to be bound and there is no such interval because the treaty enters into force immediately. Such an interval could occur when one of the States consents to be bound by signature while the other is required to ratify it.[127] On the other hand, the

[124] A. Geslin, op. cit., pp. 305–307.

[125] This time interval has been discussed e.g. in the mentioned judgment *Opel Austria v Council*. In that case the claimant relied on the violation of the interim obligation by the Council of the EU, which a few days before the entry into force of the EEA Agreement adopted a Regulation repealing certain tariff concessions. The Court held while applying Article 18 of the VCLT that since the EU had been the last of the signatories to consent to be bound by the treaty and therefore the date of its entry in force was known, the economic operator can rely on the interim obligation to challenge measures adopted by the EU in the period between the said consent to be bound and entry into force of the treaty (op. cit., paras. 89-94).

[126] Time intervals are typically longer in the case of multilateral treaties, although it does exist also in the case of bilateral treaties. In relation to bilateral treaties, Slovenia e.g. ratified in 2002 a Bilateral Investment Treaty with Russia which the latter did not more than 10 years after signature.

[127] See e.g. Arrangement between the Slovenian Nuclear Safety Administration (SNSA) and the United States Nuclear Regulatory Commission (NRC) for the Exchange of Technical Information and Cooperation in Nuclear Safety Matters (OG RS-MP, No. 3/12).

possibility of an interval is considerable in the case of multilateral treaties, in particular if they involve many States and only certain of them consent to be bound by signature. It should be reminded at this point again that consent to be bound can also be expressed by signature *ad referendum* and initialling, which could under certain circumstances also constitute signature by which a State consents to be bound.[128]

In accordance with Article 18(b) the State cannot, unlike in Article 18(a), express its intent not to become party to a treaty because it already consented to by bound by it,[129] unless it withdraws ratification, with which it would effectively notify that it does not wish to become a party. Termination of the interim obligation is thus linked to the entry into force of the treaty, is the latter is not unduly delayed. What constitutes an undue delay depends of course on the treaty and factual circumstances. That conclusion is confirmed by the *travaux préparatoires* which demonstrate that a 12-month period had been proposed while SR Waldock even proposed a 10-year period in one of his drafts, but he subsequently replied to a question on the meaning of the term "unreasonable" that it depends on the circumstances of each individual case.[130] Nor does Article 18(b) indicate who and how should determine whether the entry into force of a treaty has been unduly delayed and thus the interim obligation no longer applies. There is a view in the doctrine that in this case the State should clearly – either explicitly or implicitly – express its position that for it the interim obligation no longer applies.[131] That would, moreover, seem to follow from SR Waldock's draft Article 9, which provided in its point (b)(i) that the State can notify others after a reasonable period that it does no longer consider itself bound by this obligation.[132] However, since termination of the interim obligation on the basis of Article 18(b) is – unlike Article 18(a) or the said Waldock draft of this Article – not (any more) linked to a unilateral statement of a State but merely to the (more objective) time dimension of entry into force, the question arises whether such a view is compatible with the purpose of the adopted provision. It appears rather that the purpose of this provision – unlike

[128] Article 12 of the VCLT.

[129] In relation to that Lachs stated during the discussion on the draft Articles of the VCLT that the obligation under this point is final because the State already consented to be bound by the treaty, while the obligation in point (a) is "provisional" because it is still uncertain whether the State will ratify the treaty (YBILC, 1965, Vol. I, doc. A/CN.4/SR.789, para. 38, p. 97).

[130] On the 12-month period see UNCLT, doc. A/CONF.39/C.1/L.133/Rev.1 (1968), and on the definition of the term "unreasonable" and the reply see UNCLT, 2d session (10th plen. mtg.), doc. A/CONF-39/11/Add.1 (1970).

[131] M. Villiger, op. cit., p. 251.

[132] Waldock Report, op. cit., p. 46.

point (a) – is to restrict the conditions for the termination of the interim obligation because the State already consented to be bound by and thus to apply the treaty in good faith after its entry into force and should thus *a fortiori* act in good faith by not defeating its object and purpose of the treaty before its entry into force. If the above presumption would apply, any State that ratified the treaty could inform the other signatories that the entry into force of the treaty is in its view unreasonably delayed and that it consequently does not consider itself bound any more by the interim obligation. If it would not simultaneously withdraw its consent to be bound[133] the treaty could irrespectively of its notification subsequently enter into force for it as well, while until then such a State could act incompatibly with its object and purpose without any risk of being held responsible, which would be unacceptable.

4. CONCLUSION

States in principle act in good faith when signing treaties and there are consequently no problems with their ratification and entry into force. However, for cases in which a State would take advantage of the interval between signature and entry into force of a treaty for an attempt to prejudice its subsequent application, international law does provide for the interim obligation as an emanation of the good faith principle and the prohibition of the abuse of rights. That obligation is codified in Article 18. The interim obligation has been relatively scarcely analysed in the doctrine and case law and analyses made thus far often conclude by stating that it is an ambiguous obligation.

The contribution's objective has been thus to analyse the interim obligation of a State not to defeat the object and purpose of a treaty between its signature and entry into force on the basis of the text of Article 18 of the Vienna Convention on the Law of Treaties (VCLT), doctrine and judicial decisions. The contribution concludes that it is a legal obligation of customary international law, codified in the mentioned Article of the VCLT. A State violates it if it defeats the object of purpose of a treaty – understood as a single term – by defeating with its acts an essential element of the treaty that is necessary to its general tenor, in such a way that it impairs the raison d'être of the treaty. A violation of Article 18 must prima facie be objective, irrespective of the State's subjective relation to the violation. However, this does not reflect the understanding of that Article on the basis of *travaux préparatoires* of the VCLT and the doctrine, according to which a certain subjective element needs to be demonstrated

[133] Which is also Villiger's view (op. cit., note 38).

when assessing the State's conduct, although there is currently no consensus as to what test might be the most appropriate for that assessment.

Article 18 of the VCLT leaves open also some other seemingly less important issues that are nevertheless essential for its effectiveness. These issues have not been discussed by the doctrine or have been only marginally, and so the author attempted to resolve them or at least provide some guidance in that respect. The author thus – inter alia by comparison with the similar provision of Article 25 of the VCLT on provisional application – explains that the declaration of the intent of a State provided in point (a) of the said Article not to become party to the treaty is effective ex nunc, and that it can be withdrawn in certain circumstances.

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SVETLIČIČ, Andrej: Obveznost države, da med podpisom in uveljavitvijo mednarodne pogodbe ne izniči njenega predmeta in namena

Pravnik, Ljubljana 2015, let. 70 (132) št. 5-6

Namen prispevka je na podlagi besedila 18. člena DKPMP, pripravljalnega dela DKPMP, doktrine in sodne prakse pojasniti vsebino obveznosti države med podpisom in uveljavitvijo mednarodne pogodbe (vmesna obveznost). Iz prispevka izhaja, da gre za pravno obveznost, ki je del običajnega mednarodnega prava in je bila kodificirana v DKPMP. Država to obveznost krši, če s svojim ravnanjem izniči predmet in namen pogodbe – ki se razume kot celota – kar pomeni, da s svojimi dejanji v času med podpisom in uveljavitvijo pogodbe izniči temeljni element pogodbe, potreben za njeno celovitost, tako, da poseže v *raison d'ětre* pogodbe. Na prvi pogled mora po 18. členu DKPMP ravnanje države v smislu izničenja predmeta in namena pogodbe objektivno posegati v bistvo pogodbe, torej neodvisno od volje države v zvezi s tem. Vendar to ne ustreza razumevanju tega člena na podlagi pripravljalnega dela DKPMP in doktrine, v skladu s katerima je treba pri ravnanju države izkazati določeno raven subjektivnega odnosa do teh dejanj, ni pa soglasja glede tega, kakšen je najprimernejši test za njegovo presojo. V 18. členu DKPMP poleg nekaterih temeljnih vprašanj, kakršno je, kakšen je ustrezen test za presojo ravnanja države v primeru izničenja predmeta in namena pogodbe, ostajajo nejasna tudi nekatera druga, na videz manj pomembna, vendar z vidika njegovega učinka bistvena vprašanja, ki so v doktrini skopo ali sploh niso obravnavana in na katera je avtor skušal odgovoriti ali dati smernice za odgovor. Tako je – med drugim tudi na podlagi primerjave tega člena in podobne ureditve v 25. členu DKPMP o začasni uporabi – pojasnil, da izraz namere države iz točke (a) navedenega člena, da ne bo postala pogodbenica mednarodne pogodbe, učinkuje za naprej in da ga je v nekaterih okoliščinah mogoče preklicati.

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SVETLIČIČ, Andrej: Obligation of a State not to Defeat the Object and Purpose of a Treaty between its Signature and Entry into Force

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The contribution's objective is to analyse the interim obligation of a State not to defeat the object and purpose of a treaty between its signature and entry into force on the basis of the text of Article 18 of the Vienna Convention on the Law of Treaties (VCLT), doctrine and judicial decisions. The contribution concludes that it is a legal obligation of customary international law, codified in the mentioned Article of the VCLT. A State violates it if it defeats the object of purpose of a treaty – understood as a single term – by defeating with its acts an essential element of the treaty that is necessary to its general tenor, in such a way that it impairs the *raison d'être* of the treaty. A violation of Article 18 must *prima facie* be objective, irrespective of the State's subjective relation to the violation. However, this does not reflect the understanding of that Article on the basis of *travaux préparatoires* of the VCLT and the doctrine, according to which a certain subjective element needs to be demonstrated when assessing the State's conduct, although there is currently no consensus as to what test might be the most appropriate for that assessment. Article 18 of the VCLT leaves open also some other seemingly less important issues that are nevertheless essential for its effectiveness. These issues have not been discussed by the doctrine or have been only marginally, and so the author attempted to resolve them or at least provide some guidance in that respect. The author thus – *inter alia* by comparison with the similar provision of Article 25 of the VCLT on provisional application – explains that the declaration of the intent of a State provided in point (a) of the said Article not to become party to the treaty is effective *ex nunc,* and that it can be withdrawn in certain circumstances.