Journal of Innovation and Development
ISSN: 2958-4752 | Vol. 8, No. 1, 2024

Critical Assessment of Provisional Application of Environmental Treaty in the Facilities of CCS Projects

Xingyu Chen

Wuhan University China Institute of Boundary and Ocean Studies, Wuhan University, Wuhan, Hubei, China

Abstract: Removing legal barriers of carbon capture and storage project requires a provisional application of treaty related. And the Vienna Convention on the Law of Treaties as well as the Guide to Provisional Application of Treaties provide the law basis for such application of treaties. The positive role of such application in promoting the implementation of carbon capture and storage technologies explains its unique functions as a tool under international emergency, especially when it comes to environmental law. Nevertheless, the issue raised from that the provisional application of treaties shall not be underestimated. It can be found that the practice of provisional application may lead to the instability of the effectiveness of the treaty, the impairment of the integrity of the treaty as a whole, as well as the possibly imposing challenge on the interaction between provisionally applied treaty and the domestic law.

Keywords: CCS Project; Provisional Application of Treaties; International Treaty-making.

1. Introduction

As is one of the main available technological means of reducing carbon emissions and thereby mitigating climate change, carbon capture and storage (CCS) capturing carbon dioxide from industrial emissions and storing the captured carbon dioxide in underground rock formations or other geological formations, where it is isolated from the air. In order to remove legal barriers to CCS, the Parties to the London Protocol (LP) adopted an amendment to Article 6 of the London Protocol and a resolution on the provisional application of the amendment, which provides for special permits for the trans-boundary transport of carbon dioxide for the purposes of CCS projects.

This is one of the very practices of provisional application of treaties in the field of international environmental law, referring to the provisionally applying of treaties or part of a treaty pending its entry into force when an agreement to that effect has been negotiated, which was regulated in Article 25 paragraph 2 of the Vienna Convention on the Law of Treaties (hereinafter "VCLT").While the provisional application of treaties seems to have great potential in environmental protection as it functions as a tool under emergency, it is worth studying what positive effects the provisional application of treaties have and what issues it has further led to.

2. Purpose and Sources of the Provisional Application of Treaties

A. Purpose of the provisional application of treaties

With regard to the purpose of the provisional application of treaties, it has been argued that it is to give immediate effect to all or specific substantive provisions of the treaty without waiting for the fulfillment of the conditions for its formal entry into force, and the tribunal in the Yukos case held that the underlying rationale for the State's consent to the provisional application of treaties was the immediate assumption of an obligation pending completion of the domestic procedures necessary to bring the treaty into force.[1] It has also been argued that the purpose of provisional application of treaties is essentially to apply the treaty immediately prior to its entry into force, thereby allowing the momentum and cooperative relationship created in the negotiation of the treaty to continue. It would be helpful if the results of successful negotiations could be given immediate legal protection. At the same time, "under the emergency" has been emphasized.[2] When a treaty, on the one hand, requires ratification and, on the other hand, there is some reason for continuing its operation, the Signatory States might take the measure of provisional application. The scope of "emergency" in this context is broader[3], for example, in response to a crisis that is occurring or is about to occur, or when the expiration of a treaty is imminent and the entry into force of a new treaty relating thereto is still pending, so that the provisional application of the treaty is needed in order to guarantee the continuity of the international arrangement established by the treaty.

In the light of the foregoing, the purpose of provisional application of treaties is to enable the application of the provisions of the treaty and the effective operation of the treaties by making it necessary to apply the treaty provisionally pending its entry into force in the light of a more urgent situation. Though, it may be difficult to consider the real reasons behind the signatories' agreement to such application.

B. Sources of international law for the provisional application of treaties

There are three main sources of international law for the provisional application of treaties. Firstly, the provisions of article 25 of the VCLT, which mainly emphasize the following levels of content: firstly, in terms of the time frame, the provisional application of treaties takes place prior to the entry into force of the treaty; secondly, as for modalities, the provisional application may be provided for directly by the parties in the treaty, or by agreement; thirdly, as for the scope of the applicable provisions, either the whole or part of the treaty may be applied provisionally; and fourthly, it concerns the manner of termination of the provisional application. Given the importance of the VCLT, the elements contained in 25 article can be viewed as core elements of the provisional application of treaties.[4]

In 2012, the International Law Commission (ILC) conducted a study on the topic "Provisional Application of Treaties" to supplement the rules on provisional application of treaties, and the outcome was adopted by the General Assembly of the United Nations as the outcome of the study on the topic in 2021, namely the Draft guidelines and draft annex constituting the Guide to Provisional Application of Treaties (hereinafter "the Guide"). Although the Guide on the Provisional Application of Treaties is not legal binding force, it has a significant role to play in guiding the practice of provisional application, and has the potential of international soft law while it applied in the future. The Guide consists of twelve articles covering the scope, purpose, general rules, form of agreement, commencement, legal effect, reservations, responsibility for breach, termination, and the treatment of provisional application in relation to domestic law and the rules of international organizations. However, the Guide lacks detailed regulations on the relationship between provisionally applied treaties and provisions of domestic law, as well as the interface between the Guide and the VCLT.[5]

The quintessential international case is the Yukos case. The case has been heard by four adjudicatory bodies from February 2005 to to 5 November 2021, the issue of jurisdiction has been one of the most contentious and controversial points of contention, with the greatest differences in the views of the Parties. At the centre of the jurisdictional issue was the question of the applicability of the Energy Charter Treaty to the Russian Federation, and the key to the discussion was the discussion of the applicability to the Russian Federation of the provisional application clause of article 45 of the treaty. What stand at the core of such question is the conflict between that provision and the domestic law of the Russia, which involved two approaches, including the "piecemeal approach" and the "all-or-nothing approach".[6] The tribunal in the Yukos International Arbitration adopted the later one, taking into account the context, purpose and relevant practice of the treaty. The tribunal's view was that, under the terms of the ECT, the signatories agreed to the provisional application of the entire treaty until it entered into force in accordance. It also emphasized that the provisional application of the ECT as whole should, to a certain extent, be free from any conflict with the constitutions, laws and regulations of the State. Otherwise, the mandatory nature of the provisional application of an international treaty would be weakened if a State modify or terminate the obligation to provisionally apply an international treaty based on the discretionary in accordance with its domestic law.[7]

3. Provisional Application of Treaties on Environmental Protection

A. Provisional application in environmental treaty-making

The purpose and effect of the provisional application of treaties coincide with the purpose and expectation of environmental protection. And one of the characteristics of international environmental law treaties is their ability to be applied provisionally pending ratification.[8] Where a multilateral treaty requires ratification or the fulfillment of certain conditions for its entry into force, the provisional application of treaties enables it to be implemented before it enters into force, so that the purpose of the treaty can be achieved as soon as possible. [9] In this way, the provisional application of treaties can be used as a tool in states of emergency to respond to international crises.[10]

To date, the provisional application of treaties has already become a widely practised treaty practice. A number of important treaties dealing with the global environmental issue have been negotiated and signed with rules of provisional application. To name but a few, the Paris Agreement signed in 2016 began to be applied before its formal entry into force. The United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"), as an important convention covering issues related to the marine environment, has long contained a provision on provisional application on Article 7 of the implementation of Part XI of it. Apart from that, the Kyoto Protocol, which provides for specific measures to reduce greenhouse gas emissions, has also been provisionally applied by a number of States prior to its entering into force.

B. Example: provisional application of the 2009 amendments of LP

A good example of the provisional application of treaties in the environmental field is the provisional application of the 2009 amendment to the London Protocol (LP), which exactly reflects the purpose and effect of the provisional application.

In order to remove the legal obstacle to CCS posed by Article 6 of the LP, the Parties to the London Protocol tabled an amendment to the Article in 2009 at the Fourth Meeting of the Parties, which lead to an amendment of the article, which was adopted as resolution LP.3(4), the 2009 amendment.[11] The amendment states that carbon dioxide streams may be exported for disposal in accordance with Annex 1 of the LP provided that the States concerned have entered into an agreement or arrangement.[12]

After its adoption, Resolution LP.3(4) has long been unable to enter into force. Since the resolution LP.3(4) can only enter into force when it gained acceptance by two thirds of the Contracting, which counted as 35 Contracting Parties are required to ratify the amendment. However, as of April 2024, the 14th year since the 2009 amendment was adopted, only six Parties have ratified the amendment (including Norway, the UK, the Netherlands, Iran, Finland and Estonia).[13] Perhaps the reason for such slow progress in ratification of Amendment Love is that only a small number of countries have embarked on large-scale cross-border deployment of carbon sequestration projects. [14] The reason for the low deployment of the project may be due to its high investment costs.[15]

Some countries with large-scale deployment of carbon sequestration projects want the 2009 Amendment to enter into force as soon as possible. In 2019, at the 14th Meeting of the Parties to the London Protocol, Norway and the Netherlands jointly submitted a proposal for a resolution on the provisional application of the 2009 Amendment.[16] The proposal, saying "provisional application…would allow countries to agree to the trans-boundary transport of carbon dioxide for the purpose of carbon sequestration without violating international commitments", was adopted on 11 October 2019 as resolution LP.5(14).

This arrangement reflects the advantageous effect of the instrument of provisional application of the Treaty in the field of environmental protection: firstly, the CCS projects are one of the main scientific and technological means of mitigating the negative impacts of climate change, and are of great significance in the matter of climate change mitigation. And offshore storage usually involves transboundary transport of CO2.[17] Article 6 of the London Protocol prohibits the export of waste to other countries for dumping or incineration

at sea. Because offshore CO2 may involve "dumping" and CO2 is suspected of being "waste", the transport of CO2 from international CCS projects is prohibited by Article 6. Article 6 thus constitutes a legal barrier to the implementation of CCS projects.

Provisional application has two legal consequences: first, the amendment can begin to have a practical impact without having to wait for all States to ratify it. Secondly, without waiting for the amendment to make detailed and specific provisions, States parties can start implementing trans-boundary carbon capture and storage projects. This means that the provisional application programme will enable the 2009 amendment to enter into force as soon as possible. Thus, it can achieve the effect of realising the deployment of carbon sequestration projects as soon as possible and reducing carbon emissions as soon as possible. In fact, immediately after the adoption of the resolution on provisional application in 2019, Norway, the Netherlands and other countries accelerated the deployment of a network of facilities for carbon dioxide storage and cross-border transport in the North Sea.

4. Problems Arising from Provisional Application of Environmental Treaties

However, notwithstanding the effect of an instrument under a state of emergency, the provisional application of the 2009 amendments has led to a number of problems, including: leading to instability in the effectiveness of the treaty; undermining the integrity of environmental treaties; and Imposing challenge on the interaction between environmental treaties and municipal law

A. Precariousness of the validity of treaties

While the provisional application of treaties has its advantages, the problems it poses should not be underestimated, the first of which is the instability in the validity of a given treaty. Firstly, the provisional application of treaties is not guided by legally binding international rules, which the current situation in this area as: first, the VCLT only permits the parties to apply provisionally, which is extremely simple; second, the Guide to the Provisional Application of Treaties developed by the International Law Commission in 2021 is not legally binding.[18] After all, the provisional application of treaties is only a temporary state of affairs before the treaty formally enters into force, and in the absence of clear provisions in the rules of international law, its legal validity is bound to be questioned by some signatory States. In fact, in the previous Yukos International Arbitration case, the validity of provisionally applied treaties had been disputed by all parties.[19]

Secondly, the termination period of provisional application is not clearly stipulated in the many of the current ongoing practice of provisional application of treaties. A typical example is above provisional application of the 2008 amendment. As far as current international practice is concerned, there are three types of termination periods for the provisional application of treaties: termination by a declaration of the parties, termination by entry into force of the treaty, and termination upon reaching the deadline.[20] However, the case of the 2009 amendments has only five clauses, which read as follows: (1) allow parties to provisionally apply the 2009 amendments by submitting a declaration; (2) the declaration shall be deposited for entry into force; (3) recall the provisions of Article 6 of the London Protocol; (3) emphasize that the parties comply with the licensing conditions for carbon dioxide exports as recorded in Article 6; (4) urges Parties to consider adopting the 2009 Amendment. In other words, the resolution does not provide for a termination period for provisional application, which may lead to either a state of indefinite provisional application or the random termination of provisional application. Therefore, the provisional application programme may lead to instability in the effectiveness of the treaty.

B. Undermining the integrity of environmental treaties

Environmental protection requires the establishment of an integrated[21] and holistic legal framework and the provisional application programme may undermine this holistic nature. Take the application of 2009 amendment as an example. Firstly, the LP itself is holistic, both by its nature and inherent in the treaty. Article 21 (3) of the LP provides that an amendment shall enter into force for those Contracting Parties that have accepted it on the sixtieth day after two thirds of the Contracting Parties have deposited instruments of acceptance of the amendment. It is clear that maintaining a certain degree of integral application is an inherent mechanism of the treaty itself.[22] Secondly, the provisional application of the amendment undermines this integrity, as Langle notes that the London Protocol is an "interdependent treaty", which means that the rights and obligations of the treaty cannot be reduced to reciprocal rights between any two parties.[23]

It is precisely because of these problems that the provisional application of the 2009 amendment has triggered controversy in the international community, and some scholars believe that the option of introducing an "interpretative resolution", as advocated by some countries during the consultations prior to the introduction of the amendment, is a more reasonable approach.

C. Interaction between environmental treaties and municipal law

International law and domestic law across a number of fields, especially that of environment, in which the same topic is subject to regulation at both the municipal and the international levels.[24] This leads to the fact that the harmonisation of international environmental treaties with domestic law is a key element in achieving global environmental protection. Such harmonisation involves not only the consistency of the legal framework, but also the effective cooperation of administrative and judicial bodies. For example, environmental standards and restrictions established in treaties must be concretely implemented at the national level through specific legislative and policy measures to ensure their effectiveness and sustainability. In addition, it also involves synergistic cooperation between all levels of government and non-governmental organisations.

While *pacta sunt servanda* serves as a fundamental principle of international, since the negotiation and signing of a treaty is usually done by the Government of a State, the application of a treaty being applied provisionally before it has been ratified by the Parliament usually gives rise to the suspicion of ultra vires legislation by the Government in modern countries where the separation of powers is in force. Only a few countries, including Germany, Russia and Belarus, have expressly provided for the provisional application of treaties in their domestic legislation.[25] However, the vast majority of States do not currently have such provisions. There are three main ways in which these countries apply treaties provisionally: first, they explicitly prohibit the

provisional application of treaties, and all treaties must be ratified by their own parliaments before they can be applied, for example, in Austria, Italy, Egypt and Latin American countries, which will not sign treaties containing provisional application clauses; and second, they allow the provisional application of treaties, but only if certain conditions are fulfilled, for example, in the Netherlands, Canada, Slovenia and so on; The third is to allow provisional application in its entirety, e.g., Finland Spain, Bosnia and Herzegovina, etc.[26] Among them, the third is most likely to cause disputes between domestic legislatures and administrations, while prohibiting option fails to achieve the purpose of the treaty. Under such circumstance, provisional application attached with certain conditions, which is usually that the provisions of the treaty do not conflict with the domestic law of the State, is a compromise approach, also the most widely used one.

However, such conditional provisional application is the most commonly used method raises two other problems. For one thing, a State's determining the provisional application of treaties based on its own legislation would detract from the effectiveness of the treaty, making it impossible to give effect to the treaty in practice, and would therefore appear to violate the basic principle of the Convention on the Law of Treaties that a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.[27] In the Yukos case, the arbitral award was set aside by the District Court of The Hague precisely on the grounds that the Convention was incompatible with Russian domestic legislation.

5. Conclusion

As an emergency response tool, although the provisional application of treaties has shown unique advantages in the process of expediting the implementation of environmental protection conventions and the entry into force of environmental protection technologies, the instability of the effectiveness of the treaty, the potential damage to the integrity of the treaty, as well as the challenges of the interface between domestic and international law brought about by it should not be ignored. Thus, here comes the conclusion that the further year need to witness the improvement of the relevant rules, so as to clarify the termination conditions and rules of interpretation of provisional application, and to ensure the coordination between international environmental laws and domestic laws to ensure the effectiveness function of CCS projects.

References

[1] PCA Case, No. AA 226, Yukos Universal Limited (Isle of Man) v. The Russian Federation, Final Award, 18 July 2014.

[2] René Lefeber, The Provisional Application of Treaties, Essays on the Law of Treaties, in Nijhoff, 1998.

[3] The term of emergency is a widely used one in the field of international law and is addressed in areas such as the law of State responsibility, the law of armed conflict, etc., where it has a broad and varied behavioural appearance.

[4] Article 25 of the Vienna Convention on the Law of Treaties.

[5] International Law Commission, "Guide to Provisional Application of Treaties", Guideline 1, UN General Assembly Document A/76/10, 2021.

[6] Hobér K, Investment Arbitration and the Energy Charter Treaty Expand, International Dispute Settlement, 2010.

[7] Yukos Universal Limited (Isle of Man) v The Russian Federation, PCA Case No AA 227, Final Award, 18 July 2014.

[8] Li Yangyong, "On the Sources of International Environmental Law", in Journal of Henan College of Politics and Law Management Cadre, No. 2, 2006.

[9] UN General Assembly, 'Report of the International Law Commission on the work of its sixty-third and sixty-fourth sessions', A/CN.4/657 (18 January 2013), p. 13. A/CN.4/657 (18 January 2013).

[10] Ji Xiangren, "On the Provisional Application of International Treaties", in Journal of Guangxi University (Philosophy and Social Science Edition), No. 6, 2017.

[11] IMO, 'Report of the Thirty-first Consultative Meeting and the Fourth Meeting of Contracting Parties' LC 31/15 (30 November 2009).

[12] IMO, 'Report of the Thirty-first Consultative Meeting and the Fourth Meeting of Contracting Parties' LC 31/15 (30 November 2009).

[13] IMO, 'Report of the Forty-first Consultative Meeting and the Fourteenth Meeting of Contracting Parties' LC 41/17 (17 October 2019).

[14] Global CCS Institute, The Global Status of CCS, 2021.

[15] Viktor Weber, Are We Ready for the Ship Transport of CO2 for CCS? Crude Solutions from International and European Law, Review of European, Comparative & amp; International Environmental Law (2021), p. 4. amp; International Environmental Law, 2021.

[16] IMO, 'CO2 Sequestration in Sub-Seabed Geological Formations - Proposed Resolution on the Provisional Application of the 2009 Amendment to Article 6 of the London Protocol' LC 41/6 (2 August 2019). 2009 Amendment to Article 6 of the London Protocol' LC 41/6 (2 August 2019).

[17] Global CCS Institute, The Global Status of CCS, 2021; IPCC Special Report on Carbon Dioxide Capture and Storage, at p.5, para.6; Carbon Capture for marine and offshore industries, available at . and offshore industries, available at https://ww2.eagle.org/content/dam/eagle/articles/abs-carbon-capture-for-offshore-industry-ccj- 2021.pdf.

[18] ILC, Draft Guidelines and Draft Annex Cconstituting the Guide to Provisional Application of Treaties With Commentaries Thereto, A/76/10 (8 October 2021), pp. 153-166, available at: . 2021), pp. 3-4, available at: http://legal.un. org/docs/?path=..... /ilc/texts/ instruments/ english/ commentaries / 1_12_2021.pdf&lang=EF.

[19] Yukos Universal Limited (Isle of Man) v The Russian Federation, PCA Case No AA 227, Final Award, 18 July 2014; Veteran Petroleum Limited (Cyprus) v. The Russian Federation, PCA Case No AA 228, Final Award, 18 July 2014; Zhang Jian, "Study on the Mechanism of Provisional Application of the <Energy Charter Treaty> to the Signatory States", in Gansu Institute of Politics and Law Journal, No. 6, 2016.

[20] ILC, Draft Guidelines and Draft Annex Constituting the Guide to Provisional Application of Treaties, (8 October 2021), p.69, para. (3), available at. http://legal.un.org/docs/?path=... /ilc/ texts/ instruments/ english/draft_ articles/1_12 _2021. Pdf & lang=EF

[21] Yoshifumi Tanaka, The International Law of the Sea, Cambridge University Press , 2019.

[22] Viktor Weber, Are We Ready for the Ship Transport of CO2 for CCS? Crude Solutions from International and European Law, Review of European, Comparative & amp; International Environmental Law. 2021.

[23] D Langlet, Exporting CO2 for Sub-Seabed Storage: the Non-Effective Amendment to the London Dumping Protocol and Its Implications, International Journal of Marine and Coastal Law, 2015.

[24] Malcolm N. Shaw, International Law (9th edition), Cambridge University Press, 2021.

[25] Krieger, Provision Application, in Vienna Convention on the Law of Treaties, A Commentary, Oliver Dorr&Kirsten Schmalenbach eds, Berlin. Springer, 2012.

[26] Anneliese Quast Mertsch, Provisionally Applied Treaties: Their Binding Force and Legal Nature, Martinus Nijhoff Publishers, 2012, p. 173.

[27] Mathew Belz, Provisional Application of the Energy Charter Treaty: Kardassopoulos v. Georgia and Improving Provisional Application in Multilateral Treaties, 22 Emory International Law Review, 2008, pp. 3-44. Treaties, 22 Emory International Law Review, 2008, pp.748-749.