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The protocol on provisional application and customary International Law: a clever way of preventing France from de-railing the train towards the UPC

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This month of October will fade away, leaving behind it the "Protocol to the Agreement on a Unified Patent Court on Provisional Application", done at Brussels on 1 October 2015, the purpose of which – as its name suggests – is to provisionally apply Articles 1-2, 4-5, 6(1), 7, 10-19, 35(1, 3 and 4), 36-41 and 71(3) of the Agreement on a UPC and Article 1-7(1), 7(5), 9-18, 20(1), 2-28, 30,32 and 33 of the Statute of the UPC. This was required, in order to have a "warm-up" period before the UPC becomes operational. Before then, Judges will have to be selected and appointed, "opt-outs" will have to be managed and registered, etc. All this had not been possible without this transitional phase.

The "provisional application" is a procedure governed by Article 25 of the Vienna Convention on the Law of Treaties (1969), which allows the prospective parties to the treaty to agree the provisional application of some or all of its provisions before it comes into force. However, while the parents of the UPC were considering the need to bring forward the application of the provisions mentioned above, they had an unpleasant surprise: France is not a party to the Vienna Convention, the mother of all international treaties.

And so now, what? A possible solution could be to see if, notwithstanding the fact that France is not a party to such Convention, it could be argued that it was otherwise bound by the rule governing the provisional application of international treaties. In the Nicaragua v. U.S. case (1986), where this author's mentor (professor Abram Chayes) had the courage to defend Nicaragua against his own country, the International Court of Justice made it clear that a rule of international law may co-exist, both as a provision of a treaty, and as an international custom. So, in principle, the fact that a country is not bound by the rule of an international treaty does not necessarily mean that it is not bound by such rule, as it may exist in the form of an international custom, or even in the form of a general principle of international law.

In the case of the Protocol to the Agreement on a UPC on Provisional Application, the next question was, of course, whether Article 25 of the Vienna Convention enshrines a rule of international customary law at all. Although the debates within the United Nation's International Law Commission show that the answer to this question is not free from doubt, the countries that signed the Protocol followed a pragmatic approach and inserted a Recital "ACKNOWLEDGING that the use of provisional application is in accordance with customary international law."

All in all, this was a clever way of preventing the penultimate obstacle found in the way of the UPC, from de-railing the train.

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