



**PERMANENT MISSION OF NORWAY
TO THE UNITED NATIONS**

New York

The Permanent Mission of Norway to the United Nations presents its compliments to the Secretariat of the United Nations, Codification Division, Office of Legal Affairs, and has the honour to refer to the Report of the International Law Commission at its sixty-fifth session (A/68/10) Chapter III C, paragraph 27 in which the Commission requests States to provide information on their practice concerning the provisional application of treaties, with examples, in particular in relation to the following topics:

- (a) The decision to provisionally apply a treaty;
- (b) The termination of such provisional application; and
- (c) The legal effects of provisional application.

Please find Norway's observations in the enclosed annex.

The Permanent Mission of Norway to the United Nations avails itself of this opportunity to renew to the Secretariat of the United Nations, Codification Division, Office of Legal Affairs, the assurances of its highest consideration.

New York, January 31st, 2014



Secretariat of the United Nations
Codification Division,
Office of Legal Affairs
New York

ILC - Provisional Application of Treaties

Reference is made to the Report of the International Law Commission at its sixty-fifth session (A/68/10) Chapter III C, paragraph 27 in which the Commission requests States to provide information on their practice concerning the provisional application of treaties, with examples, in particular in relation to the following topics:

- (a) The decision to provisionally apply a treaty;
- (b) The termination of such provisional application; and
- (c) The legal effects of provisional application.

Norway has the honour to submit the following observations in response to the Commission's request:

(a) The decision to provisionally apply a treaty in Norway

In the Norwegian State practice, a decision on the provisional application of a treaty requires observance of the same constitutional procedures as for a decision regarding formal entry into force.

If the expression of a consent to be bound by a treaty requires a particular decision by the Government pursuant to the Norwegian Constitution, a similar decision would therefore have to be made in order to be able to apply that treaty provisionally. This signifies that the decision would have to be taken at the same levels and following the same procedures as for a decision regarding formal entry into force. Should, for example, the entry into force of a treaty require a prior parliamentary approval, a similar requirement would apply for the provisional application of that treaty.

In the following, a brief overview is provided of the constitutional powers concerning treaty matters, pursuant to the Norwegian Constitution of 17 May 1814:

- (i) Pursuant to Section 26 (1) of the Norwegian Constitution, it is the King (the Executive Branch) that is entitled to conclude treaties on behalf of Norway. In conformity with established constitutional practice, decisions on conclusion of treaties are thus made by the Executive. The same applies to decisions on provisional application.
- (ii) In case the treaty concerns “important” matters, Section 28 of the Constitution sets out an additional requirement. A formal decision by the King in Council, taken by Royal Decree, would be necessary before a consent to be bound by the treaty may be expressed. The same applies to decisions on provisional application of such a treaty.
- (iii) In case the treaty concerns matters of “special importance”, Section 26 (2) of the Constitution states that it may not become binding before the Parliament (the *Storting*) has given its consent thereto. This also applies to treaties whose implementation necessitates the passing of a new statutory law or other decisions by the *Storting*. A practical example concerns treaties whose implementation requires funding, which is subject to parliamentary approval. Parliamentary consent will also be necessary for the provisional application of such a treaty. In such cases, the necessary legislation or appropriation of funds has to be in place prior to provisional application. If a treaty is inconsistent with existing legislation, amendments to the legislation have to be both adopted and in force prior to any provisional application.

(b) The termination of such provisional application

The termination of the provisional application of a treaty is considered to be regulated by international customary law as reflected in Article 25 of the Vienna Convention on the Law of Treaties of 23 May 1969 (1155 UNTS 331). A treaty may thus be applied provisionally, pending its entry into force, and the provisional application will be terminated when the treaty enters into force according to the provisions of the treaty or at a time specified by the treaty, or on the basis of a notification under the conditions set out in Article 25 (2) of the said Convention.

According to Section 26 (1) of the Norwegian Constitution, not only the powers to conclude treaties, but also the powers to terminate treaties are vested in the Executive (the King). However, there is no requirement similar to Section 26 (2) as to parliamentary approval for the termination of a treaty. The decision to terminate a treaty, and thus to terminate the provisional application of a treaty, is thus entirely vested in the Executive (the King). It would depend on an assessment of the nature of the treaty in accordance with Section 28 of the

Constitution, whether such a decision would require a formal decision by the King in Council, or may be taken at ministerial levels.

(c) The legal effects of provisional application

In Norway, a treaty which is applied provisionally will have the same legal effects as a treaty which has entered into force. A provisionally applied treaty will be implemented as a treaty which is formally in force, pending entry into force or termination of provisional application.

(d) General observations

From the above observations it may be deduced that Norwegian State practice does not constitutionally distinguish between provisional application and entry into force of a treaty, as regards the domestic approval procedures. For the same reasons, Norway has rarely been itself in a position to require the provisional application of a treaty.

Not many treaties are or have been provisionally applied in Norway. Nevertheless, some treaties with the European Union and its member states have been applied on a provisional basis from the date of signature, especially when ratification by all parties has been a precondition for formal entry into force. It may take a certain amount of time to complete the constitutional requirements for ratification in the necessary number of States parties, and provisional application may in such cases provide a suitable instrument to bring the treaty into early effect. Agreements on enlargements of the European Economic Area and related agreements have been applied provisionally through agreements in the form of exchange of letters between Norway and the European Community.

Among other examples of this practice is the Cooperation Agreement on Satellite Navigation between Norway and the European Union and its Member States, signed on 22 October 2010, which has been applied provisionally between Norway and the EU from 1 May 2011, pending its formal entry into force. There are also some examples of bilateral treaties that have been applied provisionally.

Partial provisional application is also possible when the terms of the treaty provide for it. The decision on provisional application of the relevant part of the treaty is subject to the constitutional rules on decision-making by Parliament or the Government referred to in (a) above. The 2013 Arms Trade Treaty states in article 23 that "Any State may at the time of signature or the deposit of instrument of its of ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State." The question of partial provisional application and issuance of a

declaration to that effect was discussed in a white paper (Prop. 186 S 2012-2013) in which the *Storting* was invited to give its consent to Norwegian ratification.

Provisional application of a treaty is registered in the Norwegian Public Registry for treaties, but the text of a provisionally applied treaty is not published until it is formally in force for Norway.