INTERNATIONAL LAW COMMISSION

PROVISIONAL APPLICATION OF TREATIES

COMMENTS FROM THE GOVERNMENT OF
THE FEDERATED STATES OF MICRONESIA

31 JANUARY 2014

1. The Government of the Federated States of Micronesia (FSM) welcomes the opportunity to present comments to the International Law Commission (ILC) on the topic of provisional application of treaties. The mechanism of provisional application of treaties deserves a thorough examination and clarification of its scope and content. The international community, in recent years, has shied away from adopting multilateral treaties to address pressing international concerns of mutual interest. In this climate, the few multilateral treaties that are negotiated and opened for signature and ratification struggle to attain sufficient ratifications in order to enter into force. The mechanism of provisional application is an increasingly necessary tool for putting treaty imperatives into action in a timely manner.

2. As a preliminary matter, the FSM notes that Article 25 of the 1969 Vienna Convention on the Law of Treaties (VCLT) should be the foundation of the mechanism of provisional application of treaties, and should therefore be the focus of the study of the mechanism by the ILC.[1] Although the FSM is not a State Party to the VCLT, the FSM is of the view that Article 25 of the VLCT is part of customary international law, even though the specific content and scope of Article 25 are still a matter of some discussion in international law.

3. As another preliminary matter, the FSM asserts that although there is no precise definition of the mechanism of provisional application of treaties in international law, it is generally understood to describe a practice wherein a State applies some or all of the provisions of a treaty that it has either signed but not yet ratified; or that it has ratified/acceded to, but which has not received enough ratifications from other States to enter into force internationally. This provisional application normally lasts until the State ratifies the treaty, the treaty enters into force internationally, or the State indicates (after a period of provisional application) that it does not intend to ratify the treaty.

4. As a final preliminary matter, the FSM stresses that the mechanism of provisional application of treaties should not be seen as a replacement for the full and timely ratification and entry into force of treaties. States typically engage in provisional application in order to implement the provisions of a treaty in a speedy fashion without having to wait for the treaty to go through all the formalities of entering into force (whether domestically or internationally). In clarifying the mechanism, the ILC should refrain from advocating for its use; the full ratification and entry into force of treaties must remain the end goal of any treaty-making process, with provisional application playing an important—but limited—role in hastening the implementation of treaty principles by willing States.

5. On a number of occasions, the FSM either provisionally applied a treaty or assented to a treaty that allowed for its provisional application. The endorsement and use of the mechanism of provisional application by the FSM stemmed, in large part, from a need to ensure the consistent application of treaty obligations by all interested States while

[1] *See* Vienna Convention on the Law of Treaties art. 25, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

awaiting national ratification processes. In all such occasions, it was the position of the FSM that the provisional application of treaties would not be inconsistent with national ratification processes of those States that assented to provisional application. In other words, the FSM presumed that a State that agreed to provisionally apply a treaty could do so without violating domestic legal requirements.

6. From 1947 to 1986, the FSM was administered by the United States of America as part of the United Nations Trust Territory of the Pacific Islands (TTPI). During its administration of the TTPI, pursuant to the United Nations Trusteeship Agreement for the former Japanese Mandated islands, the United States of America entered into a number of treaties on behalf of the TTPI, as well as applied and extended a number of its own treaties to the TTPI. In a letter dated 22 May 1992,[2] the FSM notified the Secretary-General of the United Nations that the application of those treaties to the TTPI ceased on 3 November 1986, the date of termination of the Trusteeship. Furthermore, according to the letter, the FSM announced that it would examine all bilateral treaties validly concluded by the United State of America on behalf of the FSM, or validly applied or extended by the former to the latter before November 3, 1986, in order to determine if the FSM would succeed to the TTPI's now-defunct obligations under those treaties (whether in whole or in modified form). In the meantime, the FSM would "continue to observe the terms of each treaty which validly so applie[d] and [was] not inconsistent with the letter or the spirit of the Constitution of the Federated States of Micronesia, provisionally and on a basis of reciprocity."[3] The FSM's provisional application of those treaties, pending the completion of their examination by the FSM, was originally slated to terminate on 3 November 1995, but the FSM subsequently extended that period of provisional application to 3 November 1997, as indicated in a 2 November 1995 letter from the FSM to the Secretary-General of the United Nations.[4] The FSM's decision to provisionally apply those bilateral treaties during the period of examination stemmed in part from the wish of the FSM to maintain cordial diplomatic relations that would enable the FSM to reach satisfactory accord with the States Parties concerned regarding the possibility of the continuance or modification of their treaty relations.

7. On 10 August 1994, the FSM signed the 1994 Agreement relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea (Implementation Agreement). Article 7 of the Implementation Agreement requires, *inter alia*, that a State that signed the Implementation Agreement had to provisionally apply the Implementation Agreement beginning on 16 November 1994 if the Implementation Agreement had not entered into force internationally by that date, unless the State notified the depositary of the Implementation Agreement that it would opt out of provisional application.[5] The Implementation Agreement did not enter into force internationally until 28 July 1996, and the FSM never submitted an opt-out notification to the depositary, so the FSM proceeded

[2] For the full text of the letter, *see* https://treaties.un.org/Pages/HistoricalInfo.aspx?#%22Micronesia%20%28Federated%20States%20of%29%22 (last visited Jan. 30, 2014).
[3] Id.
[4] *See* id.
[5] Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 art. 7(1)(b), July 28, 1994, 1836 U.N.T.S. 3.

to provisionally apply the Implementation Agreement. The FSM was of the view that the Implementation Agreement deserved to be effectuated in a timely manner, given the difficulties in preceding years of putting Part XI of the 1982 United Nations Convention on the Law of the Sea into action.

8. Pursuant to Article 7 of the Implementation Agreement, the FSM had to provisionally apply the Implementation Agreement until it entered into force. Thus, the FSM's provisional application of the Implementation Agreement terminated on 16 November 1996, when the Implementation Agreement acquired a sufficient number of State ratifications to enter into force. However, the FSM actually ratified the Implementation Agreement on 6 September 1995. Thus, the FSM arguably provisionally applied the Implementation Agreement for 14 months even though the FSM was already a State Party to the Implementation Agreement during that time.

9. For the FSM, there were no legal distinctions between the FSM's provisional application of the Implementation Agreement during that 14-month period and the FSM's status as a full State Party to the Implementation Agreement in the same period. However, the FSM is aware that there may be some controversy in international law over whether a State that ratifies a treaty can still be allowed to provisionally apply that same treaty. Does it matter whether the treaty has not entered into force internationally? Should the issue be resolved by examining the text of the treaty, the *travaux préparatoires* of the treaty, or by applying rules of customary international law? The FSM looks forward to the ILC's examination of these questions.

10. The FSM has provisionally applied a number of fisheries agreements with other States. The 1982 Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest calls for, *inter alia*, the establishment of minimum terms and conditions for tuna purse seining operations in a subregion that contains the FSM, Kiribati, the Marshall Islands, Nauru, Palau, Papua New Guinea, the Solomon Islands, and Tuvalu.[6] The Parties to the Nauru Agreement have adopted a number of Implementing Arrangements that establish those minimum terms and conditions, including: the First Implementing Arrangement Setting Forth Minimum Terms and Conditions of Access to the Fisheries Zones of the Parties;[7] the Second Implementing Arrangement Setting Forth Additional Terms and Conditions to the Fisheries Zones of the Parties;[8] and the Third Implementing Arrangement Setting Forth Minimum Terms and Conditions of Access to the Fisheries Zones of the Parties.[9] The Parties to the Nauru Agreement—including the FSM—agreed to provisionally apply those Implementing Arrangements pending the conclusion of national approval processes (where necessary). It was the view of the FSM that the mechanism of provisional application was crucial in order to ensure the orderly

[6] Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest, Feb. 11, 1982.
[7] For the text of the Arrangement, *see* http://www.pnatuna.com/sites/default/files/1st%20Implementing%20Arrangement.pdf (last visited Jan. 30, 2014).
[8] For the text of the Arrangement, *see* http://www.pnatuna.com/sites/default/files/2nd%20Implementing%20Arrangement.pdf (last visited Jan. 30, 2014).
[9] For the text of the Arrangement, *see* http://www.pnatuna.com/sites/default/files/3rd%20Implementing%20Arrangement%20%28Amended%20-%2011September%202010%29.pdf (last visited Jan. 30, 2014).

continuation of lucrative fisheries operations in the subregion covered by the 1982 Nauru Agreement.

11. It should be noted that the texts of the Implementing Arrangements did not explicitly call for their provisional application. Instead, the Parties to the Nauru Agreement entered into separate agreements that called for, *inter alia*, the provisional application of the respective Implementing Arrangements. For the FSM, it is not necessary for the text of a treaty to call for provisional application; negotiating States can enter into a separate agreement to provisionally apply some or all provisions of a treaty, as noted in Article 25(1)(b) of the VCLT.

12. It should also be noted that the FSM terminated its provisional application of the First and Third Implementing Arrangements when the FSM ratified those Arrangements in accordance with the FSM's domestic constitutional requirements, whereas the FSM terminated its provisional application of the Second Implementing Arrangement when the FSM signed the Arrangement as an executive agreement that did not have to be ratified in accordance with the FSM's domestic constitutional requirements. However, a number of other Parties to the Nauru Agreement had not completed their national approval processes with regard to those Implementing Arrangements when the FSM terminated its provisional application of those Arrangements, and so the FSM continued to treat with those Parties while they provisionally applied the relevant Arrangements.

13. On 7 May 2010, the FSM initialed the Protocol to the Fisheries Partnership Agreement between the European Community and the Federated States of Micronesia.[10] According to Article 15 of the Protocol, the FSM and the European Community agreed to provisionally apply the Protocol from the time of its signature. Normally, the initialing of an international agreement like the Protocol does not constitute a signature under international law, and the FSM does not view its initialing of the Protocol to be tantamount to a signature. The FSM has not yet signed the Protocol. Thus, the FSM is not provisionally applying the Protocol. However, were the FSM to sign the Protocol, the FSM would assume the obligation to provisionally apply the Protocol pending its ratification.

14. During the Conference of the Parties serving as the eighth meeting of the Parties to the Kyoto Protocol for the United Nations Framework Convention on Climate Change from 26 November to 8 December 2012, the FSM—a State Party to the Kyoto Protocol—joined consensus to adopt Decision 1/CMP.8, which amended the Kyoto Protocol to, *inter alia*, renew its emissions reductions commitments period.[11] According to the Decision, States may provisionally apply the terms of the amendment prior to the amendment receiving enough ratifications from States to enter into force (which, to date,

[10] For the text of the Protocol, *see* Council Decision 2011/116, 2011 O.J. (L 052) (EU).

[11] For the text of the Decision, *see* Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, Decision 1/CMP.8, Amendment to the Kyoto Protocol pursuant to its Article 3, paragraph 9, *Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its eight session, held in Doha from 26 November to 8 December 2012*, at 3, U.N. Doc. FCCC/KP/CMP/2012/13/Add.1 (Feb. 28, 2013), *accessed* at http://unfccc.int/resource/docs/2012/cmp8/eng/13a01.pdf.

has not occurred). The FSM does not intend to provisionally apply the amendment—primarily because the FSM, as a non-Annex I country, does not have emissions reductions commitments under the amendment—but the FSM supported consensus on Decision 1/CMP. 8 and will honor any declaration by States Parties to the Kyoto Protocol to provisionally apply their own commitments under the amendment. As with the FSM's approach to the provisional application of its fisheries agreements and of its bilateral treaty relations with States after the termination of the TTPI, the FSM supports the provisional application of the amendment to the Kyoto Protocol because of the pressing need to maintain continuity between successive and overlapping legal regimes and ensure the timely implementation of important treaty measures while States commence and conclude national approval processes.

15. On 2 April 2013, the FSM joined 153 other Members of the United Nations in voting in favor of the adoption of the Arms Trade Treaty (ATT) by the United Nations General Assembly. According to Article 23 of the ATT, a State may provisionally apply Articles 6 and 7 of the ATT from the point when the State signs the ATT or deposits an instrument of ratification, approval, or accession for the ATT.[12] This provisional application terminates when the ATT enters into force for that particular State. Although the FSM has neither signed nor ratified the ATT, this is primarily due to the fact that the FSM is not an exporter or trans-shipper of conventional arms, and imports a very low number of conventional arms for limited law-enforcement purposes. Furthermore, the FSM supports the ATT's clause on provisional application as a valid legal mechanism for States to employ in order to hasten the regulation of the international trade in conventional arms, particularly trade by those States which are major exporters, importers, and trans-shippers of the conventional arms covered by the ATT.

16. As a concluding matter, the FSM notes that the provisional application of treaties has legal weight for the FSM insofar as it facilitates the continued smooth operation of existing activities and conditions of mutual interest to the FSM and other negotiating States while the FSM and other negotiating States conclude national approval process. When a negotiated treaty requires the adoption and implementation of new domestic laws and regulations by the FSM, the FSM's provisional application of that treaty is subject to the ratification of that treaty by the FSM National Congress before the FSM carries out the activities prescribed by those new laws and regulations. In either case, it is the policy of the FSM to allow its representatives during treaty negotiations to agree for the FSM to provisionally apply some or all the provisions of the negotiated treaties without seeking prior approval—from the FSM National Congress or any other government entity outside of the FSM's Executive Branch—for the practice of provisional application.

[12] Arms Trade Treaty art. 23, June 3, 2013.