

C. **Provisional application of treaties**

The provisional application of a treaty is vigorously used by the Russian Federation in the practices of inter-State intercourse.

As a rule, the Russian Federation resorts to provisional application of a treaty in exceptional cases in which the subject of a treaty is of particular interest both to Russia and to its counterparty, as a result of which both are interested in “jump-starting” the mechanism of the treaty without waiting for it to enter into force.

At present, Russia is provisionally applying more than 120 treaties pertaining to, by and large, questions of trade, power engineering, and customs tariff regulation.

The question of the provisional application of treaties in the Russian Federation at the national level is governed by the Federal Law on Russian Federation Treaties, paragraph 1 of article 23 of which essentially reproduces paragraph 1 of article 25 of the Vienna Convention on the Law of Treaties: “A treaty or part of a treaty, before its entry into force, may be applied by the Russian Federation provisionally if the treaty provides so or if agreement to that end has been reached by the treaty signatories”.

The provision on provisional application of a treaty is, in most cases, entered to the text itself of a draft treaty. As a rule, the following language is used:

“This Agreement shall be provisionally applied as of the date of signature” (Agreement between the Government of the Russian Federation and the Government of the Republic of Serbia on Deliveries of Natural Gas from the Russian Federation to the Republic of Serbia of 13 October 2012);

“This Agreement shall commence to be provisionally applied 30 days after the date of signature” (Agreement between the Government of the Russian Federation and the Government of the Republic of Azerbaijan on the Construction of an Automobile Bridge across the Samur River in the Vicinity of the Yarag-Kazmalyar (Russian Federation) and Samur (Republic of Azerbaijan) Checkpoints on the Russian–Azerbaijan State Border of 13 August 2013).

Sometimes, in order to prevent excessive delays in the completion of the internal procedures necessary for the entry into force of a treaty, the treaty specifies the period of provisional application. For example, the Agreement between the Russian Federation and the Republic of Tajikistan on Cooperation on Border Matters of 2 September 2011 contains this language: “This Agreement shall be provisionally applied as of the date of signature for a period of 6 months and shall enter into force as of the date of receipt of the final written notification of the completion by the Parties of the internal procedures necessary for its entry into force. If, within that 6-month period, the Parties have not completed the internal procedures necessary for the entry into force of this Agreement, the Agreement shall terminate its provisional application”.

Cases of the provisional application of only part or parts of a treaty (Protocol to the Treaty between the Russian Federation and the United States of American on Measures for the Further Reduction and Limitation of Strategic Offensive Arms of 8 April 2010) and cases of the resumption of provisional application (Agreement on the Resumption of the Provisional Application of the Agreement between the Government of the Russian Federation and the

Government of the Kingdom of Morocco on Cooperation in the Field of Marine Fisheries of 3 June 2010) are also not unknown to Russian practice.

Under the above-mentioned federal law, the decision on the provisional application by the Russian Federation of a treaty is taken by the Government of the Russian Federation or the President of the Russian Federation (depending on within whose competence the questions constituting the subject of the treaty reside). If a provision on the treaty's provisional application is included in the draft treaty, it is approved by the Government or by the President when the decision is made to sign the treaty. For example, the 10 December 2013 Order of the Russian Government No. 2315-r on the Signature of the Protocol between the Government of the Russian Federation and the Government of the Republic of Belarus on the Extension of the Term of the Agreement on the Arrangements for the Payment and Remittance of Export Customs Duties (and Other Duties, Taxes, and Fees of Equivalent Effect) in the Export of Crude Oil and Certain Categories of Petroleum Derivatives from the Territory of the Republic of Belarus to Points Outside the Customs Territory of the Customs Union of 9 December 2010).

In all other cases (when a provision on a treaty's provisional application is not included in the draft treaty), the Government of the Russian Federation and the President of the Russian Federation take separate decisions on that score. Such cases include, for example, the 17 December 1993 Order of the Russian Government No. 767-rn on the Provisional Application of the Agreement Establishing an International Science and Technology Centre; the 17 March 1997 Decree of the Government of the Russian Federation No. 324 on the Provisional Application of the Protocol to the Partnership and Cooperation Agreement Establishing a Partnership between the European Communities and their Member States, on the One Part, and the Russian Federation, on the Other Part.

The Federal Law on Russian Federation Treaties establishes specific limitations on the provisional application of a treaty the decision on the consent to be bound by which is, for the Russian Federation, taken in the form of a federal law (as a rule, ratification). Such treaties must be submitted to the State Duma of the Federal Assembly of the Russian Federation within a period of no more than six months after the date of the commencement of its provisional application (second paragraph of article 23 (2) of the Law).

It is important to bear in mind that the failure to submit the treaty to the State Duma within the period indicated does not automatically result in consequences in international law that take the form of the termination of its provisional application. That would contravene both article 23 of the Law and article 18 of the 1969 Vienna Convention on the Law of Treaties, according to which, for the termination to result, the intention to not become a party to the treaty must be clearly expressed. Serving as the legal basis for Russia's expression of such an intention would be a decision to that effect that is taken in the same manner as is a decision to begin the provisional application.

The Russian Federation's consent to the provisional application of a treaty means that the treaty becomes part of the legal system of the Russian Federation and is subject to application on an equal basis with treaties that have entered into force.

The question of the provisional application of treaties has also been the subject of consideration in the Constitutional Court of the Russian

Federation, to which in 2012, citizen I. D. Ushakov applied with a request that article 23 (1) of the Law, which provides for the possibility of the provisional application by the Russian Federation of a treaty or part of it, be declared inconsistent with the Constitution of the Russian Federation. The reason for applying to the Constitutional Court was that Russian customs authorities had ordered that citizen to pay customs duties not on the basis of the Russian Federation Customs Code, but on the basis of a provisionally applied treaty that set higher rates for customs charges.¹ The claimant asserted that the treaty was not subject to application, because it has not been officially published (under the above-mentioned Federal Law, only treaties that had entered into force were subject to official publication at that time).

In its decision on that case (27 March 2012 ruling No. 8-P), the Constitutional Court declared, inter alia, that the provisional application of treaties by Russia did not contravene the Constitution of the Russian Federation. The Constitutional Court pointed to the fact that “deeming article 23 (1) of the Federal Law on Russian Federation Treaties as not contravening the Constitution of the Russian Federation ... does not call into question the Russian Federation’s obligation to comply in good faith in inter-State relations with the universally recognized principle of international law *pacta sunt servanda* (articles 26 and 27 of the Vienna Convention on the Law of Treaties) and, as a general rule, cannot serve as justification for the failure of the Russian Federation to perform the obligations arising from treaties it is provisionally applying in relations with other States parties”.

At the same time, the Constitutional Court ordered the federal legislature to establish rules for the official publication of provisionally applied treaties of the Russian Federation that affect human and civil rights, freedoms, and duties and that set rules other than those specified by the law. Adopted pursuant to that decision of the Court was the Federal Law on the Amendment of Article 30 of the Federal Law on Russian Federation Treaties and of Article 9.1 of the Federal Law on Rules for the Publication and Entry into Force of Federal Constitutional Laws, Federal Laws, and Acts of the Houses of the Federal Assembly, which stipulates the following rules for the publication of provisionally applied treaties:

“A treaty that makes provision for, before entry into force, the Russian Federation’s provisional application of all or parts of the treaty or an accord on the provisional application of which that is reached in some other manner (with the exception of treaties of an interdepartmental nature) shall, at the request of the Ministry of Foreign Affairs of the Russian Federation, be subject to immediate publication in the Bulletin of Treaties and to placement (publication) on the Official Internet Portal of Legal Information (www.pravo.gov.ru)”.

¹ Agreement on the Rules for the Movement of Goods by Individuals across the Customs Border of the Customs Union and for the Performance of Customs Operations Associated with Their Release, of 18 June 2010 (between Russia, Belarus, and Kazakhstan).