

*Translated from Spanish*

## **Provisional application of treaties**

Observations of the Republic of El Salvador

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The Republic of El Salvador is submitting this report pursuant to General Assembly resolution 72/116, entitled “Report of the International Law Commission on the work of its sixty-ninth session”, in which the Assembly drew the attention of Governments to the importance for the International Law Commission of having their comments and observations on the topic “Provisional application of treaties”, and, in particular, on the specific issues identified in the report of its sixty-seventh session (A/70/10), in which States were requested to provide information on their practice concerning the provisional application of treaties, including domestic legislation pertaining thereto, with examples, concerning: (1) the decision to provisionally apply a treaty; (2) the termination of such provisional application; and (3) the legal effects of provisional application.

In view of the foregoing, the subject matter of the present report is structured in the following order: (I) the legal status of international treaties in the Salvadoran legal system; and (II) an explanation of the practice of the Salvadoran State in the conclusion of international treaties having clauses that require their provisional application.

### **I. Legal status of international treaties in the Salvadoran legal system**

The domestic legislation of the Republic of El Salvador assigns a particular legal status to international treaties on the basis of a constitutional provision. Article 144 of the Constitution states: *“The international treaties concluded by El Salvador with other States or with international organizations constitute laws of the Republic on entry into force, in accordance with the provisions of the treaty in question and with this Constitution. The law may not modify or derogate from what has been agreed in a treaty in force for El Salvador. In the event of a conflict between a treaty and a law, the treaty shall prevail.”*

In addition, treaties that restrict or in any way affect constitutional provisions shall not be ratified unless ratification is carried out with the corresponding reservations. The provisions of the treaty in respect of which reservations have been made shall not be the law of the Republic (article 145 of the Constitution).

Given that, in the domestic legal system, no specific law has been adopted on the implementation of international treaties, the only provisions that regulate this area are the ones

mentioned above. Accordingly, the Constitution attaches the same force of law to treaties as to laws, and even gives precedence to treaties in the event of a conflict between the implementation of a treaty and a law. Therefore, decisions on the provisional application of such instruments, their termination and the legal effects of their provisional application shall comply with the relevant provisions of those treaties while respecting the constitutional parameters defined in the aforementioned articles.

The Constitutional Chamber of the Supreme Court of Justice of El Salvador has established in its jurisprudence that treaties are an expression of the conscience of the international community and that, when they are ratified by El Salvador, those universal values, precepts and principles (habeas corpus proceedings, 19-R-96, judgment of 7 August 1996) become the country's own.

In that vein, the Constitutional Chamber has held that the Constitution of each State provides rules for the process of entry into force of international treaties in domestic law, their implementation in domestic law, and the regulation of legal relationships between treaties and rules of domestic law (unconstitutionality proceedings, 10-2000, judgment of 11 November 2003).

## **II. Explanation of the practice of the Salvadoran State in the conclusion of international treaties having clauses that require their provisional application**

Given the nature of the Salvadoran legal system, the present report will now explain State practice with regard to the ratification of treaties containing provisional application clauses.

The Republic of El Salvador has concluded and ratified three treaties on trade and cooperation that contain clauses referring explicitly to provisional application, namely:

### **➤ Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other**

Rounds of negotiations between the European Union and Central America for the conclusion of an association agreement began in 2007. The Salvadoran State, as a member of the Central American Integration System, was a party to the negotiations leading to the conclusion of the agreement, and ratified it through Legislative Decree No. 410 of 4 July 2013, published in Official Gazette No. 127, vol. 400, on 11 July 2013.

Article 353 of the agreement stipulates that, for its entry into force, the parties shall approve the agreement in accordance with their internal legal procedures, and it shall enter into force the first

day of the month following that in which the parties have notified each other of the completion of those procedures.

However, the fourth paragraph of article 353 reflects the provisional application of part of the agreement, namely the trade pillar, according to which: “4. *Notwithstanding paragraph 2, Part IV of this Agreement may be applied by the European Union and each of the Republics of the CA Party from the first day of the month following the date on which they have notified each other of the completion of the internal legal procedures necessary for this purpose. In this case, the institutional bodies necessary for the functioning of the Agreement shall exercise their functions*”.

Therefore, by virtue of that paragraph, the parties may provisionally apply the provisions relating to the establishment of a free trade area and the objectives for promoting trade in goods between the States parties to the agreement.

➤ **Free Trade Agreement between the Republic of Colombia and the Republics of El Salvador, Guatemala and Honduras**

Ratified by the Republic of El Salvador through Legislative Decree No. 699 of 21 August 2008, published in Official Gazette No. 171, vol. No. 380, on 12 September 2008.

In the particular case of this agreement, the clause concerning the provisional application of its content is not binding on the Salvadoran State. However, it is considered to be worth mentioning in order to demonstrate that El Salvador, as a party to the agreement, recognizes the possibility of regulating provisional application:

*“Article 21.6*

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*Without prejudice to article 21.3, this Agreement may be applied provisionally by the Republic of Colombia, in accordance with its constitutional requirements, from the date of its signature and until its definitive entry into force. Provisional application shall also cease at the moment when the Republic of Colombia notifies the other Parties of its intention not to become a Party to the Agreement or its intention to suspend provisional application.”*

➤ **Millennium Challenge Compact between the United States of America, acting through the Millennium Challenge Corporation, and the Government of the Republic of El Salvador, acting through the Ministry of Foreign Affairs**

This Compact on cooperation was ratified by the Salvadoran State through Legislative Decree No. 836 of 31 October 2014, published in Official Gazette No. 206, vol. No. 405, on 5 November 2014.

For the provisional application of this instrument, two clauses were established: one relating to the administrative and funding activities required for the provisional application of the Compact and another regulating the procedure by which the parties would begin its provisional application, namely:

*“Section 7.5. **Provisional application:** Until this Compact has entered into force in accordance with Section 7.3, **the Parties will provisionally apply** the terms of this Compact from the date of a letter from the Government informing MCC that the Government is prepared to provisionally apply the Compact; provided that no MCC Funding, other than Compact Implementation Funding, will be made available or disbursed before this Compact enters into force.”*

In short, despite the absence of national legislation that specifically regulates the provisional application of treaties, the practice of the Salvadoran State has reflected the ratification of international treaties that contain clauses providing for their provisional application. Therefore, the Republic of El Salvador recognizes the need to provide clarity concerning the way in which such application operates in the context of treaty law, and will continue to support that work within the framework of the International Law Commission.

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