

37. Russian Federation

Communication transmitted to the Secretariat, 9 April 2014:⁹³

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 the Russian Federation 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, the Russian Federation is provisionally applying more than 120 treaties pertaining to, by and large, questions of trade, power engineering, and customs tariffs 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, included in the text itself of a draft treaty. As a rule, the following formulation 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*, 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*, 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 the following clause:

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.

⁹³ Unofficial translation (from Russian) by the United Nations Secretariat. The original submission is available at: https://legal.un.org/legislativeseries/pdfs/chapters/book26/russia_r.pdf.

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 America on Measures for the Further Reduction and Limitation of Strategic Offensive Arms*, 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*, 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. See, for example, the *Order of the Russian Government No. 2315-r, of 10 December 2013, 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*, 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. Such cases include, for example, the *Order of the President of the Russian Federation No. 767-rp, of 17 December 1993, on the Provisional Application of the Agreement Establishing an International Science and Technology Centre*; the *Decree of the Government of the Russian Federation No. 324, of 17 March 1997, 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 *Vienna Convention on the Law of Treaties*, 1969, according to which, for the termination to result, the intention to not become a party to the treaty must be clearly expressed. A decision to that effect, taken in the same manner as a decision to commence the provisional application, would serve as the legal basis for the Russian Federation's expression of such an intention.

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.⁹⁴ The claimant asserted that the treaty was not subject to application because it had 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 (ruling No. 8-P of 27 March 2012), 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 its 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. Pursuant to the decision of the Court 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*, was adopted. It stipulates the following rules for the publication of provisionally applied treaties:

A treaty that makes provision for the Russian Federation's provisional application, before entry into force, of all or parts of the treaty or an agreement 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).

Statement made in the Sixth Committee, Seventy-third session (2018), 26th meeting, 26 October 2018:⁹⁵

The Russian legislation on treaties is based on the provisions of the Vienna Convention on the Law of Treaties and allows for provisional application. The total number of treaties provisionally applied by the Russian Federation remains relatively unchanged—there are about one hundred such treaties. We believe however, that this concept is exceptional and should be used only when there is a real necessity to begin implementation of a treaty before its entry into force. The Legal Department of the Russian MFA is trying to maintain this policy. Nevertheless, we regularly confront practical issues of various natures.

⁹⁴ *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*, 18 June 2010 (between the Russian Federation, Belarus, and Kazakhstan).

⁹⁵ Unofficial translation (from Russian) provided by the Russian Federation. Text in Russian available at: https://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/russia_2.pdf.

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Recently we witnessed another interesting incident. The Russian Federation terminated its provisional application of a multilateral treaty by notifying the depositary on its intent not to become a party to it. At the same time the depositary of the treaty is interpreting the situation in such a way that Russia terminated the provisional application of the treaty but remains bound by the obligations deriving from the signing of the treaty. On our part, we proceed from the understanding that the sending of notification of intention not to become a party to the treaty does not only terminate its provisional application but also lifts all obligations of the State deriving from its signature. Nevertheless, there is a subject for research on that issue as well.