42. South Africa

Statement made in the Sixth Committee, Sixty-ninth session (2014), 26th meeting, 3 November 2014:[100]

> In South Africa, new procedures for the conclusion of treaties were introduced in democratic South Africa, first by the *Interim Constitution of the Republic of South Africa, 1993, and finally by the Constitution of the Republic of South Africa*, 1966. In view of the enhanced status the 1996 Constitution accords to international law, it may be of particular relevance to … consider South African law with respect to the formation and domestic effect of provisional applicable treaties.
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> The customary right of the State to enter into provisionally [applied] treaties is recognised in Section 232 of the 1996 Constitution. Unless the agreement on provisional application itself requires ratification, the power of the Executive to agree to the provisional application of a treaty without prior Parliamentary approval is established by the following sub-Sections of the Constitution:
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> > Sub-Section 231 (1) authorises the executive to negotiate and sign international agreements, which includes the power to negotiate and sign agreements on provisional application; and it can be inferred from sub-Section 231 (3) that the provisional application may commence without Parliamentary consent in three circumstances:
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> > (*a*) Where the treaty that is provisionally applied is of a technical, administrative or executive nature;
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> > (*b*) Where the agreement on provisional application of a treaty is itself an agreement of a technical, administrative or executive nature; and
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> > (*c*) Where the agreement on provisional application of a treaty is one that requires neither ratification nor accession.
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> Arguably these approaches encompass almost, if not all, of the methods by which a State may agree to apply a treaty provisionally. This may be done by the inclusion of a provision to this effect in the treaty itself, an agreement in simplified form, a resolution of a conference, or a notification or declaration of provisional application. In the South African context, whatever form it takes, an agreement on provisional application must be tabled in the National Assembly and the National Council of Provinces, the two Houses of Parliament, within a reasonable time—failure to do so may constitute a breach of the Constitution.
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> The Executive in South Africa may decline to ratify a treaty approved by Parliament should the other party/parties delay or refuse to ratify, the entire treaty has become obsolete, or there is a need to renegotiate some terms. If the South African Government decides not to ratify a provisionally applied treaty, the Executive could choose to terminate the provisional application (provided the agreement on provisional application does not prohibit this).
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> Section 233 of the 1996 Constitution commands that, when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law—it is believed that 'international law' in this context would include treaties that have entered into force for the Republic of South Africa and also those that it applies provisionally.

[100] Full text available at: https://www.un.org/en/ga/sixth/69/pdfs/statements/ilc/south_africa_3.pdf.