Moratorium in International Law

Wenqiang Yin*

Abstract

Moratorium, as a postponement or suspension of an activity, is widely used as a middle ground between YES and NO in the international legal arena, which reflects the value of compromise and cooperation in international intercourse. Moratorium in international legal setting is considered an option where countries are unable to perform their obligations for a reasonable time period, or an extraordinary situation requires countries to take exceptional measures or countries deem it necessary or indispensable for achieving some policy goals. The special values of moratoria shed light on difficult and complex issues to be addressed by States.

I. Introduction

1. Moratorium, as a postponement or suspension of an activity, is widely used in both the national and international legal arenas to adjust the normal situation or presumed normal situation. As it stands, moratorium is a deviation from the proper or expected course. It only exists as an instrument to serve certain purposes or an exception to normal practice. Due to its auxiliary position, very few published works have paid attention to it. That does not mean, however, that moratorium is not important in practical terms. As a matter of fact, moratorium has its indispensable values and is particularly relevant to solutions to complex and difficult issues. In other words, moratorium is worthy to be seriously considered an option by policymakers and lawyers when facing a paradox. In order to have a full picture of the regime of moratoria, we have to examine where it comes and applies, how it comes into being, what effects it has and why it is utilized.

* Member of the Chinese Society of International Law; Ph.D. of International Law, Peking University. This comment is based on a paper originally completed in May 2009 for the postgraduate diploma in the Foreign Service Programme of Oxford University.
II. Origin and application of moratoria in international law

II.A. Origin and application of moratoria in domestic law

2. “The term moratorium originates in the Roman law and is derived from the praescripta moratoria, a deferment of payment granted by an imperial edict.”¹ Moratorium as such an instrument has long been applied in domestic law whether by legislation or by court orders. For instance, the French government passed moratory laws during the Franco-Prussian War in the nineteenth century.² During the First World War, the United Kingdom adopted moratoria on commercial transactions. Article 1 of the Postponement of Payments Act, 1914 provided that “His Majesty may by Proclamation authorize the postponement of the payment of any bill of exchange, or of any negotiable instrument, or any other payment in pursuance of any contract, to such extent, for such time, and subject to such conditions or other provisions as may be specified in the Proclamation.” On 2 August 1914, George R.I. claimed in “A Proclamation for Postponing the Payment of Certain Bills of Exchange” that “whereas in view of the critical situation in Europe and the financial difficulties caused thereby it is expedient that the payment of certain bills of exchange should be postponed as appears in this Proclamation”.³ The Moratorium Act 1930 of Australia is “to restrict temporarily certain of the rights possessed by mortgagees, vendors, and others; and for purposes connected therewith.”⁴ On 24 November 2008, due to its liquidity problem, Kaupthing Bank hf. (“Kaupthing”) of Iceland was granted a moratorium on payments to creditors by the District Court of Reykjavík. The moratorium would provide Kaupthing with appropriate protection from legal action, and ensure that all creditors of Kaupthing were treated fairly and appropriately.⁵

3. Besides a deferment of payment, the application of moratoria in domestic law has been extended to the more general situation for the purpose of suspending an activity

---

² Their international validity was discussed in an English law case. In Rouquette v. Overman and another (1875), the Court of Queen’s Bench held that “the power of a legislature to interfere with and modify vested and existing rights cannot be questioned, although no doubt such interference, except under most exceptional circumstances, would be contrary to the principles of sound and just legislation.” See Rouquette v. Overman and another, in The Law Times Reports, Vol. XXXIII (London, from September 1875 to February 1876), 426.
during a specified or unspecified period. China, for instance, has introduced moratoria on fishing in several areas of its waters.\(^6\) After the 9/11 terrorist attack, the Federal Bureau of Prison (BOP) of the United States of America implemented a policy of a blanket moratorium on the hiring of new Muslim chaplains in BOP facilities.\(^7\)

II.B. Application of moratoria in international legal practice

4. International legal practice borrowed the term moratorium from domestic law. As is the case in domestic law, moratorium was originally applied in the area of debt payment, and has been widely used as a suspension of an activity in more general situations in international law.

II.B.i. Deferment of debt payment

5. The default of international debt has a long history. For example, Mexico, in the nineteenth century, repeatedly failed to settle its foreign debt.\(^8\) After World War I and during the world depression of the 1920s and 1930s, moratorium became an important device for solving the defaulting problems of external indebtedness. In 1923, a Conference of the Principal Allied Powers held in Paris discussed the issue of settlement of reparation and international debts, among which whether a moratorium on payment should be granted to Germany was considered.\(^9\) In 1931, during the world recession, President Herbert Hoover of the United States proposed a one-year moratorium on the payments of World War I reparations and war debts among all principal nations. The proposal was eventually approved by the US Congress as an Act.\(^10\) Since the 1980s, Peru,\(^11\) Brazil,\(^12\) Russia,\(^13\)

---

8. Robin A. King, Mexican Proposal for a Continent-wide Debt Moratorium: Lessons from the 1930s, Contrasts with the 1980s (Department of Economics, University of Texas at Austin, Paper No. 89–10), 5.
Ecuador\(^{14}\) and so on have announced a moratorium on the payment of their foreign debt due to their financial troubles. The Paris Club, an informal group of official creditors whose role is to find coordinated and sustainable solutions to the payment difficulties experienced by debtor nations, has made many arrangements for rescheduling debts due to them with debtor nations. Rescheduling is a means of providing a country with temporary debt relief through a postponement of payment or/and a reduction in debt service obligations.\(^{15}\) In January 2005, the Paris Club of creditor nations announced an “immediate and unconditional” debt moratorium for Sri Lanka, Indonesia and Seychelles, hit by a tsunami on 26 December 2004.\(^{16}\)

\(\text{II.B.ii. Suspension of an activity other than debt payment}\)

6. In terms of suspension of an activity, moratorium is also extensively applied in international legal practice, whether it is provided or declared within or outside the UN system through resolutions, treaties or even by unilateral acts of particular States. Among others, moratorium has been frequently applied in the areas of resources exploitation, disarmament, territorial claims and treaty implementation.

\(\text{II.B.ii.a. Resources exploitation}\)

7. The General Assembly of the UN has adopted a number of moratorium resolutions on resources exploitation. For instance, Resolution 2574D (1969) declared that “States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction.”\(^{17}\) Resolution 41/88/B (1986) called upon “the Antarctic Treaty Consultative Parties to impose a moratorium on the negotiations to establish a minerals regime until such time as all members of the international community can participate fully in such

---


17 General Assembly, Question of the reservation exclusively for peaceful purposes of the seabed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind (http://www.nato.int/nato_static/assets/pdf/pdf_2007_05/20090515_cfe_qa_factsheet.pdf (last visited 29 March 2012)). All General Assembly resolutions could be found at the UN website: www.un.org/documents/resga.htm (last visited 21 March 2012).

8. Moratorium on resources exploitation is also provided in other international arenas. Since 1986, the International Whaling Commission (IWC) has imposed a blanket moratorium on commercial whaling. The 2000 Treaty between the United States and Mexico on the Delimitation of the Continental Shelf in the Western Gulf of Mexico provided a ten-year moratorium on petroleum or natural gas drilling or exploitation in an area of possible transboundary reservoirs following the entry into force of the Treaty. According to Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area adopted by the International Seabed Authority in 2000, the Council of the Authority may issue emergency orders to suspend or adjust exploration operations in the Area. The Interim Measures adopted by Participants in Negotiations to Establish South Pacific Regional Fisheries Management Organization (SPRFMO) in 2007 provided a moratorium on expansion of the total level of gross tonnage of vessels fishing for pelagic stocks in 2008 and 2009, and on expansion of bottom fishing.

II.B.ii.b. Disarmament


19 Schedule 10(e) of the 1946 Convention for the Regulation of Whaling (www.iwcoffice.org/_documents/commission/schedule.pdf (last visited 1 April 2009)).
22 Interim Measures Adopted by Participants in Negotiations to Establish South Pacific Regional Fisheries Management Organization (www.southpacificrfmo.org/assets/3rd-Meeting-April-2007-Renaca/Plenary-III/SPRFMO-Interim-MeasuresFinal.doc (last visited 4 April 2009)).
(1993), 49/75D (1994) and 50/70O (1995) called for a moratorium on the export of anti-personnel landmines.25 The Security Council has also adopted resolutions requiring some countries to suspend activities undermining disarmament, for example S/RES/1695 (2006) and S/RES/1718 (2006) demanding North Korea to suspend all activities related to its ballistic missile programme.26

10. Regional organizations have also adopted some such resolutions—for example, the Heads of State and Government of the Economic Community of West Africa (ECOWAS) declared a “Moratorium on the Importation, Exportation and Manufacture of Light Weapons in ECOWAS Member States” in 1998.27

II.B.ii.c. Territorial claims

11. Moratorium on performance or furtherance of territorial claims has been seen in some treaties, such as the 1959 Antarctic Treaty28 and the 2006 Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea.29

II.B.ii.d. Treaty implementation

12. Treaty implementation may be suspended. According to the 1969 Vienna Convention on the Law of Treaties, a State party to a treaty may terminate or suspend its operation due to a material breach, consent of the parties, supervening impossibility of performance and fundamental change of circumstances.30 In practice, suspension of treaty-related activities is rather complicated. In March 1993, the Democratic People’s Republic of Korea decided to withdraw from the 1968 Treaty on the Non-proliferation of Nuclear Weapons (NPT), while in June it announced a “moratorium” on the effect of its withdrawal.31 In July 2007, Russia announced

27 ECOWAS, Moratorium on the Importation, Exportation and Manufacture of Light Weapons in ECOWAS Member States, 31 October 1998 (www.fas.org/nuke/control/pcaqed/text/ecowas.htm (last visited 4 April 2009)).
28 The Antarctic Treaty (www.ats.aq/documents/ats/treaty_original.pdf (last visited 1 April 2009)).
III. Establishment and termination of moratoria

13. In principle, moratorium could only be established and terminated where it has been legally established by authoritative bodies or organs. In practice, there are several situations concerning the establishment and termination of moratoria.

III.A. Establishment of moratoria

III.A.i. Agreement

14. States could establish legally binding moratoria through bilateral and multilateral agreements. The subject matters of treaty provided moratoria could be categorized into such groups as furtherance of conflicting claims, due rights and obligations, and specific activities.

III.A.i.a. Furtherance of claims

15. The intent and purpose of the moratorium on performance or furtherance of conflicting claims are not to make any judgment on the claims, or to settle dispute resulting from the conflicting claims, but to freeze, shelve or set aside dispute and postpone the final settlement of dispute. The Antarctic Treaty is a case in point. According to Article IV(1) of the Antarctic Treaty, the Treaty will have neither positive nor negative effects on the asserted rights of or claims to territorial sovereignty in Antarctica as well as on positions of any contracting party as regards its recognition or non-recognition of such asserted rights or claims. Under Article IV(2), the status quo relating to claims is frozen, “acts or activities taking place” while the Treaty is in force have nothing to do with claims, and no new claims and enlargement of existing claims are permissible. In negotiating the Antarctic Treaty, “claimants do not generally favour any solutions that involve a renunciation of their claims”, 33 and at the same time, they had no idea of settling their respective claims. In achieving the fundamental objectives of the peaceful uses of the continent and the promotion of scientific research and co-operation, negotiating parties tended to “sidestep particularly contentious issues relating to territorial jurisdiction.” 34 As it stands today, the Antarctic Treaty successfully suspends disputes of claims and counterclaims on Antarctica. The Antarctic Treaty has been generally considered a precedent for co-existence, and provided the framework for

34 Ibid., 5.
international activities and a basis for stability in Antarctica.\textsuperscript{35} “The key to reaching this desirable result was Article IV in the Antarctic Treaty.”\textsuperscript{36} However, the territory claims are far from dead. The seven claimants have maintained their positions.\textsuperscript{37} For example, the United Kingdom, as a claimant, claimed that “appurtenant to Antarctica there exist areas of continental shelf the extent of which has yet to be defined”, and reserved the right to submit information to the Commission on the Limits of Continental Shelf thereof, when it submitted information relating to the continental shelf of Ascension Island on 9 May 2008.\textsuperscript{38} Article IV of the Antarctic Treaty “just postpones the question of settlement of territorial sovereignty but does not exclude in principle the application of the concept of territorial sovereignty in Antarctica.”\textsuperscript{39} In case the Antarctic Treaty system collapses, the issue of territorial claim disputes will definitely arise again.

16. The 2006 Treaty on Certain Maritime Arrangements in the Timor Sea provides a long-term basis for Joint Petroleum Development activities in the area of the seabed between Australia and Timor-Leste. The very interesting, rigid and comprehensive moratorium provision—Article 4: “Moratorium” of the Treaty sets up a 50-year moratorium on the determination of the maritime boundary or until five years after the exploitation of certain areas ceases, whichever is the earlier. In achieving the moratorium, it obliges that neither party should assert, pursue or further by any means its claims to sovereign rights and jurisdiction and maritime boundaries; both parties shall refrain from any act or international activity that might lead to any implications for maritime boundaries or delimitation in the Timor Sea. Furthermore, the parties are not obliged to negotiate permanent maritime boundaries for the period of the Treaty.\textsuperscript{40}

III.A.i.b. Due rights and obligations

17. Moratorium on the performance of due rights and obligations through a treaty is to legalize a situation which is seemingly unlawful if otherwise resulting from a unilateral act by obligors, and will postpone the realization of rights. Debt rescheduling agreements are such a case. The rescheduling request is initiated by the debtor country. Official creditors meet with the debtor to negotiate an Agreed Minute. The Agreed Minute sets out the broad terms of rescheduling that the participants

\textsuperscript{35} Ibid., 1.
\textsuperscript{36} Christopher C. Joyner, Antarctic and the Law of the Sea (Martinus Nijhoff, 1992), 62.
\textsuperscript{37} Kenneth R. Simmonds, Antarctic Conventions (Simmonds & Hill Publishing Ltd, 1993), 11.
\textsuperscript{40} Art. 4 of the Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea.
recommend to their respective governments be incorporated in the subsequent bi-
lateral agreements between the debtor and each creditor country. These bilateral
agreements form the legal basis for the debt rescheduling.\footnote{K. Burke Dillon and Gumersindo Oliveros, Recent Experience with Multilateral Official Debt Rescheduling (International Monetary Fund, 1987), 3.} Paris Club creditor gov-
ernments will consider a request for debt rescheduling only if the debtor country has
already fallen into arrears on debt service payments due, or they are satisfied that
without it the country will default.\footnote{Richard P.C. Brown, The IMF and Paris Club Debt Rescheduling: A Conflicting Role?, 4 Journal of International Development (1992), 291–313, 295.} In the rescheduling agreements, some
portion of due debt service will always be postponed until a specified later date.\footnote{Dillon and Oliveros, above n.41, 9.} Due to the uncertain and negative impact on creditors’ interest by debt resCHEDuLING, creditor countries have attempted to treat debt rescheduling agreements as “ab-
solute exceptions in international financial relations”.\footnote{Brown, above n.42, 295.}

III.A.i.c. Specific activities

18. The purpose of the moratorium on a specific act or activity which is not directly
affiliated with a disputed claim or a due right and obligation is for settling an un-
certain situation, or creating conditions for further work or achieving a particular
goal. For instance, the purpose of the ten-year moratorium on petroleum or
natural gas drilling or exploitation provided in the 2000 Treaty between the
United States and Mexico on the Delimitation of the Continental Shelf in the
Western Gulf of Mexico\footnote{Treaty on the Delimitation of the Continental Shelf, above n.20, art. IV.} is for cooperation and periodic consultation between
the Parties in protecting their respective interests.\footnote{Ibid., Preface.}

III.A.ii. International resolutions or declarations

19. Moratorium could be established through resolutions or declarations of inter-
national organizations or meetings. The subject matters of moratoria contained in
resolutions or declarations are mostly specific activities, seldom directly referring
to disputed claims or due rights (or obligations), which makes the adoption of
related documents more acceptable and less disputable. Such moratoria may or
may not be legally binding, completely dependent on the nature of the resolutions
and declarations.

III.A.ii.a. Resolutions with no legally binding force

20. Resolutions and declarations adopted by the UNGA and most other inter-
national organizations and meetings have no legally binding force, but recommend-
datory effect. For example, the Legal Adviser of the US State Department stated the
position of the United States as regards the UN General Assembly Resolution 2574D (1969), which declared a moratorium on deep sea mining to be that: “The Resolution is recommendatory and not obligatory. The United States is, therefore, not legally bound by it. The United States is, however, required to give good faith consideration to the Resolution in determining its policies. . . . The United States is not, however, obligated to implement the recommendations.”

The 2007 Interim Measures adopted by Participants in Negotiations to Establish SPRFMO clearly stated in the preface that “these interim measures are voluntary and are not legally binding under international law.”

III.A.ii.b. Resolutions with legally binding force

21. Some international organizations, if their constituent treaties provide so, may adopt legally binding resolutions or decisions. The moratorium provided in such resolutions or decisions is legally binding. Such resolutions as the IWC moratorium on commercial whaling, the provisional measures order by the International Court of Justice in the LaGrand case and the decisions of the Security Council belong in this realm. According to Article V of the 1946 Convention for the Regulation of Whaling, the provisions of the Schedule amended by the IWC as regards the conservation and utilization of whale resources shall become effective with respect to the Contracting Governments 90 days following the notification of the amendment by the Commission to each of the Contracting Governments. In 1982, the IWC adopted a blanket moratorium on commercial whaling with effect from the 1986 coastal and 1985/86 pelagic whaling seasons through amending the Schedule.

In the 1999 LaGrand case (Germany v. United States of America), the Court indicated provisional measures requiring the United States to take all measures at its disposal to ensure that Walter LaGrand—a German citizen who had been sentenced to death in the United States—would not be executed pending the final decision in these proceedings. “This Order was consequently binding in character and created a legal obligation for the United States”, because the Court orders on provisional measures under Article 41 of the Statute of the International Court of Justice have binding effect. The decisions of the Security Council such as S/RES/1695 (2006) and S/RES/1718 (2006) are binding upon related Member States of the UN.

48 Above n.22.
49 Schedule 10(e) of the Convention for the Regulation of Whaling, above n.19.
50 Para.29 of LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, ICJ Reports 1999, para.29.
51 Para.110 of LaGrand (Germany v. United States of America), Judgment, ICJ Reports 2001.
52 Ibid., para.109.
III.A.iii. Unilateral acts

22. Moratorium could be put in place by a unilateral act, such as unilateral decision on a moratorium on debt payment, unilateral moratorium on nuclear tests and Russia’s moratorium on observance of the CFE treaty. Unilateral moratoria could be divided into two groups according to the nature of the subject matters: voluntary commitment and unilateral suspension of discharging obligations.

III.A.iii.a. Voluntary commitment

23. If a unilateral moratorium is a voluntary commitment or sacrifice, it is normally treated as goodwill and welcomed by beneficiary parties, such as the unilateral declaration of a moratorium on nuclear tests in the 1980s by the Soviet Union,54 and the Paris Club of creditor nations’ unilateral announcement of a debt moratorium for Sri Lanka, Indonesia and Seychelles, hit by a tsunami in 2005. However, even in these circumstances, some hesitating views could be occasionally heard from beneficiary parties. For instance, with regard to the above-mentioned Paris Club nations’ unilateral moratorium, Indonesia was sceptical about the benefits thereof, worried that a debt moratorium could damage Indonesia’s creditworthiness on international markets.55

24. A unilaterally declared moratorium cannot bind other parties concerned. However, one interesting issue regarding the self-commitment moratorium is whether such a moratorium will become legally binding on the country which declares it, in other words, whether other countries have a right to challenge any violation of this unilateral undertaking. The issue is complex. It is undoubted that “not all unilateral acts imply obligation”.56 However, it is possible for some unilateral acts to have legal obligations in some cases. In the Nuclear Tests (Australia v. France) case, the International Court of Justice held:

declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. . . . When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. . . . Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.57

57 Ibid., paras.43, 46.
25. However, this approach was more or less challenged by Judge de Castro in his dissenting opinion in the same case. He claimed that, for a promise to be legally binding on a State, the authorities from which it emanates should be competent so to bind the State and that they should manifest the intention and will to bind the State; there should be a quid pro quo from the beneficiary to the promiser; and any promise (with the exception of pollicitatio) can be withdrawn at any time before its regular acceptance by the person to whom it is made. Judge de Castro adopted a much more restrictive view regarding the legal effect of unilateral acts while acknowledging that a unilateral promise could be binding in some circumstances. In general, whether a unilaterally declared moratorium of the nature of self-commitment is legally binding or not should be decided on a case-by-case basis, and is dependent upon the intention of the State which declares it.

III.A.iii.b. Unilateral suspension of discharging an obligation

26. In circumstances where a unilaterally declared moratorium relates to the fulfilment or settlement of a pending obligation, the issue of legality of the moratorium may arise. Unlike in domestic law, there is no compulsory third-party dispute-settlement mechanism applying to all States and in all cases in the international legal system. Consequently, in most cases of unilateral suspension of discharging international obligations, there would be a dispute regarding legality without an authoritative judgment. However, if related States accept a third-party mechanism to settle the issue of legality, things will change. In 2003, for example, the United States, Canada and Argentina brought claims before the WTO dispute settlement mechanism against the European Communities regarding a moratorium adopted by the European Communities on the approval of biotech products, alleging that the moratorium had restricted imports of agricultural and food products from these countries, which was inconsistent with the European Communities’ obligations under related trade agreements. In September 2006, the panel found that the European Communities applied a general de facto moratorium on the approval of biotech products between June 1999 and August 2003, and by applying this moratorium, the European Communities have acted inconsistently with their international obligations under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures because the de facto moratorium led to undue delays in the completion of EC approval procedures.

59 WTO, European Communities—Measures Affecting the Approval and Marketing of Biotech Products (DISPUTE SETTLEMENT: DISPUTE DS291) (www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm (last visited 5 April 2009)).
III.B. Termination of moratoria

27. Moratorium, as a temporary suspension or postponement, should be limited in duration. In this regard, there are some differences between moratoria with and without specified period.

III.B.i. Moratoria with specified period

28. A specific time period or a specific condition for ending a moratorium might be attached when the moratorium is established. For example, the 2000 Treaty between the United States of America and Mexico on the Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 Nautical Miles expressly provided a ten-year period for the moratorium on exploitation. The Antarctic Treaty and the Treaty between Australia and Timor-Leste on Certain Maritime Arrangements in the Timor Sea provided that the time periods for the moratorium on territory claims are for the period of the treaties. And the moratorium in Resolution 2574D (1969) was pending the establishment of an appropriate international regime. When Schedule 10(e) of the International Whaling Convention established a moratorium on commercial whaling, it, at the same time, provided that the moratorium would be kept under review based upon the best scientific advice, and modified by the IWC. In these cases, moratorium would be automatically terminated when the prescribed time period or condition is satisfied.

III.B.ii. Moratoria with unspecified period

29. An adopted moratorium per se may provide no clue about the end thereof. For example, when Resolutions 44/225, 46/215, 51/36 and 53/33 called upon States to establish a global moratorium on all large-scale pelagic drift-net fishing on the high seas, they did not imply the termination of the moratorium. And when the Ecuadorian president declared a foreign debt payment moratorium in December 2008, he did not specify the period of the moratorium. Moratoria not mentioning duration thereof seldom appear in legally binding situations, because that would lead to legal uncertainties in the interpretation and application of the moratorium. However, a moratorium with unspecified period does not mean that it is intended to last for ever. Any moratorium should maintain a temporary nature. Such a moratorium could be terminated by a new resolution or a newly established legal regime, in the case of international resolutions and declarations, or by new unilateral acts, international agreements or other forms of legal arrangements, in the case of a unilaterally declared moratorium and treaty-provided moratorium.

60 Schedule 10(e) of the Convention for the Regulation of Whaling, above n.19.
61 IANS, above n.14.
III.B.iii. Consequences of termination

30. It should be noted that the termination of a moratorium does not necessarily mean resumption of operation or performance. It might possibly signify the resumption of an original situation suspended by a moratorium, if no new authoritative rules provide otherwise. For example, after 50 years, when the Treaty on Certain Maritime Arrangements in the Timor Sea expires, Australia and Timor-Leste would resume negotiation on delimitation of their maritime boundaries. It might also possibly suggest a significant change to the original legal situation, and hence to the performance of activities, if a new legal regime emerges in related circumstances. The seabed exploitation is a case in point. In 1969, when Resolution 2574D was adopted, the legal regime for seabed mining was completely different from the current situation where all seabed area mining activities are under the control of the International Seabed Authority according to the 1982 United Nations Convention on the Law of the Sea and the Agreement relating to the implementation of Part XI of the Convention. A cancellation or prohibition might also appear if a new legal regime provides so. For instance, if the purposes of moratoria on nuclear tests are successfully achieved, it would lead to a complete ban of nuclear tests.

IV. Effects of moratoria in international law

31. Although moratorium has the basic meaning of suspension or postponement, it has different effects—freezing effect or reversing effect in practical situations. When States consider the option of a moratorium, they might have to evaluate it according to its possible effects.

IV.A. Freezing effect

IV.A.i. Meaning

32. One of the direct effects due to the application of moratoria in international law is that the status quo is frozen. To freeze the status quo means to maintain the current status, and implies no changes to the current status of interests and claims. It requires an end to change at a point where either the moratorium is adopted or the moratorium regime specifies otherwise. The Antarctic Treaty, for example, neither made any judgment on States’ territorial claims and counter-claims on Antarctica, nor did it deny the vested interest. However, changes to the status quo—new claims and enlargement of existing claims—are forbidden. The SPRFMO interim measures did not forbid the existing level of pelagic fisheries and bottom fisheries, but prohibited expansion thereof. In the LaGrand case, the order issued by the ICJ requiring the United States to freeze the process of executing Mr. LaGrand “is intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings.”

62 Para.22 of LaGrand, Provisional Measures, above n.50.
IV.A.ii. Advantages and disadvantages for States’ acceptance

33. A moratorium with freezing effect may appear to have advantages and disadvantages when States evaluate it. With regard to the advantages to interested parties, their vested interests in normal situations are not adversely affected. In addition, if the cost of likely changes to the status quo is too high for most parties, to freeze the status quo might be a good option for all. The Antarctic Treaty explains the point. In the first half of the twentieth century, territorial claim disputes exacerbated the situation in Antarctica.63 After the Second World War, claimant States feared that a failure to resolve the conflicting claims could lead the United States and the Soviet Union to assert their own territorial claims, and Antarctica would be fully integrated into the Cold War. Meanwhile, the superpowers would not like to limit their operation and control geographically, or like to exacerbate further conflict between themselves. As a result, all interested States had no other better option but to accept a freeze of the status quo in Antarctica for the benefit of peaceful utilization and scientific research cooperation.64

34. On the other hand, there might be some disadvantages in some circumstances for parties to consider a moratorium with such an effect. Firstly, to freeze the status quo does not settle disputed claims, rights or obligations, which implies legal uncertainty to some extent. States are normally inclined to have a recognized well-defined status with respect to their interest and rights. Secondly, in circumstances where the status quo is considered disadvantageous to some parties, they would prefer a change of the situation. Thirdly, parties may have different understandings and interpretations as to the status quo. These factors could hamper the willingness of interested parties to accept a moratorium. For example, some views hold that the 2006 Treaty between Australia and Timor-Leste on Certain Maritime Arrangements in the Timor Sea is “heavily biased against the interests of Timor Leste”, because “Australia retains the rights to prospect for and extract hydrocarbon resources in the disputed areas but Timor Leste has effectively given up all such rights for at least 50 years”,65 while some see it as a “win–win” situation.66

IV.B. Reversing effect

IV.B.i. Meaning

35. The application of a moratorium may lead to the complete prohibition or ban of an activity during a time period. In contrast with the freezing effect, a moratorium

64 Ibid., 173–174.
65 Datuk Dominic Puthucheary, An “unfair” deal for Timor Leste, East Timor and Indonesia Network, 6 May 2007 (www.etan.org/et2007/may/12/06unfair.htm (last visited 7 April 2009)).
66 Spokesman for Australia’s Department of Foreign Affairs and Trade, Timor Sea Treaty “a win–win situation” for both nations, East Timor and Indonesia Network, 6 May 2007 (http://www.etan.org/et2007/may/12/06unfair.htm (last visited 7 April 2009)).
in some circumstances may, in fact, reject an existing activity, right or obligation for some time. What parties should follow is a zero standard, irrespective of the status before the moratorium. It is a situation of nothing happening. For example, the effect of moratoria on debt payment, nuclear test, commercial whaling and so on is not to maintain the current level of activities, but to forbid all related activities.

IV.B.ii. Advantages and disadvantages for States’ acceptance

36. A moratorium with a reversing effect also has merits and defects when States consider it. On the one side, it is relatively simple for parties to understand and operate such a moratorium because the zero standard is very clear. In such a circumstance, misunderstanding and inconsistent interpretation could be avoided to the extent as far as possible. On the other side, however, the zero standard could seem too rigid and strict, or disproportionate to the required situations for some parties. For example, a number of countries in the IWC questioned the rationale for the moratorium on commercial whaling in 2006. They held that the moratorium on commercial whaling was neither based on advice from the Commission’s Scientific Committee, which seemed a violation of the just procedural requirement, nor necessary because many species and stocks of whales were abundant.

V. Rationale for applying moratoria

37. As an aberration from normal practice, moratorium, theoretically speaking, should not be applied if there are no substantial reasons justifying it. The extensive application of moratoria in international legal practice proves the value and necessity thereof. Moratorium is something in the middle between YES and NO, and either can go forward towards a complete ban or cancellation, or can withdraw to the original operation, dependent on specific situations. Moratorium per se bears the spirit of compromise and cooperation in diplomatic negotiations. It could be categorized into three specific reasons for the application of moratoria: inability to discharge obligations, existence of extraordinary circumstances and necessary policy tool.

V.A. Inability to discharge obligations

38. In circumstances where one party is unable to discharge its obligations, if the obligations are not cancelled or denounced, it might be justified to have a moratorium on settling the obligations. The Vienna Convention on the Law of Treaties recognizes that “Supervening impossibility of performance” could be cited as a ground for suspending the operation of a treaty. Moratorium on debt payment,


in most circumstances, is such a case. When Mexico declared a suspension of debt service on both internal and external public debt due to lack of revenue domestically and unavailability of further foreign loans in 1910s and 1920s, it explained the reason why a moratorium was needed: “Above all Mexico must live first... If a family is in financial straits bread and milk should be the first consideration and then after that will come the creditors”; “when repayment is impossible it is a sign of serious problems in the economy as a whole. Inopportune demands by a creditor injure the creditor himself as well as the debtor, worsening the situation and possibly provoking bankruptcy or repudiation.” The moratorium was “to better assure future payments to bondholders” and a better economic future for the country.69 Debt moratoria will definitely have adverse effect on the interest of creditors, hence are generally disliked and disputed by them. However, no one is obliged to do the impossible. When a debtor country is ostensibly in a debt crisis, what is the best and practical option for creditors except to agree to the postponement of debt payment?!

V.B. Existence of extraordinary circumstances

39. Existence of extraordinary circumstances could also be a justification for a moratorium. It would be unreasonably ambitious to attempt to define “extraordinary circumstances” precisely. However, it is easier and more proper to say that the extraordinary circumstances in a particular context make the normal practice of rights, obligations, claims or activities impractical, undesirable or harmful. In this respect, unforeseeable inability to discharge international obligations might also fall into this category. The Vienna Convention on the Law of Treaties allows a State party to invoke a fundamental change of circumstances as a ground for suspending the operation of a treaty.70 The 2001 Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission held that, among others, force majeure could be invoked as a ground for precluding the wrongfulness of an act of a State.71 War is undoubtedly another extraordinary circumstance. In English law, “agreements between subjects of belligerent States are not made void by the outbreak of war, but that the enforcement of the rights arising thereunder is only suspended while the war continues.”72 In practice, the existence of extraordinary circumstances has been invoked by countries in justifying the adoption of a moratorium. Russia, for example, claimed its moratorium on observance

69 King, above n.8, 8–12.
72 Schuster, above n.3, 9–10.
of the CFE Treaty on the grounds of “exceptional circumstances pertaining to the content of the CFE Treaty, affecting the security of the Russian Federation and requiring adoption of immediate measures.”

40. It should be noted that moratorium based on extraordinary circumstances could be disputed and challenged by other related parties because there is no clear-cut and hard criterion for extraordinary circumstances, nor a universally shared understanding of the link between claimed extraordinary circumstances and moratoria. Still, in the case of Russia’s moratorium on observance of the CFE Treaty, NATO held that “suspension of implementation of Treaty obligations would constitute a direct violation of the Treaty”, because “there is no provision in the Treaty that would allow for a unilateral moratorium on implementation of the Treaty”.

V.C. Necessary policy tool

41. Moratoria are widely used as a necessary means of achieving some goals, or facilitating further action. President Herbert Hoover of the United States in 1931 argued that “the suggestion of our Government for the year’s postponement of intergovernmental debts among all principal nations ... averted a catastrophe, the effects of which would have reached to the United States and would have caused the American people a loss of many times the amount involved”. The regime of a moratorium on territorial claims provided in Article IV of the 1959 Antarctic Treaty creates “optimum conditions for peaceful co-operation in the exploration and scientific investigation of Antarctic”. The moratorium declared in Resolution 2574D (1969) of the UN General Assembly was to ensure that all activities of exploitation would “be carried out under an international regime including appropriate international machinery”. In the UN General Assembly Resolutions—“A Path to the Total Elimination of Nuclear Weapons”, “a moratorium on nuclear-weapon-test explosions or any other nuclear explosions” was treated as a practical step for the “systematic and progressive efforts” to implement the NPT. The ultimate goal of establishing a moratorium on executions in Resolution 62/149 (2007) was to abolish the death penalty.

73 Information and Press Department of the Ministry of Foreign Affairs of the Russian Federation, Statement by the Ministry of Foreign Affairs of the Russian Federation, 14 July 2007 (www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bb3/95413db612370d01c325731a0030e1b5?OpenDocument (last visited 1 April 2009)).

74 See NATO, Questions and Answers on CFE, 5 May 2007 (http://www.nato.int/nato_static/assets/pdf/pdf_2007_05/20090515_cfe_qa Factsheet.pdf (last visited 19 May 2009)).

75 Hoover, above n.10.

76 Simmonds, above n.37, 7.


42. Whether a moratorium is the best or appropriate means in a particular case may be questioned by some affected parties. For instance, with respect to Resolution 2574D (1969), developing states intended to use the Moratorium Resolution to allow further discussion before the issue was overtaken by the commencement of seabed activities. Developed states, on the other hand, feared that developing states would make extended claims of national jurisdiction, and argued that a moratorium would hinder the future development of technologies relating to deep seabed mining, and would be counter-productive to the common heritage of mankind principle because no State could benefit while a moratorium existed.  

43. The reasons for applying moratoria in international legal practice—inability to discharge obligations, existence of extraordinary circumstances and an appropriate and necessary policy tool—are more or less different and could be distinguished from one another in some cases. For example, moratorium on death penalty is made mostly out of policy tool consideration; postponement of debt payment due to war is applied more out of consideration of extraordinary circumstances. However, in most cases, these reasons are mixed and combined together to underlie the rationale for the application of moratoria. Debt moratoria, for instance, in most circumstances, are due to a mixture of more than one element. In international fisheries management, “the reasoning behind the adoption of the moratorium, . . . is clearly an illustration of the application of the precautionary principle”, and at the same time, the application of a moratorium is considered a very strong conservative measure “only to be taken in extraordinary circumstances”.

VI. Conclusion

44. As a suspension or postponement of normal practice, moratorium in international legal setting is in the middle ground between YES and NO, which reflects the internationally cherished value of compromise and cooperation. From the experience of related international legal practice analysed, the widely used moratoria which could be established either by legally binding agreement or international resolutions, or by non-binding unilateral or collective declarations, have the effect of freezing the status quo or banning the subject activities without prejudice to the final settlement of the subject matter. Moratorium is usually considered a practical instrument and actually utilized in situations where countries are unable to perform their obligations for a time period, or an extraordinary situation requires countries to

80 Guntrip, above n.47, 381–382.
take exceptional measures, or countries deem it necessary or indispensable for achieving some policy goals.

45. Where countries are faced with international complexities to address such as sovereignty and maritime delimitation disputes which cannot be reconciled in a reasonable term, moratorium might be a way out if relevant countries are more concerned with peace, friendship and cooperation between them. Yet, it is undoubtedly a challenge to put a moratorium in place, which always needs coordination of political wills of the related countries. However, where countries could not find other better solutions to intractable issues, moratorium might be the most practical one.