44. Switzerland

Communication transmitted to the Secretariat, 27 January 2014:[104]

1. The decision to provisionally apply a treaty

(a) Swiss legal bases and practice

In Switzerland, the Federal Assembly (Parliament) approves international treaties, with the exception of those whose conclusion falls within the sole competence of the Federal Council (Government) by virtue of a law or an international treaty.[105] In principle, the Parliament approves, before their entry into force, the treaties which have been negotiated and signed by the government. But the latter can, when a law or an international treaty approved by the Parliament authorizes it, conclude the treaties alone, without parliamentary approval.

The competence to decide on the provisional application of a treaty rests in Switzerland with the government. This competence of the Federal Council has always been implicitly deduced from its constitutional competence in the field of foreign affairs in general.[106] Thus a "customary constitutional law"[107] has emerged. In accordance with a practice which for a long time hardly was contested,[108] the Federal Council decided on such a provisional application when it was required to safeguard essential Swiss interests or a particular emergency situation.[109]

Under domestic law, these conditions must of course only be met for treaties submitted for approval by the Federal Assembly. For treaties whose approval falls within its sole competence, the Federal Council may decide to have them enter into force upon signature; *a fortiori* it may also thus decide to apply them provisionally.[110] However, even in the case of treaties which come under its own approval competence, the Federal Council makes relatively limited use of provisional application, since it prefers entry into force of the treaty upon signature when the partners can also do so.[111]

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[104] Unofficial translation (from French) by the United Nations Secretariat. The original submission is available at: https://legal.un.org/legislativeseries/pdfs/chapters/book26/switzerland_2014_f.pdf.

[105] Art. 166 (2) of the Federal Constitution of the Swiss Confederation of April 18, 1999 (Cst., Recueil systématic [RS] 101).

[106] Art. 184 (1) Cst. provides that "the Federal Council is responsible for foreign affairs subject to the participation rights of the Federal Assembly; he represents Switzerland abroad". Art. 102, ch. 8, of the old Federal Constitution of 29 May 1874 (RS 1 3) provided for its part that "[the Federal Council] oversees the interests of the Confederation abroad, in particular the observance of its international relations, and it is, in general, in charge of external relations ".

[107] Communication from the Department of Public International Law DDIP and the Federal Office of Justice of 14 December 1987, JAAC/VPB 51.58, ch. 8.

[108] However see Valentin Zellweger, Die demokratische Legitimation staatsvertraglichen Rechts, in Der Staatsvertrag in Schweizerischen Verfassurgsrecht, Stampfli Verlag AG, Beme 2001, pp. 251–416, 395–400.

[109] See, *e.g.*, Opinion of the Federal Council of 18 February 2004 on the report of 18 November 2003 of the Committee on Political Institutions of the Council of States on the parliamentary initiative "Provisional application of international treaties", Federal Bulletin (FF) 2004 939, 942; Message from the Federal Council of 4 July 2012 concerning the federal law on the competence to conclude International Treaties of Minor Scope and on the Provisional Application of International Treaties (Amendment of the Law on the Organization of Government and Administration and the Law on Parliament), FF 2012 6959, 6970. See also FF 1995 iV 749, 755 and 1999 IV 4471, 4492.

[110] See Opinion of the Federal Council of 18 February 2004, *ibid.*, FF 2004 939, p. 940, footnote 4.

[111] Claude Schenker, Guide to Practice in International Treaties, Federal Department of Foreign Affairs, Berne 2010, p. 14, ch. 55.

The practice of considering these two conditions as alternatives (essential interests or particular urgency) for the treaties submitted for the approval of the Federal Assembly changed however after the end of 2001.

The Federal Council had decided to provisionally apply the *Agreement of 18 October 2001 between Switzerland and Germany relating to the provision of air navigation services over part of German territory by Switzerland and to the effects of the operation of Zurich airport on the territory of Germany*. However, the Federal Assembly refused to approve the treaty.[112]

Following a parliamentary intervention, the establishment of an explicit legal basis to allow provisional application was therefore required for the first time.[113] Such a legal basis seemed necessary because "the provisional application may, *de facto*, undermine the competence of the Parliament in matters of approval of treaties, to the extent that the provisional application risks creating a *de facto* situation, from which it is difficult to return"[114]. Secondly, it was provided that the two abovementioned conditions (essential interests and special urgency) had to be cumulatively fulfilled so that a treaty could be applied provisionally.[115] The debates relating to this parliamentary intervention made it appear that it was undeniable that the provisional application of an international treaty is, under certain conditions, adequate and necessary. The very nature of international relations sometimes requires prompt action to protect Switzerland's interests. This may be the case, for example, for economic treaties, where it is important to avoid the Swiss economy being placed at a disadvantage owing to the fact that it cannot yet benefit from the effects of a new treaty which has not been applied immediately."[116]

Since 1 April 2005, a legal provision in Switzerland has explicitly governed the "provisional application of international treaties by the Federal Council".[117] It provides in substance that the two aforementioned conditions must be fulfilled cumulatively in order to be able to decide on the provisional application of a treaty whose approval is the responsibility of the Federal Assembly. In addition, the Federal Council is obliged to submit the treaty to the Federal Assembly for approval within six months from the commencement of provisional application. Finally, according to another provision which entered into force at the same time, "the Federal Council consults the competent [parliamentary] committees before provisionally applying an international treaty whose approval is the responsibility

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[112] FF 2002 3171. For a summary of the history of this agreement, cf. the Message of the Federal Council of July 4, 2012 cited in footnote 109 above (FE 2012 6959), p. 6965.

[113] Spoerry parliamentary initiative of 3 October 2002: make impossible the provisional application of international treaties leading to negative effects (02.456; Official Bulletin of the Federal Assembly [BO] 2003 E 75ff).

[114] Report of 18 November 2003 of the Committee on Political Institutions of the Council of States, 03.459, FF 2004 703, 706. In its opinion of the Federal Council of 18 February 2004 cited in footnote 109 above (FF 2004 939), the Federal Council responded to this report by being favorable, for reasons of clarity, to the creation of a legal basis regulating the material conditions for the provisional application of treaties and expressing their preferences regarding the formulation of the legal basis.

[115] *Idem*., p. 709.

[116] *Ibid*. It is in particular with these arguments that, when the eventual removal of any provisional application has been mentioned, the maintenance of this possibility was then decided.

[117] Art. 7*b* (1), of the law of 21 March 1997 on the organization of government and administration (LOGA; RS 172.010), the following content: "If the approval of an international treaty is the responsibility of the Federal Assembly, the Federal Council may decide or agree to its application on a provisional basis if the safeguard of essential interests of Switzerland and a particular emergency so require."

of the Federal Assembly".[118] In cases where the Federal Council decides to provisionally apply such a treaty, the Federal Assembly remains competent for the approval of the said treaty. However, this takes place *a posteriori*.[119]

There are other legal provisions concerning the provisional application of treaties that have yet to be pointed out. Thus, the Swiss law on external economic measures provides that,

> [in] order to safeguard essential Swiss economic interests, the Federal Council may provisionally apply agreements not subject to a referendum which affect the traffic of goods, services and payments. In urgent cases, the provisional application of agreements providing for membership of an international organization is also possible.[120]

Likewise, the law on customs tariffs provides that,

> [w]hen the interests of the Swiss economy require, the Federal Council may provisionally apply agreements relating to customs duties and provisionally put into force the resulting tariffs. It can also provisionally bring into force the tariff rates resulting from agreements that the Federal Council can apply provisionally according to [the law] on external economic measures.[121]

These two provisions permit provisional application if (essential) economic interests so require, the condition of urgency having to be cumulatively satisfied only for agreements which provide for membership in an international organization. As *lex specialis*, these rules take precedence over the aforementioned provision which in all cases provides for a combination of the two conditions.

The number of treaties provisionally applied by Switzerland is relatively small. In recent years, they have amounted to less than half a dozen treaties per year. This number nevertheless testifies to the necessity, or at least the usefulness, of the institution. The provisional application of treaties has in the vast majority of cases not been a problem.

A single treaty provisionally applied by the Federal Council has not been approved by the Federal Assembly.[122]

Another provisionally applied agreement was initially rejected by Parliament for other reasons. Parliament then confirmed the provisional application notwithstanding its refusal of the agreement. This was finally adopted after the presentation of an additional message from the Federal Council. This is the Agreement of 11 October 2007 between Switzerland and the European Community in the audiovisual field, establishing the firm and conditions for Switzerland's participation in the MEDIA 2007 community program.[123]

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[118] Art. 152(3*bis*) of the law of 13 December 2002 on the Parliament (LParl; RS 177.10). Note the rejection of a parliamentary proposal by a minority who wanted to grant Parliament, or even in an emergency to its competent committees, real competence for the approval of the provisional application (Report of 18 November 2003 cited in footnote 109 above (FF 2004 703), p. 713ff).

[119] Message from the Federal Council of 4 July 2012 cited in footnote 109 above (FF 2012 6959), p. 6972.

[120] Art. 2 (provisional application of agreements) of the federal law of 25 June 1982 on external economic measures (RS 946.201).

[121] Art. 4 (1) of the law of October 9, 1986 on the customs tariff (LTaD; RS 632.10). See also Zellweger, *op. cit.* footnote 108 above, p. 396s.

[122] See above section 1 (*a*) and footnote 112.

[123] RS 0.784.405.226.8. The chairpersons of the competent parliamentary committees, consulted as a matter of urgency, had issued a positive opinion concerning the provisional application. See Message from the Federal Council of November 26, 2008 additional to the message of September 21, 2007

(b) Recent developments

The Swiss legal provisions that entered into force in 2005 were next considered on 31 March 2010. On that date, the Federal Council decided to provisionally apply the *Protocol of 31 March 2010,* amending the *Agreement of August 19, 2009 between the Swiss Confederation and the United States of America concerning the request for information from the Internal Revenue Service of the United States of America relating to the Swiss company UBS SA*[124] despite the negative advice of the Parliamentary Committees consulted.[125]

Parliament subsequently requested a modification of the existing legal bases, so that provisional application could no longer be decided without the approval of the competent Parliamentary Committees.[126]

In response, the Federal Council, recognizing that the current situation was not entirely satisfactory, introduced a bill. This provides that the Federal Council would be bound, in matters of provisional application of a treaty, by a negative notice from the competent committees if such notice was decided by a qualified majority of two thirds in the Committees of the two chambers of Parliament. The government considers it justified to strengthen the involvement of Parliament to some extent in this way. However, it did not propose approval by the Parliamentary Committees of the provisional application, but rather the possibility of them vetoing such provisional application in the event of a qualified majority. Such position was motivated by:

> 1) its [the Federal Council's] desire to avoid provisional application when there exists a "considerable risk" that the treaty in question will not subsequently be approved by Parliament;
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> 2) the wish to guarantee a certain leeway "necessary for an active foreign policy adapted to the circumstances";
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> 3) its [the Federal Council's] desire not to modify in principle the distribution of powers between the legislature and the executive, with the decision on the provisional application of a treaty remaining within the remit of the Federal Council.[127]

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approving this agreement, FF 2008 8165, 8170; Message from the Federal Council of 4 July 2012 cited in footnote 109 above (FF 2012 6959), p. 6972 and references.

[124] See RS 0.672.933.612 and the Message from the Federal Council of 14 April 2010 relating to the approval of this agreement, FF 2010 2693, 2714ff.

[125] However, this treaty was subsequently approved by Parliament. For a summary of the history of this agreement, see FF 2012 6959, 6964.

[126] Motion of the Foreign Policy Commission of the Council of States of 27 May 2010: legal basis for the conclusion of international treaties by the Federal Council (10.3354, BO 2010 E 435); Motion by the Council's Committee on Economy and Royalties National Council of 2 June 2010: revision of the legal bases governing the conclusion of an international treaty by the Federal Council (10.3366, BO 2010 N 830); see also Joder parliamentary initiative of 17 June 2010: conclusion and approval of international treaties, review of the respective competences of Parliament and government (10.457, BO 2013 N 635). It should be noted that a comparable proposal providing for the approval of the provisional application by the parliamentary committees was not retained during the adoption of Art. 7*b* LOGA and 152 (3), LParl entered into force on 1 April 2005, reasons taken in particular that the Federal Council must always be able to choose to provisionally apply a treaty in order to assume its responsibilities in terms of the conduct of foreign policy and that, since the Federal Council is competent in foreign affairs (art. 184 (1), Cst.), it is advisable not to dilute the responsibilities in this area (see Report of 18 November 2003 cited in footnote 114 above (FF 2004 703), p. 712 and 714 and Message from Federal Council of 4 July 2012 cited in footnote 109 above (FF 2012 6959), p. 6971).

[127] Message of 4 July 2012 cited in footnote 109 above (FF 2012 6959), p. 6976.

(c) Tensions between international law and domestic law

As this bill is currently being debated in the Federal Assembly, it is not yet possible to express an opinion on the precise contours of the legal provisions which will, over the next few years, regulate the provisional application of the treaties in Switzerland. The debates are continuing and it remains to be seen whether the approval of provisional application could in Switzerland be transformed, from a government measure of emergency and necessity, into a parliamentary prerogative[128] of provisional approval with an accelerated procedure.

In any event, it is possible and it seems desirable to anchor provisions in domestic law to determine the competences and conditions for the provisional application of a treaty. A deviation may thus be made in the regime relating to the approval and ratification of treaties,[129] but it is fully justified by the undeniable utility, even the necessity, of the institution of provisional application in the law of international treaties.

2. Termination of provisional application

(a) Legal bases and Swiss practice

Swiss law provides that

> the provisional application of an international treaty terminates if, within six months from the start of the provisional application, the Federal Council has not submitted to the Federal Assembly the draft Federal decree approving the treaty concerned. The Federal Council notifies the Contracting States of the end of the provisional application.[130]

Commenting on this provision before it was adopted, the Federal Council indicated that in the vast majority of cases it would meet such deadline. In the event of delay, the rule will not pose a problem if the provisional application results from a unilateral act of Switzerland: when the Federal Council decides on the provisional application, it can also decide on the end of such provisional application by notification to the Contracting States. On the other hand, where provisional application results from an agreement between the parties, the provision will have only a limited scope.[131]

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[128] According to Anthony Aust, Modern Treaty Law and Practice, 2nd ed., University Press, Cambridge 2007, p. 173, footnote 47, parliamentary approval of the provisional application is required in several states.

[129] See, *e.g.*, Denise Mathy, Article 25, in Olivier Corten and Pierre Klein (eds), The Vienna Conventions on the Law of Treaties: A Commentary, vol. I, University Press, Oxford 2011, p. 653, chp. 8.

[130] Art. 7*b*, al. 2 and 3, LOGA.

[131] The Federal Council continued as follows: "In particular, Switzerland will not be able, in all cases, to terminate provisional application without at the same time notifying the co-contracting States of its wish to renounce the ratification of the treaty. However, any delay by the Federal Council in presenting a message to the Federal Assembly relating to a provisionally applied treaty does not necessarily mean that Switzerland does not intend to ratify the agreement. However, in order to be able to terminate provisional application, such possibility should have been provided for in the agreement itself or the co-contractors should consent to the termination of the provisional application. To avoid problems of public international law, the Federal Council should only accept a clause providing for provisional application if the clause reserves the possibility of terminating such application by means of a unilateral act. Such a policy is in principle possible, yet it has the consequence of further limiting the scope for negotiation. In addition, the other Parties to the treaty would not understand if Switzerland were to reserve the possibility of terminating the provisional application of a treaty while ratifying it anyway thereafter (following approval by Parliament) and bringing it into force definitively …". (Opinion of the Federal Council of February 18, 2004 cited in footnote 109 above (FF 2004 939), p. 943ff.).

This legal provision, however, only covers the hypothesis of failure by the Federal Council to comply with the deadline imposed on it to submit the treaty in question for parliamentary approval. Such outcome has never arisen. The scenario of a refusal of approval by the Federal Assembly of a treaty provisionally applied and submitted to it within the time limit is not mentioned in the law. However, also in such case, the Federal Council must notify the other signatory states of Switzerland's intention not to become a party to the treaty, thus automatically terminating the provisional application, in accordance with Article 25, paragraph 2, of the Vienna Convention on the Law of Treaties (Vienna Convention).[132]

As already indicated, only one bilateral treaty provisionally applied by the Federal Council has been rejected by the "Federal Assembly"[133] in recent years. This was on 18 March 2003, *i.e.* before the aforementioned legal provisions came into force. The Federal Council then informed the partner on 28 March 2003 of the parliamentary refusal and, therefore, of Switzerland's intention not to become party to the treaty.

(b) Time limits

Switzerland wishes to address the issue of possible time limits to be observed by a State which, in the absence of any provision in a treaty, unilaterally wishes to terminate its provisional application. As a general rule, the termination of provisional application should be possible with immediate effect, at least in cases where notification is made within a reasonable time after the start of provisional application.

Thus, in the case of the aforementioned bilateral treaty, concluded on 18 October 2001 but rejected by the Swiss Parliament on 10 March 2003, Switzerland notified this information to its partner on 28 March 2003, on which date provisional application ended, immediately.

This immediate effect may be necessary from the point of view of internal procedures and law, as a Parliament can expect the provisional application of a treaty which it rejects under the terms of the treaty to be terminated very quickly in accordance with a regular procedure of reasonable duration.

In some situations, however, the longer the effective provisional application has lasted, the more difficult it will be to claim an immediate end. In the event of a long duration of a provisional application, the principle of good faith may require a reasonable period for the end of the provisional application and thus prevent such application from being terminated with immediate effect. In Switzerland's view, such principle may even require, depending on the circumstances, that the termination of provisional application be subject to the terms and time limits relating to the denunciation of the treaty in question. Therefore, the possibility for a State to unilaterally end the provisional application at any time must be qualified, in particular with regard to the principle of good faith.[134]

For example, Switzerland signed a bilateral treaty in 1997 with a view to avoiding double taxation in terms of taxes on income and on capital, and subsequently notified the partner in 1998 of the completion of its procedures allowing for definitive entry into force. In the absence of a corresponding notification from the partner, the signatory governments

[132] See Message from the Federal Council of 4 July 2012 cited in footnote 109 above (FF 2012 6959), p. 6972.

[133] The bilateral agreement concluded with Germany on October 18, 2001, see above at footnote 112.

[134] See in this regard the considerations of the Memorandum of 1 March 2013 of the Secretariat (A/CN.4/658), reproduced below at p. 266 at footnote 48 and paras. 74–79, according to which, notwithstanding the words "in force" of art. 26 of the Vienna Convention, the *pacta sunt servanda* principle [and thus 'good faith performance requirement] also apply to provisionally applied treaties; see also Mark E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, Martinus Nijhoff, Leiden and Boston 2009, p. 357, c. 11; Mathy, *op. cit.* footnote 129, p. 652.

amended the treaty at the end of 2000 and further agreed to apply provisionally from 1 January 2001 the 1997 treaty as amended in 2000. In January 2012, the partner notified Switzerland of its intention not to become party to the amended 1997 treaty, which was nevertheless applied in practice. It indicated that the provisional application was terminated with immediate effect. In February 2012, Switzerland informed the partner that it did not share its approach regarding the modalities for terminating the provisional application of the amended 1997 treaty. It argued that, with regard to a double taxation agreement—the application of which had started on January 1 to fully cover each fiscal year—and after eleven years of effective provisional application, the principle of good faith required a *mutatis mutandis* application of the period for denunciation provided for by the treaty, by providing a written notice of denunciation of at least six months prior to the end of the calendar year.

(c) Termination of provisional application under the treaty or agreement

It is likely rare for treaties to contain explicit provisions relating to the modalities and time limits for the termination of provisional application. Switzerland wonders, however, whether doing so might not be a way of bringing greater legal certainty to contractual relations in general and greater credibility to the institution of provisional application in particular. It seems in practice that, when a treaty is applied provisionally, some of the parties who are bound by such provisional application sometimes tend to neglect the steps still necessary for the treaty to come into force definitively. As the agreement is already applied in practice, the urgency or importance of a definitive entry into force may indeed tend to disappear, for example when the objectives of the treaty are achieved before provisional application has ended. Parties may, of course, agree to terminate provisional application, but such an agreement is often illusory in the circumstances described.

Switzerland wishes to point out the possible difficulties of domestic law, of a constitutional or even procedural nature, as examples of other grounds that may be invoked when provisional application is prolonged.

Switzerland has concluded a bilateral agreement which has been formally applied provisionally since its signature in 1989, then it notified the partner in 1990 of the completion of its procedures allowing final entry into force. But such agreement has never been materially implemented and the partner informed Switzerland, as late as 2005, that its Parliament had not yet ratified it. However, it seems in fact that following the result of constitutional changes granting international powers in the field of treaties to the decentralized entities of the partner state, the central government no longer has the power to ratify this agreement itself. Neither state, however, has notified its intention not to become party to the treaty.

The provisional application should by definition be terminated relatively quickly. The two main hypotheses are then either the final entry into force of the treaty or, exceptionally, announcement of the end of the provisional application according to Article 25, paragraph 2, of the Vienna Convention. In this regard, however, an alternative which seems to constitute one of the best solutions could also be to provide from the outset, in the treaties subject to provisional application, that such application will have a predetermined maximum duration.[135]

By way of examples which do not require any act or declaration from States, two multilateral treaties of which Switzerland is depositary and which provide for the possibility of

[135] In particular art. 7 (3), of the Agreement of 28 July 1994 relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea, RS 0.747.305.1517, UNTS No. 31364, vol. 1836, p. 3.

provisional application furthermore stipulate that "[t]he period of provisional application cannot not exceed five years " (*Convention on the use of the Platform of the International Commission on Civil Status for the international communication of civil status data by electronic means*, done in Rome on 19 September 2012 (art. 15, para. 1, i.f.); and *Convention on the issue of multilingual and coded extracts and certificates of civil status documents*, adopted in Bern on September 26, 2013 (art. 13, para. 1, i.f.)).[136]

Switzerland further considers that, for treaties without such a clause, which are formally applied provisionally but which are not or have not been so for some time, a presumption as to the end of provisional application would be desirable after a specified reasonable period of time, for States which have applied a treaty provisionally without (succeeding in) ratifying it. Such a presumption should, of course, be limited to treaties of which the signatory States do not make use. Conversely, the presumption of a definitive entry into force, since the essential act of ratification is lacking, and the presumption of an application of indefinite duration, which could be even more so, would be more difficult to imagine. definitive that it lasts. This would indeed contradict the character of provisional application, by definition temporary, also by virtue of domestic law requirements.

Switzerland therefore considers that a bilateral trade and investment protection agreement is still being provisionally applied, since its signature in 1963, despite not having been ratified. The partner, which recalled this fact on several occasions, notably in 1973 and 1974, limited itself to imprecise oral declarations followed by neither facts nor written submission, according to which it purported to declare that it no longer intended to be bound by such agreements but was still considering the matter.

3. Legal effects of provisional application

(a) Swiss legal bases and practice

For Switzerland, the provisional application of an international treaty is aimed at permitting the full legal consequences of the treaty to arise prior to the treaty's approval by the Federal Assembly. Provisional application makes it possible lawfully to implement the provisions of the treaty. This is, however, subject to the resolutive power of a possible negative decision by Parliament. Such an interpretation follows from the intention of the Swiss legislator when it drew up the aforementioned legal bases.[137]

Swiss law logically provides that "[treaties] provisionally applied before their entry into force are published in the Official Digest as soon as possible once the decision on provisional application has been made"; since legal obligations arise as soon as the texts in question have been duly published.[138]

One of the main differences between provisional application and final entry into force is precisely that it is in principle possible to terminate the provisional application of a treaty more easily than a treaty that has entered into force definitively and which would then be subject to deadlines, or even conditions, for denunciation often provided for in its final provisions. In Switzerland's view, however, certain cases should be reserved, such as that mentioned

[136] See www.dfae.admin.ch/depositaire. These two treaties are not yet in force or provisionally applied. It is likely that the depositary will announce notifications relating to 4 decisions of provisional application that it will produce effects at most for 5 years, specifying the end of this maximum period. This solution seems in fact preferable to that requiring a new notification *proprio motu* of the depositary at the end of the five-year period.

[137] FF 2010 2693, 2717; see above section 1 (*a*), at footnotes 117 and 118.

[138] Art. 8 (1) of the law of 18 June 2004 on official publications (LPubl; RS 170.512) and art. 33 (6) of the order of 17 November 2004 on official publications (OPubl; RS 170.512. 1).

above,[139] in which it would be justified to apply at the end of the provisional application the same time limits as those which are provided for by the treaty for denunciation.

(b) Partial provisional application

Partial provisional application of a treaty, also provided for in Article 25, paragraph 1, of the Vienna Convention, may in practice raise interesting questions, for example in relation to the necessary balance to be maintained between all the provisions of the treaty. Thus, partial provisional application appears difficult in the case of a so-called "integral" treaty.[140]

Just as, unless otherwise agreed or if the treaty so provides, parties cannot unilaterally bring into force or partially denounce a treaty, nor can they provisionally apply it only partially. And even where a treaty provides for (full) provisional application, a state cannot, unless otherwise agreed, provisionally apply only part of it. It is in fact necessary to prevent this State from applying temporarily the only provisions which would be favorable to it, for example.

Switzerland concluded with the European Union (EU) on August 14, 2013 an Agreement in the form of an exchange of notes concerning the adoption of EU Regulation No. 604/2013 of the European Parliament and of the Council of June 26, 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.[141] This regulation is applied by the Member States of the EU from January 1, 2014.[142] However, Switzerland has also undertaken[143] to "apply provisionally, as far as possible" the content of such acts from the date set for their entry into force and until it notifies [the EU of] the fulfillment of its constitutional requirements. Switzerland has therefore decided to apply this regulation provisionally from 1 January 2014, with the exception, however—which the partner does not oppose—of the provisions of this regulation which require legislative changes in Switzerland, because the entry into effect of such provisions takes longer.

Statement made in the Sixth Committee, Seventy-sixth session (2021), 17th meeting, 26 October 2021:[144]

Three cumulative conditions must be met for the Swiss government to be able to consent to the provisional application of treaties whose approval is a matter for Parliament: first, the essential interests of the country must be at stake and, second, there must be a particular emergency. Third, the relevant parliamentary committees must be consulted and not oppose the application.

It should also be noted that this procedure has to be undertaken within a predetermined time frame: if the government has not submitted the said treaty for approval to Parliament within 6 months of the start of the provisional application, the latter ceases.

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[139] See section 2 (*b*), *supra*.

[140] Villiger, *op. cit.* footnote 134, p. 355.

[141] RS 0.142.392.680.01, see also Official Journal of the European Union (OJ) L 180 of 29 June 2013, p. 31.

[142] *Idem*., see art. 49.

[143] In application of art. 4 (3), in *fine*, of the Agreement of 26 October 2004 between the Swiss Confederation and the European Community on the criteria and mechanisms for determining the State responsible for examining an asylum application lodged in a member state or in Switzerland (RS 0.142.392.68).

[144] Unofficial translation (from French) by the United Nations Secretariat.

Communication transmitted to the Secretariat, 22 July 2022:[145]

> Switzerland refers to the information already transmitted on 27 January 2014 and wishes to point out two developments that have taken place since then:
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> First, in its contribution of 27 January 2014, Switzerland made reference to a proposed piece of legislation (para. 1.*b*, p. 4 *in initio*), which aimed to grant the competent committees of both houses of the Swiss Parliament the right to oppose the provisional application of treaties. The Parliament then passed the legislation, which went into effect on 1 May 2015 and stipulates that the Swiss Government, the Federal Council, "shall renounce the provisional application if the competent committees of the two councils oppose it".[146]
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> Secondly, the Parliament considered that it might be urgent not only to apply a treaty falling within its authority, but also to terminate it, concluding that the Federal Council should be given the authority to urgently terminate a treaty if dictated by the need to protect the vital interests of Switzerland or to address a specific emergency. In such a case, the Federal Council must also consult the competent parliamentary committees beforehand. The piece of legislation also stipulates that "the Federal Council shall renounce the urgent termination of a treaty if the competent committees of the two councils opposed it".[147] This new urgent termination regulation went into effect on 2 December 2019. It does, in a way, mirror the regulation concerning provisional application.
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> Furthermore, the number of treaties provisionally applied by Switzerland has remained stable and relatively modest: from 2014 to date, 33 treaties have been provisionally applied (cf. annex), an average of just over four per year. The introduction of the right of opposition of the competent parliamentary committees has therefore not led to a statistically significant change compared to the previous period, for which we reported a provisional application rate of six treaties per year.
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> There is no particular problem with these provisional applications. During the reporting period, there was never any opposition from the parliamentary committees, such that the Federal Council was always able to confirm to contractual partners the provisional application of the treaties desired and contemplated in negotiations.
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> There were two cases of treaties applied provisionally that did not contain a provisional application clause:
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> The first case involves two exchanges of notes dated 20 December 2018 between Switzerland and the European Union (EU; see Nos. 22 and 23 of the annex), following which certain provisions of two European Union regulations were provisionally applied, from 28 December 2019 to 11 May 2021. Without such partial provisional application, cooperation under the Schengen Information System would have been considerably hampered and the regulations would not have been adopted as rapidly as expected by the European Union. The Federal Council determined that the partial provisional application was dictated by the need to protect the vital interests of Switzerland and to address a specific emergency, such

[145] Unofficial translation (from French) by the United Nations Secretariat. The original submission is available at: https://legal.un.org/legislativeseries/pdfs/chapters/book26/switzerland_2022_f.pdf.

[146] Art. 7(*b*) (1 *bis*) of the Organization of Government and Administration Act of 21 March 1997 (RS 172.010) and art. 152 (3 *bis*) (3 *ter*) of the Parliament Act (RS 171.10); see also RO 2015 969; FF 2012 6959.

[147] Art. 7(*b*) (1 *bis*) of the Organization of Government and Administration Act and art. 152 (3 *bis*) (3 *ter*) of the Parliament Act; see also RO 2019 3119; FF 2018 3591 5405.

that the conditions of Swiss law for provisional application were met.[148] After consulting with the relevant parliamentary committees, which shared its opinion, the Federal Council approved the partial provisional application of the provisions concerned.[149]

The second case involves the 9 December 2019 *Agreement in the form of an exchange of letters between Switzerland and the European Union in the context of negotiations under article XXVIII of the General Agreement on Tariffs and Trade (GATT)* 1994 (No. 27 of the annex). On 26 August 2020, the Federal Council decided to apply the Agreement provisionally beginning on 1 January 2021, for the following reason: in 2015, the Parliament had amended the customs tariffs set in the *Swiss Customs Tariff Act*. Switzerland then had to renegotiate with the World Trade Organization (WTO) members concerned those tariffs, which were set in an annex to the GATT. It presented the result of the negotiations to WTO on 12 February 2020. In accordance with existing WTO procedures, the legal effects of the modification went into force on 3 June 2020.[150] The content of the Agreement in the form of an exchange of letters is identical to the result of the negotiations presented to WTO; Switzerland concluded it at the request of the European Union, whose internal law requires such an act for the conclusion of negotiations. In this case too, the provisional application was dictated by the need to fulfil the international obligations of Switzerland as quickly as possible, which was expected by partners, while at the domestic level, these agreements still had to be approved by the Parliament and, in the event of a referendum, by the people.[151]

This shows that with provisional application, in cases specified by law, it is possible to mitigate the effects of sometimes longer entry-into-force timeframes, since the Parliament and the people have the power to approve treaties.

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[148] See art. 7(*b*) (1) of the Organization of Government and Administration Act, *supra*.

[149] See the message on the approval and implementation of the exchange of notes between Switzerland and the European Union concerning the adoption of the legal basis for the establishment, operation and use of the Schengen Information System (SIS) (developments of the Schengen *acquis*) and the amendment of the Federal Joint Foreigners and Asylum Information System Act of 6 March 2020, FF 2020 3361, 3371, 3450.

[150] According to the GATT decision of 26 March 1980 on procedures for modification and rectification of tariff concessions, in the absence of comments or reservations, the modifications provided are deemed certified, meaning that they are definitively approved, and have legal effect; see the message concerning the approval of the modification of Schedule LIX-Switzerland-Liechtenstein for seasoned meat of 20 January 2021, FF 2021 348, 5.

[151] See message, p. 10. Due to domestic law, the modification of the schedule could only enter into force following the approval by the Parliament of 19 March 2021 and the expiry of the referendum timeframe (8 July 2021); see the Federal Order of 19 March 2021, FF 2021 679. The European Union notified the completion of the internal approval procedures by note verbale dated 13 July 2020, and Switzerland did so by note verbale dated 12 May 2022. It is stipulated in the Agreement that it shall enter into force on the date of receipt of the last notification. Switzerland also informed the WTO of the completion of its internal procedures by letter received from the latter on 24 March 2022, such that, in keeping with WTO practice, the Schedule entered into force on that date.