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**Directorate of International Law DIL**

# Practice Guide to International Treaties

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This brochure aims to describe, as comprehensively as possible, the rules and practices adopted by Switzerland in the field of treaties. It is primarily aimed at the Swiss federal administration's specialist staff based in Switzerland and at the representations abroad. It therefore essentially focuses on practical requirements.

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## I. Concept of treaties

### A. Definition

<sup>1</sup> A treaty is an international agreement, generally concluded in writing, between two or more subjects of international law, in which they express their joint will to assume obligations governed by international law or to renounce rights, whether this agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation<sup>1</sup>.

### B. Bilateral treaty and multilateral treaty

<sup>2</sup> Firstly, a fundamental distinction should be made between a bilateral treaty, concluded between two parties, and a multilateral treaty, concluded between more than two parties<sup>2</sup>. Bilateral and multilateral treaties essentially differ in the way they are concluded, their entry into force and their administration.

### C. Form

<sup>3</sup> A bilateral treaty generally takes the form of a single instrument signed by the two parties or the exchange of two documents, diplomatic notes or letters, confirming the agreement of the parties. A multilateral treaty is made up of a single document. In exceptional circumstances, a multilateral treaty may be concluded by an exchange of documents if the number of signatories does not exceed three or four.

<sup>4</sup> International law is governed by the principle of contractual freedom. It does not stipulate any special form for treaties. It even recognises the validity of oral agreements<sup>3</sup> subject to evidence. Verbal treaties are nevertheless uncommon for reasons of legal certainty.

### D. Naming

<sup>5</sup> The terminology used to name treaties varies greatly and practice fluctuates. The terms used can cause confusion. While they are more or less interchangeable, some terms have a particular connotation.

<sup>6</sup> The title of an international act is not decisive in determining its nature<sup>4</sup>. However, establishing whether the parties wish to make their agreement legally binding is essential. If this is not the intention, it is not a treaty<sup>5</sup>. The legal nature of an international instrument depends upon the text of the act and not its title. However, a particular usage has become

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<sup>1</sup> See art. 2 para. 1 let. a of the Vienna Convention of 23 May 1969 on the Law of Treaties (VCLT; RS 0.111). This convention contains the main rules, often customary, on the conclusion, application, interpretation and termination of treaties.

<sup>2</sup> Switzerland has concluded around 4500 bilateral treaties and is a contracting party to approximately 1100 multilateral treaties.

<sup>3</sup> Art. 3 let. a VCLT: "The fact that the present Convention does not apply to international agreements not in written form shall not affect (...) the legal force of such agreements." The term "*gentleman's agreement*" is sometimes used.

<sup>4</sup> Art. 2 para. 1 let. a *in fine* VCLT.

<sup>5</sup> See no. 18sqq.; see also Administrative Case Law of the Federal Authorities (ACLFA) 70.69 (2006 IV) and the references.

established and the title of a treaty is not entirely arbitrary and may constitute a means of interpreting the intention of the parties. As a guide, a hierarchy is therefore set out in descending order reflecting the importance of the acts<sup>6</sup>:

a. Treaty

<sup>7</sup> A generic term or a term used to designate agreements generally of major significance. *Treaty* has long been the customary term used for international agreements. It is today reserved for reasonably significant acts.

b. Convention

<sup>8</sup> A convention usually contains general legislative provisions but in a less significant area than treaties. It has become the standard term to designate instruments established under the aegis of international organisations.

c. Agreement

<sup>9</sup> This is a very general term. An agreement may contain commitments of a particularly technical, economic, commercial, financial or cultural nature.

d. Arrangement

<sup>10</sup> Arrangements generally govern secondary or provisional matters. They may set out the procedures for implementing a framework treaty.

e. Exchange of letters or notes

<sup>11</sup> The exchange of letters or diplomatic notes is the simplest form of concluding a treaty. The term indicates exactly what is involved in the procedure used to establish this type of agreement<sup>7</sup>. It generally governs matters of lesser significance in isolation or annexed to another instrument.

<sup>12</sup> The preamble and the final clauses are reduced to their simplest form. The first communication constitutes the proposal and sets out the rights and obligations which the contracting parties have agreed beforehand, including the terms of entry into force and denunciation. The second communication, which generally quotes the text of the first in full to avoid any misunderstanding, responds to it by restricting itself to expressing consent and customary salutations.

<sup>13</sup> The agreement may enter into force, unless provisions to the contrary apply, from the date of the second communication or more commonly from the date of receipt of the letter or note of reply. It is usually concluded in just one language agreed beforehand<sup>8</sup>. Full powers are not generally required, at least for an exchange of notes.

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<sup>6</sup> Also see Annex A for a list of suggested titles in the three official languages and in English.

<sup>7</sup> See art. 13 VCLT.

<sup>8</sup> Also see no. 65sqq.

## f. Other

- <sup>14</sup> The *protocol* and *additional protocol* are generic terms commonly used to designate acts supplementing a basic instrument.
- <sup>15</sup> The more specific term of *concordat* usually indicates, on the one hand, the treaties concluded by the Holy See to govern the legal position of the Catholic Church in a partner state and, on the other, the agreements between the Swiss cantons, which are not treaties<sup>9</sup>.
- <sup>16</sup> The *declaration of reciprocity* sometimes indicates an exchange of letters or notes in which one party makes the granting of certain rights or benefits dependent upon the recognition of the same rights or benefits by the other party.
- <sup>17</sup> *Pact, charter, constitution, statute, act* or *(joint) declaration* are terms for instruments of reasonable significance but are less commonly used; *agreed minutes, additional agreement, amendment, regulation* and *rules* are used for supplementary instruments or instruments of secondary importance.

## E. Instruments which are not treaties

## a. Instruments which are not legally binding

- <sup>18</sup> Some instruments are not binding as, in the event of non-execution, they do not engage the international legal responsibility of the contracting parties. They are based on a joint declaration of intent by the parties the scope of which is exclusively political. First and foremost, the signatories must agree on the non-binding legal nature of such instruments. They may be entitled<sup>10</sup> *statement* or *letter of intent, memorandum of understanding*<sup>11</sup>, *modus vivendi*, or, for more specific acts, *resolution*,<sup>12</sup> *decision*<sup>13</sup>, *recommendation, final act*<sup>14</sup>, *minutes*<sup>15</sup> or *joint communiqué*. Other terms from diplomatic correspondence are also used: *aide-mémoire* and *memorandum*.
- <sup>19</sup> For reasons of transparency and legal certainty, as far as possible these terms should not be used to designate an authentic treaty. Conversely, it is not sufficient for an act to formally bear one of these titles in order for it to be legally non-binding in nature. The text in its entirety has to be drafted using terms which do not express legal commitment.

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<sup>9</sup> Cpr. art. 48 Cst.

<sup>10</sup> Also see Annex A.

<sup>11</sup> Some states wish, often for reasons of domestic procedure, to call memorandums of understanding (MoU) legally binding acts; Switzerland can comply with such requests in the event of absolute necessity because, as previously mentioned, the title does not determine the nature of the act.

<sup>12</sup> This should not be confused with the resolutions of the UN Security Council, for example, the often binding legal status of which is not brought into question.

<sup>13</sup> Adopted within the framework of international organisations or conferences, decisions can however, as is sometimes the case with those of joint committees generally set up with the EU, contain modifications to treaties or their annexes. Their treaty-based nature or otherwise is examined on a case-by-case basis.

<sup>14</sup> See no. 38 and 41.

<sup>15</sup> The *minutes* of a meeting, if signed jointly, must be drafted carefully in terms of not expressing any legal commitment. The title *agreed minutes* should be reserved for simple legally binding treaties. To avoid any confusion in German, the terms *Sitzungsprotokoll* or *Niederschrift* should be given preference over *Protokoll* (also see no. 14).

- 20 A number of clauses and terms therefore have to be reserved for treaties and their usage, which may convey an intention by the parties to enter into legally binding commitments, has to be avoided when drafting an instrument which does not contain legal obligations. As an example, terms such as “wishes”, “may” or “intends” are used in non-binding instruments and those such as “undertakes” or “shall”<sup>16</sup> are reserved for treaties. It is also recommended that a specific provision is included which specifies that such acts do not place any legally binding obligations on their signatories. However, attention should be paid to ensure that such clauses excluding the intention of the parties to establish rights and obligations are not contradicted by binding wording within the same act<sup>17</sup>.
- 21 Elements which by their nature are not appropriate for inclusion, such as undertakings to maintain confidentiality of information and the determination of detailed financial plans or in-depth procedures, are not generally found in non-binding instruments. Similarly, dispute settlement provisions and provisions governing entry into force, duration and denunciation are also reserved for treaties. At most, the date from which it takes effect may be set out in a legally non-binding instrument. Otherwise, the date of the signature, which has to be included, is decisive for indicating the commencement of the application of the instrument.
- 22 In summary, the criteria for distinguishing between a legally binding instrument and texts which are not are as follows, in descending order of importance:
- the terms used in the text and its wording generally,
  - the compatibility of the content and nature of the instrument,
  - possibly a specific clause indicating the nature of the text,
  - the final clauses reserved for treaties and
  - the title of the instrument taken as an indication of the will of the parties.
- b. Unilateral acts
- 23 Other instruments do not constitute treaties where will is not expressed jointly but instead just by one party. A unilateral declaration may be made independently of any treaty. Its author may also, in association with a treaty, undertake through a unilateral act to assume obligations extending beyond those imposed by the treaty. A unilateral declaration places an obligation on the subject of international law which has drawn it up if it has intended to enter into a legal undertaking and if the other subjects concerned were aware of this undertaking. No counterparty is required. No acceptance is necessary<sup>18</sup>.
- 24 In view of the effects of such an act, the domestic procedure for deciding to enter into legal undertakings at international level through a unilateral act follows the same rules as those used for the conclusion of a treaty.

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<sup>16</sup> Also see Annex B for a list, in the three official languages and English, of suggestions of terms specific to the type of instrument, legal or political, to be concluded.

<sup>17</sup> ACLFA 70.69 (2006 IV), B.2 and the references.

<sup>18</sup> See ACLFA 60.133 (1996 IV).

## F. Treaties of the Confederation and treaties of the cantons

- <sup>25</sup> Article 54 paragraph 1 of the Federal Constitution of the Swiss Confederation of 18 April 1999 (Cst.; RS 101) stipulates that foreign relations are the responsibility of the Confederation. The key aspect of this assignation is the general authority to conclude treaties. The Confederation represents Switzerland within the international community as a subject of public international law<sup>19</sup>. It may also conclude treaties in areas which fall under the responsibility of the cantons at national level but exercises great restraint in this regard<sup>20</sup>.
- <sup>26</sup> Paragraph 3 of article 55 Cst. on the participation of the cantons in foreign policy decisions stipulates that the cantons shall participate in international negotiations in an appropriate manner. The Federal Act of 22 December 1999 on Participation of the Cantons in the Foreign Policy of the Confederation (CPFPA; RS 138.1) establishes the procedures for the involvement and consultation of the cantons where their powers or essential interests are affected. Where the cantons are responsible for the implementation of international law, they are obliged to undertake the necessary amendments in a timely manner (art. 7 CPFPA). However, the Confederation may also provide for execution itself in accordance with the contents of the treaty or in order to adhere to international commitments where necessary<sup>21</sup>.
- <sup>27</sup> Pursuant to article 56 Cst., the cantons may conclude treaties with foreign states on matters that lie within the scope of their powers (para. 1). Such treaties must not conflict with the law or the interests of the Confederation or with the law of any other cantons (para. 2 *in initio*). If this should nevertheless occur, the Federal Council or a canton may raise an objection with the Federal Assembly (art. 186 para. 3 Cst.), which will then decide on approval (art. 172 para. 3 Cst.).
- <sup>28</sup> Before concluding a treaty, the cantons must inform the Confederation (art. 56 para. 2 *in fine*)<sup>22</sup>. They may deal directly with lower ranking foreign authorities; in other cases, the Confederation shall conduct relations with foreign states on behalf of the cantons (para. 3). In practice, the Federal Council generally signs the treaty in its own name and/or in the name of the cantons. The denunciation by the cantons of a treaty concluded on their behalf by the Federal Council passes through it as a mandatory requirement.

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<sup>19</sup> Also see no. 105.

<sup>20</sup> Dispatch of 20 November 1996 on a New Federal Constitution, Federal Gazette (Feuille fédérale, FF) 1997 I 1, p. 231sqq. ad art. 49 of the bill.

<sup>21</sup> *Ibidem*.

<sup>22</sup> The details are governed by art. 61c and 62 of the Federal Act of 21 March 1997 on the Organisation of the Government and the Administration (GAOA; RS 172.010) as well as 27o to 27t of the Ordinance of 25 November 1998 on the Organisation of the Government and the Federal Administration (GAOO; RS 172.010.1). A representation or an office which is requested to conclude a treaty for a canton, must inform, if the canton has not already done so, the DIL of the FDFA, which can, depending upon the case, make contact with the canton and the Federal Chancellery in order to initiate the procedure provided for.

## II. Negotiation of treaties<sup>23</sup>

### A. Initiation of the procedure

<sup>29</sup> The initiative for concluding bilateral treaties or participation in multilateral treaties generally lies with the FDFA or one or more other departments for treaties which fall within the scope of their powers. It may also come from the Federal Council itself, a parliamentary procedural request or a canton.

<sup>30</sup> In bilateral relations, the initiative may also come from a subject of international law wishing to enter into an agreement with Switzerland on a particular matter. In the case of multilateral issues, it may come from the international organisation under whose aegis the treaty is to be concluded or, less commonly, from a state or group of states.

### B. Consultation

<sup>31</sup> Article 147 Cst. on the consultation procedure stipulates that the cantons, the political parties and interested groups shall be invited to express their views in relation to significant treaties. Such consultation has to be organised during the preparatory work on the treaties, when they are submitted for referendum as provided for by article 140 paragraph 1 letter b Cst or subject to referendum as provided for by article 141 paragraph 1 letter d no. 3 Cst.<sup>24</sup> or where they affect the essential interests of the cantons. It may be organised for other treaties<sup>25</sup>.

<sup>32</sup> The consultation procedure may be opened either before the assignment of the negotiation mandate or after signature subject to ratification. The organisational unit concerned will choose from these two options the moment which seems the most opportune for achieving the aim of the consultation procedure as defined by law<sup>26</sup>. However, politically undisputed treaties whose content is comparable with that of existing treaties, on the one hand, and treaties where the effect on national law is non-existent or negligible, on the other, must not necessarily be submitted for consultation. However, a legislative modification already approved by Parliament will limit the scope for renouncing a consultation procedure<sup>27</sup>.

### C. Negotiation mandate

<sup>33</sup> A mandate generally has to be issued by the Federal Council for the negotiation of significant treaties. However, practice has not yet established objective legal criteria for the definition of significant areas. Political judgement is therefore sometimes decisive. The competence for decision-making and issuing the mandate is based on article 184 paragraph 1 Cst. which

<sup>23</sup> Also see the schematic overview of the procedure set out in Annex C.

<sup>24</sup> On the referendum, see no. 114sqq.

<sup>25</sup> Art. 3 para. 1 let. c and para. 2 of the Federal Act of 18 March 2005 on the Consultation Procedure (CPA; RS 172.061).

<sup>26</sup> According to art. 2 CPA, the consultation procedure aims to involve the cantons, the political parties and stakeholders in the definition of the position of the Confederation and the drawing-up of its decisions. It enables determination of whether a bill of the Confederation is substantially correct, executable and likely to be adopted.

<sup>27</sup> FF 2014 7005, 7006 (art. 3a CPA): renunciation has to be justified by objective reasons and the bill must principally concern the organisation or the procedures of the federal authorities or the division of competences between federal authorities, and no new information is expected as the positions of the interest groups are known, in particular because the subject of the bill has already entered the consultation process beforehand.

assigns responsibility for foreign relations in general to the Federal Council. It consults with the competent parliamentary committees over foreign policy on the key objectives and on the directives or guidelines concerning a mandate for important international negotiations before adopting or amending this mandate, applying article 152 paragraph 3 of the Federal Act of 13 December 2002 on the Federal Assembly (Parliament Act, ParIA, RS 171.10).

- <sup>34</sup> For bilateral treaties, the granting of such mandates is often not deemed essential in practice, except in relations with the EU. A negotiation mandate seems superfluous in areas where the content of the agreements is largely standardised<sup>28</sup> as well as for treaties where a department or an office is responsible for its conclusion. However, the opposite principle applies to multilateral treaties under preparation. The department wishing for Switzerland to accede generally requests the Federal Council to decide on participation in a conference of plenipotentiaries and to issue instructions to the Swiss delegation responsible to participate in the drafting and adoption of the treaty.
- <sup>35</sup> Federal Council directives of 7 December 2012 on the dispatch of delegations to international conferences<sup>29</sup> provide some clarification with regard to mandates. They stipulate in particular that Swiss delegations to international conferences must have a Federal Council mandate (no. 41). However, the dispatch and mandate of the delegation may be decided at department or office level (no. 44), after consultation with the federal services concerned (no. 442 and 443) in one of the two following scenarios (no. 441):
- No new obligation exceeding the powers of the department or office responsible is created, and the conference is also of limited political significance or the negotiations, the political importance of which also has to be limited, take place under the aegis of an international organisation of which Switzerland is a member and which aims to contribute to the development of international law;
  - The Federal Council has already issued a sufficient mandate either generally or for a similar previous conference.

#### D. Drawing up a draft text<sup>30</sup>

- <sup>36</sup> In the case of bilateral treaties, after consultations which may be necessary at international level, a draft text will often be drawn up unilaterally or in collaboration with the partner before the actual opening of negotiations. The department concerned may either draft it during the preparatory meetings or by means of correspondence.
- <sup>37</sup> The drawing-up of a draft multilateral treaty generally takes place within the international organisation under the aegis of which the treaty is adopted or by the diplomatic conference responsible for the adoption of a treaty. These bodies sometimes assign a mandate to an external entity specialised in drafting.

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<sup>28</sup> See no. 43.

<sup>29</sup> FF 2012 8761. These directives only apply directly with regard to multilateral treaties (no. 11), but it is sometimes possible to draw upon them for bilateral negotiations.

<sup>30</sup> During the drawing-up of a draft treaty, editorial questions are also raised in relation, for example, to terms, the wording of expressions and the structure, but also the coherence of the text in itself and in relation to other treaties and national law. The Federal Chancellery's central linguistic services may be consulted on such matters but at an early stage and in any event before the initialing of the text. The linguistic support can be provided on the three following conditions: the text has not yet been initialed, it has to be published in an official publication (FF, RO, RS) and one of the original versions of the text is in German, French or Italian.

E. Official negotiations

a. Full powers of negotiation

<sup>38</sup> The full powers/credentials (*pleins pouvoirs*, *Vollmacht*, *pieni poteri*) are established in Switzerland by the Federal Chancellery, in principle on the basis of the Federal Council's decision to assign the mandate<sup>31</sup>. They include a reference to the members of the delegation authorised to take part in an international conference and, where applicable, the authorisation to sign the final act of this conference.

<sup>39</sup> The head of a delegation assigned such powers of negotiation is authorised, without further procuration, to initial<sup>32</sup>, if a definitive text resulting from the negotiations exists, or, if the adoption of the text is put to the vote, to vote on behalf of Switzerland. A credentials committee is generally set up during international conferences. Its role is to verify the powers issued and to indicate to the conference the delegations, whose powers have been confirmed as being in due and proper form, which are to be authorised to take part in voting, the signature of the final act or initialling<sup>33</sup>. However, specific full powers generally issued in a separate document are required for the signature of an international treaty<sup>34</sup>.

b. Adoption and authentication of the treaty text

<sup>40</sup> When a draft has been drawn up before the opening of negotiations, the definitive text has to be established during them. If no draft text has been drawn up, it has to be drafted and agreed during the official negotiations and then finally acknowledged as being authentic and definitive (art. 9sq. VCLT).

<sup>41</sup> When it is adopted at a conference, in accordance with the procedures which vary from case to case (consensus, voting), the definitive text of a multilateral treaty is often annexed to the final act of the conference. The final act is an instrument without binding legal status which sets out in abridged form the objective of the conference, important organisational elements and summary information on the conference proceedings and its results.

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<sup>31</sup> When the granting of the mandate is the responsibility of the department or office (see no. 35), but full powers are nevertheless required, the unit concerned obtains them by means of the presidential decree procedure.

<sup>32</sup> See no. 90sq.

<sup>33</sup> In international practice, the criteria concerning the validity of powers set out by a credentials committee within a conference may be more flexible than those governing the full powers of the signature of a treaty (see no. 94, for example, the acceptance of copies or documents signed by an official of lower rank than head of state, head of government or minister for foreign affairs).

<sup>34</sup> See no. 93sq.

### III. Content of treaties

<sup>42</sup> A treaty is generally, except in the case of an exchange of letters or notes, incorporated in a single document which usually has the same structure. The title indicates the subject of the treaty, preceded, in the case of bilateral treaties or treaties restricted to a limited number of parties, by the names of the parties.

<sup>43</sup> In many fields, international practice has established standard clauses or bilateral treaty models, which provide draft texts drawn up on the basis of which only unresolved issues are negotiated. Similarly, one party often presents identical texts to several partners in bilateral relations. This results in largely standardised texts, as is sometimes the case in the fields of double taxation, investment protection, air transport, social security, readmission, visa exemption and free trade. Model texts are also provided by international organisations, such as the OECD, in some specific fields.

#### A. Preamble

<sup>44</sup> After its title, a treaty often begins with a preamble which may contain the following elements:

##### a. Name of the parties

<sup>45</sup> The contracting parties are indicated using the names of the states or international organisations or by the name of the bodies which have the authority to conclude on behalf of each party. The states are named according to their official designation<sup>35</sup>, in the alphabetical order of the language of the text concerned<sup>36</sup> in treaties between several states. As far as possible, the names of the parties should be uniform throughout the treaty (title, preamble, text and signatures) and the contracting parties should be at the same hierarchical level. Switzerland is sometimes referred to as “Switzerland” or “the Swiss Confederation” and sometimes “the Swiss Federal Council”<sup>37</sup>.

##### b. Reasons

<sup>46</sup> The preamble outlines the reasons which have led the parties to conclude the treaty. The agreement’s objective is often mentioned in one of the first articles of the treaty. Reference is also often made to the good relations between the contracting parties and to existing multilateral or bilateral treaties on a related subject connecting the parties. Generally, the preamble does not contain legal norms and does not have immediate legal significance. However, it can be significant to the interpretation of the treaty.

##### c. Indication of plenipotentiaries and clause on full powers

<sup>47</sup> At the end of the preamble, the surnames, first names, titles and positions of the plenipotentiaries may be set out, as well as wording attesting that they have been assigned full powers and that these have been verified as being in proper and due form and have been exchanged. These elements are nevertheless often not included, particularly in multilateral treaties, and are hardly used in recent instruments.

<sup>35</sup> See the lists of the official names of the states in the three national languages on the FDFA’s website at [www.fdfa.admin.ch/treaties](http://www.fdfa.admin.ch/treaties).

<sup>36</sup> For bilateral treaties, see no. 79sqq.

<sup>37</sup> The domestic authority responsible for conclusion does not need to be indicated in the title of an agreement. Even treaties concluded by a department alone on the basis of legal delegation are generally signed in the name of the Federal Council. The term “Swiss Federal Council” should be given preference over “Swiss government” and the adjective “Helvetic” should be avoided.

## B. The main body

<sup>48</sup> The main body is the principal part of the treaty. It contains the substantive clauses agreed by the parties. It is generally divided into articles, which are themselves sub-divided into sections or paragraphs. The articles - which may be grouped in parts, chapters or sections - are numbered in Arabic numerals and less frequently in Roman ones. The main body contains in order the general provisions, special provisions and final clauses. As far as possible, the legislative directives of the Confederation<sup>38</sup> and the principles of the “Legislative Guide”<sup>39</sup> (section 8) are followed during the drawing-up and drafting of treaties if this seems reasonable in the context of the negotiations.

<sup>49</sup> The general provisions are set out chronologically, in other words according to the steps to be undertaken by the parties for the execution of the treaty. The special provisions are also set out in a logical and systematic order. Reference to subsequent provisions in the text should be avoided and, for the sake of clarity, cross-referencing in the same treaty should not be used too frequently.

## C. Final clauses

<sup>50</sup> The final clauses are part of the main body of the treaty but require particular attention. Often neglected during the negotiation and drafting of treaties, they nevertheless play a significant role in ensuring the correct application of the treaty provisions by the parties<sup>40</sup>.

### a. Dispute settlement

<sup>51</sup> Switzerland attaches great importance to the dispute settlement clause in the interpretation and application of both bilateral and multilateral treaties. This clause is usually inserted before the final provisions. In multilateral treaties, it may also be the subject of a special annex or protocol where the clause is divided into several detailed provisions.

### b. Entry into force

<sup>52</sup> The wide range of means available to the parties for the entry into force (*entrée en vigueur*, *Inkrafttreten*, *entrata in vigore*) of a treaty indicates that fixed rules do not exist in this respect. The will of the parties is decisive. A treaty enters into force in such manner and upon such date as it may provide<sup>41</sup> or as the negotiating States may agree upon. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States (art. 24 para. 1 and 2 VCLT). In the case of multilateral treaties, entry into force often depends upon the ratification or accession of a particular number of parties, sometimes after a certain period from the meeting of this condition or the meeting of substantive or financial conditions.

<sup>38</sup> [www.chf.admin.ch](http://www.chf.admin.ch) > Thèmes > Législation > Technique législative

<sup>39</sup> [www.ofj.admin.ch](http://www.ofj.admin.ch) > Etat & citoyen > Légistique > Instruments de légistique

<sup>40</sup> See Annex E as well as, for example, “Final Clauses of Multilateral Treaties Handbook, UN, New York,” available in English (at <http://treaties.un.org/doc/source/publications/FC/English.pdf>, 2003) and in French (at <http://treaties.un.org/doc/source/publications/FC/French.pdf>, 2006).

<sup>41</sup> See no. 124sqq.

## c. Provisional application

- 53 In contrast to entry into force, provisional application (application provisoire, vorläufige Anwendung, applicazione provvisoria) is not definitively binding. A treaty or a part of a treaty is applied provisionally pending its entry into force if the treaty itself so provides or the negotiating States have in some other manner so agreed (art. 25 VCLT). The provisional application of a treaty which revokes a previous agreement provisionally suspends its application.
- 54 In Switzerland, if responsibility for the approval of a treaty lies with Parliament, the Federal Council may decide on or agree to its provisional application, provided this is necessary to protect Switzerland's essential interests and in the event of particular urgency. It then has six months from the provisional application to submit the treaty concerned for approval to the Federal Assembly<sup>42</sup>. This approach does not impede parliamentary powers of approval; the provisional application of a treaty may be interrupted at any time. This ensures that Switzerland is not bound to it long-term and definitively unless the treaty is approved in accordance with the ordinary procedure<sup>43</sup>.
- 55 If responsibility for approval of the treaty does not lie with Parliament, these conditions do not have to be met. The Federal Council, a department or an office which has the power to conclude the treaty can decide on its entry into force upon signature. A fortiori, it may decide on its provisional application. However, limited use is made of this procedure in practice and preference should be given to entry into force of the treaty upon signature or shortly afterwards<sup>44</sup>.

## d. Denunciation and withdrawal

- 56 The term denunciation (*dénonciation*, *Kündigung*, *denuncia*) is reserved for bilateral treaties and withdrawal (*retrait*, *Rücktritt*, *ritiro*) for multilateral treaties. It is advisable to provide for a clause on this in all treaties which can be denounced by their nature. This is not the case with peace treaties or territorial settlements, for example. In the absence of such a clause, a treaty is only subject to denunciation or withdrawal if it is established that the parties intended to admit such a possibility or if such a right may be implied by the nature of the treaty. In these two scenarios, notification of the denunciation or withdrawal has to be provided at least twelve months in advance (art. 56 VCLT).
- 57 The denunciation of a bilateral treaty is usually communicated by verbal note from one party to the other and it results in the treaty being repealed. Withdrawal from a multilateral treaty is generally addressed to the depositary who notifies the parties. It does not detract from the validity of the treaty, even if the number of parties falls below the number necessary for its entry into force (art. 55 VCLT). State law determines the authority authorised to denounce or withdraw from a treaty<sup>45</sup>.

<sup>42</sup> Art. 7b GAOA. For the origin of this provision, see the report of 18 November 2003 of the Council of States Political Institutions Committee (FF 2004 703) and the Federal Council opinion of 18 February 2004 (FF 2004 939). On provisional application, also see VALENTIN ZELLWEGER, *Die demokratische Legitimation staatsvertraglichen Rechts*, in: *Der Staatsvertrag im schweizerischen Verfassungsrecht*, Bern 2001, p. 251sq., 397sq.

<sup>43</sup> Art. 25 VCLT; also see FF 1999 IV 4471, 4492 and the references. The parliamentary committees have to be consulted beforehand (art. 152 para. 3<sup>bis</sup> ParlA) and, recently since 1 May 2015, the Federal Council has to "renounce the provisional application if the two competent committees of the Federal Assembly oppose it." (see FF 2014 7043, 7044 ad art. 7b para. 1<sup>bis</sup> GAOA).

<sup>44</sup> However, for treaties to be published, as publication has to take place shortly before entry into force or from when this is known (see no. 162), a period of time between the signature and entry into force should preferably be provided for to enable publication in time.

<sup>45</sup> In Switzerland, this responsibility generally lies with the Federal Council, see no. 120sq.

e. Other

- <sup>58</sup> A territorial clause may specify the scope of the treaty for the contracting states which administer extra-metropolitan territories. Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory (art. 29 VCLT). In multilateral treaties, such exceptions to this principle are set out in declarations made by the parties concerned where they are not included in the body of the text.
- <sup>59</sup> A clause concerning the duration only generally exists in certain bilateral treaties. It may provide for an expiration date determined in advance or an initial fixed period of validity and then prolongation by tacit consent from year to year, combined with a notice period for denunciation. Saving any provisions to the contrary, a treaty establishing the border between two states is concluded for an unlimited period (and cannot be denounced); a treaty solely concerning performance and counter-performance is generally automatically terminated when both have been executed.
- <sup>60</sup> It is often the case that upon conclusion the parties agree on a procedure enabling the amendment of the agreement, if the need arises, mainly when a treaty is of indefinite duration and above all for multilateral treaties<sup>46</sup>.
- <sup>61</sup> The termination (extinction, Beendigung, estinzione) of a treaty takes place pursuant to its provisions or by unanimous agreement of the parties. A treaty may also be terminated through its own execution. Furthermore, external events, such as cases of force majeure, may also have an effect on the existence of a treaty (see art. 54 to 64 VCLT).
- <sup>62</sup> In contrast to termination, the suspension (suspension, Suspendierung, sospensione) of the application of the treaty does not affect its validity. Suspension is in principle only possible under certain established conditions (art. 57sq. VCLT) and may only be given preference over denunciation if the grounds on which it is based are of a transitory nature. The competent authority in Switzerland to decide suspension is determined according to the same rules as for denunciation and withdrawal<sup>47</sup>.

D. Annexes

- <sup>63</sup> Bilateral and multilateral treaties are often accompanied by annexes which govern technical issues or details. They may also contain exchanges of supplementary letters, application protocols, lists of all kinds, geographical maps, etc.
- <sup>64</sup> In principle, the annexes have to be considered as an integral part of the treaties. They may also have to be signed by the plenipotentiaries depending on their form (e.g. protocol), at least as far as bilateral treaties are concerned, with the exception of lists, maps and of course the exchange of notes for which initialling is preferred.

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<sup>46</sup> Also see no. 191

<sup>47</sup> See no. 120sq.

#### IV. Treaty languages

<sup>65</sup> In light of the increase in languages admitted or officially recognised by international organisations and the growing requirement of states to use their own language(s) in international relations, the drafting of treaties has become an issue of increasing importance.

##### A. Authentic text

<sup>66</sup> The authentic text (*texte authentique*, *authentischer Text*, *testo autentico*) of a treaty may be drafted in one or more languages. It is advisable to specify which language prevails in case of divergence (see art. 33 VCLT). However, some international institutions, such as the UN and as a rule the EU, declare that the texts drafted in all of their official languages are equally authentic.

<sup>67</sup> Bilateral treaties are generally drafted in the official language or one of the official languages of each party. This authentic version is handed over to the partner for verification and approval prior to signature. A third language, often English as this is used in negotiation, is sometimes provided for as the single version which prevails in the event of divergence between the different versions, above all where the language of a state is not very accessible. For Switzerland, the drafting of an authentic version in at least one of the official languages is a legal requirement for treaties whose publication is mandatory<sup>48</sup>, but this is nevertheless subject to exceptions where English is used in cases of urgency or where peremptory requirements concerning form or usage exist<sup>49</sup>.

##### B. Translations

<sup>68</sup> In Switzerland, the Official Compilation of Federal Legislation (*Recueil officiel*, RO) and the Classified Compilation of Federal Legislation (*Recueil systématique*, RS)<sup>50</sup> are published in French, German and Italian. Translations are therefore frequently produced for publication. However, only the authentic text designated as such by the treaty is authoritative<sup>51</sup>.

<sup>69</sup> Treaties drafted under the aegis of international organisations rarely have a German or Italian version. In the case of the most significant multilateral treaties, a joint translation for the German-speaking states or Italian-speaking states is sometimes produced by the states concerned. In contrast to autonomous Swiss translations, which are often based on the authentic French version, the joint translations are generally based on the English version of the treaties. Although they are joint translations, they may still contain differences based on specific linguistic particularities in one of the participating countries.

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<sup>48</sup> See no. 160sqq.

<sup>49</sup> Art. 13 of the Federal Act of 5 October 2007 on the National Languages (LangA; RS 441.1) and art. 5 of the Ordinance of 4 June 2010 on the National Languages (LangO; RS 441.11). The exchange of notes or letters is the example of the peremptory requirement of form (art. 5 para. 1 let. b LangA; see no. 13); the use of English (see art. 5 para. 1 let. c LangO) essentially concerns commercial agreements.

<sup>50</sup> See [www.admin.ch/bundesrecht/00567/index.html?lang=fr](http://www.admin.ch/bundesrecht/00567/index.html?lang=fr) as well as no. 160sqq., and [www.admin.ch/bundesrecht/00566/index.html?lang=fr](http://www.admin.ch/bundesrecht/00566/index.html?lang=fr) as well as no. 165sqq.

<sup>51</sup> Art. 9 para. 2 of the Publications Act of 18 June 2004 (PublA; RS 170.512) indicates that international treaties specify which version is authoritative (also see art. 15 para. 3 of the draft revision, FF 2014 6993, 6997). It is the linguistic services of the department that carry out the translations into French, German and Italian required for the publications.

<sup>70</sup> For multilateral treaties, official translations are sometimes produced, in addition to the authentic version drafted and signed in one or more languages, in one or more other languages. This procedure is disappearing.

C. Amendment of drafting errors

<sup>71</sup> Drafting errors, such as grammatical, spelling or typographical mistakes or a lack of concordance, namely differences not of substantive scope between the authentic versions of the treaty, do not influence the content of the treaty and therefore do not invalidate the consent of the parties. Such errors do therefore not affect the validity of the treaty (art. 48 para. 1 and 3 VCLT). In the case of bilateral treaties, an exchange of diplomatic notes acknowledging the drafting error and confirming the correction is sufficient. Each party can then amend the error in its own original.

<sup>72</sup> In the case of multilateral treaties, the matter is governed in detail by the Vienna Convention (art. 79). The depositary notifies the signatory and contracting parties of the error and the proposed amendment. If no objection is made within a specified period, the depositary makes the rectification to the original copy of the treaty and then draws up and sends a procès-verbal of rectification of the text. These rules also apply where the treaty has not yet entered into force.

## V. Depositary of the treaties<sup>52</sup>

### A. Designation

<sup>73</sup> Multilateral treaties generally establish a depositary (dépositaire, Depositär, depositario). When negotiating a treaty, the parties are free in their choice of depositary. This task is increasingly less frequently assigned to the government of a state but instead to the secretariat of the international organisation under the auspices of which the treaty was concluded. The UN is therefore currently the depositary for over 550 treaties and the Council of Europe for around 220.

<sup>74</sup> Switzerland acts as depositary for around 80 treaties<sup>53</sup>, including the Geneva Conventions for the Protection of War Victims and their additional protocols<sup>54</sup>. It therefore possesses extensive experience of the field. The role of depositary vested in the Federal Council is exercised by the DIL of the FDFA<sup>55</sup> and its Treaty Section. The decision to accept the designation of the Federal Council as the depositary of a treaty logically lies with it.

### B. Role

<sup>75</sup> The depositary is designated and its role is often specified by the treaty itself in the final clauses. In the absence of specific provisions, the obligations of the depositary are governed by the principles of general international law as codified in the Vienna Convention, reflecting customary law. This contains various provisions on the depositary (art. 76 to 80). After providing for an obligation to act impartially (art. 76 para. 2), it sets out in detail but not exhaustively its main tasks, which are primarily of a notarial nature (art. 77).

<sup>76</sup> In particular, the depositary receives and keeps, on behalf of the parties, the original documents, such as the original text of the treaty, the full powers of signature, the ratification instruments, the communications and all acts relevant to the implementation and the field of application of the treaty in question. It examines the formal admissibility of the full powers, instruments and any reservations and declarations. It notifies the parties and other interested States of signatures, ratifications, accessions, successions, reservations, declarations and withdrawals. It produces certified copies of the treaty text, carries out the procedure for the correction of errors in the original documents and registers the treaty with the office of the UN Secretary-General<sup>56</sup>. The depositary therefore performs an international role of an administrative nature which requires precision and exactitude.

<sup>77</sup> However, it is not for the depositary to exercise a substantive control over the acts submitted to it. This competence lies exclusively with the parties. For example, the legitimacy of the proposed corrections to one of the language versions is exclusively the responsibility of the signatories and the parties (art. 79 VCLT). They are also responsible for evaluating the material admissibility of any reservations made which run counter to a treaty (art. 20

<sup>52</sup> On the matter in general, also see “Le rôle de la Suisse en tant que dépositaire des Conventions de Genève” (Switzerland’s role as depositary of the Geneva Conventions), annex 2 to the Foreign Policy Report of 15 June 2007 (FF 2007 5257, 5291sqq.).

<sup>53</sup> See [www.fdfa.admin.ch/depositary](http://www.fdfa.admin.ch/depositary).

<sup>54</sup> See *ibidem* and RS 0.518.12, 0.518.23, 0.518.42, 0.518.51, 0.518.521, 0.518.522, 0.518.523.

<sup>55</sup> Art. 8 para. 3 let. d of the Organisation Ordinance of 20 April 2011 for the Federal Department of Foreign Affairs (OrgO-FDFA; RS 172.211.1).

<sup>56</sup> See no. 173.

VCLT)<sup>57</sup>. In such cases, the depositary's role is restricted to forwarding the documents received. When a material judgement has to be made on a particular act associated with a treaty, where the depositary is also a party<sup>58</sup>, it has to distinguish between its two roles. It can nevertheless exercise its rights as a party unrestrictedly.

<sup>78</sup> The depositary's duty of impartiality does not oblige it to play a passive role. The depositary designated is often chosen because it has played a major role during the negotiations of the new treaty or because it attaches great importance to the field governed. The choice of depositary therefore often represents recognition of the diligence shown. It may also express the expectation that this particular commitment will continue in future. The assumption of a degree of responsibility for the proper functioning and wide geographical application of the treaty is therefore common.

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<sup>57</sup> The situation is nevertheless different if the reservation is inadmissible for formal reasons, for example, if the treaty itself excludes the possibility of making reservations.

<sup>58</sup> This is the case for the majority of treaties for which Switzerland assumes the role of depositary.

## VI. Originals of bilateral treaties

### A. Concept

- <sup>79</sup> Responsibility for the preparation and formatting of the texts<sup>59</sup> in principle lies with, unless agreed otherwise, the party in whose country the treaty is signed. The diplomatic representation of the partner often provides assistance with the preparation of the texts. The authority concerned and the representation agree on the type of paper, the format used and the method of preparation, including the use of a cover, a ribbon or piece of cord and possibly a seal. Each party usually provides its own materials.
- <sup>80</sup> All bilateral treaties are drawn up in two original copies, one for each of the contracting parties. The Swiss original and the partner's original contain the texts of a treaty in all of the languages in which it has been drawn up. A treaty with a Spanish-speaking state drawn up in three languages - for example, French, English and Spanish - is therefore made up of the Swiss original and the partner's original both of which are drawn up in each of these three languages which means six texts in two originals.
- <sup>81</sup> The two documents are identical, except for the order in which the contracting parties are mentioned in the title and in the signatures<sup>60</sup>. Each party is given precedence in the document assigned to it. The Swiss original mentions Switzerland first whereas the partner's original mentions Switzerland second. In the Swiss original, the signature of the Swiss plenipotentiary is entered on the left and that of the partner on the right. In the partner's original, the signature of the Swiss plenipotentiary appears on the right and that of the partner on the left. This precedence may also be applied in the body of the text but is used increasingly less frequently; if need be, the same sentence firstly mentions the party whose original the text in question constitutes<sup>61</sup>.
- <sup>82</sup> The use of an entire page for each article has to be avoided as well as double-sided printing unless the treaty text is very long. It is also vital that the originals are compared in all the languages provided for.

### B. Cover

- <sup>83</sup> Treaties of a certain importance are bound in a cover (*couverture*, *Mappe*, *copertina*). The party in whose country the treaty is signed can supply the two covers provided they are of neutral appearance. Otherwise each partner uses its own cover. The Swiss original and the partner's original, drawn up in all the treaty languages, are placed in a single cover for each original if possible. When opening the cover, the version drawn up in the national language of the state whose original it constitutes is placed on top of the version drawn up in the partner's language.

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<sup>59</sup> Also see Annex D.

<sup>60</sup> This order may also differ in the preamble and in the body of the treaty.

<sup>61</sup> If the Swiss original states, for example, "Considering the legislation of Switzerland and of the United Kingdom...", the content of the UK version will be "considering the legislation of the United Kingdom and of Switzerland...". The same applies to all the languages of the treaty.

### C. Ribbon or piece of cord

<sup>84</sup> The texts of the treaty are then bound to the covers with a ribbon (ruban, Band, nastro) or a piece of cord (cordonnet, Kordel, cordoncino). The ribbon or piece of cord used is often in the colours of the party whose original it constitutes<sup>62</sup>.

### D. Seal

<sup>85</sup> The ribbon or piece of cord can be attached with a seal (sceau, Siegel, sigillo), either dry to be stuck or in red wax for sealing. The use of the seals went together with ribbons for almost all bound treaties. Only treaties of limited importance, generally not bound, were not decorated with ribbons or seals. The exception is currently tending to become the rule which means that the seal is never mandatory. The dry seal to be stuck no longer exists in Switzerland and it is only at the partner's request to seal a treaty with wax that Switzerland still does this on rare occasions.

<sup>86</sup> Each delegation checks the original of the other party and the text of the treaty in all of its languages before the seals are finally affixed, which takes place at the ministry of foreign affairs of the state in which the signature is to take place and always before this<sup>63</sup>. For Switzerland, the seal of the Swiss Confederation is not used for treaties, as only the President of the Swiss Confederation together with the Chancellor makes use of it. A head of mission or representative of the FDFA abroad in principle uses the seal of the embassy concerned. The head of delegation uses this or the seal of his/her department.

<sup>87</sup> The two seals are affixed once to each original either in the place provided for this purpose on the back of the cover or directly below the space provided for the signature of the corresponding plenipotentiary. In the second case, they are attached at the end of the text drawn up in the national language of the state whose original it constitutes on the treaty itself and not on any annexes.

### E. Original

<sup>88</sup> Each party is entitled to a signed original copy (original, Urschrift, originale) of each text in all of the languages of the treaty, in other words, all of the versions of its own original. It may also request a copy of all of the texts constituting the partner's original.

### F. Certified copy

<sup>89</sup> The system of original does not apply to multilateral treaties. The original is in principle made up of a single treaty text signed in all of the languages in which it has been drawn up. A certified copy (copie certifiée, beglaubigte Kopie, copia certificata) conforming with the original of a multilateral treaty is issued by the depositary to each party involved in its drafting or upon request to each party likely to be bound by it.

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<sup>62</sup> The use of a double bind on each cover, one in the colours of Switzerland and the other in the partner's colours, is tending to disappear.

<sup>63</sup> In Switzerland, the Treaty Section of the DIL of the FDFA, which has an FDFA seal for treaties signed in Bern, should be contacted in good time to affix the seals at least a day before the signature.

## VII. Signature of the treaties

### A. Initialling

<sup>90</sup> Initialling (*paraphe*, *Paraphierung*, *parafa*) is the simple entering of the negotiators' initials at the end of the treaty text. This optional formality generally takes place when the definitive text of the treaty has been adopted by the negotiators without them having full powers to sign it or when the treaty's clauses differ substantially from the instructions received. The initialling takes place to give a certain degree of gravity to the completion of the negotiations of an important treaty. Initialling is generally intended to be followed by the signature of the treaty unless the parties deem initialling sufficient (art. 10 let. b and 12 para. 2 let. a VCLT).

<sup>91</sup> The initials are generally entered at the bottom of the last page of the treaty text. In addition to the signature, the partner sometimes requires the initialling of each page of a bilateral treaty by the two parties. This wish should be complied with but not expressed by Swiss representatives, at least for a treaty whose pages are bound and therefore irremovable.

### B. Signature *ad referendum*

<sup>92</sup> A signature *ad referendum* is given subject to confirmation. Similar to initialling in terms of its effect, this formality is becoming less important and is not used by Switzerland. The signature *ad referendum* is equivalent to the definitive signature of the treaty when it is confirmed (art. 10 let. b and 12 para. 2 let. b VCLT).

### C. Full powers of signature

<sup>93</sup> The powers must unequivocally authorise one or more persons, the plenipotentiaries, to sign, on behalf of the state, a treaty which must be clearly designated. When the text of a treaty expressly stipulates that the signature must be followed by ratification, there is no point in indicating in the powers or upon signature that this is undertaken subject to ratification.

<sup>94</sup> Only heads of state, heads of government and ministers for foreign affairs may sign a treaty without producing full powers (art. 7 VCLT). The other representatives of a state have to produce the powers before or during signature. By extension, the full powers have to be signed by one of the three aforementioned authorities<sup>64</sup>. Copies, facsimiles, documents validly signed electronically and unsigned telegraphs or emails may be provisionally accepted if they come from constitutionally empowered bodies and provided their authenticity is certified by the designated plenipotentiary but they then have to be confirmed by the original powers in proper and due form.

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<sup>64</sup> It may also be a person provisionally exercising the powers of the head of state, the head of government or minister of foreign affairs (but the powers must then indicate "acting" or "ad interim") excluding their deputies.

<sup>95</sup> In Switzerland, the powers required for signing a treaty are established by the Federal Chancellery based on a Federal Council decision<sup>65</sup>. The full powers are submitted in the original copy to the partner of a bilateral treaty in exchange for its powers or to the depositary of a multilateral treaty. If the designated plenipotentiary is authorised to delegate the signature, the signatory will also produce the original evidence of this delegation. In the case of bilateral treaties, the partner's original copy of the full powers document and, where applicable, a translation must also be handed over at the same time as the original copy of the signed treaty to the DIL of the FDFA.

#### D. Signature

<sup>96</sup> Unless it is definitive and expresses the consent of a party to be bound by a treaty (art. 12 para. 1 VCLT)<sup>66</sup>, the signature (signature, Unterzeichnung, firma) by the plenipotentiaries only attests the authenticity of the negotiated text. This is known as a simple signature. The signatory is therefore not yet bound by the treaty itself. It is however obliged to act in good faith with regard to the treaty and to refrain from acts which may jeopardise the subsequent execution of the treaty or render it impossible (art. 18 VCLT).

<sup>97</sup> In the case of bilateral treaties, each party firstly signs its own original, on the left, in all the languages of the treaty. It then hands over its original to the partner, who signs it on the right. Any annexes to the treaty should also be signed in the same way<sup>67</sup>. After the signature, each party takes back its own original. They are not exchanged, this practice being reserved for full powers documents and ratification instruments. With multilateral treaties, the plenipotentiaries sign the single original copy in the order in which they are mentioned at the beginning of the treaty or, failing that, according to the alphabetical order of the parties concerned.

<sup>98</sup> Usually, treaties are signed by persons at the same level. When a minister of foreign affairs or a senior official from this ministry signs on one side, in the absence of the counterpart, the other party is often represented by an ambassador (diplomatic level). If another head of delegation signs it, it is his/her counterpart who enters into the undertaking for the partner (administrative level).

#### E. Place, date

<sup>99</sup> All treaties must indicate the place where it was actually signed. In cases where treaties are signed in two (bilateral) or several (multilateral) different places, this must be expressly indicated. The indication of the place appears immediately before the date and the signatures.

<sup>100</sup> All treaties must contain the date of their signature. If a bilateral treaty is signed on different dates, this has to be indicated. This indication immediately follows that of the place. For multilateral treaties, the date of adoption of the treaty text by a diplomatic conference and the date of opening for signature can be different. This is due to the need to leave the depositary,

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<sup>65</sup> This generally takes place at the same time as the decision of adoption and signature of the treaty. However, for treaties where authority lies with a department, sector or office and the signature is not therefore subject to a Federal Council decision, the unit in question requires the full powers from the Federal Chancellery by means of the presidential decree procedure after having obtained confirmation of its powers of conclusion from the DIL of the FDFA (Directives of the Federal Council of 7 December 2012 concerning the dispatch of delegations to international conferences, FF 2012 8761, no. 52sqq.).

<sup>66</sup> Also see no. 124sq.

<sup>67</sup> Also see no. 79sqq. and Annex D.

the secretariat of the conference or the competent bodies of the organisation sufficient time to draw up the treaty text in all of its languages or to provide the parties with additional time to prepare for signature. In order to encourage participation in the treaty by the largest number of parties possible, the signature deadline often extends over a certain period or may even be unlimited. The depositary takes note of the date of signature. The plenipotentiaries may also indicate this by hand next to their signature.

- <sup>101</sup> If a treaty is signed on different dates but attaches legal significance, such as entry into force, to the date of signature, the most recent date is usually taken into account.

#### F. Identification of the signature

- <sup>102</sup> For bilateral treaties, the signature should be preceded or followed by the full name of the plenipotentiary, the official title of their position and the authority that they represent, at least where full powers are not handed over at the same time. For an exchange of letters, the letterhead may stand in lieu<sup>68</sup>.

#### G. Reservations and declarations<sup>69</sup>

- <sup>103</sup> Subject to the provisions of the treaty in question, the parties may set out reservations and declarations at the time of the signature of a multilateral treaty, including declarations on the territorial application of the treaty or on the authorities designated to implement it. The reservations and declarations were sometimes set out at the end of the treaty text itself, by hand and above the signature, but this has become rare. They are more commonly included in a separate document, letter or note and handed over to the depositary upon signature.
- <sup>104</sup> Reservations or declarations formulated when signing subject to ratification must, unless the treaty includes provisions to the contrary, be confirmed upon ratification (art. 23 para. 2 VCLT) in the instrument itself or in an attached document.

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<sup>68</sup> For an exchange of notes, the person who initials is not identified.

<sup>69</sup> About this issue in general, see no. 140sqq.

## VIII. Domestic procedure for the approval of treaties<sup>70</sup>

### A. Distinction between treaties and non-binding instruments

- <sup>105</sup> It is the content of an agreement and not its form or its title which, in Switzerland, determines the domestic procedure required for its approval and entry into force. To establish the national competence for concluding any international instrument, it firstly has to be determined whether it will result in any legally binding effects under international law. If this instrument is drawn up in such a way that the Swiss Confederation (acting through the Federal Council or a subordinate authority) undertakes specific commitments which place it under legal obligations, it is a treaty. Under international law, it is the Swiss Confederation (see art. 6 VCLT) – and not the administrative unit, which does not have any legal personality – that can be held responsible for the obligations undertaken.
- <sup>106</sup> If the text does not express any legal obligation for the parties, which it should refer to expressly if possible<sup>71</sup>, it is a non-binding instrument<sup>72</sup>. In principle, competence for conclusion therefore lies with the Federal Council pursuant to article 184 paragraph 1 Cst. Such an instrument can only be concluded by a department under its own competence if it is of very limited importance in terms of conducting Swiss foreign policy. It can only be concluded by an office or sector if this possesses a delegation of competence to also conclude treaties in this field<sup>73</sup>.

### B. Competence of the Federal Assembly

- <sup>107</sup> Foreign relations are the responsibility of the Swiss Confederation (art. 54 para. 1 Cst.). Under the provisions of article 166 paragraph 2 Cst., it is the competence of the Federal Assembly to approve treaties with the exception of those that are concluded by the Federal Council under a statutory provision or a treaty<sup>74</sup>. This also applies to amendments<sup>75</sup> but, depending upon the legal basis, the modification may not be subject to the authority which approved the treaty<sup>76</sup>. However, to extend a treaty, it is established practice for the approving authority to be competent.
- <sup>108</sup> This approval is required from the Federal Assembly by the Federal Council, in principle by means of a dispatch<sup>77</sup>, to which the treaty text is annexed (art. 184 para. 2 Cst.). The treaty can only be approved or rejected as a whole. At most, the Federal Assembly may make its approval dependent upon the formulation of a reservation provided this does not conflict with the treaty. Approval is provided by means of the adoption of a federal decree.

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<sup>70</sup> On these matters in general, see ACLFA 70.69 (2006 IV) and the references. Also see aide-mémoire in Annex F.

<sup>71</sup> Through a provision stipulating, for example, that “this text is not intended to create legally binding obligations between the signatories.”

<sup>72</sup> See no. 18sqq.

<sup>73</sup> Also see ACLFA 70.69 (2006 IV), D and the references.

<sup>74</sup> Also see art. 7a para. 1 GAOA and 24 para. 2 ParlA.

<sup>75</sup> See no. 186sqq.

<sup>76</sup> This is the case with a modification to a treaty submitted to Parliament which, if it is of limited importance pursuant to art. 7a para. 2 GAOA (see para. 3 and 4 new), can be approved by the Federal Council alone.

<sup>77</sup> Some treaties in the field of commerce are subject to the approval of the Federal Assembly by means of periodic reports of the Federal Council, for example, on international economic policy; see art. 10 para. 2 and 3 of the Federal Act of 25 June 1982 on International Trade Measures (RS 946.201).

### C. Competence of the Federal Council

- <sup>109</sup> Pursuant to article 184 paragraph 1 Cst., the Federal Council is responsible for foreign relations, subject to the rights of participation of the Federal Assembly, and represents Switzerland abroad. This provision establishes the general competence of the Federal Council, in particular to conclude legally non-binding international instruments as well as to assign negotiation mandates.
- <sup>110</sup> Article 184 paragraph 2 Cst. states that it is the Federal Council which signs the treaties, submits them to the Federal Assembly for approval and ratifies them<sup>78</sup>. The executive always has the competence to decide whether to sign a treaty subject to ratification and, technically, to perform this signature. It also has the competence to decide on ratification subject to the approval of Parliament and, technically, to carry out the deposit or the exchange of the ratification instruments.
- <sup>111</sup> The executive has various legal bases<sup>79</sup> giving it its own competence to conclude treaties. This is effectively provided for in various special laws or in some treaties already approved by Parliament as well as in the GAOA, article 7a, paragraph 2 of which states that the Federal Council may conclude treaties of limited scope alone.
- <sup>112</sup> Considered as treaties of limited scope are, pursuant to article 7a paragraph 3 GAOA, in particular, treaties which (a) neither create new obligations for Switzerland nor result in the renunciation of existing rights, (b) serve for the execution of previous treaties approved by the Federal Assembly and are limited to setting out the rights and obligations or the principles of organisation already contained in the basic treaty, or (c) concern authorities and govern administrative or technical matters. However, limited scope is excluded, pursuant to paragraph 4 of this provision, in particular if (a) one of the application criteria for an optional referendum is met, (b) the treaty contains provisions the subject of which comes under the sole competence of the cantons, or (c) if it results in one-off expenditure of over CHF 5 million or periodic expenditure of over CHF 2 million a year.<sup>80</sup> It is sufficient for one of the three conditions of paragraph 3 to be met but none of the criteria of paragraph 4 must be met in order for the Federal Council to have competence of conclusion.

### D. Competence of subordinate administrative units<sup>81</sup>

- <sup>113</sup> Parliament can delegate the competence to conclude treaties not just to the Federal Council, but also directly to the subordinate administrative units. The Federal Council for its part can also sub-delegate the competence to conclude a treaty to a department (art. 48a para. 1, 1<sup>st</sup> clause, GAOA). It may also delegate its competence to a sector or an office where treaties of limited scope are concerned (art. 48a para. 1, 2<sup>nd</sup> clause, GAOA) or if another express legal basis exists to this effect; a general or abstract norm provided for in an ordinance or a specific individual or collective authorisation in the form of a Federal Council decision is therefore required.

<sup>78</sup> See no. 126sqq.

<sup>79</sup> See FF 1999 IV 4471, 4488sqq.

<sup>80</sup> See FF 2014 7043. Art. 7a GAOA was amended on 1 May 2015 with the purpose of a restriction of the Federal Council's competence of conclusion. It previously also covered treaties of limited scope on subjects concerning the regulatory powers of the Federal Council in so far as the exercising of this competence requires the conclusion of an international treaty (para. 2 let. c) and it did not provide for criteria excluding the limited scope. See Explanatory Report of 7 May 1999 by the National Council's Political Institutions Committee concerning the parliamentary initiative "Parliamentary Procedure Act. Amendments to the New Constitution", FF 1999 IV 4471, 4490, no. 318.5 ad art. 47<sup>bis</sup> b para. 3 of the former Parliamentary Procedure Act, incorporated into the former art. 7a para. 2 GAOA.

<sup>81</sup> For details, see ACLFA 70.69 (2006 IV), C.2.

## E. Referendum

- <sup>114</sup> Article 140 paragraph 1 letter b Cst. stipulates that accession to organisations for collective security or to supranational communities must be put to the vote of the Swiss people and the cantons. The federal decree of approval of a treaty establishing Switzerland's accession to such organisations is therefore subject to a mandatory referendum and has to be approved by the double majority of the Swiss people and the cantons.
- <sup>115</sup> With regard to the optional referendum on treaties<sup>82</sup>, article 141 paragraph 1 letter d Cst. stipulates that, if 50000 citizens eligible to vote or any eight cantons request it within 100 days of the official publication of the enactment, the following treaties shall be submitted to a vote of the Swiss people: treaties that (1) are of unlimited duration and may not be terminated, (2) provide for accession to an international organisation or (3) contain important legislative provisions or whose implementation requires the enactment of federal legislation.
- <sup>116</sup> The question of knowing whether a treaty provides for accession to an international organisation, whether it can be denounced or if its implementation requires the adoption of federal laws is relatively straightforward in principle. However, knowing whether it contains important legislative provisions often requires more in-depth analysis. Legislative provisions are to be understood to be, pursuant to article 22 paragraph 4 ParIA, general and abstract provisions applied directly that establish obligations, confer rights or attribute competences. Important pursuant to article 141 paragraph 1 letter d no. 3 Cst. are provisions, which, in domestic law, have to be enacted, in view of article 164 paragraph 1 Cst., in the form of a federal law.
- <sup>117</sup> In order to establish a coherent practice with regard to treaties which contain important legislative provisions or whose implementation requires the adoption of federal laws and to avoid similar agreements being repeatedly made subject to referendum, the Federal Council proposed to Parliament that agreements which do not contain significant additional obligations compared to already existing treaties, should not be made subject to optional referendum on treaties<sup>83</sup>.
- <sup>118</sup> Article 141a Cst. provides Parliament with the opportunity to incorporate constitutional (in the case of a mandatory referendum) or legal (if the federal decree is subject to optional referendum) modifications concerning the implementation of the treaty<sup>84</sup> into the federal decree approving a treaty.
- <sup>119</sup> A popular ballot is organised if a mandatory referendum is provided for or if the call for an optional referendum succeeds. The Federal Council is only authorized to ratify the treaty if the treaty is accepted in the ballot. A treaty rejected in a referendum cannot be ratified and does not therefore enter into force for Switzerland. Provisional application must be terminated where applicable<sup>85</sup>.

<sup>82</sup> For developments concerning this matter, see, for example, ZELLWEGER, *op. cit.*, p. 281sq. and ACLFA 69.75 (2005 IV).

<sup>83</sup> This may concern so-called "standard" agreements; see no. 43sq. and, for example, the dispatch of 19 September 2003 concerning Double Taxation with Israel (FF 2003 5903, 5910). This disputed practice is under discussion. It has been abandoned since 2009 for double taxation conventions.

<sup>84</sup> See RIDHA FRAOUA, La mise en œuvre des traités internationaux: portée de l'article 141a de la Constitution fédérale, *in*: Atelier du droit: mélanges en l'honneur de HEINRICH KOLLER à l'occasion de son 65<sup>e</sup> anniversaire, Basel 2006, p. 233sq.

<sup>85</sup> See no. 54; see art. 7b para. 3 GAOA.

F. Competence for denouncing a treaty<sup>86</sup>

<sup>120</sup> By established doctrine and practice, in principle the Federal Council has the competence to denounce a bilateral treaty or to withdraw from a multilateral treaty on the basis of article 184 paragraph 1 Cst. This also applies in the case of the suspension of a treaty. However, when the competence to conclude a treaty lies with a department, a sector or an office, this administrative unit also has the competence to denounce it, withdraw from it or suspend it. These principles apply whether Switzerland is acting unilaterally or by joint agreement with a partner.

<sup>121</sup> Parliamentary approval of denunciation, or even submission for referendum, is not excluded. However, such a procedure is only envisaged if already provided for during the conclusion of the treaty or, failing this, only for very important treaties, since paragraphs 1 and 2 of article 184 Cst. would otherwise be partially devoid of substance, the first making the Federal Council responsible for foreign relations in general and the second granting it the competence to decide whether or not to sign the treaties.

G. Annual report to Parliament

<sup>122</sup> In accordance with article 48a paragraph 2 GAOA, the Federal Council presents the Federal Assembly with a report each year on the treaties concluded by it, a department, a sector or an office. The drafting of this annual report is coordinated by the Treaty Section of the DIL of the FDFA which collects the information provided by the departments responsible. Parliament thereby regularly acknowledges, by means of brief statements, all treaties and modifications not submitted to it by dispatch for approval.

<sup>123</sup> This report enables Parliament to examine, for each treaty, whether it comes under the competence of the Federal Council by law. If it deems it does not, it may, through a motion, instruct the Federal Council to submit the treaty in question to it retrospectively. The Federal Council therefore has the opportunity to submit the treaty or modification in question for approval by the Federal Assembly in a separate dispatch or to denounce it as soon as possible. The deposition of a motion requesting the approval of a treaty *a posteriori* by the Federal Assembly does not suspend its application. The treaty continues to apply during the parliamentary procedure. In the event of the rejection of the treaty, it nevertheless has to be denounced at the earliest possible date.

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<sup>86</sup> See ACLFA 70.69 (2006 IV), F and the references.

## IX. Expression of consent to be bound by a treaty<sup>87</sup>

### A. Definitive signature

<sup>124</sup> The definitive signature (signature definitive, vorbehaltlose Unterzeichnung, firma definitiva) expresses a party's consent to be bound by the treaty (art. 12 VCLT). It is a means of commitment which constitutes the exception in Swiss practice. It is primarily used for certain specific categories of bilateral treaties, in particular in the field of economic, technical or financial cooperation. It of course entails the prior consent of the entity authorised to conclude the treaty under national procedure.

<sup>125</sup> Such a process is possible at international level where the treaty provides for it and where it is specified by the powers of the plenipotentiaries. For multilateral treaties, Switzerland rarely uses the definitive signature which includes ratification and has equivalent status to it or to accession in terms of its legal effect.

### B. Ratification

<sup>126</sup> The ratification (ratification, Ratifikation / Ratifizierung, ratifica) is the only means of expressing consent to be bound by a treaty recognised by Swiss constitutional law. A treaty that is not definitively signed has to be ratified in principle in order to enter into force. It is sometimes stipulated that the signature takes place subject to ratification (art. 14 para. 1 VCLT). In Switzerland, competence for ratification lies with the Federal Council (art. 184 para. 2 Cst.). It generally decides upon ratification of a treaty when deciding on its signature or, if the approval of Parliament is required and ratification is subject to this, when it approves the dispatch to be sent to it.

<sup>127</sup> The act through which a party enters into obligations at international level has to be distinguished from approval granted by the authority to which the domestic constitutional system assigns competence to conclude a treaty. In Switzerland, when it does not have direct competence for conclusion, the Federal Council requires the approval of the Federal Assembly (art. 166 para. 2 Cst.) before formally proceeding with ratification. The approval granted by Parliament provides the Federal Council with authorisation to ratify the treaty. It does not oblige it to do so. Ratification of the treaty by the Federal Council can be communicated to the other party (bilateral treaty) or to the other parties (multilateral treaty) in two ways.

<sup>128</sup> The simplest and most frequently used method, with regard to bilateral treaties in any case, consists of informing the partner in writing that the domestic procedures required for the entry into force of the treaty in question have been completed. As a general rule and also according to Swiss practice, a simple verbal note referred to as a notification is drawn up for this purpose. This notification can also take the form of another signed document.<sup>88</sup>

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<sup>87</sup> See art. 11 VCLT.

<sup>88</sup> It must be specified in the treaty, if possible, that it is the date of *receipt* of the last notification that prevails. In effect, the term "date of the last notification" leaves open the question as to whether it is the date of the note or its receipt that applies. The DIL of the FDFA, through its Treaty Section, carries out the conclusion procedure for international treaties (art. 8 para. 3 let. d OrgO-FDFA). In this capacity, it coordinates the deposit of the ratification instruments and provides notification of the completion of the domestic procedures. A Swiss representation or office which produces or obtains such notes must send a copy of the Swiss notes and the original notes of the partner to this section with translation into one of the official languages or into English where necessary.

- <sup>129</sup> The traditional and more formal method involves exchanging (bilateral treaty) or submitting to the depositary (multilateral treaty) the ratification instruments in proper and due form (see art. 16 and 77 let. d VCLT). In Switzerland, the ratification instrument has to be drawn up in one of the three official languages of the Swiss Confederation, often in French, sometimes in German and rarely in Italian. In a document dated and signed by the President of the Swiss Confederation and the Federal Chancellor, the Federal Council attests that the treaty in question has been duly approved by the competent Swiss authorities, declares its ratification – where applicable with the reservations, declarations and communications made therein – and undertakes to observe it on behalf of the Swiss Confederation<sup>89</sup>.
- <sup>130</sup> In practice, the Federal Council carries out ratification in the days, weeks or months following the date of the federal decree of approval, the end of the unused referendum period or the date of the popular vote authorising it. It generally performs the task at the latest within a year of these dates unless extraordinary circumstances require a new Federal Council decision to defer ratification.

### C. Acceptance, approval and act of formal confirmation

- <sup>131</sup> At international level, the consent of a party to be bound by a treaty can be expressed by a different means than ratification. Acceptance (acceptation, Annahme, accettazione) and approval (approbation, Genehmigung, approvazione) are procedures accepted when they are expressly provided for in the treaty text. The legal effects and the procedure to be followed at international level for acceptance or approval are the same as for ratification (art. 2 para. 1 let. b and art. 14 para. 2 VCLT).
- <sup>132</sup> The act of formal confirmation (acte de confirmation formelle, Akt der förmlichen Bestätigung, atto di conferma formale) is the act through which an international organisation provides consent at international level to be bound by a treaty<sup>90</sup>. It is equivalent to ratification, which is nevertheless a term reserved for states.

### D. Accession

- <sup>133</sup> When a party has not signed a multilateral treaty, it may, if provided for by the treaty, deposit an instrument of accession (adhésion / accession, Beitritt, adesione). While ratification follows the signature of a treaty, accession (art. 15 VCLT) is generally a single act. Depending upon the provisions of the treaty, accession is possible for the parties either from the opening of the treaty for signature, from when it can no longer be signed or only after the entry into force of the treaty.
- <sup>134</sup> Accession to a treaty has to be distinguished from accession to an international organisation. This can take place not just through accession itself to the organisation's constituting treaty but also by the signature followed by the ratification of this constituting act.

<sup>89</sup> The exchange of ratification instruments may be entered in special minutes. In Switzerland, these are then drawn up in two copies in one of the three official languages or in English. In the past, the text of the bilateral treaty was also included in the instrument, in its authentic version drawn up in an official language, but this practice has disappeared. The deposit of ratification instruments of a multilateral treaty with a depositary may also be entered in minutes. Switzerland, as a depositary, only draws up such minutes where provided for by the treaty, but substitutes this by sending an acknowledgement of receipt in the form of a verbal note to the depositing party.

<sup>90</sup> See art. 2 para. 1 let. b<sup>bis</sup> of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organisations or between International Organisations (FF 1989 II 766, 767sq.), ratified by Switzerland but not in force (see FF 1989 III 1625).

## E. Succession of states

- <sup>135</sup> Succession (succession, Nachfolge, successione) is the substitution of one state (successor) for another (predecessor) with regard to a territory's responsibility for international relations. It can arise as the result of the establishment of the independence of a new state, the unification of states, the separation of states or the transfer of part of a state's territory to another state. The effects of the succession of states on the treaties concluded by the predecessor state and which are applicable to the territory of the successor state are governed by the Vienna Convention of 23 August 1978 on Succession of States in respect of Treaties<sup>91</sup>.
- <sup>136</sup> For newly independent states<sup>92</sup>, the Convention establishes the "*tabula rasa* (clean slate) principle" (art. 16sq.), according to which the new state is not bound to maintain in force any bilateral or multilateral treaty which was applicable to its territory before independence. Treaties concerning boundaries and territorial regimes (art. 11sq. of the Convention) are generally exceptions to the *tabula rasa* principle. However, the newly independent state may generally notify its succession, accede to the multilateral treaties which it wishes to maintain, or conclude another agreement to this end with the parties bound by bilateral treaties which were applicable to its territory.
- <sup>137</sup> In the case of bilateral treaties, Switzerland's practice is to conclude an agreement with the new state, if it consents, in the form of an exchange of notes expressly stating which treaties in force between Switzerland and the predecessor state continue to apply to the newly independent state<sup>93</sup>. This solution enables treaty relations to be maintained with the new state without necessarily having to open negotiations with it on the conclusion of new treaties. With regard to multilateral treaties and bilateral treaties for which no agreement has been reached, a cessation of application to the territory forming the successor state is presumed from the date of independence. In contrast, continuation of application is presumed where this results from conclusive acts.
- <sup>138</sup> In practice, newly independent states have often made a declaration to the office of the Secretary-General of the UN through which they express their intention to maintain in force, possibly for a period limited to several years, the treaties concluded by the predecessor state. This period enables newly independent states to systematically examine each treaty concluded by the predecessor state.
- <sup>139</sup> In the event of the unification of two or more states (art. 31sq. of the Convention), the principle is the continuation of the treaties, at least for those which do not prohibit automatic accession through succession. In cases of separation, this principle applies to just one state, known as the continuator, which may also retain membership of the international organisations held by the predecessor state provided this is not prohibited by the constituting act. The other state (secession) or the other states (dismemberment) have to request their

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<sup>91</sup> This convention (see United Nations Treaty Series UNTS no. 33356, volume 1946, p. 3) entered into force on 6 November 1996, but neither signed nor ratified by Switzerland, only applies to around 20 states. Originally resulting from the process of decolonisation after the Second World War, the issue of the succession of states with regard to treaties has given rise to, in Switzerland and elsewhere, a certain degree of legal uncertainty. The general presumption of the continuation of the validity of treaties has been reversed over the years in favour of expiration. Recent practice has put greater emphasis on the will of the new state. Changes of government and fundamental modifications to political, economic and social conditions in a country have no effect on the validity of the treaties. They do not constitute a case of succession of state.

<sup>92</sup> This is the case with states formed as a result of decolonisation.

<sup>93</sup> This generally concerns all bilateral treaties in force with the predecessor state and which lend themselves to this; revision is nevertheless often carried out at this juncture involving the non-resumption of obsolete treaties or a special mention of the treaties where renegotiation is anticipated over the short term.

accession where applicable. With successions concerning one part of a territory which passes from one state to another (art. 15), the treaties of the predecessor state generally cease to apply in favour of those of the successor state.

## X. Reservations, declarations and objections<sup>94</sup>

### A. Reservation

<sup>140</sup> The reservation (*réserve*, *Vorbehalt*, *riserva*) is a unilateral declaration, regardless of its wording or title, made by one party when it signs, ratifies, accepts or approves a multilateral treaty<sup>95</sup> or accedes to it, with the intention to exclude or modify the legal effect of certain provisions of the treaty in terms of their application to itself (art. 2 para. 1 let. d and 19sqq. VCLT).

<sup>141</sup> In order to reconcile the two conflicting principles of the universality and the integrity of treaties, reservations should be used with restraint. Nevertheless, there has been a shift over the course of the years towards the admissibility of reservations in order to encourage a larger participation to treaties (universality). A reservation never contains, for the party which has made it, the legal obligation to eventually remove it, for example, by amending its domestic law.

<sup>142</sup> Any reservation has to be made in writing. When it is made at the time of the signature of a treaty concluded subject to ratification, it must, unless the treaty stipulates otherwise, be confirmed upon ratification, either in the instrument itself or in an attached document. A reservation enters into effect on the date of confirmation. Unless expressly stipulated by the treaty, it cannot be made after ratification or accession<sup>96</sup>.

<sup>143</sup> A reservation with regard to another party modifies the provisions of the treaty to which the reservation relates for the author of the reservation and reciprocally in its relations with this party. However, the reservation does not modify anything for the other parties in terms of their relations with one another (art. 21 para. 1 and 2 VCLT).

<sup>144</sup> A reservation expressly authorised by a treaty does generally not require any subsequent acceptance (*acceptation*, *Annahme*, *accettazione*) by the other parties. The Vienna Convention more generally establishes the principle of tacit acceptance in the event of the silence of the treaty provisions (art. 20 para. 1). The treaty may nevertheless provide for the requirement of the express acceptance of the reservations. The acceptance then has to be set out in writing. It does not have to be confirmed if it is provided prior to the confirmation of the reservation itself.

### B. Declaration

<sup>145</sup> Some parties effectively make reservations entitling them declarations. These are known as qualified declarations. However, beyond the title alone, the emphasis should be placed on determining the substantive content of the text drawn up. Hence, it is not the title but the content which determines the qualification. Qualified declarations are treated according to the same rules as reservations<sup>97</sup>.

<sup>94</sup> On the matter in general, see Guide to Practice on Reservations to Treaties and the commentary on this, *in*: Report of the International Law Commission, sixty-third session, 26 April to 3 June and 4 July to 12 August 2011, UN, New York 2011 (A/66/10) and 2012 (A/66/10/Add. 1).

<sup>95</sup> A reservation may in principle only be made for multilateral treaties. A reservation to a bilateral treaty would effectively correspond to a request to reopen negotiations. It suggests that they have not been completed or that the treaty should be understood in the opposite sense to the reservation.

<sup>96</sup> On the possible admissibility of late reservations, see, for example, ACLFA 2009.11, p. 215 to 218.

<sup>97</sup> See, for example, ANTHONY AUST, *Modern Treaty Law and Practice*, 3<sup>rd</sup> edition, Cambridge 2013, p. 117sqq. and Judgement of the European Court of Human Rights of 29 April 1988, *Belilos vs. Switzerland*, Series A 132, no. 49.

- <sup>146</sup> Similarly, a declaration may consist of an explanation of one party's interpretation of certain treaty provisions. This may also sometimes be a qualified declaration, which is equivalent to a reservation. The interpretative declaration is often difficult to qualify. Only an analysis on a case-by-case basis enables to designate it as a simple or qualified declaration.
- <sup>147</sup> A distinction is therefore made between reservations or qualified declarations, having the legal quality of a reservation, on the one hand, and declarations without such quality or simple declarations on the other (*déclaration, Erklärung, dichiarazione*).
- <sup>148</sup> In the case of the latter, this refers to any declaration made by one party concerning the treaty, one of its provisions or the other parties to the treaty. The simple declaration does not result in the exclusion or amendment of the legal effects of particular treaty provisions.

### C. Admissibility

- <sup>149</sup> The evaluation of the admissibility of a reservation is sometimes a delicate matter and has to be carried out on a case-by-case basis according to the following criteria:
- The reservation must not be prohibited by the treaty (art. 19 let. a VCLT);
  - If the treaty stipulates that only certain reservations may be made, the reservation concerned must be included amongst them (art. 19 let. b VCLT); if a treaty provides for specific validity requirements for a reservation, these have to be adhered to;
  - Even when the treaty does not restrict the freedom to make reservations, they must not be incompatible with the object and purpose of the treaty (art. 19 let. c VCLT);
  - The reservation may not contradict the peremptory norms of international law (*jus cogens*).
- <sup>150</sup> The object and purpose of the treaty are the most difficult criteria to determine. Legal theory scarcely defines these terms but nonetheless states that the object and purpose can be inferred from the title of the treaty, its preamble, an initial provision setting out the object, a provision outlining the main concern of the parties, preparatory works or the general scheme of the treaty<sup>98</sup>. It also suggests various synonyms (*raison d'être, fundamental principles, "effectiveness", essence, overall goal or telos*<sup>99</sup>) and methods which can be used to determine the compatibility of a reservation with the object and purpose of a treaty<sup>100</sup>.
- <sup>151</sup> Any qualified declaration may be subjected to the same evaluation. In contrast, a simple declaration, essentially political in nature, is not generally subject to any restriction.

<sup>98</sup> ALAIN PELLET, Article 19 Convention of 1969, *in*: OLIVIER CORTEN/PIERRE KLEIN (ed.), *The Vienna Conventions on the Law of Treaties*, Oxford 2011, vol. 1, p. 405sq., no. 108sq. p. 447sq.

<sup>99</sup> Greek term denoting the objective that the parties have sought to achieve through the conclusion of the treaty, its purpose.

<sup>100</sup> PELLET, *op. cit.*, nos. 106 and 115.

## D. Objection

- <sup>152</sup> When one party to a treaty deems that a reservation made by another party does not meet the conditions established by international law, it may raise an objection (objection, Einspruch/Einwand/Einwendung, obiezione; art. 20sq. VCLT). Unless the treaty stipulates otherwise, a reservation is deemed to have been accepted by a party if it does not object to the reservation. Hence, absence of objection to a reservation can therefore count as its tacit acceptance.
- <sup>153</sup> An objection is a unilateral act that aims to modify the legal effect of a reservation made by one party but which does not alter the content of the treaty itself between this party and the others. The objection is a response to the unilateral act by the party which makes the inadmissible reservation. Its effects have their source in the reservation and not in the treaty. The objection made to a reservation by another contracting party does not prevent the treaty from entering into force between the party which made the reservation and the one which made the objection unless the contrary intention has been clearly expressed by the latter. However, the provisions to which the reservation relates do not apply between the two parties to the extent provided for by the reservation. The legal effect of the objection is therefore to paralyse the application of the contentious provisions to some degree in the relations between the two parties. Its political effect is to send out a strong signal in favour of the integrity of the treaties and the strengthening of the effectiveness of international law.
- <sup>154</sup> A party can raise an objection within the period of twelve months from the date on which it received notification of the reservation from the depositary of the treaty concerned or when it expresses its consent to be bound by the treaty, if this date is later (art. 20 para. 5 VCLT). The objection to a reservation must be made in writing. If a reservation is made at the time of signature, an objection already made to this reservation does not need to be reiterated after confirmation, at the time of ratification, of the reservation itself.

## E. Withdrawal

- <sup>155</sup> Unless the treaty stipulates otherwise, a reservation or an objection can be withdrawn at any time. The consent of the party which accepted the reservation is not required for withdrawal (retrait, Rückzug/Zurückziehen, ritiro). The withdrawal from a reservation or an objection has to be made in writing. It does not have retroactive effect.
- <sup>156</sup> Unless the treaty stipulates otherwise or unless agreed otherwise, the withdrawal of a reservation does not take effect vis-à-vis another contracting party until it has received notification and the withdrawal of an objection to a reservation only takes effect once the party which made the reservation has received notification of the withdrawal.

## F. Competences in Switzerland

- <sup>157</sup> Switzerland adopts a rather restrictive practice in terms of making reservations and attempts, as far as possible, to adopt treaties in their entirety. The Federal Council proposes and formulates reservations. The Federal Assembly, where applicable, examines them in the context of the treaty approval procedure. It has the power to amend the reservations, to reject them or to propose others. The text of the reservations is set out in full in the federal decree. The Federal Council is bound by the decision of the Federal Assembly. It will include the text of the reservations in the ratification instrument or in an annexed note or in the notification of the completion of the procedures. The same applies to declarations.

- <sup>158</sup> A withdrawal of reservations can be equated, from the perspective of domestic procedures, to a modification of a treaty. The Federal Assembly, which has authorised the Federal Council to ratify a treaty with specific reservations, generally remains competent for deciding whether to withdraw a reservation unless it has delegated this competence to the Federal Council. The Federal Council is therefore only competent for deciding upon the withdrawal of reservations where it possesses the competence for amending the treaty concerned or, in application of article 7a paragraph 2 GAOA (see para. 3 and 4 new), when these reservations and their withdrawal are of limited scope.
- <sup>159</sup> The competence for making an objection to a reservation or withdrawing it generally lies with the Federal Council on the basis of article 184 paragraph 1 Cst. The Federal Council can also delegate this competence to departmental level, which it generally does for the withdrawal of an objection. The restraint which Switzerland has long demonstrated in making objections to the reservations of other states is disappearing today.

## XI. Publication of treaties

### A. National publication<sup>101</sup>

#### a. Official Compilation

<sup>160</sup> With regard to international law, the following are generally published in the Official Compilation of Federal Legislation (Recueil officiel, RO)<sup>102</sup>, if they are binding upon Switzerland:<sup>103</sup>

- a. Treaties which are submitted to referendum pursuant to article 140 paragraph 1 letter b Cst. or subject to referendum pursuant to article 141 paragraph 1 letter d Cst.;
- b. Other treaties that contain or authorise to enact legislative provisions;
- c. The decisions of bodies and organisations established by treaties where they contain or authorise to enact legislative provisions.

<sup>161</sup> The Federal Council may decide that a treaty or a decision which does not contain legislative provisions is nevertheless published in the RO. Treaties whose term of validity does not exceed six months and those of limited scope are usually not published (art. 3 para. 2 and 3 PubIA).<sup>104</sup> Under very specific conditions some treaties and decisions can be published in the RO only by reference (art. 5 PubIA and 9sq. PubIO). A treaty not published is still generally accessible to the public. The treaties which have to be kept secret in the interests of national defence are obviously not published in the RO (art. 6 PubIA; also see art. 8 PubIO).

<sup>162</sup> Publication of the texts to be published has to take place at least five days before their entry into force. Treaties whose date of entry into force is still not known at the time of their approval are published as soon as this date is known (art. 7 para. 1 and 2 PubIA; also see art. 8a and 8b PubIO). Treaties applied provisionally before their entry into force are published in the RO as soon as the decision on their provisional application has been taken (art. 33 para. 6 PubIO)<sup>105</sup>. It is the duty of the offices responsible to provide the texts for publication in good time, translated, where necessary, into the official languages of the Swiss Confederation, through the Official Publications Centre OPC (Centre des publications officielles CPO; Kompetenzzentrum Amtliche Veröffentlichungen KAV; Centro delle pubblicazioni ufficiali CPU) of the Federal Chancellery.

<sup>163</sup> The legal obligations arise from the texts from the time of their publication (art. 8 para. 1 PubIA)<sup>106</sup>. A non-published treaty binds state bodies as such but not the other subjects of law under the Swiss legal system having proven that they were not aware or could not have been

<sup>101</sup> The Federal Chancellery is primarily competent for these matters.

<sup>102</sup> *Amtliche Sammlung des Bundesrechts (AS); Raccolta ufficiale del diritto federale (RU)*.

<sup>103</sup> Art. 3 para. 1 PubIA.

<sup>104</sup> The treaties of limited scope (see art. 7a para. 2 GAOA [also see para. 3 and 4 new], no. 112) are only published in the RO if they concern the rights and duties of private individuals, if they modify treaties already published or if their publication proves necessary for the security of law or transparency (art. 2 of the Ordinance of 17 November 2004 on Official Publications; PubIO; RS 170.512.1). The notion of "treaties of limited scope" in the legislation on publications does not only apply to treaties concluded pursuant to art. 7a para. 2 GAOA. However, an amendment to art. 3 para. 3 PubIA, already approved by Parliament (FF 2014 6993), will reverse this principle, but allow the Federal Council to determine the conditions under which treaties and decisions of limited scope or whose duration of validity does not exceed six months are not published.

<sup>105</sup> If the treaty repeals a previous agreement also published (see no. 53), this is removed from the RS.

<sup>106</sup> The version published in the printed edition of the RO prevails (art. 9. para. 1 PubIA; also see art. 8b PubIO), but the revised PubIA provides in its art. 15 for the precedence of the electronic version of legal texts (see FF 2014 6993; PIERRE TERCIER/CHRISTIAN ROTEN, *La Loi fédérale sur les recueils du droit fédéral et la Feuille fédérale*, RSJ 111/2015, p. 113–121).

aware despite the attention they must pay to the circumstances (see art. 8 para. 3 PubIA). However, whether a treaty is published or not has no effect on its validity in international law.

<sup>164</sup> The multilateral treaties often have an original version at least in French. For bilateral treaties that are to be published, the competent offices generally have to request an authentic version in an official language<sup>107</sup>. The treaties and the decisions concerning international law specify which version is authoritative (art. 9 para. 2 PubIA). The publication in the RO indicates whether the text of the treaty is an original version or a translation. In contrast to domestic law, only the original text is authentic. Hence there is only equivalence of authority between the treaty texts published in the three official languages of the Swiss Confederation if all these three languages are also authentic versions.

#### b. Classified Compilation

<sup>165</sup> The Classified Compilation of Federal Legislation (*Recueil systématique, RS*)<sup>108</sup> is a consolidated collection of Swiss law classified by subject area and updated periodically (art. 11 PubIA and 14 PubIO). With regard to international law, it contains the decisions and treaties published in the RO.

<sup>166</sup> The RS is also published in the three official languages of the Swiss Confederation. The classification adopted for domestic law is decimal; for international law it is identical but is preceded by a zero. The printed volumes, in red, produced in loose-leaf format, have white labelling on the spine for domestic law and yellow for international law.

<sup>167</sup> Each year the Federal Chancellery publishes a classified index of the acts and treaties published in the RO and RS, with an alphabetic table and a list of texts published in the form of a reference. It chronologically indexes the data concerning the legal texts published in the RO since 1 January 1948 (art. 22sq. PubIO).

#### c. Federal Gazette

<sup>168</sup> Federal decrees concerning the approval of treaties providing for accession to collective security organisations or supranational communities as well as those subject to referendum (art. 13 let. d and e PubIA) are among those published in the Federal Gazette (*Feuille fédérale, FF*)<sup>109</sup>. When the Federal Assembly receives a dispatch relating to a treaty or a decision concerning international law which has to be adopted, the text concerned is published in the FF at the same time as the dispatch (art. 17 PubIO).

<sup>169</sup> The FF is published every week in the three official languages. The Federal Chancellery periodically publishes a table of contents of the FF (art. 24 PubIO).

#### d. Electronic publications

<sup>170</sup> The RO, RS and FF are not just published in printed form but also electronically online (art. 16 para. 1 PubIA and 29 para. 1 PubIO)<sup>110</sup>. Upon entry into force of the revised PubIA, it is the electronic version published that is authoritative<sup>111</sup>.

<sup>107</sup> See no. 67.

<sup>108</sup> *Systematische Sammlung des Bundesrechts (SR); Raccolta sistematica del diritto federale (RS)*.

<sup>109</sup> *Bundesblatt (BBl); Foglio federale (FF)*.

<sup>110</sup> [www.admin.ch](http://www.admin.ch) → Droit fédéral (*Bundesrecht, Diritto federale*) or, specifically, [www.admin.ch/bundesrecht/00567/index.html?lang=fr](http://www.admin.ch/bundesrecht/00567/index.html?lang=fr) for the RO, [www.admin.ch/bundesrecht/00566/index.html?lang=fr](http://www.admin.ch/bundesrecht/00566/index.html?lang=fr) for the RS and [www.admin.ch/bundesrecht/00568/index.html?lang=fr](http://www.admin.ch/bundesrecht/00568/index.html?lang=fr) for the FF. Also see no. 163.

<sup>111</sup> Art. 15 PubIA revised (FF 2014 6993, 6997).

- <sup>171</sup> The DIL of the FDFA keeps up to date a list which is as complete as possible of all the treaties concerning Switzerland using a database accessible on the internet<sup>112</sup>. This is a compilation of information about the treaties in force for Switzerland or which it has signed, as well as other important non-binding treaties and instruments. It enables searches to be carried out by subject area and, for the bilateral instruments signed by Switzerland, by state or international partner organisation. It also mentions treaties not published by Switzerland whose texts are generally available from the DIL of the FDFA. For the published treaties, it contains details which are not included in the official publications (competent office in Switzerland and, where applicable, title in English and depositary, for example). The information is regularly updated but there is no guarantee of its completeness or accuracy; only information in the RO has legally binding scope<sup>113</sup>.
- <sup>172</sup> The Federal Chancellery also publishes an electronic directory of the legal texts of the EU which are of importance to Switzerland owing to sectoral agreements concluded with the EU. It may publish there other legal texts of the EU to which federal law refers (art. 25 PubLO)<sup>114</sup>.

## B. International registration

- <sup>173</sup> At international level, the office of the UN Secretary-General publishes in the United Nations Treaties Series (UNTS), which currently includes over 2700 volumes<sup>115</sup>, all treaties concluded by a member of the UN and registered with it<sup>116</sup> – which amounts to over 200000 treaties and subsequent formalities relating to them – accompanied, where necessary, by a translation in English or in French<sup>117</sup>. The obligation to register with the office of the UN Secretary-General also applies to multilateral treaties registered by an organisation or a depositary state, which may not even be party to the treaty. In the absence of a specific clause on this matter, the designation in the treaty of a depositary mandates it to register the treaty on behalf of the parties<sup>118</sup>.

<sup>112</sup> [www.fdfa.admin.ch/treaties](http://www.fdfa.admin.ch/treaties) → Treaty database (Banque de données des traités internationaux; Datenbank Staatsverträge; Banca dati dei trattati internazionali).

<sup>113</sup> However see no. 163.

<sup>114</sup> [www.admin.ch/bundesrecht/00566/00596/00653/index.html?lang=fr](http://www.admin.ch/bundesrecht/00566/00596/00653/index.html?lang=fr).

<sup>115</sup> Searches of this compilation can be carried out on a website from the UN's collection of treaties, <http://treaties.un.org>, at <https://treaties.un.org/pages/UNTSOnline.aspx?id=1>. This compilation has, since 1946, followed on from the 205 volumes of the League of Nations Treaty Series (1920–1944).

<sup>116</sup> See art. 102 para. 1 of the Charter of the United Nations of 26 June 1945 (RS 0.120). The parties to a bilateral treaty have to stipulate, ideally in the final clauses of their agreement, which of the two will carry out this registration. Non-registration may have consequences. No party to a treaty which has not been registered can invoke this treaty before a body of the UN, including the International Court of Justice (ICJ). See, for example, JEAN-PAUL JACQUÉ, article 102, *in*: JEAN-PIERRE COT/ALAIN PELLET (dir.), *La Charte des Nations Unies*, 3<sup>rd</sup> ed., Paris 2005, vol. 2, p. 2117sq.; ERNST MARTENS, article 102 *in*: BRUNO SIMMA ET AL (eds), *The Charter of the United Nations*, 3<sup>rd</sup> ed., Oxford 2012, vol. 2, p. 2089sq.

<sup>117</sup> The registration request is prepared in Switzerland by the Treaty Section of the DIL of the FDFA and sent to the UN in principle by the Permanent Mission to the United Nations in New York. It is accompanied by a certified copy of the text in all the languages, contains any attached documents, reservations or declarations and indicates the name of the signatories, the date and place of the signature as well as the date and method of entry into force.

<sup>118</sup> Art. 77 and 80 VCLT.

### C. National registration and archiving

- <sup>174</sup> The treaties deposited in the Federal Archives pass through the DIL<sup>119</sup>. The originals constituting the Swiss versions of bilateral treaties, the certified copies of multilateral treaties and the originals of multilateral treaties of which Switzerland is the depositary are deposited from their entry into force in the Federal Archives by the Treaty Section of the DIL of the FDFA. It will have already registered them in its database beforehand<sup>120</sup>.
- <sup>175</sup> In the case of bilateral treaties, the full powers documents<sup>121</sup>, i.e. a copy of the Swiss full powers and the original of the partner's full powers, and, for treaties which enter into force by means of notification of the completion of the required procedures, a copy of the Swiss note and the original of the partner's note, have, where applicable, to be forwarded for archiving along with the Swiss original<sup>122</sup>. The copies of these documents for the requirements of the representations and offices have to be produced prior to their forwarding to the DIL of the FDFA.
- <sup>176</sup> It is the responsibility of the competent offices to immediately inform the Treaty Section of the DIL of the FDFA about any treaty concluded by Switzerland. For the purposes of registration, publication, where applicable, and then archiving, it has to receive, once the Swiss signature has been provided, the Swiss original copy of all bilateral treaties and a certified copy of all multilateral treaties generally obtained from the depositary upon conclusion.

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<sup>119</sup> See art. 4 para. 3 of the Archiving Ordinance of 8 September 1999 (ArchO; RS 152.11). Pursuant to art. 8 para. 3 let. d OrgO-FDFA, the DIL manages documentation relating to the treaties. According to the instructions of 28 September 1999 regarding the obligation to make documents available and to transfer documents to the Federal Archives (see [www.bar.admin.ch/dokumentation/00437/index.html?lang=fr](http://www.bar.admin.ch/dokumentation/00437/index.html?lang=fr)), the originals of the treaties and other instruments of international cooperation have to be immediately sent after they have been signed, whether they are classified or not, to the DIL which transfers them to the Federal Archives from their entry into force.

<sup>120</sup> See no. 171.

<sup>121</sup> See no. 93sqq.

<sup>122</sup> See no. 128. Also see Annex D. These documents will be accompanied, if necessary, by a translation in an official language or in English unless they are drawn up in a language which is widely understood in Switzerland, such as Spanish or Portuguese.

## XII. Application and interpretation of treaties

### A. International law and domestic law<sup>123</sup>

<sup>177</sup> The Swiss Confederation and the cantons shall respect international law (art. 5 para. 4 Cst.). When Switzerland concludes a treaty, it ensures that its international commitments are in line with domestic law or amends this in conformity with international law. If a conflict with domestic law cannot be resolved in this way, the Swiss authorities and courts, in practice, generally agree on the primacy of international law. Subsequent constitutional law which is directly applicable and federal acts through which the Federal Assembly has voluntarily departed from international law are exceptions to this principle. Even in the latter scenario, the international norms on the protection of human rights generally take precedence over domestic law<sup>124</sup>. The same applies to the peremptory norms of international law (*jus cogens*, see art. 139 para. 3 Cst. and 53 VCLT). In the event of conflict between a treaty norm and an domestic constitutional or legal provision, all state authorities must attempt to resolve this by interpreting domestic law in conformity with the treaty.

<sup>178</sup> International law, when it enters into force for Switzerland, automatically acquires validity and binding force under the Swiss legal system. This is the theory of monism which, in contrast to that of dualism, does not require a constituting act of national law, adoption or transformation to give the international norm validity under the domestic system<sup>125</sup>.

<sup>179</sup> The Vienna Convention establishes the primacy of international law over domestic law (art. 27) except where the first refers to the second which is the case with regard to the competence for concluding treaties. According to article 46, a party having given its consent to be bound by a treaty in manifest violation of a provision of a domestic law of fundamental importance regarding the competence to conclude treaties enables this party to request the annulment of the treaty.

### B. Application

#### a. *Ratione personae*

<sup>180</sup> The validity of treaties under Swiss law has to be distinguished from direct applicability. Although the provisions of treaties automatically become valid under Swiss law, this does not necessarily mean that they can be directly applied to a specific case. Where necessary, implementing provisions have to be drawn up. If implementing legislation is not required, the norms are referred to as self-executing<sup>126</sup>.

<sup>123</sup> On the issue in general, see the Federal Council report of 5 March 2010 (FF 2010 2067) and additional report of 30 March 2011 on the relationship between international law and domestic law (FF 2011 3401); also see the report on the relationship between domestic law and international law in Switzerland, FDFA, Bern 2012, publication available in German, French and Italian which can be downloaded at [www.fdfa.admin.ch](http://www.fdfa.admin.ch) → Services and publications → Publications.

<sup>124</sup> See Decisions of the Swiss Federal Supreme Court 139 I 16, point 5, 138 II 532 point 5.1, 136 II 241 point 16.1, 125 II 417, point 4d.

<sup>125</sup> See, for example, Decisions of the Swiss Federal Supreme Court 127 II 177, point 2c.

<sup>126</sup> These are norms intended to be immediately applied by the state authorities and to directly bind private persons. They have to be sufficiently specific in contrast to programmatic norms which have to be fleshed out by the legislator before becoming sources of law and obligations for private persons (see, for example, Decisions of the Swiss Federal Supreme Court 138 II 42, point 3.1, 136 I 290, point 2.3.1, 133 I 286, point 3.2, 131 V 390, point 5.2 and the references).

<sup>181</sup> If the parties to two multilateral treaties governing the same subject are not the same, in relations between a party to the two treaties and a party to just one of these treaties, the treaty to which the two are party governs their rights and obligations (art. 30 para. 4 VCLT). In principle, the treaties place obligations on and authorise only the contracting parties. They do not have legal effects on third parties (*res inter alios acta; pacta tertiis nec nocent nec prosunt*). However, there are treaties in favour or at the expense of third parties which then have to consent to them (art. 34sq. VCLT).

b. *Ratione temporis*

<sup>182</sup> The principle of the non-retroactivity of treaties is well established (art. 28 VCLT). A treaty can therefore only enter into force after the completion of the full conclusion process in line with international law and the domestic law of the parties<sup>127</sup>. The entry into force is therefore never prior to the treaty's date of signature. This principle can nonetheless be moderated. The parties may have an interest in all or certain clauses being applied with anticipated effect on a date which precedes the entry into force<sup>128</sup>, or even, in exceptional circumstances and for some types of treaties, on a date which precedes signature (see art. 28 VCLT). They must then agree upon this.

<sup>183</sup> In the case of successive treaties, a subsequent treaty generally prevails over the previous treaty (art. 30 para. 3 and art. 59 para. 1 VCLT). When a treaty stipulates that it is subject to a previous or subsequent treaty or that it should not be deemed incompatible with the other treaty, the provisions of that treaty will prevail (art. 30 para. 2 VCLT).

<sup>184</sup> The application of a treaty may be suspended owing to its provisions or by consent of the parties (art. 57 VCLT). The application of a multilateral treaty may also be suspended by agreement between two or several parties only where this possibility is provided for by the treaty itself or provided it is not incompatible with the object and purpose of the treaty. The other parties to the treaty must be notified (art. 58 VCLT)<sup>129</sup>. Suspension, like denunciation or withdrawal, may also be the result of a breach of the treaty under certain material conditions (art. 60 VCLT) and formal grounds (art. 65 to 68 VCLT).

c. *Ratione materiae*

<sup>185</sup> A treaty is executed when the performance and counter-performance stipulated have been completed in full. It then becomes without object, while formally remaining in force. A treaty has to be executed in its entirety. Like ratification or provisional application, denunciation, withdrawal or suspension cannot generally be partial unless the treaty stipulates otherwise. The principle of the inseparability of treaties is therefore established (art. 44 VCLT), separability being deemed an exception.

<sup>127</sup> Some treaties make a distinction, for practical reasons, between their date of entry into force and the commencement of their effective application. This is the case in most agreements concerning fiscal matters so that the same system is applied to the entirety of a "fiscal year", or some treaties with the EU, often with the aim of ensuring commencement of application coordinated with the member states. This distinction should nevertheless be avoided as far as possible for reasons of legal certainty and simplification.

<sup>128</sup> For provisional application, see art. 25 VCLT and no. 53sq.

<sup>129</sup> Also see no. 62.

### C. Modification

- <sup>186</sup> Any treaty can in principle be amended by the parties (art. 39 VCLT)<sup>130</sup>. The amendment of a bilateral treaty is carried out, where the text is silent, according to the same procedure as that followed for the conclusion. It can take the simplified form of an exchange of letters or notes.
- <sup>187</sup> The amendment of a multilateral treaty is more complicated. Any modification proposal drawn up by a contracting party must, unless stipulated otherwise, be communicated to all the other contracting parties which are entitled to decide on the matter and to become parties to the amended treaty. However, the amending agreement does not bind the parties to the treaty which do not become parties to this agreement. Any party which consents to be bound by the treaty after the entry into force of the amending agreement is expected to become a party to the amended treaty. However, it is considered a party to the non-amended treaty in relation to any party to the treaty not bound by the amending agreement (art. 40sq. VCLT).
- <sup>188</sup> Some treaties provide for – generally for the amendment of technical annexes – a special amendment procedure which does not require the express consent of all parties in order to favour, as far as possible, the application of a single text. In order for an amendment to enter into force, it may be sufficient for it to be accepted by a simple or qualified majority of the parties or that it is not objected to by a certain number of parties. This latter procedure is known as *opting out* or *contracting out*. If an amendment proposal is validly submitted, the parties have a period within which to object to it. Depending on the wording provided for, all the parties can, for example, be bound by the amendment if the number of objections made does not reach the minimum stipulated or all the parties which did not raise an objection within the period provided for can be bound by the amendment, at least in their relations with the other parties which did not object<sup>131</sup>.

### D. Invalidity

- <sup>189</sup> A treaty is invalid in particular when the consent of the parties has been vitiated, namely when the will expressed does not correspond to the joint and actual intention of the parties. The manifest violation of a provision of domestic law on the competence to conclude treaties (art. 46 VCLT), error, fraud, corruption and coercion (art. 48 to 52 VCLT) are reasons for invalidity.
- <sup>190</sup> The invalidity of the treaty, depending upon the circumstances, will be invoked from its conclusion with *ex tunc* effect or its annulment, with *ex nunc* effect, upon invocation of the grounds of invalidity. In the first scenario, if the reestablishment of the *statu quo ante* is no longer possible, the invalidity includes the obligation to remedy the damage suffered. Invalidity is also provided for when a treaty conflicts with a peremptory norm of general international law (*jus cogens*; art. 53 VCLT).

<sup>130</sup> On domestic competence to decide in Switzerland, see no. 107 *in fine*.

<sup>131</sup> The procedure for concluding a treaty containing such a clause requires special attention. The competent authority in Switzerland for approving the conclusion of such treaties has to be at least that which will be competent for the approval of amendments likely to be adopted in this way. Furthermore, as this procedure sometimes dispenses with formal domestic approval of such amendments which is required in principle, the Swiss delegation participating in the negotiations on such amendments or requested to approve them must have a formal mandate (see no. 33sq.) from the competent authority.

## E. Termination

- <sup>191</sup> Many bilateral treaties are concluded for a limited duration. The text of the treaty itself consequently governs the conditions and procedures of its termination. This takes place either by means of the mere passage of time, the fulfilment of a resolutive condition or the denunciation provided for. Multilateral treaties are rarely concluded for a specific duration. This is why they generally contain provisions on their revision.
- <sup>192</sup> The other main means of terminating treaties are (art. 54 to 64 VCLT) the mutual consent of the parties, the conclusion of a new treaty on the same subject, the renunciation of the rights conferred by the treaty, the establishment of a derogating customary provision resulting in the desuetude of the treaty, the emergence of a situation making execution impossible, the substantial violation of the treaty by one of the parties, a fundamental change of circumstances (*clausula rebus sic stantibus*) or the emergence of a new peremptory norm of general international law (*jus cogens*)<sup>132</sup>.

## F. Interpretation

- <sup>193</sup> The interpretation aims to determine the precise meaning of a treaty provision. Articles 31 to 33 of the Vienna Convention, which contain reasonably detailed rules on the interpretation of treaties, are deemed customary law. Article 31 paragraph 1 stipulates that a treaty must be interpreted in good faith<sup>133</sup> in accordance with the ordinary meaning given to the terms of the treaty (literal interpretation) in their context (systematic) and in the light of its object and purpose (teleological<sup>134</sup>). The importance of the subsequent practice of the parties should also be underlined (art. 31 para. 3 VCLT).
- <sup>194</sup> Consideration should firstly be given to the natural and ordinary meaning of the terms of the treaty. Where they have a clear and precise meaning according to their usual definition and general context at the time of the conclusion of the treaty, it is not necessary to deviate from their natural meaning and to use other means of interpretation.
- <sup>195</sup> Secondary and subsidiary status is therefore given to preparatory works (historical interpretation) and other supplementary means of interpretation (art. 32 VCLT). Recourse to supplementary means should only be made for the purposes of confirmation or if the interpretation, based on the natural and ordinary meaning of the terms of the treaty, leads to results that are clearly different from those intended by the parties. The circumstances of the treaty's conclusion and the analysis of the joint will of the parties are part of these supplementary means.

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<sup>132</sup> For the concept, see decision of the Swiss Federal Supreme Court of 23 January 2008 (2A.783/2006) and Decisions of the Federal Supreme Court 109 Ib 64, point 6b.

<sup>133</sup> Also see art. 26 VCLT.

<sup>134</sup> It is often equated with the principle of effectiveness: it requires the interpreter to adopt the option from various possibilities which enables the anticipated effect of the norm concerned to be achieved.

## ANNEX A – Names of international instruments, classification

## International treaties

Importance of the act	English	French	German	Italian
<p style="text-align: center;">+</p> <p style="text-align: center;">V</p> <p style="text-align: center;">—</p>	Treaty	Traité	Vertrag	Trattato
	Convention	Convention	Übereinkommen	Convenzione
	Agreement	Accord	Abkommen	Accordo
	Protocol	Protocole	Protokoll	Protocollo
	Additional protocol	Protocole additionnel	Zusatzprotokoll	Protocollo aggiuntivo
	Pact	Pacte	Pakt	Patto
	Charter	Charte	Charta	Carta
	Constitution	Constitution	Verfassung/Konstitution	Costituzione
	Constitutive act	Acte constitutif	Gründungsakte	Atto costitutivo
	Statute	Statut	Statut / Satzung	Statuto
	Concordat	Concordat	Konkordat	Concordato
	Arrangement	Arrangement	Vereinbarung	Accordo
	Exchange of letters	Echange de lettres	Briefwechsel	Scambio di lettere
	Exchange of notes	Echange de notes	Notenaustausch	Scambio di note
	Act	Acte	Akt	Atto
	Joint declaration	Déclaration conjointe	Gemeinsame Erklärung	Dichiarazione comune
	Additional agreement	Avenant	Zusatzabkommen	Accordo aggiuntivo
	Agreed minutes	Protocole d'accord	Vereinbarung	Protocollo d'accordo
	Modus vivendi	Modus vivendi	Modus vivendi	Modus vivendi
	Amendment	Amendement	Änderung	Emendamento
Regulation	Règlement	Reglement, Verordnung	Regolamento	
Rules	Règles	Regeln	Norme	

## Other instruments

	Memorandum of understanding (MoU)	Mémorandum d'entente	Verständigung	Memorandum d'intesa
	Statement of intent	Déclaration d'intention	Absichtserklärung	Dichiarazione d'intenti
	Letter of intent (LoI)	Lettre d'intention	Absichtserklärung	Lettera d'intenti
	Recommendation	Recommandation	Empfehlung	Raccomandazione
	Resolution	Résolution	Resolution	Risoluzione
	Decision	Décision	Beschluss	Decisione
	Minutes	Procès-verbal	Protokoll / Niederschrift	(Processo) verbale

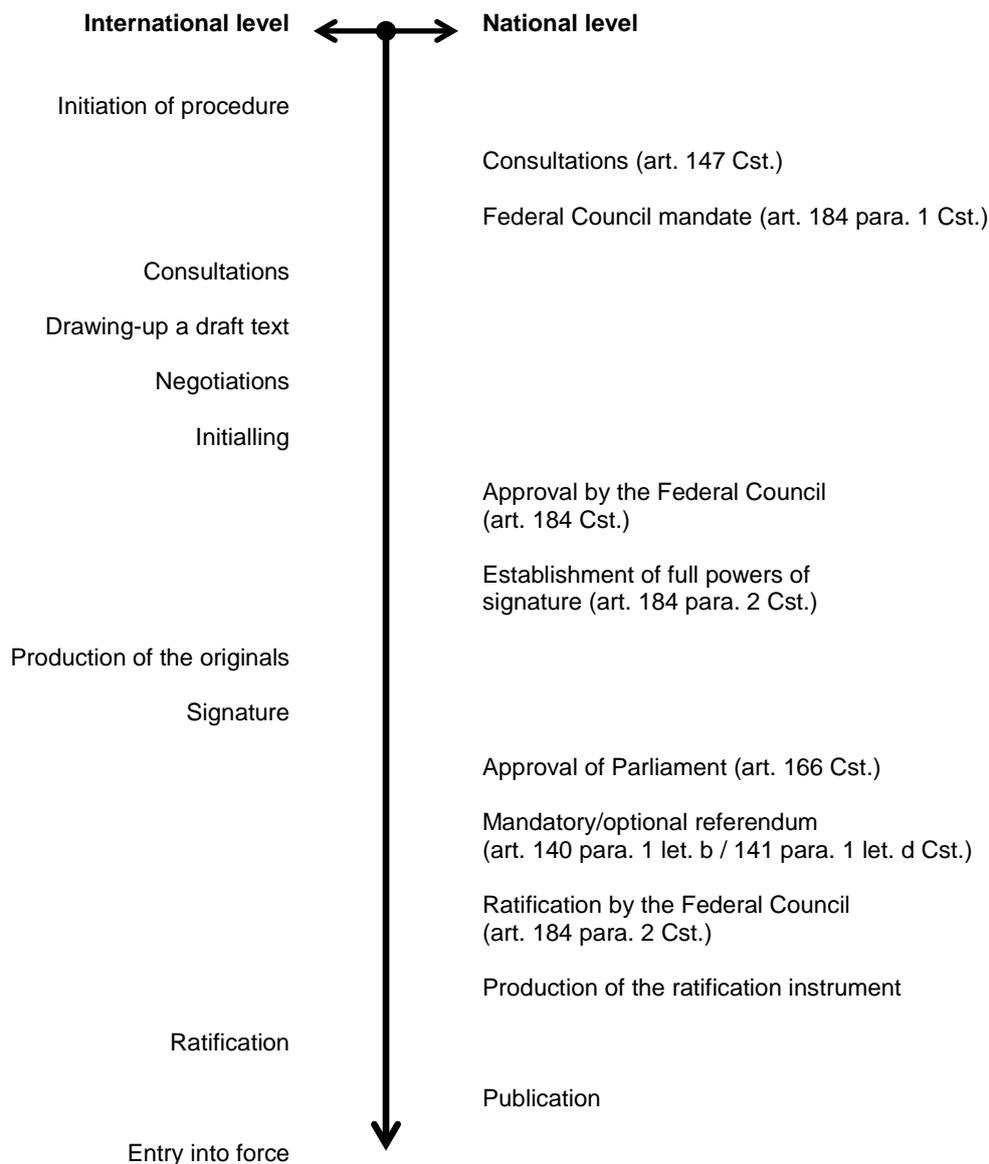
## ANNEX B – Terminological suggestions for treaties and non-binding acts

Comparative table<sup>135</sup>

TREATIES TRAITES VERTRÄGE TRATTATI		LEGALLY NON-BINDING INSTRUMENTS INSTRUMENTS NON CONTRAIGNANTS RECHTLICH NICHT BINDENDE VEREINBARUNGEN STRUMENTI NON VINCOLANTI		
shall doit (ou verbe au futur) hat...zu, ist...zu, muss deve		can peut kann può	wishes (will <sup>136</sup> ) souhaite wünscht desidera	intends a l'intention beabsichtigt ha intenzione
agreement accord Abkommen accordo	undertaking engagement Verpflichtung impegno	understanding entente Absprache intesa		
agree, concur, convene, consent être d'accord, convenir, consentir übereinstimmen, zustimmen concordare, convenire, acconsentire		understand, declare s'entendre, déclarer sich verständigen, erklären accordarsi, dichiarare		
State party Etat partie Vertragspartei Stato parte	party partie Partei parte	Government Gouvernement Regierung Governò	participant participant Teilnehmer partecipante	signatory signataire Unterzeichner firmatario
preamble préambule Präambel preambolo		introduction introduction Einleitung introduzione		
article article Artikel articolo	clause clause Bestimmung, Klausel clausola	paragraph paragraphe Abschnitt paragrafo		
condition, term condition Bedingung condizione	rule règle Regel regola	provision disposition Vorschrift disposizione	modality Modalité Modalität modalità	
enter into force entrer en force, en vigueur in Kraft treten entrare in vigore		come into effect, come into operation prendre effet wirksam werden prendere effetto		
authentic authentique beglaubigt autentico	authoritative officiel amtlich ufficiale	equally valid de même valeur gleichgewichtig di stessa valore		
done fait geschehen fatto	concluded conclu abgeschlossen concluso	signed signé unterzeichnet firmata		

<sup>135</sup> Partially taken, for English, from AUST, *op. cit.*, p. 23, 369sqq. and 429.

<sup>136</sup> *Will* has to be used with caution; this term is deemed legally binding by the United States whereas it is the form not deemed legally binding by the United Kingdom.

ANNEX C – Schematic overview of the procedure for the conclusion of a treaty<sup>137</sup>

<sup>137</sup> The steps outlined are not all necessarily followed or may be followed at a different time:

- The first international steps, from initiation to initialling, do not generally apply to multilateral treaties;
- It is possible in principle for a multilateral treaty not to be signed. Ratification is then often called accession;
- The Federal Council mandate, which is not always necessary, can also be subsequent to international consultations (no. 33sq.);
- National consultations may also only take place after the signature (no. 32);
- Initialling is always optional (no. 90sq.);
- The full powers are not required for heads of state, heads of government, ministers for foreign affairs or sometimes, on the basis of long practice, for heads of mission or accredited representatives (art. 7 para. 2 VCLT);
- There are numerous exceptions in practice to the principle of the submission of treaties to Parliament (art. 166 para. 2 Cst.);
- The treaty is only submitted for referendum if specific conditions are met (art. 140sq. Cst.);
- The ratification decision by the Federal Council is taken if possible, subject to parliamentary approval, at the same time as the adoption of the treaty which may have been initialled;
- Some treaties are not published (art. 3 PublA et art. 2sq. PublO).

**ANNEX D – Aide-mémoire for the signature of bilateral treaties**<sup>138</sup>

- Each agreement is drawn up in two **originals**, a Swiss original which mentions Switzerland first (Agreement between Switzerland and...; Swiss signature on the left) and a partner's original which mentions the partner first (Agreement between... and Switzerland; Swiss signature on the right).
- Each original contains the text of the agreement in all of the authentic **languages**. The linguistic copies are compiled in an order which may differ depending upon the original, with the copy in the language of the party whose original it constitutes (for Switzerland French, German or Italian) generally appearing first.
- The Swiss **materials** can be obtained from the Treaty Section DIL/FDFA. The Swiss original is printed on paper provided by Switzerland and the partner's original on paper provided by the partner. The most important agreements are placed in a binder bound by a piece of cord and in exceptional cases sealed (wax) at the request of the partner. For less important agreements, a card folder often replaces the binder and the piece of cord but the pages should be stapled together.
- In principle and in the absence of any contrary agreement, the **printing** of the various linguistic copies is carried out by the party in whose country the signature takes place where the need sometimes arises to provide the partner with Swiss paper and vice-versa. The author of a linguistic copy generally provides it for the two originals. In any event, it must be verified before signature that each original contains the same text and that the linguistic copies are identical in terms of content.
- **Wax seals** are never mandatory. Where applicable, they are affixed at the ministry of foreign affairs of the country where the signature takes place (for treaties signed in Bern, at least one day before the signature at the Treaty Section which possesses FDFA seals). Before the affixing of the seals, each delegation verifies the original of the other party and the text of the agreement in all of its languages. For Switzerland, the head of delegation may use the seal of his department/office. For the FDFA abroad and ambassadors, the seal of the embassy is used.
- The **full powers** documents are exchanged before signature. The heads of state, heads of government and ministers of foreign affairs do not have to present this document.
- Each party first **signs** its own original and, where applicable, the protocols or exchanges of letters annexed, in all the languages, before signing the other original and then taking its own away.

**Documents to forward to the DIL/FDFA upon signature or receipt**

**The Treaty Section is informed immediately and receives the following as soon as possible:**

1. **The original of the agreement (Swiss original)**. All copies for the requirements of the offices have to be made before delivering the original to the Treaty Section.
2. **The original of the partner's full powers with**, where applicable, a **translation** in French, German, Italian or English (except where Spanish or Portuguese).
3. **A copy of the legal basis for the signature of the agreement**, for example:
  - Decision of the Federal Council (including details of the person responsible for the dossier) or
  - Proposal and decision of the head of department or office.
4. For agreements which enter into force by notification of the completion of the required procedures:
  - **A copy of the Swiss note;**
  - **The original of the partner's note with**, if necessary, a **translation** in French, German, Italian or English (except if Spanish or Portuguese).

Bern, October 2014

<sup>138</sup> For any further information, to obtain materials or for sending original copies, the contact details are: FDFA, DIL, Treaty Section, 3003 Bern, Switzerland, [staver@eda.admin.ch](mailto:staver@eda.admin.ch), tel. +41 58 462 30 63 / 79.

## ANNEX E – Final clauses of a treaty. Examples of provisions

### Final provisions of a multilateral treaty<sup>139</sup>

#### Art. 81 Signature

The present Convention shall be open for signature by all States Members of the United Nations [...] as follows: until 30 November 1969, at the Federal Ministry for Foreign Affairs of the Republic of Austria, and subsequently, until 30 April 1970, at United Nations Headquarters, New York.

#### Art. 82 Ratification

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

#### Art. 83 Accession

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in art. 81. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

#### Art. 84 Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

#### Art. 85 Authentic texts

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

*In witness whereof* the undersigned Plenipotentiaries, being duly authorised thereto by their respective Governments, have signed the present Convention..

Done at Vienna, this twenty-third day of May, one thousand nine hundred and sixty-nine. (*Signatures*)

### Final provisions of a bilateral treaty<sup>140</sup>

#### Art. 16 Final provisions

- 16.1 This agreement repeals and replaces the convention on the protection/conservation of the secrecy of national defence/national military defence done in Paris on 22 March 1972 and in Bern on 23 March 1972.
- 16.2 This agreement is concluded for an indefinite period. Each of the parties shall notify the other of the completion of the required domestic procedures concerning the entry into force of this agreement which enters into effect on the first day of the second month after receipt of the last of the notifications.
- 16.3 ...
- 16.4 Each party shall rapidly communicate to the other any modification of its national laws and regulations likely to have an effect on the protection of classified information under this agreement. In this event, the parties shall consult to examine any amendments to this agreement. In the meantime, the classified information shall remain protected in accordance with these provisions.
- 16.5 The provisions of this agreement can be amended by common agreement in writing between the parties. These modifications shall take effect in accordance with the procedures provided for in para. 16.2.
- 16.6 This agreement can be denounced by joint agreement or unilaterally with the denunciation taking effect six (6) months after receipt of written notification. The denunciation does not affect the rights and obligations of the parties associated with the information exchanged within the framework of this agreement.

*In witness whereof* the representatives of the two parties, duly authorised to this effect, have signed this agreement and have affixed their seal to it.

Done in Solothurn, on 16 August 2006, in two copies in French.

For the Swiss Federal Council:  
(*The signatures*)

For the government of the French Republic:

<sup>139</sup> Taken from the Vienna Convention of 23 May 1969 on the Law of Treaties (VCLT; RS 0.111).

<sup>140</sup> Taken from the Agreement between the Swiss Federal Council and the Government of the French Republic on the Reciprocal Exchange and Protection of Classified Information (RS 0.514.134.91).

## ANNEX F – Competence to conclude an international act, aide-mémoire<sup>141</sup>

**Does the act aim to produce legal effects in international law?  
(= does it contain obligations which require the Swiss Confederation to undertake commitments?)**

**If yes (= international treaty), competence:**

- of the **Federal Assembly** in principle (art. 166 para. 2 Cst., *in initio*)
- of the **Federal Council** if provided for by a law or a treaty (art. 166 para. 2 Cst., *in fine*), in particular if the treaty is of limited scope (art. 7a GAOA)
- of **subordinate administrative units** provided the legal conditions of (sub)delegation are met (art. 48a GAOA or other laws) or if the unit possesses general competence for international relations in its field and the obligations are restricted to the completion of the purely administrative or organisational procedures

**If not (≠ international treaty), competence:**

- of the **Federal Council** in principle (art. 184 para. 1 Cst.)
- of **departments** if this instrument is only of very limited importance from the perspective of conducting Switzerland's foreign policy
- of **subordinate administrative units** only if they possess the competence to also conclude treaties in this field

**Special cases**, sometimes subject to other regulations:

- International acts which are not governed by international law
- International acts which are concluded by legal entities of public law

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<sup>141</sup> See ACLFA 70.69 (2006 IV) for developments concerning all of these matters.

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