Matthias Oesch

International Relations

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I. Treaties

Switzerland traditionally adopts a friendly and respectful attitude towards international law. As a relatively small export-driven country, Switzerland depends on stable international relations, based on the rule of law. It is no surprise, then, that Switzerland participates in numerous international organisations and treaty networks. Nowadays, Switzerland's membership of the United Nations (UN) provides the foundation. Also significant is Switzerland's membership of other organisations and treaty networks, covering almost any policy field conceivable, like trade, investment, monetary issues, taxation, transportation, telecommunication, environment, development, food, health, education, culture, metrology, and weapons control. Switzerland is also a signatory to various human rights treaties; amongst them the European Convention on Human Rights (ECHR), which has been attributed a quasi-constitutional status by the Federal Supreme Court.[1] It is not a member of the North Atlantic Treaty Organisation (NATO); at least, it participates in Partnership for Peace (PfP). The first section of this chapter examines Switzerland's participation in various organisations and treaty networks.

Switzerland – despite its location at the heart of the European continent, surrounded by three of the six founding members of the then-named European Economic Community (EEC) – is not a member of the European Union (EU). Still, it is of prime importance to Switzerland that it maintains close and stable relations with the EU and its member states. Swiss membership of the Council of Europe and the bilateral agreements with the EU are also discussed below.

1. United Nations and Specialised Agencies

Founded in 1945 in the aftermath of two devastating world wars, the UN's primary aim is to maintain and achieve collective security. As a truly global organisation, it provides a unique forum for all nations and other actors

1 See the chapter on Constitutional Law, p. 144.

to co-operate on the international plane. Its outreach, both in terms of its membership and the variety of subject matters it has competence to deal with, is unrivalled by any other international organisation. Currently, its membership encompasses 193 member states. Various programmes, funds and specialised agencies also operate under the UN, all of which have their own memberships and budget. Among the programmes and funds are the United Nations Children's Fund (UNICEF), the United Nations Development Programme (UNDP), the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Environment Programme (UNEP). The specialised agencies are fully-fledged international organisations; they include, among others, the World Health Organization (WHO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Labour Organization (ILO) and the two Bretton Woods institutions, the World Bank and the International Monetary Fund (IMF). The main seat of the UN in Europe is in Geneva; the headquarters are at the Palais des Nations, which was originally built to house the League of Nations, the predecessor of the UN (1920–1946).

Regarding Switzerland's involvement with the UN, it did not actually join the organisation until 2002. The accession process was instigated by a popular initiative; the people and the cantons approved of the accession – albeit quite narrowly, by only 54.6 %. Before joining, Switzerland had already participated in many of the UN's specialised agencies, programmes and funds. It had been a member of the World Bank and the International Monetary Fund since 1992. Since acceding to the UN, Switzerland has played an active role in the organisation. It was involved in the foundation of the new Human Rights Council in 2006 and has actively contributed to the debate on the potential reform of the Security Council.[2] Switzerland has also formally applied to become a member of the Security Council for the period of 2023–24; elections are scheduled for 2022. According to the Federal Council, membership of the Security Council would not compromise Switzerland's policy of neutrality.[3]

2 Federal Department of Foreign Affairs (FDFA; https://perma.cc/A6SY-TXYK).

3 For more detail on Switzerland's policy of neutrality, see p. 174.

2. Trade and Investment

The World Trade Organization (WTO) sets out the basic legal framework for international trade. It was founded in 1995 as a successor to the General Agreement on Tariffs and Trade of 1947 and largely continued the latter's approach. The WTO currently has 164 members and is situated in the Centre William Rappard, Geneva. The WTO Agreement, which established the organisation, has three main annexes which legally bind all members: the General Agreement on Tariffs and Trade 1994 (embracing various side-agreements, on issues such as technical barriers to trade, agriculture, anti-dumping, and countervailing measures), the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). These agreements provide for the basic principles of market access, non-discrimination, and transparency to be respected by all members while simultaneously allowing them to pursue equally legitimate policy objectives, like the protection of public morals, the environment and human and animal health and life. Another key WTO agreement is the plurilateral Agreement on Government Procurement, which sets out rules for public tendering. The Dispute Settlement Understanding (DSU) provides for a fully-fledged state-to-state dispute resolution mechanism. Panels and, upon appeal, the Appellate Body render binding rulings. If a defending party does not comply with such a ruling, the complaining party is permitted to suspend obligations vis-à-vis the defending party, i.e. to impose retaliatory measures.

Switzerland has a long history of involvement with the General Agreement on Tariffs and Trade 1947. It had become a member of the General Agreement on Tariffs and Trade in 1966 (having applied its rules de facto since 1960). Subsequently, when the WTO became the successor of the General Agreement on Tariffs and Trade in 1995, Switzerland was an original member. Since then, the WTO has provided the backbone of Swiss external economic relations. Swiss companies profit from binding market access rights abroad. To date, Switzerland has only once actively participated in WTO dispute settlement proceedings as a complaining or defending party – it participated as a complaining party in the US – Steel case.[4]

4 See pp. 183.

Further, aside from WTO agreements, Switzerland has concluded a series of free trade agreements with countries all over the globe.[5] In addition to the European Free Trade Association (EFTA) and the free trade agreement with the EU,[6] Switzerland currently has a network of 28 free trade agreements with 38 partners. Switzerland has usually concluded its free trade agreements together with its EFTA partners Norway, Iceland and Liechtenstein; examples are the agreements with Macedonia, Serbia, Ukraine, Turkey, Israel, Egypt, Mexico, Singapore, Chile, the Republic of Korea, the SACU States (including South Africa), Canada, and Hong Kong. Recently, Switzerland has also entered into agreements on its own; this has been the case with respect to the agreements with Japan and China. The main objective of free trade agreements is not only to improve market access for Swiss companies per se, but also to ensure that Swiss companies enjoy market access conditions which are at least as favourable as those enjoyed by its main competitors (in particular those competitors located in the EU). In this context, the conclusion of the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) has led Switzerland to try to renegotiate specific elements of the free trade agreement with Canada. Further, the possible (although currently highly unlikely) conclusion of the Transatlantic Trade and Investment Partnership between the EU and the US (TTIP) would result in even clearer disadvantages for Swiss companies vis-à-vis their competitors in the EU; Switzerland would be forced to make new attempts to level the playing field.

Switzerland is also a party to other international organisations and treaty networks which complement the multilateral trading system under the WTO and free trade agreements. Examples include the World Customs Organization (WCO) and the Organization of Economic Co-operation and Development (OECD). Furthermore, Switzerland has concluded 130 bilateral investment treaties (BITs), mainly with developing and least-developed countries. These treaties allow Swiss firms to request the establishment of arbitration tribunals, in particular based on the rules of the International Centre for Settlement of Investment Disputes (ICSID), in order to review expropriations.

5 State Secretariat for Economic Affairs (SECO; https://perma.cc/JBY6-CRC3).
6 See pp. 169.

3. Switzerland and Europe

a) General Framework

Switzerland was hesitant about joining European organisations and treaty networks after the end of the Second World War, being concerned that such action may compromise its position of neutrality, independency and autonomy in external trade matters. However, it did join the Organisation for European Economic Co-operation (OEEC), whose key purpose was to administer the European Recovery Program (Marshall Plan), as an original member at its creation in 1948. In 1961, the OEEC was renamed the OECD, and both its mandate and membership were substantially broadened. Regarding European integration, Switzerland did not participate in the efforts to further this through joining the EEC/EC/EU. Instead, in 1960, Switzerland founded the EFTA, together with six other European countries. It is still a member of EFTA to this day, together with Iceland, Liechtenstein and Norway. In 1963, Switzerland became a member of the Council of Europe, whose prime objective is to promote democracy, human rights and the rule of law. Further, in 1974, it also ratified the ECHR. In 1972, Switzerland and the EEC concluded a comprehensive free trade agreement which has been providing the basis for bilateral relations with the EU up to this day. In 1975, Switzerland became an original member of the Conference on Security and Co-operation in Europe (CSCE) – renamed the Organisation for Security and Co-operation in Europe (OSCE) in 1994. In 1992, the people and the cantons rejected accession to the European Economic Area (EEA). Thereafter, Switzerland focused, faute de mieux, on concluding sectoral treaties with the EC/EU, combined with the policy of autonomous adaptation of Swiss law to ensure compliance with EU law. This approach, the "Swiss model" of European integration, has proven to be successful, as will be further outlined below.

b) Bilateral Agreements

Together with the free trade agreement Switzerland concluded with the EEC in 1972, the two sets of bilateral agreements of 1999 and 2004 between Switzerland and the EU (the "Bilaterals I" and the "Bilaterals II") provide the legal framework for the Swiss-EU relationship. The Bilaterals I consist of seven agreements, mainly dealing with market access (free movement of persons, public procurement, technical barriers to trade, trade in agricultural

products, land transport, air transport, and research). These agreements are tied together by a guillotine clause; the termination of one agreement automatically leads to the termination of the others. The EU insisted on such a clause in order to prevent "cherry picking" on the part of Switzerland; the former feared that the Swiss people would reject the Agreement on the Free Movement of Persons – a particularly sensitive issue in this country but a conditio sine qua non for the EU – in a referendum. The Bilaterals II consist of nine agreements and in some respects go beyond market access: they also deal with political issues and co-operation in culture and education (Schengen/Dublin, taxation of savings, fight against fraud, trade in processed agricultural products, MEDIA, environment, statistics, pensions of former EU officials, education and youth programmes). The Bilaterals II do not contain a guillotine clause; only the Schengen/Dublin association agreements share a common fate. The main agreements are supplemented by over 100 other (secondary) agreements. Institutionally, the agreements fail to go beyond the classic tools of diplomatic dispute resolution. Dispute resolution under such agreements proceeds in agreement-specific mixed committees which decide by consensus.

Since 2004, only a few agreements have been concluded, amongst them an agreement on customs facilitation and security, which substantially revised an older version (1990/2009), and an agreement on the cooperation of competition authorities (2013). Moreover, under further bilateral agreements, Switzerland participates in various EU agencies and programmes, including Europol, Eurojust, the European Border and Coast Guard Agency (Frontex) and the European Aviation Safety Agency (EASA). Such participation allows Swiss representatives to be integrated into EU transgovernmental structures. Swiss representatives are informed on ongoing action and can influence the work, mainly by relying on the power of the pen (decision shaping). Naturally, they do not possess voting rights (decision-making).

Currently, Switzerland's "bilateral way" of cooperating with the EU faces two major challenges. The first major challenge has arrived in the form of a popular initiative approved by the people and the cantons called "against mass immigration" ("Gegen Masseneinwanderung", 2014). According to the initiative's newly introduced Articles 121*a* and 197 No 11 Constitution,[7] Switzerland shall control the immigration of foreign nationals autonomously,

7 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Swiss Constitution www.admin.ch (https://perma.cc/M8UJ-S369).

by introducing annual quotas and granting Swiss citizens priority on the job market. After the approval of the initiative, the EU made it clear in response that it was not willing to renegotiate the Agreement on the Free Movement of Persons of 1999 to the effect that quotas and a discriminatory priority system for Swiss citizens would be permitted. Against this background, the Federal Assembly decided to implement the initiative in a way that ensured it would not violate the Agreement on the Free Movement of Persons. In the context of the Swiss policy of cooperation with the EU, this outcome has been welcomed by most commentators. The danger posed to the continuation of the current bilateral way has been, at least for the time being, dispelled. However, from a constitutional law perspective the outcome is problematic. The wording of the initiative's newly introduced constitutional provisions is clear, and the implementing legislation fails to reflect this properly. An initiative committee successfully collected more than 100'000 signatures for their initiative "out of the dead end" ("Raus aus der Sackgasse", RASA), which provided for the deletion of Articles 121*a* and 197 No 11 Constitution, the articles which had been created by the "against mass immigration" initiative. However, the initiative committee withdrew the initiative in late 2017, meaning the people and the cantons do not have the possibility to vote on the matter again. This is regrettable.

The second major challenge to the bilateral agreement approach is the fact that as of 2008, the EU has made it clear that it expects Switzerland to conclude an institutional agreement which provides common rules on the dynamic updating of the bilateral agreements, the supervision of their correct interpretation and application, and dispute resolution. An institutional agreement would apply to both new and existing market access agreements which are based on EU law. In Switzerland, the prospect of such an institutional agreement is controversial; some see it as a threat to Switzerland's sovereignty. However, it might actually be advantageous for Switzerland to have the increasingly complex treaty network established on a new and clearer basis: this would enhance legal security, transparency and efficiency. The EU and Switzerland would have a right to bring disputes before a juridical body, presumably an arbitration panel (which must involve the European Court of Justice where a dispute concerns the interpretation of EU law). Switzerland would not depend exclusively on the goodwill of the EU in resolving disputes as is the case today. Moreover, the EU has made the conclusion of new market access agreements (for example an agreement on electricity and on financial services) conditional upon the conclusion of an institutional agreement.

Thus, if Switzerland wants to benefit from such agreements in the future, it must act to establish this institutional agreement. The current state of affairs regarding the institutional agreement is that Switzerland and the EU are still in the negotiation phase.

c) Autonomous Adaptation of Swiss Law to EU Law

In parallel to the tight network of bilateral agreements Switzerland is party to, it has adopted another approach to mitigate the negative consequences of not being a member of the EU or the EEA: namely, the policy of autonomous adaptation of Swiss law to ensure compliance with EU law. According to the Federal Council, Switzerland's "*goal has to be to secure the greatest compatibility of our legislation with the legislation of our European partners in the areas of cross-border significance.*"[8] Of course, it is entirely possible for Switzerland to deviate from EU regulations and directives; however, this shall only be the chosen approach if there are cogent political and/or economic reasons for doing so.

Overall, the policy of autonomous adaptation has led to the systematic adoption of EU law. Typical examples where autonomous adaptation is employed are laws concerning technical regulations and standards, data protection and financial markets. It has been estimated that 30–50 % of all federal acts and ordinances are influenced by EU law, directly or indirectly: certainly no insignificant proportion.

8 Bericht über die Stellung der Schweiz im europäischen Integrationsprozess vom 24. August 1988, Federal Gazette No 37 of 20 September 1988, pp. 249, p. 380 (own translation).

II. Constitution

The Federal Constitution contains many provisions relevant to Switzerland's international engagement. These provisions regulate a variety of matters from the goals to be pursued in international relations to the different competences of various actors in this area, in particular those of the federation, the cantons and the people. Finally, the jurisprudence of the Federal Supreme Court has had a strong influence on the position of international law in Switzerland. These areas will be discussed in the upcoming paragraphs.

1. Goals and Means

The Constitution enlists the goals which Switzerland shall pursue in its international relations. Partly, these goals are of an egoistic nature while partly, they direct the authorities to act altruistically (Preamble, Articles 2 IV, 54 II and 101 I Constitution). They state that the people and the cantons are resolved to act in a spirit of solidarity and openness towards the world; the confederation is committed to a just and peaceful international order; it shall ensure that the independence of the country and its welfare is safeguarded; it shall contribute to the alleviation of need and poverty in the world, to the respect for human rights and democracy, to the peaceful co-existence of peoples, and to the conservation of natural resources; it shall safeguard the interests of the Swiss economy abroad. Regrettably, the Constitution does not reflect the true extent of Swiss participation in international and European organisations and treaty networks. Only Switzerland's UN membership is mentioned; it, at least, has found its way into the transitional provisions (Article 197 No 1 Constitution).

These constitutional goals are framed in rather abstract terms. Thus, in essence, it falls under the discretion of the authorities to concretise them when they decide on specific foreign policy measures. Moreover, the Constitution does not provide for any applicable rules to follow in the event of a conflict between these goals. For instance, there might be controversial debate over whether and, if so, to what extent the protection of fundamental rights should be taken into account in the context of free trade agreements.

The Constitution provides no real guidance in this context. There was some debate over this issue when Switzerland negotiated and concluded its free trade agreement with China in 2014; there were concerns that such an agreement could foster human rights violations if free trade was relied upon too heavily as an end in itself. The eventual result of these negotiations was an agreement that reaffirms both parties' commitment to respecting selected fundamental rights and "fundamental norms of international relations" in the Preamble, supplemented by a side-agreement on labour and employment.

Some argue that the concept of neutrality also amounts to a principle which guides Swiss foreign policy. Back in 1815 at the Congress of Vienna, the then predominant European powers recognised the neutrality of the Swiss confederation. Since then, this status has been reconfirmed several times, and Switzerland has adhered to the notion of (armed) neutrality as acknowledged in public international law. However, the Constitution does not state that neutrality in itself is a goal of Swiss foreign policy.[9] Rather, neutrality is to be used as one of many instruments in order to achieve the goals set out above.

2. Competences

a) Federation and Cantons

Foreign relations fall under the competences and responsibilities of the federation (Article 54 Constitution). This includes the competence to conclude treaties. This competence for concluding treaties can result in the federation dealing with issues that also encompass policy areas which internally fall into the cantons' domain. Thus, the federal authorities are obliged to protect the interests of the cantons in such a situation and to ensure that they participate in preparing and conducting treaty negotiations in an appropriate manner (Article 55 Constitution).

Despite the existence of Article 55 Constitution, the increasing tendency to take recourse to treaties has resulted in a tacit neutralisation of cantonal competences. The bilateral agreements Switzerland has established with the EU, for instance, deal with matters partly falling into the domain of the cantons,

9 Thomas Fleiner/Alexander Misic/Nicole Töpperwien, Constitutional Law in Switzerland, 2nd edition, Alphen aan den Rijn 2012, n. 24; Walter Haller, The Swiss Constitution in a Comparative Context, 2nd edition, Zurich/St. Gallen 2016, n. 71 et seq.

such as cantonal police, recognition of professional qualifications and public procurement. Accordingly, to ensure that the cantons are not being effectively ignored or undermined, consultation and cooperation between the different layers of government are fundamentally important; more so today than in the past. The cantons have also taken their own steps to ensure their interests are represented: in 1993 they founded the Conference of the Cantonal Governments (KdK) which helps coordinate the efforts of the cantons to pool their interests and speak with one stronger voice.

The cantons are competent to independently conclude international treaties in areas which fall under their remit, as long as the federation has not taken action in that specific policy field itself (Article 56 Constitution). For example, treaties between cantons and neighbouring states or sub-levels of states, such as the German *Bundesländer*, concern cross-border issues like transportation, infrastructure, waste management, and the protection of the environment.

b) Federal Council, Federal Assembly, Federal Courts

The fundamental principle of the separation of powers between the different branches of government is not just relevant to the Swiss political system in general,[10] but is also a key principle in Swiss foreign policy. The functions of the Federal Council (including the federal administration), the Federal Assembly and the Federal Supreme Court within the context of international relations are as follows:

- The Federal Council is primarily responsible for foreign relations, subject to the right of participation of the Federal Assembly (Article 184 Constitution). It represents Switzerland abroad. The federal administration negotiates treaties, based on a mandate established by the Federal Council. The Federal Council is competent to conclude treaties of limited scope on its own; this is the case, inter alia, when a treaty does not create new obligations for Switzerland or when a treaty primarily concerns the authorities and involves technical administrative issues (Article 7*a* of the Government and Administration Organisation Act).[11]

10 See the chapter on Constitutional Law, pp. 151.

11 Government and Administration Organisation Act of 21 March 1997 (GAOA), SR 172.010. See for an English version of the act www.admin.ch (https://perma.cc/7A5T-PQ6B).

- The Federal Assembly participates in shaping foreign policy and supervises the maintenance of foreign relations (Article 166 Constitution). It must agree to the conclusion of treaties (unless the Federal Council can do so on its own). However, the Federal Assembly can only approve or reject a signed treaty in toto. In particular, in the case of "package deals" (such as the accession to the WTO),[12] the Federal Assembly realistically has no other choice than to "wave" a treaty through. From a democratic point of view, this is problematic. It does not allow the treaty at issue to be subjected to proper scrutiny by the Federal Assembly in order to propose amendments. It should be noted, however, that the Foreign Affairs Committees of the National Council and the Council of States must be consulted before the Federal Council adopts a negotiation mandate. Further, these committees are periodically informed about ongoing negotiations, to ensure they are able to offer relevant and up-to-date advice in this regard.
- The Federal Supreme Court acts on appeal, hearing cases decided either by the highest cantonal courts or by other federal courts. Thereby, it also interprets international law and shapes the relationship between international law and Swiss law.[13]

The ongoing shift in law-making from domestic legislation towards international treaties has led to a readjustment of the power balance between the Federal Assembly and the Federal Council (including the federal administration). The power of the latter is increased to the detriment of the former. Consequently, new procedures should be sought in order to enhance the participation of the Federal Assembly as well as that of cantons and civil society groups both in the preparatory phase of and throughout negotiations. Currently, the aforementioned groups' participation in the treaty-making process is, from a democratic viewpoint, too marginal.

c) Direct Democracy

Swiss citizens are regularly called upon to vote on issues which either directly or indirectly concern foreign relations and Switzerland's position on the international plane. The direct democratic tools on offer – popular initiatives and referenda – have decisively shaped the treaty-making process in

12 See pp. 167.

13 See pp. 179.

Switzerland.[14] The instruments are two distinct creations, but have a similarly strong impact on Swiss international relations:

- A popular initiative allows a minimum of 100'000 citizens to demand a vote on a proposed revision of the Constitution (Articles 138–139*b* Constitution). Through popular initiatives, the people can have a significant influence on Switzerland's international relations. A prime example of this was the popular initiative for the accession of Switzerland to the UN, which was approved of by the people and the cantons in 2002. This was a positive step forward in terms of Switzerland's cooperation with the international community. However, over the last decade, an increasing number of initiatives have been incompatible with international law, considering their unambiguous wording. Key examples are the initiative "against the construction of minarets" ("Gegen den Bau von Minaretten", 2009), the initiative "for the expulsion of criminal foreign nationals" ("für die Ausschaffung krimineller Ausländer", 2010) and the initiative "against mass immigration" ("Gegen Masseneinwanderung", 2014). The implementation of initiatives such as these presents huge problems. This is particularly the case when the initiatives violate basic norms of international law. The initiative "against the construction of minarets" is not compatible with the freedom of religion (Article 9 ECHR) and the prohibition of discrimination (Article 14 ECHR). The initiative "for the expulsion of criminal foreign nationals" and the initiative "against mass immigration" are both incompatible with the Agreement on the Free Movement of Persons with the EU. Moreover, the initiative "for the expulsion of criminal foreign nationals" also violates the right to respect for private and family life (Article 8 ECHR). Often, it is simply not possible to fully implement such initiatives. Proposals for reform in this problematic area have been put forward; for example, there have been calls to introduce a provision according to which a popular initiative must comply with basic fundamental rights as guaranteed, for instance, in the ECHR in order to be valid. However, it is crucial to note that any revision to this effect would itself require the approval of the people and the cantons, which may pose a real obstacle.[15]

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14 For more information on these instruments, see the chapter on Constitutional Law, pp. 151.

15 Haller, n. 597 et seqq.

- A referendum allows citizens to vote, inter alia, on the conclusion of an international treaty (Articles 140–142 Constitution). A mandatory referendum takes places in the case of an accession to an organisation for collective security (e.g. NATO) or to a supranational community (e.g. the EU); such an accession needs the approval of a majority of the people and a majority of the cantons. The vote on the envisaged accession to the EEA, eventually rejected by the people and the cantons in 1992, was conducted under this title, due to its potential political and economic significance. In addition, an optional referendum can be requested by 50'000 citizens against the conclusion of an international treaty that: is of unlimited duration and cannot be terminated; provides for accession to an international organisation; contains important legislative provisions or requires the enactment of federal legislation for implementation. Decisive for the outcome is the vote of the people; a majority of the cantons is not required. The bilateral agreements concluded with the EU in 1999, the "Bilaterals I", and the Schengen/Dublin association agreements of 2004 were all approved of in optional referenda.

It should be noted that regarding referendum votes on treaties, the people often do not possess a real option (a situation somewhat resembling that faced by the Federal Assembly in the case of "package deals"). Practical constraints and opportunity costs can de facto force the people to approve a treaty. Typical examples of this sort of situation are votes on amendments to the Schengen/Dublin association agreements in order to keep them in line with dynamic EU law; rejecting such amendments would seriously endanger the fate of these agreements altogether. Therefore, when the people approved the incorporation of the Council Regulation on biometrics in passports and travel documents[16] into the Schengen Agreement with 50.1 % of the votes in 2008, many breathed a sigh of relief – a negative vote could have seriously endangered the continuation of the Schengen Association Agreement and, by virtue of the guillotine clause linking these two treaties, also of the Dublin Association Agreement.

16 Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents.

3. Relationship Between International Law and Swiss Law

The federal authorities and the cantons are obliged to respect international law in all their activities (Article 5 IV Constitution). Based thereon and in light of the principle of pacta sunt servanda, the Federal Supreme Court has developed a rich stream of case law concerning the validity, rank and effect of international law in Switzerland:

- Swiss law follows the monist tradition. Therefore, treaties which have been duly entered into force automatically become part of domestic law. An act of transformation is not needed.[17]
- International law generally takes precedence over national law. This is unequivocally the case for peremptory norms of international law (ius cogens); such norms always overrule any conflicting provisions of national law. Moreover, treaties concluded by Switzerland supersede federal acts in the case of a conflict, unless the Federal Assembly has intentionally enacted legislation which violates the treaty obligation; in such a case, the authorities shall apply the federal act (*Schubert* case law).[18] However, this *Schubert* exception is subject to two key limitations: treaties which guarantee fundamental rights, such as the ECHR, and the Agreement on the Free Movement of Persons with the EU[19] must be respected in all cases; the *Schubert* exception does not apply.[20] The Federal Supreme Court has not yet explicitly decided whether these considerations equally apply in the case of a conflict between a treaty and the Constitution.[21]
- A powerful instrument for averting conflict is the method of interpreting Swiss law in a way that ensures its conformity with international law. The Swiss authorities routinely employ this method.[22]
- Individuals can invoke treaty provisions in proceedings before public authorities directly if they are self-executing, i.e. if they both confer

17 See already BGE 7 I 774, a judgment of the Federal Supreme Court of 1881.
18 BGE 99 Ib 39.
19 See pp. 181.
20 BGE 125 II 417; BGE 142 II 35.
21 See BGE 139 I 16.
22 BGE 94 I 669.

rights on individuals and are sufficiently clear and unconditional to preclude any need for implementing legislation.[23] Typically, human rights treaties as well as the main bilateral agreements with the EU are directly applicable. However, a key problem with this principle is its vulnerability to interpretation: sometimes the courts refrain from applying treaty provisions directly, even though they seem to obviously meet the conditions of clarity and unconditionality. WTO agreements, for instance, are not considered to be directly applicable.[24] The Federal Supreme Court has also, time and again, refused to directly apply the free trade agreement concluded in 1972 with the EU. This mercantilist approach is the subject of controversial debate. There are competing interests at stake: for example, ensuring the effectiveness of international law versus maintaining both balanced international legal relations (reciprocity) and the domestic balance of powers. Concerns as to the lack of adequate democratic representation in international law-making are a key part of the debate.

In 2016, the Swiss People's Party (SVP) submitted the initiative "Swiss law instead of foreign judges (self-determination initiative)" ("Schweizer Recht statt fremde Richter [Selbstbestimmungsinitiative]"). According to the proposed text, the Swiss Constitution is the highest source of law in Switzerland. In the case of a conflict between the Constitution and a treaty, the former prevails (with the exception of ius cogens). In such a circumstance, the treaty must be renegotiated; if necessary, it must be terminated. The proposed text reflects the concern that the scope for domestic policy-making is becoming increasingly limited by international law. However, the way the text addresses this concern is hardly useful. The idea of establishing a rigid hierarchy between the Constitution and international law oversimplifies the complex interplay between these legal dimensions. Moreover, the wording of the initiative is too ambiguous: for example, under what exact circumstances would it become "necessary" to terminate a treaty? Fundamentally, this initiative endangers both legal security and Switzerland's reputation as a reliable partner in international relations. The people will vote on this proposal in due course.

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23 BGE 124 III 90.

24 Thomas Cottier/Matthias Oesch, International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland. Comments, Cases, and Materials, Bern/London 2005, pp. 223.

III. Landmark Cases

In the following section, two key cases which demonstrate Switzerland's involvement and interaction with the international community will be discussed. One case, which came before the Federal Supreme Court, clarified the position of Swiss law with respect to the Agreement on the Free Movement of Persons between the EU and Switzerland (1.). The second case demonstrates Switzerland's participation in an international dispute settlement procedure, through its membership of the WTO (2.).

1. Supremacy of the Agreement on the Free Movement of Persons

AA, a citizen of the Dominican Republic, had been residing in Switzerland since 2002. In the same year, she gave birth to a boy, BA. The father of BA was C, a German citizen who also lived in Switzerland. Based on these relationships, AA and BA were granted a residence permit in Switzerland, derived from C's right of residence under the Agreement on the Free Movement of Persons. In 2013, however, the competent authority in the Canton of Zurich refused to prolong AA's residence permit, on the grounds that she had been dependent on social security payments for several years. They did, however, grant her son, BA, a residence permit, derived from his father's right of residence. The authority argued that the existence of BA did not require that AA received a residence permit; AA could take her son with her upon leaving the country or alternatively he could remain in Switzerland under his father's care. AA challenged this refusal. She argued that she had a right to reside in Switzerland based on the Agreement on the Free Movement of Persons.

The substantive outcome of the case was that the Federal Supreme Court confirmed the decision of the cantonal authority upon appeal.[25] However, the most interesting points of the judgement were discussed by the Court

25 BGE 142 II 35.

by way of introduction to the case, where two issues which had been hotly debated in the aftermath of the approval of the popular initiative "against mass immigration" ("Gegen Masseneinwanderung", 2014) were clarified. First, the Federal Supreme Court confirmed that the Agreement on the Free Movement of Persons is to be interpreted in light of the case law that has been developed by the European Court of Justice in interpreting EU law provisions on the free movement of persons. A parallel interpretation of the Agreement on the Free Movement of Persons – i.e. an interpretation which follows that of the European Court of Justice – is supported by the Preamble of the Agreement on the Free Movement of Persons' objective, which is "*to bring about the free movement of persons between* [*Switzerland and the EU*] *on the basis of the rules applying in the European Community*". As such, a parallel interpretation is also in line with the teleological method of interpretation, as provided for in Article 31 of the Vienna Convention on the Law of Treaties. There is no explicit obligation on Switzerland to follow European Court of Justice judgements, except in the case of those judgements rendered before June 1999 (Article 16 Agreement on the Free Movement of Persons). However, an autonomous interpretation shall only be followed if there are cogent reasons to do so. In this case, the Federal Supreme Court made it clear that the new Articles 121*a* and 197 No 11 Constitution do not constitute such cogent reasons. Thus, they interpreted the Agreement on the Free Movement of Persons' provisions in light of the pertinent case law of the EU and, upon this basis, confirmed the decision of the cantonal authority to refuse to reissue AA with a residence permit.

Second, the Federal Supreme Court clarified the relationship which exists between the Agreement on the Free Movement of Persons and federal acts. In the case of a conflict, the former takes precedence over the latter. This remains the case even when the Federal Assembly intentionally violates the Agreement on the Free Movement of Persons in full knowledge of the legal and/or political consequences of such an action. Thus, it can be seen that the *Schubert* exception does not apply within the scope of the Agreement on the Free Movement of Persons.[26] The Federal Supreme Court based this finding on the observation that the Agreement on the Free Movement of Persons leads to a harmonisation of the legal order (sectoral participation in the common market) through the realisation of a basic freedom, as well as on the fact that EU law is directly applicable in EU member states and claims supremacy over

26 See pp. 179.

national laws. With respect to the case at hand, however, it was not apparent whether these considerations were relevant in order to decide the case (thus forming part of its *ratio decidendi*) or whether they were *obiter dicta*.

The message sent out by the Federal Supreme Court is clear: legislation implementing Articles 121*a* and 197 No 11 Constitution which violates the Agreement on the Free Movement of Persons would have no practical effect. EU citizens could still directly rely on the Agreement on the Free Movement of Persons; the Federal Supreme Court would continue to uphold these rights. In fact, since this ruling the Federal Assembly has implemented the new provisions in an Agreement on the Free Movement of Persons-consistent way.[27] Unsurprisingly, the judgment of the Federal Supreme Court has been received controversially. Some see it as the Federal Supreme Court ignoring the voice of the people, who voted in favour of Articles 121a and 197 No 11 Constitution but have found that there continues to be no real practical enforcement of these new articles. One key positive aspect of the judgement is that it enhances legal security and contributes to the reliability of Switzerland in the realm of external relations.

2. US Safeguard Measures on Steel Products

In 2002, the then President of the United States, George W. Bush, imposed definitive safeguard measures on various steel products. The measures consisted of additional tariffs ranging from 8 % to 30 % and were intended "*to facilitate positive adjustment to competition from imports of certain steel products*".[28] Consequently, some products of foreign steel producers were kept out of the US market; the prices of others were artificially increased. Swiss companies were amongst the affected producers. As a direct response to the US measures, the EU adopted its own safeguard measures on steel products: it imposed a tariff quota system in order to limit trade diversion resulting from US protectionism. The EU measures were even more problematic for the Swiss steel industry than the original US ones.

Eight WTO members – the EU, Japan, Korea, China, Switzerland, Norway, New Zealand and Brazil – challenged the US safeguard measures before the WTO Dispute Settlement Body (DSB), arguing that the measures were

27 See pp. 170.

28 US Presidential Proclamation No. 7529 of 5 March 2002.

inconsistent with Article XIX General Agreement on Tariffs and Trade 1994 and the Agreement on Safeguards. According to long-standing case law, these rules permit WTO members to apply safeguard measures only when, as a result of unforeseen developments, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry producing like or directly competitive products. After unfruitful consultations, a panel was established to examine the matter. The panel determined that the conditions for the imposition of safeguard measures were not met in the case of the United States for any steel product at issue. On appeal, the Appellate Body confirmed the ruling.[29]

After the Appellate Body had issued its report, President Bush terminated the safeguard measures. A combination of some of the following four reasons might have been decisive in making him do so:

- First, the Appellate Body determined unequivocally that the measures violated WTO law. From a legal perspective, the United States were hence obliged to withdraw the measures; respect for the rule of law demanded this.
- Second, President Bush was anxious to please constituencies in the States which had traditionally been home to many steel-industry jobs, such as Pennsylvania, Ohio and West Virginia. From a political perspective, he had already accomplished what he had intended through the initial imposition of the measures.
- Third, it had become increasingly apparent that the measures were having a negative effect on the US industry as a whole. The safeguard measures did more harm to the steel-using industries than good to the steel-producing industry. Thus, from an economic viewpoint, the termination of the measures was somewhat logical.
- Fourth, WTO law permits members affected by WTO law-incompatible safeguard measures to apply re-balancing measures.[30] As such, various co-complainants who participated in the WTO dispute settlement

29 US – Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS253/AB, issued 10 November 2003 (complaint of Switzerland).

30 Under the Agreement on Safeguards, an affected member is permitted to apply re-balancing measures, whereas the Dispute Settlement Understanding (DSU) allows a complaining party to suspend obligations vis-à-vis the defending party if the latter does not comply with a panel or Appellate Body ruling.

> proceedings were planning to impose re-balancing measures against the United States. The EU, the complainant by far the most affected by the safeguard measures, had already adopted a regulation setting out potentially targeted products, such as fruits and vegetables, textile products and Harley Davidson motorcycles.[31] Japan, China, Norway and Switzerland followed suit and threatened to adopt similar re-balancing measures. By terminating the US safeguard measures, President Bush could avoid the adoption of potentially very harmful re-balancing measures against the US.

This has been the only WTO case in which Switzerland has actively participated, as a complaining or defending party, to date. In the end, the Swiss delegation was content with the final outcome: it successfully relied on WTO law and prevailed over the United States, resulting in the termination of the harmful safeguard measures. However, at the same time, their satisfaction was not absolute. Although the US measures were declared unlawful eventually, in the meantime, Swiss steel producers suffered real damage due to the trade-restrictive measures imposed by both the US and the EU and the loss of market shares, which they then had to regain tediously. In this context, it is problematic that the WTO dispute settlement mechanism does not provide for compensation for damages suffered due to unlawful actions.

31 Council Regulation (EC) No 1031/2002 of 13 June 2002 establishing additional customs duties on imports of certain products originating in the United States of America; see also WTO Document G/C/10, G/SG/43 of 15 May 2002.

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