International Relations DRAFT

Prof. Matthias Oesch

1st Treaties

a) In General

Switzerland has traditionally been friendly towards, and respectful for, 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 that Switzerland participates in numerous international organisations and treaty networks. Membership to the United Nations (UN) provides the foundation (1.b). Other organisations and treaty networks, covering almost any policy field conceivable, such as trade, investment, monetary issues, taxation, transportation, telecommunication, environment, development, food, health, education, culture, metrology and weapons control also are significant (s. for treaties on trade and investment 1.c). Switzerland is a signatory to various human rights treaties; among them is the European Convention on Human Rights (ECHR) which has been attributed, by the Federal Supreme Court, a quasi-constitutional status (s. the chapter on constitutional law). Switzerland is not a member of the North Atlantic Treaty Organisation (NATO); it participates in Partnership for Peace (PfP).

Switzerland – although located at the heart of the continent, surrounded by three of the six founding members of the then European Economic Community (EEC) – is not a member of the European Union (EU). Therefore, close and stable relations with the EU and its member states, in particular, of course, with the neighbouring countries Austria, France, Germany and Italy, are of prime importance. Swiss membership to the Council of Europe and the bilateral treaties with the EU are also dealt with below (1.d).

b) United Nations and Specialised Agencies

The UN, which was founded in 1945, primarily aims at ensuring collective security. Moreover, it provides a unique forum for all nations and other actors to co-operate on the international parquet. Its outreach, with respect to both its membership and the variety of subject matters which are dealt with under its auspices, is unrivalled by other international organisations. Currently, it encompasses 193 member states. In addition to the UN itself, the UN system also consists of various affiliated programmes, funds and specialised agencies, all having their own membership 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 Labor Organization (ILO) and the two Bretton Woods institutions, the World Bank and the International

Monetary Fund (IMF). Geneva is the main seat of the UN in Europe; the Palais des Nations, which was built for the League of Nations, the predecessor of the UN (1920-1946), hosts the UN.

Switzerland joined the UN as late as in 2002. The accession process was initiated by a popular initiative; the people and the cantons approved of the accession. Before, Switzerland had already participated in various special agencies, programmes and funds of the UN. It had become a member of the World Bank and the IMF in 1992. Since its accession, Switzerland has played an active role in the UN. It was involved in the foundation of the new Human Rights Council in 2006 and has actively contributed to the debate on a reform of the Security Council.[1] Switzerland has formally applied to become a member of the Security Council for the period of 2023-24. According to the Federal Council, membership in the Security Council would not hinder Switzerland to continue its policy of neutrality (2. a).[2]

c) Trade and Investment

The World Trade Organization (WTO) sets out the basic legal framework for international trade. It was founded in 1995, succeeding, and continuing the tradition of, the General Agreement on Tariffs and Trade of 1947 (GATT). The WTO consists of 164 members. The WTO Agreement has three main annexes which are legally binding for all members: the GATT 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 while, at the same time, allowing members to pursue equally legitimate policy objectives, such as the protection of public morals, human and animal health and life and the environment. The plurilateral Agreement on Government Procurement 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, the complaining party is permitted to suspend obligations vis-à-vis the defending party, *i.e.*, to impose retaliatory measures. Geneva is the seat of the WTO. Its headquarters are located in the Centre William Rappard.

Switzerland became a member of the GATT in 1966 (having applied its rules *de facto* since 1960). It was an original member of the WTO in 1995. 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 actively participated, as complaining party, in WTO dispute settlement proceedings once (3. b).

Furthermore, Switzerland has concluded a series of free trade agreements with countries all over the globe.[3] In addition to the European Free Trade Association (EFTA) and the

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1 www.eda.admin.ch and link to international organisations/United Nations.

2 Die Kandidatur der Schweiz für einen nichtständigen Sitz im Sicherheitsrat der Vereinten Nationen in der Periode 2023-2024, Bericht des Bundesrates vom 5. Juni 2015, available at www.eda.admin.ch and link to international organisations/United Nations.

3 www.seco.admin.ch and link to Economic Relations/Free Trade Agreements.

free trade agreement with the EU (1. d) bb), Switzerland currently has a network of 28 free trade agreements with 38 partners. Switzerland has usually concluded its free trade agreements together with the 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 (incl. 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 good as those enjoyed by its main competitors, in particular those located in the EU. Against this background, 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. The possible – albeit, at least at the moment, hardly realistic – conclusion of the Transatlantic Trade and Investment Partnership between the EU and the US (TTIP) would result in even more obvious disadvantages for Swiss companies vis-à-vis their competitors in the EU; Switzerland would be forced to try to level the playing field again.

Other international organisations and treaty networks, which are also relevant for Switzerland, complement the multilateral trading system under the WTO and free trade agreements. Among them are the World Customs Organization (ICO) 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.

d) Switzerland and Europe

aa) Overview

Switzerland hesitated to join European organisations and treaty networks after the end of the Second World War. At least, it was an original member of the Organisation for European Economic Co-operation (OEEC) which was founded in 1948 in order to administer the European Recovery Program (Marshall Plan); in 1961, the OEEC was renamed OECD, and its mandate and membership were substantially broadened. Switzerland did not participate in the efforts to foster European integration under the EEC/EC/EU. Instead, in 1960, Switzerland founded, together with six other European countries, EFTA of which it is still a member, together with Iceland, Liechtenstein and Norway. In 1963, Switzerland became a member of the Council of Europe, whose prime objectives are to promote democracy, human rights and the rule of law; in 1974, it also agreed to respect 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 until today. In 1975, Switzerland was an original member of the Conference on Security and Co-operation in Europe (CSCE) which was renamed to 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 EU law. This approach, the "Swiss model" of European integration, has proven to be successful.

bb) Bilateral Agreements

In addition to the free trade agreement of 1972, the two sets of bilateral agreements of 1999 and 2004, the "Bilaterals I" and the "Bilaterals II", provide the legal framework for the relationship between Switzerland and the EU. 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, research). These agreements are tight together by a *guillotine* clause; the termination of one agreement automatically leads to the termination of the others. The Bilaterals II consist of nine agreements and, partly, go beyond market access, also dealing 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 main agreements are supplemented by more than 100 other (secondary) agreements. Institutionally, the agreements fail to go beyond the classic tools of diplomatic dispute resolution. This is done in agreement-specific mixed committees which decide by consensus.

Since 2004, only a few agreements could be concluded, among them being an agreement on customs facilitation and security, substantially revising an older version (1990/2009), and an agreement on the cooperation of competition authorities (2013). Moreover, Switzerland participates in various EU agencies and programmes, among them being Europol, Eurojust, the European Border and Coast Guard Agency (Frontex) and the European Aviation Safety Agency (EASA).

Currently, the bilateral way faces two major challenges: First, the people and the cantons approved the popular initiative "against mass immigration" ("Gegen Masseneinwanderung", 2014). According to the newly introduced Articles 121*a* and 197(11) of the constitution, Switzerland shall control the immigration of foreign nationals autonomously, by introducing annual quotas and granting Swiss citizens priority on the job market. The EU made it clear that it was not willing to renegotiate the Agreement on the Free Movement of Persons of 1999 (AFMP) to the effect that quotas and a discriminatory priority system for Swiss citizens would be permitted. Against this background, the Federal Assembly decided to enact implementation legislation in a way so that it does not violate the AFMP. With a view to the Swiss policy towards the EU, this outcome has been welcomed by most commentators. The risk to endanger the continuation of the bilateral way in its current form has been, at least for the time being, dispelled. From a constitutional law perspective, however, the outcome is problematic. The wording of the newly introduced provisions is clear; the implementing legislation fails to reflect this properly. An initiative committee has successfully collected more than 100'000 signatures for their initiative "out of the dead end" ("Raus aus der Sackgasse") which provides for the deletion of Articles 121*a* and 197(11). The people will be called upon to vote on this initiative in due course. Second, the EU has made it clear, since 2008, that it expects Switzerland to conclude an institutional agreement, providing for common rules on the dynamic updating of the agreements, the supervision of their correct interpretation and application, and dispute resolution. An institutional agreement would apply to existing and new market access agreements which are based on EU law. Nego-

tiations are under way. In Switzerland, such an institutional agreement is highly controversial although it might also be advantageous for Switzerland to put the increasingly complex treaty network on a new basis, thus enhancing legal security, transparency and efficiency. Moreover, the EU has made the conclusion of new market access agreements, such as an agreement on electricity and on financial services, conditional upon the conclusion of an institutional agreement.

cc) Autonomous Adaptation of Swiss Law to EU Law

In parallel to the tight network of bilateral treaties, Switzerland has adopted another instrument in order 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 EU law. According to the Federal Council, "our goal has to be to secure greatest compatibility of our legislation with the legislation of our European partners in the areas of cross-border significance."[4] Deviations from EU regulations and directives are, of course, possible; however, they shall only be chosen if there are cogent political and/or economic reasons to do so. Overall, the policy of autonomous adaptation has led to a systematic adoption of EU law. It has been estimated that 30-50% of all federal acts and ordinances are influenced by EU law, directly or indirectly.[5]

2. Principles

a) Goals and Means

The constitution enlists the goals which Switzerland shall pursue in international relations. Partly, they are of an egoistic nature; partly, they direct the authorities to act altruistically (Preamble, Articles 2[4], 54[2] and 101[1]): 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 Swiss participation in international and European organisations and treaty networks. Only the membership to the UN is mentioned; it has found its way, at least, into the transitional provisions (Article 197[1]).

These constitutional goals are framed in rather abstract terms. In essence, it lies within the discretion of the authorities to concretise them. Moreover, the constitution does not provide for a rule applicable when these goals collide, need to be weighed against each other and prioritised. For instance, it might be controversially debated whether and, if so, to what extent the protection of fundamental rights shall be taken into account in free trade agreements.

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[4] Bericht über die Stellung der Schweiz im europäischen Integrationsprozess vom 24. August 1988, BBl 1988 III 249, 380 (own translation).

[5] MATTHIAS OESCH, Europarecht, Band I: Grundlagen, Institutionen, Verhältnis Schweiz-EU, Bern 2015, n. 936.

It is sometimes argued that neutrality also amounts to a principle which guides Swiss foreign policy. The then predominant European powers recognised the neutrality of the Swiss confederation at the Congress of Vienna in 1815. 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. The constitution does not, however, state that neutrality is a goal of Swiss foreign policy in itself.[6] Rather, neutrality is an instrument, among others, in order to achieve the goals set out supra.

b) Competences

aa) Federation and Cantons

Foreign relations fall within the competence and responsibility of the federation (Article 54 Cst.). This includes the competence to conclude treaties. This competence also encompasses policy areas which internally fall into the domain of the cantons. The federal authorities are obliged to protect the interests of the cantons and to ensure that they participate in preparing and conducting negotiations in an appropriate manner (Article 55 Cst.).

The ongoing tendency to take recourse to treaties more often has resulted in a tacit neutralisation of cantonal competences. The bilateral agreements with the EU, for instance, deal with matters partly falling into the domain of the cantons, such as cantonal police and public procurement. Accordingly, consultation and cooperation between the different layers of government are even more important today than they were in the past. In 1993, the cantons founded the Conference of the Cantonal Governments (KdK) which coordinates the efforts of the cantons to pool their interests and to speak, ideally, with one voice.

The cantons are competent to conclude treaties on their own in areas which fall into their competence as long as the federation has not taken action in that policy field itself (Article 56 Cst.). Examples of treaties between cantons and neighbouring states or sub-levels of states, such as German *Bundesländer*, concern cross-border issues such as transportation, infrastructure, waste management and the protection of the environment.

bb) Federal Council, Federal Assembly, Federal Courts

The principle of separation of powers between the different branches of government, as applied to the Swiss political system in general (s. the chapter on constitutional law), is also relevant in foreign policy. The functions of the Federal Council (incl. the federal administration), the Federal Assembly and the Federal Supreme Court are as follows:

- The Federal Council is responsible for foreign relations, subject to the right of participation of the Federal Assembly (Article 184 Cst.). It represents Switzerland abroad. The federal administration negotiates treaties, based on a mandate set up by the Federal Council. The latter is competent to conclude treaties of minor relevance.
- The Federal Assembly participates in shaping foreign policy and supervises the maintenance of foreign relations (Article 166 Cst.). It must agree to the conclusion of treaties (unless the Federal Council can do so on its own). The Federal Assembly can

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[6] FLEINER/MISIC/TÖPPERWIEN, n. 24; HALLER, n. 71-72; Bericht des Bundesrates vom 5. Juni 2015 (fn. XXX), p. 20.

only, however, approve or reject a signed treaty *in toto*. In particular in the case of "package deals" (such as the accession to the WTO, 1. c), the Federal Assembly has realistically no other choice than to "wave" a treaty through. From a democratic viewpoint, this is problematic. At least, the Foreign Affairs Committees of the National Council and the Council of States must be consulted before the Federal Council adopts a negotiation mandate. Moreover, these committees are periodically informed about ongoing negotiations.

– The Federal Supreme Court acts upon appeal, hearing cases which have been 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 (2. c).

The ongoing shift in rule-making from domestic legislation to international treaties leads to a readjustment of the balance of powers between the Federal Assembly and the Federal Council. It increases the power of the latter, incl. that of the federal administration, to the detriment of the former. New procedures should be sought in order to enhance the participation of the Federal Assembly as well as of cantons and civil society groups in the preparatory phase of, and during, negotiations. Currently, their participation in the treaty-making process is, from a democratic viewpoint, too marginal.

cc) Direct Democracy

Swiss citizens are regularly called upon to vote on issues which concern foreign relations. The direct democratic elements on offer, popular initiatives and referenda, have decisively shaped the treaty-making process in Switzerland (s. for these instruments the chapter on constitutional law):

– A popular initiative allows 100'000 citizens to request a vote on a revision of the constitution (Articles 138-139*b* Cst.). A prime example of how people can determine the position of Switzerland in the world therewith was the popular initiative for the accession of Switzerland to the UN which was approved of by the people and the cantons in 2002. Over the last decade, an increasing number of initiative texts have been, with a view to their unambiguous wording, not compatible with international law. 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") and the initiative "against mass immigration" ("Gegen Masseneinwanderung", 2014). The implementation of such initiatives poses enormous problems; this holds in particular true when they violate basic norms of international law, such as the ECHR and the bilateral treaties with the EU (as is the case in the just mentioned examples). Often, it is simply not possible to implement such initiatives properly. Reform proposals, such as to introduce a provision according to which a popular initiative needs to comply with basic fundamental rights as guaranteed, for instance, in the ECHR, have been put forward – being aware of the fact that any revision to this effect would require the approval of the people and the cantons.[7]

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[7] See for such proposals Das Verhältnis von Völkerrecht und Landesrecht, Bericht des Bundesrates vom 5. März 2010, BBl 2010, 2263, 2330; Zusatzbericht des Bundesrates vom 30. März 2011, BBl 2011 3613, 3640; HALLER, n. 597-609.

– A referendum allows citizens to vote on the conclusion of an international treaty (Articles 140-142 Cst.). 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 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 also conducted under this title, due to the political and economic significance of such an accession. An optional referendum can be requested by 50'000 citizens against the conclusion of an international treaty which is of unlimited duration and may not be terminated, which provides for accession to an international organisation or which contains important legislative provisions or whose implementation requires the enactment of federal legislation. Decisive for the outcome of the vote are the people; a majority of the cantons is not required. The bilateral treaties with the EU of 1999, the "Bilaterals I", and the Schengen/Dublin association agreements of 2004 were approved of in optional referenda.

Similar to the Federal Assembly, the people often do not possess a real option in referendum votes. Practical constraints and opportunity costs *de facto* force them to approve a treaty. Typical examples are votes on amendments to the Schengen/Dublin association agreements in order to keep them in line with the dynamic EU law; rejecting such amendments would seriously endanger the fate of these agreements altogether. Therefore, when the people approve the incorporation of the Council Regulation (EC) No 2252/2004 (biometrics in passports and travel documents) into the Schengen Agreement with 50.1% of the votes in 2008, many breathed a sigh of relief.

c) Relationship between International Law and Swiss Law

The federal government and the cantons are obliged to respect international law (Art. 5[4] Cst.). Based thereon and in light of the principle of *pacta sunt servanda*, the Federal Supreme Court has developed a rich case law concerning the validity, rank and effect of international treaties in Swiss Law:

– Swiss law follows the monist tradition. Therefore, treaties, which have been duly entered into force, are automatically part of domestic law. An act of transformation is not needed.
– International law in general takes precedence over national law. This holds true, without exception, for peremptory norms of international law (*ius cogens*). Moreover, treaties supersede federal acts in the case of a conflict, unless the Federal Assembly intentionally enacts legislation in order to violate the treaty obligation; in such a case, the authorities shall apply the federal act (*Schubert* case law).[8] However, treaties which guarantee fundamental rights, such as the ECHR, and the Agreement on the Free Movement of Persons with the EU (3. a) must be respected in any case; the *Schubert* exception does not apply.[9] 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.[10]

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8 BGE 99 Ib 39.
9 BGE 125 II 417; BGE 142 II 35.
10 S. BGE 139 I 16.

– A powerful instrument to avoid conflicts is the method to interpret Swiss law in conformity with international law. The Swiss authorities routinely apply this method.[11]
– Individuals can invoke treaty provisions in proceedings before public authorities directly if they are self-executing, *i.e.*, if they confer rights on individuals and are sufficiently clear and unconditional so that there is no need for implementing legislation.[12] Typically, human rights treaties as well as the main bilateral agreements with the EU are directly applicable. However, the courts refrain from applying treaty provisions directly in some instances even though they meet the conditions of clarity and unconditionality. WTO agreements, for instance, are not considered to be directly applicable.[13] The Federal Supreme Court has also, time and again, rejected to apply the free trade agreement with the EU of 1972 directly. This mercantilist approach is controversially debated. There are competing interests some of which are the following: effectiveness of international law on the one hand, balanced international legal relations (reciprocity) and domestic balance of powers on the other. Concerns as to the lack of adequate democratic representation in international rule-making add to 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*). The treaty must be renegotiated; if necessary, it must be terminated. The people will vote on this proposal in due course. The proposed text reflects the concern that the scope for domestic policy-making is increasingly limited by international law. However, the way the text addresses this concern is hardly useful. The logic to set up a rigid hierarchy between the constitution and international law is oversimplifying the XXX interplay between these layers. Moreover, it is unclear under what circumstances – namely: "if necessary" – a treaty must be terminated. Legal security and the reputation of Switzerland as a reliable partner in international relations are put at risk.

3. Landmark Cases

a) Supremacy of the AFMP (Federal Supreme Court)

A.A., a citizen of the Dominican Republic, lived in Switzerland since 2002. In the same year, she gave birth to a boy, B.A. C., a German citizen, who also lived in Switzerland, acknowledged fatherhood. Based on these relationships, A.A. and B.A. were granted a residence permit in Switzerland, derived from C.'s right of residence based on the AFMP. In 2013, the competent authority in the Canton of Zurich refused to prolong the residence permit of A.A. on the grounds that she had been dependent on social security payments for several years (whereas her son, B.A., was again granted a residence permit, derived from the right of residence of his father). The authority argued that A.A. could take her son with her; alternatively, it would be possible for him to remain in

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11 BGE 94 I 669.
12 BGE 124 III 90.
13 COTTIER/OESCH, p. 223-226.

Switzerland under the custody of his father. A.A. challenged the decision. She argued that she had a right to reside in Switzerland based on the AFMP.

The Federal Supreme Court confirmed the decision upon appeal.[14] By way of introduction, it clarified two issues which were hotly debated in the aftermath of the approval of the popular initiative "against mass immigration" ("Gegen Masseneinwanderung", 2014). First, the Federal Supreme Court confirmed that the AFMP is to be interpreted in light of the case law which the European Court of Justice (ECJ) has developed in interpreting EU law provisions on the free movement of persons. A parallel interpretation is supported by the objective of the AFMP "to bring about the free movement of persons between [Switzerland and the EU] on the basis of the rules applying in the European Community" (Preamble), and, as such, part of the teleological method of interpretation, as provided for in Article 31 of the Vienna Convention on the Law of Treaties. However, there is – except for ECJ judgments rendered before June 1999 (Article 16 AFMP) – no explicit obligation on the part of Switzerland to follow ECJ judgements. An autonomous interpretation shall be chosen if there are cogent reasons to so. The Federal Supreme Court made it clear that the new Articles 121*a* and 197(11) Cst. do not constitute such a cogent reasons. *In casu*, the Federal Supreme Court interpreted the AFMP in light of the pertinent case law of the EU and, based thereupon, confirmed the decision of the cantonal authority.[15] Second, the Federal Supreme Court clarified the relationship between the AFMP and federal acts. In the case of a conflict, the former takes precedence over the latter. This holds also true when the Federal Assembly intentionally violates the AFMP and is ready to face the legal and/or political consequences of such an action. Within the scope of the AFMP, the *Schubert* exception does not apply (2. c). The Federal Supreme Court based its finding on the observation that the AFMP leads to a harmonisation of the legal order (sectoral participation in the common market) through the realisation of a basic freedom and that EU law is also directly applicable in EU member states and claims supremacy. With respect to the case at hand, it was not apparent, however, whether these considerations were relevant in order to decide the case or whether they were *obiter dicta*.

The message sent out by the Federal Supreme Court is clear: Legislation implementing Articles 121*a* and 197(11) Cst., which violates the AFMP, would have no practical effect. EU citizens could still rely on the AFMP. In fact, the Federal Assembly has implemented the new provisions in an AFMP-consistent way (1. d) bb). Few surprisingly, this judgment has been controversially received. A positive aspect is that it enhances legal security and contributes to the reliability of Switzerland in external relations.

b) US Safeguard Measures on Steel Products (WTO Appellate Body)

In 2002, the President of the United States, George H. 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".[16] Consequently, some products of foreign steel producers were kept out of the US market; the price of others was artificially in-

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14 BGE 142 II 35.

15 However, it is questionable whether the Federal Supreme Court interpreted the pertinent ECJ cases correctly; s. MATTHIAS OESCH, Besprechung von BGE 142 II 35, in: ZBl 2016, p. 208-213.

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

creased. Among the affected producers were also Swiss companies. As a direct response to the US measures, the EU also adopted 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 US measures.

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). They argued that the measures were inconsistent with Article XIX GATT 1994 and the Agreement on Safeguards. According to long-standing case law, these rules permit WTO members to apply safeguard measures 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 in order to examine the matter. The panel determined that the conditions for the imposition of safeguard measures were not met by the United States for any steel product at issue. Upon appeal, the Appellate Body confirmed the ruling.[17]

After the Appellate Body had issued its report, President Bush terminated the safeguard measures. A mixture of the following four reasons might have been decisive for him to do so. First, the Appellate Body determined unequivocally that the measures violated WTO law. From a legal perspective, the United States was hence obliged to withdraw the measures, and the rule of law prevailed. Second, President Bush was anxious to please constituencies in States in which many jobs have traditionally been found in the steel industry, such as Pennsylvania, Ohio and West Virginia. From a political perspective, he had accomplished what he intended to achieve with the imposition of the measures. Third, it became more and more apparent that the measures had a negative effect on the US industry as a whole. The safeguard measures did more harm to the steel-using industries than the steel producing industry profited, and the termination of the measures was, from an economic viewpoint, logical. Fourth, WTO law permits members affected by safeguard measures, which are not compatible with WTO law, to apply re-balancing measures.[18] Various co-complainants planned 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.[19] Japan, China, Norway and Switzerland followed suit and threatened to adopt similar re-balancing measures. When President Bush terminated the safeguard measures, the pending adoption of re-balancing measures could be avoided.

This has been the only WTO case in which Switzerland has participated to date. At the end, the Swiss delegation was content with the final outcome. It successfully relied on WTO law and prevailed over the United States. At the same time, the delighted was not

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

18 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.

19 Regulation (EC) No. 1031/2002; s. also WTO Docs. G/C/10, G/SG/43.

unclouded. Although the US measures were unlawful, Swiss steel producers suffered damages due to higher tariffs and the loss of market shares which they needed to regain tediously. Against this background, it is problematic that the WTO dispute settlement mechanism does not provide for the compensation of damages suffered on the grounds of unlawful actions.

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