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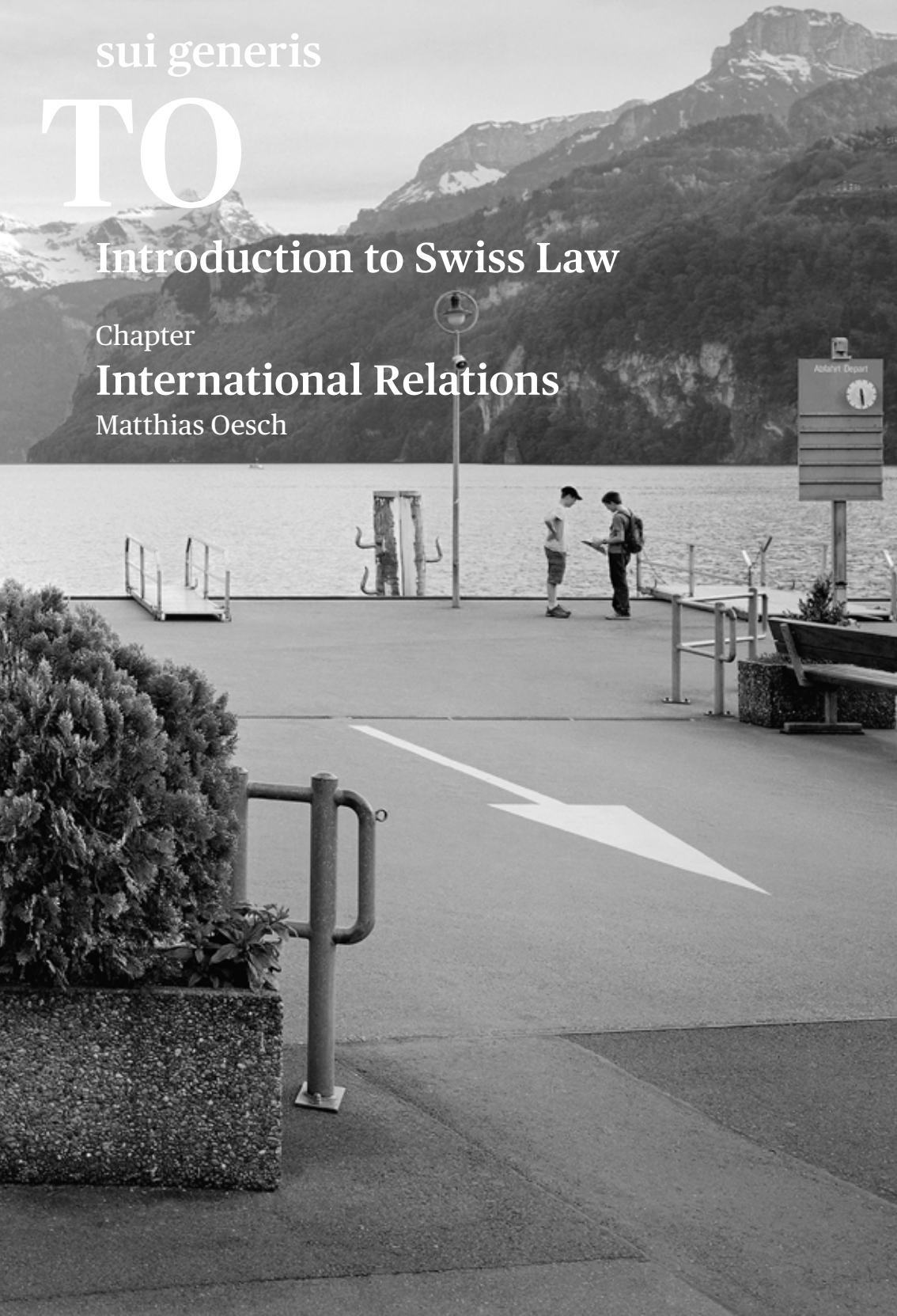
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Introduction to Swiss Law

Chapter

International Relations

Matthias Oesch



Marc Thommen

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I. Treaties

Switzerland has traditionally adopted 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, therefore, that Switzerland participates in numerous international organisations and treaty networks. Today, Switzerland's membership in the United Nations (UN) is the foundation to Switzerland's international relations. Switzerland is also a member of various other international organisations and treaty networks, which cover almost every conceivable policy field: for example, 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 is the European Convention on Human Rights (ECHR), which has been attributed a quasi-constitutional status by the Federal Supreme Court.[1] Switzerland is not a member of the North Atlantic Treaty Organisation (NATO); however, it does participate in Partnership for Peace (PfP), a NATO programme of practical bilateral cooperation between individual Euro-Atlantic partner countries and NATO.

Despite its location at the heart of the continent, surrounded by three of the six founding members of the European Economic Community (EEC), Switzerland is not a member of the European Union (EU). Still, maintaining close and stable relations with the EU and its member states is of significant importance to Switzerland.

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 to co-operate on the international level. Its outreach, both in terms of its membership and the variety of subjects which it has the competence to deal with, is unrivalled by any other international organisation. Currently, its membership encompasses 193 member states. Various programmes, funds,

1 See the chapter on Constitutional Law, pp. 119.

and specialised agencies also operate under the UN, each 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 Labour Organization (ILO) and the two Bretton Woods institutions, the World Bank and the International Monetary Fund (IMF). The main headquarters of the UN in Europe are at the Palais des Nations, in Geneva, which was originally built to house the League of Nations, the predecessor of the UN (1920–1946).

Switzerland did not join the UN until 2002. The accession process was instigated by a popular initiative; the people and the cantons approved of the accession. 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] It has 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, being a member of the Security Council would not compromise Switzerland's policy of neutrality.[3]

2. Trade and Investment

The World Trade Organization (WTO) sets out the basic legal framework for international trade. It was founded in 1995 as the successor to the General Agreement on Tariffs and Trade (GATT) of 1947 and, in terms of its aims and objectives, largely followed in the latter's footsteps. 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 GATT of 1994 (also embracing various side-agreements, on issues such as technical barriers to trade, agriculture,

2 Federal Department of Foreign Affairs (FDFA; perma.cc/3RCP-RKCJ).

3 For more detail on Switzerland's policy of neutrality, see p. 148.

safeguards, antidumping, 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 also allowing members 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 can render binding rulings (albeit, currently, the Appellate Body's proper functioning is seriously put into question given the United States' practice of blocking the appointment of new judges). 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 GATT 1947. It had become a member of the GATT in 1966 (having applied its rules de facto since 1960). Subsequently, when the WTO became its successor in 1995, Switzerland was an original member. Since then, the WTO has provided the backbone to Swiss external economic relations. Under the WTO, Swiss companies can profit from binding market access rights abroad. Further, Switzerland can actively participate in WTO dispute settlement proceedings as a complaining or defending party. It has participated in such proceedings twice to date. In 2002/2003, it was a complaining party in the US – Steel case.[4] Switzerland is also a complaining party in a case which was initiated against the US in 2019, also concerning additional tariffs on steel products.[5]

Aside from WTO agreements, Switzerland has also concluded a series of free trade agreements with countries all over the globe.[6] In addition to the European Free Trade Association (EFTA) and the Free Trade Agreement with the EU, Switzerland currently has a network of 32 free trade agreements with 42 partners. In practice, Switzerland has tended to enter into free trade agreements alongside its EFTA partners Norway, Iceland, and Liechtenstein; examples include 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

4 See pp. 157.

5 US – Certain Measures on Steel and Aluminium Products, WT/DS556, pending.

6 State Secretariat for Economic Affairs (SECO; perma.cc/7C7N-PGGN).

also entered into agreements on its own; this was the case for Switzerland's agreements with Japan, China, and the United Kingdom. The main objective of free trade agreements is not just 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, to avoid being at a comparative disadvantage to competitors in the EU. Another potential example is the possible (although currently highly unlikely) conclusion of the Transatlantic Trade and Investment Partnership between the EU and the US (TTIP) which would result in even clearer disadvantages for Swiss companies vis-à-vis their competitors in the EU; Switzerland would again have to act to attempt to level the playing field.

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

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 this may compromise its position of neutrality, independency, and autonomy in external trade matters. However, in 1948 Switzerland did join the Organisation for European Economic Co-operation (OEEC), which had the key purpose of administering the European Recovery Program (Marshall Plan), as an original member at its creation. In 1961, the OEEC was renamed the OECD, and both its mandate and membership broadened substantially. As for 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 today, 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. In 1974, it also ratified the ECHR. In 1972, Switzerland and the EEC concluded a Free Trade Agreement which has provided 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) which was renamed as the Organisation for Security and Co-operation in Europe (OSCE) in 1994. In 1992, the people and the cantons rejected the proposal of Switzerland's accession to the European Economic Area (EEA). Thereafter, Switzerland has focused, *faute de mieux,* on concluding sectoral treaties with the EC/EU, combined with the policy of adapting Swiss law autonomously to EU law. This approach–the Swiss model of European integration, so to speak–has proven successful.

b) Bilateral Agreements

Together with 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 basic legal framework for Swiss-EU relations. 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 Switzerland from "cherry picking"; in particular, the EU 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 (Schengen/Dublin, taxation of savings, fight against fraud, trade in processed agricultural products, MEDIA, environment, statistics, pensions of former EU officials, and education and youth programmes). The Bilaterals II do not contain a guillotine clause; it is only the Schengen/Dublin association agreements that share a common fate. The main agreements are supplemented by over 100 other (secondary) agreements. Institutionally, the agreements fail to provide for anything further than the classic tools of diplomacy. Dispute resolution under such agreements is therefore effected via various specified mixed committees, with decisions made by consensus.

Since 2004, only a few new agreements have been concluded, amongst them an agreement on customs facilitation and security which substantially revised an older version (1990/2009), an agreement on the cooperation of competition authorities (2013), and an agreement on the linking of the EU and Swiss trading system for CO2-equivalent emission allowances (2017). Switzerland is also a member of 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 for Swiss representatives to be integrated into EU transgovernmental structures. It ensures that Swiss representatives remain informed on ongoing developments and can have some influence on matters, mainly by relying on the power of the pen ("decision shaping"). Naturally, they do not possess voting rights (and thus cannot be formally involved in "decision-making").

The Swiss people and the cantons have repeatedly affirmed the Swiss model of European integration, by voting in favour of the conclusion of those bilateral agreements, which were put to a referendum, and rejecting popular initiatives to the contrary.[7] However, a problematic situation arose in 2014, when the people and the cantons approved the initiative "against mass immigration" *("Gegen Masseneinwanderung").* According to the initiative's newly introduced Articles 121*a* and 197 No. 11 Constitution,[8] Switzerland shall control the immigration of foreign nationals autonomously, by introducing annual quotas and granting Swiss citizens priority on the job market. Treaties which contradict these provisions must be renegotiated and amended. Shortly after the approval of the initiative, the EU made it clear that it was not willing to renegotiate the Agreement on the Free Movement of Persons, which as set out above is part of the Bilaterals I. Against this background, the Federal Assembly decided to implement the initiative in a way that ensured it would not violate this agreement.[9] In the context of Swiss-EU relations, this outcome has been welcomed. However, from a constitutional law perspective, it is problematic. The wording of the provisions introduced with the intiative is clear, and the implementing legislation fails to reflect this properly. However, notably, the people and the cantons rejected the initiative "for moderate immigration" *("Begrenzungsinitiative")* in 2020, which would have required the termination of the Agreement on the Free Movement of Persons had it been successful. Thereby, the people and the cantons arguably implicitly confirmed the Federal Assembly's implementation of the initiative "against mass immigration".

7 See pp. 150.

8 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Swiss Constitution www.fedlex.admin.ch (perma.cc/7ARN-UVSH).

9 See for the supremacy of this agreement over Swiss law pp. 155.

Since 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 to ensure their correct interpretation and application, and dispute resolution. An institutional agreement would apply to both existing and future market access agreements which are based on EU law. In 2014, Switzerland and the EU commenced negotiations. In 2021, however, Switzerland decided to end the negotiations without signing the draft text. The Federal Council identified substantial differences between Switzerland and the EU as the cause of the breakdown of the negotiations. Switzerland's decision here is regrettable. It could be advantageous for Switzerland to have the increasingly complex treaty network established on a new, clearer basis: this would enhance legal security, transparency, and efficiency. The institutional agreement envisaged by the EU would give both the EU and Switzerland a right to bring disputes before a juridical body (under the proposed draft text, this body would be an arbitration panel which would have to involve the European Court of Justice if a dispute concerned the interpretation of EU law). Switzerland would not depend exclusively on the goodwill of the EU in resolving disputes as is the case today. With no institutional agreement, the EU is no longer prepared to update the existing agreements on a regular basis. Nor is it conceivable to conclude new market access agreements, (e.g. an agreement on electricity and an agreement on financial services). The result is an erosion of the highly valued bilateral approach; no appealing prospect!

c) Autonomous Adaptation of Swiss Law to EU Law

Alongside the tight network of bilateral agreements, Switzerland 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".[10] Of course, it remains entirely possible for Switzerland to deviate from EU regulations and directives. In reality, however, this is only done where there are cogent political or economic reasons for doing so.

Overall, the policy of autonomous adaptation has led to the systematic adoption of EU law. Autonomous adaptation is typically utilized for legislation

10 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 (BBl 1988 III 249; own translation).

concerning technical regulations and standards, data protection, and financial markets. It has been estimated that 40–60% of all federal acts and ordinances are directly or indirectly influenced by EU law; this is certainly no insignificant proportion. Notably, today the autonomous adaptation of Swiss law to EU law is no longer limited to legislation with cross-border significance. Accelerated by spill-over effects, EU law has infiltrated the Swiss legal order across the board.

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 competences of the 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.

1. Goals and Means

The Constitution specifies the goals which Switzerland shall pursue in its international relations. These goals in part reflect Switzerland's self-interest as a state, although there are also provisions directing the authorities to act altruistically (Preamble, Articles 2 IV, 54 II and 101 I Constitution). For example, it is stated 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 are 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, found its way into the transitional provisions (Article 197 No. 1 Constitution).

Switzerland's constitutional goals are framed in rather abstract terms. Therefore, in practice it falls to the relevant authorities to use their discretion to concretise them when deciding 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 considered in the context of free trade agreements. The Constitution provides no real guidance in this context. There was in fact some debate over the issue when Switzerland negotiated and concluded its Free Trade Agreement with China in 2014. There was concern that such an agreement could lead to human rights violations, if the principle of free trade was

relied upon as an end in itself. The eventual result of these concerns and resulting negotiations was an agreement that reaffirms both parties' commitment to respect selected fundamental rights and "fundamental norms of international relations" in the Preamble and is supplemented by a side-agreement on labour and employment.

Some argue that the concept of neutrality also amounts to a guiding principle of Swiss foreign policy. Back in 1815, at the Congress of Vienna, the then predominant European powers recognised the neutrality of the Swiss confederation. This status has been reaffirmed several times since, 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.[11] Rather, neutrality is used as one of many instruments to achieve the above-mentioned goals.

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. In exercising its treaty-making power, the federation can end up dealing with policy areas which internally would fall within the cantons' domain. Therefore, when dealing with such matters, the federal authorities are obliged to protect the interests of the cantons 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, however, the increasing reliance on 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, such as cantonal police, recognition of professional qualifications, and public procurement. Accordingly, to ensure that the cantons' interests are not ignored or undermined, consultation and cooperation between the different layers of government is 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

11 ALEXANDER MISIC / NICOLE TÖPPERWIEN, Constitutional Law in Switzerland, 2nd edition, Bern 2018, n. 24; WALTER HALLER, The Swiss Constitution in a Comparative Context, 2nd edition, Zurich / St. Gallen 2016, n. 2, n. 71 et. seq.

(KdK) which helps coordinate the efforts of the cantons to pool their interests and speak with one stronger, louder voice.

The cantons are also competent to independently conclude international treaties in areas which fall under their remit, provided 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 Supreme Court

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,[12] 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 Federal Assembly's right of participation (Article 184 Constitution). The Federal Council 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 with limited scope on its own. This competence arises, inter alia, where a treaty does not establish new obligations for Switzerland or where a treaty primarily concerns the authorities and technical administrative issues (Article 7*a* of the Government and Administration Organisation Act).[13]
— The Federal Assembly participates in shaping foreign policy and supervises the maintenance of good foreign relations (Article 166 Constitution). Its agreement is a necessary condition for the conclusion of treaties (unless the Federal Council has capacity to do so on its own). However, the Federal Assembly can only approve or reject a signed treaty in toto. Therefore, particularly in the case of "package deals" (such as the accession to the WTO),[14] the Federal Assembly realistically has no choice other than

12 See the chapter on Constitutional Law, pp. 123.

13 Government and Administration Organisation Act of 21 March 1997 (GAOA), SR 172.010. See for an English version of the act www.fedlex.admin.ch (perma.cc/L6NT-ZSMV).

14 See pp. 140.

to "wave" a treaty through. This is problematic from a democratic point of view. There is no opportunity for the Federal Assembly to subject the treaty at issue to proper scrutiny, or to suggest necessary amendments. At least, it is mandatory for the Federal Council to consult the Foreign Affairs Committees of the National Council and the Council of States before adopting a negotiation mandate. Further, these committees are periodically informed about ongoing negotiations, to ensure they can meaningfully participate in consultations.

— The Federal Supreme Court acts on appeal, hearing cases decided either by the highest cantonal courts or by other federal courts. As part of this function, it is also sometimes required to interpret international law, thereby shaping the relationship between international law and Swiss law.[15]

The ongoing shift in law-making from the domestic sphere towards the international fora—the latter developed both through treaties and the development of soft law—has led to a readjustment of the power balance between the Federal Assembly and the Federal Council (including the Federal Administration). The increased power of the latter results in the opposite effect for the former. It would therefore be advisable to consider and implement new procedures in international law-making which would allow the thorough participation of the Federal Assembly, as well as cantons and civil society groups, from the preparatory stage to the conclusion of negotiations. Currently, such groups' ability to participate in the treaty-making process is, from a democratic viewpoint, too limited.

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 Switzerland.[16] The instruments are two distinct creations, but have a similarly strong impact on Swiss international relations:

15 See pp. 152.

16 For more information on these instruments, see the chapter on Constitutional Law, pp. 126.

— 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 Switzerland's accession to the UN, which was approved by the people and the cantons in 2002. This was a positive step forward in terms of Switzerland's integration into the international community. However, over the last decade, an increasing number of initiatives which are incompatible with international law have been approved. 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 such initiatives presents problems. This is particularly the case when the initiatives violate basic norms of international law. For example, 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. 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 for the Swiss authorities to fully implement such initiatives. There have been proposals for reform in this problematic area. For example, there have been calls to introduce a provision requiring a popular initiative to comply with basic fundamental rights, as guaranteed, for instance, under the ECHR, in order to be valid. However, crucially, any revision to this effect would itself require the approval of the people and the cantons, which may pose a real obstacle.[17]

— 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 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 Switzerland's envisaged accession to the EEA, eventually rejected by the people and the cantons in 1992, was conducted under these provisions given its political and economic significance. In

17 HALLER, n. 597 et seqq.

addition, a so-called "optional" referendum can be requested by 50,000 citizens against the conclusion of an international treaty that: 1. is of unlimited duration and cannot be terminated; 2. provides for accession to an international organisation; 3. contains important legislative provisions or requires the enactment of federal legislation for implementation. The outcome of an optional referendum is determined by the vote of the people; the majority vote 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 by optional referenda. In 2021, the people approved the conclusion of the Free Trade Agreement with Indonesia, albeit with a remarkably close margin of 51.6% of the votes.

When voting on treaty referenda, the people often do not possess a real choice (a situation which somewhat mirrors that faced by the Federal Assembly in the case of "package deals"). Practical constraints and opportunity costs can de facto force the people into approving a treaty. Typical examples of this sort of situation are votes on amendments required to keep the Schengen/Dublin association agreements in line with dynamic EU law, because rejecting such amendments would seriously endanger the fate of the underlying agreements. Therefore, when the people approved the incorporation of Regulation (EC) No 2252/2004 on biometrics in passports and travel documents into the Schengen Agreement in 2008, with 50.1% of the votes, many breathed a sigh of relief; a rejection could have threatened the future of the Schengen Agreement and, by virtue of the guillotine clause previously discussed, that of the Dublin Agreement. The same relief was palpable when the people approved the incorporation of a revision of Directive 91/477/EEC on control of the acquisition and possession of weapons into the Schengen Agreement in 2019, with 63.7% of the votes.

3. Relationship Between International Law and Swiss Law

The federal authorities and the cantons are obliged to respect international law in all their actions (Article 5 IV Constitution). Based on this principle and that known as 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. It has, over the course of decades, set out the following key principles:

— Swiss law follows the monist tradition. Therefore, treaties which have been duly entered into force automatically become part of domestic law. A separate process of incorporation is not necessary.[18]
— 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).[19] However, the *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 must be respected in all cases.[20] The *Schubert* exception does not apply to such treaties.[21] 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.[22]
— One 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.[23]
— 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 to preclude any need for implementing legislation.[24] Typically, human rights treaties as well as the main bilateral agreements with the EU are directly applicable. However, 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.[25] The Federal Supreme Court has also, time and again, refused to directly apply the Free Trade Agreement

18 See already DFC 7 I 774, a judgment of the Federal Supreme Court of 1881.
19 DFC 99 Ib 39.
20 See pp. 155.
21 DFC 125 II 417; DFC 142 II 35.
22 See DFC 139 I 16.
23 DFC 94 I 669.
24 DFC 124 III 90.
25 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.

with the EU of 1972. This mercantilist approach is controversial; the debate typically turns on the competing interests of ensuring the effectiveness of international law versus maintaining both balanced international legal relations (reciprocity) and the domestic balance of powers. Concerns over the lack of adequate democratic representation in international law-making also typically form part of the debate.

In 2018, the people and the cantons rejected the popular initiative "Swiss law instead of foreign judges (self-determination initiative)" *("Schweizer Recht statt fremde Richter [Selbstbestimmungsinitiative]")*. The proposed text stated that 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 rejection of this initiative was widely welcomed, and rightly so. The idea of establishing a rigid hierarchy between the Constitution and international law oversimplifies the complex interplay between these spheres. The initiative would have endangered both legal security and Switzerland's reputation as a reliable partner in international relations.

III. Landmark Cases

The following section examines two key cases which demonstrate Switzerland's interaction with the international community. The first case set out below, 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 Switzerland and the EU (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[26]

The background of this case concerned AA, a citizen of the Dominican Republic, who had been residing in Switzerland since 2002. In the same year, she gave birth to a boy, BA. C, the father of BA, was 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. However, BA was granted a residence permit, derived from his father's right of residence. The authority argued that BA's residence in Switzerland did not mean that AA was entitled to 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 Federal Supreme Court confirmed the decision of the cantonal authority upon appeal. This outcome was not of any particular note. However, the Court made interesting points by way of introduction to its judgment, where it considered and thereby clarified two issues which had been the subject of heated debate following the approval of the popular initiative

26 DFC 142 II 35.

"against mass immigration" (*"Gegen Masseneinwanderung",* 2014).[27] First, the Federal Supreme Court confirmed that the Agreement on the Free Movement of Persons is to be interpreted in a manner that is compatible with the European Court of Justice (ECJ) case law on EU law provisions on the free movement of persons. Switzerland's parallel interpretation of the agreement–i.e. an interpretation which follows that of the ECJ–is supported by the Preamble of said agreement which declares that its objective is *"to bring about the free movement of persons (...) 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 (VCLT). There is no explicit obligation on Switzerland to follow ECJ judgements, except in the case of those judgements rendered before June 1999 (Article 16 Agreement on the Free Movement of Persons). However, Switzerland should only follow its own autonomous interpretation if there are cogent reasons to do so. In this judgment, 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, it interpreted the Agreement on the Free Movement of Persons in line with the relevant case law of the ECJ 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 considered the relationship 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 said agreement in full knowledge of the legal and political consequences of such an action. Thus, it can be concluded that the *Schubert* exception does not apply to the Agreement on the Free Movement of Persons (as set out above).[28] The Federal Supreme Court based this finding on the fact that said agreement harmonises the legal order (sectoral participation in the common market) by realising a basic freedom, as well as on the fact that EU law is directly applicable in EU member states and claims supremacy over national laws. It was not clear whether these comments were relevant considerations in deciding the case (thus forming part of its *ratio decidendi*) or whether they were *obiter dicta*.

The message from this Federal Supreme Court judgment was 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 in these circumstances,

27 See p. 144.

28 See pp. 153.

and the Federal Supreme Court would continue to uphold these rights. In fact, following the ruling, the Federal Assembly implemented the new provisions in a way that ensured the Agreement on the Free Movement of Persons was respected.[29]

Unsurprisingly, the judgment of the Federal Supreme Court has been received controversially. On a positive note, the judgment has enhanced legal security and upheld the reliability of Switzerland in the realm of external relations.

2. US Safeguard Measures on Steel Products

In 2002, the President of the United States, George W. Bush, imposed safeguard measures on various steel products. The measures consisted of additional tariffs set at values from 8% to 30% and were intended "to facilitate positive adjustment to competition from imports of certain steel products".[30] Consequently, some products of foreign steel producers were prevented from entering 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: a tariff quota system intended to limit trade diversion resulting from US protectionism. The EU measures, however, 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 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 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 consultations between the relevant parties proved unfruitful, a panel was established to examine the matter. The panel determined that the conditions for the imposition of safeguard measures were not met for any US steel product at issue. On appeal, the Appellate Body confirmed the ruling.[31]

29 See pp. 144.

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

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

After the Appellate Body had issued its report, President Bush terminated the safeguard measures. A combination of some of the following reasons were likely relevant to his decision:

— The Appellate Body had 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.
— 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.
— 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 industry than good to the steel-producing industry. Thus, from an economic viewpoint, the termination of the measures was somewhat logical.
— WTO law permits members affected by WTO law-incompatible safeguard measures to apply re-balancing measures.[32] As such, some co-complainants, who participated in the WTO dispute settlement 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.[33] 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 potentially harmful effects of re-balancing measures taken against the US.

The Swiss delegation was content with the final outcome: Switzerland had successfully relied on WTO law and prevailed over the United States, resulting in the termination of the harmful safeguard measures. However, there

32 Under the Agreement on Safeguards, an affected member is permitted to apply rebalancing 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.

33 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.

were some caveats. For example, although the US measures were eventually declared unlawful, in the meantime, Swiss steel producers suffered real damage, due to the trade-restrictive measures imposed by both the US and the EU, as well as a loss of market shares, which then had to be tediously regained. In light of this, it is somewhat problematic that the WTO dispute settlement mechanism does not provide for the award of compensation for damage suffered due to unlawful actions.

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INTRODUCT SWISS LAW



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