

Charlotte Sieber-Gasser

## **Democratic Legitimation of Trade Policy Tomorrow**

### **TTIP, Democracy and Market in the Swiss Constitution**

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Freihandelsabkommen umfassen vermehrt auch Rechtsharmonisierung zwischen den Partnerstaaten, während die Beseitigung von Zöllen an Bedeutung verliert. Dies führt zu sogenannten dynamischen Handelsabkommen, welche sich auch nach der Ratifikation noch weiterentwickeln. Die vertiefte Einbindung und Integration einer Demokratie in den globalen Markt über solche Freihandelsabkommen ist jedoch von der Gunst der Wählerschaft abhängig. Der Beitrag beleuchtet die neuen Herausforderungen für die demokratische Legitimierung der Integration einer Demokratie in die Weltwirtschaft anhand einer Fallstudie zur Schweiz. Die Autorin stellt fest, dass es unwahrscheinlich ist, dass sich die derzeit geltenden demokratischen Grundsätze und Institutionen der Schweiz vollständig mit den neuen regulatorischen Herausforderungen der dynamischen Abkommen vereinbaren lassen.

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## I. Introduction

[Rz 1] In the past twenty years, the world has seen unprecedented globalization of markets and production, which demands from governments increasing coordination of policies beyond external affairs.<sup>1</sup> Yet, the regulatory and political framework of global trade has not fully accommodated the need for increasing coordination. While businesses and other economic forces continue to cooperate and coordinate closer, governments lack the right institutions to follow suit at equal pace. Some say that progressive globalization therefore is weakening state institutions and, thus, strengthening economic forces.<sup>2</sup> Concerns are raised over the remaining authority of states in today's globalizing world. The main concern is that while it was the state that defined the rules in the market before, it is now the market that dictates its rules to the state.<sup>3</sup> This potential shift in regulatory power has distinct implications for the scope of democratic rights and the level of democratic legitimation of trade policy decisions.

[Rz 2] Baldwin describes the current situation on the global market as one of 21<sup>st</sup> century trade, which differs from the 20<sup>th</sup> century trade regulation with respect to its complexity and level of integration. He concludes that «simple commerce needs simple rules; complex commerce needs complex rules».<sup>4</sup> Thus, since commerce is already globally deeply integrated, it requires adequate regulation. Currently, trade regulation catches up with trade integration through substantial Free Trade Agreements (FTAs), while the role of World Trade Organization (WTO) law is shifting towards establishing global minimum standards and defining the general rules of trade regulation.<sup>5</sup>

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<sup>1</sup> See e.g. DUNNING, JOHN H., 2015, *The Globalization of Business: The Challenge of the 1990s*, Routledge, New York, p. 73.

<sup>2</sup> E.g. NULLMEIER, FRANK, 2009, «Formen der Staatlichkeit: Zu einer Analytik politischer Einheiten», In: Nicole Deitelhoff and Jens Steffek (eds.), *Was bleibt vom Staat?: Demokratie, Recht und Verfassung im globalen Zeitalter*, Campus Verlag, Frankfurt am Main, pp. 35–56; DINGWERTH, KLAUS, BLAUBERGER, MICHAEL & SCHNEIDER, CHRISTIAN, 2011, *Postnationale Demokratie*, VS Verlag, Wiesbaden.

<sup>3</sup> STRANGE, SUSAN, 2015, «The Declining Authority of States», In: Frank J. Lechner and John Boli (eds.), *The Globalization Reader*, 5th edition, John Wiley & Sons, West Sussex, pp. 232–238, p. 233.

<sup>4</sup> BALDWIN, RICHARD, 2011, *21st Century Regionalism: Filling the Gap between 21st Century Trade and 20th Century Trade Rules*, WTO Staff Working Paper, No. ERSD-2011-08, Geneva, p. 8.

<sup>5</sup> COTTIER, THOMAS, SIEBER-GASSER, CHARLOTTE & WERMELINGER, GABRIELA, 2015, «The Dialectical Relationship of Preferential and Multilateral Trade Agreements», In: A. Dür and M. Elsig (eds.), *Trade Co-operation: The Purpose, Design and Effects of Preferential Trade Agreements*, Cambridge University Press, Cambridge, pp. 465–496, pp. 491–492.

Because of the required complexity of adequate trade regulation today, actual market access will increasingly be granted in FTAs and less so at the WTO. This means that we are likely to see an increase in substantial, complex FTAs, given that FTAs today appear to be the most adequate legal instrument for the elimination of non-tariff-barriers (NTBs) to trade and a deepening of economic integration.

[Rz 3] This article focuses on the implications of expanding trade regulation on democratic rights and regulatory power in democracies. As an example it illustrates the current constitutional challenge of economic integration in the case of Switzerland. It first assesses to what extent trade regulation is indeed expanding, and to what extent expansion limits the regulatory power in a democracy. It discusses how trade regulation evolved in Switzerland, and to what extent it is democratically legitimized. The article illustrates the constitutional challenge of weighing and balancing democratic rights and economic interests, and concludes by critically elaborating the current and future challenges for democratic legitimation of trade policy in Switzerland.

## II. Trade Liberalization Today

[Rz 4] As a result of successful negotiations at the WTO in the past, trade liberalization today has moved from reducing tariffs to targeting NTBs to trade. Today, average tariffs in developed countries are a little less than 3 per cent, while NTBs account for a substantial share in remaining barriers to trade. Thus, reducing NTBs promises considerable economic gains.<sup>6</sup>

[Rz 5] NTBs are also called «behind-the-border» barriers to trade, which derives from the character of NTBs – measures, other than tariffs, which have the potential to distort trade – they take effect before or after crossing a border. Prominent examples of NTBs are safety rules or domestic measures aiming at protecting public health. They can usually be found in domestic legal documents, in the form of licenses, quotas, production standards or bureaucratic and administrative burdens. NTBs may substantially impede trade; at times they may even develop an effect similar to a ban. Therefore, harmonizing domestic rules and regulations between trading partners is key to further trade liberalization.<sup>7</sup> As a consequence, domestic regulation becomes increasingly intertwined with trade regulation, therewith, obliterating the boundaries between national and international law.

[Rz 6] The most efficient way to reduce NTBs is regulatory convergence or regulatory harmonization. Since regulatory convergence requires consensus and mutual recognition in sensitive regulatory areas, it is mainly achieved on a preferential basis between members of FTAs. Due to the different levels of economic and technological development among the 161 members of the WTO, regulatory convergence in a multilateral context is limited to minimum standards with relatively little substance compared to what can be achieved in the context of an FTA.<sup>8</sup> WTO law is, thus, shaping regulatory governance of trade to the extent that it provides the legal basis of all trade regulation.<sup>9</sup>

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<sup>6</sup> EGGER, PETER, FRANCOIS, JOSEPH, MANCHIN, MIRIAM & NELSON, DOUGLAS, 2014, *Non-Tariff Barriers, Integration, and the Trans-Atlantic Economy*, paper prepared for the October Economic Policy Panel, Rome, p. 29.

<sup>7</sup> See COTTIER, THOMAS, 2014, «International Economic Law in Transition from Trade Liberalization to Trade Regulation», *Journal of International Economic Law*, vol. 17, no. 3, pp. 671–677.

<sup>8</sup> HOEKMAN, BERNARD & MAVROIDIS, PETROS C., 2015, *Regulatory Spillovers and the Trading System: From Coherence to Cooperation*, The International Centre for Trade and Sustainable Development, Geneva, p. 3.

<sup>9</sup> SHAFFER, GREGORY, 2014, *How the WTO Shapes Regulatory Governance*, UC Irvine School of Law Research Paper No. 2014–53, available at: <http://www.papers.ssrn.com> (last visited 4 2015); BROWN, ANDREW G. &

[Rz 7] It can be observed that more recent FTAs encompass more areas of law than older FTAs, and more substantial and complex regulation. Such FTAs are therefore called *substantial* FTAs. They cover – among the mutual recognition of selected production methods and diplomas and certificates – regulation concerning labor rights, food safety, security concerns, environment, energy, human rights, internet, intellectual property, investment, and government procurement.

[Rz 8] In addition to the broadening regulatory scope of more recent trade agreements, the institutional structure of the agreements also evolved. Previously, trade agreements provided for static liberalizing commitments. More recently, FTAs provide for a more or less complex institutional structure including several working groups, regular meetings between the FTA members, and a separate dispute settlement system. The newest institutional development – mainly observed in transatlantic relations – introduces a binding institutional framework for subsequent negotiations. Parties commit to meeting on a regular basis for subsequent rounds of negotiations, and to reaching a specific goal within a clearly defined timeframe. This institutional framework renders those agreements «dynamic», meaning that it is in their nature to further develop and continuously deepen market integration among their members.

## 1. Dynamic Trade Agreements

[Rz 9] A prominent example of such a substantial FTA is the recently negotiated *Comprehensive Economic and Trade Agreement (CETA)* between the European Union (EU) and Canada.<sup>10</sup> In addition to the CETA joint committee, it establishes several specialized committees for each of the regulatory chapters in CETA. The different specialized committees have specific authority and functions, which are also defined in CETA. One example is the specialized committee on mutual recognition (joint committee on mutual recognition<sup>11</sup>). The committee's objective is the adoption of a Mutual Recognition Agreement (MRA) within a reasonable period of time. The relevant provisions read as follows:<sup>12</sup>

[Rz 10]

[...] c) in light of each Party's consultations [...], the Joint Committee shall, within a reasonable period of time, review the recommendation with a view to ensuring its consistency with [...] this Chapter. Where [...] satisfied, the Joint Committee shall establish the necessary steps to negotiate and each Party shall inform its respective Relevant Authorities. d) the Negotiating Entities shall thereafter pursue the negotiation and submit a draft MRA text to the Joint Committee. e) the Joint Committee will thereafter review the draft MRA to ensure its consistency with the Agreement. f) If in the view of the Joint Committee the MRA is consistent with the Agreement, the Joint Committee shall adopt the MRA by means of a decision, which shall be conditional upon subsequent notification to the Committee by each Party of the fulfillment of their

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STERN, ROBERT M., 2011, «Free Trade Agreements and Governance of the Global Trading System», *The World Economy*, vol. 34, no. 3, pp. 331–354, p. 344.

<sup>10</sup> Consolidated CETA Text, available at: [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf) (last visited November 4 2015). The agreement is 1634 pages long and encompasses 42 chapters. Most notably, it introduces an institutional framework for regulatory cooperation, harmonization and dispute settlement.

<sup>11</sup> CETA, Chapter XX, Mutual Recognition of Professional Qualifications, Art. 3.

<sup>12</sup> Ibid.

respective internal requirements. The decision shall become binding on the Parties upon notification to the Mutual Recognition Committee by each Party.

[Rz 11] While the agreement does not introduce a binding deadline for the conclusion of the MRA negotiations, it establishes that the committee on mutual recognition shall meet within one year after the CETA enters into force.<sup>13</sup> Furthermore, it defines guidelines for MRAs of professional qualifications, therewith defining the minimum standard of the mandate of the subsequent MRA negotiations, without, however, limiting its scope or depth.<sup>14</sup> While from a legal perspective the binding minimum commitments are of limited scope, the potential liberalizing effect of this provision – if political will to introducing substantial commitments persists – is considerable and legally only limited by the scope of the objective of the chapter (here, limited to mutual recognition of professional qualifications).

[Rz 12] The mandate for the negotiations over the *Transatlantic Trade and Investment Partnership (TTIP)* between the EU and the United States of America (US) is equally ambitious and explicitly lists regulatory convergence as one of the main objectives.<sup>15</sup> Negotiations over the TTIP have not yet been concluded, but it is not expected that the TTIP will turn out less substantial than CETA.

[Rz 13] The other large trade agreement recently negotiated, the *Transpacific Partnership (TPP)* initially aimed at a similarly ambitious and substantial outcome as CETA.<sup>16</sup> Negotiations over the TPP have been concluded on October 5 2015.<sup>17</sup> The draft text of the agreement was published by the New Zealand Ministry of Foreign Affairs and Trade on November 5 2015<sup>18</sup>. Generally, from what was made public by the parties, TPP is primarily promoting regulatory transparency, rather than introducing regulatory convergence. Furthermore, the agreement is dynamic to the extent that it remains open with respect to the accession of additional members and to further liberalization. However, TPP does not appear to provide for a binding commitment of a clearly defined mandate for subsequent negotiations over liberalization.<sup>19</sup> Thus, the phenomenon of substantial and dynamic trade agreements is currently limited to regional initiatives and transatlantic relations.

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<sup>13</sup> Ibid., Art. 5.

<sup>14</sup> Ibid., Annex XY, Guidelines for Agreements on Mutual Recognition of Professional Qualifications (MRAs).

<sup>15</sup> COUNCIL OF THE EUROPEAN UNION, 2014, *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America*, Declassification, ST 11103/13, DCL 1, October 9 2014, Brussels, available at: <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf> (last visited August 31 2015).

<sup>16</sup> OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2011, *Outlines of TPP*, November 12 2011, Hawaii, available at: <https://ustr.gov/tpp/outlines-of-TPP> (visited September 14 2015).

<sup>17</sup> See e.g. KERRY, JOHN, 2015, *Successful Conclusion of Trans-Pacific Partnership (TPP) Negotiations*, Press Statement, Secretary of State, October 5 2015, Washington DC.

<sup>18</sup> New Zealand Ministry of Foreign Affairs and Trade, 2015, *Text of the Trans-Pacific Partnership*, available at: <http://www.mfat.govt.nz/Treaties-and-International-Law/01-Treaties-for-which-NZ-is-Depositary/0-Trans-Pacific-Partnership-Text.php> (last visited November 6 2015).

<sup>19</sup> On October 26 2015, the Canadian Government provided for the most detailed information on the scope of TPP, see: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/understanding-comprendre/index.aspx?lang=eng> (last visited October 26 2015).

## 2. Impaired Democracy?

[Rz 14] The expansion of trade regulation as a consequence of globalization is well documented and discussed widely. Concerns are raised in particular with respect to state sovereignty.<sup>20</sup> One important aspect for these concerns in the area of trade regulation is the WTO dispute settlement system. The WTO dispute settlement system works well in safeguarding compliance with WTO law. This means, however, that states – contrary to what was the case before – are restricted by WTO commitments in freely deciding upon their trade policies. Zangl says that the effective dispute settlement under WTO law helps to overcome the divided rule of law, which applied largely domestically, but less so internationally as a consequence of weak enforcement mechanisms.<sup>21</sup> In trade law, the rule of law is fully established beyond state boundaries: WTO members are effectively bound by trade law, both domestically and globally. Thus, as a consequence of their membership in the WTO or in an FTA, states can only regulate individually insofar as they still respect their commitments in international trade law. This may mean that trade policy decisions have been taken to a supranational level with limited democratic representation and legitimation.<sup>22</sup> Scholars of political sciences question therefore whether «a fundamental commitment to the principles and institutions of representative democracy is sufficient to sustain the legitimacy and effectiveness of current mechanisms of self-government».<sup>23</sup> The legal assessment on the other hand is concerned with the extent to which the «principles and institutions of representative democracy» remain legally complied with within the scope of their original meaning. Since most «principles and institutions of representative democracy» were originally introduced at a time when globalization had not yet been as dominant as today, the current legal and regulatory challenges in trade policy could not be considered. Therefore, the current «principles and institutions of representative democracy» in Switzerland may possibly not be able to sufficiently accommodate the challenges of the increasing complexity of trade regulation.

## 3. Challenge Ahead: Including the Constituency in the Process

[Rz 15] In 1999, protests against the 3<sup>rd</sup> WTO Ministerial Conference in Seattle prevented its conclusion as a consequence of the riots and disagreement among delegates. The massive protests were followed by a number of international anti-globalization protests. After a few years, the intensity of the protests decreased substantially.<sup>24</sup> However, lately people all around the world

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<sup>20</sup> See e.g. SASSEN, SASKIA, 2015, *Losing Control? Sovereignty in an Age of Globalization*, Paperback edition, Columbia University Press, New York; HOLTON, ROBERT J., 2011, *Globalization and the Nation State*, 2nd edition, Palgrave Macmillan, Basingstoke, pp. 97–126; COHEN, JEAN L., 2012, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*, Cambridge University Press, Cambridge.

<sup>21</sup> ZANGL, BERNHARD, 2006, *Die Internationalisierung der Rechtsstaatlichkeit*, Campus Verlag GmbH, Frankfurt, p. 254.

<sup>22</sup> RITBERGER, BERTHOLD, 2009, «Copy and paste»: Parlamentarisierung jenseits des Nationalstaats», In: N. Deitelhoff & J. Steffek (eds.), *Was bleibt vom Staat? Demokratie, Recht und Verfassung im globalen Zeitalter*, Campus Verlag GmbH, Frankfurt, pp. 137–160, p. 138.

<sup>23</sup> Most prominently, DALTON, RUSSELL J., SCARROW, SUSAN E. & CAIN, BRUCE E., 2003, «New Forms of Democracy? Reform and Transformation of Democratic Institutions», In: B. E. Cain, R. J. Dalton & S. E. Scarrow (eds.), *Democracy Transformed? Expanding Political Opportunities in Advanced Industrial Democracies*, Oxford University Press, Oxford, pp. 1–22, p. 1.

<sup>24</sup> See DWYER, MIMI, 2013, «Where Did the Anti-Globalization Movement Go?», *New Republic*, October 25 2013, available at: <http://www.newrepublic.com/article/115360/wto-protests-why-have-they-gotten-smaller> (last visited August 17 2015).

gather on the streets for new protests against trade agreements. In Europe, anti-globalization movements primarily criticize the new trade agreements, the TTIP between the US and the EU, and the Trade in Services Agreement (TiSA), a plurilateral agreement on trade in services among a large number of WTO members.<sup>25</sup>

[Rz 16] As a reaction to the protests and the growing concern over these new trade agreements, political parties have become active. In Switzerland, for instance, various organizations and political parties are currently collecting signatures for different people's initiatives concerned with implications of globalization. Some of these new people's initiatives collide with Swiss commitments in international trade agreements. Adoption could, thus, entail having to disregard international law.<sup>26</sup> This highlights how international trade regulation impacts on the regulatory scope of national democracy and underlines that democracies require answers to the question of the right balance between market and democracy. They particularly require answers because in a democracy, trade policy and global economic integration depend on the support of the constituency.

[Rz 17] The new, so-called mega-regional trade agreements put further emphasize on the increasing regulatory tension between institutions of democracy and of economy:

- the CETA between Canada and the EU;
- the TTIP between the US and the EU;
- the TPP between 12 pacific rim countries, including the US;
- and the TiSA between 25 WTO members, accounting for 70% of world trade in services, including the US and the EU.

[Rz 18] Mega-regional trade agreements are large enough to develop considerable trade distorting effects for third countries, as well as to create opportunities for spill-over effects.<sup>27</sup> Thus, in order to outweigh trade distortion, countries outside of these mega-regional agreements will have a strong incentive to implement the same standards through voluntary regulatory alignment.

### III. Trade Law and Democracy: The Case of Switzerland

[Rz 19] The Swiss economy is substantially deeply integrated in the global market – with strong trade and investment income contributing significantly to its wealth.<sup>28</sup> Switzerland is a semi-direct

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<sup>25</sup> See e.g. ERMERT, MONIKA, 2015, «Wave Of Protests Against TTIP, CETA, TiSA», *Intellectual Property Watch*, April 19 2015, available at: <http://www.ip-watch.org/2015/04/19/wave-of-protest-against-ttip-ceta-tisa-rising/> (last visited August 17 2015).

<sup>26</sup> Without going into any detail of the potential collision with trade law, there are currently at least 6 people's initiatives in the process of being prepared for the vote. Among them the Swiss people's initiatives against speculation with food (Keine Spekulation mit Nahrungsmitteln); for food security (Für Ernährungssicherheit), see also BBl, 2015, Botschaft zur Volksinitiative «Für Ernährungssicherheit», *Bundesblatt*, 2015 5753, June 24 2015, pp. 5777–5778; for healthy and environmentally friendly produced food (Fair-Food-Initiative); for food sovereignty (Für Ernährungssouveränität); against foreign judges (Schweizer Recht statt fremde Richter); and for responsible corporations (Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt).

<sup>27</sup> For details of the economic implications for Switzerland as a third country outside of the TTIP, see COTTIER, THOMAS ET AL., 2014, *Potential Impacts of a EU-US Free Trade Agreement on the Swiss Economy and External Economic Relations*, Rechtsgutachten erstattet Staatssekretariat für Wirtschaft SECO, available at: <http://www.wti.org> (last visited August 17 2015); SIEBER-GASSER, CHARLOTTE, forthcoming, «TTIP and Swiss Democracy», *European Yearbook of International Law*.

<sup>28</sup> KOF Globalisierungsindex, 2015, *Stagnierende Globalisierung*, Medienmitteilung, March 5 2015, KOF Konjunkturforschungsstelle, ETH Zurich, Zurich: Switzerland ranks on the 9<sup>th</sup> position worldwide of the most globalised economies in the index.

democracy; a representative democracy with elements of a direct democracy. The country has a long tradition of democratic ruling, and the democratic rights of its citizens are culturally and socially deeply rooted.<sup>29</sup> Swiss citizens have relatively broad referendum rights on the communal, the cantonal and the federal level, as well as the right to submit initiatives on revisions to the federal or the cantonal constitution.

[Rz 20] The general tension between global market integration and democratic participation in democracies is particularly distinct in Switzerland because of its citizens' substantial democratic rights and the deep integration in the global market. The case of Switzerland serves therefore as an example to illustrate the current challenges in sufficiently legitimating decisions on trade regulation.

## 1. Regulatory Basis of Trade Policy in Switzerland

[Rz 21] Foreign trade relations are generally the authority of the federal government, with subsidiary competences of the cantons.<sup>30</sup> For the ratification of international treaties, different procedures apply, depending on the nature of the treaty. The mandatory referendum applies among others to accession to international organizations concerned with collective security, or supranational organizations.<sup>31</sup> The optional referendum applies among others to international agreements that provide for the accession to an international organization, establish important binding legal rules, or require the implementation in federal law.<sup>32</sup> A popular vote will be held on the optional referendum, if eight cantons or 50'000 voters ask for it within 100 days after the notification of the treaty.

[Rz 22] International trade agreements, thus, normally do not fall within the scope of the mandatory referendum. With the exception of the treaties with the EU<sup>33</sup>, Swiss people did not vote on any of the 30 Swiss FTAs currently in force, nor did they vote on the accession to the GATT in 1966 or the membership in the WTO. The accession to the WTO was subject to the optional referendum, but due to the insufficient number of signatures, no popular vote was held.<sup>34</sup> On the other hand, the Swiss people adopted in a popular vote on a referendum the accession to the Bretton Woods

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<sup>29</sup> See e.g. KRIESI, HANSPETER & TRECHSEL, ALEXANDER H., 2008, *The Politics of Switzerland: Continuity and Change in a Consensus Democracy*, Cambridge University Press, Cambridge.

<sup>30</sup> Art. 54-56, and Art. 101 of the Swiss Constitution.

<sup>31</sup> Art. 140 of the Swiss Constitution. Majority of both the cantons and the total votes is required.

<sup>32</sup> Art. 141 of the Swiss Constitution. Majority of total votes is required.

<sup>33</sup> In the past 25 years, the Swiss people decided 11 times on referenda or people's initiatives concerning EU-Swiss relations: Accession to the European Economic Community, popular vote of December 6 1992; decision on negotiations on the accession to the EU to the people, popular vote of June 8 1997; Bilateral Treaties I, popular vote of May 21 2000; yes to Europe, popular vote of March 4 2001; Schengen-Dublin, popular vote of June 5 2005; enlargement of the free movement of persons agreement to the new EU member states, popular vote of September 25 2005; cooperation with new EU member states, popular vote of November 26 2006; biometric passports, popular vote of May 17 2009; continuation and enlargement of the free movement of persons agreement with the EU to Rumania and Bulgaria, popular vote of February 8 2009; indirectly, mass-immigration, popular vote of March 14 2015; and, end to overpopulation, popular vote of November 30 2014. Source: chronology of Swiss popular votes, Swiss federal administration.

<sup>34</sup> KÜBLER, DANIEL ET AL., 2012, *Mehr Direkte Demokratie in der Aussenpolitik?*, Studien ZDA No. 2, Zentrum für Demokratie, Aarau, p. 10.



institutions in 1992<sup>35</sup> and the accession to the United Nations (UN) in 2002<sup>36</sup>, based on a people's initiative. Whether the limited number of trade policy popular votes is a consequence of general consensus on trade policy of Switzerland or the consequence of general disinterest in the matter remains open.

[Rz 23] Popular votes on economic integration are characterized by political campaigning urging the constituency to accept less convenient legislation in order to keep up with global integration. Alternatives to the proposed treaty are rarely offered.<sup>37</sup> While until 2008, the Swiss people generally voted in favor of increasing global integration<sup>38</sup> – be it directly on an international agreement, or indirectly on the implementation of an international agreement – just recently, a small majority of the Swiss people decided in favor of the so-called mass immigration popular initiative.<sup>39</sup> By limiting immigration to Switzerland, this initiative could result in reversal of the degree of integration of Switzerland in the global market.<sup>40</sup>

[Rz 24] This is one prominent example of the increasing tensions between trade law and the peculiar democratic system of Switzerland. Given the substantial democratic rights of the Swiss people, and given the level of integration in and dependence from the global market of the Swiss economy, finding the right balance between safeguarding established democratic rights, while protecting the interests of the Swiss economy in the global market is a distinct challenge, which is likely to persist in the near future.

## 2. Evolution of Swiss Free Trade Agreements

[Rz 25] The deep integration of the Swiss economy in the global market is in parts related to the activities of Swiss businesses and investments, to unilateral trade liberalization, to commitments

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<sup>35</sup> Referendum on the accession to the Bretton Woods Institutions, May 17 1992, BBl 1992 V 453; Referendum on the involvement of Switzerland in the Bretton Woods Institutions, May 17 1992, BBl 1992 V 454.

<sup>36</sup> Popular vote on the accession to the UN, people's initiative, March 3 2002, BBl 2002 3690. Membership in the UN was rejected by the Swiss people in a popular vote before, March 16 1986, BBl 1986 II 98.

<sup>37</sup> For instance, in the explanatory statement to the popular vote on the Bilateral Treaties I, the federal government argued in favor of the Bilateral Treaties I without offering an alternative, saying: «Mit einem Nein würden wir keine Probleme lösen. [...] Der Druck, der wegen der Liberalisierung des Welthandels auf der Landwirtschaft lastet, würde bestehen bleiben und könnte nicht durch die Öffnung des EU-Marktes aufgefangen werden. Die Industrie wäre gegenüber ihren Konkurrenten in EU-Staaten weiterhin benachteiligt.» FEDERAL GOVERNMENT, 2000, *Volkabstimmung vom 21. Mai 2000: Erläuterungen des Bundesrates*, Bundeskanzlei, Bern, p. 12; see also SCHOLTEN, HEIKE, 2014, «Europapolitik und europapolitische Kampagnen in der Schweiz», In: H. Scholten & K. Kamps (eds.), *Abstimmungskampagnen*, Springer VS, Wiesbaden, pp. 395–417.

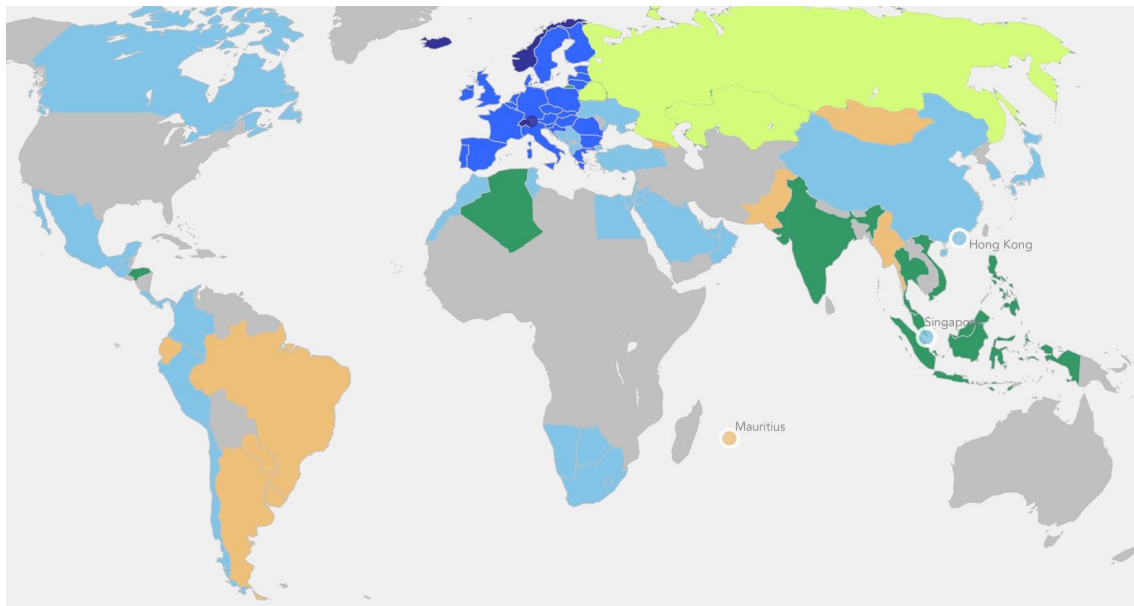
<sup>38</sup> See e.g. GEMPERLI, SIMON, 2014, *Selbstbezogene Schweiz: Unbehagen im Erfolgsstaat*, Commentary, NZZ, Zurich, August 15 2014.

<sup>39</sup> The popular initiative to stop mass immigration led to a partial revision of the Swiss federal constitution, which requests that all residence permits issued in Switzerland be regulated by quotas, and that Swiss nationals are treated more favorably on the labor market (therewith abandoning National Treatment commitments). International treaties, which oppose of this new provision of the Swiss federal constitution, have to be renegotiated and adapted within three years. The popular initiative was accepted by a narrow margin (50.3% of the votes). See also ELSEY, DOMINIK, 2014, *Swiss accept initiative to «Stop Mass Immigration»: Legal Implications (Part II)*, Blog, Cambridge Journal of International and Comparative Law, February 27 2014, available at: <http://cjlcl.org.uk/2014/02/27/swissimplications/> (last visited August 20 2015).

<sup>40</sup> See e.g. TOBLER, CHRISTA, 2015, «Masseneinwanderungsinitiative und bilaterale Verträge – wie weiter? Eine Frage von allgemeiner wirtschaftlicher Relevanz», In: A. Mathis & R. Nobs (eds.), *Treuhand und Revision*, Jahrbuch 2015, WEKA Business Media AG, Zurich, pp. 7–33; SCHLEGEL, STEFAN & SIEBER-GASSER, CHARLOTTE, 2014, «Der Dritte Weg zur Vierten Freiheit», *Jusletter*, March 17 2014; critical, EPINEY, ASTRID, 2014, «Zur rechtlichen Tragweite der Art. 121 a, Art. 197 Ziff. 9 BV», *Jusletter*, June 2 2014.

in multilateral trade liberalization, and to bilateral and regional trade liberalization. In particular, there are currently 30 bilateral or regional trade agreements in force between Switzerland and countries from all around the world. In addition, the Swiss economy is highly integrated in the EU market through a large number of individual treaties. The Swiss government, thus, plays an active role in creating opportunities for market access for Swiss businesses all around the world and Switzerland prides itself with a comparatively large number of trade agreements in a global context.<sup>41</sup>

[Rz 26] Most of the 30 Swiss FTAs were negotiated within the framework of the European Free Trade Association (EFTA), in which Switzerland, Norway, Iceland and Liechtenstein are the remaining members after other initial members left in order to join the EU. More recently, Switzerland endeavored to negotiate FTAs on its own, in addition to the FTAs negotiated within the EFTA framework. Swiss FTAs are spread across the world, focusing on strategic economic partners. As can be seen in Figure 1, Switzerland has few FTAs with poorer developing countries, but covers preferential market access to many of the new emerging economies. Furthermore, while Switzerland has FTAs with the large industrialized economies of Europe and Canada, it has not yet concluded an FTA with the US or Australia and New Zealand. The on-going negotiations with a number of South East Asian countries – if successfully concluded – will allow counterbalancing the potential trade diversion of TPP<sup>42</sup>:

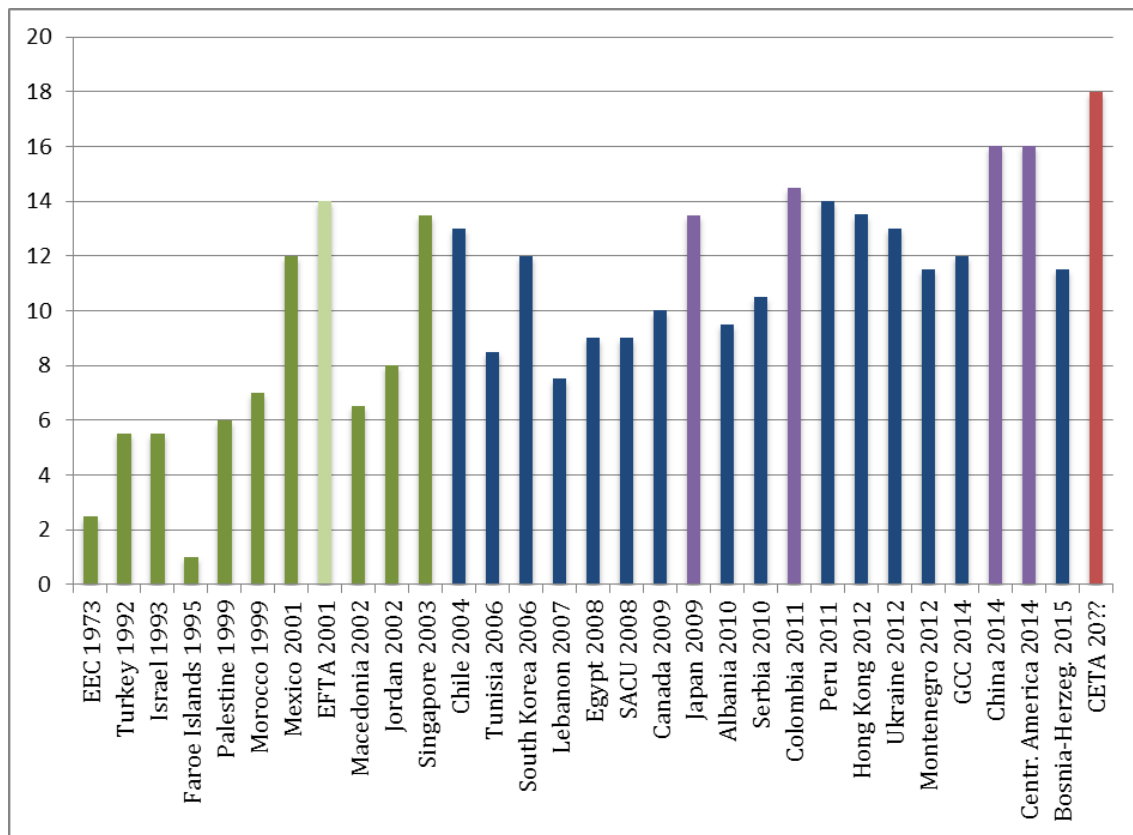


Source: EFTA (2015), Author. Light Blue = FTAs in force; Blue = FTA and Bilateral Treaties with the EU; Dark Blue = EFTA agreement; Green = Negotiations on-going; Light Green = Negotiations on hold; Orange = Cooperation agreement.

<sup>41</sup> STAATSSSEKRETARIAT FÜR WIRTSCHAFT, 2015, *Bericht zur Aussenwirtschaftspolitik 2014*, Swiss federal administration, January 14 2015, Bern.

<sup>42</sup> The TPP was negotiated between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, US and Vietnam. After the successful conclusion of the on-going negotiations, Switzerland will have an FTA with 6 of the 12 TPP members.

[Rz 27] The bulk of the Swiss FTAs were concluded within the past 25 years. By far the oldest of the Swiss FTAs is the FTA with the European Economic Community (EEC), which was concluded already in 1973. This agreement has, however, been complemented in the meantime by a number of additional Bilateral Treaties and agreements between Switzerland and the EU. The scope of the Swiss FTAs differs. While older agreements tend to be limited to trade in goods and elimination of tariffs, the more recent agreements cover more aspects of trade and NTBs. This evolution of the scope of the agreements is in line with the global evolution of FTAs. It can be observed globally, that FTAs are increasingly more substantial and cover more aspects of trade, thus, going beyond legal aspects covered by WTO law.<sup>43</sup> The following Figure 2 shows the empirical assessment of the scope of Swiss FTAs in comparison with CETA (details of the assessment in Annex 1):



Source: Author. Commitments per chapter were given 1 point, if WTO-plus or -extra, and 0.5 points if more or less on the level of WTO minimum standards; the more points, the more substantial and broad the FTA. Green = before partial revision of Swiss constitution; Purple = introduction of new structure and/or scope of FTA; Blue = FTA after partial revision of Swiss constitution, not introducing new structure and/or scope.

[Rz 28] While the oldest trade agreements currently in force in Switzerland established mainly commitments in trade in goods (tariffs), rules of origin and custom procedures, the scope of trade

<sup>43</sup> MAVROIDIS, PETROS C., 2013, «Gone with the Wind? The Diminishing Relevance of the WTO to Preferential Trade Agreements», In: Kleimann D (ed.), *EU Preferential Trade Agreements: Commerce, Foreign Policy and Development Aspects*, European University Institute, Florence, pp. 19–24, p. 23.

agreements continuously extends since the year 2000. The newest agreements even cover chapters on labor standards and environmental aspects of trade. The most substantial trade agreement of Switzerland is the FTA with China, which Switzerland negotiated outside of the EFTA framework and provides for detailed and substantial regulation also beyond of the main chapters listed in the table above. But also the FTAs with Colombia, Japan, Peru and Central America are considerably more substantial with respect to regulatory breadth and depth compared to older Swiss FTAs in particular.

[Rz 29] From what is known from the current negotiations over the TTIP<sup>44</sup>, it will be of comparable breadth and depth as the CETA, if not even more substantial. Consequently this increases the incentive for third countries, such as Switzerland, to conclude similar agreements in order to secure market access in the US, the EU and other member states of the new mega-regional agreements.<sup>45</sup> Up until today, Switzerland has not yet concluded an FTA of similar depth and breadth as compared with CETA. If Switzerland were conclude a similar agreement, this would mean an increase in the scope of economic integration commitments as compared to previous FTA commitments and possibly the adoption of a dynamic trade agreement for the first time.

### 3. Democratic Legitimation of Swiss Free Trade Agreements

[Rz 30] In 2003 the scope of the optional referendum in Art. 141 of the Swiss constitution was broadened in a partial revision of the Swiss constitution.<sup>46</sup> The revision was suggested by the Swiss government and meant to strengthen direct democratic rights with respect to Swiss commitments in international law. The revision was accepted in a popular vote by the Swiss constituency on February 9 2003. Until 2003, the Swiss federal government ratified FTAs, after approval by the Swiss federal assembly.

[Rz 31] With the new scope of Art. 141(1)(d)(3) of the Swiss constitution, FTAs are subject to the optional referendum if they establish important legislative provisions. However, the first agreement submitted to the federal assembly after the revision of Art. 141 of the Swiss constitution, the FTA with Chile in December 2004, was not subject to the optional referendum. Instead, the Swiss federal government introduced the so-called «common practice of standard agreements». It argued that FTAs are essentially the same and normally require little to no amendment to federal law. It was therefore not necessary to burden the legislative process with the optional referendum.<sup>47</sup> The federal assembly accepted this line of argumentation and up until today, only one FTA of Switzerland was subject to the optional referendum, despite Art. 141(1)(d)(3) of the Swiss constitution.

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<sup>44</sup> COUNCIL OF THE EUROPEAN UNION, 2014, *Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America*, Declassification, ST 11103/13, DCL 1, October 9 2014, Brussels, available at: <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf> (last visited August 31 2015).

<sup>45</sup> See KARMAKAR, SUPARNA, 2013, *Prospects for regulatory convergence under TTIP*, Working Paper, Bruegel Policy Contribution, No. 2013/15, Brussels; LEJOUR, ARJAN ET AL., 2014, *Economic Incentives for Indirect TTIP Spillovers*, CEPS Special Report No. 94, Centre for European Policy Studies, Brussels; HOEKMAN, BERNARD, 2013, *New Approaches to Support Transatlantic Trade Integration*, SNS Analys No. 18, Centre for Business and Policy Studies, Stockholm, pp. 16–7.

<sup>46</sup> SWISS FEDERAL ADMINISTRATION, 2003, *Volksabstimmung vom 9. Februar 2003: Erläuterungen des Bundesrates*, Bundeskanzlei, Bern.

<sup>47</sup> See Botschaft Doppelbesteuerungsabkommen mit Israel, BBl 2003 6467, p. 6475; Botschaft Freihandelsabkommen mit Chile, BBl 2003 7113, p. 7136.

[Rz 32] Concerns have been raised with respect to the compatibility of the common practice of standard agreements with the Swiss constitution. Most prominently, Diggelmann argues strongly in favor of a revision of the common practice of standard agreements, since skepticism in the population against trade agreements is on the rise and since the importance of a trade agreement needs to be assessed on a case-by-case basis and differs between partners and between different times even if the treaty text was identical.<sup>48</sup>

[Rz 33] A closer look at the scope of Swiss FTAs reveals that the FTA with Chile in 2004 was slightly less ambitious than the FTA with Singapore<sup>49</sup>, which was ratified in January 2003, one month before the revision of Art. 141 of the Swiss constitution. Consequently, the FTA with Chile arguably did not establish important legislative provisions or require substantial amendment of federal law. The agreement does not cover commitments in investment, while the agreement with Singapore does. Furthermore, the FTA with Chile covers commitments in public procurement, but also the previous FTA with Mexico does so. Thus, the assessment of the Swiss federal government that the FTA with Chile did not establish important legislative provisions or require substantial changes to federal law as in Art. 141(1)(d)(3) of the Swiss constitution appears valid.

[Rz 34] The Swiss federal government had until May 2015 the authority to provisionally implement FTAs that do not fall under the referendum, until approval by the federal assembly.<sup>50</sup> The government used this right several times in the past, for instance in the cases of the FTA with Tunisia in 2005<sup>51</sup> and the FTA with Egypt in 2007.<sup>52</sup> Both agreements were implemented a year before they were officially approved by the federal assembly. The provisional implementation of the air transportation agreement with Germany in 2002 and the provisional implementation of the agreement on the request for administrative assistance by the US in 2009 lead to several motions by the federal assembly and subsequently to the amendment of Art. 152 of the Federal Act on the Federal Assembly: Since May 1 2015, the federal government's authority to provisionally implement FTAs and other international agreements is limited to the extent that the federal government shall consult with the two responsible commissions of the federal assembly, and that the commissions may execute their veto if two thirds of both of their members vote against the provisional implementation.<sup>53</sup>

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<sup>48</sup> DIGGELMANN, OLIVER, 2014, *Muss das Freihandelsabkommen der Schweiz mit der Volksrepublik China dem fakultativen Staatsvertragsreferendum unterstellt werden?*, Rechtsgutachten, February 15 2014, available at: [http://www.ivr.uzh.ch/institutsmitglieder/diggelmann/gutachten/GA\\_FHA\\_China.pdf](http://www.ivr.uzh.ch/institutsmitglieder/diggelmann/gutachten/GA_FHA_China.pdf) (last visited August 14 2015), pp. 52–8.

<sup>49</sup> See Figure 2 above and Annex 1.

<sup>50</sup> Art. 2 of the Federal Act on foreign trade policy measures (Bundesgesetz über aussenwirtschaftliche Massnahmen, SR 946.201).

<sup>51</sup> SECO, 2005, *Anwendung des Freihandelsabkommens zwischen EFTA-Staaten und Tunesien ab dem 1. Juni 2005*, Pressemitteilung, May 30 2005, Swiss Federal Administration, Bern.

<sup>52</sup> SECO, 2007, *Anwendung des Freihandelsabkommens zwischen den EFTA-Staaten und Ägypten ab dem 1. August 2007*, Pressemitteilung, July 19 2007, Swiss Federal Administration, Bern.

<sup>53</sup> Art. 152(3bis) of the Federal Act on the Federal Assembly (ParlG, SR 171.10). See also Botschaft zum Bundesgesetz über die Kompetenz zum Abschluss völkerrechtlicher Verträge von beschränkter Tragweite und über die vorläufige Anwendung völkerrechtlicher Verträge, BBl 2012 7465.

#### 4. Problems with the Common Practice of Standard Agreements

[Rz 35] However, in 2009, Switzerland concluded its first substantial individual FTA outside of the EFTA framework with Japan. This agreement has a different structure compared to EFTA FTAs, while it also accounted for the most substantial FTA at the time.<sup>54</sup> Given that the different structure and the depth of the commitments were likely to serve as a basis for subsequent individual FTAs of Switzerland, this agreement established important legislative provisions and should have been subject to the optional referendum, based on Art. 141(1)(d)(3) of the Swiss constitution.

[Rz 36] The FTA with Colombia, which was ratified by the federal assembly and the Swiss federal government in 2011, is more substantial than the FTA with Singapore and accounted at the time for the most substantial EFTA FTA of Switzerland. It is the first FTA of Switzerland that covers binding commitments in phytosanitary and sanitary measures and also one of the few FTAs at the time that covered commitments in public procurement.<sup>55</sup> It was likely at the time that this agreement would serve as a basis for subsequent, equally ambitious EFTA agreements. Therefore, it can be argued that this agreement established important legislative provisions and should have been subject to the optional referendum.

[Rz 37] Again, the same is true for the EFTA FTA with the Central American States (Panama and Costa Rica) in 2014. This agreement is more ambitious than the FTA with Colombia and covers new aspects of trade, such as labor and environment.<sup>56</sup> The first FTA introducing chapters on labor standards and environment is however, the FTA with Montenegro in 2012. The FTA with Montenegro at the time introduced important legislative provisions by establishing the basis for chapters on labor standards and environment in subsequent EFTA FTAs.<sup>57</sup> On the other hand, covering trade-related issues such as labor and environment in an FTA for the first time remains the only new aspect of this agreement. The FTA with Montenegro otherwise does not account for the most ambitious FTA of Switzerland and EFTA. Thus, from a strictly legal point of view, the agreement should have been subject to the optional referendum, while from an economic or political point of view, the implications of this agreement may appear less substantial.

[Rz 38] The only exception to the rule of the common practice of standard agreements is the FTA with Hong Kong in 2012. Because of the novelty of the legal embedding of the agreement on labor standards in the FTA, the Swiss federal government suggested the submission under the optional referendum. The referendum was not seized, however.<sup>58</sup>

[Rz 39] Finally, the FTA with China, which Switzerland negotiated on its own, has a different structure compared to EFTA FTAs and accounts for the most ambitious FTA of Switzerland today.<sup>59</sup> It covers more chapters than were assessed in Figure 2 and Annex 1, and in the individual chapters assessed, the agreement enters into more detail and specificities than any of the previous FTAs of Switzerland. In addition, given the economic implications of trade liberalization between

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<sup>54</sup> See Figure 2 above and Annex 1.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Art. 2 of the Bundesbeschluss über die Genehmigung des Freihandelsabkommens zwischen den EFTA-Staaten und Hongkong, China, des Landwirtschaftsabkommens zwischen der Schweiz und Hongkong, China, sowie des Abkommens über Arbeitsstandards zwischen den EFTA-Staaten und Hongkong, China, March 16 2012, BBl 2012 3525.

<sup>59</sup> See Figure 2 above and Annex 1.

Switzerland and the largest emerging economy today, it could well be argued that the FTA with China established important legislative provisions and should have been subject to the optional referendum.

[Rz 40] It is suggested that the first dynamic FTA of Switzerland would need to be subject to the optional referendum, based on Art. 141(1)(d)(3) of the Swiss constitution, since Switzerland would adopt a dynamic agreement for the first time and therewith establish a new benchmark for subsequent trade negotiations. In addition and depending on the FTA it is possible that a dynamic FTA with strong institutions and considerable delegation of legislative authority amounts *de facto* to an international organization<sup>60</sup> and ratification would therefore fall under the optional referendum based on Art. 141(1)(d)(2) of the Swiss constitution. Since Art. 141(1)(d)(2) of the Swiss constitution leaves less room for interpretation, submission under the optional referendum would be obvious. Dynamic trade agreements would furthermore carry similarities with the bilateral agreements between Switzerland and the EU, and a potential future framework agreement for the relations between Switzerland and the EU. Since the Swiss constituency repeatedly voted on bilateral treaties with the EU, similar treatment of dynamic trade agreements is suggested.

## 5. Democratic Legitimation of Trade Negotiations

[Rz 41] Legally, the federal government of Switzerland has the exclusive authority to enter into international negotiations, including trade negotiations and exploratory talks.<sup>61</sup> The federal government furthermore has the authority to define the agenda for negotiations (in conjunction with the commissions of the federal assembly in «important» negotiations<sup>62</sup>) and is not required by the constitution to exchange information with the federal assembly, nor with the general public, at the beginning or during the negotiations.<sup>63</sup> Based on the Federal Act on the Federal Assembly the federal government is, however, required to inform the commissions on foreign policy of the federal assembly regularly, and the presidency of the federal assembly periodically on «important» issues of foreign policy.<sup>64</sup> Given that there is no legal obligation to consult or coordinate trade negotiations with the federal assembly in the Swiss constitution and the obligation to consult and inform in the Federal Act on the Federal Assembly is limited to «important» negotiations and issues, the federal government enjoys considerable discretionary power.

[Rz 42] In consequence, this means that constitutional democratic legitimation of FTAs in Switzerland is normally to a large extent limited to the process of ratification once negotiations have been concluded – and at times even only once the FTA has already been implemented provisionally. Regardless of the kind of democratic legitimation of an FTA – be it by the federal assembly or by optional referendum – FTAs are normally presented to the constituency in the form of a

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<sup>60</sup> An international organization is defined by an agreement between two or more states to establish membership in an association, with the objective of safeguarding common interests through common institutions. See e.g. KLEIN, ECKART, 2004, «Die Internationalen und die Supranationalen Organisationen», In: W. Graf Vitzthum (ed.), *Völkerrecht*, 3. edition, De Gruyter Rechtswissenschaften, Berlin, pp. 243–355, p. 255.

<sup>61</sup> Art. 184 of the Swiss Constitution.

<sup>62</sup> Art. 152(3) of the Federal Act on the Federal Assembly (ParlG, SR 171.10).

<sup>63</sup> Art. 166 of the Swiss Constitution establishes supervising authority of the federal assembly over foreign relations, without, however, implying a particular authority before the ratification process of international treaties.

<sup>64</sup> Art. 152(2) of the Federal Act on the Federal Assembly (ParlG, SR 171.10).

final package deal, which is obviously very difficult to refuse, in particular if the FTA was already provisionally implemented beforehand.

[Rz 43] This may politically be linked with the distinct difference between the ratification of an FTA and the ratification or referendum on a federal law: While an issue of federal legislation can be brought up again in a different form or at a different time, the implementation and ratification of a trade agreement is always tied to *momentum*: There is a *momentum* for deepening trade relations and international integration with a particular country. On the other hand, of course, the historical reason for the current institutional setting of trade negotiations lies in the fact that, while an individual chapter of an FTA may appear to be imbalanced, the FTA as a whole is considered beneficial for all of its members: It is only through the package of the FTA that it can be concluded and ratified.

[Rz 44] Increasing democratic participation in trade negotiations may therefore have a negative impact on the success rate and the speed of trade negotiations. The constitutional provisions of democratic rights and of the duty of safeguarding the country's interests abroad are, thus, competing and require careful balancing and weighing in the case of trade negotiations.

[Rz 45] Dynamic trade agreements increase the need for democratic participation during negotiations even more. These agreements establish an institutional framework and binding commitments to continuously deepen economic integration, regulatory harmonization and convergence.<sup>65</sup> This means that the final package deal of a trade agreement of the new generation outlines the institutional framework and the liberalizing commitments at the starting point, but remains open with respect to the final depth and breadth of the agreement. Such an agreement, when ratified by the democratic institutions, will still evolve and its scope remains uncertain.

[Rz 46] Therefore, it is likely that also the character of trade negotiations changes, since negotiations will increasingly be concerned with the right institutional framework and the right set of minimum standards for subsequent mandates for negotiations, instead of liberalizing commitments. Given that trade negotiations are changing in nature, it has to be evaluated whether they remain sufficiently democratically legitimized as required by the Swiss constitution.

[Rz 47] The more recent trade policy discussions and negotiations worldwide suggest that dynamic trade agreements appear as the most suitable legal instrument to tackle the regulatory challenges in global trade at the moment. Consequently, it is likely that the world will see more dynamic FTAs in the near future. For Switzerland, the question of democratic legitimation of a dynamic trade agreement arises already in the context of the negotiations with the EU over a new institutional framework for the economic and political relations. According to the mandate and the regulatory needs, such an institutional framework agreement between Switzerland and the EU would need to be dynamic. It will, however, also be relevant in the context of the TTIP, should Switzerland wish to dock onto the TTIP, since the TTIP is expected to be a dynamic agreement. Possibly, should the dynamic nature of the CETA turn out to increase market access for its members beyond the current level and require subsequent rounds of renegotiations of the EFTA-Canada FTA, such renegotiations may also require entering into a dynamic institutional framework with Canada in

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<sup>65</sup> The dynamic institutional framework of the new generation of trade agreements can mainly be observed in the transatlantic context (CETA, mandate of the TTIP and the mandate of the EU-Mexico agreement). Prominently discussed in PETERSMANN, ERNST-ULRICH, 2015, «Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?», *Journal of International Economic Law*, vol. 18, no. 2, pp. 1–29.



order to facilitate renegotiations. In short, the current dynamics in trade law suggest strongly that the question of democratic legitimation of dynamic trade agreements be discussed.

[Rz 48] The legal question that needs to be addressed before the negotiation and ratification of a dynamic FTA relates to the evolution of the degree of market integration, once a dynamic trade agreement is ratified: If federal laws require amendment as a consequence of the legislative authority of FTA institutions, submission under the referendum would be required by the Swiss constitution<sup>66</sup> but contradict Switzerland's commitments in the FTA. The legal implications of such a referendum remain uncertain to date.<sup>67</sup> This is similarly the case with people's initiatives contradicting Swiss commitments in trade agreements.<sup>68</sup> Given the shift away from tariffs to NTBs in international trade liberalization, these systemic challenges to the constitutional rights and obligations in Switzerland will have to be addressed in the near future in order to safeguard legal security.

#### IV. Challenges Ahead

[Rz 49] The global integration of markets is bound to progress at a considerable pace. Switzerland will therefore continue to depend on its integration in the global trading system. This will inevitably require the adoption of new, potentially dynamic trade agreements in the nearer future and the engagement in regulatory convergence. Both are a challenge to the current process of democratic legitimation of FTAs as established in the Swiss constitution.

[Rz 50] Economic integration of a democratic state in the global market depends, however, on the support of the domestic constituency. Given that skepticism towards globalization is on the rise in industrialized and democratic countries, it is therefore suggested that democratic legitimation of trade policy and trade negotiations be increased. In the case of Switzerland this could, arguably, be achieved without a revision of the Swiss constitution. It would, however, require a change in federal legislation, clarifying the procedures of trade negotiations. The federal government could be obliged to inform about trade negotiations more actively and therewith increase transparency. Furthermore, the federal assembly could be involved in the definition of the negotiating mandate as a general rule and not only if the negotiations are considered «important». Furthermore, public consultations similar to the public consultations within the EU could be introduced also in Switzerland. Such public consultations consist of a public call for proposals on the negotiation mandate. Naturally, public consultations require the publication of the general mandate for the negotiations and allow all interested stakeholders to participate on the basis of a public debate. This would increase democratic legitimation during the negotiations, it would increase transparency, and allow various stakeholders to participate and declare their views and interests in a transparent and fair manner. As a beneficial side effect in a democratic context, public consultations increase the level of information and awareness for trade negotiations in the constituency.

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<sup>66</sup> Art. 141(1)(a) of the Swiss Constitution.

<sup>67</sup> Re-negotiations within the FTA institutions? Resignation from the FTA? Restriction to the scope of the optional referendum?

<sup>68</sup> Art. 138–9 of the Swiss Constitution. Resignation from the FTA? Re-negotiations of the FTA? Subsequent popular vote on the membership in the FTA? Non-implementation of aspects of the people's initiative? Restriction to the scope of the people's initiative?

[Rz 51] On the international level, the democratic legitimation of decisions on economic integration will likely also have to be increased, given the dependence from the constituency in democracies. Democratic legitimation of decision-taking in international bodies should therefore be discussed. This applies to the decision-taking processes within the WTO, but also – and most importantly – to the institutional framework of decision-taking in dynamic trade agreements. The EU is one example of an international body providing for considerable democratic legitimation in its decision-taking processes. Less ambitious approaches in the context of a dynamic trade agreement could consist of parliamentary representation in the FTA institutions or of the reservation that the implementation of subsequent decisions of FTA institutions be subject to agreement by the federal assembly or the constituency.

[Rz 52] Consequences of not being a member of a supranational organization will likely be more distinct for Switzerland in the nearer future. The new mega-regional trade agreements will create incentives for Switzerland to dock onto such agreements or to implement regulation, which other countries introduced, through voluntary regulatory alignment. This global development limits, to a certain extent, the regulatory power of the Swiss federal government and the Swiss federal assembly. With progressive globalization, national interests increasingly have to be secured through regional or global cooperation and integration. One way to meet the impending undermining of democratic rights and legitimation of trade law is to democratically participate at the level where decisions are taken. Supranational and international organizations and their membership – contrary to what many believe – could therefore turn out to be the savior of modern democracy.

## **Annex 1**

[Rz 53] Annex 1 shows the result of the empirical legal assessment of the evolution of the scope and the structure of Swiss FTAs, plus CETA. The empirical legal analysis is based on the main treaty texts and is listing the chapters/sections in the treaties without investigating in detail the scope of the respective commitments. Thus, it serves as an illustration of the regulatory evolution without claiming to provide a thorough analysis of the scope of the respective commitments in comparison.

Country/Countries	EFTA	entry into force	tariffs (goods)	services	rules of origin	custom	technical barriers	sanitary measures	investment	competition	intellectual property rights	technical cooperation	institutional provisions	dispute settlement	movement of persons	government procurement	subsidies	transparency	labour standards	environment
EEC		73	x		i	i							i							
Turkey	x	92	x		i	i				i	i	i	x			i	i			
Israel	x	93	x		i	i					i		x	x		i	i			
Faroe Islands		95	x																	
Palestine	x	99	x		i	i					x	i	x	x			i			
Morocco	x	99	x		i	i					x	x	x	x		i	i			
Mexico	x	01	x	x	i	x	i	i	x	x	x		x	x	i	x	i	i		
EFTA		01	x	x	i	x	x	i	x	x	x	i	x	x	x	x	x	i		
Macedonia	x	02	x			x	i				x		x	x		i	i			
Jordan	x	02	x		x	x	i				x	i	x	x		i	i			
Singapore	x	03	x	x	x	x	i	i	x	x	x	i	x	x	x	i	i	x		
Chile	x	04	x	x	x	x	i	i		x	x	i	x	x	x	x	i	x		
Tunisia	x	06	x		i	x	i	i	i		x	x	x	x			i			
South Korea	x	06	x	x	i	x	i	i		x	x	x	x	x	i	i	i	x		
Lebanon	x	07	x		i	x	i	i				x	x	x			x			
Egypt	x	08	x		i	x	i	i		x	x	x	x	x			i			
SACU	x	08	x		i	x	i	i		i	x	x	x	x		i	i			
Canada	x	09	x	i	i	x	x	i		x		i	x	x	i	i	i	i		
Japan		09	x	x	i	x	x	i	x	x	x	x	x	x	x	i		x		
Albania	x	10	x		i	x	i	i	i		x	i	x	x		i	i	x		
Serbia	x	10	x		i	x	i	i	i		x	i	x	x		i	i		x	x
Colombia	x	11	x	x	i	x	i	x	x	x	x	x	x	x	x	x	i	x		
Peru	x	11	x	i	i	x	i	x	x	x	x	x	x	x	x	x	i	x		
Hong Kong	x	12	x	x	i	x	i	i	x	i	x	i	x	x	x	i	i	x		x
Ukraine	x	12	x	x	i	x	i	i	x	x	x		x	x	x	x	i	x		
Montenegro	x	12	x	i	i	x	i	i	i		x		x	x		i	i	x	x	x
GCC	x	14	x	x	i	x	i	i		x	x		x	x	x	x	i	x		
China		14	x	x	x	x	x	x	i	x	x	x	x	x	x	i	i	x	i	x
Centr. American States	x	14	x	x	i	x	i	i	x	x	x	x	x	x	x	x	i	x	x	x
Bosnia-Herzeg.	x	15	x	i	i	x	i	i	i		x		x	x		i	i	x	x	x
EU/Canada		--	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x

Source: Author. EEC = European Economic Community; EFTA = European Free Trade Association (rev. agreement in 2001); SACU = Southern Africa Customs Union; Serbia has a revised agreement, not in force yet (rev. 2015); GCC = Gulf Cooperation Council; Centr. America = Costa

Rica, Guatemala, Panama. x = substantial commitments; i = incorporation of WTO commitments or limited commitments.<sup>69</sup>

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<sup>69</sup> In addition to the listed commitments, the CETA – among others – also includes cooperation in the field of motor vehicle regulations, mutual acceptance of conformity assessments, good manufacturing practices for pharmaceutical products, and enhanced cooperation on science, technology, research and innovation. It is considered to be a dynamic agreement, which should evolve relatively fast given its institutional structure and the mutually agreed commitment to further liberalization.