



Causes & Costs of Swiss Protectionism in Migration: The Way Forward



Thomas Cottier
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February 9, 2014

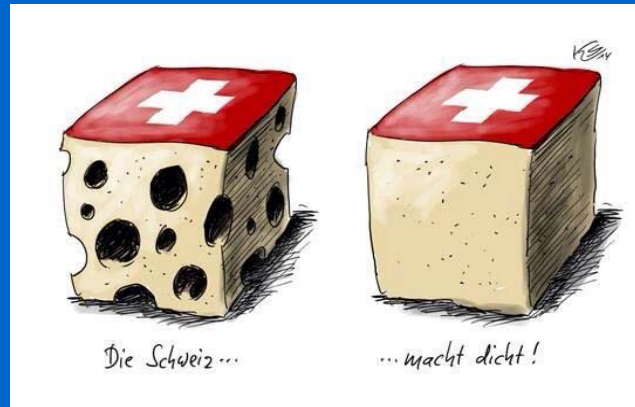
- Swiss voters approve by a narrow margin of 50.3% v. 49.7% (20'000) and 14 v. 12 Cantons an initiative "Against Mass Immigration", now constituting Article 121a of the Federal Constitution:
 - Autonomous management of migration
 - General application of quotas including EU/EFTA
 - Preference of Swiss employees
 - Possible restrictions of right to family
 - Prohibition to conclude new treaties incompatible with Article 121a Cst.
 - Duty to adjust existing agreements incompatible with Art. 121a Cst.
 - Implementation by federal law or executive ordinance by February 9, 2017

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Fortress Switzerland



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Incompatible with European Law

Free Movement of Persons

- Art. 121a Cst. reflects existing model of 2nd tier immigration towards third countries outside of EU/EFTA
- Art. 121a Cst. is not compatible with the Agreement on Free Movement of Persons (FMPA) concluded 1999 being part of a package deal with the EU and EFTA:
 - QRs phased out (except for Romania, Bulgaria)
 - No quotas, principle of non-discrimination
 - Right to family

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Assertive European Union

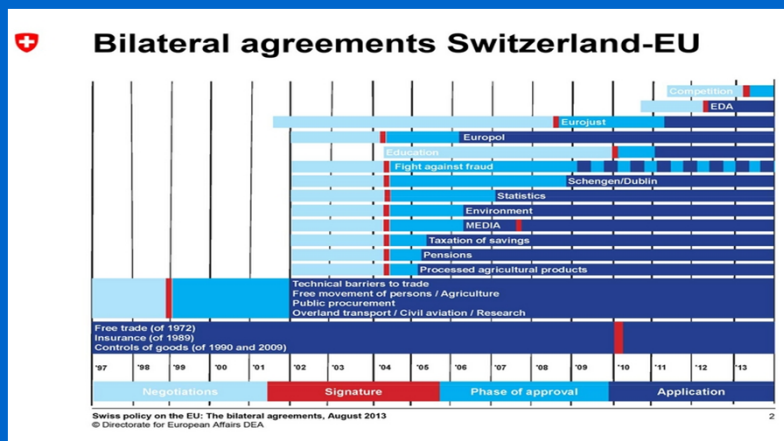
- “Free movement of persons is as important to the EU as principle as is direct democracy to Switzerland” (Chief negotiator O’Sullivan, Feb.11, 2011)
- Major concessions on Free Movement of Persons very unlikely
- Risk of suspension or cancellation of 1999 Package of Bilateral I Agreements

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Bilateral Agreements CH-EU



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The Economist, Charlemagne 15.2.14



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Swiss Immigration 2013

- Movements
 - 155 401 incoming
 - 70 023 departures
 - 85 378 net increase
 - 34 000 naturalisation
- EU/EFTA
- 67.8% (increase 4.3%)
 - 15 337 Portugal
 - 7777 Germany
 - 6895 Italy
 - 6261 France

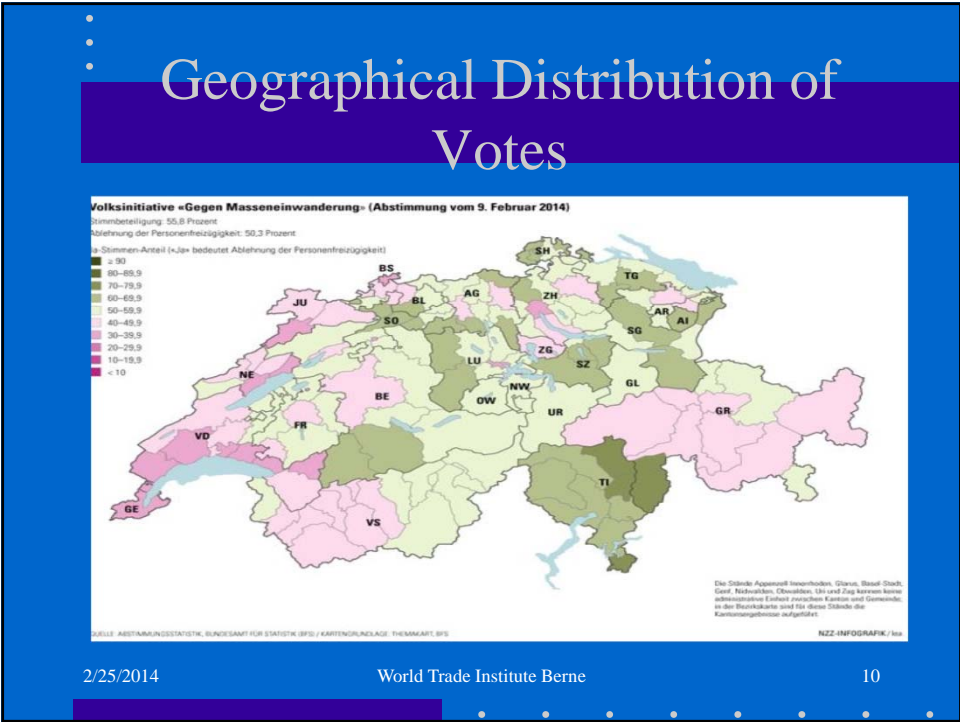
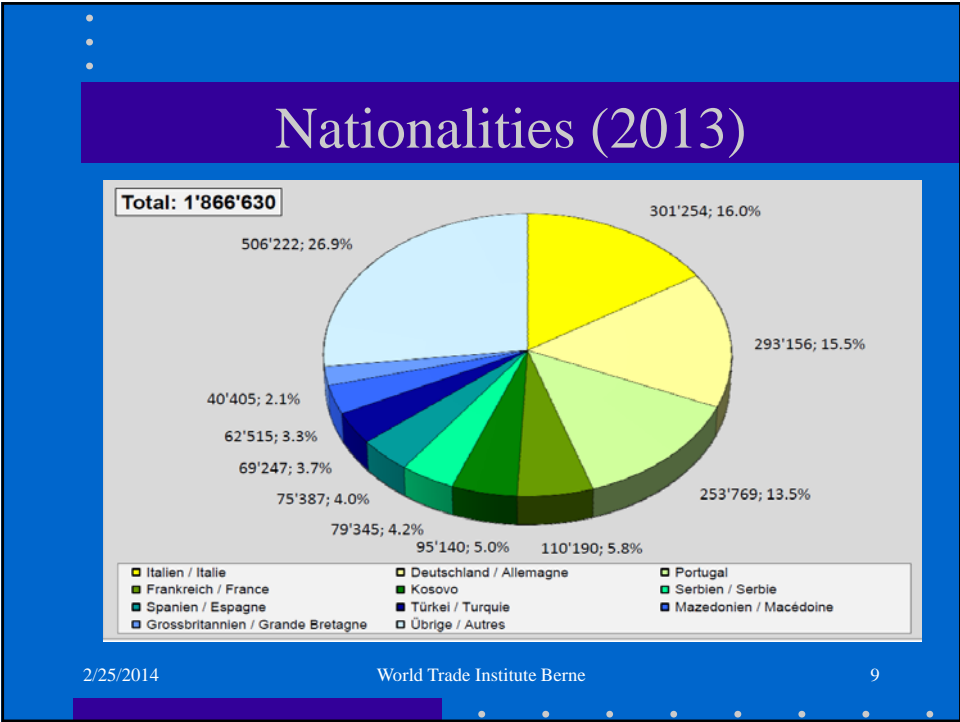
- Residents with foreign passports
- 1 886 630 (Dec 13)
- Increase: 3.4 %
 - 48% Work
 - 32% Family
 - 11% Education
- 24 % of population

NZZ Feb 21, 2014

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Anecdotal Evidence

- Contra
 - Protect relations with EU
 - Inefficiency of quotas and red tape
 - Risk of economic downturn (back to 1990s slump)
 - Loss of investment, exports, dislocation of jobs)
 - Solidarity and European integration
 - Cosmopolitanism
- Favourable
 - National conservative agenda and ideology, fear of loosing Swiss identity
 - Fighting creeping EU Membership
 - Untamed increase of foreign population, density in agglomerations
 - Social dumping and competition on job market
 - Sustainable development
 - Relations with EU manageable
 - Tactical voting

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Related Factors

- Agricultural protectionism and economically weak regions; loss of agricultural land, ecological concerns and qualitative growth
- Shortage of housing, increasing rents
- Traffic jams and congestions, alpine transit
- Anti-globalisation: aftermath of financial and debt crisis
- An economy without public leaders failing to consider public interests in business decisions
- A general sense of malaise and anxiety expressed at the polls, afraid to lose economic benefits in process of integration and globalization

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Costs of Article 121a Cst.

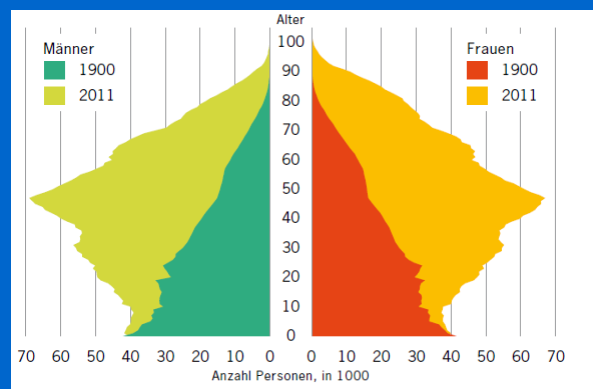
- Reputational costs on perception of Switzerland, alienation and demotivation of European inhabitants in the country
- Quota system attracts less qualified personnel
- Creates red tape and additional costs
- Does not substantially reduce numbers due to economic needs
- Switzerland will continue to depend on immigration due to demographic structure:

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Demographic Structure of Switzerland



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Potential Economic Costs

- Loss of jobs
- Legal uncertainty for businesses during next 3 years: impact on FDI and domestic investment
- Shift of jobs to EU countries
- Shift in allocation of residence permits
- Tensions among sectors competing for quotas
- Flanking measures (labour standards) undermined

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Costs for Swiss EU Relations

- Suspension of extension of FMPA to Croatia triggered suspension of negotiations on Erasmus, Horizon 2020, and on Energy
- Full implementation of Art. 121a Cst. inevitably leads to violation of treaty law, possible sanctions, suspension and cancellation of full package of 1999 treaties either by EU or Switzerland
- Art. 121a Cst. fundamentally weakens Swiss treaty making powers with EU

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Paradoxical Effects of Art. 121a Constitution



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The Way forward: An Issue of Timing

- The path of autonomy and domestic legislation
- Homework
- The path of multilevel governance and treaty negotiations
- Towards a new Package Deal

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Dilemmas and Conflicting Interests

- Maintaining vital relations with EU and faith to existing international obligations
- Maintaining welfare and sustainable development
- Maintaining Switzerland as an open economy
- Respect for foreign workers in Switzerland
- Maintaining national sovereignty and self-determination
- Respecting majority votes and the Cst.
- Preserving the balance within the country between urban and rural areas, East and West

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The Legality of Art. 121a Cst.

- A hypothetical cantonal initiative introducing quotas and privileges vis-à-vis other cantons is illegal within the federacy and null and void.
- A Swiss initiative introducing quotas and privileges vis-à-vis EU Members is conflicting with existing treaties, but not null and void. It's adoption into the Constitution does not override existing agreements in international law.

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The Legitimacy of Art. 121a Cst.

- The provision was lawfully adopted
- The provision was adopted on a very narrow margin. The interests of a very strong minority of 49.7 % need to be taken into account.
- The vote took place without any participation of all those affected (24% of inhabitants). It is of low legitimacy from the point of view of democratic deliberation and process

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The Path of Autonomy

- Domestic implementation of Art. 121a Cst. by means of legislation and ordinances
- Draft legislation subject to referendum
- Likely showdown referendum on Swiss EU treaties (Bilaterals I) due to incompatibility:
 - Adoption of legislation and suspension of treaties
 - Rejection of legislation and status quo ante
 - Obligation to implement by ordinance by 2017 ?

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The Path of Multilevel Governance

- Switzerland, by means of treaty network, is a *de facto* Member of the EU
- Article 121a Cst. can only be implemented to the extent compatible with Swiss-EU treaty law
- Negotiations should precede legislative changes and implementation of Art. 121a Cst.

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Swiss-EU Negotiations

- Switzerland should seek extension of safeguard clauses and ceilings on immigration (e.g. 30%) in the context of *ordre public* exemptions
- Switzerland will need to offer major concessions
 - Extension of FMPA on new Member States
 - Improving implementation of FMPA on the ground
 - Non-discriminatory taxation (holding companies)
 - banking secrecy (automatic information)
 - Disciplines on subsidies and competition
 - Institutional reform (surveillance authority and dynamic adoption of *acquis*)
- Likely Referendum on new Package (Bilaterals III)

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Duty to Negotiate

- Art. 121a(4) Cst. does not allow new treaties incompatible with its provisions (CH-China FTA?)
- Art. 197(9) Cst. requires negotiations and adjustment of existing treaties under Art. 121a Cst. No obligation to withdraw or cancel FMPA
- Government is obliged to negotiate. It takes two to tango for agreement and adjustment:
- No obligation to agree in accordance with Art. 197(9) Cst.

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Failing or Partial Agreement

- Failure to conclude leaves existing FMPA in place
- Art. 121a(1-3) Cst. on substance is not self-executing (5). It does not displace self-executing treaty obligations of FMPA
- The doctrine of the Supreme Court denying treaty application in case of deliberate infringement (Schubert) does not apply, due to non-self execution of substantive provisions of Art. 121a Cst.

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Homework

- A new and less defensive approach to European Integration, enhancing awareness
- Corporate Social Responsibility of Swiss businesses at home
- Accelerated naturalization of foreigners, addressing also *sans-papiers*
- Housing and zoning reforms
- Traffic and mobility (working hours, home office, school hours)
- Structurally weak regions need reinforcement and agricultural protectionism to be revised
- Labour laws and wage structures
- Reforming academic qualifications in Swiss Universities

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Conclusions

- The problem addressed is multifaceted and not limited to immigration
- Restrictions of Free Movement of Persons need negotiations prior to homework. Future restrictions will depend on concessions (trade off)
- Article 121a and 197(9) Cst. only call for negotiations with the EU and cannot secure agreed amendments to FMPA. The provision is likely to be effective for Europeans - if at all - only to the extent Swiss are ready to make substantial concessions in other policy areas
- The crisis bears the potential to increase awareness of interdependence and MLG and is likely to result in higher levels of integration of Switzerland as a de facto Member of the EU.

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Thank you for your attention!
Thomas.cottier@wti.org

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