

7. The EU's call for institutionalization of the bilateral agreements

a. General

The EU and Switzerland have concluded some 120 bilateral agreements, 20 of which are of special significance. Conflicts are, as a rule, to be settled by diplomatic means. In this country, they are understood as intergovernmental affairs, even if they involve private parties. The perspective is always «them against us» or «us against them». Most conflicts are dealt with by **Joint Committees**, i.e. through diplomatic means. Provisions in bilateral agreements may be invoked before the courts of either Contracting Party, which is before the **ECJ** and the **Swiss Federal Supreme Court**. Experience shows, however, that there are limitations. As previously noted, the Federal Supreme Court has denied direct effect of crucial provisions of the FTA in two early landmark rulings and the ECJ has shortly thereafter decided otherwise.⁶⁸⁸ In the EU, the Commission may also bring an infringement action against a Member State for violation of a bilateral agreement with Switzerland. It has done so on rare occasions upon repeated complaints from the Swiss Government.⁶⁸⁹ On the Swiss side, there is **no surveillance mechanism**.

After the second package of bilateral agreements had been sewn up, Swiss political and business circles cherished the idea that the «bilateral path», which after 1992 was a stopgap measure, had evolved into the specific **Swiss form of European integration**. One political party after the other decided to delete the long-term objective of EU membership from its program. Politicians and business leaders pointed to the fact that the Swiss people had given its blessing to bilateralism more than once. In fact, the bilateral path was confirmed by the people no less than four times.⁶⁹⁰ The EEA was largely depicted as inferior to bilateralism, in particular from the viewpoint of state sovereignty. The Swiss banks and the providers of post, railway and telecommunication services, Swiss Post, Swiss Federal Railways and Swisscom, are furthermore opposed to liber-

alizing trade in services. The same goes for the labor unions since the ECJ and the EFTA Court have handed down their rulings on the relationship between the free movement of services and collective bargaining in the EU and the EEA.⁶⁹¹ The Federal Council and the Swiss public took it for granted that the EU would be interested in concluding **further bilateral agreements** based on the same parameters, i.e. on the adoption of EU *acquis* at the time of signature, homogeneity rules on the template of the FMPA, and on diplomatic dispute resolution. Nobody thought of an EEA type surveillance and court mechanism. Talks were opened in the areas of **trade in electricity, chemical safety (REACH), food and product safety and free trade in agricultural goods**. Both the federal administration and the umbrella organization of Swiss industry, *economie-suisse*, never tired of claiming that bilateralism as such and the conclusion of bilateral agreements was in both sides' best interest. They also denied that there were any major problems with regard to dispute resolution.

The Union, however, became less and less enthusiastic about the sometimes slow taking over of new *acquis* and the diplomatic conflict management. In the respective Joint Committees, it claimed that Switzerland was violating the FMPA in several respects, that it granted export subsidies that were incompatible with the agricultural trade agreement and that certain cantonal tax regimes implied state aid in violation of the FTA.⁶⁹² In December 2008, the Council of the EU claimed that Switzerland had not fully implemented the EU *acquis* in the field of free movement of persons and that certain cantonal tax regimes were not compatible with the state aid provisions of the 1972 EU-Swiss FTA. Since the EEA judicial framework does not apply to Switzerland, the Council was «concerned with an inconsistent application of agreements concluded between the EU and Switzerland.»⁶⁹³ In September 2010, the European Parliament called on Switzerland to agree to **horizontal mechanisms** and in December 2010 the Council reiterated and accentuated its criticism pointing to the need for horizontal mechanisms.⁶⁹⁴ The Commission for its part made it clear to Switzerland that the conclusion of new bilaterals could only be envisaged if a satisfactory solution could be found for **four institutional issues**: (1) the dynamic adjustment of bilateral law to new relevant EU *acquis*, (2) a mechanism

687 Opinion of Advocate General of NILO JÄÄSKINEN of 19 April 2012, nyr.

688 Supra. E. V. 7. c.

689 <http://www.nzz.ch/nachrichten/wirtschaft/aktuell/eu_schaltet_sich_in_schweizerisch-italienischen_streit_ueber_diskriminierung_von_firmen_ein_1.9936891.html> visited 14 March 2012.

690 See, e.g., CARL BAUDENBACHER, Rechtsprechung: Rechtssicherheit als Standortfaktor, in: Katja Gentinetta/Georg Kohler (eds.), Souveränität im Härtestest. Selbstbestimmung unter neuen Vorzeichen, Zurich 2010, 247 ff.

691 See Cases C-341/05, *Laval* [2007] ECR I-11767; C-438/05 *Viking Line* [2007] ECR I-10779; C-346/06, *Rüffert* [2008] ECR I-1989; Case E-2/11 *STX Norway Offshore*, judgment of 23 January 2012, nyr.

692 See the Former EU Ambassador in Switzerland, MICHAEL REITERER, Problems Under the Current Regime? The Point of View of the EU, in: Carl Baudenbacher, ed., Switzerland – EU: Towards New Ways of Dispute Resolution?, International Dispute Resolution Vol. 4 (Stuttgart 2012) (forthcoming).

693 <<http://register.consilium.europa.eu/pdf/en/08/st16/st16651-re01.en08.pdf>> visited 12 March 2012, paragraphs 27 ff., 29.

694 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118458.pdf> visited 13 March 2012.

ensuring uniform interpretation of bilateral law, (3) a mechanism for monitoring compliance with the bilateral treaties, and (4) a judicial mechanism.

b. *Conceptual remarks*

From a legal point of view, there is a clash of two concepts of Switzerland's integration in Europe. The Swiss government, time and again, has put forward the view that Switzerland and the EU are two sovereign players which meet «on eye level». Their contractual relations are, like all international agreements concluded by Switzerland, governed by **public international law**. The EU, on the other side, sees Switzerland as a participant in its internal market. Since its operators enjoy the advantages of participation in this market, the country must abide by its rules. From the perspective of the EU this means that there must be a **level playing field** for individuals and economic operators in Switzerland and in the EU. When it comes to the adoption of new EU *acquis*, the taking over of the new ECJ case law, surveillance and judicial review, the same conditions must apply. What counts, is no more a formalistic legal approach which operates with the concepts of classical international law, but a **functional view**.⁶⁹⁵ This is understandable. A third country which now and then negotiates a bilateral agreement with the EU is acting in the framework of public international law. If, however, that country declares the bilateral path to constitute its integration (or business) model and concludes bilateral agreements in a great number, it must accept that with regard to legislation, interpretation and enforcement, it is subject to the same rules as the 27 EU (and the 3 EEA) Member States.⁶⁹⁶ This is nothing else than a case of application of the dialectic principle of **transition from quality to quantity**.⁶⁹⁷

As far as **methods of interpretation** are concerned, this new approach of the European Union has become practical in the course of the conflict over certain cantonal tax regimes. Article 23(1)(iii) FTA declares incompatible with the proper functioning of the agreement in so far it may affect trade between the EU and Switzerland «any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods». The Union claims an interpretation of this provision not in accordance with the rules of the Vienna Convention on the Law of Treaties, but in accordance with

the contemporary understanding of the parallel state aid provision in EU law.⁶⁹⁸ It thereby refers to a unilateral declaration made at the time of signature of the FTA where the Commission stated that it would assess practices running contrary to Article 23 based on the criteria which follow from the application of the parallel Articles of the EEC Treaty (now TFEU). Switzerland failed to react to this statement.⁶⁹⁹ Since there is no court that can decide on the matter, the said tax conflict must be solved by diplomatic tools.

Economically speaking, the sectoral agreements create a **bilateral monopoly**. It follows from the nature of a bilateral monopoly that disputes can be resolved in three ways: By a court, by an arbitration tribunal, or by negotiations. Under the bilateral agreements, there is neither a court nor an arbitration tribunal. Negotiations will only resolve the dispute if both parties have the possibility to resort to safeguard measures. That means that the resolution of the conflict is ultimately brought off by **militant action**. In this respect, there are clear parallels to collective bargaining where disputes over wages and other working conditions are resolved by the possibility to take industrial action or by such action itself. Under the **FMPA**, there is no mechanism which would force the Swiss authorities to hold out their hand and to agree to a solution. Under **Article 27 FTA**, the EU could open dispute settlement proceedings which could culminate in the taking of safeguard measures.⁷⁰⁰ In the framework of the conflict over the cantonal tax regimes, the Union has, however, refrained from pursuing this path. All it did was to express concern about the said tax issues and to regret «the lengthy dialogue on this issue [which] has not yet led to an abolition of the state aid aspects of these regimes.»⁷⁰¹ This means that in reality, there is no mechanism which ultimately guarantees the resolution of a dispute. Disputes will then go on for years, and this is exactly what is currently happening between the EU and Switzerland. It is noteworthy in this context that the Secretary of State in the Federal Department of Economic Affairs stated on 28 December 2012 that the establishment of a dispute resolution mechanism might also be in Switzerland's interest.⁷⁰²

695 With regard to the importance of functional interpretation in economic law see supra, Section I.

696 See the Head of the Swiss Desk in the European Commission's European External Action Service GIANLUCA GRIPPA, *Judicialisation of the Relationship Switzerland-EU? Options from the Perspective of the European Union*, in: Carl Baudenbacher (ed.), *Switzerland – EU: Towards New Ways of Dispute Resolution?*, International Dispute Resolution Vol. 4 (Stuttgart 2012) (forthcoming).

697 See CARL BAUDENBACHER, «Helvetische Lösung» mit der EU kaum möglich, *NZZ international* edition of 4 January 2012; with regard to the principle in general GEORG WILHELM FRIEDRICH HEGEL, *Vorlesungen, Ausgewählte Nachschriften und Manuskripte* 7, Hamburg 1989, 170 (in the chapter Greek philosophy, 1st part).

698 See Commission Decision of 13 February 2007 on the incompatibility of certain Swiss company tax regimes with the Agreement between the European Economic Community and the Swiss Confederation, C (2007) 411 final. See also the judgments of the EFTA Court of 10 May 2011 in Joined cases E-4/67–10 *The Principality of Liechtenstein, REASSUR Aktiengesellschaft and Swisscom RE Aktiengesellschaft v ESA* [2011] EFTA Court Report, 16, and of 30 March 2012 in Joined Cases E-17/10 & E-6/11 *The Principality of Liechtenstein and VTM Fundmanagement v ESA*, nyr.

699 BBl 1972 II 965.

700 See supra, E. V. 7. b.

701 Council Conclusions of December 2010, paragraph 44, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118458.pdf> visited 13 March 2012; also MARESCAU, (fn 677), 732. But see infra, H. II. 1.

702 <http://www.nzz.ch/nachrichten/politik/schweiz/wenn_die_eu_ihre_dogmatische_sicht_aendert_geht_es_1.13916532.html> visited 15 March 2012.

Switzerland's economic success coupled with its unwillingness to integrate politically has furthermore contributed to EU representatives complaining about alleged cherry picking. The 2010 Report «Internal Market beyond the EU: EEA and Switzerland» of the European Parliament's Committee on Internal Market and Consumer Protection states in that regard:

«Some interviewees from the EU side indicated that for Switzerland the sectoral bilateral approach is a business-model. The approach taken is often not very appreciated by the European Commission. In some views, Switzerland is aiming at grasping all the benefits of the Internal Market while being shy of taking on board other policies that complete the market as for instance EU company law, state aid and competition policy.»⁷⁰³

c. *Putting wood behind the arrow*

In the course of the years 2010/2011, Switzerland indicated *volens volens* that it would be prepared to speak about an institutionalization of the bilateral agreements. There are good reasons for assuming that such a development would also be in the interest of those whose access to the EU single market the bilateral agreements are guaranteeing. The protagonists of a market are **entrepreneurs, workers, traders, consumers and investors**. It is strange that they can hardly defend their rights flowing from the bilateral agreements in court. Adherence to the traditional concept of state sovereignty with diplomatic protection in cases of conflict is out of date in 21st century Europe. For citizens and economic operators to beg for diplomatic help has something paternalistic about it, a whiff of *ancien régime*. Actually, a country with such a proud democratic tradition like Switzerland should realize that judicialization is in the interest of individuals and businesses. It is an expression of **people's sovereignty**, for the benefit of which state sovereignty should step back.

On 8 February 2011, Foreign Minister *Micheline Calmy-Rey* met Commission President *José Manuel Durão Barroso* in Brussels.⁷⁰⁴ Whereas the Swiss side claimed that there had been agreement that the negotiations on the institutionalization of bilateralism and on new bilateral agreements should be conducted in parallel, the Commission stated that the institutional questions had to be resolved first. Be that as it may, the year 2011 was lost because the EU accepted that putting pressure on Switzerland could play into the hands of the anti-Europeans in the federal election of October. In fact the Swiss People's Party was the looser of the election.⁷⁰⁵ But those who had hoped that the Fed-

eral Council would move after the election were disappointed. Towards the end of 2011, the Swiss government came up with an idea which was referred to as a «roadmap»: The agreement on trade in electricity that was almost completed with regard to substance should serve as a **pilot project** where new the mechanisms could be tested. Whether this approach is acceptable to the EU from the perspective of the smooth functioning of the European single market remains to be seen.

With regard to a possible surveillance and court mechanism, the Federal Council's Europe Report of September 2010 discussed **three options**: (1) The docking to the EEA/EFTA institutions EFTA Surveillance Authority and EFTA Court; (2) the establishment of a bilateral court Switzerland-EU; (3) the establishment of a bilateral arbitration tribunal Switzerland-EU.⁷⁰⁶ The two latter ideas will hardly materialize. The ECJ has made it clear in Opinion 1/91 that it is not prepared to accept a court applying law which is identical in substance to EU law and making decisions which would be binding on it.⁷⁰⁷ Moreover, Article 111(4) EEA states that no question of interpretation of the provisions of this Agreement that are identical in substance to corresponding rules of EU law may be dealt with in arbitration proceedings. A similar rule has been inserted into the «24 hours» agreement.⁷⁰⁸ University of Zurich International Law Professor **DANIEL THÜRER** who had been commissioned by the Federal Council to write an opinion realized that the creation of a bilateral judicial or arbitration mechanism would be impossible.⁷⁰⁹ He presented **three models**: (1) The docking to the EEA/EFTA institutions EFTA Surveillance Authority and EFTA Court, (2) the creation of a Swiss implementation body and a chamber at the Federal Supreme Court, and (3) the creation of a Swiss implementation body and of a judicial forum above the Federal Supreme Court. All three proposals were referred to as «two-pillar» models.

On 26 April 2012, the Federal Council announced that it planned to propose a **«two pillar»** solution to the European Union with a Swiss pillar and an EU pillar. In the Swiss pillar, an «independent» surveillance authority consisting of Swiss citizens would be elected by the Swiss Parliament and the judicial function would be exercised by the Federal Supreme Court. There are in particular two arguments which speak against such a model. Firstly, no country which participates in the European single market can monitor itself with regard to sur-

703 <<http://www.europarl.europa.eu/document/activities/cont/201003/20100315ATT70636/20100315ATT70636EN.pdf>> visited 13 March 2012, 32. The Swiss contributor to the report was University of Basel European Law Professor **CHRISTA TOBLER**.

704 <http://ec.europa.eu/delegations/switzerland/press_corner/all_news/news/2011/20110208_de.htm> visited 14 March 2012.

705 See <<http://www.wahlen.ch/new/index.php?sid=4bfb94e5fe5d08f8c23c521706ca8c17&item=/>

> and <<http://www.wahlen.ch/new/index.php?sid=4bfb94e5fe5d08f8c23c521706ca8c17&item=/staenderatswahlen/2011>> visited 2 April 2012.

706 Bericht des Bundesrates über die Evaluation der schweizerischen Europapolitik vom 17. September 2010, 71 <<http://www.ssn.ethz.ch/var/ssn/storage/original/application/a976a1db23cdce44a60778c8d16ab5b6.pdf>> visited 4 January 2012.

707 [1991] ECR I-6079.

708 See supra, E. V. 5. d.

709 The Federal Council refused to publish the **THÜRER** opinion, but it was leaked to the press and has been posted on the world wide web; <<http://www.weltwoche.ch/fileadmin/doc/ausgaben/11/51/Gutachten-Prof-Dr-D-Thuerer.pdf>> visited 20 April 2012.

veillance and judicial review. That the German Supreme Court would decide on an action brought by a German surveillance body concerning the compatibility of the German beer purity law with the EU rules on free movement of goods would be unthinkable for any EU and EEA-European.⁷¹⁰ It would be equally impossible that the Norwegian Supreme Court would adjudicate on a case brought by a Norwegian instance concerning the compatibility of the Norwegian ownership restrictions in waterfalls with the EEA free movement of capital rules.⁷¹¹ This is not just a question of whether the members of a national authority and of a national court would be truly independent. Even the appearance of dependence must be avoided. The argument that with the European Commission and the ECJ, the EU too is monitoring itself, is not convincing. The ECJ is the common court of 27 states composed of judges from those 27 states and therefore has an **outstanding position**.⁷¹² This position has been recognized by Switzerland when accepting the homogeneity provisions of the Lugano Convention, the FMPA and the ATA. The same goes, *mutatis mutandis*, for the EFTA Court.

Secondly, the Federal Council's proposal would not lead to a two pillar, but to a **three pillar structure** in the European single market with three authorities responsible for the initiation of proceedings for breach of law which would be identical in substance and three courts which would interpret the identical provisions. It must be concluded from the second EEA opinion of the ECJ of 1992⁷¹³ that the EU has, by accepting the EEA with the EFTA Surveillance Authority and the EFTA Court, gone to the limit of what is feasible from a homogeneity perspective. That the Union would agree to the creation of a third pillar for a single state is unlikely, not least in view of the legal situation of its 27 Member States and the 3 EEA/EFTA countries.

In accordance with a statement of the **Federal Supreme Court**, the Federal Council also expresses the hope that the relations between that court and the ECJ would be intensified by the establishment of an informal exchange mechanism, and this on a reciprocity basis. As stated in Opinion 1/91,⁷¹⁴ the ECJ is basically prepared to give preliminary rulings to non-Member States' country courts, but only if they are binding. Otherwise, the ECJ fears that the binding character of its rulings vis-à-vis the EU Member State courts could be weakened. That the ECJ would ask the Swiss Supreme Court for its opinion if the latter has decided a novel legal question appears to be excluded. On balance, there seem to be two options for Switzerland: Either to «dock» to the ECJ by accepting the latter's jurisdiction to render binding preliminary rulings upon re-

quest by Swiss courts, but without a Swiss judge participating. The ECJ would then be a **foreign court in optima forma**. Or to dock to the **EFTA Court** with the possibility to have an own national as a judge there. It is clear that in such a case, some rather tricky problems would have to be overcome because the new EFTA Court would have to apply two different sets of rules.

Admittedly, docking to the EFTA Court (and consequently to the EFTA Surveillance Authority) would be neither fish nor fowl. If that does not work, the only possibility of securing Swiss industry access to the EU internal market, is, in view of the unattainability of EU membership, that Switzerland makes a second attempt to **join the EEA**, possibly with some modifications and amendments. If EEA membership should get on the Government's radar, one would have to look to the future. That means that the following options would have to be examined: It would be worthwhile to strive for the integration of the **Schengen** and **Dublin** association as well as of the **Lugano** regime into the EEA. Another area where it could be advantageous to give jurisdiction to the EFTA Court is **patent law**.

710 See Case 178/84 *Commission v Germany* [1987] ECR 1227.

711 See Case E-2/06 *EFTA Surveillance Authority v Norway* [2007] EFTA Court Report, 164.

712 See CHRISTIAN KOHLER, *Dialog der Gerichte im europäischen Justizraum* (fn 575), 150 ff.

713 [1992] ECR I-2821.

714 1991 ECR I-6079.