

Swiss Model of European Integration

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A. Economic Integration and Political Abstention

Switzerland ranks among the economically most integrated countries in Europe. Open to globalization for decades, her goods and services industries export more than two thirds of their output to the European Union (EU) and the European Economic Area while four fifths of her imports originate in the EU. In absolute terms, Switzerland is the fourth largest trading partner of the Union, after the United States, China and Russia.¹ Swiss direct investment in the EU amounts to 50 per cent of total investment, and to 5.68 per cent of total foreign investment in the Union.² Switzerland, located at the heart of Europe, hosts a large number of multinational companies and their headquarters within a fabric of mainly small and medium sized enterprises, which provide the bulk of jobs in the country. While the focus on Europe has been strong in the past, Switzerland has also had a global outlook and its export industries operate in North America (10.1 per cent export shares)³ and other continents, with emerging countries playing an increasingly prominent role.

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¹ For more details see the homepage of the State Secretariat for Economic Affairs: <<http://www.seco.admin.ch/themen/00513/00538/index.html?lang=en>> (last access on 24.4.2013).

² OECD iLibrary: <http://stats.oecd.org/BrandedView.aspx?oeid_bv_id=idi-data-en&doi=dat a-00337-en> (last access on 24.4.2013).

³ Credit Suisse Economic Research, Swiss Issues Branchen, Exportindustrie Schweiz, 2011, 10.

The country enjoys a low level of unemployment (3.2 per cent in March 2013)⁴ and faces pressures of immigration. More than 20 per cent of residents are foreign passport holders. The country has seen increasing immigration in the wake of the financial and debt crisis. The population is bound to reach 8 million shortly. The country is considered to rank number one in terms of international competitiveness according to the World Economic Forum. The same holds true for innovation of its industries and research institutions, according to the Global Competitiveness Report 2012-2013. Albeit these rankings are not categorical, they are indicators of a successful framework for prosperity. In addition, the country hosts one of the most important financial centres next to New York, Frankfurt and the City of London. Swiss banks account for approximately 2.6 per cent of total global wealth management.⁵ Gross domestic product (GDP) per capita amounts to 659.3 billion US dollars,⁶ ranking the country 19th in terms of GDP.⁷

Strong economic ties to the European economy and a place at the geographical heart of Europe contrast with the fact of institutional abstention from the process of political integration of Europe. Switzerland is neither a member of the EU, nor the European Economic Area Agreement (EEA). It belongs to what may be called the fourth level of integration, partly participating in the internal market today by means of a series of bilateral agreements.

Switzerland was a member of the Organisation for European Economic Co-operation (OEEC) (today the Organisation for Economic Co-operation and Development (OECD)) from the outset in 1948, benefitting from the Marshall Plan. Together with Britain, she was a founding member of the European Free Trade Association (EFTA) in 1961, and one of its remaining members, the others being Norway, Iceland and Liechtenstein, all of them members of the EEA. She joined the European Council in 1963 and the European Convention on Human Rights in 1974. Other than that, she was a latecomer to multilateral institutions, and remains so. Hostile to the multilateral project of the Havana Charter on an international trade organization, Switzerland only joined the General Agreement on Tariffs and Trade (GATT) in 1966. She joined the World Bank and the International Monetary Fund (IMF) in 1991 and the United Nations (on a vote decided by a narrow margin) as a full member in 2002 after a first attempt had failed in 1986. Yet, abstention has not meant absence. Switzerland was present earlier as a major lender and donor to the World Bank, a member of G-10 and to many special organs of the United Nations. Today, Switzerland is multilaterally well anchored on the global level, much more so than in multilateral European institutions. She has played an active role in the United Nations, the Bretton Woods Institutions and the World Trade Organization (WTO). Switzerland's diplomacy keeps up the traditions of offering good services. It represents US interests and Iran, and was recently instrumental in conciliating the relationship of Russia and Georgia in the run-up to the Russian accession to the WTO. Her situation in Europe, however,

⁴ For further details see: <<http://www.tradingeconomics.com/switzerland/unemployment-rate>> (last access on 24.4.2013).

⁵ SwissBanking, *The Economic Significance of the Swiss Financial Centre*, 2012, 3.

⁶ World Development Indicators database, World Bank, <<http://data.worldbank.org/country/switzerland>> (last access on 24.4.2013).

⁷ World Development Indicators database, World Bank, <<http://databank.worldbank.org/databank/download/GDP.pdf>> (last access on 24.4.2013).

explains why the country is not a formal member of the G-20, but was invited only as a guest in 2013.

Overall, Swiss foreign policy is rather reactive. Many still think that the best foreign policy for a neutral country is no policy at all, except for economic relations. The same holds true for European integration. Yet, institutional abstention does not mean that the country is not supportive of the European project of securing peace and prosperity. In her own way, Switzerland contributes to it as an economy and with generous donor programmes, funding and the building of transit routes. Nonetheless, the country has consistently been absent, sitting on the fence, when the agenda of European integration is defined. The Swiss model of European integration is a passive model of adjustment to developments defined elsewhere. An outgoing export industry is accompanied by a static but stable framework. This has served the country well so far in economic terms, and is generally supported by industry associations and the public at large in the country.

B. Free Trade and Agricultural Protection versus Integration

Swiss trade policy and foreign external relations in the post war period were shaped as a commitment to free trade for its export oriented industries, benefiting from post war reconstruction on the continent and in the United Kingdom. At the same time, the wartime period left a lasting mark on agricultural policies. The experience of famine and shortages during World War I and the interwar period enhanced levels of state intervention in the face of an upcoming war in Europe. The agricultural regime, largely based upon executive powers, was transformed and corroborated into law in 1951. Ever since then, it has elaborated highly protectionist agricultural policies felt necessary to protect coherence and the fabric of the country. This explains the country's late accession to the GATT and the extensive exemptions under the Swiss Protocol of Accession of 1966 which, until the entry into force of the WTO, prevented the country from undertaking effective structural reform in the primary sector. As of today, and with results of the Doha Round impending, levels of agricultural protection in Switzerland are roughly double the level under the Common Agricultural Policy. Rural areas are strongly represented in Parliament and reform is unlikely to take place without external pressure either from Europe or globally. Switzerland is part of the G-10 in the WTO, next to Japan, Korea, Norway and Israel – the most protectionist countries in agriculture.

Swiss trade policy has therefore been shaped by conflicting strands: industrial free trade agricultural protection and mercantilist traits in attracting foreign companies and headquarters. These strands essentially explain the course of post war history in Swiss foreign economic policy. It is characterized by bilateral agreements with the Union, and a policy of unilateral alignment to EU law outside these agreements, wherever feasible.

I. Treaty Making

In the early 1950s, Switzerland joined Britain's effort to create a large trans-European free trade area within the then OEEC.⁸

The project was a reaction to the emerging ideas of European Integration between France and Germany, based upon the precepts of the Coal and Steel Community of 1951 and its institutions. France and Germany, and with them Italy and the Benelux countries, opted for integration with the Rome Treaties in 1956, with both Britain and Switzerland abstaining from negotiations. In reaction, they formed the European Free Trade Association (EFTA) in 1960, organizing the rest of Western Europe into a free trade zone limited to industrial goods and transformed products, but excluding trade in primary goods. In the following decade, EFTA emerged as an important platform for negotiations with the EEC after efforts on the part of Switzerland to enter an association with the Community were vetoed by France and de Gaulle, and likely domestic opposition for the reasons discussed below.

The prospects of entry of the United Kingdom, Denmark and Ireland into the EEC triggered the moment for the remaining EFTA countries (Austria, Sweden, Norway, Iceland, and subsequently also Finland and Portugal) to multilaterally negotiate bilateral free trade agreements with the EU. These agreements, very much due to UK support bridging old and new ties, entered into force in 1972. In due course, trade with the EEC substantially increased on the basis of this framework agreement, while trade relations among the remaining EFTA members did not increase in comparable terms. This is particularly true for Switzerland. She mainly trades with her neighbours. Switzerland's largest trading partner in absolute terms has been the land of Baden Württemberg, adjacent to the north of the Swiss German speaking part of the country.

The 1972 Free Trade Agreement has remained the cornerstone of Swiss-EU relations. It provided the basis for more than 130 additional instruments. Switzerland – unlike the Nordic countries – continuously updated its relations with the EEC, seeking market access and avoiding potential discrimination. The Bonn *Bundesrepublik* was a strong ally and during that period inherently protected Swiss interests along the river Rhine, together with other free traders in the EEC of the Twelve.

The Single European Act in 1986 and the subsequent internal market agenda raised concerns among other EFTA members that they would be left out from an increasing pace of integration, moving towards the Union and the Treaty of Maastricht. The constellation triggered the offer of the EEC to negotiate the EEA agreement. Switzerland was an active and leading participant in these negotiations between 1989 and 1992, with a particular focus on institutional matters. The institutional design of the EEA with the EFTA pillar of surveillance and the EFTA Court was largely due to Swiss efforts in seeking an acceptable format for substantial alignment to the emerging *acquis communautaire*. From the outset,

⁸ For a history of Switzerland's relation to European integration see *Dieter Freiburghaus, Königsweg oder Sackgasse: Sechzig Jahre schweizerische Europapolitik*, 2009; *Clive H. Church*, Thoughts on "Switzerland in Europe", as seen from foggy northern islands in: Thomas Cottier/Rachel Liechti (eds.), *Die Schweiz und Europa. Wirtschaftliche Integration und institutionelle Abstinenz*. 2009, 163-182 with further references.

the EEA was designed as a transitory arrangement, keeping EFTA members outside until the agenda of internal deepening of membership was achieved. Austria, Sweden and Finland joined the EEA in 1992 under these premises, preparing for accession in 1995. Switzerland, on the other hand, failed to approve the treaty in a referendum on 6 December 1992. Efforts in Norway to join the new Union have failed twice, and the country together with Iceland and Liechtenstein has ever since constituted the membership of the EEA.

Switzerland, upon the referendum in 1992, was bound to continue on its well established path of bilateral arrangements with the Union. The government adopted a policy of declaring membership a long-term goal. In the meantime it sought additional bilateral sectoral agreements, and the Union, with strong support from Germany, was willing to enter negotiations provided that the package would entail the free movement of persons. A first set of agreements was concluded in 1999, which have come to be known as the Bilaterals I. The package entails a total of seven agreements in the following fields: free movement of persons, technical barriers to trade, public procurement markets, agriculture, research, civil aviation and overland transport.

A renewed effort followed and was concluded in 2004 entailing agreements beyond the field of trade policy and commercial relations. The emerging European Area of Freedom, Security and Justice (AFSJ) brought about alignments to the Schengen/Dublin system in particular. This series, called Bilaterals II, which was no longer defined as a package deal, comprised the following agreements: Schengen/Dublin, taxation of savings, processed agricultural products, media, environment, fight against fraud, pensions, education, vocational training and youth.

Since 2004, negotiations have been limited to revisions and the adoption of secondary legislation of the *acquis communautaire*. A number of projects in the pipeline have remained unconcluded. This in particular relates to an impending agreement on energy and trade in electricity, a free trade agreement on agriculture, an agreement on cooperation in competition law and policy, and a number of technical agreements.⁹ Negotiations are held up due to the EU's prerequisite that the institutional structure of cooperation be overhauled. The Commission and the Council have made it clear on several occasions that the EU is no longer willing to continue the path of economic integration in the absence of an appropriate institutional framework.

The current array of bilateral agreements entails a total of 19 major agreements and a host of additional instruments. These reflect different generations of agreements, gradually moving from a philosophy of free trade and equivalence to agreements on fuller integration into Europe. Levels of integration vary, and the courts of Switzerland and of the Union have partially aligned them to full internal market rules, and partially kept them apart – not reaching full integration but remaining instruments of free trade only. While the FTA 1972 has largely remained an agreement based on equivalence, the agreements in Bilaterals I and II are largely characterized by the adoption and implementation of secondary legislation

⁹ Swiss enlargement contribution, satellite navigation, emissions trading, peacekeeping operations, Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) and tax issues.

which was shaped to serve the purpose of fuller internal market integration. The Agreement on civil aviation amounts to the most highly integrated agreement, anchoring full jurisdiction of the Courts of the European Union in bilateral relations. The Agreement on the Free Movement of Persons, which also covers establishment for natural persons and freedom of temporal services, aligns Switzerland to important acts of secondary law. In both agreements, Swiss courts are bound to take into account the case law of the courts of the EU. Technically, this obligation is limited up to the time of entry into force of these agreements. In practice, however, Swiss courts have largely aligned their jurisprudence to the evolving case law.

While the level of integration varies between the different agreements, they all follow the same institutional structure. This structure is limited to joint Committees and the absence of judicial dispute resolution (with the exception of one agreement). The agreements essentially follow the structure adopted for the 1972 Free Trade Agreement, and the architecture has not evolved further. The structure of these agreements epitomizes the philosophy of economic integration and institutional abstention.

II. The Policy of Unilateral Alignment to EU Law

The policy of unilateral alignment of Swiss legislation to EU law emerged in the context of the Single Market Programme upon the adoption of the Single European Act in 1986. Fearing a loss of competitiveness, the government announced in 1988 a policy called Euro-Compatibility. The policy instructed ministries to prepare legislation in line with EU law whenever feasible. At the outset, the policy was limited to matters of international trade, but eventually developed into a general doctrine, as trade and internal implications can no longer be readily distinguished. Upon the failure of the EEA Agreement in 1992, the Government successfully embarked on adopting legislation prepared for the EEA, now newly termed Swiss Lex. In the period following 1992, important Acts were passed which strongly reinforced competition law, technical barriers to trade, which had earlier been abundant and had segregated the Swiss market, were removed, and disciplines on the Swiss internal market and the introduction of a modern VAT system were enhanced. The momentum of that period, responding to the fear of being left outside, was thus used to further align Switzerland to EU law while refuting the EEA and its multilateral institutions.

There are no official data on the level and degree of unilateral alignment. Politicians, for electoral reasons, tend to downplay its importance. Research has shown that approximately 50 per cent of Federal legislation (not taking into account the level of Cantons) falls within the ambit of EU law. In some 15 per cent of the total legislation, EU law is followed and adopted fully. Some 30 per cent of the 50 per cent affected are influenced by it, and in another 10 per cent the main goals were followed, while in some 30 per cent, the goals of EU law are partly considered.¹⁰ Research also shows that Swiss legislation is often prepared on the

¹⁰ *Emilie Kohler*, *Influences du droit européen sur la législation suisse : analyse des années 2004 à 2007*, Jusletter 31. August 2009.

basis of EU law, but undergoes substantial changes in domestic legislative processes and outcomes. What results is often a set of rules inspired by, but not fully compatible with, EU law. Also, the process seeks to learn from past experience and come up with simpler and more manageable solutions than adopted within the EU. What results, in other words, is a rather complex European law *sui generis* in Switzerland.¹¹

Overall, it is fair to say that the influence of European law is substantial and exceeds by far the influence of foreign laws formerly exerted by means of inspiration on the basis of legal comparison. Swiss law has not evolved in isolation. Its Constitution of 1848 was influenced by the US Constitution of 1776, and the evolution of fundamental rights protection in the post war period was strongly influenced by US and German law; civil and commercial law was largely built in the triangle of German, French and Italian law. Yet, unlike in comparative law, EU law is adopted as a policy of Government and Parliament. Moreover, the choice is normally reduced to the approach which prevailed in EU negotiations of which Switzerland has not been part.

The policy of Euro-Compatibility, however, has not touched what a majority in Switzerland considers important niches. These areas are essentially the mercantilist policies of direct taxation and tax privileges for holding companies, the protection of banking secrecy, and the refusal to introduce liberalization of trade in electricity, or to grant permission for parallel trade in pharmaceuticals under patent protection. It essentially entails those areas currently under dispute with the EU and with Member States, in particular Germany and France. Niche policies tend to create tensions whenever they seek to gain a particular advantage to the detriment of other European countries.

C. Explaining the Roots of Bilateralism

A number of reasons explain the Swiss model for European integration. They are rooted in history, the political institutions, politics and economic interests.¹²

I. Historical Reasons

Switzerland is located at the heart of Europe and at the crossroads of German, French and Italian culture. Ever since its expansionist policies in Europe were given up following the defeat of Marignano in 1515, the country has sought to stay away from European quarrels and wars. The doctrine of neutrality emerged, supporting the export of able and feared mercenaries and other business to European kingdoms. Following the religious wars, the sovereignty and neutrality of

¹¹ Thomas Cottier/Rachel Liechti, *Zwischen Skylla und Charybdis: Die Rezeption des europäischen Wirtschaftsrechts in der Schweiz*, *EuZW* 2012, 849-853.

¹² On Switzerland and her political system see generally *Wolf Linder*, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Society*, 3rd rev. ed., 2010; *Clive H. Church*, *The Politics and Government of Switzerland*, 2004; *Johnathan Steinberg*, *Why Switzerland?*, 2nd ed. 2003; for a comparative analysis of federalism including Switzerland see *Jürgen Rose/Johannes C. Traut* (eds.), *Federalism and Decentralisation*, 2002.

Switzerland were eventually recognized to be of mutual interest and were formally confirmed after the Napoleonic wars, in Vienna in 1815. Foreign policy, to the extent it existed, served the purpose of preserving a fragile domestic consensus in what emerged as the first pluri-lingual federalist democracy on the continent, based upon a liberal constitution established in 1848. Switzerland, at the time, was a pioneer and largely isolated in political terms within the European Concert. External economic relations were based upon the European bilateral treaty system entailing the most-favoured nation (MFN) principle in the nineteenth century. World War I reinforced the essential need for neutrality and abstention. The League of Nations, of which Switzerland became a member, implied important changes to the traditional perceptions of neutrality. The failure of the system and the advent of fascism, however, brought about disillusion regarding multilateralism and a return to traditional perceptions which prevailed until the 1990s. Armed neutrality assisted in keeping the country out of World War II, but left it quite isolated in the post war period. Switzerland was barred at the outset from joining the United Nations as a neutral, and the Allies considered her to have substantially contributed to the German war effort. This experience largely influenced the mindset of post war attitudes in the country. They reinforced the ideals of independence, democracy, the rule of law, federalism and neutrality, and of freeing trade combined with agricultural protectionism. These principles readily proved to impede fuller integration into the EEC. Peace between France and Germany was not considered a matter to be actively supported. The Swiss were brought up to stay out of European politics.

Early efforts at association with the new EEC faced the challenge of these principles and traditions internally, and the majority was not unhappy when President de Gaulle of France vetoed the effort in 1961.¹³ The very same challenges emerged during the debate over the EEA Agreement which was essentially defeated on a ticket stressing tradition, independence, direct democracy and federalism. The European movement, while strongly rooted in Swiss history and democracy, and working in Switzerland particularly in the interwar period and during the war, never attained popular support. It has remained a matter of idealism too far distant from the realities of Swiss economic and political interests. Accordingly, an initiative to join the EU, which had been launched in 1996, failed miserably in 2001.¹⁴ There was no economic pressure or need to change course, albeit the country suffered from temporarily low growth rates during the 1990s. Yet, in general, taking into account overall developments since 1945, the country largely benefitted from post war recovery and the ensuing periods of global growth. Switzerland turned from a poor country into one of the most prosperous in Europe. All these factors largely explain the fact of political abstention in the process of European integration.

Interestingly, the turn towards multilateralism, as indicated above, occurred on the global scale rather than the European one. The political institutions mainly

¹³ See *Dieter Freiburghaus*, *Königsweg oder Sackgasse: Sechzig Jahre schweizerische Europapolitik*, 2009, 98-108.

¹⁴ For details and results see: <<http://www.admin.ch/ch/d/pore/vi/vis254.html>> (last access on 23.4.2013).

explain why the country was late in joining the multilateral post war order and why it refrained from joining the EU and the EEA Agreement.

II. The Impact of Direct Democracy and Federalism

Late participation in multilateral institutions and the abstention in European integration are largely due to the Swiss institutions of direct democracy and federalism.

The Swiss model of European integration essentially follows from the constitutional organization of the country and of its political power. Under the Federal Constitution, Membership to a supranational organization, in particular the EU or North Atlantic Treaty Organization (NATO), is subject to a double majority of the popular votes and of the 26 Cantons. The matter is dealt with like a change of the Constitution. These changes are extremely difficult to achieve for European integration. The majority of Swiss Cantons are rural and small. They predominantly vote conservative. The urban centres are able to muster a small majority of the popular vote, but unable to override the Cantons. The EEA agreement thus was refuted in 1992 by a marginal 50.3 per cent, but by a large majority of 16 of 23 Cantons,¹⁵ and accession to the United Nations succeeded due to the swing vote of a single Canton.¹⁶ Accession to the EU is therefore extremely difficult to achieve, a situation that is substantially different from that in most countries where the decision is left to the Parliament.

Bilateral trade agreements, on the other hand, are subject to single majorities. They parallel legislation. They are approved by Parliament and subject to referendum only if 50 000 signatures are collected within 3 months.

Swiss democracy essentially works bottom up and incrementally. It is able to deal with specific issues, but is not suitable to deal with large scale political projects, the implications of which are difficult to anticipate. There is no grand design, no binding government programme, and there is no long term thinking under the premises of Swiss democracy. This is not necessarily bad. The country is well managed, and able to take on larger projects, such as restructuring energy supplies in a sequence of steps. But it fails to anticipate long-term developments in foreign affairs and to bring them to the table. The political culture experiences difficulties in dealing with major changes and prefers to take up matters step by step. Bilateral agreements are well suited to this approach. They are limited in scope, and more suitable to be dealt with in the political process than comprehensive agreements with a multitude of facets. Referenda have so far been mainly related to the free movement of persons, and Switzerland has been the only country where this has been put to a vote several times. On average, a majority of 55 per cent approved the treaty and its extension. It is unclear whether this will be the case in the future. A potential referendum strongly influenced the government in handling the agreement in respect to safeguard measures.

The right to popular referenda essentially defines power relations in the country. Parties and powers capable of triggering, funding, debating and potentially

¹⁵ For details see: <<http://www.admin.ch/ch/d/pore/va/19921206>> (last access on 23.4.2013).

¹⁶ For details see: <<http://www.admin.ch/ch/d/pore/va/20020303/index.html>> (last access on 23.4.2013).

winning a referendum need to be embedded in the Government. Since 1959, the Federal Council has been composed of a rainbow coalition with liberal, Christian, social-democratic and national-conservative members, all having different views, in particular on European integration. The constellation explains why the Government is unable to forcefully lead the agenda on European integration. Repeatedly, it has stated that the prerequisite for accession to the Union is broad support in society; yet little has been done to generate such support by government leadership.

Swiss federalism shows high levels of decentralization. EU membership entails substantial restructuring, in particular in taxation. The expansion of European law in areas other than trade and commerce has increasingly affected the powers of the Cantons and induced, by way of treaty making, substantial and implied changes in power allocation. While the majority of governments of Cantons opted for EU membership, as this would increase their participation, traditional patterns of federalism also partly explain the Swiss model of European integration.

III. Politics and Public Opinion

European integration is essentially part of domestic politics, as parties use the topic to enhance their electorate. While there was a period in the mid-1990s when liberal and Christian parties were in favour of accession, the only parties advocating it in principle are the Social Democratic Party and the Green Parties, albeit with qualifications. The debt crisis in the EU Member States and the crisis management within the European Monetary Union have largely eroded support for full membership. The crisis clearly influenced perceptions of the EU as a whole, including a functioning internal market with its freedoms and policies. The public does not draw distinctions between the debt crisis and well established areas of European law and policy. Recent polls in 2012 show that a mere 6 per cent are in favour of accession to the EU. A majority of 60 per cent supports the Swiss model of European integration. Even belatedly joining the EEA agreement merely musters some 46 per cent in favour.¹⁷

European integration has dominated Swiss politics during the last 20 years. Recourse to independence, neutrality and direct democracy induced a surge in the popularity of the Swiss People's Party with a national-conservative ticket. This surge put other political parties on the defensive and contributed to an overall evasion of a prospective discussion on the fate of Switzerland in Europe. European integration is met in Swiss public opinion with considerable scepticism, fuelled by press reporting that stresses failures rather than achievements. The overall pattern of blaming Brussels for failures and praising capitals for successes is no different in Switzerland than elsewhere in Europe. Public opinion is not sufficiently informed, and tends to extrapolate the current problems of the Monetary Union to the whole of the EU, including a reasonably well functioning internal market. Deep down, many Swiss hope that Europe, one day, will return to the system of nation states of which they were a founding party. They do not suffi-

¹⁷ See for example: NZZ, 30 November 2012: <<http://www.nzz.ch/aktuell/schweiz/europa-puls-des-stimmvolks-1.17861883>> (last access on 25.4.2013).

ciently take into account the price this may entail. Younger generations are no longer convinced that European integration is essential to preserve peace and stability in Europe. Even worse, they take it for granted. Foremost, the Swiss have not participated in the shift and development of sovereignty, moving from traditional precepts to a model of cooperative sovereignty and multilevel governance in Europe. While Members gradually, to a greater or lesser extent, and with varying perceptions across the political spectrum, have experienced the transformation of sovereignty, the Swiss model of European integration has spared the Swiss from such an experience so far. This fact substantially contributes to the current stalemate in Swiss-EU relations as a public debate on the key issue of institutional relations.

D. The Pros and Cons of Bilateralism

I. Accommodating Swiss Democracy

The Swiss model of European integration, on the one hand, corresponds to traditional fundamentals of Swiss history and constitutional institutions while achieving the set goals of securing market access and non-discrimination to a large extent. So far, it has served the country and its interests well, apart from the grounding and loss of Swissair in 2001, which was partly due to the rejection of the EEA agreement and came as a heavy blow to Swiss identity. The pace of integration is tailor-made, and Swiss voters recurrently have the possibility to exercise their democratic rights in defining the bounds of integration. For example, whether or not preferential relations should include services will be subject to a full political debate and potential referendum. Adjustment to secondary EU-legislation is also subject to legislative procedures, and the participation of Parliament is secured. Members retain the possibility to refrain from implementing legislation at the cost of the agreement being fully or partly suspended. The Swiss model retains the scope of traditional perceptions of formal sovereignty of the nation state. The policy of unilateral alignment allows picking and choosing. Government and Parliament are able to select those acts which appear suitable to achieve set goals and to do so without creating additional barriers due to diverging legislation. It also allows them to leave aside legislation and adopt their own regulations if they seem preferable. Finally, accountability is limited to treaty based obligations, but does not extend to acts adopted by unilateral alignment. Overall, the model leaves the widest possible room for formal self-determination within the process of European integration.

II. Shortcomings

The Swiss model of European integration, on the other hand, is facing a number of serious problems and shortcomings. They relate to the process of bilateralism. They also relate to the substance of the agreements and to legal protection. Overall, this creates considerable uncertainty.

The Swiss model, of course, depends upon the EU and the Member States as much as it depends upon Switzerland. So far, the EU has agreed to negotiate bilaterally and to grant substantial participation in the internal market to an outsider, due to the past record and position of the country and due to a long term commitment to eventually join as a full member. It is unclear to what extent the model is and will be accepted as a permanent feature. It no longer enjoys the goodwill of former times. With the centre of the EU moving eastward and new Members not having a particular relationship with Switzerland, it is unlikely that substantial market access rights can be secured without full institutional commitments. The point is that the Swiss model entails substantial insecurity, which in return may affect long term relations and investment in the country. The Commission and the EU will be careful not to grant third parties equal or even more favourable conditions than are granted to Members. It will seek to avoid allowing the special case of Switzerland, based upon historical facts in particular constitutional engagements, to contribute to the dismantlement of levels of integration achieved in a long-term and arduous process.

Both in the adoption of treaties and by way of unilateral alignment, the principles, rules, directives and regulations are drafted and negotiated without any participation of the Swiss authorities. The private sector is able to participate in hearings of industrial associations. This option is only exceptionally open to Government to the extent that a particular treaty provides for it. Except for the Schengen Agreement, this is nowhere the case. The Swiss Government is therefore essentially cut off from the legislative process, even though the act will be binding under an existing agreement or in terms of unilateral alignment. The constellation is linked to a substantial lack of information and a deficit in terms of participation in formal and informal networks of legislative experts. Personal contacts may partly compensate for institutional shortcomings. Overall, however, their value should not be overestimated, as personnel often changes and continuity in the flow of informal interaction is difficult to maintain. While the Swiss model secures formal sovereignty, self-determination in real terms has been eroding.

The adoption of secondary legislation by the Swiss Parliament and the executive branch entails complex procedures of treaty making and changing of treaties with full procedures, while these instruments are automatically applicable within the EU and in the EEA, merely subject to a right of refusal. Updating secondary law under existing agreements has not been a problem so far. There is however a discrepancy between formal and static treaties and the dynamic adjustment to integration of which Switzerland partly and de facto is a part.

The Swiss model produces European law *sui generis*. Neither the treaties nor unilateral alignment result in a coherent and consistent body of law identical to European law applicable to Members. The instruments are interpreted and construed independently by the courts of the EU and by Swiss Courts. While the Swiss courts take EU jurisdiction into consideration, the EU courts rely on the wording of the agreements, which are interpreted autonomously by each party, and not on European law. The case law and precedents of the Court of the European Union do not necessarily offer guidance. This is yet another source of legal insecurity. Knowledge and mastery of this body of *sui generis* European law requires advanced skills which often are not available. While lawyers and courts in Switzerland pay regular attention to it, the treaties are much less well known

within Member States, and authorities tend to treat Swiss interests in terms of third party entitlements. Little is known about the effectiveness of these Agreements in Member States. Furthermore, the lack of mutual authoritative interpretation reduces the authority of the law.

The Swiss model of European integration also creates asymmetries in legal protection. While the European Treaties are subject to preliminary rulings under Art. 267 TFEU, no such procedure exists on the Swiss side. Plaintiffs challenging domestic law or decisions based on one of the bilateral agreements are unable to obtain an authoritative interpretation, unless they appeal all the way to the Supreme Court. The costs of litigation are therefore obviously high. Moreover, there is no requirement of lower courts to comply with Supreme Court rulings, and little is known about the extent to which Swiss law of European integration is actually respected by lower courts.

There is no avenue through which to address disputes on the application and the interpretation of the agreements beyond the mixed committees. Their powers are generally limited to conciliation. Except for the Civil Aviation Agreement, no judicial review is available before the courts of the EU. Disputes therefore need to be carried out on the political level and often at high political costs and taking a considerable time. Moreover, Switzerland does not enjoy standing as a Government before the Courts of the EU unless it can invoke private party rights under Article 263 TFEU. In 2010, the General Court declined to affirm standing of the Swiss Government under the Civil Aviation Agreement, despite high levels of integration and the matter before the court affecting Zurich airport clearly being a matter of national interest.¹⁸ The Court of Justice affirmed the decision in 2013.¹⁹ Despite full integration into the European civil aviation market, Switzerland does not enjoy the same procedural rights as a Member State. On substance, the rulings leave the impression that the courts do not weigh the interests of third parties equally with those of Member States. Overall, the framework of international legal protection of the Swiss model is clearly deficient.

In conclusion, the existing framework and architecture is no longer sufficient to absorb the increasing body of treaties and secondary legislation adopted. It seeks to square an inherently dynamic body of law with a static framework based upon traditional perceptions of national sovereignty. Its machinery is not up to the task.

III. The Impact on Multilateralism and Third Country Relations

The Swiss model of static and passive European integration does not extend to third party relations. Swiss-EU relations are based on a free trade zone and do not legally affect relations to the rest of the world. Switzerland has been an active member in the WTO, stimulating and supporting multilateral trade negotiations, and she currently has a network of 26 free trade agreements with 35 partners out-

¹⁸ GC, Case T-319/05, *Zurich Airport*, ECR 2010, II-4265.

¹⁹ ECJ 07.03.2013, Case C-547/10 P, *Zurich Airport*, not yet published in the ECR.

side the EU.²⁰ Negotiations are taking place with China, India, Thailand, Indonesia, central American States,²¹ Vietnam and, since November 2012, also with Malaysia. The policy is to achieve preferential relations with emerging markets. These negotiations are partly led within EFTA, and partly on their own.²² They essentially seek to prevent and parallel EU free trade agreements, avoiding discrimination against Swiss products in favour of EU products.

Close ties to the EU, however, are not without implications for third country relations. As a non-Member, Switzerland is perceived by the EU and its Member States as an outsider. For the rest of the world, Switzerland is part of Europe, due to its close ties, and is perceived as a sort of *de facto* or associate member of the Union. In the WTO, Switzerland is able to act on her own and to take initiatives. She can work much faster than the EU. Yet, her negotiating powers have declined since the end of the Uruguay Round as the EU and the world know that Switzerland will ultimately align with the EU. There is no longer a need to negotiate with Switzerland as she will not insist on imposing her own perceptions. For example, Switzerland will not be a position to block extensive liberalization of trade in agriculture to the extent that it has been accepted by the EU. Should the Doha Round succeed, Switzerland will face substantial cuts in agricultural support measures, aligning levels of protection to those of the Common Agricultural Policy. Due to close bilateral relations with the EU, Switzerland thus has largely lost her treaty-making power within the WTO.

Independent free trade agreements with third countries are hailed as one of the main advantages of the Swiss model of European integration. In the absence of a customs union, Switzerland is not linked to the common commercial and trade policy of the Union. Swiss free trade agreements are often concluded prior to the EU ones and create first mover advantages which are mainly reaped by large exporting companies. Yet, once the EU catches up, with much deeper and broader agreements, the advantage disappears and turns into a permanent disadvantage. Moreover, it should be noted that Swiss free trade agreements are selective. They do not cover the African continent, with the exception of South Africa, Botswana, Lesotho, Namibia and Swaziland. No preferential trade agreements exist that address burning problems of migration and refugees.

Switzerland may face substantial challenges from an EU-US Free Trade and Investment Agreement, currently under negotiation. It will bring discrimination against Swiss exporters to the United States and force companies to produce from within the EU. Due to opposition from the Swiss agriculture sector, efforts to bring about a free trade agreement with the US stalled in 2007; it is unlikely that the US will be willing to take this up again without substantial concessions in agriculture. The agreement may force Switzerland to review its model of integration with the EU as a result of third party preferential trade.

Dependence on EU external relations also largely explains why Switzerland, despite belonging to the league of the prime 20 industrialized countries, does not formally belong to the G-20. Dependence upon European ties and policies does

²⁰ For details see the homepage of the State Secretariat for Economic Affairs: <<http://www.seco.admin.ch/themen/00513/00515/01330/04619/index.html?lang=en>> (last access on 26.4.2013).

²¹ Costa Rica, Guatemala, Honduras and Panama.

²² With Japan and the Faroe Islands.

not render it necessary to include her voice, much to the detriment of the defence of Swiss interests, in particular in the field of regulating tax evasion and tax fraud. The country is no longer able to sustain its particular niche policies where they differ from European law and policy.

The Swiss model of European integration, while formally leaving treaty making powers unaffected, has contributed to a decline of effective treaty making power outside the EU. The country cannot escape the fact that Europe's interests in the world are mainly defended by the EU without Switzerland having any say.

E. The Institutional Challenge

The institutional deficiencies of the framework of Swiss participation in the internal European market induced the Commission and the Council to make further agreements dependent upon the elimination of shortcomings. Repeatedly, Switzerland was invited to make proposals as to how the adoption of secondary legislation could be rendered automatic, and on how surveillance and international arbitration could be brought about. In December 2012, the Council held that "in particular, the Council deems it necessary to establish a suitable framework applicable to all existing and future agreements. This framework should, inter alia, provide for a legally binding mechanism as regards the adaptation of the agreements to the evolving EU *acquis*. Furthermore, it should include international mechanisms for surveillance and judicial control. In this context, the Council notes that by participating in parts of the EU internal market and policies, Switzerland is not only engaging in a bilateral relation but becomes a participant in a multilateral project. All in all, this institutional framework should present a level of legal certainty and independence equivalent to the mechanisms created under the EEA Agreement".²³

Since the request affects the fundamentals of the Swiss model and traditional Swiss perceptions, the Government has been reluctant to engage and has merely proposed internal surveillance to the EU. No effort has been made to actively pursue an agenda of enhancing decision-shaping and judicial review, which generally has been to the advantage of small Members otherwise exposed to power politics. Importantly, the Government has failed to engage in a public debate on the matter and little is known about where negotiations actually stand. It is feared that all suggestions for institutional changes will induce fundamental opposition and cannot result in a win-win constellation. It seeks linkage of institutional questions to an impending agreement on energy, as it fears that a self-standing institutional framework will not be able to survive a national referendum and will grandly boost the national conservative Party.

The EU seeks to align the Swiss model to the structures of the EEA, without necessarily seeking full membership to the EEA. There are essentially three options.

Given the pros and cons of the Swiss model, it is conceivable to link existing and future bilateral agreements to the EFTA surveillance authority which is cur-

²³ Council of the European Union, Council conclusions on EU relations with EFTA countries, <http://eeas.europa.eu/norway/docs/2012_final_conclusions_en.pdf> (last access on 26.4.2013) 6.

rently serving the EEA Agreement only. It is conceivable to expand jurisdiction of the EFTA Surveillance Authority and the EFTA Court to cover additional agreements and new Members. Such members need not be limited to Switzerland. It is conceivable to construct, on that basis, what may be called the fourth circle of European integration for countries who either cannot or do not want to be full members to the EU Monetary Union, the EU, or the EEA, but seek deeper links than could be offered under a free trade agreement. Constituting the fourth circle of integration revives the European Free Trade Association and makes good use of existing structures. It allows a coherent structure to be brought about and enables the avoidance of new and different institutional settings for these countries. It also allows participation in law making to be substantially increased by enhancing formal and informal access to the process of decision-shaping of EU law relevant to the fourth circle agreements.

Linking the Swiss model to EFTA entails the reliance of each of these countries upon its own set of agreements. The model is therefore based upon the idea of variable geometry. This could be an appropriate response to countries finding themselves in different stages of social, economic and political development, and for whom a "one-size fits all" solution is not suitable. While Norway, Iceland and Liechtenstein essentially rely upon the EEA agreement, they may individually add their own instruments, for example on fisheries. Switzerland would rely upon its existing and future bilateral agreements, and other countries would bring their own stock of treaty rights and obligations. Both the EFTA Surveillance Authority and the Court, enlarged and newly staffed, would be fully able to make determination on the basis of pertinent agreements. This is not unusual and there is no need to rely upon a single and uniform body of law. The case law will eventually bring about coherence among different regimes while respecting different rights and obligations within the variable geometry of the fourth circle of integration.

Legal protection of the agreements within the Union would remain with the Commission and the Court of the European Union. Since Switzerland does not enjoy a standing as a member, recourse to arbitration on intergovernmental disputes would be available in accordance with the institutional provisions of the EEA Agreement.

Secondly, failing such efforts, Switzerland could opt belatedly to become a member of the EEA Agreement as it stands. Swiss accession could be used to further develop the agreement with EFTA countries and to align it partly to existing Swiss-EU bilateral agreements.

Thirdly, the EU and Switzerland might develop a self-standing bilateral framework *sui generis*. It would create an independent international authority of surveillance, perhaps attached to the EFTA secretariat, and an independent Court, equally attached to the EFTA court, yet short of integrating these institutions. There is considerable doubt as to whether such architecture is in the interests of the EU, which needs to develop coherent structures to deal alike with all countries in Europe that are not able or not willing to integrate beyond the fourth level.

F. Conclusions

The Swiss model of integration is based upon particular historical and constitutional premises of the country. It developed in squaring the need for market access and non-discrimination with traditional precepts of formal sovereignty, neutrality, self-determination, direct democracy and federalism. It has been suitable for a country abstaining from international disputes within and outside Europe and refraining from taking a leading role in foreign policy. Thanks to the goodwill of the EEC, the EC and the EU in subsequent generations, and being the fourth largest trading partner located at the heart of Europe, Switzerland was able to obtain a treaty regime which respects the country's basic constitutional needs. She has managed to achieve reciprocal market access combined with full institutional abstention. This static model, however, has reached its limits. Further developments, even maintaining existing agreements, depend upon appropriate institutional arrangements which secure international surveillance and judicial review as well as automatic adoption of secondary legislation under agreements adopted. Existing institutions under the EFTA pillar are able to provide these functions. There is no need to reinvent the wheel. Whatever solution is achieved, however, Switzerland, and possibly other countries in the fourth circle of integration, will depend on legal developments occurring within the EU as the price for market access rights and non-discrimination. It has been a constant in history that the largest markets set the rules. Participation in EU law making will not exceed due process rights to be heard and of decision-shaping. The countries in the fourth circle will retain formal sovereignty, but largely lose self-determination except for the decision whether or not to join another level of European integration. They need to make up their own minds, taking into account not only their own history and constitutional precepts, but also the needs of present and future generations in Europe facing emerging powers.