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Towards a Framework Agreement in the context of the '*Bilaterals III*' ?

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René Schwok

Jean Monnet Chair

Department of Political Science &

European Institute of the University of Geneva

University of Geneva

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By René **Schwok**
Jean Monnet Chair
*Department of Political Science &
European Institute of the University of Geneva*
University of Geneva

Introduction

The relations between the EC/EU and Switzerland are governed by a whole structure of bilateral agreements concluded over the years. The main stages were: the Free Trade Agreement of 1972, the Bilateral Agreements I of 1999, the Bilateral Agreements II of 2004 (See annexes)¹.

The idea of a framework agreement covering all those agreements was launched in 2005². Swiss officials took the initiative. Initially, the first reaction of the European Commission had not been very positive. Over the years, however, its attitude had become less negative, although not enthusiastic. Matthias Brinkmann, Head of Unit in the European Commission's Directorate-General for External Relations, stated that the idea of signing a Framework Agreement could be of interest to the EU provided that it has an added value, such as for instance putting in place a mechanism of permanent political dialogue between both partners³. The Commission, however, will wait to see the Swiss proposals before raising its own suggestions.

Unfortunately, the Federal Council will not unveil its own views before the likely referendum in May 2009 on the extension of the EU – Switzerland bilateral agreements with Bulgaria and Romania. The Swiss government fears to give ammunition to the opponents of enlargement of these agreements by detailing its framework agreement. Berne accepted to extend free entry to both countries' nationals when they joined the EU at the start of last year. But the isolationist Swiss People's Party (SPP) wants to block the change. The right-wing party has been emboldened by winning nearly 30% of the vote in the last elections to the legislature, and will easily rustle up the 50,000 signatures needed for a plebiscite.

¹ For more details, see René Schwok, *Switzerland – EU Relations. Towards an EU membership?*, Houndmills, Palgrave/Macmillan, 2008 (to be published).

² See "Cabinet weighs alternatives to EU membership" in www.swisspolitics.org, quoting interview with State Secretary Michael Ambühl of the Integration Bureau, dated 19 June 2005.

³ http://www.ceps.be/Article.php?article_id=514

The SSP will invoke images of Switzerland being swamped by an invading horde of undesirables. Their rhetoric will probably degenerate into pure xenophobia and they also seem bound to stir up anti-Roma sentiment, dishonestly tarring all Romanians with the same brush.

In the opposing corner, a broad coalition will favour upholding Switzerland's international commitments and its tradition of openness. This camp will include parties from both the right and left of the political spectrum, plus bosses and trades unionists, intellectuals and journalists. Their main argument will be to remind voters that, if they vote against the free movement of labour, the EU would be perfectly within its legal rights to rescind bilateral agreements with Switzerland. Then the country's entire European policy would crumble.

The result of the vote is hard to predict. On the strength of previous outcomes, the pro-Europeans could be expected to win with a majority of around 55%. But there is a significant new factor that could upset this forecast. SPP leader Christoph Blocher was evicted from the Federal Council in December 2007, and has decided to make his former colleagues pay dearly for this humiliation. In 2005 and 2006 referendums, he refrained from adopting a clear stance, but this time around Blocher will not be inclined to hold back. Can he get 50% support in 2009? It seems there maybe a cliff-hanger referendum in prospect.

Under these circumstances, no substantial document will be published until 2009. Legally speaking, the Federal Council can even wait until December 2012 to give an answer to a postulate by a Swiss Member of Parliament ...⁴

To overcome this lack of sources, I conducted some interviews with Swiss and European officials in charge of the dossier. This already gave us some ideas of the positions of both partners, although it is unfortunately not sufficient.

1. Rationale for a framework agreement

The idea of a framework agreement came from the observation that all agreements between the EU and Switzerland were improvised in a very pragmatic way without any pre-established model and without any final direction. This distinguishes them from the European Economic Area, as well from the numerous association and partnership agreements between the EU and third countries where a comprehensive framework provided the first step for the conduct and development of these relations.

The typical format of agreements between the EU and third countries consist of a cooperation/association council at the foreign ministers/commissioner level, a cooperation or association committee at the level of senior officials supported by a set of sectoral sub-committees of experts and lower-level officials. A parliamentary committee consisting of representatives of third-country national parliaments and of the European Parliament accompanies this executive branch structure. In many cases the official institutions are supplemented by institutions and/or mechanisms of dialogue between non-state actors (trade unions, industry federations, business, etc).

In the Swiss case, there is however no such a high level and comprehensive mechanism. There are only some irregular meetings between Swiss ministers and EU Commissioners, especially in time of crisis.

⁴ *Accord-cadre entre la Suisse et l'UE*, Postulat déposé par Philipp Stähelin, 05.10.2005.
http://www.parlament.ch/F/Suche/Pages/geschaefte.aspx?gesch_id=20053564

2. Mixed committees

Normally, agreements between the EU and Switzerland are administered by mixed committees, which see to their proper functioning⁵. They serve as platforms for mutual consultations, for information exchanges, as well as for advice. In the mixed committees the two parties have the power of decision only if expressly stated in the agreements. However, they must reach a unanimous decision. In the performance of these functions the mixed committees meet at various levels: at the level of experts and at the level of high-ranking officials.

For example, the mixed committees can approve modifications in appendices to the agreements insofar as these are of a technical nature (e.g. lists of legislations or products). Changes in the provisions of the agreements themselves and in particular the introduction of new obligations on the parties must be approved via the appropriate domestic procedures of the EU and Switzerland.

The Bilateral Agreements are conceived as static in nature (except for Schengen/Dublin and the Civil Aviation Agreement). The mixed committees for the Schengen/Dublin Association Agreement are of a special kind in that they perform two different tasks: on the one hand they oversee the proper functioning of the agreements, and on the other they are involved in further developing existing Schengen/Dublin legislation.

Since the agreements are based on the equivalence of the laws on both sides, it is in the interest of both parties to maintain this equivalence, also when new legislation is adopted. Adaptations might be required for example for reasons that have to do with competition (avoidance of obstacles to market access) and the question of legal security. In cases where one of the parties plans to change certain legal requirements, information exchanges and consultations are the agreed procedures.

3. A framework agreement to streamline existing bilateral agreements

Such a framework agreement could ensure that existing, as well as future bilateral agreements is part of a more coherent and effective mechanism. Its purpose would be to simplify the administration of the many agreements linking Switzerland and the EU. Their implementation work would be subject to a comprehensive coordination. Apart from the fact that a framework agreement could encourage synergies within mixed committees and facilitate coordination of work, it would also give a better overview, would save time and improve efficiency.

Bilaterals I and II also increased the workload of all branches of government in Switzerland. There are also difficulties to keep parliament actively involved. This raises important issues for the Swiss parliament, which has relatively few resources available to its task of oversight of foreign affairs. A framework agreement could in this regard ease the communication and the transparency.

4. Merging the various joint committees into one single umbrella

One proposal to improve coordination would be to merge the various joint committees of the main sectoral agreements and the hundred secondary agreements into one single umbrella, similar to the

⁵ Note that there are 2 mixed committees for agriculture but none for the agreement of the taxation of saving.

EEA Joint Committee and indeed to most other senior officials institutions in EU external relations agreements.

One concern expressed was the fear of creating a kind of “big bazaar”, where Swiss ministers and EU Commissioners would just record the results of the numerous committees. The establishment of such a higher-level mechanism could then neglect the cooperative spirit with which solutions are pursued in the joint committees.

5. A Political dialogue

The notion of a political dialogue could recover two different concepts.

First, it means essentially a high-level on-going policy dialogue on the general meaning of the bilateral agreements with a view on the signature of new ones. As a matter of fact, Switzerland - EU agreements do not include provisions for a multi-faceted and regularised political dialogue, as is typically the case in agreements between the EU and other non-member countries. As a consequence, Swiss concerns are less likely to be raised on the EU's agenda and to receive a hearing than in most other third States. Such a dialogue could also help to find acceptable overall solutions in case of blockages on different dossiers.

On the Swiss side, there is however a fear that such a coordination committee could lead to politicise issues and provide linkages between non-related policy areas. On the EU side, the view is expressed that such dialogues play a limited role in the shaping of the overall relationship with third countries.

The experience concerning the political dialogue in the EEA and other association is also interesting to be observed. The initial idea was that the EEA Council would consist of the then EU 15 foreign ministers, the three EFTA/EEA foreign and the European Commissioner for External Relations. Over time, however, a practice developed whereby the EU side was represented not by the foreign ministers of the member states and then Commissioner, but by their deputies or senior officials. This model was increasingly seen as unsatisfactory. The size of the association councils was also found to be too cumbersome. The EU then decided to streamline its participation in all association councils and the EEA. Instead, the EU is now represented by a 'Troika', consisting of the relevant European Commissioner, the foreign minister of the rotating EU Presidency and the High Representative for the CFSP. While this facilitates the proceedings and improves the possibilities for a real debate among the interlocutors, the absence of the member states reduces however the potential significance of the political dialogue.

Second, a political dialogue could mean that the EU and Switzerland would discuss international political issues such as defence, terrorism, immigration, and UN matters. Again, such political dialogue already exists between the EU and most non-EU European countries.

Switzerland already participates in various peace missions abroad and lends support by providing experts and military personnel. Cooperation with the EU in the framework of the European Security and Defence Policy (ESDP) is becoming increasingly important. Switzerland is currently involved in three peacekeeping missions in Bosnia and Herzegovina, as well as in the Democratic Republic of the Congo as part of the ESDP. Furthermore, Swiss police officers and justice experts will soon participate in the civilian ESDP mission in Kosovo. The conditions for Swiss participation in ESDP operations are however governed in ad-hoc agreements in each case.

6. Participation in the shaping process

Swiss officials would be interested to obtain the right to participate in all consultations pertaining to Community legislation of relevance to bilateral agreements with Switzerland. This is already the case for three agreements, but some people in Bern want to formalize the arrangement and include practically all-existing agreements. The three agreements where Switzerland participates in the EU's decision-shaping are: air transport, the Schengen and the Dublin association agreements.

The Schengen association agreements provided a model differing from the standard EU cooperation and association agreements. The Schengen association agreement went further than standard EU cooperation and association agreements in granting greater access to the decision-making process in EU institutions than any other EU third-country agreement. Representatives of the associated states (Norway, Iceland, Switzerland) here participate with a say, but not a vote, in the EU Council of Ministers machinery (in the guise of the Schengen Mixed Committee) at the level of experts, junior and senior officials, as well as ministers.

The Schengen case is however very specific and will not be duplicated. This official participation of Norway, Iceland and Switzerland in the shaping process was only possible for two reasons: 1. Schengen was first negotiated as an international law agreement and only later introduced as EC law; second, Norway and Iceland benefited from the exceptional circumstances of the already existing free movement of persons within the Nordic Union. This very special context will however not be repeated.

Therefore, a possible solution would be to imitate the agreement on air transport. In this area, Switzerland is not seating in the room during the decision shaping procedure but is fully informed by EU officials of the latest proposals of new legislations.

It seems that Swiss authorities would be interested to get such an "Air transport" mechanism. The EU is however less interested to grant to a third country such a privileged situation. According to officials in the Commission, such a concession would be granted to Switzerland only if this country would be committed to adopt almost automatically the evolution of the EC legislations.

7. Quasi automatic updating of existing agreements

According to the EC Commission, quasi-automatic updating of existing agreements to keep in line with the evolution of the relevant *acquis* would lead to greater simplicity and security than the present method, consisting of renegotiating the slightest change in Community law.

Today, in the case of evolution of the relevant Community *acquis* nothing is clear about what Switzerland has to do (except again in the air transport agreement and in Schengen/Dublin). It is generally assumed that Switzerland will adapt autonomously for minor issues. The Joint Committee set up by each bilateral agreement may make technical changes to the annexes of the agreement but not add new obligations. If there is, however, a major change of the EU legislation, it is expected to conclude another treaty.

The air transport agreement could also be a kind of model. There, the *acquis* is explicitly the legal basis of cooperation, and the EU institutions – the European Commission and the European Court of Justice – have competences in surveillance and arbitration in specified areas (in this case competition and state aid policies in the field of civil aviation).

In the cases for Schengen and Dublin association agreements, the situation is slightly different. New *acquis* requires approval from the Swiss Parliament, but in case of a refusal, the agreement could be terminated.

The air transport model could get some support within the Swiss administration as it will get the running of the bilateral agreements much smoother. Such a mechanism will be however strongly fought by far right and eurosceptic supporters such as the Swiss People's Party (SPP) and the Campaign for a independent and Neutral Switzerland (CINS). They would strongly oppose what they call a « colonial contract ». This opposition partly explains why the Swiss government will not develop its concept of a framework agreement before the anticipated referendum of May 2009 by fear of being accused of abandoning Switzerland's sovereignty.

8. Using EEA institutions?

Switzerland already benefits from its membership in EFTA through its observer status in the EFTA Standing Committee and in the EEA Joint Parliamentary Committee. Swiss 'social partners' also participate in the EEA Consultative Committee.

EU and Swiss officials were generally lukewarm to ideas to compensate deficiencies encountered in the bilateral sectoral approach by utilising the EEA institutions such as the ESA and the EFTA Court. The need for a more formal arbitration mechanism, which could be envisaged with the EFTA Court playing a role, was not seen as necessary, and the idea of giving the ESA a role in surveillance of the EU-Swiss agreements was rejected.

9. A "classical" association agreement?

Some analysts argue that Switzerland should sign a comprehensive association agreement with the EU. This idea is however not useful. On the one hand, EU – Switzerland bilateral agreements are already "association agreements" as they are based on article 310 of the European Community, as it is the case for most agreements between the EU and third countries. This article 310 does not say however what should be the content, the structure and the organs of such an agreement.

On the other hand, both Swiss and EU officials are sceptical about the idea of a "classical" association agreement. They would prefer to take distance from existing models. They claim that such an association would entail more complexity and expenditure without improving the efficiency of the agreements. This would require renegotiation of the entire set of bilateral sectoral agreements; a prospect they are not likely to support. Pragmatically, their interest remains in the improvement of the content. They do not want to open the Pandora's box. A "classical" association would make a *tabula rasa* of the past without providing any major improvement.

Concluding remarks

It appears that a possible future framework agreement between the EU and Switzerland would not be spectacular and that it would change nothing fundamental to the current situation. It remains, however, that in looking at the details, such a framework could contain a large number of minor

innovations that are interesting to study, particularly for specialists of the external dimension of the EU.

In its bilateral agreements, Switzerland obtained a privileged treatment that most EU leaders, legal experts and political scientists held for not realistic. It shows that it is possible to conclude bilateral agreements with a non-EU country on a large scale.

Moreover, “à la carte” approximation has been developed. How many times pundits said that Switzerland could not get “à la carte” treatment, that Bern could not “have the cake and eat it”, that Swiss selfishness could not last longer. Switzerland got even a kind of “à la carte to à la carte”. As a matter of fact, the EEA was already a kind of “à la carte” treatment, letting the EEA/EFTA States to get access to the EU Internal market without joining the EU. The EU - Switzerland bilateral agreements can be viewed as a kind of solution that would be even more flexible than the EEA⁶.

Approximation of Switzerland’s legislation with the EU will continue in the next years, as there is a common interest in reaching agreements. The EU is engaged in a bilateral path with the Confederation and nothing indicates a shift of direction, although maybe with less tolerance and less flexibility with 27 countries.

It is difficult to draw generalizations from the Swiss case⁷ because those bilateral agreements were negotiated in a different period with a very special country. In other words, what was acceptable for the EU with 15 member States in the late 1990s and early 2000s can be only different today. Moreover, Switzerland, being a wealthy and well-connected enclave within the historical centre of the EU was in a different bargaining position than today’s non-EU countries which are geographically more marginal, often lack connections within the EU capitals and are relatively too poor for getting as many concessions as the Swiss did from the Union.

Finally, almost all relations of the EU with its neighbours (EEA, Stability and Association agreements with the Western Balkans, Europe agreements) were much more comprehensive than the agreements with Switzerland. As a matter of fact, the levels of their structures as well as of their organs are more sophisticated than in the Swiss case. In this regard, the very specific experience of Switzerland is hardly exportable to other countries. At this stage, only Israel, with no comprehensive association agreement, seems to partly fit to Switzerland’s case⁸. It does not mean, however, that the Swiss case cannot be a model for other non-EU countries. But if it is, it would be more an interesting experiment than a proper model.

⁶ More developments in René Schwok, “Switzerland’s Approximation of its Legislation to the EU Acquis: Specificities, Lessons and Paradoxes”, *European Journal of Law Reform*, Utrecht, 2007, Vol. IX, No. 3, pp. 449-465

⁷ On the issue of the Bilateral Agreements being used as models for possible agreements between the EU and other countries see René Schwok and Christophe Bonte, *EEA and Switzerland - EU Bilateral Agreements in Comparative Perspective : What Lessons?*, in Paul Demaret et al. (Eds.), *Regionalism and Multilateralism after the Uruguay Round : Convergence, Divergence and Interaction* (1997); Marius Vahl and Nina Grolimund, *Integration without Membership. Switzerland’s Bilateral Agreements with the European Union*, Brussels, CEPS, 2006.

⁸ Alfred Tovias, “Exploring the ‘Pros’ and ‘Cons’ of Swiss and Norwegian Models of Relations with the European Union”, *Cooperation and Conflict*, 2006, Vol. 41, No. 2, pp. 203-222.

ANNEXES

I The Seven Bilateral Agreements I

(1) Air Transport. Thanks to this agreement Swiss airlines are put on an equal footing with their European competitors. They may also hold a majority share in EU companies. This agreement nonetheless came too late to avert the Swissair bankruptcy.

(2) Public Procurement Markets. This concerns reciprocal opening of Community public markets. The others had already been opened by agreements entered into with the World Trade Organisation (WTO).

(3) Participation in Community Research Programs. This was a confirmation that Switzerland's participation had been in jeopardy. From January 1, 2004 on Swiss researchers have additionally the same participation rights as their EU State member partners.

(4) Agriculture. This agreement reduced customs duties and quotas on certain agricultural products, with the exception of fresh meat, wheat and milk. It also did away with non-tariff trade barriers. As a result, prescriptions for veterinary medicine and plant protection are recognized as equivalent.

(5) Elimination of Technical Barriers to Trade. The agreement introduces mutual recognition of conformity assessments: evaluations, inspections, certificates and authorizations. This means less red tape at border crossings but not adoption of the « Cassis de Dijon » principle.

(6) Overland Transport. It allows free circulation of trucks above 28 tonnes. It brings with it a new tax system and leads to the construction of two enormous crossborder railways: those of the Lötschberg and the Gothard Alpine crossing points.

(7) Free movement/establishment of persons. This represents the phased elimination of restrictions for EU citizens with a work permit or who are financially self-sufficient.

II The Nine Bilateral Agreements II

- (1) Taxation of savings. Switzerland imposed a withholding tax on all income from savings of persons with residency in the EU. Banking secrecy was maintained.
- (2) The Fight against Fraud. Switzerland undertook to help the EU fight against fraud in customs duties and indirect taxes. It obtained further guarantees concerning its banking secrecy.
- (3) Schengen /Dublin. Schengen: Checks on persons at borders were abolished. Switzerland may still, however, maintain customs controls on merchandise. Dublin: It was prohibited to request asylum in Switzerland if the request had already been made in another European State.
- (4) Processed Agricultural Products: Reduced customs duties on processed agricultural products (i.e. chocolate, biscuits, soups, instant coffee).
- (5) Statistics. Switzerland joined Eurostat, the Statistical Office of the European Union.
- (6) Pensions. Switzerland agreed to grant an income tax exemption for the pensions of retired EU officials living in Switzerland. Only fifty persons were affected.
- (7) The Environment. Switzerland joined the [European Environment Agency](#) (EEA)
- (8) MEDIA. Swiss participation in MEDIA, an EU program aiming to strengthen the European audiovisual industry
- (9) Education, Occupational Training, Youth. Swiss participation in EU programs aiming to encourage cross-border mobility of students, trainees, and young people. (Socrates, Leonardo da Vinci et Jeunesse).

III Future bilateral agreements?

Formally or informally, discussion had begun on more than twenty dossiers that might lead to agreements. All of these issues are, as always, the subject of heated debate. Some of them will even be submitted for a referendum vote. At first sight, the most emotional dossiers are free trade in agricultural products and liberalization of services.

This is a non-exhaustive list drawn up on the basis of different reports by the Federal Council and the European Commission.

Full-fledged participation in Galileo (European system similar to American GPS)
Mutual recognition of Appellation of Controlled Origin
Participation in the European Aviation Safety Agency (EASA)
Greater participation in Erasmus
Reciprocal opening of electricity markets
Facilitating rules of origin
« Cassis de Dijon » principle
Liberalisation of services
Facilitation of indirect taxation (VAT, excise duties)
Customs union
Free trade of agricultural products
Disease prevention
Food security
Combating terrorism
Strengthening Europol agreement
Participation in Eurojust
Judicial cooperation in civil matters and bankruptcies
Ongoing political dialogue
Aspects of foreign policy
Ad hoc cooperation with the European Defence Agency
Institutionalising cooperation with European Security and Defence Policy (ESDP)