

Switzerland's Approximation of its Legislation to the EU *Acquis*:

Specificities, Lessons and Paradoxes

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A. Introduction

Switzerland is geographically an enclave in the heart of the European Union (EU) but a large majority of the population (more than 70%) does not want to join the EU yet. This is due to numerous interlinked reasons (lack of historical trauma, strong attachment to neutrality, importance of direct democracy for the Swiss political identity and opposition from key economic sectors).¹

There is, however, a consensus for avoiding a marginalization from the EU. After all, it is too costly from an economic point of view, as it is inefficient to produce goods in Switzerland that would not be easily accepted on the EU market. Moreover, the Swiss do not want to be left out of areas such as research, security, culture and the environment.

The same is true from the EU side. The Swiss market is very close to the rest of Europe. So why not facilitate trade between the two entities? Less known is the fact that Switzerland is the second EU export market, after the US, but far ahead of Japan, China or Russia! There are all kinds of other financial, transport, personal, social and environmental interactions. For instance, 700,000 persons, mostly from the EU, enter Switzerland every day. There are therefore strong incentives to ease the lot both of the businessman and the average person.

The first major attempt in the 1990s to enhance relations between the EU and Switzerland was the European Economic Area (EEA). This scheme was tailor-made for Swiss specificities, granting economic access to the Internal Market without membership. But as the Swiss population refused to join the EEA in December 1992, Switzerland and EU authorities decided to develop a new *sui generis*, pragmatic and bilateral approach. A whole series of bilateral agreements have been concluded step by step, notably in bilateral negotiation rounds I and II.

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¹ More details on Switzerland's refusal to join the EU in R. Schwok, Switzerland – EU Relations. Impossible Membership? (2008).

Of course, the principal, basic principle is that Switzerland has to approximate its legislation to that of the most important Contracting Party, namely the EU. But the interesting point is that a lot of elements could be negotiated. To be sure, at the beginning of each round of negotiations, the EU would present an apparently inflexible position, reflecting its own legislation, itself the product of hard-won compromises. Interestingly, however, during the negotiations with its Swiss partner, the EU hegemonic position did not lead to a kind of imperious 'take it or leave it' attitude. As a result, Switzerland's bilateral agreements offer very interesting, original and also paradoxical cases when considering approximation of laws to the EU.

In the first parts of this article, the two packages of bilateral agreements between the EU and Switzerland will be introduced in a didactic manner, as they are mostly unknown outside Switzerland and rather complicated and technical. Only the most important and problematic agreements will be analyzed. The minor ones, which have no major implications and which have not caused polemics, will merely be mentioned.

For each major agreement, there will be a presentation of the positions of the two parties (EU and Switzerland) before the negotiations. Then there will be a summary of the negotiations and of the outcomes. This study dwells particularly on the difficulties of the Swiss negotiators, being wedged between EU demands and objections of the Swiss People. Finally, special emphasis will be put on the phase of ratification, characterized by very emotional popular votes.

In the last section, this study will highlight three paradoxical and ignored aspects of those apparently boring bilateral agreements: 1. Switzerland is getting more integrated into the EU than some EU countries; 2. From a legal point of view these agreements are interesting because they contain almost no legal innovation, especially compared to the European Economic Area (EEA); 3. The closer Switzerland gets to the EU, the more distant prospects of EU membership seem to become.

B. The Bilateral Agreements I

I. Introduction

After a popular vote turned down Swiss participation in the EEA, the Federal Council (Swiss Government) began long negotiations with the EU that led to the conclusion of a package of seven bilateral agreements.²

They are called in this text the 'Bilateral Agreements I'.³ These agreements relate to seven issues (see Table 1 below).⁴

² F. Emmert, *Switzerland and the EU: Partners, for Better or for Worse*, 3 *European Foreign Affairs Review* (1998).

³ Texts of all the Bilateral Agreements I and II are easy to find on the following web address: www.europa.admin.ch/dokumentation/00438/00464/index.html?lang=en.

⁴ Signed on 21 June 1999 in Luxembourg, they entered into force on 1 June 2002.

From a legal point of view, they are interdependent. In other words, if Switzerland had rejected one of them, all the others could have been called into question. This is the concept of 'appropriate parallelism', sometimes called the 'guillotine clause'.

The EU required that the seven agreements come into effect at the same time. Thus Switzerland could not demand that six agreements apply before the seventh agreement on the free movement of persons was ratified.

This EU condition was obvious to the Community experts, but the Federal Council hoped that Switzerland could elude it. Switzerland indeed tried to get a clause which would have made it possible for her to oppose the right of free movement of persons seven years after the entry into force of the agreements, without allowing the possibility for the EU to object to the six others. Finally, the legal services of the Commission refused to concede such an exemption to Switzerland.

Five agreements did not cause difficulties as they relate to relatively secondary issues. The two others - free movement of persons and surface transport – were, however, intensely discussed. They are also more complex and caused very emotional debates.

These Bilateral Agreements I could have been called into question if the referendum of September 2005 had succeeded, the referendum relating to the extension of these agreements to the countries that joined the EU in 2004. The same risk exists after every possible future EU enlargement (Turkey, Croatia).

These agreements can eventually be terminated in 2009. The Swiss diplomats obtained this clause in order to reassure the population that it would be possible to organize a referendum in case of a massive invasion of EU citizens. So new popular votes are not excluded.

Table 1: The seven bilateral agreements

(1) <i>Surface transport.</i> It allows freedom of movement of trucks of more than 28 tons. It also creates a new system of taxation and leads to the construction of two railway tunnels of pharaonic proportions: Lötschberg and Gothard.
(2) <i>Free movement of persons.</i> It is the removal by stages of the restrictions on the citizens of the EU Member States who have a work permit or sufficient resources.
(3) <i>Air transport.</i> The agreement provides for mutual open access to each party's air transport sector. This means that air carriers from both parties are granted traffic rights between any points between the two parties. Thanks to this agreement, the Swiss airline companies are placed on an equal footing with their European competitors. They can also take a majority interest in the companies of the EU. This agreement came, however, too late to avoid the bankruptcy of Swissair.
(4) <i>Public procurement markets.</i> That relates to the reciprocal opening of the communal public procurement markets. The others had already been opened by the agreements concluded within the framework of the World Trade Organization (WTO).
(5) <i>Participation in EU research programmes.</i> It is about the confirmation of this participation, which risked being called into question. Since January 1, 2004, Swiss researchers held, moreover, the same rights of participation as their partners in the EU Member States.

(6) *Agriculture.* This agreement allows the reduction of customs duties and quotas on a few agricultural products, except for fresh meat, corn and milk. It also removes non-tariff obstacles to trade. Those reductions apply to a list of sensitive products including Swiss dairy products and cheese, and fresh EU products such as fruit and vegetables.

(7) *Technical barriers to trade:* The agreement introduces the mutual recognition of product conformity checks: tests, inspections, certificates and authorizations. That implies less administrative red tape during the crossing of frontiers, but not an introduction of the “Cassis of Dijon” principle.

II. Surface Transport

The issue of surface transport is apparently simple: this agreement mainly aims at making it possible for European trucks of more than 28 tons to circulate throughout Switzerland. At first sight, there is nothing here to arouse passions. And yet this issue caused intense debate in Switzerland. No less than four popular votes were organized on this subject during the 1990s (see appendix, table 4). They led to the building of a railway tunnel of pharaonic proportions.

The negotiations revolved around one conflict. On the one hand, the EU wished to increase the North-South traffic through Europe. Brussels also wanted to limit the diversion of a very polluting traffic towards France and Austria generated by the Swiss limit of 28 tons.

On the other hand, the Swiss Government wished to transfer by rail the largest possible share of the traffic crossing the Alps. Its margin of manoeuvre was limited because it had to avoid alienating the environmentalist pressure groups, as well as the population of the Alpine areas.

Lastly, the Federal Council was held imprisoned because of a constitutional initiative adopted by the People on 20 February 1994, to transfer in 10 years traffic of goods from road to rail (‘Initiative of the Alps’).

Finally, the agreement lets the trucks of more than 28 tons freely circulate into Switzerland if they pay a tax of 200 Euros per vehicle, per voyage.

The transfer from road to rail will be carried out by the construction of two new tunnels through the Alps: Lötschberg and, especially, Gotthard. This latter tunnel will be the longest in the world (57 km), reaching a 2,300 meters depth. The costs are also impressive. They have been assessed at nearly 20 billions Euros.

The negotiations induced interesting politological analyses. The metaphor of a multi-level game has been used. It illustrates the links between the national and the international levels.⁵ That applies well to the Swiss case. The Federal Council faced dilemmas *vis-à-vis* some national interest groups as well as towards international actors. On the one hand, the Swiss diplomats can use the risk of a negative referendum as a tool to extort more concessions from the EU. On the other hand, the Swiss government cannot guarantee that the agreement signed at the international level will enter into force.

⁵ R. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42/3 International Organization 427(1988).

More concretely, the Federal Council partially had to yield on its initial objectives of a very high tax, while making sure that the European truck-drivers pay substantial taxes, which would be partially dissuasive. Let us note that the European Commission sometimes supported Switzerland's environmentalist position as regards piggyback traffic, against the opinion of a few EU Member States (the practice of carrying trailers, semi-trailers or containers in a train atop a flatcar).

A third country could thus convince the European Union to adopt a logic that many Member States do not yet accept for themselves. With the support of the Commission - the point has to be stressed - Switzerland was able to impose its position according to which the trucks must be taxed based on the pollution that they generate.

III. Freedom of Movement of Persons

The agreement on persons allows the free movement to Switzerland of any citizen of a EU or of an EFTA Member State. It applies, on a reciprocal basis, to any Swiss citizen who might wish to get a job in another European State.

This agreement also makes it possible to avoid any discrimination on the labour market. The national preferences are removed, except for the professions linked to national security.

This agreement on persons was the most difficult to obtain. It was indeed necessary to solve the following dilemma. On the one hand, the EU required the automatic granting of the free movement of its nationals. On the other hand, the Swiss Government refused to do so out of consideration for xenophobic fears. The ratification of this agreement led to the organization of two very emotional referendums.

One of the headaches of the agreement on the free movement of persons comes from all the transitional measures which it contains. To sum up, the agreement is articulated in the following way.

- (1) After two years, viz. since 2004, priority given to the workers residing in Switzerland and discriminatory controls of the contracts of employment were removed.
- (2) During a five years phase, viz. until 2007, the quota of nationals from the EU countries authorized to establish themselves in Switzerland was gradually increased. As of June 1 2007, Switzerland has introduced the free movement of persons. This probation period is planned for seven years, until 2014. During this period, Switzerland retains the right to unilaterally reintroduce some quotas.

IV. Popular Vote on the Bilateral Agreements I – 21 May 2000

On 21 May 2000, the Swiss People accepted the Bilateral Agreements I with a comfortable majority of 67.2% of the voters.⁶ Why did the Swiss accept the Bilateral Agreements I, whereas they had refused the EEA in 1992? What are the elements which generated this reversal of the public opinion?

First, the debate on the Bilateral Agreements I avoided confusion on the question of EU membership. Indeed, contrary to the vote on the EEA, the Government and its supporters clearly differentiated the bilateral agreements from full membership in the EU. One did not observe in 2000 the ambiguity of the December 1992 EEA referendum, when the Federal Council antagonized many citizens by submitting an application for joining the EU.⁷

Also let us recall that the formal sovereignty of Switzerland is better preserved in Bilateral Agreements I and II than in the EEA. Bilateral Agreements I and II do not comprise supranational organs (i.e. European Surveillance Authority and Court of Justice). Nor do they include either an almost automatic adoption of the evolution of the relevant Community legislation. This reassured those Swiss citizens who were most attached to the formal sovereignty of the country.⁸

On the domestic level, the Federal Council, the conservative parties and the business federations had to grant concessions to the trade unions and the leftist parties. The latter had threatened not to support Bilateral Agreements I in the absence of such concessions. Thus, Switzerland introduced measures against risks of social dumping: (1) legislations about ‘detached workers’; (2) possible introduction of minimal wages into the frontier cantons; (3) facilitated extension of collective social agreements on minimum wages between business federations and trade unions.

Finally, one has to mention a very important point: the unambiguous engagement of the authorities in support of the BA I. Learning from their previous mistakes in the 1992 campaign about the EEA, the Federal Council, the political parties, the business federations and the trade-union associations were well united and developed a much better communication campaign.

V. Popular Vote on the Extension to the Central and Eastern European Countries – 25 September 2005

In a popular vote held on 25 September 2005, 56% of the voters approved the extension of the free movement of persons from the ten countries that joined the EU in 2004 (mostly from Central and Eastern Europe).

The ‘no’ vote was promoted by the far right parties and movements such as the *Swiss People’s Party* (SPP) and the *Campaign for an Independent and Neutral*

⁶ <http://www.admin.ch/ch/f/pore/va/20000521/index.html>.

⁷ H. Hirter & W. Linder, *Analyse der eidgenössischen Abstimmungen vom 12. Mai 2000*, Vox (2000).

⁸ R. Schwok & N. Levrat, *Switzerland’s Relations with the EU After the Adoption of the Seven Bilateral Agreements*, 6/3 *European Foreign Affairs Review* 335 (2001).

Switzerland (CINS). They flaunted the spectre of an invasion of workers from Eastern Europe. They intentionally caused fears by anticipating an increase of unemployment in Switzerland.

To obtain the support of the trade unions and the parties of the left, the Federal Council and the business federations were forced to grant new concessions in order to fight social dumping. Those measures are more generous than those that had been granted before the first referendum of 2000.

C. The Second Bilateral Agreements (BA II)

The EU and Switzerland signed a second series of Bilateral Agreements (BA II) on 26 October 2004. These agreements relate to nine issues (see table below). Each one of them went into force on a different date.

From a legal point of view, these agreements are not linked. Contrary to the Bilateral Agreements I, they do not include a 'guillotine clause'. Switzerland could have refused one of them without putting the others in jeopardy. This is in fact the normal way of concluding bilateral agreements with the EU. It was the 'guillotine clause' of the Bilateral Agreements I, which was an exception.

Seven of these agreements did not cause difficulties as they relate to only secondary issues. The two others were the subject of very intense negotiations: Schengen/Dublin and taxation of savings. A popular vote was organized on the Schengen/Dublin Agreement in June 2005. It was accepted by 54.5% of the voters.

Table 2: The Nine Bilateral Agreements II

(1) <i>Taxation of savings.</i> Switzerland deducts a withholding tax on the EU's behalf. This tax is imposed on income from savings originating abroad, which will be effective for natural persons with tax residency in an EU Member State. This withholding tax will increase progressively up to 35%. There will be no automatic exchange of information between tax authorities. The Swiss banking secrecy remains protected.
(2) <i>Schengen/Dublin.</i> The 'Schengen' agreement promotes the removal of controls on persons at the borders between the EU and Switzerland. Due to the fact that Switzerland is not a member of the EU customs union, the Border Guard will continue to check goods entering the country. The 'Dublin' agreement lays the foundation for sharing the burden of managing asylum migration. Only one State is ever responsible for conducting the procedures relating to an asylum case. Thanks to an electronic database, repeated applications can be identified and the applicant can be repatriated to the state responsible for the asylum proceedings.
(3) <i>The fight against fraud.</i> The agreement on combating fraud aims at more intensive cooperation against smuggling and other types of offences, in the areas of indirect taxes and subsidies as well as in public procurement. For example, the EU could more efficiently fight smuggling of cigarettes.
(4) <i>Processed agricultural products.</i> Less customs on processed agricultural products (e.g. chocolate, biscuits, soups, sauces, pasta, instant coffee).
(5) <i>Statistics.</i> Switzerland joins Eurostat, statistical Office of the European Union.

(6) <i>Pensions</i> . Switzerland waives her tax on pensions of retired EU officials living in Switzerland in order to avoid double taxation. This arrangement only affects around 50 pensioners.
(7) <i>Environment</i> . Participation of Switzerland in the European Environment Agency.
(8) <i>MEDIA</i> . Participation of Switzerland in MEDIA, the EU programme aiming at helping European audiovisual production in the face of non-European competition.
(9) <i>Education, professional training, youth</i> . Participation to be legally guaranteed, which would grant equal rights to Swiss people participating in projects relating to the EU programmes on the mobility of students and youths (Socrates, Leonardo da Vinci and Youth).

I. Taxation of Savings

Legally, this relates to an agreement between the Swiss Confederation and the *European Community*. This means that only an authorization of ratification by the European Parliament was necessary.

This agreement came into effect on 1 July 2005. Its principal point is the following: the Swiss authorities must apply a tax on the interests of the saving of the persons with residence in the EU who have banked their money in Switzerland.

At the beginning, this taxation is fixed at 15%. Gradually, it will amount to 35% (in 2011). Switzerland must redistribute 75% of it to the EU States taxation departments.

Thanks to this agreement, Switzerland can preserve its banking secrecy. The negotiations were long and delicate. At certain periods, one feared for the preservation of the Swiss banking secrecy. This did not fail to cause a mini-psychodrama in large sectors of the public opinion. Switzerland finally played its cards correctly because the agreement enables it to preserve its cherished banking secrecy.

1. Fiscal Evasion: The EU Against Fiscal Tax Havens

Since the end of 1980, the EU countries sought to prevent their nationals from putting their money in foreign states for the purpose of escaping income tax on the interest accruing from their savings. To fight this 'fiscal evasion', the Commission proposed to set up a mechanism for an automatic exchange of information. This involves a lifting of banking secrecy. The EU, however, had the following difficulty: three Member States – Luxembourg, Belgium and Austria – did not want to lift their banking secrecy if Switzerland maintained it. The EU thus had to integrate third countries into her project, in particular Switzerland. It was indeed necessary to satisfy Luxembourg, Belgium and Austria which feared that the money invested in their banks would be diverted into Switzerland and other banking safe havens.

2. On Taxation, a Tactical Choice by Luxembourg, Belgium and Austria

To resolve this dilemma, at the time of the European Council of Feira (June 2000), the Heads of State and government proposed the automatic exchange of information (lifting of the banking secrecy). Their principal condition was that Switzerland and other European third countries adopt the same measure.

The position of Luxembourg, Belgium and Austria reflected in fact a tactical choice in order to avoid directly opposing their partners.

They conditioned their support on the approval of Switzerland, in the knowledge that this country would never accept.

By allowing a non-member state to seal the fate of a EU directive, they gave Switzerland a kind of veto.⁹

In the Swiss population, this European Council of Feira caused, however, a mini-psychodrama.¹⁰ There was a general feeling that banking secrecy was in danger.

Finally, confronted with the Swiss intransigence, with the double game of the three Member States and with ambiguous positions by the United Kingdom, the remaining States had to accept that three EU countries (Austria, Belgium and Luxembourg), as well as Switzerland, European micro-States and the overseas territories that were dependencies of the United Kingdom and the Netherlands, could maintain their banking secrecy.

In exchange for this continuation of a disputed practice, the countries and territories mentioned must introduce a withholding tax on income from savings for persons with tax residency in an EU Member State. This withholding tax will increase progressively up to 35%.

3. Evaluation

For the EU, this agreement on the taxation on savings constitutes a qualified victory, as it did not succeed in developing a single policy on the matter and it could not prevent tax avoidance. It could, however, recover some money. The results are quite impressive: the product of the withholding tax collected in Switzerland amounts to 536.7 million Swiss Francs (324 million Euros) for the fiscal year 2006.

On the Swiss side, the result of the negotiations was welcomed with a hardly concealed relief. The Confederation indeed succeeded in putting an end to pressures for the abolition of banking secrecy. It obtained consent that no other request of this nature would be formulated for roughly fifteen years.

Let us finally note the following paradox. On the one hand, this agreement on tax avoidance brings Switzerland closer to the EU since it forces the Confederation to adopt the relevant Community legislation. On the other hand, it moves Switzerland away from EU membership, because the Swiss bankers

⁹ Ch. Bonte, *La fiscalité de l'épargne dans l'UE: un droit de veto accordé à un pays tiers*, 494 *Revue du Marché commun et de l'Union européenne* (2006).

¹⁰ R. Schwok (Ed.) *Place financière suisse, évasion fiscale et intégration européenne* (2002).

consider that such a 'generous' EU concession on banking secrecy would not be granted again if Switzerland fully joined the EU.

One can certainly object that such a probability is very low, considering that Austria, Belgium and Luxembourg do enjoy the same status as Switzerland. It would indeed be necessary to obtain their approval in order to lift banking secrecy. But such an argument hardly convinces Swiss bankers. They are so relieved that they do not want to take the risk of having to make concessions on this point during possible negotiations for EU membership.

II. Association to 'Schengen /Dublin'

'Schengen/Dublin' means that Switzerland is to be associated not only to the 'Schengen' agreement, but also to the 'Dublin' agreement. The most important engagement – and the one which was the most discussed – relates to 'Schengen'. The one about 'Dublin' was not contentious.

Formally, it is about an agreement between, on one side, the Swiss Confederation and, on the other side, the European Community and the European Union.¹¹ Such a formulation implies that the agreement is also linked to the third pillar of the European Union: Justice and Home Affairs.

1. Characteristics and Specificities

'Schengen' promotes the free movement of persons by removing controls on persons at the internal frontiers of the EU. At the same time cross-border cooperation between police forces and judicial authorities is strengthened. Due to the fact that Switzerland is not a member of the EU customs union, it will be a special case in Schengen: the Border Guard will continue to check goods entering the country at the border. Individuals may also then be checked.

Legal assistance is also regulated within the scope of Schengen cooperation. A special provision ensures that Swiss banking secrecy is protected with regard to direct taxes.

Since the Amsterdam Treaty, the Schengen legislation belongs to the EU *acquis*. On the one hand, the United Kingdom and Ireland stay outside. On the other hand, Norway and Iceland, two non-Member States of the EU, have been members since 1999. It is stipulated that in the Schengen scheme Switzerland will have the same status as the above-mentioned Nordic States. On the model

¹¹ Full text in <http://www.europa.admin.ch/dokumentation/00438/00464/00638/index.html?lang=en>. The exact title is: 'Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen Acquis' (2004/0199 (CNS)). The EU is competent on the basis of article 38 EU (which relates to article 24 of the same treaty), for all aspect of the Schengen acquis relevant to the Third Pillar.

A. Cornu, *Les aspects institutionnels des Accords d'association de la Suisse à Schengen et à Dublin*, in Ch. Kaddous & M. Jametti Greiner (Eds.), *Accords bilatéraux II Suisse-UE/Bilaterale Abkommen II Schweiz-EU*, at 214 (2006).

of those two associated countries, it gets the right to participate in the shaping of decisions, but it does not have formal joint rights of decision in relation to future Schengen law.

This is close to the mechanism within the EEA: Switzerland can take part in the decision-making process, but it does not get a voting right. Adoption by Switzerland of the Schengen/Dublin legislations will not be automatic, but will have to be approved under the Swiss legislation process, consisting of the Federal Council, which requires parliamentary approval and a referendum, if necessary. Failure to adopt a legal act could ultimately result in termination of the agreement.

2. Popular Vote on Schengen – 5 June 2005

A referendum was conducted that rejected only one of the nine bilateral agreements: that which makes Switzerland a party to the Schengen Agreement. At the time of the vote of 5 June 2005, a majority of 54.6% of the voters decided in favour of these agreements. But 12 cantons out of 23 voted against. That means that if the vote had required the double majority of the people and the cantons, the accession of Switzerland to Schengen would have been rejected.

The campaign against the Schengen/Dublin agreement was mainly led by the Swiss People's Party (SPP) and the Campaign for an Independent and Neutral Switzerland (CINS). Their arguments revolved around the loss of sovereignty of Switzerland, the removal of border checks, the invasion of foreigners, the free immigration of criminals and the submission to foreign judges.¹²

On the other hand, the rest of the Swiss political mainstream parties, as well as employers' and trade-union associations, were more united than ever in order to make Switzerland a party to the Schengen/Dublin agreement.

D. Continuation of the Bilateral Path

The Federal Council, the political parties and the economic actors want to conclude new agreements as well as to consolidate the bilateral path. The EU is also committed to this bilateral approach to Switzerland and nothing indicates that it could be called into question.

I. Additional Bilateral Agreements

Formally or informally, at least twenty new issues could be negotiated between the EU and Switzerland in the years to come (see following table). All these topics will be the subject, as always, of difficult negotiations. Some will necessitate popular votes. At first sight, the two most emotional issues are the agricultural free trade area and liberalization of services.

¹² www.auns.ch; www.udc.ch.

Table 3: 21 New possible bilateral agreements

(Non-exhaustive list established on the basis of reports by the Federal Council and the European Commission)
Full participation in Galileo (European programme quite similar to the North American Global Positioning System (GPS).
Mutual recognition of protected designations of origins.
Participation in the European Aviation Safety Agency.
Better access to Erasmus.
Mutual access to the electricity market.
Easing rules of origins.
Extension of the “Cassis de Dijon” principle.
Liberalisation of services.
Aspects of indirect taxation (VAT, excise duties).
Customs union.
A free-trade agreement in agricultural products.
Prevention of illnesses.
Food Safety.
Fight against terrorism.
Improvement of the agreement with Europol.
Participation in Eurojust (coordination to fight cross-border organized crime).
Permanent political dialogue.
Elements of foreign policy.
<i>Ad hoc</i> cooperation with the European Defence Agency (armament).
Enhanced cooperation with ESDP (security and defense).

II. Improvement of the Institutional Framework of the Agreements with the EU

In the continuation of its bilateral path, the Federal Council wishes to conclude a framework agreement that would embrace all the bilateral agreements between Switzerland and the EU.

In fact, to advance this concept of a framework agreement, Bern pursues six goals.

Firstly, to unite the roughly twenty main bilateral agreements and the hundred secondary agreements between Switzerland and the EU under only one roof.

Secondly, to have only one method of management of these agreements around a single joint committee, if possible.

Thirdly, to offer Switzerland a kind of permanent political dialogue of higher level with the EU.

Those first three objectives should not pose major problems for the EU, as they are primarily practical. It is also in its interest that the existing and future bilateral agreements fall under a more coherent and more effective framework.

In a less explicit way, the Federal Council tries to impose three other objectives. Those are more delicate and are not yet approved by the EU.

Firstly, Switzerland would like to obtain a right of consultation in the phase of shaping of all new Community legislation relevant to the bilateral agreements with Switzerland. Such a practice already exists for some of them (air transport and Schengen), as well as in the EEA. But Bern would wish to better formalize it and especially to extend it to all the existing and future agreements.

Secondly, a few voices in the federal bureaucracy prefer that Switzerland commit itself to adopt every new evolution of the relevant Community legislation. That would bring more simplicity and more security than the current method, which consists of renegotiating every tiny new evolution of the Community legislation. This would be similar to the EEA mechanism, but on an individual basis, rather than on a collective EEA/EFTA pillar basis.

Thirdly, Swiss authorities would like to create an independent legal mechanism, such as an arbitration body, in order to resolve disputes with the EU. Brussels is however reluctant, as such a body could develop legal interpretations different from the jurisprudence of the European Court of Justice.

In conclusion, Switzerland plans to continue its bilateral path, while consolidating it. The EU is known not to be hostile to such a continuation of bilateral agreements. It seems, however, that Brussels prefers to negotiate by packages, in order to force Switzerland to accept its views.

E. Interesting Paradoxes

I. Switzerland is Sometimes More Integrated in the EU than some Member States

1. Since 1988, Switzerland cannot adopt new federal (national) legislation without checking *a priori* what the relevant EU law in the same area is. Swiss parliamentarians are thus aware of what the EU does and are kindly advised to avoid creating distortions with EU legislations. They are of course free to do what they want but they almost invariably try not to diverge too much from the EU. Moreover, with an eye to joining the EEA, the Swiss Parliament accepted in the early 1980s a package of legislation intended to approximate Swiss laws in numerous fields to the EU ('Eurolex'). The laws of this package did not enter into force, as Switzerland did not join the EEA but a lot of them were nevertheless introduced. They are called 'Swisslex'.

2. Switzerland has adopted EU policies rejected by some EU States. A good example is offered by its participation to the Schengen area. The Confederation is dismantling its physical borders whereas the United Kingdom and Ireland, two Member States, stay outside this important EU policy. Moreover, Switzerland is

often quicker to apply the Community legislation under the terms of the Bilateral Agreements I and II than many EU Member States.

3. Switzerland also won the ‘competition’ of the country, which has organized the highest number of popular votes on the European question. Since 1972, the Swiss citizens had to express themselves twelve times about European integration! (See the chronology in the annex where these votes are indicated in italics, table 4).

The Swiss People are thus among the most knowledgeable about the EU policies. They have acquired a unique knowledge on some of issues. Note that the Swiss citizens were the only ones to express their opinions on the issue of the free movement of the Central and Eastern Europeans to Western Europe. No other European population has ever accepted by a popular vote the 2004 EU enlargement. Only this non-EU country has done it.

II. The EU – Switzerland Bilateral Agreements I and II Are Not Very Innovative from a Legal Point of View

Coming historically after the European Economic Area, one could have expected the bilateral agreements to be more sophisticated from a legal point of view. This is in fact not the case. These agreements do not contain legal innovations. They are traditional international agreements, which are much less original and complicated than the European Economic Area.

The EEA mechanism is much more interesting. In it there is an EFTA Court of Justice and an equivalent of the Commission for the Norway, Iceland and Liechtenstein (EEA/EFTA States), the so-called EFTA Surveillance Authority. It is also clear that the EEA/EFTA States accept the jurisprudence of the European Court of Justice. Finally, those non-EU European countries are committed to take over the evolution of the Community *acquis* relevant to the EEA.

In the case of evolution of the relevant Community *acquis* nothing is clear about what Switzerland has to do (except in the air transport agreement and Schengen/Dublin). It is generally assumed that Switzerland will adapt autonomously for minor issues. If there is, however, a major change of the EU legislation, it is expected to conclude another treaty. But nothing has been codified in this regard.

In the bilateral agreements between Switzerland and the EU there is no specific Court of Justice or any kind of Tribunal of Arbitration. In the event of litigation, no legally binding mechanism is established. There are only political, mixed committees staffed by diplomats, not by lawyers.¹³

A current example illustrates this argument well. In 2007, the EU began strong attacks on tax privileges granted by some Swiss cantons to foreign companies, claiming that they are contrary to the 1972 free-trade Agreement, article 23.3. (There is so far no example based on the 1990s and 2000s bilateral agreements).

¹³ Ch. Kaddous, *La place des Accords bilatéraux II dans l'ordre juridique de l'Union européenne*, in Ch. Kaddous & M. Jametti Greiner (Eds.), *Accords bilatéraux II Suisse-UE/Bilaterale Abkommen II Schweiz-EU*, at 214 (2006). There is not even a mixed committee in the agreement on the taxation of savings.

The EU is calling on Switzerland to give up the tax practice and comply with its demands. The tax advantages in question concern foreign holding companies whose headquarters are in Switzerland but which make profits abroad. A total of 20,000 Swiss and foreign holding companies with a tax revenue of Sfr 7 billion (€4.23 billion) could be affected by changes.

The Federal Council objects that the 1972 Free Trade Agreement with the European Union does not apply to the tax benefits granted to foreign companies by some cantons. It argues that the 1972 agreement is only applicable to certain goods. Bern also states that when the agreement was signed, Switzerland and the European Community did not envisage a harmonization of their legislation. The Swiss Government also affirms that the rules of the trade agreement must not be interpreted in the same way as internal EU regulations on competition. Thus, according to the Swiss government and a large majority of Swiss legal experts, Switzerland is not violating the 1972 agreement.¹⁴ True or not, there is no independent jurisdictional mechanism to solve such divergences. There will be diplomatic negotiations and a compromise based on political power.

III. The Closer Switzerland Gets to the EU, the More Distant Prospects of Joining the EU Seem to Become

These Agreements I and II also lead to the paradoxical observation that the closer Switzerland gets to the EU, the more distant prospects of joining the EU seem to become.¹⁵ The *EUization* (Europeanization) induced by the multiplication of bilateral agreements and the autonomous adoption of many EU statutes will not necessarily lead Switzerland to join the EU.

Indeed, the majority of Swiss do not consider that such a satellization makes their independence factitious. They do not get disillusioned with a situation, which favours the illusion of a sovereignty, which has in fact already lost its substance. This reality does not lead them to favour the option of membership.

On the contrary, the principal conclusion drawn by a majority of Swiss citizens is that one can still continue "to manage" for a long time like that. For the dominant opinion, it is not worth belonging to the EU if one can have most of the EU advantages without its disadvantages.

The Bilateral Agreements II reinforces this analysis. Indeed, they grant Switzerland some special conditions, which, in theory, should disappear in the event of membership. One example is the condition relating to banking secrecy in the agreement on the taxation of savings. On the one hand, it brings Switzerland closer to the European Union on a particularly significant point. It indeed forces the Confederation to copy the European legislation and to tax the income on savings of the EU residents having put their money to Switzerland. On the other hand, it constitutes an additional obstacle on the path to membership. The

¹⁴ D. Miéville, *Le Temps*, 2 March 2007.

¹⁵ Most of the authors in a book edited by Clive Church in 2006 do not share my analysis. Most of them claim that the bilateral way is not sustainable and that Switzerland will naturally be forced to join the EU. See C. Church (Ed.), *Switzerland and the European Union* (2006).

bankers fear that by joining the EU, this very favourable treatment will be placed in jeopardy. They suspect that the Confederation would adopt the automatic exchange of information, resulting in the lifting of the banking secrecy. Thus the closer Switzerland gets to the EU through bilateral agreements, the more distant the prospects of joining the EU seem to become.

F. Concluding Remarks

Bilateral agreements between the EU and Switzerland offer very interesting, original and also paradoxical cases when considering approximation of laws by non-EU countries. Conceptualizing and, even more so, modelling the EU negotiating position in the Swiss case could be of great interest to its future partners in bilateral agreements.

In the first parts of this article, the two packages of bilateral agreements between the EU and Switzerland are introduced didactically. This study paid particular attention to the difficulties of the Swiss negotiators, being wedged between EU demands and Swiss population's resistance. A special emphasis was also put on the phases of ratification, characterized by very emotional popular votes.

In the last section, this article highlighted three paradoxical and ignored aspects of those bilateral agreements: Switzerland is becoming more integrated into the EU than some EU countries. From a legal point of view these agreements are interesting because they contain almost no legal innovation, especially compared to the European Economic Area (EEA). The closer Switzerland gets to the EU, the more distant the prospects of the EU seem to become.

The article also observes that a kind of *à la carte* integration is possible and that the EU – Switzerland bilateral agreements can be viewed as an even more flexible solution than the European Economic Area.

Although it is dangerous to make generalizations from the Swiss case,¹⁶ the Swiss case is nevertheless an interesting experiment (but not a proper model) for other non-EU countries. This country indeed obtained a privileged treatment that most EU leaders, legal experts and political scientists considered unrealistic. 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 have pundits affirmed that Switzerland could not get *à la carte* treatment, that Bern could not “have its cake and eat it”, that Swiss selfishness could last no longer. Switzerland got even a treatment of a double *à la carte*. As

¹⁶ Because those bilateral agreements were negotiated in a different period, and with a very special country. The EU was to a large extent also different from what it is today. On the issue of the Bilateral Agreements being used as models for possible agreements between the EU and other countries see R. Schwok & Ch. Bonte Christophe, *EEA and Switzerland – EU Bilateral Agreements in Comparative Perspective: What Lessons?*, in P. Demaret et al. (Eds.), *Regionalism and Multilateralism after the Uruguay Round: Convergence, Divergence and Interaction* (1997); M. Vahl & N. Grolimund, *Integration Without Membership. Switzerland's Bilateral Agreements with the European Union* (2006); A. Tovias, *Exploring the 'Pros' and 'Cons' of Swiss and Norwegian Models of Relations with the European Union*, 41 *Cooperation and Conflict* (2006).

a matter of fact, the EEA was already a kind of 'à la carte' treatment, letting the EEA/EFTA States get access to the EU Internal Market without joining the EU. The EU-Switzerland bilateral agreements can be viewed as an even more flexible solution than the EEA. Approximation of Switzerland's legislation to the EU will continue in the years ahead, as there is a mutual interest in reaching agreements. The EU is engaged in a bilateral venture with the Confederation and nothing indicates a shift of direction. It is therefore reasonable to expect more adaptation by Switzerland to the EU laws in the next years. The conclusion of a framework agreement, which would consolidate this approach, is also a perfectly realistic perspective.

Table 4: Annex: Abridged chronology

(Italics: popular votes in Switzerland)

3 May 1960: Establishment of EFTA (European Free Trade Association)
<i>3 December 1972: Popular vote on a Free-trade agreement.</i>
22 May 1992: The Federal Council decides to apply to EU membership.
<i>27 September 1992: Popular vote on the construction of new railways through the Alps.</i>
<i>6 December 1992: Popular vote on the European Economic Area (EEA).</i>
1 January 1994: EEA enters into force without Switzerland.
<i>20 February 1994: Popular vote on the "Alp Initiative" to ban European trucks in Switzerland.</i>
<i>8 June 1997: Popular vote on a constitutional initiative from the "Lega" calling for withdrawing the EU membership application.</i>
<i>27 September 1998: Popular vote against new taxes aiming at deterring transit of trucks.</i>
<i>29 November 1998: Popular vote on the financing of new tunnels (Gothard, Lötschberg).</i>
<i>21 May 2000: Popular vote on the Bilateral Agreements I.</i>
<i>14 March 2001: Popular vote on a constitutional initiative from the Pro-European movement calling for starting EU membership negotiations.</i>
1 June 2002: The first Bilateral Agreements enter into force.
<i>5 June 2005: Popular vote on Schengen.</i>
<i>25 September 2005: Popular vote on the extension of free movement of persons to the Central and Eastern European citizens.</i>
<i>26 November 2006: Popular vote on a cohesion funds for the 10 countries, which joined the EU in 2004.</i>
14 May 2007: Green light from the Council to the Commission for starting negotiations with Switzerland on tax benefits granted to foreign companies by some cantons.