

EU–SWITZERLAND: *QUO VADIS?*

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I. INTRODUCTION

It creates a feeling of unreality to write a contribution in a tribute publication for a dear colleague, who was above all a good friend and who left us totally unexpectedly a little more than a year ago. I knew Gabriel for many years. If my recollection is correct, it was in the early Gorbachev period that he asked me to lecture in the Brussels Seminar on the legal framework governing relations between the European Community and Eastern Europe. At the time, we were all thrilled about what was going on beyond the Iron Curtain. Certainly, among the many classic themes of European Community law at the Brussels Seminar, my intervention was somewhat exotic. However, slowly but surely, it became a well-established chapter in the annual meetings in Brussels. Moreover, my topic would later evolve to become “The EU Enlargement” while, after 2004, it even became “The Enlarged EU and its Neighbourhood.” Gabriel, in fact, also wanted me to include the relations between the EU and Russia, Turkey, and the Western Balkans. Gabriel was always present among the Seminar’s participants each year, and he was genuinely interested in everything that was taking place on the European continent. In particular, the EU’s enlargement process and its implications for the EU’s proximity policy struck a sensitive chord for him. A presentation at the Brussels Seminar always ended in an after-lecture drink or meal, during which we further explored the potential for and limits of the EU’s policy making. Gabriel often asked me to travel to Athens, Georgia, as a visiting professor at the University of Georgia School of Law, to explain these important European complexities to American law students. Unfortunately, I was only once able to come, and I must confess that now I deeply regret not being with him in Athens more often, as I have an excellent memory of my stay there. It was my first teaching experience in the U.S., and I was very impressed with the excellent academic atmosphere, the students’ eagerness to learn about Europe, Professor Sohn’s legendary black desk (which I was allowed to use during my stay), and so many other things—but above all, the warm hospitality of Gabriel and Gisèle.

In the last Brussels Seminar I taught—the 2009 session—I briefly touched on the relations between the EU and Switzerland, and Gabriel was deeply fascinated by the uniqueness of that relationship. How could a European State in the heart of the European Union survive without being an EU member? I had the intention, and I promised Gabriel to include a more structured form of this special aspect of the EU’s proximity relations in the 2010 Brussels Seminar. Sadly enough, instead of a presentation on this topic

at the Seminar, I have prepared a contribution in the Dean Wilner Tribute Issue.

II. BACKGROUND AND OVERVIEW OF THE BILATERAL LEGAL FRAMEWORK

The legal framework of EU–Switzerland relations is particularly complex and not easy to summarize.¹ The reasons are diverse. In the first place, there is the Byzantine complexity of the EU’s external decision-making process and of the legal structure of the EU’s external relations—something that has increased considerably since the entry into force of the Lisbon Treaty. But there is, of course, also Switzerland’s own specificity. Switzerland is not only one of the few countries fully enclosed in the heart of the EU, it is also a very important trade partner of the EU. Switzerland has concluded by far the largest number of bilateral sectoral agreements with the EU (more than 120).² Switzerland’s membership in the European Free Trade Association (EFTA), but its lacking membership in the European Economic Area³ and its customs and monetary union with Liechtenstein, add a special perspective to this specificity. In addition, Switzerland’s constitutional system, with its direct democracy and system of popular referenda, as well as its neutrality, are elements that impact its relations with the EU, but that, unfortunately, are not examined in this contribution.

As a result of the specific geographical position of Switzerland, the European Community rapidly accepted the idea that bilateral sectoral *ad hoc* agreements with Switzerland were necessary after the establishment of the

¹ For a comprehensive overview of the legal framework of bilateral relations between the EU and Switzerland, see Christine Kaddous, *The Relations Between the EU and Switzerland*, in *LAW AND PRACTICE OF EU EXTERNAL RELATIONS* 227, 227–69 (Alan Dashwood & Marc Maresceau eds., 2010). For an overview of the political background of this relationship, see RENE SCHWOK, *SWITZERLAND–EUROPEAN UNION: AN IMPOSSIBLE MEMBERSHIP?* (Lisa Godin-Roger trans., 2009).

² For a recent overview, see *Les accords bilatéraux Suisse-Union européenne, Septembre 2011* Bureau d’intégration, Département fédéral des affaires étrangères, Bern, available at <http://www.europarl.europa.eu/document/activities/cont/201003/20100315ATT70636/20100315ATT70636EN.pdf>. For a list of the bilateral agreements (Sept. 2005) see *Accords bilatéraux II Suisse-UE et autres Accords récents*, 929–46 (Christine Kaddous & Monique Jametti Greiner eds., 2006). See also Christa Töbler, Jeroen Hardenbol & Balázs Mellár, *Internal Market Beyond the EU: The EEA and Switzerland*, Directorate-General for Internal Politics, European Parliament (2010) PE 429.993, available at <http://www.europa.admin.ch/dienstleistungen/00553/index.html?lang=fr>.

³ See *infra* p. 732.

European Economic Community (EEC). By the 1960s, various agreements of this nature had already been concluded; for instance, agreements on clocks and watches⁴ and on certain cheeses,⁵ but the first bilateral agreement of a more comprehensive nature was no doubt the 1972 Agreement Between the European Economic Community and the Swiss Confederation (1972 Agreement) which basically aimed at establishing free trade for industrial products.⁶ This Agreement was one of a series of agreements that the EEC signed with all the EFTA Member States before the 1973 accession of the two EFTA States—the U.K. and Denmark—to the European Community. The 1972 Agreement with Switzerland, which has been the main legal basis for the development of mutual trade relations, is still in force today and remains an important framework for mutual trade.⁷ It must be said that it has even gained new momentum as a result of a sharp divergence in the

⁴ These agreements were not published in the Official Journal of the European Communities; they were later amended and the amendments were published in the Official Journal. Amendment of the Additional Agreement to the Agreement Concerning Products of the Clock and Watch Industry Between the European Economic Community and its Member States and the Swiss Confederation, 1977 O.J. (C 253) 1; Amendment of the Additional Agreement to the Agreement Concerning Products of the Clock and Watch Industry Between the European Economic Community and its Member States and the Swiss Confederation, 1986, 1987 O.J. (C 94) 1. The agreements have been published in the Swiss *Recueil systématique du droit fédéral*, Accord du 30 juin 1967 concernant les produits horlogers entre la Confédération suisse et la Communauté économique européenne ainsi que ses Etats membres, available at http://www.admin.ch/ch/f/rs/c0_632_290_13.html; Accord complémentaire du 20 juillet 1972 à l'Accord concernant les produits horlogers entre la Confédération suisse et la CEE ainsi que les Etats membres, available at http://www.admin.ch/ch/f/rs/c0_632_290_131.html.

⁵ Tariff Agreement with Switzerland, Negotiated Under Article XXVIII of GATT, Concerning Certain Cheeses Falling Within Heading ex 04.04 of the Common Customs Tariff, June 29, 1967, 1969 O.J. (L 257) 5. The implementation of that agreement was later modified by Commission Regulation 3048/87, Sept. 9, 1987, 1987 O.J. (L 289) 18, now replaced by Agreement Between the European Community and the Swiss Confederation on Trade in Agricultural Products, Concessions Regarding Cheeses, Annex 3, 2002 (L 114) 148.

⁶ Agreement Between the European Economic Community and the Swiss Confederation, July 22, 1972, 1972 O.J. (L 300) 189 [hereinafter 1972 Agreement].

⁷ The 1972 Agreement aimed at progressively eliminating the obstacles to substantially all trade regarding products falling within Chapters 25 through 99 of the Brussels Nomenclature, but it did not apply to agricultural products (which are within Chapters 1 through 24 of the Brussels Nomenclature). In 1999, within the *Bilaterals I* (see *infra* p. 733), the Agreement Between the European Community and the Swiss Confederation on Trade in Agricultural Products (2002 O.J. (L 114) 132) was signed which constitutes an important complement to the 1972 Agreement. Within the *Bilaterals II* package (see *infra* p. 734), the Agreement as regards Provisions Applicable to Processed Agricultural Products, 2005 O.J. (L 23) 19, amending the 1972 Agreement, was concluded.

interpretation of the Agreement's provisions on state aid. The European Commission believes that certain tax regulations applied by Swiss cantons with regard to holding companies, mixed and management companies, offering tax advantages to companies established in Switzerland for profits generated in the EU, are a violation of Article 23 of the 1972 Agreement.⁸ This provision states that "any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods" is "incompatible with the proper functioning of the Agreement in so far as [it] may affect trade between the [European] Community and Switzerland."⁹

According to the European Commission, these tax advantages "are not related to specific investments which could justify granting an advantage to compensate for specific costs incurred by the beneficiaries but, instead, constitute a reduction of charges that should normally be borne by the firms concerned in the course of their business."¹⁰ They are, therefore, forms of aid which, in its view, are "public operating aid" and "discriminate against multinational enterprises which do not establish their holding or management activities in Switzerland."¹¹ For this reason, a considerable number of multinational companies have decided to relocate their headquarters from the EU to Switzerland.¹² The Swiss response to the EU's interpretation of Article 23 is that Switzerland is not a part of the EU's Internal Market and that the EU interpretation of the competition rules, including those on state aid, are not applicable in Switzerland.¹³

In addition, in the Swiss view, the 1972 Agreement only covers trade of certain goods and cannot be a proper legal basis for judging company

⁸ Commission Decision, Incompatibility of Certain Swiss Company Tax Regimes of 13 February 2007, C (2007) 411 final, not published in the Official Journal.

⁹ 1972 Agreement, *supra* note 6, art. 23, para. 1.

¹⁰ Commission Decision, *supra* note 8, para. 57.

¹¹ *Id.* para. 46.

¹² See, e.g., Maija Palmer & Ben Fenton, *Yahoo Set to Move European HQ from London to Geneva*, FIN. TIMES, Mar. 14, 2008, at 1; *Lake Geneva Goes Bananas*, SWISSINFO.CH (July 26, 2008), http://www.swissinfo.ch/eng/business/Lake_Geneva_goes_bananas.html?cid=6822842; Julia Kollewe, *McDonald's to Move European Head Office to Switzerland*, GUARDIAN (U.K.) (July 13, 2009), <http://www.guardian.co.uk/business/2009/jul/13/mcdonalds-headquarters-move-geneva>; Simon Goodley et al., *Cadbury's Secret Swiss Move Will Cost UK Exchequer Millions in Tax*, GUARDIAN (U.K.), Dec. 3, 2010, at 1.

¹³ For a summary of the Swiss position, see *Tax Issues*, SWISS CONFEDERATION: FEDERAL DEPARTMENT OF FOREIGN AFFAIRS, <http://www.europa.admin.ch/themen/00499/00503/00567/index.html?lang=en> (last visited Aug. 20, 2011).

taxation laws. The dispute settlement procedure foreseen in this Agreement does not provide for a smooth outcome of this controversy since it is up to the Joint Committee to put an end to the conflict, which implies “mutual agreement” between the parties (pursuant to Article 30, paragraph 2 of the Agreement).¹⁴ Logically enough, the Joint Committee has so far been unable to take such a decision. From a strictly legal point of view, however, the EU could have considered unilaterally adopting safeguard measures (a possibility foreseen in Article 27, paragraph 3 of the Agreement)¹⁵ but this was probably a bridge too far, and until now, diplomatic channels have been followed trying to solve the matter, yet without success. Recently, the Council (of Ministers) of the EU expressed renewed concern about these tax regimes, regretting “the lengthy dialogue on this issue [which] has not yet led to an abolition of the state aid aspects of these regimes.”¹⁶ This controversy needs to be kept in mind when attempting to make a global assessment of the bilateral relations.

Another important issue for the EU–Switzerland relations was the EC’s initiative on the Completion of the Internal Market. This was one of the major EC policy programs launched in the second half of the 1980s that aimed to achieve an area without borders with free movement of goods, persons, services, and capital by 1992.¹⁷ Needless to say, this project seriously affected the EC’s EFTA partners, as close neighbors of the Internal Market, and this explains why in the course of implementation of this project, the idea of a European Economic Area (EEA) was also launched to establish an Internal Market between the EC and the EFTA countries. In 1992, during the final phase of the preparation of the conclusion of the EEA Agreement, Switzerland even formally applied for EU membership.¹⁸ However, a few months afterwards in a popular referendum, the Swiss population refused to approve the EEA Agreement.¹⁹ As a result of the collapse of the EEA option for Switzerland and the “freezing” of its application for EU membership, it was indispensable—there was simply no

¹⁴ 1972 Agreement, *supra* note 6, art. 23, para. 2.

¹⁵ *Id.* art. 27, para. 3.

¹⁶ General Affairs Council of the European Union, Council Conclusions on EU Relations with EFTA Countries, para. 44 (Dec. 14, 2010), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118458.pdf

¹⁷ *See Completing the Internal Market*, COM (1985) 310 final.

¹⁸ Switzerland applied for membership on May 20, 1992.

¹⁹ The unexpected outcome of this referendum was 50.3% against the EEA, 49.7% in favor.

other alternative—to organize the bilateral relations in a sectoral manner. However, instead of further progressing exclusively on an agreement-by-agreement approach, the idea arose to work through negotiating “packages.” Fortunately, this package method proved to be workable and flexible enough to cope with the most pressing issues in the bilateral relations. Through clusters of bilateral sectoral agreements, complex and delicate negotiation packages were formed that allowed the EU and Switzerland to move forward. No doubt, the agreements that resulted from this process are much better than no agreements at all and the method followed in this process has also made it possible to reach a wide range of different areas. Although considerable cherry-picking took place on both sides, this process led to an improved global equilibrium in mutual relations. The same result would most likely not have been obtained if the negotiations were conducted on a purely individual basis. Regrouping in bilateral negotiations, a great variety of different agreements made it possible to more easily create compromises between the parties.

The first package of agreements, known as the *Bilaterals I*, signed in 1999 and entered into force in 2002, was composed of seven sectoral agreements covering free movement of persons, transport over land, air transport, public procurement markets, elimination of technical barriers to trade, research, and agriculture.²⁰ The eye-catcher was the Agreement on the Free Movement of Persons as requested by the EC.²¹ More than one million EU citizens live in Switzerland (amid a population of slightly more than 6 million Swiss citizens) and over 200,000 EU nationals (“les frontaliers”) cross the border daily to work in Switzerland.²² This agreement was the sole “mixed agreement” of the package; that is, from the EU’s side, an agreement that the EC *and* its Member States sign. As a consequence of this “mixity,” EU enlargement, after the entry into force of the *Bilaterals I*, required Swiss approval for the application of the Agreement on the Free Movement of Persons to the new EU Member States. For the EU enlargements of 2004

²⁰ For text of these agreements, see 2002 O.J. (L 114) 1 [hereinafter *Bilaterals I*].

²¹ Agreement Between the European Community and its Member States, of the One Part, and the Swiss Confederation, of the Other, on the Free Movement of Persons, June 21, 1999, 2002 O.J. (L 114) 6 [hereinafter Agreement on the Free Movement of Persons].

²² For recent statistical data, see *Communiqué de presse*, Département fédéral de l’intérieur DFI, Office fédéral de la statistique, Confédération Suisse, 7 March 2011, <http://www.bfs.admin.ch/bfs/portal/fr/index/themen/03/22/press.html>. In 2010 approximately 231,000 “frontaliers”/“frontalières” worked in Switzerland.

and 2007, Switzerland agreed to extend the Free Movement of Persons Agreement through popular referendum.²³ The various agreements of the *Bilaterals I* were, notwithstanding their great diversity, interconnected through the famous “guillotine clause,” which stipulated that all the agreements had to enter into force simultaneously and would collectively terminate should any individual agreement be terminated.²⁴

Of course, it is not the place here to examine the agreements individually,²⁵ but soon after their signature, initiatives were launched for a new series of agreements called the *Bilaterals II*.²⁶ A number of agreements were not included in the *Bilaterals I* and were considered “leftovers,” while for some new areas, additional bilateral agreements were suggested. On the whole, the negotiations for the *Bilaterals II* again covered a wide range of topics such as environment, education, statistics, MEDIA, processed agricultural products, pension, and services, but the most sensitive topics were the EU’s requests for an agreement on taxation on savings income and an agreement on the fight against fraud in the area of indirect taxation. Switzerland for its part demanded to be associated with the activities of the Schengen and Dublin Conventions establishing co-operation in the fields of

²³ The additional protocol regarding the 2004 EU enlargement was approved on September 25, 2005 by a majority of 56%. *Votation populaire du 25 septembre 2005*, SWISS CONFEDERATION, <http://www.admin.ch/ch/f/pore/va/20050925/index.html> (last visited Aug. 20, 2011). On February 8, 2009, the extension of the Agreement on Free Movement of Persons to Bulgaria and Romania was approved in a referendum by a majority of 59.6%. *Votation populaire du 8 février 2009*, SWISS CONFEDERATION, <http://www.admin.ch/ch/f/pore/va/20090208/index.html> (last visited Aug. 20, 2011).

²⁴ See, e.g., Agreement on the Free Movement of Persons, *supra* note 21, art. 25.

²⁵ For a thorough analysis of the *Bilaterals I*, see ACCORDS BILATÉRAUX SUISSE - UNION EUROPÉENNE (Daniel Felder & Christine Kaddous eds., 2001); Stephan Breitenmoser, *Sectoral Agreements Between the EC and Switzerland: Contents and Context*, 40 COMMON MKT. L. REV. 1137 (2003).

²⁶ The most important agreements of the *Bilaterals II* are: Agreement on Participation of Switzerland in the European Environment Agency and European Information and Observation Network, 2004 O.J. (L 90) 37; Agreement Regarding Provisions Applicable to Processed Agricultural Products, 2005 O.J. (L 23) 19; Agreement on Cooperating in Field of Statistics, 2006 O.J. (L 90) 2; MEDIA Agreements, 2006 O.J. (L 90) 23, and 2007 O.J. (L 303) 9; Agreement on the Swiss Confederation’s Association with the Implementation, Application and Development of the Schengen *Acquis*, 2008 O.J. (L 53) 1; Agreement Concerning the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in a Member State or in Switzerland, 2008 O.J. (L 53) 5; Cooperation Agreement to Combat Fraud and Any Other Legal Activity to the Detriment of the Financial Interests of the Parties, 2009 O.J. (L 46) 6.

justice, police, asylum, and migration.²⁷ While the Swiss authorities insisted on parallelism in the negotiations, this was not the case for ratification, conclusion, and entry into force of the agreements making up the package, and the various agreements were disconnected from each other.²⁸ Consequently, contrary to the *Bilaterals I*, the agreements of the *Bilaterals II* did not include the “guillotine clause.” Certainly, the EU request for cooperation by Switzerland regarding taxation of savings income was a particularly difficult matter, the more so since the EU had made the entry into force of its own Council Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments,²⁹ dependent on the entry into force of an agreement with Switzerland (and the four small States: Liechtenstein, San Marino, Monaco, and Andorra), applying “measures equivalent to those contained in this Directive.”³⁰ In other words, one of the most important EU Directives in the field of fiscal policy establishing the principle of information exchange regarding EU residents’ bank accounts in other EU Member States than the Member State of residence, needed, as a *conditio sine qua non*, co-operation by Switzerland. Of course, such a demand was not without danger for the Swiss sacrosanct bank secrecy principle, but Switzerland also rapidly understood that “a war” with the EU on such a sensitive topic could not be won and should be avoided by all means. In 2003, a political compromise between the EU and Switzerland was reached and was formalized in the 2004 Agreement Providing for Measures Equivalent to those Laid Down in Council Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments.³¹ The Agreement did not establish automatic exchange of information and thus the Swiss bank secrecy principle had been safeguarded.³² On their part, the

²⁷ See *infra* pp. 752–53.

²⁸ This explains why the agreements of the *Bilaterals II*, contrary to those of the *Bilaterals I*, have different dates for their conclusion and entry into force.

²⁹ Council Directive 2003/48/EC of 3 June 2003 on Taxation of Savings Income in the Form of Interest Payments, 2003 O.J. (L 157) 38 [hereinafter EU Savings Directive].

³⁰ *Id.* art. 17, para. 2.

³¹ Agreement Providing for Measures Equivalent to Those Laid Down in Council Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments, 2004 O.J. (L 358) 30 [hereinafter 2004 Agreement on Taxation of Savings Income]. For more details, see Marc Maresceau, *Bilateral Agreements Concluded by the European Community*, in 309 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 416, 416–19 (2004).

³² It is not the purpose of this Article to go into the details of the Swiss bank secrecy laws which are under increasing pressure from the U.S. and EU Member States but it is perhaps useful to recall that in 2009, Switzerland agreed to cooperate concerning a request for information from

Swiss authorities agreed to introduce “equivalent measures,” consisting of a system of tax retention, to be introduced in different phases. In the third and last phase of this arrangement, 35% tax on savings income is to be imposed on EU account holders in Switzerland. Exchange of information is only foreseen for conduct constituting tax fraud or the like under the laws of the requested State; in other words, it is Swiss law which determines the meaning of “tax fraud” in Switzerland and not that of the requesting State.

It should also be noted that after the Swiss rejection of the EEA initiative, EU–Switzerland relations did not exclusively develop through the *Bilaterals I* and *II*. Various *ad hoc* bilateral agreements were also concluded, such as, *inter alia*, agreements on Swiss participation in certain EU Missions (e.g., the Aceh Monitoring Mission (Indonesia),³³ the EU Police Missions in the

the U.S. Internal Revenue Service regarding UBS (Agreement Between the United States of America and the Swiss Confederation, Aug. 19, 2009, *available at* http://www.irs.gov/pub/irs-drop/us-swiss_government_agreement.pdf) but further actions against Swiss bank secrecy are not to be excluded (*see* Haig Simonian, *Swiss and US to Clash Again on Bank Secrecy*, FIN. TIMES, Sept. 5, 2011, at 3; Haig Simonian, *Swiss Pressed over Secret Accounts*, FIN. TIMES, Aug. 10, 2011, at 12. The pressure from the U.S. on Switzerland has also inspired some EU Member States to negotiate bilateral tax cooperation agreements with Switzerland. For example, on October 6, 2011 the UK signed a taxation cooperation agreement with Switzerland providing *inter alia* for taxation of UK bank account holders in Switzerland while preserving the bank secrecy principle. Haig Simonian & Norma Cohen, *UK in Tax Deal over Swiss Bank Accounts*, FIN. TIMES (Aug. 24, 2011), <http://www.ft.com/intl/cms/s/0/df9d4d9e-ce6d-11e0-b755-00144feabdc0.html#axzz1gvTZyqjf>; text of the Agreement, *available at* <http://www.news.admin.ch/NSBSubscriber/message/attachments/24483.pdf>. Before the signature of the UK–Switzerland agreement, Germany had already signed on September 21, 2001 a taxation cooperation agreement. Abkommen zwischen der Schweizerischen Eidgenossenschaft und der Bundesrepublik Deutschland über Zusammenarbeit in den Bereichen Steuern und Finanzmarkt, Sept. 21, 2011, *available at* <http://www.news.admin.ch/NSBSubscriber/message/attachments/24360.pdf>). More EU Member States, inspired by these bilateral agreements, are currently negotiating taxation cooperation agreements with Switzerland (for example Greece) but others, such as France, have refused to follow the UK and German example. *See, e.g., La France refuse de céder aux avances de la Suisse sur l'évasion fiscale*, LE MONDE (Aug. 19, 2011), http://generation.lemonde.fr/politique/article/2011/08/18/la-france-refuse-de-ceder-aux-avances-de-la-suisse-sur-l-evasion-fiscale_1560811_823448.html). However, the recent bilateral agreements with the UK and Germany are currently examined by the European Commission for possible breaches of EU law, in particular, the EU Savings Directive, *supra* note 29, and 2004 Agreement on Taxation of Savings Income, *see supra*, note 31. *See* Alex Barker, *UK and German Tax Deals with Swiss Anger Brussels*, FIN. TIMES, Nov. 28, 2011, at 1.

³³ Council Decision 2005/966 CFSP, of 14 November 2005 Concerning the Conclusion of an Agreement Between the European Union and the Swiss Confederation on the Participation of the Swiss Confederation in the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM), 2005 O.J. (L 349) 30.

Former Yugoslav Republic of Macedonia,³⁴ in Bosnia and Herzegovina,³⁵ the Rule of Law Mission in Kosovo (EULEX)).³⁶ Switzerland also participates in a number of Community Programmes³⁷ and some specific bilateral agreements have further been concluded, for example, on procedures for the exchange of classified information.³⁸ In addition, Switzerland also agreed to financially participate to reduce social and economic disparities in the enlarged European Union. A Memorandum of Understanding with the EU was signed for this purpose, where Switzerland agreed to finance projects in the new EU Member States for a total of 645 million euro,³⁹ an amount that increased to 902 million euro after the accession of Bulgaria and Romania.⁴⁰

Finally, though not examined further in this Article, Switzerland has a policy of closely following the developments of the EU *acquis* (the accumulated legislation, legal acts, and court decisions which constitute the body of EU law), particularly regarding the Internal Market. Consequently, even outside the bilateral agreement frameworks, Switzerland often adapts its domestic law unilaterally to that of the Union.

³⁴ Council Decision 2004/809/CFSP of 5 July 2004 Concerning the Conclusion of the Agreement Between the European Union and the Swiss Confederation on the Participation of the Swiss Confederation in the European Union Police Mission (EUPOL Proxima) in the former Yugoslav Republic of Macedonia, 2004 O.J. (L 354) 77.

³⁵ Agreement Between the European Union and the Government of the Swiss Confederation, Represented by the Federal Department of Foreign Affairs, on the Participation of Switzerland in the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH), Dec. 11, 2002, , 2003 O.J. (L 239) 14.

³⁶ Council Decision 2008/666/CFSP of 24 July 2008 Concerning the Conclusion of an Agreement Between the European Union and the Swiss Confederation on the Participation of the Swiss Confederation in the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, 2008 O.J. (L 217) 24.

³⁷ For example, Switzerland participates in MEDIA 2007, the Seventh Framework Programme, and the Socrates, Leonardo, and Youth Programmes. See Kaddous, *supra* note 1, at 239, 245–46, 249–50. Arrangements for such participation are often based on a specific bilateral agreement.

³⁸ Agreement Between the Swiss Confederation and the European Union on the Security Procedures for the Exchange of Classified Information, Apr. 28, 2008, 2008 O.J. (L 181) 58.

³⁹ See Press Release, EU and Switzerland to Sign Memorandum, IP/06/234, 6283/06 (Feb. 27, 2006), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/234&type=HTML&aged=0&language=EN&guiLanguage=en>.

⁴⁰ See Press Release, Signature of Memorandum of Understanding, Pres/08/188 (June 25, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/08/188&type=HTML>.

III. ASSESSMENT OF THE CURRENT RELATIONSHIP

In September 2010, the Swiss Government published a comprehensive report on Switzerland's European Policy as a response to the postulate submitted by National Counsellor Christa Markwalder, requesting the Swiss Federal Council assess advantages and disadvantages of the various policy instruments regarding Switzerland–EU relations, and make suggestions regarding priorities, immediate measures, and next steps related to Switzerland's future European policy.⁴¹ In this report, the Swiss Federal Council examines the following options: continuation of the bilateral approach, but without concluding new agreements; continuation of the bilateral approach, but combining with further sectoral development (in other words, further amplifying the bilateral sectoral frameworks); creation of a global institutional framework, including the creation of a horizontal solution to manage and channel the bilateral relationships; accession to the EEA; accession to the EU; or accession to the EU, but with certain exceptions resulting from Switzerland's specificity such as its neutrality, currency, tax system, et cetera.⁴² The main message of the Federal Council is that, on the whole, Switzerland is satisfied with the bilateral sectoral approach followed thus far, and that in the present circumstances, the bilateral sectoral agreements make it possible to safeguard Switzerland's interest in Europe, "namely preserving its freedom of action, its prosperity and its values."⁴³ Consequently, "the Federal Council [is in favor of maintaining] its commitment to the consolidation and further development of the bilateral agreements approach, which it currently regards as *the most suitable instrument* for safeguarding Switzerland's interests in Europe."⁴⁴

⁴¹ RAPPORT DU CONSEIL FÉDÉRAL SUR L'ÉVALUATION DE LA POLITIQUE EUROPÉENNE DE LA SUISSE (2010), available at <http://www.admin.ch/ch/f/ff/2010/6615.pdf>. For a summary in English, see SWISS CONFEDERATION: FEDERAL DEPARTMENT OF FOREIGN AFFAIRS, SWITZERLAND'S EUROPEAN POLICY: AN OVERVIEW OF THE FEDERAL COUNCIL'S REPORT ON THE EVALUATION OF SWITZERLAND'S EUROPEAN POLICY (2010), available at http://www.europa.admin.ch/dokumentation/00437/00460/01549/index.html?lang=en&download=NHzLpZeg7t,lnp6IO NTU042l2Z6lnlad1IZn4Z2qZpnO2Yuq2Z6gpJCDdoF8gGym162epYbg2c_JjKbNoKSn6A--.

⁴² SWISS CONFEDERATION: FEDERAL DEPARTMENT OF FOREIGN AFFAIRS, *supra* note 41.

⁴³ *Id.* at 15.

⁴⁴ *Id.* (emphasis added). In her speech on November 15, 2010, at the Swiss Mission to the EU, Brussels, Swiss Foreign Minister Micheline Calmy-Rey presented a mixed picture of the current state of the bilateral relationship. While insisting that existing bilateral frameworks allowed Switzerland to achieve its objectives in terms of prosperity and national security, she felt that Swiss independence and sovereignty were under continued pressure since

As already mentioned, the EU's view is more nuanced. In its Conclusions of December 14, 2010 on the relations with EFTA Countries, the EU Council qualified the relations with Switzerland as “good, intensive and broad”⁴⁵ and previously, the Council had already recognized that the sector-based bilateral agreements were a fruitful basis “for a wide-ranging and productive co-operation.”⁴⁶ However, it is also true that there is an increasing strain on this method of conducting bilateral relations. The reasons for the changing EU perception on the relations with Switzerland are varied and relate to the EU's enlargement and its own deepening,⁴⁷ but also to the growing and cumbersome sophistication of the bilateral mechanisms set up with Switzerland over the years.⁴⁸ EU–Switzerland relations occupy a very specific position in the EU's proximity policy as a whole.

The integration of EFTA countries in the EU's Internal Market through the EEA Agreement, their acceptance of a wide range of flanking and accompanying policies, and the establishment of a solid institutional EEA framework—in particular, through the work of the EEA Joint Committee—have led to an exemplary incorporation record of the EU *acquis* in the legal order of these countries, notwithstanding the fact that they remain non EU members. The EU Council's assessment of the relations with EFTA countries within the EEA Agreement is outspoken and unambiguous: “the

Switzerland, as a non-EU member, “est de plus exposée à un risque élevé de discrimination (tant économique que politique) d'où une réduction parfois importante de sa souveraineté réelle.” (“Switzerland is becoming increasingly exposed to a high risk of discrimination (economically as well as political) and hence to a reduction, sometimes considerably, of its real sovereignty.”) ALLOCUTION DE MADAME LA CONSEILLÈRE FÉDÉRALE MICHELINE CALMY-REY À L'OCCASION DE LA CÉLÉBRATION DES 50 ANS DE LA MISSION SUISSE AUPRÈS DES INSTITUTIONS EUROPÉENNES 5 (Nov. 15, 2010).

⁴⁵ General Affairs Council of the European Union, *supra* note 16, para. 37.

⁴⁶ General Affairs Council of the European Union, Conclusions on EU Relations with EFTA Countries, Dec. 8, 2008, para. 24.

⁴⁷ Ambassador M. J. de Watteville, Head of the Swiss Mission to the EU, perfectly summarized this state of affairs when he held that the EU has become a major actor on the international scene and this affects its own priorities. The EU is therefore “moins disponible pour traiter avec un pays comme le nôtre, alors qu'elle est devenue un partenaire encore plus crucial pour la Suisse.” EXPOSÉ A L'OCCASION DE L'OUVERTURE DE L'ANNÉE ACADÉMIQUE DE L'INSTITUT EUROPÉEN DE L'UNIVERSITÉ DE GENÈVE (2010).

⁴⁸ See Herman Van Rompuy, President of the European Council, Remarks at the Joint Press Conference with Doris Leuthard, President, Switz. (July 19, 2010) (emphasizing that there are now sixty specific bilateral “working groups” monitoring the implementation of the many agreements). Valentina Pop, *EU Looking to Reset Relations with Switzerland*, EUOBSERVER.COM (July 19, 2010), <http://euobserver.com/18/30504>.

EEA countries have demonstrated an excellent record of proper and regular incorporation of the *acquis* into their own legislation,"⁴⁹ which is a prerequisite for continued homogeneity of the Internal Market. In this respect, it is noted by the Council, there is a smooth and well-functioning surveillance system, through the excellent work of the EFTA Surveillance Authority (ESA) and the EFTA Court.⁵⁰

Unfortunately, the same cannot be said regarding the EU–Switzerland relationship. Switzerland, notwithstanding its EFTA membership, rejected the EEA model of integration.⁵¹ As already mentioned, bilateral relations must have an *ad hoc* and *sui generis* sectoral basis as a result of this rejection. Consequently, the integration of Switzerland into the EU *acquis* is less comprehensive and more fragmented than that achieved through the EEA model. As a result, in EU–Switzerland relations, legal certainty is less guaranteed, and surveillance is more one-sided and less transparent than that operating within the EEA framework. This is perhaps the main reason for the increasing criticism within the EU as to how its relations with Switzerland are organized. A growing issue at the bilateral level is the question of the take-over by Switzerland of *new* EU *acquis*, in particular, when this *acquis* concerns the Internal Market, including case-law of the European Court of Justice⁵² and, naturally, the closely-related issue of efficient supervision and enforcement of existing agreements, just mentioned. At the time of writing this Article, the EU Council has in rather direct language expressed the view that the current system of bilateral agreements with Switzerland has become "unwieldy to manage and has clearly reached its limits."⁵³ Consequently, the homogeneous interpretation of the many bilateral agreements with Switzerland and the questions related to an independent surveillance system, judicial enforcement mechanisms and a dispute settlement mechanism, will need to be more adequately addressed. Needless to say, these issues represent a full negotiating menu for the years

⁴⁹ General Affairs Council of the European Union, *supra* note 16, para. 3; *see also* General Affairs Council of the European Union, *supra* note 46, para. 2.

⁵⁰ General Affairs Council of the European Union, *supra* note 16, para. 3.

⁵¹ *See supra* p. 732.

⁵² General Affairs Council of the European Union, *supra* note 16, para. 42.

⁵³ *Id.* para. 48.

to come, which will not only affect mutual bilateral relations, but may also have repercussions on domestic Swiss politics and law.⁵⁴

Different models on how to refer to the EU *acquis* and how to cope with the developments of the law are found in existing EU–Switzerland agreements. They provide a complex and diverse picture of various forms and degrees of integration and/or cooperation. From a comparative perspective, the following questions appear to be relevant: in principle, how is the “acceptance” or “integration” by Switzerland of substantially identical or similar provisions of the EU *acquis* organized? Are there specific provisions on development of the law on “acceptance” or “integration” of *posterior* legislation and *posterior* case-law of the Court of Justice? What solutions are suggested if a conflict or imbalance persists, and is there an adequate dispute settlement mechanism in case of such conflict or imbalance? If so, at what level is the dispute solved? Is arbitration foreseen, and if so, how is this organized? Is there a possibility for “compensation” if the imbalance persists? Finally, how is “termination” of an agreement organized? Again, it is impossible to provide an exhaustive analysis of all these questions within this Article.⁵⁵ In the following section, four different

⁵⁴ It is interesting to note that on the same day as the publication of the Council’s Conclusions on the EU’s Relations with EFTA Countries, December 14, 2010, the Swiss authorities reacted with an Official Statement by the Integration Office FDFA/FDEA. After reiterating that the present bilateral agreements with the EU “are working well,” the Integration Office responded to certain specific EU comments and observed that an informal Swiss–EU working group was currently discussing the possible horizontal institutional provisions of future bilateral agreements, the models for adjusting the agreements to comply with new developments of EU law, how to ensure coherent application and interpretation of future agreements, and how an effective dispute settlement procedure could be set up. The Statement also underlined that “[a]ny solution must respect the sovereignty of both parties and the efficient operation of their institutions.” Statement, Integration Office FDFA/FDEA, Conclusions of the Council of the EU on Relations with Switzerland (Dec. 14, 2010).

⁵⁵ It should be added that also EU Member States may have bilateral disputes with Switzerland and such disputes may sometimes have, be it only partially, an EU law dimension. A rather unusual example of this was the dispute between Belgium and Switzerland concerning the interpretation and application of Lugano Convention. Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 28 I.L.M. 620 (1989). On December 21, 2009 this dispute was brought by the Belgian Government before the International Court of Justice, *see* Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v. Switzerland). According to the Belgian Government, Swiss courts, and in particular, the Federal Supreme Court, in breach of this Convention, refused to recognize the future Belgian court decisions related to the consequences of the bankruptcy of Sabena (the former Belgian national airline had been acquired by the Swiss SAirGroup (formerly Swissair)). This case involved a number

types of integration agreements (agreements that refer to certain aspects of the EU *acquis* and which Switzerland, to a certain extent, is prepared to respect), are briefly examined.

IV. DIFFERENT TYPES OF INTEGRATION AGREEMENTS: THE QUESTION OF REFERENCE TO EU LAW AND THE DEVELOPMENT OF EU LAW

Explicit references to integration of the EU *acquis*, whereby a third party agrees to apply the *acquis*, remain very rare in bilateral agreements between the EU and third countries, which is also the case in relations with Switzerland. Nevertheless, at least four types of agreements can be identified that have, to some extent, such an integration dimension. Strangely enough, they all follow a different pattern of integration. In this context, the following agreements can be discussed: the Agreement on the Free Movement of Persons,⁵⁶ the Agreement on Air Transport,⁵⁷ the Agreement on Customs Security,⁵⁸ and the Agreements on the Association to the Schengen/Dublin *Acquis*.⁵⁹

of important procedural and substantive law questions which cannot be examined here but it also raised the interesting issue whether and to what extent an EU Member State could bring a case before the International Court of Justice against a non-EU Member State for a matter which had at least in part also an EU law dimension. The 1988 Lugano Convention had extended the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters to Iceland, Norway, and Switzerland, Sept. 27, 1968, O.J. (L 299) 32, and was subsequently revised in order to align the 1988 Lugano Convention with the 2000 EU Regulation on Jurisdiction and the Recognition of Enforcement of Judgments in Civil and Commercial Matters, Council Regulation (EC) 44/2001, Dec. 22, 2000. See Council Decision of 27 November 2008 Concerning the Conclusion of the Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2009 O.J. (L 147) 1. However, by Order of April 5, 2011, the International Court of Justice removed the case because the Belgian Government had informed the Court that "in concert with the Commission of the European Union" it wanted to discontinue the proceedings. Press Release, Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v. Switzerland), ICJ, No 2011/11 (Apr. 12, 2011). Whatever the outcome about jurisdiction might have been if the case had continued, it provides an illustration of the sometimes high degree of sensitivity and complexity of the relationship of EU Member States with Switzerland.

⁵⁶ Agreement on the Free Movement of Persons, *supra* note 21.

⁵⁷ Agreement Between the European Community and the Swiss Confederation on Air Transport, 2002 O.J. (L 114) 73 [hereinafter Agreement on Air Transport].

⁵⁸ Agreement Between the European Community and the Swiss Confederation on the Simplification of Inspections and Formalities in Respect of the Carriage of Goods and on

A. *Agreement on the Free Movement of Persons*

The Agreement on the Free Movement of Persons, which is the masterpiece of the *Bilaterals I*, has a general integration provision that details the following: “In order to attain the objectives pursued by this Agreement, *the Contracting Parties shall take all measures necessary* to ensure that rights and obligations equivalent to those contained in the legal acts of the European Community to which reference is made are applied in relations between them.”⁶⁰ The Agreement further stipulates that, insofar as the Agreement involves concepts of Community law, “account shall be taken of relevant case-law of the Court of Justice of the European Communities prior to the date of its signature.”⁶¹ However, as one of its major weaknesses, the Agreement remains vague on judicial developments subsequent to its signing. Relevant case-law *posterior* to the date of signature shall be brought to Switzerland’s attention and “[t]o ensure that the Agreement works properly, the Joint Committee shall, at the request of either Contracting Party, determine the implications of such case-law.”⁶² Through the Joint Committee, Switzerland is to be informed of the EU’s process of adapting draft amendments to its domestic legislation or as soon as there is a change in the case-law.⁶³

If a Contracting Party initiates the process of adopting a draft amendment to its domestic legislation, or as soon as there is a change in the case-law of authorities against whose decision there is no judicial remedy under domestic law, it shall inform the other Contracting Party through the Joint Committee.⁶⁴ The Committee will then hold an exchange of views.⁶⁵ This soft approach also governs the procedure regarding settlement of disputes

Customs Security Measures, June 25, 2009, 2009 O.J. (L 199) 24 [hereinafter Agreement on Customs Security].

⁵⁹ Agreement on the Association to the Schengen *Acquis*, Oct. 26, 2004, 2008 O.J. (L 53) 1; Agreement on the Association to the Dublin *Acquis*, Oct. 26, 2004, 2008 O.J. (L 53) 5.

⁶⁰ Agreement on the Free Movement of Persons, *supra* note 21, art. 16, para. 1 (emphasis added). For more details on the reference to Community Law in the Agreement on the Free Movement of Persons, see the excellent study by ALVARO BORGHI, *LA LIBRE CIRCULATION DES PERSONNES ENTRE LA SUISSE ET L’UE: COMMENTAIRE ARTICLE PAR ARTICLE DE L’ACCORD DU 21 JUIN 1999*, at 311–31 (2010).

⁶¹ Agreement on the Free Movement of Persons, *supra* note 21, art. 16, para. 2.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* art. 17, para. 1.

⁶⁵ *Id.* para. 2.

before the Joint Committee.⁶⁶ The Joint Committee will endeavor to find an acceptable solution and may settle the dispute,⁶⁷ but the Agreement remains silent on what needs to be done if a dispute concerning the interpretation or application of the Agreement persists and that is, at least for the EU, precisely one of the major weaknesses of this Agreement.⁶⁸

The Swiss Federal Supreme Court (“Tribunal fédéral”), the highest judicial authority in Switzerland, holds the opinion that the Agreement on the Free Movement of Persons only partly applies the EU *acquis* regarding free movement of persons.⁶⁹ This partial application of EU law results from the fact that Switzerland does not fully and completely participate in the EU’s Internal Market. Consequently, judgments of the European Court of Justice based on concepts or on arguments that go beyond the framework, as established in the Agreement, cannot as such be transposed in the Swiss legal order.⁷⁰ Borghi provides a number of illustrations where divergences may occur, and he mentions, *inter alia*, the European Court’s case-law regarding European citizenship and the impact of Council Directive 2004/38/EC of April 29, 2004, on the right of citizens of the Union and their family members to move freely and reside freely within the territory of the Member States.⁷¹ “Free movement” in this Directive is partly based on the notion of “European citizenship,” and consequently, is conceptually not identical to the “free movement” concept in the Agreement between the EU and Switzerland.⁷² Certainly, the Swiss Federal Supreme Court is always entitled but not obliged to find inspiration for its own case law in rulings of the European Court of Justice which are *posterior* to the date of signature of the Agreement on the Free Movement of Persons. This is exactly what happened in an important judgment on September 29, 2009, where the Swiss Federal Supreme Court, after confirming that it was not legally bound by a ruling of the European Court of Justice *posterior* to the signature of the

⁶⁶ *Id.* art. 14.

⁶⁷ *Id.* art. 19.

⁶⁸ *See infra* p. 745.

⁶⁹ ATF 130 II 113 of 19 December 2003, para. 6.2, available at <http://www.servat.unibe.ch/dfr/bge/c2130113.html>.

⁷⁰ In the French version, this reads as follows: “[L]es arrêts de la Cour de justice fondés sur les notions ou des considérations dépassant ce cadre relativement étroit ne sauraient donc, sans autre examen, être transposés dans l’ordre juridique suisse.”

⁷¹ Council Directive 2004/38, Right of Citizens of the Union and their Family Members to Move and Reside Freely Within the Territory of the Member States, 2004 O.J. (L 158) 77.

⁷² *See* BORGHI, *supra* note 60, at 318–21, 338–39.

Agreement on the Free Movement of Persons, nevertheless opted in favor of the European Court's approach, and relied extensively on the *Metock* ruling of May 11, 2009, of the European Court, which had applied Directive 2004/38/EC to all family members who accompany or join their Union-citizen spouse (thus not permitting the host Member State to maintain the requirement of *prior* lawful residence in another Member State before arriving in the host Member State).⁷³ In doing so, the Swiss Federal Supreme Court reversed its previous interpretation which imposed a condition of *prior* lawful residency in an EU Member State on family members of an EU national in Switzerland to qualify for residency in Switzerland. The Swiss Federal Supreme Court also emphasized that existing Swiss law on family unification did not impose such a condition and, consequently, its previous case law could be re-examined.⁷⁴

The lack of any dynamic character in the Agreement on the Free Movement of Persons⁷⁵ is one of the causes of the growing EU sensitivity. The Agreement concerns one of the major aspects of the Internal Market, but there is nevertheless a large degree of autonomy left for Switzerland

⁷³ Case C-127/08, *Metock v. Minister for Justice, Equality and Law Reform*, 2008 E.C.R. I-6809.

⁷⁴ See Judgments of the Federal Supreme Court ATF 2C_196/2009 of 29 September 2009, available at http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=29.09.2009_2C_196/2009; see also ATF 2C_760/2009 of 17 April 2010, available at http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=17.04.2010_2C_760/2009.

⁷⁵ In various recent rulings, the European Court of Justice has drawn attention to the fact that Switzerland, with its rejection of the EEA, refused to become economically integrated with the EU's Internal Market. Consequently, Internal Market-related interpretations cannot be automatically transposed to bilateral agreements with Switzerland, including the Agreement on the Free Movement of Persons, unless these agreements contain an express provision for such interpretations. See Case C-351/08, *Grimme v. Deutsche Angestellten-Krankenkasse*, 2009 E.C.R. I-10777; Case C-541/08, *Fokus Invest v. Finanzierungsberatung-Immobilientreuhand und Anlageberatung GmbH (FIAG)*, 2010 E.C.R. I-1025; Case C-70/09, *Hengartner and Gasser v. Landesregierung Vorarlberg*, not yet reported. In his Opinion in *Hengartner and Gasser*, Advocate General Jääskinen observed that the coverage of the Agreement on the Free Movement of Persons "is limited by the specific nature of its provisions and because it contains provisions designed to limit or to clarify its material or temporal scope." These limitations "are foreign to European Union law." In this respect he referred more specifically to Article 16, paragraph 2, of the Agreement limiting the obligation of Swiss courts to take account of relevant case law of the European Court *prior* to the signature of the Agreement, see Point 46. The interpretation provided by the Court and Advocate General seems correct and is indeed a consequence of the partial integration approach as established in the Agreement on the Free Movement of Persons. On the lack of dynamic character in the Agreement, see also Kaddous, *supra* note 1, at 242.

regarding legislative and judicial developments of the EU *acquis*, and conformity with development of EU law after the signature of the Agreement depends largely on “goodwill” of the Swiss authorities, including that of Swiss courts.

B. Agreement on Air Transport

The Agreement on Air Transport, as already mentioned, also belongs to the group of agreements of the *Bilaterals I*. The preamble recalls that it is the desire of the Contracting Parties, “in full deference to the independence of the courts,” to prevent divergent interpretations “and to arrive at as uniform an interpretation as possible of the provisions of this Agreement and the corresponding provisions of Community law which are substantially reproduced in this Agreement.”⁷⁶

Article 1, paragraph 2 of the Agreement stipulates:

Insofar as they are identical in substance to corresponding rules of the EC Treaty and to acts adopted in application of that Treaty, . . . provisions [in this Agreement] shall, in their implementation and application, be interpreted in conformity with the relevant rulings and decisions of the Court of Justice and the Commission of the European Communities given prior to the date of signature of this Agreement.⁷⁷

For rulings and decisions given *after* the date of signature of the Agreement, they “shall be communicated to Switzerland.”⁷⁸ The Joint Committee, at the request of one of the Parties, may be asked to intervene, but there is a considerable degree of legal uncertainty if the incompatibility persists and the procedure foreseen under Article 22 of the Agreement might be applied. Before going into this procedure it should also be mentioned that Article 23 of the Agreement lays down a complicated procedure for “new legislation.”⁷⁹ Experts from the other Contracting Party are consulted when new legislation is being drafted.⁸⁰ For the EU, this means that Switzerland

⁷⁶ Agreement on Air Transport, *supra* note 57.

⁷⁷ *Id.* art. 1, para. 2.

⁷⁸ *Id.*

⁷⁹ *Id.* art. 23.

⁸⁰ *Id.* para. 2.

may participate in the “decision-shaping.” Of course, also here, “decision-making” in the EU remains a matter for the EU institutions exclusively. As soon as the EU adopts an amendment of its *acquis* covered by the Agreement, it informs the other Contracting Party, and the latter may ask to hold an exchange of views in the Joint Committee within six weeks on the implications of the amendments of the *acquis*.⁸¹ If the Joint Committee is able to take a decision (but such a decision implies mutual agreement between the Parties) then this will be binding upon the Parties.⁸² If the Joint Committee does not take a decision on an issue that has been referred to it within six months, then “the Contracting Parties may take appropriate temporary safeguard measures under Article 31 for a period not exceeding six months.”⁸³ Of course, it is important to recall in this context that the Agreement on Air Transport is part of the *Bilaterals I*, and consequently the prospect of a possible termination of the Agreement should be avoided since it could trigger the “guillotine clause.” Finally, it must also be noted that when a dispute is brought before the Joint Committee concerning the interpretation or application of the Agreement, the Joint Committee has no jurisdiction regarding “questions which are within the exclusive competence of the Court of Justice of the European Communities under Article 20.”⁸⁴

Article 20 is indeed a special provision in this Agreement, providing for *exclusive competence for the Court of Justice of the European Communities* regarding “all questions concerning the validity of decisions of the institutions of the Community taken on the basis of their competences under this Agreement.”⁸⁵ Granting exclusive competence to the European Court of Justice in a bilateral agreement with a third State is, understandably, very rare.⁸⁶ After all, why should a third country accept exclusive jurisdiction of

⁸¹ *Id.* para. 3.

⁸² *Id.* art. 22, para. 1.

⁸³ *Id.* para. 5. Article 31 holds that if one of the Contracting Parties refuses to comply with obligations under this Agreement, the other Party “may . . . take appropriate temporary safeguard measures in order to maintain the balance of this Agreement.” *Id.* art. 31.

⁸⁴ *Id.* art. 29.

⁸⁵ *Id.* art. 20.

⁸⁶ *See, e.g.*, Monetary Agreement Between the EU and the Vatican City State, 2010 O.J. (C 28) 13. In this agreement, the Court of Justice is given exclusive jurisdiction to settle disputes between the parties that may arise from the application of the Agreement and cannot be settled by the Joint Committee. *Id.* art. 10, para. 1. This Agreement goes further than the Agreement on Air Transport with Switzerland regarding the exclusive jurisdiction of the European Court of Justice. The Agreement with the Vatican City State also provides that the EU or the Vatican City State may bring the matter before the Court of Justice if the other

the other party's court to settle questions of interpretation and application concerning an agreement between that third party and the EU? The possible answer why this happened in the Agreement with Switzerland is the far-reaching integration dimension of that agreement, which simply cannot allow divergences in interpretation and application. To date, it is the only bilateral agreement where Switzerland made such an unusual and far-reaching concession. Additionally, within the Agreement, Switzerland also accepted that "the Community institutions shall enjoy the powers granted to them under the provisions of the regulations and directives whose application is explicitly confirmed in the Annex,"⁸⁷ but "in cases where Switzerland has taken or envisages taking measures of an environmental nature under either Article 8(2) or 9 of Council Regulation (EEC) No 2408/92, the Joint Committee, upon request by one of the Contracting Parties, shall decide whether those measures are in conformity with this Agreement."⁸⁸

It is on the basis of this Agreement that Switzerland has submitted a complaint to the European Commission regarding certain air traffic rules adopted by Germany that seriously affect landing and take-off at Zurich Airport, as well as low-altitude flights over the German territory under normal weather conditions.⁸⁹ The Commission decided, however, that

Party has not fulfilled an obligation under this Agreement. *Id.* art. 10, para. 2. The judgment of the Court shall be binding on the Parties "which shall take the necessary measures to comply with the judgment within a period to be decided by the Court in its judgment." *Id.* In other words, the EU can bring an action before the Court of Justice against the Vatican City State and the judgment of the Court is binding on the Parties. Also the Monetary Agreement between the EU and the Principality of Andorra attributes exclusive jurisdiction to the European Court of Justice for settling disputes between the parties arising from the application for the Agreement. *Id.* para. 1. Switzerland's acceptance in the Agreement on Air Transport of the Court's jurisdiction does not imply the possibility of direct actions against Switzerland; the Court's jurisdiction is limited to question concerning validity of decision of EU institutions. Also the new Monetary Agreement with Monaco signed on 29 November 2011 (not yet published), replacing the 2001 Monetary Agreement, grants exclusive jurisdiction to the European Court of Justice for disputes between the parties which cannot be solved by the Joint Committee established by the Agreement (art. 12). The main reason why in these agreements the States concerned have accepted the jurisdiction of the Court of Justice has to do with the specific nature of such agreements: the contracting parties of the EU, while not being EU Member States of the Eurozone, nevertheless use the euro as their official currency. Consequently, they have to respect the rules of the relevant EU *acquis*. *Id.*

⁸⁷ Agreement on Air Transport, *supra* note 57, art. 18, para. 2.

⁸⁸ *Id.*

⁸⁹ For a discussion of the German complaint, see Commission Decision 2004/12 EC of 5 December 2003, 2004 O.J. (L 4) 13.

Germany could maintain its national rules,⁹⁰ and Switzerland challenged this decision before the Court of Justice. However, as a result of an internal reorganization of the European Court's procedures it was the General Court (before the entry into force of the Lisbon Treaty called "Court of First Instance," and not the European Court of Justice which on September 9, 2010 decided to uphold the Commission's decision allowing Germany to continue applying its restrictive national rules).⁹¹ While a discussion of the substantive law part of the ruling is beyond the scope of this Article, one aspect of the judgment of the General Court needs further comment. Notwithstanding the fact that in the Agreement the "Court of Justice of the European Communities" was explicitly given exclusive jurisdiction, the Court decided that Switzerland's action for annulment had to be brought before the "Court of First Instance" (now the General Court). In its Order on July 14, 2005,⁹² the Court observed that the expression "Court of Justice of the European Communities" used in Article 20 of the Agreement with Switzerland should be read as referring to "the Court" as a "Community institution," which includes the Court of Justice as well as the Court of First Instance.⁹³ This is a very astonishing interpretation of Article 20 of the Agreement and it is doubtful that this is the correct approach. The question was not—contrary to what the Court's Order implies—whether Switzerland had to be assimilated to Member States or to a "legal person" in the context of Article 230(4) of the Treaty Establishing the European Community (now

⁹⁰ *Id.*

⁹¹ Case T-319/05, *Switzerland v. Commission*, 2006 E.C.R. II-2073. Switzerland decided to appeal against the ruling of the General Court and the case is now pending before the Court of Justice. See Département Fédéral de l'Environnement, des Transports, de l'Énergie et de la Communication, *Restrictions de vol: le Conseil fédéral fait recours contre l'arrêt du Tribunal de l'UE*, SWISS CONFEDERATION (Oct. 13, 2010), <http://www.bazl.admin.ch/aktuell/medieninformation/00024/index.html?lang=fr&msg-id=35563>.

⁹² A Notice is published in the *Official Journal of the EU* that Case C-70/04 is referred to the Court of First Instance of the European Communities (the text of the Order is only available in French). Order of the Court of 14 July 2005, 2005 O.J. (C 296) 8.

⁹³ The French version reads as follows: "[A] supposer même que, ainsi que le soutient la Commission, l'article 20 de l'accord CE-Suisse sur le transport aérien vise à conférer à la Cour de nouvelles compétences, dont celle de connaître du présent recours, rien ne s'oppose à ce que les termes « Cour de justice des Communautés européennes » figurant à cet article soient interprétés comme se référant à la Cour en tant qu'institution communautaire qui comprend la Cour et le Tribunal" (emphasis added), Order of the Court of 14 July 2005, *supra* note 92, para. 18.

Article 263 TFEU).⁹⁴ Switzerland is not a Member State of the Union, and, as mentioned before, as a third State Switzerland accepted exclusive jurisdiction of the “Court of Justice of the European Communities” and not the jurisdiction of the Court of First Instance. It is more than likely that for Switzerland, the term “Court of Justice of the European Communities” meant nothing else than what it was supposed to mean; that is, “the Court of Justice” and not another court of the Union. Replacing the “Court of Justice of the European Communities,” as formulated in the Agreement, by another court whose decisions moreover are subject to possible appeal is a unilateral move that cannot be justified on the basis of the terms and spirit of the Agreement and that clearly has negative effects for Switzerland.

C. Agreement on Simplification of Inspections and Formalities in Respect of Carriage of Goods and Customs Security Measures

In 1990, Switzerland concluded an agreement on the simplification of inspections and formalities in respect of the carriage of goods.⁹⁵ However, in 2009, the need to include an additional chapter on customs security led to a new consolidated agreement with a strong integration dimension.⁹⁶

This is clear from the wording of the preamble of the new Agreement, which holds that the Contracting Parties “undertake to guarantee on their respective territories an equivalent level of security through measures *based on legislation in force in the Community*.”⁹⁷ If the EU draws up new legislation in an area covered by the Agreement, the opinion of Swiss experts is sought informally. In the phase *prior* to the adaptation of the EU act, the Contracting Parties may request consultation in the Joint Committee.⁹⁸ The customs security measures are contained in Chapter III of the Agreement and are considered as binding *acquis* for Switzerland. If amendments are needed to take account of the development of EU legislation, “[they] shall be

⁹⁴ The Treaty on the Functioning of the European Union establishes the jurisdiction of the Court of Justice of the EU for actions brought against acts of EU institutions; such actions can be brought by Member States, EU institutions, and under certain conditions, by any natural or legal person. TFEU art. 263.

⁹⁵ Agreement Between the European Economic Community and the Swiss Confederation on the Simplification of Inspections and Formalities in Respect of the Carriage of Goods, 1990 O.J. (L 116) 19.

⁹⁶ Agreement on Customs Security, *supra* note 58.

⁹⁷ *Id.* (emphasis added).

⁹⁸ *Id.* art. 22, para. 3.

decided as soon as possible so that they can be implemented at the same time as the amendments to the EU legislation in compliance with the internal procedures of the Contracting Parties.”⁹⁹ If a decision cannot be adopted for a simultaneous implementation, the amendments provided for in the draft decision shall nevertheless be implemented provisionally where possible.¹⁰⁰

The Agreement explicitly allows a Contracting Party to take appropriate “rebalancing measures,” including suspension of the Agreement, if it finds that the other Contracting Party does not adhere to its conditions or if the equivalence of the Contracting Party’s customs security measures is no longer assured.¹⁰¹ If the effectiveness of customs security is at stake, provisional protective measures may be taken without *prior* consultation.¹⁰² Scope and duration of such measures shall be limited to what is necessary to remedy the situation and to secure a fair balance of rights and obligations.¹⁰³ A Contracting Party may ask the Joint Committee to hold consultations about *the proportionality* of the rebalancing measures and, where appropriate, may decide to submit a dispute on the matter to arbitration.¹⁰⁴ The Agreement further stipulates that the question submitted for arbitration must concern the question of proportionality and that no question of interpretation of provisions of the Agreement that are identical to corresponding provisions of EU law may be resolved within this framework.¹⁰⁵ An arbitration procedure is worked out in Annex III to the Agreement.¹⁰⁶ Each of the Parties shall appoint one arbitrator and the two arbitrators shall by common agreement appoint a third arbitrator who shall not be a national of either of the Contracting Parties.¹⁰⁷ If no agreement can be reached, the third arbitrator shall be chosen from a list established by the Joint Committee.¹⁰⁸

Switzerland considers that the integration mechanisms in this Agreement demonstrate, on the one hand, a firm willingness on its part to move forward in the direction of acceptance and further development of the EU *acquis*,

⁹⁹ *Id.* para. 4.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* art. 29, para. 1.

¹⁰² *Id.*

¹⁰³ *Id.* para. 3.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Annex III.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

while nevertheless, preserving the essentials of Swiss autonomy.¹⁰⁹ Switzerland also finds that this Agreement is an indication that, if needed, the EU is prepared to accept “a pragmatic approach”¹¹⁰ in its relations with Switzerland. However, it is doubtful that the specific arrangements in this (highly technical) Agreement might serve as a source of inspiration for other integration agreements with Switzerland.

D. Agreements on the Association to the Schengen/Dublin Acquis

Switzerland's commitment to accept the development of the *acquis* is probably the most advanced in the association agreements to the Schengen/Dublin Conventions; these two agreements provide examples of “deep integration.” Certainly, Switzerland is allowed to participate in the decision-shaping of the development of the relevant *acquis*, but not in the decisionmaking. The adoption of new acts or measures is reserved to the competent institutions of the European Union, and they enter into force simultaneously for the European Union, its Member States, *and for Switzerland*. If Switzerland cannot implement the development of the *acquis* on a provisional basis and if this disrupts the operation of the Schengen/Dublin co-operation, the situation is examined by the Mixed Committee. If necessary, the EU is entitled to take proportionate and appropriate measures against Switzerland to ensure that the Schengen/Dublin co-operation continues to operate smoothly.¹¹¹ Where Switzerland is unable to comply with the acts taken by the EU *the Agreement shall be considered terminated*, unless the Mixed Committee decides otherwise.

The Mixed Committee also keeps under constant review developments in the case-law of the European Court of Justice.¹¹² If a substantial divergence between the case-law of the Court of Justice and that of Swiss courts persists, or if a substantial divergence between authorities of the Member States concerned and the Swiss authorities in the application of the Schengen/Dublin *acquis* persists, the matter may be brought before the

¹⁰⁹ See RAPPORT DU CONSEIL FÉDÉRAL SUR L'ÉVALUATION DE LA POLITIQUE EUROPÉENNE DE LA SUISSE, *supra* note 41, at 38–39.

¹¹⁰ See *id.* at 46–47, 101.

¹¹¹ Agreement on the Association to the Schengen *Acquis*, *supra* note 59, art. 7, para. 2(b); Agreement on the Association to the Dublin *Acquis*, *supra* note 59, art. 4, para. 4.

¹¹² Agreement on the Association to the Schengen *Acquis*, *supra* note 59, art. 8, para. 1; Agreement on the Association to Dublin *Acquis*, *supra* note 59, art. 5, para. 1.

Mixed Committee. If no solution is found within two months, following the procedure in the Agreement, then the matter is entered as a matter of dispute on the agenda of the Mixed Committee. If no solution can be found within 90 days—this deadline can be extended by 30 days with a view to reaching a final settlement—the Agreement “shall be terminated six months after the expiry of the 30-day period.”¹¹³ There is no further dispute settlement mechanism foreseen in this hypothesis (there is no compensation or arbitration).

These aforementioned Agreements are the most far-reaching illustrations of integration agreements and of incorporation of the *acquis*, including as a sanction if divergence persists, the termination of the agreement.

V. CONCLUSION

As shown in this Article, the relations between the EU and Switzerland are extremely intense and they have been beneficial for both the EU as well as Switzerland. Switzerland is a very important and reliable partner of the EU. This does not need further explanation. However, it is also true that the bilateral relations, as they have developed over the years, have become increasingly complicated and some of the issues that have arisen, such as those on the cantonal company tax regimes, have yet to be solved. One of the major difficulties in the bilateral relations involving Switzerland stems from the operation of the complex institutional labyrinth, as a result of the many bilateral agreements that penetrate into the EU’s core activity—that is, the Internal Market. The examination of the various integration agreements with Switzerland demonstrates that the existing mechanisms have not been able to guarantee an adequate legal framework to cope with the development of the *acquis*. Too many loopholes and uncertainties remain in the examined agreements, and it is difficult to escape the impression that the homogeneity of the Internal Market depends too much on goodwill. This may be the main explanation for the EU’s growing call for a horizontal solution whereby, *inter alia*, a general institutional framework is established. It is thought that such a move could considerably enhance legal certainty and create greater transparency.

¹¹³ Agreement on the Association to the Schengen *Acquis*, *supra* note 59, art. 10; Agreement on the Association to the Dublin *Acquis*, *supra* note 59, art. 7.

Switzerland, to the extent that it becomes part of large segments of the EU's Internal Market, is increasingly aware that this move creates specific obligations, and is in favor of "a comprehensive and coordinated approach" to the Switzerland-EU relations.¹¹⁴ An Internal Market, and certainly that of the EU, cannot function *à la carte*; therefore, as suggested in the Report of the Federal Council of September 17, 2010,¹¹⁵ Switzerland may be prepared to pay, under certain conditions as a result of exercising its sovereignty, a price if divergences from the EU *acquis* occur and persist. As repeatedly mentioned, Switzerland also insists that it is necessary to find a formula combining Switzerland's adequate participation in decision-making and a respect for Switzerland's sovereignty. In addition, Switzerland is also in favor of more adequate arbitration mechanisms. However, it is not evident that these demands can easily be satisfied in so far as they regard compliance with substantive areas of the Internal Market *acquis*. The concept of compensatory measures, which seems borrowed from international economic law practice, is not the most appropriate mechanism to solve the question of divergences in the development of the law regarding integration agreements which concern the Internal Market. It is true that the EEA Agreement itself contains the possibility of safeguard measures in order to remedy possible persisting imbalances in the application of the *acquis*, but so far this hypothesis has never occurred. If it were ever to occur, then the EEA would likely be in serious danger. Consequently, solutions regarding the development of the law as laid down in the Agreement on customs security and which seem to have a preference of the Swiss side—also because these involve a detailed arbitration clause (something which is lacking in the other bilateral agreements)—cannot be a workable model for the further integration of Switzerland in the Internal Market.

Another sensitive aspect that needs a solution is the question of supervision of the bilateral commitments. The EU would likely favor a solution whereby the European Court of Justice has jurisdiction to settle disputes on the interpretation and application of the bilateral agreements; however, this idea, understandably, is not very popular in Switzerland, and

¹¹⁴ Herman Van Rompuy, President, European Council, Statement Following His Meeting with Micheline Calmy-Rey, President, Switz., PCE 031/11 (Feb. 8, 2011), available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/119222.pdf (quoting the view of the Swiss President).

¹¹⁵ RAPPORT DU CONSEIL FÉDÉRAL SUR L'ÉVALUATION DE LA POLITIQUE EUROPÉENNE DE LA SUISSE, *supra* note 41.

the recent handling of the only precedent of the Luxembourg Court's jurisdiction in the Agreement on Air Transport, obliging Switzerland to initiate proceedings against the Commission first before the Court of First Instance (now General Court) instead of before the Court of Justice, will not contribute to promote this option. Unfortunately, in an exclusive bilateral framework, as is the case with Switzerland, there are not many other alternatives for an adequate and transparent supervision of Switzerland's commitments toward the Internal Market *acquis*. The idea that the EFTA Surveillance Authority and EFTA Court could be used for this purpose seems at first difficult to contemplate—unless of course Switzerland becomes a member of the EEA or unless an intra-EFTA arrangement provides sufficient guarantees to the EU for a transparent supervision of and enforcement by Switzerland of the Internal Market *acquis*. It may perhaps be possible to find a procedural framework that incorporates Switzerland for its Internal Market-related commitments in the EEA surveillance system. After all, the EU's Internal Market is also that of the EEA, and Switzerland is a member of EFTA.

It is true that the various questions raised regarding the adaptation to the development of the *acquis* would certainly be handled most efficiently if Switzerland were to accede to the EEA or the EU. But this is a highly political matter that depends heavily on the position of the Swiss population. If for one reason or another neither of these options is possible, then it will be necessary for Switzerland to contemplate workable integration models, which do not jeopardize the full and efficient application of the Internal Market, and which provide adequate legal certainty. This, inevitably, has a cost, in terms of sovereignty and independence—two of the main and almost magic concepts in the Swiss foreign policy discourse.¹¹⁶

¹¹⁶ The great sensitivity of this debate is also demonstrated by the intensity of the controversy which has erupted in Switzerland after the completion of this contribution. See for example the critical comments by Urs Paul Engeler, *Diskrete Umgehungsmanöver*, DIE WELTWOCHEN (2001), <http://www.weltwoche.ch/ausgaben/2011-51/bundesrat-diskrete-umgehungsmanoever-die-weltwoche-ausgabe-512011.html> with links to the opinion of the *Verwaltungskommission* of the Federal Supreme Court of 29 June 2011 and to the opinion of Professor Daniel Thürer (*Gutachten über mögliche Formen der Umsetzung und Anwendung der Bilateralen Abkommen*) of July 7, 2011 (these opinions have been prepared at the request of the Federal Council); see also the comments by Carl Baudenbacher, “*Helvetische Lösung*” mit der EU kaum möglich, NEUE ZÜRCHER ZEITUNG (Jan. 3, 2012), who argues that “a Swiss solution” to the approach of the relations with the EU is not realistic and that reorientation by Switzerland towards the EEA model should be seen as a valid option (if accession to the EU is not possible).