Breaking the deadlock

A proposal for a genuine arbitration mechanism to solve disputes between Switzerland and the European Union

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Executive Summary/English

Switzerland and the European Union (EU) are currently negotiating an institutional framework for the existing sectoral agreements. One of the most contentious issues of the negotiations consists in the question of how disputes about the interpretation and update of the agreements should be solved. This policy brief is concerned with this particular issue and proposes a settlement mechanism that considers the parties' divergent positions. The disputes this paper is concerned with include provisions that are related to EU law and are thus not specific to the agreements. Due to the provisions' relation to EU law, the proposed mechanism allocates some competences to the Court of Justice of the European Union (CJEU). However, the CJEU's role is limited to the interpretation of provisions that are essentially rules of EU law. An ad hoc arbitration panel forms the principal instance of the settlement mechanism.

Executive Summary/Deutsch

Die Schweiz und die Europäische Union (EU) verhandeln momentan über ein institutionelles Rahmenabkommen für die schon existierenden bilateralen Verträge. Einer der umstrittensten Verhandlungspunkte umfasst die Frage, wie anhaltende Unstimmigkeiten zwischen der Schweiz und der EU über die Interpretation und Aufdatierung der Verträge gelöst werden könnten. Der vorliegende Policy Brief nimmt sich dieser Problematik an und schlägt ein Streitbelegungsmechanismus vor, welcher die divergierenden Parteieninteressen berücksichtigt. Die Unstimmigkeiten, mit welcher sich dieser Policy Brief befasst, beinhalten Vertragsbestimmungen, die sich auf EU Recht beziehen und damit nicht spezifisch „bilateral“ sind. Aufgrund der Nähe der Vertragsbestimmungen zum EU Recht delegiert das vorgeschlagene Streitlösungsverfahren einige Entscheidungskompetenzen an den Gerichtshof der Europäischen Union (EuGH). Die Rolle des EuGHs beschränkt sich jedoch auf die Interpretation von Vertragsbestimmungen, welche im Wesentlichen solche des EU Rechts darstellen. Die Hauptinstanz des Streitbelegungsmechanismus bildet ein ad hoc Schiedsgericht.

Executive Summary/Français

La Suisse et l'Union européenne (UE) négocient actuellement la mise en place d'un cadre institutionnel pour les accords sectoriels existants. L'une des questions les plus controversées des négociations consiste à savoir comment résoudre les litiges concernant l'interprétation et la mise à jour des accords. Le policy brief suivant porte sur cette problématique et propose un mécanisme de règlement des différends qui tient compte des positions divergentes des parties. Les litiges en question portent sur des dispositions qui sont liées au droit de l'UE et ne sont donc pas spécifiques aux accords. En raison de la particularité des relations de ces dispositions avec le droit de l'UE, le mécanisme proposé attribue certaines compétences à la Cour de justice de l'UE (CJUE). Cependant, le rôle de la CJUE se limite à l'interprétation de dispositions pouvant être qualifiées pour l'essentiel de droit de l'UE. L'instance principale de ce mécanisme de règlement des différends prendrait la forme d'un panel d'arbitrage ad hoc.

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1. Introduction

Switzerland and the European Union are negotiating an agreement that intends to deepen their contractual relationship with regard to Switzerland's sectoral participation in the EU's single market.[1] The negotiations started on 22 May 2014[2] and their goal is to establish a common institutional framework designed to cover some of the many so-called "sectoral agreements", which have allowed Switzerland to access the single market.[3] Swiss officials stated that only five of these treaties (free movement of persons, agriculture, air transport, land transport and technical barrier to trade) would be covered by the negotiations.[4] The EU, however, has to date not officially agreed to this agenda limitation.[5] Future sectoral bilateral treaties might also be embedded within the emerging institutional structure.[6] Importantly, the institutional agreement is of horizontal nature and is not concerned with substantive questions. It will thus not modify the existing sectoral agreements content-wise. Instead, the objective of an institutional agreement consists in the parties' uniform interpretation and application of treaty provisions. Therefore, such an agreement should also include a dispute settlement mechanism (DSM) where disagreement arises between the two parties.

Switzerland and the European Union are negotiating an agreement that intends to deepen their contractual relationship with regard to Switzerland's sectoral participation in the EU's single market.

Arguably, the five sectoral treaties that the institutional agreement between Switzerland and the EU seeks to cover already contain provisions that assure a certain degree of equivalent legislation and uniform interpretation.[7] The institutional agreement, though, proposes a higher degree of legal certainty between the parties. In pursuit of this objective, Switzerland and the EU already came to a political understanding in 2013 which was drafted in a so-called *non-paper*. In this unofficial document, the parties consented to the dynamic incorporation of the evolution of the relevant EU *acquis*[8] into the

1 For more information on the institutional question within the wider political context of Switzerland-EU relations, see among others: SCHWOK, René and LAVENEX, Sandra, "The Swiss Way. The Nature of the Swiss Relationship with the EU". In Eriksen, Erik Oddvar (Ed.). *The European Union's non-members: independence under hegemony?*, London: Routledge, 2015, pp. 46-48.

2 AMARELLE, Cesla and BOILLET, Véronique, "Nouveau partenariat institutionnel entre la Suisse et l'Union européenne: enjeux et perspectives dans le cadre de l'ALCP". In Epiney, Astrid and Diezig, Stefan (Eds). *Annuaire suisse de droit européen 2013/2014*, Berne: Stämpfli, 2014, p. 391.

3 The five sectoral agreements are part of the so-called "Bilaterals I" - a package of seven bilateral treaties - that were ratified in 1999 and entered into force in 2002. See: VAHL, Marius and GROLIMUND, Nina, *Integration without Membership: Switzerland's Bilateral Agreements with the European Union*, Brussels: CEPS, 2006, p. 42.

4 See TOBLER, Christa and BEGLINGER, Jacques, "Brevier zum Institutionellen Abkommen Schweiz-EU", *Occasional paper*, 3 March 2018, p. 9.

5 Despite the lack of an official bipartisan statement on the amount of treaties that should be covered we proceed on the assumption that the five agreements mentioned will be included.

6 The future agreements might include the following issues: electricity (market-coupling), financial services and other agreements that would allow Switzerland to access the single market in a non-discriminatory manner. See: COUNCIL OF THE EUROPEAN UNION, "Council Decision Authorising the Opening of Negotiations on an Agreement between the European Union and the Swiss Confederation on an Institutional Framework, Governing Bilateral Relations", *Confidential and Unpublished*, Brussels, 6 May 2014, p.1; Annex p. 3. See also: KAYNE Amanda, "Constructive tensions in EU-Swiss Negotiations Says State Secretary Roberto Balzaretti, *CNN Money Switzerland*, 10 April 2018, 09:30-09:40. Available at: https://bit.ly/2v7dm6j (consulted 11 April 2018).

7 MARESCEAU, Marc, "EU-Switzerland: Quo Vadis?", *Georgia Journal of International and Comparative Law*, 39:3, 2011, pp. 728-755. Note that the air transport agreement is different to the other four agreements. This particular sectoral agreement already includes a mechanism to ensure the uniform interpretation of provisions of the agreement that correspond with provisions of EU law (for air transport issues related to competition). Most importantly. the mechanism includes the CJEU's jurisdiction over the dispute. This is not the case for the other sectoral agreements that allow for Switzerland's access to the single market. See *ibid.*: pp. 746-749.

8 The EU *acquis* is the body of legal rules binding upon all EU member states and institutions. Definition is available at: https://eur-lex.europa.eu/summary/glossary/acquis.html (consulted on 6

sectoral agreements. Moreover, they agreed to apply the provisions that correspond "in substance" to EU law "in conformity" with the jurisprudence of the Court of Justice of the European Union (CJEU), including the case-law posterior to the ratification of the agreements. Crucially, both Switzerland and the EU also acknowledged that the current mechanism to solve disputes about interpretation and application has become outdated and that a more efficient mechanism is necessary.[9]

In this paper, we are concerned with the need for an efficient DSM and propose an arbitration procedure for cases in which a dispute is persistent and concerns a provision that is related to EU law. Such a scope limitation is crucial because the resolution of disputes that concern EU law is one of the most contentious issues in the negotiation proceedings.

April 2018).

9 ROSSIER, Yves and O'SULLIVAN, David, "Elements de discussion sur les questions institutionnelles entre l'Union européenne et la Confédération helvétique", *confidential and unpublished non-paper*, May 2013.

2. The need for a more efficient dispute settlement mechanism

At the start of the institutional negotiations, Switzerland and the EU agreed that a dispute in its early stages should be referred to the relevant Joint Committee.[10] However, in cases of persistent disputes the parties envisage a DSM that involves a judicial element.[11] Therewith, the parties want to relocate the dispute settlement from the diplomatic to the legal sphere. However, a deadlock soon followed the early breakthrough. Indeed, the specificities of the adjudicative dimension of the new DSM appear to be one of the most complicated and contested issues, prolonging already lengthy negotiations.[12]

The parties want to relocate the dispute settlement from the diplomatic to the legal sphere.

After four years of official negotiations and almost 20 rounds of bilateral talks,[13] the general contours of the Swiss and EU positions are the following: the EU will not enter into new sectoral agreements without the adoption of an institutional framework and it considers the CJEU as the most appropriate institution to adjudicate disputed provisions that are related to EU law.[14] Switzerland, on the other hand, seeks continuous, non-discriminatory and certain access to the internal market but does not want to subject itself to direct jurisdiction of the CJEU. However, the Swiss government conceded that the CJEU might be asked to interpret some core EU law provisions.[15]

Despite these differences, Switzerland and the EU revealed in early 2018 that both parties are willing to discuss the idea of an arbitration panel to solve persistent disputes about the interpretation of treaty provisions.[16] The arbitration panel should be competent to settle disputes bindingly and in last instance.[17] The specificities of such an arbitration procedure are yet to be agreed on.[18]

At the time of writing, the parties have still not been able to agree on a draft DSM. The problem appears to be that the EU embraces an arbitration solution provided that the arbitrators are *obliged* to request the CJEU to give a binding ruling on the interpretation of disputed provisions that are related to EU law.[19] Switzerland, on the other hand, prefers a system weighted in favour of an *ad hoc* arbitra-

10 The Joint Committees are the institutions in charge of managing the sectoral agreements.

11 KADDOUS, Christine, "La Suisse sous le joug des juges étrangers ?, *Le Temps*, 27 August 2013. See also: COUNCIL OF THE EUROPEAN UNION, *op.cit.*, 6 May 2014.

12 TOBLER, Christa and BEGLINGER, Jacques, *op.cit.*, p. 23. See also: SWISS FEDERAL COUNCIL, "Press Conference on Switzerland-EU relations", Berne, 5 March 2018, 15:45-17:00. Available at: https://bit.ly/2IihLoY (consulted 31 March 2018).

13 SWISS DEPARTMENT OF FOREIGN AFFAIRS, "Rapport sur la politique extérieure 2017", *18-oXX*, 21 February 2018, p.22. Available at: https://bit.ly/2JodveJ (consulted 30 March 2018).

14 NUSPLIGER, Niklaus, "Diese Minenfelder lauern auf dem Weg zum EU-Rahmenvertrag", *Neue Zürcher Zeitung*, 5 March 2018. Available at: https://bit.ly/2EDfMt7 (Consulted 11 April 2018).

15 In the view of the Federal Council, the main issue remaining regarding dispute settlement and the involvement of the CJEU is to "define what accounts to EU law in the agreements". See *Ibid.*, 08:30-09:05; 17:00-18:40.

16 TOBLER, Christa and BEGLINGER, Jacques, *op.cit.*, p. 27. See also: KAYNE Amanda, *op.cit.*, 10 April 2018, 09:50-10:00.

17 GMUER, Heidi, "EU bringt ein Schiedsgericht-Lösung ins Spiel", *Neue Zürcher Zeitung*, 28 December 2017. Available at: https://bit.ly/2J5Li6b (consulted 30 March 2018).

18 KAYNE Amanda, *op.cit.*, 10 April 2018, 10:50-11:00.

19 NUSPLIGER, Niklaus, *op.cit.*, 5 March 2018. See also GMUER, Heidi, *op.cit.*, 28 December 2017.

tion panel[20], granting it far-reaching competences whilst the CJEU should play the smallest role possible.[21] This means that the CJEU should only be called upon to adjudicate a disputed provision that is "directly based on EU law".[22]

Thus, the question arises how Switzerland and the EU could rapidly solve the contentious issue of a judicial dispute settlement mechanism within the institutional negotiations. Our proposal represents a step towards bridging the parties' divergent positions. It distinguishes three different "types" of provisions that refer to EU law and adapts the role of the CJEU accordingly. The three different "types" include treaty provisions defined "by reference" to EU law, treaty provisions that are "identical in substance" to EU law and treaty provisions that include so-called "concepts" of EU law. The degree of the CJEU's involvement depends on the closeness of the "type" of the provision to a corresponding EU law provision. The proposed model therefore incorporates the Swiss position insofar as the CJEU would only be competent to interpret provisions that amount to core EU law. Our proposal proceeds from the existing DSM as outlined in the EU-Ukraine Association Agreement of 2014 (as well as from the EU-Moldova and of the EU-Georgia Association Agreement).[23]

The degree of involvement of the CJEU depends on the closeness of a specific "type" to an EU law provision.

20 An important but for this paper not relevant further difference of opinion consists in the question whether the arbitration panel should be *ad hoc*, thus temporary, always reassembling and unprecedented (favoured by Switzerland) or whether it should be developed as a permanent investment court system (possibly envisaged by the EU). See TOBLER, Christa and MUSER, Marco, "Schiedsgerichte in den Aussenverträgen der EU. Neue Entwicklungen unter Einbezug der institutionellen Verhandlungen Schweiz-EU", *Jusletter*, 28 May 2018.

21 SWISS FEDERAL COUNCIL, "Press Conference on Switzerland-EU relations", Berne, 5 March 2018, 18:40-19:00. Available at: https://bit.ly/2IihLoY (consulted 31 March 2018). Note that the Federal Council employs the expression "sui generis" law to define provisions of the sectoral agreements which are not defined by reference to provision of - or identical in substance to - EU law.

22 NUSPLIGER, Niklaus, *op.cit.*, 5 March 2018.

23 EUROPEAN UNION, "Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part", *Official Journal of the European Union*, Brussels, 29 May 2014; EUROPEAN UNION, "Association Agreement between the European Union and its Member States, of the one part, and Moldova, of the other part", *Official Journal of the European Union*, Brussels, 30 August 2014. Available at: https://bit.ly/2GFwIRi; EUROPEAN UNION, "Association Agreement between the European Union and its Member States, of the one part, and Georgia, of the other part", *Official Journal of the European Union*, Brussels, 30 August 2014. Available at: https://bit.ly/2DSUnwg (All Consulted 6 April 2018).

3. The dispute settlement mechanism and the legal peculiarities of the sectoral agreements

It is possible to envisage three different scenarios of disputes that might not be solved within a political consultation process, potential mediation procedure or joint referral to the CJEU.[24] Therefore, the case would then proceed to arbitration.

1) The first scenario concerns the interpretation of *sui generis* provisions of the five agreements, i.e. the provisions that are neither defined by reference to EU law, are not "identical in substance" to EU law, nor are "concepts" of EU law. For instance, AFMP provisions that allow for transitional periods before the full implementation of the agreement. If a dispute should arise in regard to this kind of provision the CJEU would not be involved.

2) The second scenario concerns the interpretation of a provision that is related to EU law. More precisely, the object of dispute consists in the interpretation of a provision of the agreements which makes reference to EU law, which is identical in substance to EU law or which is a concept of EU law. They represent the majority of the provisions of the sectoral agreements.[25] As discussed, both parties agree that such a scenario shall involve the CJEU in some capacity. The degree of involvement is at the core of the current disagreements between the parties.

3) The third scenario concerns the update of corresponding EU legislation and case law, which might be relevant to the agreements. The object of dispute consists in the question of which new EU law should be integrated into the agreements. Simply put, which piece of new EU legislation or case law qualifies as "relevant" to the agreements? A question for instance is whether new EU directives that grant more social rights to citizens under the free movement rules should also apply to the AFMP. Arguably, this scenario concerns a different matter; the question at stake does not concern the interpretation of agreement provisions but the extension to new EU law. Notwithstanding this crucial difference, a dispute related to the update of the agreements should also be addressed through an arbitration procedure (see note 32).

It is possible to envisage three different scenarios of disputes that might not be solved within a political consultation process, potential mediation procedure or joint referral to the CJEU.

24 Similar to Article 111 paragraph 3 of the EEA Agreement, it could be expected from the provisions of the incoming institutional agreement that the contracting parties to the dispute may jointly request the CJEU to give a ruling on the interpretation of the relevant rules.

25 GROSJEAN, Arthur, "Une épée de damoclès plane au-dessus du tribunal arbitral", *La Tribune de Genève*, 27 May 2018. Available at: https://bit.ly/2JrIiUN (consulted 2 June 2018).

Three different "types" of provisions that are related to EU law

Importantly, the five above-mentioned sectoral agreements exhibit three different "types" of provisions that are related to EU law. The "types" do not necessarily signify a difference in content but a difference in the form and manner of the way treaty provisions are linked to EU law. The three different "types" include treaty provisions defined by "reference" to EU law, treaty provisions that are "identical in substance" to EU law and treaty provisions that include so-called "concepts" of EU law. All of the mentioned "types" fall under the second scenario of the mentioned disputes that might proceed to arbitration.

The three different "types" include treaty provisions defined by "reference" to EU law, treaty provisions that are "identical in substance" to EU law and treaty provisions that include so-called "concepts" of EU law.

Firstly, the sectoral agreement on the free movement of persons (AFMP), for example, makes specific references to EU regulations and directives. An example is Article 4 of the Annex I which deals with the right to stay. It explicitly refers to the Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State.[26] In Article 16 Paragraph 1 the AFMP gives a definition of provisions that make reference to EU law. They are provisions which specifically mention "EU legal acts".[27] In this paper, we use this definition as stated in the AFMP.

Secondly, the agreement on air transport mentions in Article 1 Section 2 provisions that are "identical in substance to corresponding rules of the EC Treaty and to acts adopted in application of that treaty". As one of many examples, Article 13 of the Air Transport Agreement which prohibits government subsidies closely resembles Article 87 of the former EC Treaty which is now Article 107 of the Treaty on the Functioning of the European Union (TFEU). Article 111 Paragraph 3 of the Agreement on the European Economic Area (EEA) gives a useful definition of what identical in substance means. It explains that provisions which are similar to corresponding rules of the EU treaties and to EU secondary legislations are to be considered identical in substance.[28]

Thirdly, whilst the agreement on land transport does not make specific reference to the jurisprudence of the CJEU, it involves provisions that resemble the aim of EU law. For example, Article 32 containing the principle of non-discrimination concurs with Article 12 of the former EC Treaty which is now Article 18 of the TFEU.[29] Such a parallelism

26 Importantly, since April 2006 the mentioned Regulation No 1251/70 is no longer in force but the AFMP still refers to it. This underlies the need for an institutional framework that ensures the continuous updating of the agreements. See *Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State* (no longer in force, date of end of validity: 26/04/2006).

27 EUROPEAN UNION, "Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation of the Other, on Free Movement of Persons", *Official Journal of the European Union*, Brussels, 30 April 2002, art. 16. Available at: https://bit.ly/2JdcK1W (consulted 2 April 2018).

28 EUROPEAN UNION, "Agreement on the European Economic Area", *Official Journal of the European Union*, Brussels, 3 January 1994, art. 111. Available at: https://bit.ly/2GOeiRD (consulted 2 April 2018).

29 EPINEY, Astrid and SOLLBERGER, Kaspar, "Zum Gestaltungsspielraum der Vertragsparteien: die rechtliche Tragweite des Art. 32 des Abkommens über den Güter- und Personenverkehr auf Schiene und Strasse", In: Felder, Daniel and Kaddous, Christin (Eds), Accords bilatéraux Suisse-EU (Commentaires) – Bilaterale Abkommen Schweiz – EU (Erste Analysen), Basel, Genève, Munich, Brussels: Helbing und Lichtenhahn, 2001, pp. 521-545.

could amount to "concepts" of EU law. Arguably, concepts of EU laws are neither clearly defined nor explicitly mentioned in the sectoral agreements, except for a provision in the AFMP - Article 16 Paragraph 2 AFMP (only mention, no definition). So, provisions that include concepts of EU law are neither making reference to-, nor are identical in substance to EU law but share the same aim.[30]

In the case of all three "types" of provisions the legal question at stake is the interpretation of provisions that are related to EU law. In regard to those provisions that concern the interpretation of EU law, the CJEU needs to be involved in the settlement of related disputes. Such a position has been a constant EU red line in the institutional negotiations. The limitations set by the case-law of the CJEU are the reason for the EU's relative intransigence here.[31] However, since our model seeks to overcome the aforementioned discrepancies between the EU's and Switzerland's positions it proposes a differentiation, based on the above-mentioned three different "types" of provisions, in the degree of the CJEU's involvement. It should also be noted that whilst the identification of provisions that are defined in reference to EU law is straightforward it might come down to the above-mentioned arbitration panel to define which treaty provisions are identical in substance to EU law and which provisions include concepts of EU law.

Since our model seeks to overcome the aforementioned discrepancies between the EU's and Switzerland's positions it proposes a differentiation, based on the above-mentioned three different types of provisions, in the degree of the CJEU's involvement.

30 EPINEY, Astrid and SOLLBERGER, Kaspar, *op.cit.*, pp. 528.

31 As Prof. Matthias Oesch developed: "the CJEU has consistently held [for instance in Opinion 1/91 – see note 42] that it does not accept any other court which authoritatively interprets EU law, including EU law which has been incorporated into a treaty with a third country, also for the EU". See OESCH, Matthias, Switzerland and the European Union. General Framework, Bilateral Agreements, Autonomous Adaptation, Zurich: Dike, 2018, p. 167.

4. The proposed model for the dispute settlement

The scope of our model is a relatively narrow one: We only focus on the question of the arbitration panel's competence in disputes which involve treaty provisions that are related to EU law (scenario 2). The reason for such a limited scope is that a mechanism for disputes that involve EU law seems to currently be one of the most contentious issues between the parties. In this regard, we are proposing an arbitration model that reconciles the parties' diverging positions. Such a narrow focus also excludes important dimensions of a future dispute settlement mechanism including the role and competence of the Joint Committees in the early stages of the dispute, the procedural details of the arbitration initiation procedure and the composition and functioning of the arbitration panel.

More precisely, the following model proposal does not address scenarios 1 and 3. Disputes about provisions that solely originate from the treaty, and are thus *sui generis*, follow a "classical" arbitration procedure without referral to the CJEU (scenario 1). As for disputes relating to the update of corresponding EU legislation and case law which might be relevant to the agreements (scenario 3), it is yet unclear which solutions will emerge.[32] This question must be addressed within the part of the institutional agreement that is dealing with Swiss adoption of the relevant *acquis*.[33]

What follows is our proposed wording to institute an arbitration panel.

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32 Interestingly, in the case of the AFMP, the Federal Supreme Court of Switzerland already several times commented on the relevance of case-law of the Court of Justice of the European Communities and EU directives adopted posterior to the date of signature. In the opinion of the Federal Supreme Court it should be taken into account unless there are compelling reasons not to do so. In such cases, the Court engages in a weighing of interests between a corresponding legal situation and uniform area of freedom of movement and compelling reasons against the unilateral adoption. In our view, this approach that is in extensive conformity with new EU law facilitates an arbitration-centered model in case of disputes about the adoption of new EU legislation or case law. See Federal Supreme Court of Switzerland decisions *BGE 136 II 5, BGE 136 II 65 and BGE 139 II 393*.

33 Regarding the update of the agreements to developments within the acquis, we expect the outcome of the negotiations to be the following: in case Switzerland refused to adopt a for the EU relevant piece of law, the arbitration panel has the capacity to settle the dispute. If Switzerland decided against compliance with the arbitration panel's decision the EU would be allowed to adopt counter measures (the proportionality of these measures could be evaluated by an independent arbitration court). Thus, the part of the affected agreement would not be automatically suspended as it is the case in the EEA treaty. Self-evidently, the "solution" of counter-measures might be favorable for Switzerland since the agreement in question would not be suspended or revoked but continue being applied.

Model for a genuine arbitration mechanism

Arbitration

1. Where the Parties have failed to resolve the dispute by recourse to consultations within the relevant Joint Committee, the complaining Party may request the establishment of an arbitration panel.

2. Unless the Parties agree otherwise within five days of the establishment of the panel, the terms of reference of the arbitration panel shall be to examine the matter referred to in the request for establishment of the arbitration panel, to rule on the compatibility of the measure in question with the provisions of this Agreement and to settle the dispute.

Disputes relating to obligations defined by reference to a provision of EU law or to provisions identical in substance to EU law

1. The procedures set out in this Article shall apply to disputes concerning the interpretation of a provision which imposes upon a Party an obligation defined by reference to a provision of EU law or which imposes upon a Party an obligation defined by a provision that is identical in substance to EU law.

2. Where a dispute raises a question of interpretation of a provision of EU law as referred to in Paragraph 1, the arbitration panel shall not decide the dispute but request the European Court of Justice to give a ruling on the provision. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the European Court of Justice has given its ruling. The ruling of the European Court of Justice shall be binding on the arbitration panel. The arbitration panel shall settle the dispute accordingly.

Disputes relating to obligations that include a concept of EU law

1. The procedures set out in this Article shall apply to disputes concerning the interpretation of a provision which imposes upon a Party an obligation that involves concepts of EU law.

2. Where a dispute raises a question of interpretation of a concept of EU law as referred to in Paragraph 1, the arbitration panel *may request that the Court of Justice of the European Union to give a ruling on the provision*. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. The ruling of the Court of Justice of the European Union shall be binding on the arbitration panel. The arbitration panel shall settle the dispute accordingly.

5. Analysis of the model

The arbitration model we envisage in this paper proceeds from the very specific situation in which Switzerland and the EU would not succeed in settling a dispute about the interpretation of a provision that is related to EU law within a political consultation process. Based on the recent history of Switzerland-EU relations, it is important to note that such a specific situation will probably not occur often. In general, Switzerland complies with EU law that is relevant to the sectoral agreements.[34] Also, it seems that most issues raised at the Joint Committees have been effectively resolved through backchannel diplomatic negotiations.[35]

The arbitration model we envisage in this paper proceeds from the very specific situation in which Switzerland and the EU would no succeed in settling a dispute about the interpretation of a provision that is related to EU law within a political consultation process. Based on the recent history of Switzerland-EU relations, it is important to note that such a specific situation will probably not occur often.

The model of arbitration we put forward, nevertheless, takes seriously the aim of the parties (especially the EU) to ensure more legal certainty and considers a hypothetical situation in which a persistent dispute was to take place. The model is based on Article 322 of the EU-Ukraine Association Agreement. Article 322 introduces an automatic referral mechanism from the arbitration panel to the CJEU if a dispute concerns one of the pre-selected Chapters of the same agreement or "imposes upon a Party an obligation defined in reference to a provision of EU law". Important to note is the "or" condition which means that in all cases the arbitration panel has to refer the case that concern such an obligation. Equally significant is the fact that the preliminary ruling of the CJEU is binding on the panel.[36] As scholars already noted, this provision is a "unique dispute settlement mechanism".[37] Only three new generations of association agreements concluded by the EU include a provision that requires an automatic referral to the CJEU.[38]

As discussed, Swiss-EU sectoral agreements exhibit legal peculiarities. The provisions of the sectoral agreements are different to those of the EU-Ukraine Association Agreement (especially the "concepts" of EU law as mentioned in Article 16 Paragraph 2 of the AFMP). The EU-Ukraine Association Agreement only contains one "type" of provision related to EU law in the form of so-called "approximation" provisions

34 The Federal Supreme Court of Switzerland, for example, usually interprets most of the provisions related to the sectoral agreements in conformity with the CJEU's case-law. See EPINEY, Astrid, "How does European Law Influences Swiss Law and Swiss Policies", In: Nahrath, Stéphane and Varone, Frédéric (Eds), *Rediscovering Public Law and Public Administration in Comparative Policy Analysis: a Tribute to Peter Knoepfel*, Berne: Haupt Verlag, 2009, pp. 183-196.

35 TOBLER, Christa and BEGLINGER, Jacques, *op.cit.*, p.23.

36 Scholars already stressed the legal importance of the procedure of article 322 of the Association Agreement. For them, the procedure "is crucial to preserve the CJEU's exclusive jurisdiction to interpret the EU *acquis*". Regarding the binding nature of the CJEU decision, the same scholars argue that "Article 322 EU-Ukraine AA precludes the arbitration panel to give a binding ruling on the interpretation of the agreement's provisions which are essentially rules of EU law by delegating disputes on a question of interpretation of a provision of EU law to the Court of Justice by means of a preliminary ruling". VAN DER LOO, Guillaume, VAN ELSUWEGE, Peter and PETROV, Roman, "The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument", *EUI Working Papers*, Law 2014/9, September 2014, pp. 20-21.

37 *Ibid.* p. 20.

38 In addition to the EU-Ukraine agreement, there are also the EU-Georgia agreement (art. 267) and the EU-Moldova agreement (art. 403) which institute a similar procedure. EUROPEAN UNION, *op.cit.*, 30 August 2014.

that might contain references to EU law.[39] Distinct from the EU-Ukraine Association Agreement, potential disputes between Switzerland and the EU could affect the interpretation of different "types" of provisions. Thus, we recognize that the EU-Ukraine dispute settlement mechanism is not *ipso facto* applicable to the sectoral agreements. As a result, we adapted the EU-Ukraine arbitration provision to accommodate the particular Swiss-EU legal context.

The arbitration panel is the instance with the competence and obligation to decide which kind of provision is at stake. The model proposes that in cases in which provisions that make reference to EU law or are identical in substance to EU law are subject to a dispute, the arbitration panel must then request the CJEU to give a ruling on the scope and nature of the relevant EU law. Still, the primary decision about whether the provisions are indeed making reference to – or are identical in substance to EU law lies in the competence of the arbitration panel.

The model proposes that in cases in which provisions that make reference to EU law or are identical in substance to EU law are subject to a dispute, the arbitration panel must then request the CJEU to give a ruling on the scope and nature of the relevant EU law.

Regarding disputes that concern concepts of EU law, the model contains a refinement. In such cases the arbitration panel can – and therefore is under no obligation to – request that the CJEU give a ruling on the scope and nature of the relevant concept of EU law. This refinement in regard to concepts of EU law is based on the wording of Article 16 AFMP. The other agreements do not specifically mention concepts of EU law but as our example of the land transport agreement on p. 6 shows they are also contained in further sectoral treaties. Article 16 AFMP differentiates clearly between provisions that make reference to EU law and concepts of EU law. This means that the AFMP provisions including concepts of EU laws are neither making reference to, nor are identical in substance to EU law. Paragraph 1 of Article 16 is concerned with provisions which specifically refer to EU law: "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." Paragraph 2 by contrast deals with concepts of EU law and reads as follows: "Insofar as the application of this Agreement involves concepts

Regarding disputes that concern concepts of EU law, the model contains a refinement. In such cases the arbitration panel can – and therefore is under no obligation to – request that the CJEU give a ruling on the scope and nature of the relevant concept of EU law.

39 The EU-Ukraine agreement mainly contains WTO law but also includes numerous "elements of EU law" that come in the form of legal approximation. See TOBLER, Christa, "One of the Many Challenges after Brexit: The Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere", *Maastricht Journal of European and Comparative Law*, 23(4), pp. 589. Legal approximation is a particular feature of the recent integration agreements that the EU concluded with some European Neighborhood Countries (Ukraine, Moldova and Georgia). In the context of the EU-Ukraine Association Agreement, it is to be defined as a process based on clear obligations where relevant Ukrainian legislations are to be brought into accordance with EU law in a gradual manner (with annexes to the agreements specifying the procedure and expected pace of the approximation process). Provisions relating to legal approximation are therefore very different to the provisions of the sectoral agreements between Switzerland and the EU. Approximation provisions always orient themselves towards EU law. The sectoral agreements provisions, on the other hand, whilst seeking some degrees of legal homogeneity with EU law always take the treaties as start and end point and the interpretation proceeds in light of treaty law. See VAN DER LOO, Guillaume, VAN ELSUWEGE, Peter and PETROV, Roman, *op.cit.*, pp. 14-17.

of Community law, account shall be taken of the relevant case-law of the Court of Justice of the European Communities prior to the date of its signature. Case-law after that date shall be brought to Switzerland's attention (...)." Whereas Paragraph 1 strives for a homogenous interpretation of the provisions, Paragraph 2 only speaks of 'taking into account' concerning case-law until 1999 (i.e. when the AFMP was signed) and "bringing to attention" in regard to case-law after the ratification date. The difference lies in the degree of the striven for legal homogeneity between the treaty provisions and EU law. In our model, we duly consider this distinction.

Consequently, we propose a CJEU-centred procedure in cases in which provisions that make reference to EU law are involved in a dispute (analogue for provisions that are identical in substance to EU law). In contrast, if the disputed provision includes a concept of EU law the model works with a 'can' provision and therefore the arbitration panel is under no strict obligation to refer the issue to the CJEU.[40] If the arbitration panel was to decide against a referral the decision process would proceed as in scenario 1 in which *sui generis* provisions are at stake.

As stated, in the particular situation in which a dispute concerns a provision that includes a concept of EU law the arbitration panel has the option to either refer the case to the CJEU or decide directly, meaning without referral to the CJEU, on the whole dispute. This decision is entirely left to the arbitrators. One criterion for the arbitrators' (voluntary) referral to the CJEU could be the degree of similarity the aims of the disputed provision including concept of EU law and the equivalent EU law provision.

Hence, in our model the CJEU would make a binding decision upon interpretation questions that concern provisions that are "essentially" rules of EU law (i.e. provisions that make reference to EU law or that are identical in substance to EU law) and leave the other matters to the arbitrators to decide.

Hence, in our model the CJEU would make a binding decision upon interpretation questions that concern provisions that are "essentially" rules of EU law (i.e. provisions that make reference to EU law or that are identical in substance to EU law) and leave the other matters to the arbitrators to decide.

Importantly, in the proposal, the CJEU's ruling in no circumstances "condemns" or "judges" any of the parties but simply submits an interpretation about a specific provision. The ruling of the CJEU is addressed to the arbitration panel only. Based on this ruling, the arbitrators definitively solve the dispute in its entirety. In other words, the CJEU under no circumstances is given the competence to settle the whole dispute. Rather, the arbitrations incorporate the CJEU's ruling in their decision on the whole dispute that is at stake.

40 For a detailed clarification of the distinction between Paragraph 1 and Paragraph 2 of Article 16 AFMP, see: EUROPEAN UNION, *op.cit.* , 30 April 2002, art. 16. See also: AMARELLE, Cesla and BOILLET, Véronique, *op.cit.*, pp. 383-387.

6. Conclusion

The model we put forward fully respects the general red lines of the EU (more precisely the one set by the CJEU on a previous international agreement).[41] Moreover, it addresses Switzerland's assertion that it would not accept any direct jurisdiction of the CJEU and prefers an arbitration panel with extended competences. Our model can thus be seen as a grand political compromise which might not completely satisfy all the stakeholders involved[42], but which might, nevertheless, be able to rapidly unlock the current stalemate of the on-going Switzerland-EU institutional negotiations.

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Further, we think that this arbitration model could also serve as an inspiration for the Brexit negotiations on the so-called "future relations" that the EU and the UK will in due course enter into. This is particularly so if the UK were to decide to conclude one or several agreements that allowed for a sectoral and an unfettered access to parts of the single market.

As one author already argued, addressing the institutional challenges of a post-Brexit deal: the EU has "well-defined" goals regarding the institutional framework for all market access agreements with third-states.[43] The first objective consists in homogenous interpretation, which means that there is a legal obligation to interpret the law of the agreement in parallel to EU law. The second objective relates to the safeguarding of the autonomy of the legal order of the EU, signifying that the CJEU is the only institution with the competence to give an authoritative interpretation of the EU law included in the agreement. These goals are only to be achieved, among all, through a system of dynamic adoption of relevant EU laws, mechanisms ensuring for a consistent interpretation based on CJEU's jurisprudence and, just as importantly, an effective dispute resolution system.[44] The institutional question is therefore not a matter specific to the particular context of Switzerland-EU relations. Instead, it pertains to all systems of single market integration without full membership. The legal setting in which the economic activities take place is not static but continuously evolving. And in order to safeguard the very aim of market integration, this continuous change requires a certain degree of legal harmonization between the participating parties.

41 COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, "Opinion of the Court of 14 December 1991 delivered pursuant to the second subparagraph of Article 228(1) of the EEC Treaty – Opinion 1/91", *European Court reports 1991*, Luxembourg, 14 December 1991. Available at: https://bit.ly/29zYZMQ (consulted 6 April 2018).

42 Especially since recently the CJEU took a hard stance on arbitration tribunals which might also influence Switzerland-EU institutional negotiations. The CJEU found that investment arbitration tribunals could not be called upon to autonomously interpret EU-law in light of bilateral investment treaties concluded between EU member states. According to some scholars, the consequences of this ruling are not limited to intra-EU member states agreements but might also affect EU agreements with third-states due to the level of abstraction of CJEU's arguments. See: THYM, Daniel, "The CJEU ruling in ACHMEA: Death Sentence for Autonomous Investment Protection Tribunals", *EU Law Analysis*, 9 March 2018. Available at: https://bit.ly/2Gu4SHN (Consulted 31 March 2018).

43 TOBLER, Christa, *op.cit.*, pp. 577.

44 *Ibid.*, pp. 577-578; 581-591.

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