European Economic Area and Switzerland - EU Bilateral Agreements in Comparative Perspective: What Lessons?

SCHWOK, René


Available at: http://archive-ouverte.unige.ch/unige:40928

Disclaimer: layout of this document may differ from the published version.
European Economic Area and Switzerland-European Union Bilateral Agreements in Comparative Perspective: What Lessons?

René SCHWOK & Christophe BONTE

Associate Professor, European Graduate Institute and Political Science Department, University of Geneva;
Research Assistant, European Graduate Institute, University of Geneva

INTRODUCTION

Our main objective is to compare the European Economic Area (EEA) with the bilateral agreements between Switzerland and the European Union (CH-EU) in order to assess what lessons can be applied to the Central and Eastern European Countries (CEECs), as well as to Turkey, Cyprus, and Malta, the three Mediterranean Countries (MCs) who have applied for EU membership.

The first part of this article aims at putting the origin and development of both the EEA and the CH-EU agreements in historical perspective in order to better understand their specificities, their assets and their weaknesses. Indeed, it would be sterile to study these treaties without understanding the geo-strategic, political, economic and social circumstances which shaped their main elements. Particular attention will be devoted to the CH-EU agreements as they constitute a new, original and often more ignored exercise than the EEA.
The second part is the core of this study. It compares in a systematic way the institutional and legal aspects of both the EEA and the CH-EU agreements in order to point out their analogies and differences. One should note that such a comparison has never been officially done by either the European Commission or by the Swiss bureaucracy, which seems to be uneasy with its political implications.

An epistemological remark is necessary: on the one hand, all legal aspects of the EEA are known, published and have been studied by numerous scientific books and articles (see bibliography). On the other hand, the CH-EU agreements have not yet been initialled (September 1997) and will perhaps never be signed and ratified. This has caused us some difficulties as we could work only on so-called "information sheets", unofficial reports and press articles. We have tried to compensate for this weakness by having private meetings with high level civil servants and diplomats from the European Union, the EFTA Surveillance Authority (ESA) and Switzerland. It is nevertheless obvious that such a method is not sufficient from a scientific point of view, and that it will be necessary to wait for the final outcome of the negotiations in order to reach a definitive judgement of the CH-EU agreements. Confronted with so much uncertainty, we should have used the conditional form more often. For stylistic reasons, however, and in order to publish a more readable text, we have used the indicative.

The objective of the third part is to assess what lessons the CEECs and MCs can learn from both the EEA and the CH-EU agreements. We are, of course, fully aware that there are numerous differences between, on the one hand, the CEECs/MCs, and, on the other hand, the EFTA countries. We are, nevertheless, convinced that a few CEECs and MCs will not join the EU in the coming years, and that they, therefore, have to find intermediary solutions in order to be integrated in the EU system. From this perspective, it is interesting to assess to what extent the European Union has not made a conceptual break by accepting to negotiate the enlargement of its Single Market to an individual country (Switzerland), and no longer with a bloc as in the case of the EEA.

HISTORICAL CONTEXT

This article aims to analyze the positive and negative elements of both the European Economic Area (EEA) and Switzerland-European Union (CH-EU) agreements in order to learn lessons for the Central and Eastern European Countries (CEECs) and the Mediterranean Countries
(MCs). Such a study cannot be done, however, through a solely legal-institutionalist approach. It is also necessary to put those two agreements in an historical perspective in order to fully take into consideration the political specificity of each actor and the contexts of the different negotiations.

First, it is important to remember that both the EEA and the CH-EU agreements are products of the history of the European Free Trade Association (EFTA), which was founded in 1960 by seven Western European countries (Austria, Denmark, Portugal, Norway, Sweden, Switzerland, and the UK). Its two main achievements included: (1) the removal of tariffs and quotas on industrial goods; (2) the building of bridges with the European Community (EC). The subsequent accession of the United Kingdom, Denmark, Norway and Ireland to the EC in the early 1970s had a profound effect on the remaining EFTA members who signed agreements in 1972 to remove tariffs and quotas on industrial goods (Pedersen, 1994).

**Origins and Evolution of the EEA**

In Luxembourg in April 1984, a new boost to EC-EFTA cooperation was given by the first meeting at a ministerial level between the then eighteen countries of the EC and EFTA. Also for the first time the expression "European Economic Space" was used. It was then only a general framework for bilateral and sectoral agreements between the EC and each individual EFTA country. A year later, in 1985, the Internal Market programme posed an even greater challenge to the EFTA countries. In order to deter new membership applications at a time when the Community was attempting to deepen rather than widen, the Commission proposed that the EFTA countries join the EC Member States in a new European Economic Area (EEA). This would give the EFTA countries most of the benefits of the Internal Market, without actually giving them full EC membership (Schwok, 1991). Long and difficult negotiations led to the May 1992 Porto Agreement.

EEA has been EFTA’s swan song, leading this association in the direction of both growth and deliquescence. On the one hand, EFTA became much more important, structured, bureaucratic and expansive with the constitution of the EFTA pillar of the EEA. The EEA/EFTA countries got a Court of Justice, a Surveillance Authority (ESA), participation in numerous EU committees and an obligation to finance the EU structural funds. On the other hand, EFTA has been undermined by the 1992 Swiss negative referendum on EEA, as well as by the departures of
Austria, Finland, and Sweden who joined the EU in January 1995. There are now only four remaining countries in EFTA: Norway, Iceland, Liechtenstein and Switzerland. The three first countries (4.4 million people) belong to the EEA/EFTA pillar, while Switzerland (7 million people) is active only in the tiny Geneva-based EFTA Secretariat.

The EEA system might have perhaps worked a few more years if the end of Cold War had not accelerated the pace of European integration. As long as the East-West conflict continued, the possibility of EC membership for the neutral states was almost frozen. The events of 1989, however, upset the status quo. Deepening the EC through the Maastricht Treaty was one of the answers to the crumbling of the Soviet Union, the partial American withdrawal, the German unification, and the liberation of Central and Eastern Europe. This had a profound impact on the most important EFTA countries by strengthening the domestic pro-EU lobbies (Pedersen, 1994: 82-105).

To sum up, the combination of (1) the institutional weakness of the EEA, (2) the end of the Cold War, and (3) the growing appeal of the EU led most EFTA states to join the organization founded by Jean Monnet and Robert Schuman.

**Origins of the CH-EU Agreements**

The proposed EEA disappointed Switzerland in three important respects: it was based solely on EC law; it created a kind of mini-supranational organization within the EFTA pillar of the EEA; and it did not allow de facto any country to opt out of future EC directives pertaining to the EEA (infra).

Dissatisfied with the EEA offer, in June 1992, Bern applied for full EC membership. Apart from a desire to overcome the proposed EEA’s drawbacks by acquiring full EC decision-making capabilities, Switzerland was motivated by three main objectives: to adapt to the changing post-Cold War international environment; to meet the challenge of deeper integration inherent in the recently-negotiated Maastricht Treaty; and to keep pace with the other EFTA countries wanting to join the EC (Conseil fédéral, 1992).

The issue soon became moot, however, contrary to the advise of a large majority of economic, political, and trade union leaders, 50.3% of the electorate (and approximately three-quarters of the cantons) rejected EEA membership in December 1992.
To compensate for this setback, the Swiss Government began to negotiate a series of bilateral agreements covering most aspects of the EEA agenda (Kahil, 1995). Not surprisingly, the most contentious questions concerned sensitive domestic political issues: the free movement of people, and truck transit through the Alps.

Apart from specific events and developments that have affected Switzerland-EU relations in recent years, there are a number of underlying factors that negatively influence Swiss attitudes toward European integration. These are Swiss nationalism, neutrality, economic particularism, and the weakness of the central government (Schwok, 1994(a)).

This is the context in which Switzerland is now negotiating bilateral agreements with the EU. The position of Bern is paradoxical: the Swiss government is, on the one hand, committed to full EU membership and is keeping some nostalgia for the EEA (a treaty tailored-made for Switzerland) and, on the other hand, is negotiating from a very restricted position (in regards to the free movement of persons, free movement of capital, and transportation) in order to appease the large domestic Eurosceptical mood.

The EU negotiation's position is also rather paradoxical. On the one hand, the Fifteen are ready to grant to Switzerland rather privileged treatment, but, at the same time, they do not want to grant it all the EEA advantages (especially in relation to Technical Barriers to Trade (TBT)) and demand that Switzerland accept EEA principles, such as the free movement of persons. This explains why the CH-EU negotiations have been so long and difficult.
1. Legal Aspects

1.1. Legal Basis

The EEA Agreement comes under Article 238 EC which rules Association Agreements concluded by the EC with third countries (or international organizations). In Community jargon the EEA is a so-called mixed agreement, i.e. a treaty which covers areas under Community external competencies and national competencies (Blanchet, 1994: 19-20), with the Community and the fifteen Member States as Contracting Parties (Article 2(c) EEA).

Formally, it is an agreement under public international law. However, due to its close relationship to the Community legal system, as well as its dynamic character (infra 2.3), it is of a unique character (Norberg, 1993: 73; 81; 93; 202). Indeed, through the conclusion of the EEA Agreement the Contracting Parties have created a new legal order, EEA law, which is parallel to EC law (for more discussion, see Jacot-Guillarmod, 1991).

1.2. Ratification Process

Ratification of the EEA had to be given by the EU and EEA/EFTA national parliaments in accordance with their respective constitutional requirements as stated in Article 129 EEA (Norberg, 1993: 306-307), as well as by the

All the CH-EU bilateral agreements are mixed agreements based on Article 228 EC. Note that the CH-EU agreements related to the common trade policy are also based on Article 113 EC and that the air transport agreement is based on Article 84 EC (Friedländer, 1996: 6).
European Parliament (assent procedure).

ratify the seven agreements as long as Switzerland has not ratified all of them (Kahil, 1995: 29-30).

In the fields of road transportation, the free movement of persons and theoretically, public procurement, the European Parliament (EP) will be involved through the assent procedure. In the other sectors, it seems so far that the EP will only be consulted. Note that the ratification by each of the fifteen national parliaments will be required in the two sensitive fields that are road transportation and the free movement of persons; this procedure could easily last from two to five more years although the agreements could ad interim enter into force.

At the Swiss domestic level, the EEA Agreement is based on Article 89 §5 of the Federal Constitution which demands the organization of a referendum requiring the majority of both the citizens and the cantons, as joining the EEA has been considered for legal and domestic political reasons as similar to joining a supra-national organization (Blanchet, 1994: 247-248).

In Switzerland the CH-EU agreements will be based on Article 89 §3 of the Constitution which does not compel the organization of a referendum but allows a facultative referendum if 50,000 citizens want one. Note that in this case of facultative referendum, only the popular majority is needed, i.e. it is easier for the government to win the consultation.

1.3. Denunciation / Cancellation

Each Contracting Party can denounce the agreement in writing on a twelve months notification basis as stated in Article 127 EEA (Norberg, 1993: 304-305).

There is no legal linkage between the seven agreements. Each of them will have its own rules of denunciation, even though these rules will probably be identical.
(It should be noted that the Preamble to the EEA Agreement states that the conclusion of the agreement does not preclude in any way the possibility of an EFTA state acceding to the EU).

One logical consequence of the EC notion of *appropriate parallelism* is the following: if one agreement was denounced by one of the Contracting Parties, the other side could act the same way by denouncing another of the seven agreements.

### 1.4. Revision / Widening

The EEA Agreement can be revised or widened. Article 118 EEA contains what has been referred to as the *evolutionary clause* of the agreement. It lays down the procedure to be applied when a Contracting Party considers that the material scope of the agreement should be extended to fields not covered by the relations thereby established (Norberg, 1993: 293-294).

Every modification of its core text needs to be ratified by each Contracting Party in accordance with their own procedures. The simplified revision procedure according to which the EEA Joint Committee can carry out modifications by consensus is only applicable to modifications of technical detail in annexes and protocols; this procedure seems to have been the most often used up to now (EEA and EFTA Surveillance Authority, *Reports '95*).

According to the notion of *parallelism of forms*, each agreement should include a provision for its revision. The Contracting Party that would like to alter or add something to one agreement will have to address to the Joint Committee in charge of it. This complex procedure means the possibility of a facultative referendum for each important revision.

Note that a simplified procedure of revision would be possible on the least important points (i.e. adaptation to technical progress or lists of products).
2. **Institutional Aspects**

2.1. Institutions

The EEA is based on a two-pillar structure: the EC on the one hand, and the EFTA on the other hand. It is important to point out that the EEA/EFTA states have to **speak with one voice** (Article 93 EEA) within the institutions that administer the EEA (i.e. the EEA Council and the EEA Joint Committee). To that effect, those countries have set up an EFTA Standing Committee which is an interstate organ made up of representatives from Iceland, Norway and Liechtenstein (with only observers from Switzerland). The function of the EFTA Standing Committee is to elaborate by consensus common positions of the EEA/EFTA states on issues related to the EEA (Norberg, 1993: 107-126).

The EEA has set up its own distinct common institutions in which decisions are taken only by consensus: the EEA Council, the EEA Joint Committee, the EEA Joint Parliamentary Committee and the EEA Consultative Committee (Articles 89-96 EEA). It should be noted that there is no transfer of legislative powers from any Contracting Party to any institution of the EEA (Norberg, 1993: 74).

In addition to providing for the establishment of specific EEA institutions, the agreement also obliged the EFTA states to set up, by a separate agreement, two new Each sectoral agreement will have its Joint Committee (CH-EU), like the ones set up by the Free Trade Agreements (FTA) of 1972 (Kehil, 1995: 59). Some of those Joint Committees will have to be newly established whereas others already function, such as in the fields of research and road transport.

Note the following exception: only the European Commission is competent for the rules of competition in air transport and Switzerland will have to accept the European Commission decisions in that field (SDES, 1996: 45-46). Switzerland will possibly have to set up an independent surveillance authority in the fields of air transport and public procurement.

If Switzerland does not comply with EC rules in the six other agreements, the EU could eventually take safeguard provisions or other forms of counter-measures.

The CH-EU agreements will be based on the principle of trust and fairness between the Contracting Parties (so they will depend, to a large extent, upon civil servants).
institutions, an EFTA Surveillance Authority (ESA) and an EFTA Court (Article 108 EEA) in order to provide for a system of surveillance and judicial control on the EFTA side corresponding to that existing on the EC side, i.e. the Commission and the ECJ. In doing so, they have thus created a mini-supranational organization.

The main task of the ESA is to ensure that EEA rules are properly enacted and applied by the EFTA States, especially the rules of competition. With regard to its surveillance function, ESA has been given powers corresponding to those of the European Commission. The Authority can thus investigate possible infringements either on its own initiative or on the basis of complaints. It can also refer to the EFTA Court (Norberg, 1993: 209-272).

Note that, initially, the EC and the EFTA states wanted to set up an EEA Court composed by EFTA, as well as EC Court of Justice judges. The EC Court of Justice opposed, however, the creation of an EEA Court on the basis that the EEA/EFTA states would not have been committed to its rulings (Opinion 1/91, December 14, 1991, ECR I-6079). So, in the absence of an EEA judicial body, EC and EFTA negotiators elaborated the new following jurisdictional mechanism:

As the EC does not usually admit any kind of arbitration on the settlement of disputes, one cannot expect that such a mechanism would be applied in the CH-EU agreements despite Swiss wishes to build an exceptional legal mechanism based on the model of the CH-EU Agreement concerning Direct Insurance other than Life Insurance (OJ L 205, 27.07.1991, p.2). A diplomatic solution will, therefore, certainly prevail.
1. The EC Court of Justice is now exclusively competent in interpreting the *acquis communautaire*; through Article 6 EEA and Article 3 ESA/EFTA Court the Contracting Parties take over all the EEA relevant case law of the ECJ given prior to the date of signature of this agreement (Norberg, 1993: 104-105 and Norberg in Stuyck, 1994: 16-19). There is also a need to consider the case law of the ECJ delivered after the signature of the EEA. On the EC side this will be ensured through the ECJ. On the EFTA side Article 3(2) of the ESA/EFTA Court Agreements obliges the EFTA Court and the ESA to pay due account to the principles laid down by the relevant rulings of the ECJ given after the signature of the EEA Agreement and which concern the interpretation of the EEA Agreement or of such rules of Community law which are identical in substance to the EEA Agreement (Treumer, 1994; see also Mr. Myhre's interesting comment on that book on the decisions of the ECJ prior and after the date of signature of the agreement).

Furthermore, an EFTA state institution may solicit the European Court of Justice on the interpretation of a provision of the agreement (Article 107 and Protocol 34 EEA).
2. The EFTA Court, set up by the EEA/EFTA states, is competent for sanctions concerning the surveillance procedure regarding the EEA/EFTA states, calls against decisions taken by the European Surveillance Authority in the field of competition policy, and settles disputes between two or more EEA/EFTA states (Article 108 EEA). The EFTA Court has already delivered decisions (Blanchet, 1996).

3. A procedure of conciliation (Article 105 EEA) will apply in case of divergence of jurisprudence between the two institutions (Norberg in Stuyck, 1994: 29-32); a procedure of arbitration (Protocol 33 EEA) is also envisaged at a last recourse in case of political deadlock (Norberg, 1993: 113; 284).

2.2. Involvement in the Shaping Process

The EEA Agreement aims at solving the dilemma of, on the one hand, keeping the sovereignty of the EFTA states, and, on the other hand, respecting the EC autonomy of decision, as well as maintaining the homogeneity of the EEA Agreement.

When adopting a new EC legislation the EEA/EFTA states are involved in the following different ways (Article 97 and following EEA):

**Phase 1**: EFTA experts are consulted on the same basis as EU

The EC is reluctant to give Switzerland the right to benefit from the advantages granted to the EEA/EFTA states in the shaping process.

Swiss experts will neither have any formal right to be consulted nor will they have the possibility to express their opinions. They will only have the opportunity to be informed by the European Commission according to its own goodwill and to submit their comments.

Regarding the Swiss participation in different committees, a unique
experts in the preparatory phase of any new Community legislative act relevant to the EEA (note that banking and financial issues are excluded from the first phase).

Phase 2: A copy of the Commission's proposal is transmitted at the same time to the EU Council of Ministers and to the EEA/EFTA states; a preliminary exchange of views takes place within the EEA Joint Committee if one of the Contracting Parties requests it (general principle of droit d'évocation individuel stated in Article 5 EEA). Note that there is no corresponding article in the EC Treaty (Norberg, 1993: 103-104).

Phase 3: the EEA/EFTA states get the right to be fully informed and consulted within the EEA Joint Committee regarding any new EC legislative act at the same time the EU Council of Ministers and the European Parliament are examining it.

Phase 4: at the time of the final decision, the EU Council of Ministers has the final say (in agreement with the Parliament if required). The EEA/EFTA states cannot make use of any co-decision right (Norberg, 1993: 133-141).

2.3. Involvement in the Decision-Making Process

After a decision has been adopted by the EU Council of Ministers (with the approval of the EP, as required) it is implemented in the Switzerland will retain the possibility of not adopting new EC legislation, but at the risk of countermeasures or safeguard provisions
EEA through the EEA Joint Committee as soon as possible in order to permit an almost simultaneous application in the EC and the EEA/EFTA states (Blanchet, 1994: 33-34). Meanwhile, the EEA/EFTA states can use their right of veto, although only on a collective basis. In order to do so, they will have to first enter into negotiations within the EEA Joint Committee to find a mutually acceptable solution (for more details, see Norberg, 1993: 143). If, in the six following months, there is no agreement, the part of the legislative act that has been rejected will be considered provisionally suspended for each EEA/EFTA state — Article 102 EEA (Norberg, 1993: 141-148).

The important point is that the veto of one EFTA state is considered as a collective opting out. This then opens all EFTA states to possible counter-measures or safeguard provisions, i.e., unilateral suspension of one part of the EEA Agreement. Note that the EC can make use of counter-measures that are also available in fields other than those in which one or some EEA/EFTA states have made use of veto right — see Articles 112-114 EEA (infra).

To keep its homogeneity, the EEA Agreement is designed to be dynamic and is amended on a quasi-automatic and continuous basis to ensure that relevant and acceptable Community legislation in corresponding areas is extended to the EEA/EFTA states. Article 102 which could be undertaken by the Community in order to preserve the general balance of the CH-EU agreements. The most effective counter-measure would be the denunciation (or temporary suspension) by the EC of another agreement which binds it to Switzerland.

Furthermore, the CH-EU agreements will not be amended on a quasi-automatic and continuous basis as in the EEA (no such dynamic aspect as the Community opting in exists). And even if every modification of an agreement will a priori bring about a new round of negotiations, it should not be forgotten that adoption of continuing law in a bilateral agreement will carry out new legal and political questions. The alternative to an adaptation of the droit évolutif by decisional mechanism would consist in denouncing the former agreement and concluding a new one. This will be difficult. There would be a serious problem with individual rights acquired during the existence of the first agreement (Kahil, 1995: 31-32).
EEA states that the EEA Joint Committee shall take as soon as possible a decision on any new Community legislation within the framework of the agreement for making such amendment part of the EEA Agreement (Norberg, 1993: 142-143 and Norberg in Stuyck, 1994: 19-21).

3. Contents

3.1. Legal Basis

All relevant Community rules of primary and secondary EC law regarding the four freedoms and other Internal Market fields have been integrated into the agreement. The primary law rules have been integrated in the main agreement and the secondary legislation in the annexes to the agreement (Norberg in Stuyck, 1994: 15).

Specifically the EEA is based on the extension of the Community legislation on the removal of technical barriers to the four freedoms of movement (relevant *acquis communautaire*).

The CH-EU sectoral agreements are partial agreements, so they do not take over the whole relevant *acquis communautaire*.

Seven issues (which will then make seven agreements) are now under discussion between Switzerland and the EU. Five were accepted by the EC: road and air transport, research, public procurement and Technical Barriers to Trade (TBT). The EC asked to add two more issues: agriculture and the free movement of persons (Kahil, 1995: 7). In addition, Switzerland would like to negotiate in the second round on five other issues: training, passive textile improvement, processed agricultural products, audiovisual services (participation in the MEDIA Community Programme) and cooperation in the field of statistics (*Bureau de l'intégration*, 1996).
3.2. Four Freedoms of Movement

The EEA is based only on the removal of technical barriers on the four freedoms of movement as well as on the so-called horizontal and flanking measures. It means in other words that it does not include:

1. **Tariff barriers**: The EEA is not an agreement on the removal of tariff barriers and quantitative restrictions. Remember that those first generation barriers were already abolished by the 1972 Free Trade Agreements between each individual EFTA state and the EC. Note however that customs and border formalities are simplified and that a common rule establishes the origin of all goods traded in the EEA (as each Member State retains its own external tariff).

2. **The common external trade policy**: The EEA Agreement forms a fundamentally improved free trade area, and not a customs union with a common external tariff. The autonomy in external economic policy matters is warranted.

3. **The fiscal harmonization** (VAT and excise duties).

4. **The common agricultural policy**: EEA/EFTA countries are not concerned by the CAP although there is increased free trade in agricultural products, especially from some EC Member States, by way of bilateral agreements (Norberg, 1993: 74). Indeed, the CH-EU agreements cover only partly the four freedoms of movement (Bureau de l'intégration, 1996):

Free movement of goods: the EU has accepted the principle of an agreement on Technical Barriers to Trade (TBT). So far, Brussels has, however, differentiated between the so-called harmonized and non-harmonized fields. In regard to the harmonized sectors, the Commission is ready to grant Switzerland the same kind of agreement as the EEA.

Regarding the non-harmonized sectors, the EU is not keen on extending the principle of Cassis de Dijon to Switzerland (SDES, 1996; see also the interesting discussion about the extension of the Cassis de Dijon case law to EC external trade in Prof. Demaret’s report in this book). The EC position is based on the argument that in the CH-EU agreements, there will not be any jurisdictional mechanism (such as the EFTA Court) to monitor the Swiss non-harmonized norms.

This would result in a serious difference with the EEA, for in this treaty the EFTA countries also got an agreement on the non-harmonized fields. In the negotiations, Bern is trying to reverse Brussels’ attitude in order to get the same privileges as the EEA/EFTA states (Bureau de l'intégration, 1996).
Iceland, Norway, Austria, Finland and Sweden concluded — at that time — in parallel to the EEA Agreement, bilateral agreements with the EC granting removal of tariffs and other concessions in the field of agriculture (Blanchet, 1994: 18). A general evolutive clause is also included in the EEA Agreement (Article 19 EEA).

5. The common fisheries policy: the EEA Agreement contains, nevertheless, a partial liberalization of trade in fish and the conclusion of bilateral agreements between some of the EFTA states and the Community (Norberg, 1993: 365-368).

6. The common economic and monetary policy: no participation in the EMU.

7. The political union: no participation to the Common Foreign and Security Policy (CFSP), except for a related political dialogue on a common defence policy in the long run and on cooperation in the fields of Justice and Home Affairs.


Note that a new law entered into force on July 1st, 1996, that prescribes that all new Swiss technical norms have to be systematically harmonized with those of its main trade partners. This is a euphemism for adapting to new EC technical legislative acts partners (Bureau de l'intégration, 1996: 30).

The CH-EU Agreement in the field of public procurement allows the extension of GATT provisions to municipalities as well as to entities operating in the fields of water, energy, transport and telecommunications. Note that provisions on public procurement are less integrated in GATT than in the EEA. (SDES, 1996).

Free movement of services: most services are not included in this first round of the negotiations with the exception of air and road transport. Note that the initial Swiss proposals of 1993 were much more ambitious as they covered all services.

Free movement of persons: the EU has demanded its inclusion in the first round of the negotiations despite strong Swiss reluctance. This is, so far, the main obstacle in the way of both the conclusion and the ratification of the agreements.

Free movement of capital: Switzerland was not interested in entering into negotiations on this freedom and the EU has so far agreed to leave this issue aside.
3.3. **Competition Rules**

The Community competition rules in the field of the four freedoms of movement are transposed into the EEA Agreement. Part IV of the EEA Agreement contains the rules on competition (antitrust and state aids), on procurement and on intellectual, industrial, and commercial property. The EEA competition rules play an important role in the integration of the economies of the Contracting Parties into one unified market.

Note that the Contracting Parties were able in Article 26 EEA to include in the EEA Agreement the principle of prohibition of the application of anti-dumping measures (with the exemption of the fisheries sector) to EEA originating products between them (for more discussion, see Mr. Bellis' report in this book). Indeed, it is not logical to apply anti-dumping measures where common competition rules exist, since the latter rules, in principle, encourage price competition between undertakings (Norberg, 1993: 499-500; 389-392).

In the field of competition, surveillance of the implementation of common rules across the area is carried out by the Commission on the one hand and by the EFTA Surveillance Authority on the other (supra).

In addition to the four freedoms, the Contracting Parties are also required to ensure that the rules on competition, in the context of horizontal agreements, do not prejudice the freedom to conduct business as achieved by the Community. The states are also bound to introduce the necessary measures for the realization of Community objectives, such as the adoption of a Unified Patent 

Part V of the EEA Agreement also contains provisions on horizontal agreements, freedom to conduct business, procedures and rules on state aids, rules on intellectual property, and the environment. These provisions aim at ensuring a high level of protection in these areas. In case of disputes, the EEA Agreement provides for a mechanism of judicial review, allowing for a final determination of the legality of the measures taken by the Contracting Parties. This mechanism is designed to ensure the effective protection of the rights of individuals and businesses, while also maintaining the stability and predictability of the EEA regulatory framework.
3.4. Flanking and Horizontal Policies

In addition to the establishment of the four freedoms, the Contracting Parties cooperate in a wide range of other areas.

Part V of the Agreement (see also Annexes XVIII-XXII) contains provisions which are horizontally relevant to the four freedoms and must facilitate their achievement. The EEA/EFTA states thus take over the EC secondary legislation in the fields of social policy, consumer protection, environmental protection, statistics, and company law. Note that the horizontal areas concern binding Community acts, which is not the case for the so-called flanking policies.

Part VI (see also Protocol 31) of the agreement concerns cooperation outside the four freedoms, known as flanking policies. This part essentially aims at enabling the EFTA states to participate in EC programmes and other common actions in a number of areas indirectly related to the four freedoms: research and development, information services, education, training and youth, small and medium-sized enterprises, tourism, audiovisual sector and civil protection (Norberg, 1993: 609-670 and Blanchet, 1994: 17-18); Note that EEA/EFTA states are not obligated to adapt their own legislation to the Community legislation in those fields where there is no real harmonization, but

The question of the Swiss participation in the flanking and horizontal policies by way of the bilateral agreements remains open. It is not impossible, but the risk exists that each time the EC believes that its interests are not preserved, it will refuse to negotiate in new fields; this is the case for the participation in Community programmes in the fields of statistics and audiovisual — MEDIA Programme (Bureau de l’intégration, 1996: 10-11).
only broadened and strengthened co-operation between the Contracting Parties to the EEA Agreement (*Bureau de l'intégration*, 1992: 4.0F).

### 3.5. Financial Mechanism

As part of the Agreement on the EEA, the EEA/EFTA states established a Financial Mechanism (Part VIII and Protocol 38 EEA) intended for the development and adjustment of certain economically disadvantaged states or regions of the EEA (namely Greece, Southern and Northern Ireland, Portugal and ten regions of Spain). This Financial Mechanism, restricted to projects carried out by public authorities and public and private firms, has provided, for the year 1995, interest rebates for a total volume of loans of ECU 1.500 million and grants amounting to ECU 500 million. Priority is given to the environment (including urban development), transport (including transport infrastructure), and education and training projects. The European Investment Bank (EIB) administers the mechanism (EFTA, 1996: 28-30 and Norberg, 1993: 673-676).

Until now the EC has not claimed any Swiss contribution to an eventual financial mechanism.

### 3.6. Safeguard Measures

The EEA Agreement includes a general safeguard provision in order to preserve vital interests of EEA states. In case of serious difficulties in economic, social or environmental issues, in a particular area or region, a Contracting

Safeguard measures are one of the most sensitive parts of the CH-EU agreements. Bern emphasizes that it will not begin negotiating on this aspect as long as present negotiations in the most sensitive fields (road transport and free movement
Party has the option of invoking this clause in order to avoid negative consequences of Community legislation. As those measures derogate to the EEA Agreement, they are restricted in their sphere of implementation and in time. They can be initiated unilaterally by an EEA/EFTA state or by the European Commission on behalf of the Fifteen (Article 112 EEA).

Furthermore, proportionate rebalancing measures from other states are possible as stated in Article 114 EEA (Norberg, 1993: 113; 287-290 and Blanchet, 1994: 38-39).

Note that no corresponding provisions are included in the EC Treaty, but similar provisions are normal in trade agreements, one example being Article 27 in most of the FTAs between the EFTA countries and the EC.

3.7. Transitional Periods

Transitional periods should consist of time-limits allotted to EEA/EFTA states for implementing new Community legislation into their internal legal order (Blanchet, 1994: 65-68).

If Switzerland joins the EEA, it would have the benefit of maximum transitory periods of five years in the fields of the free movement of persons and measures related to the Lex Friedrich, i.e. acquisition of real estate by foreigners (Bureau de l'intégration, 1992: 0.8F).

Knowing under which conditions Switzerland could benefit from transitional periods is a strategic element of present negotiations about which nothing can be said for the moment.
WHAT LESSONS FOR THE CEECS AND THE MCS?

Our thesis is that the CEECs and MCs can learn from both the EEA and the CH-EU agreements. Those two treaties prove that it is possible to profit from most advantages of the Internal Market without being a member of the European Union. Moreover, they show that the Fifteen are also ready to let nonmember countries take part in technological, academic, environmental, and other programmes of cooperation. Note finally, that both the EEA and the CH-EU agreements cover fields much larger and go to levels of integration much deeper than North American Free Trade Agreement or Mercosur or the Customs Union between the EU and Turkey.

To what extent are the CEECs and MCs interested in the EEA and the CH-EU agreements? The official answer is: not at all. The three Mediterranean Countries, as well as all of the CEECs, except for the countries of former-Yugoslavia and Albania, have formally applied for EU membership and do not want to take into consideration any other alternative, except, recently, Malta. The EU has also officially declared its readiness to later accept any European country (with the exceptions of Turkey and non-Baltic countries of the former Soviet Union).

The timing for widening the Union is, however, far from being clear. Germany is pressing less as it costs too much, NATO enlargement is taking the priority and there is no imminent danger at its Eastern borders. As pointed out by Mr. Jacques Santer, who used to be a strong proponent of EU enlargement, "only one or two CEECs are likely to gain membership by 2003." (Financial Times, December 2, 1996).

So it seems that only Poland, Hungary, the Czech Republic and possibly Slovenia have a serious chance to join the EU in the next years. For the others, (at least a dozen countries!), chances of rapid membership are very slim. As a consequence, it is imperative to envisage for those countries intermediary solutions in order to remove non-tariff barriers.

The case of Malta is particularly relevant: the Mediterranean island is indeed groping for a new relationship with the EU as its government has frozen Malta's long-standing application to join the EU. The so-called "Swiss option" is now officially the aim of the Labour government, as Malta wishes to get most of the advantages of the Internal Market without being a EU Member (Financial Times, January 10, 1997).

Another very interesting example is Turkey, as this country is committed through its 1996 Customs Union to negotiate bilaterally the
removal of non-tariff barriers, free movement of capital, as well as of services with the EU (interview with Ambassador Lake, EU representative in Ankara, January 7, 1997).

To this list of countries, one can add a few others, which do not have the vocation to join but are nevertheless interested in being much more closely integrated into the EU (Israel, Moldova, Ukraine, Russia, Belarus, Morocco, Tunisia, Algeria). For those states also, the EEA, as well as the CH-EU agreements bear some relevance.

Lessons from the EEA (for CEEC)

Positive Elements

1. Participation in most of the advantages of the Internal Market without being an EU member: this point seems obvious nowadays but it was far from being the case in the 1980s. Many members of the Commission, as well as experts of the Union considered such a perspective to be a kind of anathema. Even today, most CEEC and MC leaders still have conceptual difficulties admitting that one can take part in the most important elements of the Internal Market without being a member of the Union.

2. Opportunity of influence: the Commission is legally committed to consult experts from the EEA/EFTA states at a very early stage of the elaboration of new EU legislation. Moreover, this system of input in the Commission’s proposals and at other levels of the EC seems to be functioning in a satisfactory way (European Voice, 1-7-896, Tribune de Genève, 22.8.96). The two main snags are the followings: (a) the relatively small EFTA countries do not always have a sufficient number of trained experts able to exert influence in all of the committees; (b) some EU bureaucrats have not yet adopted the reflex of systematically inviting the EFTA countries. Those problems would nevertheless not hurt the CEECs and the MCs which are usually much more important and powerful.

3. Vertical evolution: one of the main benefits of the EEA is that it can evolve in a quasi automatic way. In other words, each time the EU adopts new legislation relevant to the EEA, the countries of the EFTA pillar adopt it, within the EEA Joint Committee, without proceeding to any negotiation. To be sure, they have the right to negotiate, and, indeed, the Norwegians have applied their right often in oil matters. Moreover, they have the right to opt out collectively from any new legislation but they do not do it, mainly because they simply do not need to. Such a system
is very practical, especially for the EU, as part of its legal order is adopted by nonmembers without any real intervention.

4. **Potential horizontal evolution:** the EEA Agreement covers of course only the elements which are explicitly mentioned (relevant *acquis communautaire*). Any extension to fields such as agriculture, fiscal matters, or removal of the physical barriers to the free movement of persons necessitates an extra international agreement. One has nevertheless observed that EEA/EFTA states get much more privileged treatment than any country in the world. They benefit from regular political dialogue (Norway and Iceland are also members of NATO), they are close to the European Monetary System (EMS), they are the first informed about the evolution of the 1996 Intergovernmental Conference (IGC 96) and they have been offered a statute of association to the Schengen Agreement which is a quasi-membership. To be sure, this agreement is extra-Community and the goodwill towards Norway and Iceland comes largely from their belonging to the Nordic Council, but it nevertheless constitutes another sign of the general benevolence of the EU and its Member States *vis-à-vis* the EEA/EFTA states.

5. **Heavy structure runs smoothly:** the EEA system is heavy and costly. It necessitates a Court of Justice (concerning the performing of the EFTA Court see Blanchet, 1996), an institution similar to the Commission (ESA), mixed committees, links between parliamentarians, financial contributions to the EU structural funds among other kinds of links. Many experts doubted that such a system could work after the departures of Austria, Sweden, and Finland. Nevertheless, one has to admit that this system is functioning with relative flexibility (see, for instance, Mr. Myhre’s comment in that book on the Norwegian case), it is adaptable and its costs are easily borne by the EEA/EFTA states.

6. **Does not preclude membership:** as it has been shown by the examples of Austria, Sweden and Finland, EEA membership is not an obstacle on the road to any future full EU membership. Furthermore, it can even contribute to better preparation for countries belonging to the EEA/EFTA pillar which have already adapted their legislation to the most important aspects of the Internal Market and have acquired the working habits of the EU.

**Negative Elements**

1. **No participation in the decision-making process:** EEA/EFTA states do not actually take part in the decision itself which is the sole domain of the EU.
the negotiations surrounding EEA, the Community has always categorically refused to grant to nonmembers any right of co-decision. Note that this has been at the origins of numerous controversies, as Jacques Delors, in his January 1989 proposals, used the expression “common decision-making” (EFTA Bulletin, April-June 1989: 6).

2. *De facto adaptation to the new EU legislative acts*: since the EEA Treaty entered into force in January 1994, EEA/EFTA states have taken over all the new EU legislative acts which are relevant. Norway has for instance adopted EU directives on energy (liberalization of the markets) and food (food additives) which did not fit the Norwegian standards at the time (Tribune de Genève, 28.8.96). They could have rejected some of them but it was, firstly, not in their interest and, moreover, the procedure is too complicated and heavy. As a matter of fact, if an EEA/EFTA state cannot adopt one new EU legislative act, the other EEA/EFTA states can then not adopt on an individual basis either. Moreover, they take the risk that the Community will adopt counter-measures in another field. This explains why one can speak of a quasi-automatic adaptation to the evolution of EU legislation.

3. *Based on EU law*: the whole Treaty is based on EU law. EEA/EFTA states have to adapt to it, as well as its interpretations by the EC Court of Justice. Symbolically, the tiny Court of Justice of the EFTA pillar which was based in Geneva, showing the independence of EFTA, was moved to Luxembourg on September 1st, 1996.

4. *Supranationality*: the EEA creates two supranational organs: (a) the EFTA Surveillance Authority, which controls the rules of competition in the same way as the Commission; and, (b) the EEA/EFTA Court of Justice. One should also mention that the EU Court of Justice bears, in most cases, the final competence. Finally, to implement the concept of homogeneity throughout the whole area, there is again this notion of collective opting out. One can easily imagine the difficulties if the EFTA pillar of EEA would have to integrate CEECs or MCs that cannot adapt to the evolution of the relevant EU *acquis*.

*Lessons from the CH-EU Agreements*

**Positive Elements**

1. It fits the specific needs of a non-EU country in the phase of negotiation: compared to EEA, the main advantage of the CH-EU bilateral agreements is that it allows a third country to negotiate independently.
For instance, Switzerland is not forced to harmonize its position with its EFTA partners before negotiating with the Union. On the other hand, for Brussels, it would have been preferable to negotiate with a bloc of countries which have previously harmonized their positions and, thus, not to grant any preferential treatment to one single state. For the CEECs and MCs, this observation is particularly important because if they had to harmonize their positions before dealing with the Community, it is clear that difficulties would rise in the case of a "Balkan" pillar with Croatia and Serbia or a "Central European" pillar with the Czech Republic and Slovakia or a "Mediterranean" pillar with Southern Cyprus and Turkey.

2. **It fits the specific needs of a non-EU country in the phase of administration:** after the agreements have entered into force, the third country has a much larger freedom and margin to manoeuvre than in the EEA as it is not dependent upon the collective opting out mechanism. Adopting any new EU legislative act relevant to the agreements remains an individual act which is not linked to the possible changes of mood of the pillar's partners. Moreover, there is no risk to be penalized by EU counter-measures which would have been decided following the "wrong" behaviour of another pillar's country. The responsibility is individual and would certainly better fit the needs of the CEECs and the MCs than in the EEA system.

3. **Flexibility of content:** bilateral agreements of the CH-EU type allow the non-EU-country to refuse to negotiate in some sectors. Switzerland was for instance not interested in dealing with the free movement of capital, whereas it had to negotiate both the principle and the content within the EEA framework. Note, however, that this notion of flexibility is double edged as it also allows the EU to refuse to negotiate in some sectors. One has only to remember that, in 1993, Bern proposed sixteen areas for talks and that Brussels has accepted only seven in the first round of negotiations. For the CEECs and MCs, such flexibility is particularly interesting as the EU would have a tendency to be less tough with them than with Switzerland (a rich and quite "rebellious" country).

4. **No automatism:** bilateral agreements of the CH-EU type do not force one non-EU country to take over in a quasi-automatic way the new legislative acts relevant to the agreements (except in the field of air transport). In each case, the non-EU country would keep the capacity to judge, without appeal, if it will adopt the acts. One should, nevertheless, avoid being too idealistic, as the Union has imposed the principle of **appropriate parallelism** (which is very close to the concept of **keeping homogeneity** in the EEA). Concretely, it seems (this point has to be confirmed),

...
that the European Union will retain the right to sustain any bilateral agreement with Switzerland if it estimates that Bern is not observing the principle of appropriate parallelism.

5. No supranationality: in the CH-EU agreements, there is nothing similar to the ESA, no Court of Justice and no collective opting out. This is an advantage for countries which cherish notions such as sovereignty and independence. CEEC and MC leaders will have less difficulty with public opinion (which often is nationalistic) to join a bilateral agreement rather than something like EEA.

6. Not based on EU law: except in the field of air transport, CH-EU agreements are based on international law. Moreover, they only have a political jurisdictional mechanism (mixed committees) and no EU-based jurisdictional mechanism (EU Court of Justice, EEA/EFTA Court of Justice). This allows a non-EU country to claim that it keeps its sovereignty better than countries in the EEA. Practically speaking, however, the difference is rather small. If one non-EU country does not adopt new relevant Community legislation, there will no longer be the so-called parallelism of forms and the EU will be entitled to take safeguard measures.

7. Does not preclude membership: bilateral agreements such as those existing between Switzerland and the EU do not constitute any obstacle to the road to full EU membership. As a matter of fact, Switzerland has not withdrawn its membership application (although it has been de facto frozen like in Malta). Note that the Swiss position would, nevertheless, be mere credible on the issue of permanent exception (for instance on the free establishment of persons) if Bern had withdrawn its application to full membership. One can indeed not ask for any permanent derogation if one aims to be a full member (i.e. without derogation) of the EU. This point should also be clear for the CEECs and MCs.

Negative Elements

1. Appropriate parallelism: first, the Union has forced Switzerland to negotiate in some sectors that Bern did not want to tackle (free establishment of persons) and has refused to extend the principle of Cassis of Dijon in the so-called non-harmonized sectors. Moreover, Brussels has demanded, and attained that the seven agreements will enter into force all together. In other words, Switzerland cannot expect that six agreements will apply if the seventh (for instance on persons) did not get the ratification's approval of the population. CEECs and MCs should,
therefore, not expect any *à la carte* treatment although they could expect more favourable conditions from the EU due to their economic backwardness, their political importance and their more positive attitude towards integration than Switzerland.

2. No automatism: there is no automatic retaking of the new EU legislative acts in the CH-EU agreements. We have already noticed that this can be an advantage for a non-EU country in terms of sovereignty. But this could become a negative element if the Union does not want to acknowledge the compatibility of the non-EU country with its own. Remember that in the EEA, the EFTA countries have obtained a guarantee that as long as they adopt the new EU legislation, it will be automatically recognized as compatible by Brussels. For the CEECs and MCs, this could be a snag, although one should nevertheless not exaggerate the probability that the EU would not recognize the compatibility of their legislation.

3. Complex for the EU: it is obvious that for Brussels, the multiplication of bilateral agreements of the CH-EU type represents a much more complicated and potentially more conflictual exercise than to deal with pillars formed around blocs of countries which have previously harmonized their positions and accept to administer jointly the agreements. Now, with the CEECs and MCs, it is probable that the Union will negotiate bilateral agreements in parallel and that their shape and content would be globally similar (as it is already the case in the European agreements).

4. No transitivity: contrary to the EEA, there is no transitivity. It means that one non-EU country will also have to conclude with the other non-EU countries’ agreements modelled on the one negotiated with the Union. For instance, Switzerland will have to sign an agreement with Norway and Iceland (maybe not with Liechtenstein as it is already well integrated into the Swiss economy) in the fields which are relevant to its own agreements with the EU. CEECs and MCs will be confronted with the same kind of challenges. This means concretely that if Hungary and Rumania concluded agreements of the CH-EU type, those two countries would have to extend them to their own bilateral relations. For instance, Rumania would have to accept the principle that Hungarians are free to establish themselves in Transylvania.

**Differences between the EFTAs and the CEECs/MCs**

We are, of course, fully aware that the differences are numerous between, on the one hand, the EFTAs, and, on the other hand, the CEECs...
1. Historical context: As it has already been mentioned in the introduction, the history of the EFTA countries has been determined by events which will not be the same in the future. It is also important to note that most CEECs and MCs will not be the same in the future. The economic context is very different today. EFTA states have the highest GPDs in Europe, modern infrastructures, well-established market economies, etc., which are not found in most of the CEECs and MCs.

2. Bureaucratic development: One of the least studied but most important points has to do with the compatibility between the EFTA countries and the EU. The development of their legal order has been parallel during the last 50 years. This explains, for instance, why Austria, Sweden, and Finland did not have to undertake any fundamental legal adjustments in order to join the EEA or the EU.

3. Accordion to collaborating with the European Union: One of the advantages of the EFTA countries is that they are accustomed to dealing with the EU. Their relations date back to the beginning of the 1960s, and they have ended until today. It is true also for some MCs. More fundamentally, EFTA is very close to the working and reasoning patterns of the EU bureaucrats. They do not have any difficulty dealing with them.

4. Legal order: EFTA countries have the same kind of law as the EU countries. The legal order has been parallel during the last 50 years. This explains, for instance, why Austria, Sweden, and Finland did not have to undertake any fundamental legal adjustments in order to join the EEA or the EU.
principal, and almost unique obstacle comes from their population's Euro-reluctance. In the cases of the CEECs and MCs, opinion polls such as the Eurobarometer, show that the people are very supportive of EU membership (although more qualitative analyses would show much greater diversity, i.e. the Islamic fundamentalists in Turkey).

CONCLUSION

The main point of this article is to show that the Union has taken a new step in the direction of variable geometry by accepting bilateral and sectoral negotiations on non-tariff barriers with one non-EU country. This means that the CEECs and the MCs are now entitled to ask to get the same kind of deal. This would allow some of them to partly join the EU Internal Market and to participate in part of its horizontal dimension without full membership. By the way, such a dimension is already anticipated in the European agreements and has been applied to Israel in regard to technological cooperation.

Perhaps the best solution for countries not joining the EU is to combine the best aspects of the EEA with those of the CH-EU agreements. From the EEA, they should try to get those advantages such as: influence at the level of the shaping, quasi-automaticity when adopting the relevant Community acquis, strong homogeneity with the Internal Market, and transitivity. From the CH-EU agreements, they could find positive elements such as legal flexibility, formal independence, and some margin of manoeuvre during the phases of both negotiation and administration.

It is nevertheless obvious that our observations have to be taken with circumspection. We are fully aware that the EEA is far from being a model as it has suffered from the disaffection from the most important EFTA states and that the CH-EU agreements might never be concluded or ratified. Moreover, we do not doubt that the historical, economic, political, social, legal and bureaucratic contexts are very different between, on the one hand, the EFTA countries, and, on the other hand, the CEECs and MCs. History will not be repeated the same way. Neither the EEA nor the CH-EU agreements constitute proper models but only experiences (positive and negative) from which some lessons could be learned by the EU, as well as by the CEECs and the MCs.
BIBLIOGRAPHY


Conseil fédéral, Rapport sur la question d'une adhésion de la Suisse à la Communauté européenne, Berne, 18 May 1992(b).


EFTA SURVEILLANCE AUTHORITY, Annual Report '95, EFTA, Brussels, 1996.


FRIEDLANDER, Ralph, "Integrationspolitische Wege der Schweiz im Vergleich", in : Europa 2'96, 1996, pp.4-7.


TREUMER, Steen, "The EFTA Court", in: EIPASCOPE, No.2, European Institute of Public Administration, 1994, pp.2-4.
