II. Paving the Way to Negotiations: From Mounting Pressure to Becoming Proactive

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1. Mounting Pressure

1.1 The 2009 OECD/G20 Lists

1 Under pressure from the G20 and the OECD, Switzerland announced in March 2009 that the distinction between tax fraud and tax evasion was abolished for non-residents; however the distinction still remained for Swiss residents.

2 A number of tax havens were not on the OECD lists that were endorsed by the G20 at the beginning of April 2009. During the G20 meeting in London on 2 April 2009, France and China negotiated the contents of white and black lists. France kept getting a veto from China because China could not accept that Hong Kong and Beijing appeared on the black list. Finally, a convenient “tailor made” solution was found: countries that had made progress or had lifted their opposition on the application of art 26 of the OECD Model Tax Convention on Income and Capital, would be included on the white list. Non-cooperative tax havens would figure on a black list (4 countries). In addition, a grey list was created.

3 During its London meeting in June 2009, the G20 agreed on a list of countries that had not substantially implemented internationally agreed tax standard. It was Angel Gurria, the ambitious Secretary General of the OECD, who published the list, not the G20. Although part of the founding members of the OECD, Switzerland appeared on the list but had not been informed about it. The Federal Council registered a formal complaint with the OECD authorities and temporarily suspended the payment of its membership fee. “I think that the aspiration of the OECD was to become the General Secretariat of the G20.”

4 Neither Hong Kong nor Macao were mentioned on the grey or black lists of the OECD, as China refused to appear on the lists; Barrack Obama intervened and negotiated with Nicolas Sarkozy the removal of Hong Kong and Macao from the lists, despite the fact that Monaco still remained on the list. Macao and Hong Kong committed to reform their
standards in a foreseeable future. Besides, the US did not figure on the lists, despite the existence of the State of Delaware and related territories such as the Bahamas; the UK and the British Isles were not mentioned either; neither was Singapore, as it is not a full member of the OECD.

5 The contents and drafting of the list, usually the prerogative of the OECD, was not discussed with its members and came as a total surprise to the countries on it. “So much so, that for the first time in the history of the OECD, countries on the grey list, particularly Austria, Belgium, Luxembourg and Switzerland coordinated their answer, at Treasury level, and announced in a common press release, one week before the G20 meeting, the lifting of reservations on art 26.”

6 A number of observers believe that the contents of the lists are a proof of a commercial warfare and constitute a side effect of the financial and public debt crisis. The financial crisis has led to an institutional crisis. The pressure has increased and created new limits to how countries agree to cooperate with each other. In the months running up to the G20, Switzerland had agreed to revise bilateral agreements. “But the G20 has a double morality.” Like in “Animal Farm,” we are all equal regarding national and tax sovereignty, but some of us are more equal than others.

7 The signature of 12 double taxation agreements (DTAs) finally removed Switzerland from the OECD grey list on September 24, 2009. Since then, the new OECD standard is part of all new DTA.

8 In April 2012, Bern had already signed or negotiated DTAs with 27 developing countries; conventions with China, India, Kazakhstan, Uruguay, Oman and Turkmenistan are all in agreement with the OECD standard. Regarding countries that have not signed DTAs with Switzerland, some have chosen to sign an Agreement on the exchange of information only; such is the case of Scandinavia, the US, France and the Netherlands. Tax agreements and DTAs both authorize administrative assistance, as Switzerland no longer distinguishes tax evasion and tax fraud for non-Swiss residents. However, signing DTAs with financial centers such as Guernsey, the Bahamas, Jersey or the Caiman Islands would not make much sense for Switzerland, as it cannot prosecute a Swiss taxpayer for tax evasion.

1.2 The Pressure from Italy

9 At the beginning of the years 2000, Rome took a number of concrete measures to compel Switzerland into cooperating and adapting its transparency policy in tax issues. For instance, a number of bureaucratic schemes were put in place by Berlusconi’s government, not allowing the entry into force of the EU agreement on fighting tax fraud relating to VAT. In 2002, Brussels finally told Rome to stop discriminatory measures against Swiss companies in areas such as bidding on public contracts in Italy, or forcing holding companies to provide a range of tax certificates proving they do not benefit from any privileged tax status. Despite these quibbling measures, commercial exchanges with Italy remained strong and increased even faster than with France.

10 During the same period, Italy set up tax amnesty programs. Money was channeled back to Italy to benefit from the successive amnesties, but it also kept flowing back out to safer havens. The reason was that Italy was not engaging in reforming its finance system and the estimated 27% Italian “underground economy” kept flourishing.
If results of the Italian scudo fiscale appeared impressive, “they were helped by the fact that the tax amnesties of 2001–2002, 2003 and 2009 covered a wide range of assets such as real estate, paintings, motor yachts and luxury goods, etc.” But Italian taxpayers kept thinking that the next scudo would overbid the last one, and kept postponing regularization.

The usefulness of such amnesties is questioned. It appears incentives in amnesty packages increase the likelihood taxpayer will actively evade tax in the future. When the frequency of tax amnesties increases, the participation of taxpayers decreases. Furthermore, tax amnesties tend to be followed by tax increases which, as such, increases the risk of new tax evasion. It does not successfully fight tax evasion in the end. In 2011, the OECD claimed that since 2009, Italy managed to recover Euro 5.6 billion, the United Kingdom Euro 260 million, Germany Euro 1.8 billion; the USA Euro 1.4 billion; and Euro 1.2 billion for France.

1.3 From Alfredo Gysi and the “sostituto d’imposta” to Patrick Odier’s “Projet – Retenue à la source libératoire sur les avoirs déposés auprès de banques dans le cadre de relations transfrontalières” (January 2009–December 2009)

It is particularly because of (or thanks to?) the pressure Italy applied on Switzerland that solutions started to emerge. There were a number of initiatives. But the embryo of what would become the German and UK tax agreements came from Ticino, the Swiss canton that has the closest ties with Italy. And Ticino was the Swiss financial center suffering the most from Italy’s poundings.

In January 2009, Alfredo Gysi, President of the Association of Foreign Banks in Switzerland, Member of the Bank Council of the Swiss National Bank, Chairman of the Board of Directors of the Banca della Svizzera Italiana, thought about creating a Swiss equivalent of the “sostituto d’imposta,” a withholding tax system on savings. In February 2009, the Association of Foreign Banks in Switzerland examined it.

On March 13, 2009, Hans Rudolf Merz, then President of the Swiss Confederation, Federal Councilor in charge of the Federal Department of Finance from 2003 to 2010, announced that Switzerland was giving up banking secrecy on tax evasion matters, following the lifting of Switzerland reserves on art 26 OECD; the banking industry finally realized it had to become proactive. The announcement by Hans-Rudolf Merz gave an extra boost to Gysi’s project, which was then submitted to Avenir Suisse, a Swiss think tank for multinationals. Heated discussions took place during the meeting, particularly from well-known lawyers who could not understand the feasibility of the project. “The toughest part was to convince the bankers themselves that the project was of great value.”

On March 19, 2009, the President of the Economy and Tax Commission of the Federal Assembly, Konrad Graber, filed a postulate (“Postulate Graber: Strategy for the Swiss Financial Center,” 09.3209). Konrad Graber is a PDC politician from Lucerne. He is also member of the Delegation that represents the Federal Assembly to the AELE. Konrad Graber built his political career on defending Switzerland’s economy, and particularly, ensuring social welfare, successful bilateral approach with the EU, a forward-looking financial market strategy, and transport policy, healthy public finances and debt.
The Negotiations of a Tax Agreement between Switzerland and Germany
“The proposal was constructed in an arrangement of multiple segments”
which allowed for optimal flexibility in negotiations. The code name of this tax project was “Rubik,” until the family of Ernő Rubik, Hungarian professor and inventor of the Rubik’s Cube, requested that the tax agreement no longer be called by the name of the world famous mechanical puzzles.

2. Becoming Proactive

2.1 Overview of the Swiss Traditional Players in Tax or Finance Related Foreign Policy Issues

Before the creation of the SIF in 2010, Swiss political economy was dealt with by the Secrétariat d’État à l’Economie (SECO), including issues relating to the Swiss Financial Center. The SECO is part of the Federal Department of Economic Affairs, FDEA. For instance, between 1997 and 2000, the SECO led the Financial Services negotiations part of the Uruguay Round Agreement “General Agreement on Trade in Services (GATS) at WTO.” In parallel, due to globalization and increase in international counterparts, “all Federal Departments are active in foreign policy.” This presents coordination challenges. “To ensure full consistency, it was suggested several times to attach the Federal Office for Foreign Economic Affairs (now known as SECO) to the FDFA. The Federal Council was always opposed to the idea. The presence under one entity of trade, industry and agriculture facilitates understanding despite competing interests. [...] The system worked smoothly when the heads of departments were driven by an equal willingness to cooperate.”

It was Jean Zwahlen, Swiss Ambassador to the OECD (1983–1988) and later Member of the Governing Board of the Swiss National Bank (1988–1996), who first realized the importance of banking and finance in the realm of Swiss foreign affairs. As head of the financial end economic division (1972–1983), he created a dedicated department within the FDFA.

Historically, the Federal Department of Finance was active domestically, with a few international technical representations such as at the IMF or the World Bank. The Swiss Federal Tax Administration was very much in favour of defending Swiss traditional values and supported “status quo” in tax related issues. There was also a Division in charge of financial related issues as part of the Integration Office FDFA/FDEA, a center of expertise for European policy matters. It was a unit that was shared by the Federal Department of Foreign Affairs (FDFA) and the Federal Department of Economic Affairs (FDEA).

In the 1990s, international financial issues such as money laundering were rising in importance. Prime responsibility was with the Department of Finance. However, the FDFA and the FDEA were also very much involved in discussions. If much was achieved to fight money laundering, not much was achieved regarding “transparency.” Many ideas were floated but no proactive strategy or decision was taken. Bern was very much organized like a militia, dealing with the problems as they aroused but not drawing long-term strategies or scenarios, particularly on financial or banking issues. Moreover, although cooperation was excellent amongst departments or sections, the production of a strategic vision was not a strong point of this militia system.
At the beginning of the years 2000, a working group composed of bankers and civil servants was set up under the lead of the FDF, at that time headed by Kaspar Villiger (Federal Council: 1989–2003; FDF head: 1996–2003; Chairman of the Board of UBS from 15 April 2009 until 3 May 2012). There were a number of outcomes from these meetings, but they were oriented towards consolidating the business rather than adopting a proactive strategy for the future.

Sectorial foreign policies within the FDFA were set up on an ad hoc basis. Departments all had bespoke international sector, depending on their activities each, working out their own solutions to find answers to their own challenges.

The FDFA remains active along 5 main objectives: formulate and coordinate Swiss foreign policy on “peaceful coexistence among Peoples, respect for human rights and the promotion of democracy, safeguarding the interests of the Swiss economy abroad, relieving need and poverty in the world, preserving the natural environment.”

There was no “FDF international negotiator” as such, as tax issues were domestic. There was no diplomat in charge of Finance, except State Secretary Jean-Daniel Gerber who was “lent” on an ad hoc basis for consultations or particular negotiations. Gerber was Director of the State Secretariat for Economic Affairs from 2004 to 2011. When he retired from SECO, he was appointed Member of the Board of Directors of Credit Suisse (April 2012).

2.2 Creation of the State Secretariat for International Financial Matters (SIF)

In early 2010, the government moved one step further. Considering the other banking topics that were emerging (UBS default, UBS crisis in the US, the Abacha crisis), the timing seemed right to put Swiss banking back in order with the implementation of a fourth pillar: “Integrity.” “It’s not a question of image, it’s a matter of justice,” said Micheline Calmy-Rey, head of the Federal Department of Foreign Affairs of the Swiss Confederation.

“The tax agreements were a solution that could serve as a gateway to integrity, avoiding confiscatory procedures. What remained critical was to prompt clients to settle the past. They might have inherited undeclared assets or just not been able to sort out their situation, by fear or simple lack of knowledge. This should be possible at reasonable cost while maintaining confidentiality and privacy and ensuring by the same token for the future the same tax obligations as if the assets were domestically deposited. Clients have traditionally turned to Swiss banks to benefit from the strength and professionalism of the Swiss financial industry, the stability and the predictability of the Swiss legal system, and from a long tradition of confidentiality and service quality.”

The role of stability and predictability of a legislative system is often undermined, even in long standing democracies. More recently, citizens and corporations in Europe (ex. France) or Latin America (ex. Argentina) have (re)discovered fluctuating legislative systems where governments change their tax policies overnight – sometimes leading to “wallet stigmatization” – enforcing unilateral nationalization or managing public debt by increasing public spending and raising taxes.

The SIF was created to serve the purpose of reinforcing Switzerland's international position in financial and tax matters. The State Secretary represented Switzerland's interests in international financial and tax matters, and lead negotiations in these areas.
It was also the task of the State Secretariat to safeguard Switzerland's interests in the International Monetary Fund and in the Financial Stability Board, as well as to actively participate in international efforts to combat financial crime. Moreover, the SIF was to analyze developments in the financial markets in Switzerland and abroad, and to further develop legislation concerning the financial sector.

The creation of the SIF was a direct consequence of the emergencies and international pressure mounting on Switzerland relating to automatic exchange of information. When the Federal Council appointed Michael Ambühl, his first mission was probably to finalize preparatory work and deliver a negotiation mandate to the Federal Council; it was adopted 6 months after his appointment. The Swiss Parliament, its Finance Commission (CIF), as well as the Cantonal Finance Directors, gave feedback on the project of negotiation mandate.

The appointment of a new State Secretary, within a newly created structure and with an extended and unique mandate, was as such the opportunity to create informal meetings. “Germany and Switzerland have always enjoyed close economic relations – and frequent contacts between FDF Federal Councilor Hans Rudolf Merz and German Finance Minister Wolfgang Schäuble, made things easier when it was decided to work out a solution on the tax issue.”

Equally, the fact that a new UK Ambassador had recently been appointed in Bern created new opportunities for informal discussions. But the situation was different with the UK. UK officials heard of the withholding tax model and as they were finalizing a tax agreement with Liechtenstein, they contacted Bern. Back in August 2009, Liechtenstein Prime Minister Klaus Tschütscher and the Financial Secretary to the Treasury Stephen Timms MP, signed an agreement on cooperation in tax matters in Vaduz. The two countries agreed on a joint model for cross-border cooperation to ensure a due process for past and future tax claims.

Appointing such an experienced and successful negotiator as Michael Ambühl to head the SIF, appeared logical. When asked what was so special about his job, he said: “Solving an interesting problem in terms of clients is really what interests me.” The SIF dream-team aggregated experiences from the Tax Administration, the FDF and the FDFA. It is responsible for the coordination and strategic management of international financial, monetary and tax matters.

There is no doubt that Michael Ambühl contributed to convince Hans Rudolf Merz that a new strategy was necessary for the Swiss Financial Center.

2.3 State Secretary Michael Ambühl

“Power defines the interest categories in which statesmen think”.

Michael Ambühl's appointment was initially perceived as a “turning point.” He was believed to be more oriented towards “solutions” than his predecessors.

Michael Ambühl (1951) was not the traditional Swiss diplomat. He grew up in Bern in a family that was familiar with federal policy and management. After leaving school, he studied engineering at the ETH Zurich. Instead of then going into business or preparing a PhD, he was hired as an assistant at the Institute of Operations Research at the University of Zurich (field of research: mathematics and emerging computer science). He joined the
Foreign Office at the age of 31 and was immediately sent to Kinshasa, DRC. The turning point of his career occurred in 1992 at the Swiss Mission to the EU in Brussels. From then on, Ambühl did not grow into a classic diplomat, but a negotiator. And as things happen, all negotiators are diplomats but not all diplomats are negotiators. Representation has always been the most traditional role associated with the work of a diplomat, representing the head of state and government. But in his 28 years with the Foreign Office he acted as a negotiator and never headed a Swiss embassy abroad. “His career was special. A talented engineer and mathematician, he made every effort to curb the irrational rationality of policy-making in Bern.”

46 Michael Ambühl was a member of the Swiss delegation for the first Bilateral Agreements with the EU under Jakob Kellenberger, ICRC’s former President. In 1999, he was promoted Chief of the Integration Office in Brussels, and in 2001 he was in charge of the preparation of negotiations for a second round of EU agreements, the Bilateral Agreements II, regarding economic interests such as food industry, tourism, and the financial center. He also extended cooperation between Switzerland and the EU. Negotiations between Switzerland and the EU began in June 2002 and were signed in October 2004.

47 “To reach a decisive breakthrough, you need acumen, especially when things finally go to the ministerial level and controlled negotiations take place. Until then, all types of contacts are possible, timeouts, and meetings in smaller groups, consultations with the headquarters and so on.”

48 His colleagues praised his tenacity, coupled with a strong sense of logic. The downside of this cold-blooded negotiator was that he felt forced to control every little detail. He was also extremely ambitious, impatient and addicted to control. Michael Ambühl was also a rarity among Swiss diplomats; he was a leader, determined and pugnacious. He understood numbers and figures, a key asset. He seemed to fit the definition of Snyder, Bruck and Sapin: “the State is the unit of analysis and assuming that State’s action is the action taken by those acting in the name of the State, hence the State is its decision makers.”

49 The Federal Council saw him “as the classic civil servant, to whom what is most relevant is not their own career, but rather to service the country. In this sense, Michael Ambühl is a total patriot.”

50 Michael Ambühl intended to tackle the problem “with Diplomatic Engineering. As reality is chaos, you need to reduce the technical complexity of the issue and this will allow to find the right political relevance to any given problem.”

51 “Let us remember Finance Minister Steinbrück’s whips and cavalry threat. […] I am convinced that the credibility of the Swiss position and the negotiating skills of Michael Ambühl were essential in order to change this situation fundamentally.” His mandate was quasi ministerial with the aim of ensuring that Hans-Rudolf Merz, then Swiss Finance Minister, did not comment too much or too quickly about pending negotiations. It was the first time a Secretary of State had such a wide – and political – mandate. He was a substitute to the Finance Minister but his equal in all areas of expertise that were part of this mandate, namely all fiscal and monetary policies with third countries. “Leadership in this case was inventive and determined. Determination was definitively a key.”

52 As mentioned earlier, the creation of the SIF was the first concrete sign that Switzerland intended to be proactive about the future of its Swiss financial center. The choice of Michael Ambühl was a sensible move as he had previously led the negotiations between
Switzerland and the US concerning UBS in the summer of 2009, as part of the Federal Department of Foreign Affairs (FDFA).

Ambühl had a clear vision of the goal, a fair knowledge of the case and an acute sensitivity to external and domestic levels.

Back in 1998, Franz Blankart, on the eve of leaving his position as Head negotiator for the EEA, mentioned the fact that he had “never been able to meet with the Federal Council. This was due to a tradition dating back to 1949, according to which a civil servant was not allowed to speak before the Federal Council. I had to submit my request for a meeting seven times and sometimes wait for over three weeks. This means that I was never able to inform the government in plenum and in a timely manner on on-going negotiations, or even answer their questions. Information was transmitted in writing, which meant that a number of technical questions remained unanswered. In addition, negotiations took place in English – considered as an exotic language at the time in Switzerland – as three of the seven Federal Councilors – including two in charge of the EEA issue – could not understand English.”  

Things have changed since 1998. If Switzerland, and its Federal Councilors could stay in isolation some 20 years ago, world globalization and increasing internationalization have greatly changed their profiles. Federal Councilors attending international negotiations in English, not fully understanding the issues discussed and therefore unable to brief chief negotiators, is a situation that belongs to the past. Nowadays, all Swiss Federal Councilors master or have a good working level of English. Besides, although still codified, access to Federal Councilors is facilitated and more oriented towards a team approach; an illustration of this is the text message Foreign Minister Micheline Calmy-Rey is said to have sent Michael Ambühl during negotiations he was leading with Washington, reading, “Ne lâchez pas!” (Don’t give in!).

2.4 Participants to the 2011 Negotiation between Switzerland and Germany

Swiss diplomats and bankers often have similar backgrounds, even if events opposed them in recent history. There has however been increasing evidence of a certain lack of coordination between Swiss diplomacy and Swiss bankers’ international activities; this could be explained by the tendency of some bankers to share little or irrelevant information regarding sensitive aspects of their activities with the authorities... until it is too late, as in the UBS crisis as well as in the US/UBS case.

Bankers or their trade associations are not officially party to negotiations such as tax cooperation agreements, for instance with Germany and the UK, but they have always been active informally.

Ambühl’s teams was handpicked across the Federal Administrations as appropriate and according to the topics on the agenda or their technicality. Members of the Swiss foreign diplomatic missions in Brussels or Berlin did not directly take part in negotiations, as the main role of Ambassadors and their colleagues is to create the best “microclimate” possible between two rounds of negotiations. Swiss permanent missions abroad are considered on “stage.” They are precious intermediaries and advisors to Bern. However, over time, any diplomat posted in a foreign country naturally tends to become closer to his host country than to the Swiss position. This can be a strong asset as he fully appreciates the position of the country in which he is posted. Diplomats abroad gather
detailed information, than can be used in due course. Sources are often informal and based on personal contacts with officials. In addition, Ambühl’s technical teams working on this project were also frequently in contact with their foreign counterparts, in session with FATF, ECOFIN, FATCA...

The German Ambassador to Bern Peter Gottwald was not officially part of the process, although he was kept frequently informed of progress. This was quite the opposite of the UK Ambassador to Bern, Sarah Gillett, who actively took part in the UK negotiations. This was quite unusual and must have felt awkward to the delegations, as her role at times went beyond the traditional delivering of messages from her country’s leaders and she is said to have actively participated in the power games of negotiations.

NOTES

84. Pierre-Alain Margelisch, CEO of the Swiss Bankers Association (SBA), meeting on 14.3.2012.
85. Ibid.
86. Ibid.
87. Ibid.
92. Parti Démocrate-Chrétien (center right).
95. Pierre-Alain Margelisch, CEO of the Swiss Bankers Association (SBA), meeting on 14.3.2012.
96. Patrick Odier, Senior Partner, Lombard Odier & Cie, Genève, Chairman of the Swiss Bankers Association (SBA), meeting on 13.1.2012.
103. Patrick Odier, Senior Partner, Lombard Odier & Cie, Genève, Chairman of the Swiss Bankers Association (SBA), meeting on 13.1.2012.

104. Pierre-Alain Margelisch, CEO of the Swiss Bankers Association (SBA), meeting on 14.3.2012


109. Ibid.


112. Ibid.


114. Pierre-Alain Margelisch, CEO of the Swiss Bankers Association (SBA), meeting on 14.3.2012.

