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ENER 329
IND 187
COMPET 512
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Subject:	EU ETS: Linking negotiations with Switzerland - Joint non-paper

Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

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COUNCIL OF
THE EUROPEAN UNION

Brussels, 20 June 2013

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NOTE

from :	General Secretariat
to :	Delegations
Subject :	EU ETS: Linking negotiations with Switzerland - Joint non-paper

With a view to the WPE meeting on 24 June on the above, delegations will find attached a Commission/CH joint non-paper on a draft Agreement, as transmitted by the Commission. The latest preliminary comments from the Commission are shown in track changes.

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DRAFT

AGREEMENT between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems

THE EUROPEAN UNION,

(hereinafter referred to as 'the Union')

of the one part, and

THE SWISS CONFEDERATION,

of the other part,

(hereinafter referred to as 'the Parties'),

CONSCIOUS OF the global challenge presented by climate change and the international efforts required to reduce greenhouse gas emissions to combat climate change;

NOTING the international commitments, in particular the United Nations Framework Convention on Climate Change and its Kyoto Protocol [as well as future international agreements regarding the Kyoto Protocol's successor], to reduce greenhouse gas emissions;

CONSIDERING THAT the Swiss Confederation and the Union share the objective of reducing greenhouse gas emissions significantly by 2020 and beyond [add 2050 targets];

RECOGNISING THAT emissions trading systems are an effective tool for reducing greenhouse gas emissions cost-effectively;

CONSIDERING THAT, linking emissions trading systems to enable the trade of emission allowances between systems will help build a robust international carbon market and further reinforce the emission reduction efforts of the parties who have linked their systems;

HAVING REGARD TO the Emissions Trading System of the Union, established by Directive 2003/87/EC as amended, and the Emissions Trading System of the Swiss Confederation, established by the CO₂ Act;

NOTING THAT this agreement does not affect the provisions by means of which the Contracting Parties set their objectives for reducing greenhouse gas emissions not covered by their emissions trading systems.

HAVE AGREED AS FOLLOWS:

Preambles from joint non-paper prepared by CH were translated and slightly modified, shortened and reordered.

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CHAPTER I GENERAL PROVISIONS

Article 1 Objective

This agreement aims at linking the Emissions Trading System of the Union (hereinafter referred to as "EU ETS") with that of Switzerland (hereinafter referred to as "ETS of Switzerland").

Accepted the rewording proposed in the joint non-paper prepared by CH. Main difference to the EU non-paper is that the CH joint non paper refers to "aims at" instead of "*links*". "Aims at" is justified if linking is conditional upon the two ETS meeting the minimum criteria including aviation.

Article 2 Definitions

Emission allowances

Non-discriminatory access

Minimum criteria

Fundamental change: actions/measures with the result that emissions trading system would fall short of the minimum criteria.

Union registry, Swiss registry, administrator

Authorised Parties

Decision – legally binding acts taken by the Joint Committee

Recommendation – non-legally binding acts taken by the Joint Committee

Link (bilateral agreement, accession to this treaty, allowing sectoral credits in)

Terms which require definitions will be identified and defined once the other articles have been largely finalised. The above list is only provisional.

Article 3 Principles

1. Emission allowances that can be used for compliance under the ~~EU-ETS~~ of one party to this agreement shall be ~~fully~~ recognised for compliance under the ETS of any party to this agreement ~~Switzerland~~.
- ~~2. Emission allowances that can be used for compliance under the ETS of Switzerland shall be fully recognised for compliance under the EU ETS.~~
2. [Parties shall provide non-discriminatory access to emission allowances issued under one of the linked emissions trading systems for ~~operators~~ account holders active in at least one of the linked emissions trading systems.] [This paragraph needs further work]

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3. Emission allowances can only be surrendered for compliance in an ETS other than the ETS from which it is originating X in advance of the surrender deadline.

Somewhat accepted the wording/suggestion in the joint non-paper prepared by CH although made some modifications.

Merged paragraphs 1 and 2 to simplify accession to this agreement by a third party and removed “fully” to allow for restrictions on compliance use for “security” reasons and as introduced by the new paragraph 3.

Old paragraph 3 (now para 2) requires further work: non-discriminatory access leads to confusing with respect to free allocation particularly as it is covered later in the document with respect to access to auctions.

‘Operators’ changed to ‘account holders’ to avoid confusion with compliance buyers- text implies broader set of ‘operators’.

With regards to paragraph 2 CH requested: *The parties shall guarantee non-discriminatory access to their carbon market to all operators active on the carbon market of the other contracting party.*

Suggestion to propose access to emission allowances rather than access to markets and to ensure that such access is non-discriminatory with regards to all allowances issued under and for all operators active in one or more of the linked emissions trading systems.

Article 4 Obligations

1. The Emissions Trading Systems of the Parties shall meet the minimum criteria set out in Annex I.
2. The Parties shall not take any actions whereby their respective emissions trading systems would fall short of the minimum criteria set out in the Annex I.
3. A ~~Neither~~ party shall inform the other party in writing of any intention to link its emissions trading system to that of a third party. ~~If, without the prior consent by the~~ other party to this agreement does not consent, the consequences set out in Article 17 shall apply.

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Wording in CH joint non paper:

1. The Emissions Trading Systems of the Parties must meet the minimum criteria set out in the Annexes

2. The Parties shall collaborate in order to ensure a common administration of the aviation sector as set out in Annex III.

3. The Parties shall refrain from amendments to their respective Emissions Trading Systems which would fall short of the minimum criteria as set out in the Annexes.

Removed the requirement to collaborate on the administration of the aviation sector, as such collaboration will be required on many matters and does not explicitly need to be referred to within the linking treaty. Could for example envisage a Memorandum of Understanding. If considered necessary could include a general obligation to cooperate/collaborate.

New Paragraph 2 appears somewhat superfluous in light of paragraph 1. Accepted the proposal of the joint non-paper prepared by CH to not refer to fundamental changes in paragraph 2 (initial Commission wording: *Any fundamental change made by one of the parties to its respective emissions trading system shall lead to the termination of the agreement, unless the other party/ies to this agreement provided their consent to this change in accordance with article x. Changes that qualify as a fundamental change are set out in Annex I*). As a consequence had to add paragraph 3. Removed the provisions foreseen in the CH joint non paper article on implementation (*1. The Parties shall take all appropriate measures to ensure compliance with this agreement. 2. The parties shall abstain from taking any measures, which are liable to jeopardise compliance with this Agreement*). If considered necessary, could be inserted in the obligations article.

CHAPTER II TECHNICAL PROVISIONS

Article 5 Registries

1. The registries of the contracting parties must meet the minimum criteria defined in Annex I, Part C.
2. To operationalize the link between the EU ETS and the ETS of Switzerland, a direct link between the Union registry and the Swiss registry shall be established, which will enable the registry-to-registry transfer of allowances issued under either system.
3. ~~T~~Amongst others, the registry link shall, inter alia:
 - a. ~~shall~~ be administered for the Government of Switzerland by the Swiss Administrator and for the European Commission by the European Union Central Administrator.
 - b. ~~shall~~ operate in accordance with applicable laws in each jurisdiction.
 - c. ~~shall~~ be supported by automated processes build-integrated into both the Swiss registry and the Union registry to facilitate-enable transactions.
 - d. ~~shall~~ be implemented so as to ensure consistent functionality for users of the Swiss registry and the Union registry.
 - e. ~~shall~~ only be suspended where necessary, for example for system or security maintenance or to ensure the integrity of the carbon market, and only in in accordance with provisions contained in applicable Swiss and European Union laws. The parties shall give notice of a suspension of the registry link and shall make the suspensions as brief as possible.

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4. The parties shall act promptly and in close cooperation using measures available in their respective jurisdictions to prevent fraud and preserve market integrity. The Swiss Administrator, the ~~European Union~~ Central Administrator and National Administrators from European Union Member States shall work together to minimise the risk of fraud, misuse or criminal activity involving the registries, to respond to such incidents, and to protect the integrity of the ~~indirect~~ registry link.
5. Without prejudice to paragraphs 3 and 4, the parties through the Swiss Administrator and the ~~European Union~~ Central Administrator [or Joint Committee] shall ~~finalise-determine common operational understandings-procedures related to~~ on technical or other matters requiring a joint approach, ~~ahead-in advance~~ of the registry link commencing operation.
6. Issues requiring resolution arising out of the operation of the registry link will be resolved through timely consultation by the parties through the Swiss Administrator and the European Central Administrator [or Joint Committee].

Accepted the proposal of the joint non-paper prepared by CH to develop an annex on the minimum registry criteria. Remainder of article has been strongly aligned with the wording of the registry arrangements for the partial link with Australia. May need to clarify how the Administrators are to work together (alternatively for Joint Committee). Wording in joint non-paper prepared by CH is as follows:

1. *The technical link/transfer of emission allowances between the parties' ETS is realised through the respective registries.*
2. *The registries of the parties must meet the minimum criteria defined in Annex X*
3. *The parties shall closely collaborate on all relevant registry issues. In particular, they shall inform each other on all issues touching on the security and integrity of the registries. This may include frauds, blacklists, hacking of registries or other attacks. Further the parties shall inform each other on planned technical developments and downtimes of registries as well as on the status of exchanged emission allowances per unit and on the total holdings of such allowances.*

Article 6 Allowances

1. Regardless of the emissions trading system in which an allowance has been issued, allowances for stationary installations shall be designated 'general allowances' and for the aviation sector 'aviation allowances'.
2. The emissions trading system in which an allowance was issued shall be identifiable by all on the basis of the country code of the serial number of the allowance.
3. ~~The Each parties party~~ shall inform ~~each-the~~ other on an annual basis ~~on-of~~ the total holdings of ~~exchanged-allowances issued under the other system~~ and the number of ~~exchanged-allowances issued under the other system~~ ~~that were~~ surrendered for compliance or cancelled.

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4. Parties which have ~~Allowances shall be indirectly backed by~~ Kyoto Protocol units valid for the ~~relevant second commitment period of the Kyoto Protocol shall.~~ ~~Therefore, flows between the EU ETS and the ETS of Switzerland shall give rise by at least the end of the relevant each commitment period, to a transfer between the EU and a Swiss stocks of Kyoto Protocol units reflecting the flows of allowances to ensure the accurate accounting of emission budgets.~~ The mechanism for such transfers shall be determined in an Annex to this agreement agreed by the Joint Committee and adopted by the Parties once the relevant international rules have been adopted and shall be in accordance with Kyoto Protocol rules also regulate any share of proceeds ~~levy applicable to the transfer of Assigned Amount Units.~~

Accepted the proposal of the joint non-paper prepared by CH to have a separate article on allowances whereby the title of the article has been changed from “units and accounting/transfers” to allowances. Paragraphs 1 and 2 are taken over from the CH paper. However, the origin of the allowances needs to be identifiable by all due to the restrictions on compliance use and for suspension. Remainder of article has been strongly aligned with the wording of the registry arrangements for the partial link. Wording in joint non-paper prepared by CH is as follows: “*At the end of each commitment period, the parties shall calculate net import and export of Swiss and European emissions rights into and from the EU ETS. The accounts are then balanced by the transfer of AAUs from one party to the other on the basis of the results. The paragraph applies to the extent that AAUs are issued in accordance with the commitment under the United Nations Framework Convention on Climate Change.*”

Article 7 Auctioning

1. Each party shall provide non-discriminatory access to auctions carried out within its emissions trading systems for authorised parties.
2. ~~Any~~ auctioning platforms used within the emissions trading systems of the parties and authorised parties participating in their auctions ~~of the parties~~ must meet the minimum criteria set out in Annex I, Part C.
2. ~~Switzerland may choose to use an auctioning platform set up in the Union or one of its Member States under the EU ETS. If Switzerland does not auction on the common auction platform appointed pursuant to the Auctioning Regulation, it shall appoint an auction platform pursuant to an open and competitive EFTA-wide tender procedure (without prejudice to the requirements of adequate supervision of the auctions by national competent authorities). Switzerland may make a request to use an auctioning platform formally set up within the EU ETS. If this request is accepted by the Commission or the Member State, which has set up the auctioning platform in question, it is for the Commission or the Member State to ensure that the minimum criteria are fulfilled. The Commission or the Member State may request Switzerland to pay a fee for the use of the auctioning platform.~~

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3. ~~Where Switzerland is using an auctioning platform formally set up within the EU ETS, the revenues generated from the auctioning of allowances issued in Switzerland shall be forwarded to Switzerland.~~

Accepted the proposal of the joint non-paper prepared by CH with regards to paragraphs 1 (must clarify meaning of authorised parties, possibly in definitions) and 2.

Article

Exchange of national experts

Propose to remove this article from the treaty, which calls for the exchange of national experts. Does not require to be settled in a treaty. Can be agreed upon through a memorandum of understanding or other form of arrangement.

CHAPTER III

INTERNATIONAL AVIATION

Article 8

Coverage of International Aviation

This Agreement shall come into effect in respect of international aviation once European Union legislation on climate impacts from aviation has been included into the Annex of the Agreement between the European Union and the Swiss Confederation on Air Transport, pursuant to the Joint Committee under Article 23 of this agreement, from the date of application of this legislation to flights departing and arriving from airports in the Swiss Confederation.

CH joint non paper sets out the minimum criteria in Annex II and provides special provisions on cooperation in Annex III.

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CHAPTER IV

INTERPRETATION AND DEVELOPMENT OF LAW

Article 89

Interpretation of Law/Reference to concepts of Union law

Insofar as this Agreement involves concepts of Union law, ~~account shall be taken of~~ the relevant case law of the Court of Justice of the European Union shall be used for the interpretation of this agreement.

Joint non-paper prepared by CH states that “account shall be taken” and that consideration should only be taken of the case law adopted “prior to the date of signature of the agreement”. Commission has thus far been insisting on “shall be used” and case law adopted prior and post to the signature of the agreement.

Internal comment for WPE: As a compromise, we could consider accepting “account shall be taken” as long as the case law is not restricted to the one adopted prior to signature, for example: “Insofar as this Agreement involves concepts of Union law, account shall be taken of the relevant case law of the Court of Justice of the European Union for the interpretation of this agreement.”

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Article 910 Development of Law

1. ~~As soon as a~~ Parties shall keep each other informed of the development of ~~y initiates the process of proposing/adopting~~ new relevant domestic legislation or amendments of relevance to this agreement, or as soon as there is a change in the case law to authorities against whose decisions there is no judicial remedy under domestic legislation in a field of relevance to this agreement, it shall inform the other Party thereof.
2. From the day of a notification pursuant to paragraph 1, the other Party shall have X days to consent to or reject the ~~change (proposal/adoption) development~~. Where the party fails to respond to the notification, this shall be considered as consent to the ~~change (proposal/adoption) development~~.
3. Following a notification pursuant to paragraph 1, either Party may request an exchange of views on the new legislation or amendments to existing legislation of relevance within the Joint Committee as part of a continuous process of information and consultation.

Paragraph 1 taken from the joint non-paper prepared by CH but requires further elaboration/clarification with regards to what is meant by “informed of the development”. Ideally, stage of proposal.

Paragraphs 2 and 3 are based on the Schengen Agreement. Paragraph 4 taken from the joint non-paper prepared by CH.

The joint non-paper prepared by CH also describes in this article that the Joint Committee can decide to amend the annexes and create new ones and that the parties cooperate with regards to information sharing and consultation so as to make it easier for the Joint Committee to take decisions. This has instead been integrated in the chapter on the Joint Committee.

Internal comment for WPE whereby in Schengen no reply is considered as a rejection and parties have 30 days to respond. Schengen also foresees that the Joint Committee has 90 days to “reject” such a termination – however, giving such a say to the Joint Committee here risks to create a lot of market uncertainty and to encourage parties to reject a change and then prevent the termination through the Joint Committee.

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Article Amendments to the ETS falling short of the minimum criteria

CH joint non paper proposed:

1. *If one of the parties makes amendments to its emissions trading system, whereby its system would no longer meet the minimum criteria listed in the annexes, the other party may, after consultation within the Joint Committee, take appropriate re-balancing measures.*
2. *If one of the parties makes amendments to its emissions trading system, whereby its system would no longer meet the minimum criteria listed in the annexes and whereby a significant risk of common carbon market distortion would arise, the other party may suspend the application of this agreement from the moment the amendment has entered into force, unless the Joint Committee decides otherwise.*
3. *The scope and length of the measures referred to in paragraphs 1 and 2 shall be limited to what is necessary to settle the situation and to guarantee a just balance between the rights and obligations deriving from this Agreement. The Joint Committee shall examine the proportionality of the measures.*
4. *If no agreement can be reached within the Joint Committee, the disagreement shall be settled by arbitration.*

Although an interesting idea, impractical in practice:

- difficulty to agree on appropriate re-balancing measures in Joint Committee
- definition of appropriate re-balancing measures unclear
- difficulty to determine what would constitute a significant risk of common carbon market distortion
- difficulty to determine appropriate scope and length of application of re-balancing measures/suspensions to guarantee a just balance between the right and obligations and unrealistic to expect Joint Committee to take a position on the proportionality
- Concerns about measures that accept weakening of environmental integrity of linked systems, which minimum criteria are intended to protect.

Article 110

Participation in the Committees of the Union

Without prejudice to the participation of other organisations, Switzerland shall ensure that the Union are able to attend all meetings of the Swiss Parliament as observers. Where this is foreseen in Union law, the Union shall allow ensure that representatives from Switzerland are entitled to attend as observers the agenda items in committee meetings which are of relevance for this agreement as observers.

Internal comment for WPE: EEA EFTA States' participate as observers in climate change committee as provided for under the standard rules for comitology (Article 7) for third parties and experts

'Where this is foreseen in Union law' above would allow for this

The Council's rules of procedure are silent on third party participation- e.g, for WPE.

If we need clearly to limit participation to the CCC, an alternative formulation could be:

"In respect of committees which assist the European Commission in the exercise of its executive powers, experts from Switzerland shall be associated with the work as observers when this is called for by the good functioning of this Agreement."

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CHAPTER V JOINT COMMITTEE

Article 1~~2~~⁴ Joint Committee

1. A Joint committee composed of representatives of the Parties is hereby established.
 - ◆ The Joint Committee shall reach its decisions by ~~mutual~~ agreement. Agreement shall be reached through mutual agreement in a bilateral agreement, and through the simple majority of votes in a multilateral agreement, whereby the weight of each party's vote shall be determined on the basis of the [eg size (coverage, allowances, emissions, etc)] of its ETS.
2. The Joint Committee shall meet as required.
3. Either party may request the convening of a meeting; the Joint Committee shall meet within X days of such a request.
4. The Joint Committee shall establish its rules of procedure which shall contain, inter alia, provisions on the convening of meetings, the appointment of a chairperson and the chairperson's term of office.
5. The Joint Committee may decide to set up any subcommittee or working party that could assist it in its work.

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Accepted all paragraphs of CH non-paper with the exception of paragraph 4 (CH proposed: *"In case a Party requests the convening of a meeting, the Committee shall strive to meet within [two months] of such a request"*) and removed "mutual" in paragraph 2.

The CH proposal for paragraph 4 is not acceptable due to the role of the Joint Committee, egin law development. The delay within which the Joint Committee meets upon request must be shorter than the delay within which a party must accept or reject the amendments to domestic law proposed by the other party.

CH noted that details on the working of the Joint Committee, including timing, can be agreed in its rules of procedure and would therefore not need to be included in the agreement.

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Internal comment for WPE: With regards to paragraphs 1 and 2 we need to discuss and agree whether we want to include further details on composition, as well as how and within which delay the Joint Committee reaches its decisions. Under international law we cannot grant fewer powers to one party of an agreement than to the other. Australia expressed similar views but said that a distinction could possibly be made through weighted voting. However, weighted voting in a bilateral agreement makes little sense, as one party (here the EU) would always outweigh the other; this is unlikely to be acceptable to CH. In case of mutual agreement need a strong dispute settlement and termination clause (as CH is dependent on the link, we de facto have greater powers than CH).

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Article 1~~3~~2

Functions of the Joint Committee

1. It shall be the responsibility of the Joint Committee to administer this Agreement and ensure its proper implementation.
2. Either party may request the Joint Committee to convene and discuss possible amendments to the treaty and its annexes, as well as the adoption of new annexes.
3. Upon agreement within the Joint Committee to adopt an amendment or a new annex following a request made under paragraph 2, the Joint Committee shall take a decision to this end.
4. Upon a request made pursuant to article 9(3), the Joint Committee shall hold an exchange of views and take a position as to whether the proposed new legislation or amendments to existing legislation would result in the respective Party's Emissions Trading System no longer meeting the minimum criteria set out in Annex I.
- ~~4.5.~~ Upon notification of a suspension of or intention to terminate this agreement in accordance with article 14, the Joint Committee shall hold an exchange of views and aim to find agreement to end the suspension or prevent the termination.
- ~~5.6.~~ In case the Joint Committee identifies asymmetries between the Emissions Trading Systems of the Parties, it may provide recommendations to the parties on how these could be best addressed.
7. The Joint Committee shall aim to settle disputes arising between and referred to it by the parties in line with article 13.
- ~~6.8.~~ The Joint Committee shall only carry out the functions listed in this article.

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Accepted para 1 of the CH joint non paper but did not include 2nd sentence (For that purpose, the Joint Committee shall take recommendations and decisions).

Reordered para 2 and 3 according to sequence, simplified them and removed duplications. Moreover, the steps to be taken by the parties following a decision by the Joint Committee to amend the agreement/annexes should be set out in the article on review or implementation.

Para 2 and 3 in the CH joint non paper read:

2. The Joint Committee may decide to amend the annexes of this agreement or to create new annexes.

3. The Joint Committee shall discuss amendments to this Agreement proposed by one of the Parties and submit proposed amendments to the Parties for adoption according to their respective internal procedures.

Slightly changed the language with regards to paragraph 4 to adapt it to the rest of text:

“The Joint Committee shall hold an exchange of views on the implications an amendment to the relevant domestic legislation of a Party pursuant to article 10(1) of this Agreement affecting one of the parties’ emissions trading systems and that was brought to the Joint Committee’s attention”.

Deleted CH para 5 which grants powers to the Joint Committee in addition to adopting rebalancing and suspension measures if a party’s emissions trading system fails to meet the minimum criteria (*“Without prejudice to article on Amendments to the ETS falling short of the minimum criteria, the Joint Committee may adopt any decision aimed at safeguarding the proper functioning of this agreement in case one of the parties adopts new legislation or amendments to existing legislation resulting in its Emissions Trading System falling short of the minimum criteria set out in annex ...”*).

Added para 5 on suspension and termination.

Accepted para 6 of the CH joint non paper.

Introduced paragraph on dispute resolution and suspension/termination;

Added para 8 to clarify that the list of functions of the JC is exhaustive.

Do we need to agree on delays within which the Joint Committee needs to act?

Do we need to clarify what is legally binding and what is not? Here or in other articles?

CHAPTER VI DISPUTE SETTLEMENT

Article ~~13~~14 Dispute Settlement

1. The parties shall refer disputes on the interpretation or application of this agreement arising between them to the Joint Committee for resolution.
2. Where the Joint Committee is unsuccessful in settling the dispute [within certain delay], the Joint Committee shall refer the dispute to the European Court of Justice of the European Union/EFTA court/the arbitration tribunal of the International Court of Justice for resolution.

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3. This dispute settlement mechanism shall also remain available after the termination of this agreement.
4. The decisions of the Joint Committee and the arbitrator taken pursuant to this article shall have immediate and legally-binding effect.

Rejected CH joint non paper proposal whereby all disputes on the interpretation or application of this agreement shall be settled by the Joint Committee. The CH joint non paper only foresees for an arbitration procedure where one party makes changes to its ETS, whereby its system would fall short of the minimum criteria. This arbitration procedure is described in Annex V of the CH joint non-paper and foresees that three arbitrators shall be determined, whereby each party selects one within 30 days and the selected arbitrators select a third one by mutual agreement, whereby the third arbitrator may not come from either jurisdiction. In practice, this mechanism has proven to be unworkable.

CHAPTER VII TERMINATION

Article 1415 Suspension and Termination

1. A party may terminate this agreement at any time by notifying the other party of its decision in writing. The termination shall take effect after consultation within the Joint Committee and not before X after the notification has been made in writing to the other party. The decision shall be made public after the notification has been made to the other party. A decision to terminate shall be taken by a party in accordance with its internal procedures.

~~1.~~

- ~~1-2.~~ Without prejudice to paragraph 1, either a party may suspend this agreement in the following shall lead to the immediate termination of the agreement circumstances:

- a. Where contrary to article 9, a party ~~adopts~~ adopts/announces to adopt changes to its emissions trading system, ~~whereby its system no longer meets the minimum criteria set out in Annex I; without the other party having previously consented to the changes in writing.~~
- b. ~~Where a party announces its intention/informs the other party in writing of any its intention to link its emissions trading system~~ emissions trading system to that of a third party, and the other party does not consent ~~contrary to article 16, a party to this agreement links to a third party, without the other party to this agreement having previously consented to the link in writing. Failure to inform the other party of its intention to link its emissions trading system~~ emissions trading system to that of a third party shall be considered as a failure to consent for the purposes of this article.
- c. Where a party imposes/announces additional restrictions on the compliance use of allowances originating from another linked system other than those restrictions foreseen in article 3(3) and article 14(4) of this agreement ~~X months in advance of compliance deadline and suspension provisions].~~

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d. ~~Where a party fails to provide/announces to no longer provide non-discriminatory access to emission allowances issued under one of the linked emissions trading systems for operators active in at least one of the linked emissions trading systems.~~

e. ~~Where a party announces its intention to terminate this agreement.~~

f. ~~Where a party announces its intention to not extend or abolish its emissions trading system ETS.~~

3. ~~A party shall announce notify its decision to suspend the agreement in writing to the other parties to the link and the public at large together with a note justifying the reasons justification for this suspension. The decision shall be made public after the notification has been made to the other party.~~

4. ~~During suspension, only allowances originating from the party's ETS can be used for compliance in that ETS. Allowances originating from another ETS cannot be surrendered for compliance during suspension.~~

5. ~~A party's decision to suspend is of temporary duration [eg 2 months]. The duration of the suspension may be extended until the but may be extended up to the moment of termination of this agreement is terminated. A decision to extend the suspension shall be taken by a party in accordance with its internal procedures.~~

CH joint non paper only foresees for para. 1.

Further reflection will be required on when can suspend an agreement: announcement, adoption, etc.

Article ~~15~~16

Consequences of Termination

II. ~~On termination of this Agreement, each Party shall take back the unused emission allowances originating from its Emissions Trading System and which are present in the emissions trading system of the other party and replace them by unused emission allowances originating from the other party's emissions trading system.~~

III. ~~Once the decision has been taken to terminate the Agreement, the parties shall work together to implement appropriate processes to manage the termination of the link, including with respect to processes for ensuring the accurate accounting of emissions budgets under the Kyoto Protocol.~~

Further consultation is required, also with stakeholders to see whether termination would be taken into account in contractual arrangements or whether needs to be regulated.

Potential claims by account holders in a party's registry or other private entities should be decided under the domestic laws and relevant international obligations in force in the parties' respective jurisdictions. With regards to the question of how the liability in respect to such claims should be shared between the parties, this should be settled by arbitration. No reference to such claims should be expressly made in the treaty, as this would encourage such claims and to make it more difficult to conclude the treaty.

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Article Security Mechanism~~15 bis~~

- ~~Failure to meet minimum criteria to lead to rebalancing measures and suspension where market distortion as proposed in CH joint non paper~~
- ~~Rule on net flow limitations~~
 - ~~Eg mechanism for risk mitigation whereby temporary inflow caps could be introduced in response to important developments to protect the integrity of schemes whilst avoiding automatic termination.~~
- ~~Rule on compliance use (eg temporarily cannot use for compliance)~~

No separate article required as dealt with through article 3(3) and the possibility of suspension, which impose restrictions on the compliance use.

CHAPTER VIII FINAL PROVISIONS

Article 17 Implementation~~16~~

1. The Parties shall take all appropriate measures to implement the decisions and act on the recommendations and in accordance with the positions of the Joint Committee.
2. Decisions taken by the Joint Committee shall enter into force X days after completion of the internal procedures by both parties.
3. Without prejudices to paragraph 2, decisions which increase the level of ambition of the minimum criteria set out in Annex I shall enter into force X days after adoption of the Joint Committee.

Merged implementation and review article

IMPLEMENTATION: EU non paper suggested the following wording:

1. The parties shall take all appropriate measures to ensure compliance with this agreement
2. The parties shall abstain from taking any measures which are liable to jeopardise compliance with this agreement.

CH proposed in their draft joint non paper to delete the first paragraph. This is understandable as there is indeed only very little measures the parties can take to ensure compliance, such as measures to enhance coordination. However, by limiting the article to the second paragraph, the article becomes superfluous, as the requirement to abstain from measures that could jeopardise compliance with this agreement is indirectly covered by the articles on principles and obligations. Article could be deleted and 2nd paragraph, if considered necessary, included in the obligations article.

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REVIEW: CH non-paper suggested the following wording, much of which is already covered in the article on the Joint Committee.

1. If a Party wishes to have this agreement reviewed, it shall submit a proposal to the Joint committee to that effect. The amendment to this Agreement shall enter into force after completion of the respective internal procedures.
2. The Annexes to this Agreement may be amended by a decision of the Joint Committee in accordance with article 5(2).

Proposal to limit this article to review only and deal with the powers of the Joint Committee in the article dedicated to the functions of the Joint Committee.

Article ~~17~~18

Linking Agreement with third parties

1. The parties to this agreement may negotiate jointly or unilaterally with a third party to establish a link.
2. Where a party negotiates unilaterally with a third party with the intention to establish a link, the former shall inform the other party to this agreement thereof and regularly update it on the status of the negotiations.
3. A party may only establish a link with a third party if the other party to this agreement previously consents to the establishment of this link in writing. ~~The establishment of a link without having received the written consent from the other party in writing shall lead to the termination of this agreement.~~

Rejected CH joint non paper proposal *the parties shall consult each other before starting negotiations with third countries in areas covered by this agreement.*

1. *in order to limit potential distortions of the carbon market, the parties undertake to conduct joint negotiations with third countries with regard to mutual recognition of emission allowances*
2. *if necessary, Switzerland shall make efforts to conclude an agreement with the EFTA states on the creation of reciprocal rights and obligations identical to the rights and obligations covered by this agreement.*

Internal comment for WPE: Rejected CH joint non paper proposal as paragraphs 1 and 2 would grant the same power to CH as to the EU in negotiations and because paragraph 3 is not necessary.

Article ~~18~~19

Annexes

The Annexes to this Agreement ~~are~~shall form an integral part ~~of it~~thereof.

Article is fine.

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Article ~~19~~20

Languages

This agreement shall be drawn up in duplicate in the Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, Gaelic, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, each of these texts being equally authentic.

Article 21

Ratification and Entry into Force

1. This agreement shall be concluded for an indefinite period, unless terminated in accordance with article X.
2. This agreement shall be ratified or approved by the parties in accordance with their respective internal procedures.
3. Without prejudice to specific arrangements for the aviation sector laid down in article 8 Annex I, Part B, this agreement shall enter into force on the 1 January following the completion of the internal procedures necessary for ratification by both parties.

Language from CH draft non-paper accepted for paragraphs 1 and 2 although paragraph 1 may cause difficulties due to the 2020 sunset clause in the CH ETS. With regards to paragraph 3, treatment of aviation needs to be discussed further. In previous meetings it was discussed that the link should ideally start on 1 January. Therefore CH language (*enter into force on the first day of the second month after the parties have notified each other of the completion of their respective internal procedures necessary for this purpose*) was changed.

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Annex I

Merged Annexes on Minimum Criteria in CH joint non paper into one. Content needs to be developed and agreed. Removed annex on arbitration.

Minimum Criteria

A. Minimum Criteria for Stationary Installations

Pursuant to article 4(1), the rules for the Emissions Trading Systems of the Contracting Parties defined in the respective domestic legislation (EU ETS directive¹, Swiss CO₂-Act² and ordinance³) concerning the elements listed below are considered as being equivalent minimum criteria:

	EU legislation	CH legislation	<u>Minimum Standard</u>
The mandatory nature of the participation in the ETS;		Art. 16 CO ₂ G; Art. 40.1 CO ₂ V	
The coverage (sectors) of the ETS;		Art. 16 CO ₂ G; Art. 40.1 CO ₂ V, Annex 6	
The calculation of the cap;		Art. 18 CO ₂ G; Art. 45.1 CO ₂ V, Annex 8	
The level of ambition (reduction path);		Art. 18 CO ₂ G; Art. 45.1 CO ₂ V, Annex 8	
The use of international offsets and quality restrictions;		Art. 5 and 6 CO ₂ G; Art. 4 and 48 CO ₂ V, Annex 2	

¹ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275 of 25.10.2003, p. 32), as last amended by Directive 2009/29/EC of 23 April 2009 so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ L 140 of 23.04.2009, p. 63)

² Bundesgesetz über die Reduktion der CO₂-Emissionen vom 23. Dezember 2011 (CO₂-Gesetz; SR 641.71)

³ Verordnung über die Reduktion der CO₂-Emissionen vom 30. November 2012 (CO₂-Verordnung; SR 641.711)

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The auctioning rules;		Art. 19 CO2G; Art. 47 CO2V	
The free allocation using uniform benchmarks;		Art. 19 CO2G; Art. 46.1 CO2V; Annex 9	
The Monitoring and Verification rules;		Art. 20 CO2G; Art. 50-54 CO2V	
The level of the sanctions.		Art. 21 CO2G; Art. 56 CO2V	

B. Aviation

~~[All references to aviation are subject to change depending on further developments of the EU legislation in this respect (e.g. depending on resolutions of the ICAO Assembly in Autumn 2013.)]~~

~~i. Minimum Criteria for Aviation~~

~~Pursuant to article 4(1), the following elements are considered as being minimum criteria as regards the aviation sector:~~

- ~~• Covered flights: The following flights have to be covered :

 - ~~○ Domestic flights~~
 - ~~○ Flights within EU/EEA/CH~~
 - ~~○ [Flights from/to third countries]~~~~
- ~~• Exceptions: The following exceptions from the above mentioned principles can be foreseen:

 - ~~○ Exceptions foreseen in Annex I of the EU ETS Directive¹~~
 - ~~○ Flights of aircraft operators with total annual emissions lower than 10'000 tonnes per year or fewer than 243 flights per period for three consecutive four month periods~~~~
- ~~• Cap: The cap until 2020 is not higher than 95 percent of the historical emissions of the considered flights in the period 2004-2006.~~
- ~~• Free allocation of emission allowances: The number of emission allowances allocated free of charge to aircraft operators is calculated based on the EU/EEA benchmark for tonne-kilometres².~~

~~¹Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275 of 25.10.2003, p. 32), as last amended by Directive 2009/29/EC of 23 April 2009, so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ L 140 of 23.04.2009, p. 63)~~

~~²2011/638/EU: Commission Decision of 26 September 2011 on benchmarks to allocate greenhouse gas emission allowances free of charge to aircraft operators pursuant to Article 3e of Directive 2003/87/EC of the European Parliament and of the Council.~~

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- ~~Auctioning: The emission allowances not allocated free of charge have to be auctioned.~~
- ~~Use of CERs and ERUs:~~
 - ~~Quality: quality requirements of the EU ETS Directive¹~~
 - ~~Quantity: at least 1.5% of the verified emissions, at most 50% of the reduction below the historical emissions (0 2004-2006).~~
- ~~Monitoring, verification and accreditation: Monitoring, verification and accreditation must comply with the general requirements laid down in the EU ETS Directive².~~
- ~~Sanctions: The sanction in case of non-compliance must be not lower than 100 Euro or 125 Swiss Franc per tonne of CO₂. An operating ban as measure of last resort needs to be foreseen.~~

ii. Technical provisions on international aviation and cooperation

1. Technical provisions / cooperation

- Attribution of flights between Switzerland and EU/EEA and vice versa: The flights are attributed to the two systems according to the departing flight principle. Flights departing from Switzerland are attributed to the ETS of Switzerland, flights departing from EU/EEA are attributed to the EU ETS. Consequently, the revenues from auctioning are attributed based on the same principle.
Vols au départ ou à destination de l'aéroport de Bâle-Mulhouse : L'attribution des vols à l'Etat membre responsable est régie par le droit national sous lequel s'effectue le vol.
- Administration of aircraft operators: For the ~~Swiss~~ ETS ~~of Switzerland~~ and the EU ETS each aircraft operator is administered only by one national authority (in line with article 18a of the EU ETS Directive³). In case of aircraft operators from EU/EEA/CH the state which granted the operating licence shall administer the operator. In case of aircraft operators from third countries, the state with the greatest estimated attributed aviation emissions from flights performed by that aircraft operator in the base year (2010) shall administer the operator. If the administrative responsibility passes on from a national authority to the Swiss authority, operators that do not have a Swiss operating licence may choose to remain with the original administering state until 2020 at the latest.
Monitoring plans, monitoring reports and free allocations of emission allowances that are approved by a national authority in the EU/EEA will be accepted by the Swiss authorities and vice versa.
For the purpose of free allocation of emission allowances to the administered aircraft operators, emission allowances have to be transferred from the Union registry to the registry of Switzerland or vice versa (see articles 5 and 6).
- Mutual recognition of accredited verifiers: Both Contracting Parties mutually recognize their accredited verifiers.
- Collaboration with Eurocontrol: The European Commission ensures that the necessary data in order to determine the small emitters in the whole EU/EEA/CH area and to calculate the cap for the ETS of Switzerland is provided in due time by Eurocontrol.

~~¹Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275 of 25.10.2003, p. 32), as last amended by Directive 2009/29/EC of 23 April 2009 so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ L 140 of 23.04.2009, p. 63)~~

~~²ibid~~

~~³See footnote 1.~~

C. Minimum Criteria for Registries and Auctioning

Minimum Standards [to be developed]

E.g. Data Exchange Standards (DES) of the UNFCCC, version XYZ

DES for the communication between the secondary transaction log of Switzerland and the transaction log of the Union [to be elaborated]

Security requirements

Description	CH-ETS	EU-ETS
2-factor authentication	Yes (mandatory)	Yes ()
4-eyes-principle	Yes (mandatory)	Yes ()
Safety delay	NO	Yes
Holding accounts (Trusted account list)	NO	Yes
Trading accounts	Yes	Yes
Hiding of serial numbers	Planned	Yes
SMS Tan for transactions		Yes
...		

D. Minimum Criteria for International Credits