

FAQ on the Treaty negotiated in August 2009 between Switzerland & the USA

Argument:

Switzerland is a constitutional state. The verdict of the Federal Administrative Court is binding and cannot be changed. The primacy of the constitution cannot be put at stake under alien and/or economical pressure. Separation of the powers forbids overturning a decision by a federal court through a decision of the parliament.

Answer:

The treaty is a binding contract under international law. On recommendation by the president of the Federal Administrative Court, the problem can be solved, if the Swiss Parliament ratifies this treaty. This course of action is legal, consistent with the constitution and in accordance with the rule of law.

Argument:

The Americans will understand the Swiss decision. The predicted scenario (severe consequences for the Swiss economy) is not plausible. The USA is also a constitutional state and will understand Switzerland's rationale on why it cannot fulfil a treaty that has been declared as illegal.

Answer: Switzerland cannot declare this treaty as illegal as it is a binding contract under international law. Switzerland needs to comply with legal requirements. If Switzerland was to break this treaty, this would be considered as a political decision by the Swiss parliament in order to protect tax criminals, not as a consequence of a court decision – a completely incomprehensible decision in the eyes of Americans. Considering possible measures by the IRS, one should take into consideration the position of IRS: If the Swiss Parliament says no to the treaty, the IRS stand there empty-handed. After 2.5 years, two formal request for exchange of information and one treaty, the IRS will have nothing to show (except the 275 files from February 2009). In our view, the IRS will be obliged by domestic pressure to react in a visible way to avoid being seen as incompetent bunglers and wafflers on tax criminals.

Argument:

Federal Council has to renegotiate the treaty. The Federal Council has chosen the wrong strategy by assigning the parliament to ratify the treaty. The Federal Council has to explain to the USA that this treaty is incompatible with the Swiss jurisdiction. It also must seek a modification of the treaty.

Answer:

As the chosen course of action is legal, the Federal Council cannot claim that fulfilling the treaty is impossible. Also, given the domestic priorities of US policy, a renegotiation is not possible. A modification of the treaty would be considered a concession to tax criminals – a definite no-go in light of the upcoming mid-term elections in November. Furthermore, the USA will argue that “a deal is a deal”.

Argument:

The Federal Council does not need the Parliament. The Federal Council must finish what it has started: it can apply emergency law and therefore does not need ratification by the parliament.

Answer:

As the chosen course of action is legal under Swiss law, the Federal Council is not allowed to apply emergency law. It must pursue the strategy that is compliant with the constitutional law.

Argument:

UBS must answer for their mistakes. UBS has to hand out the requested bank data to the USA in its own authority and bear the legal consequences.

Answer:

In general, UBS must bear the consequences of their mistakes from the past. By delivering the requested bank data, however, the UBS would severely violate Swiss jurisdiction. No parliamentarian can seriously consider such a solution, let alone request the bank to do such a thing. In truth, this solution could only be proposed by uninformed people. If UBS was obliged to hand over client data, all members of the Board of Directors and of the Executive Board would break federal penal laws and would have to be indicted by the Swiss Justice department. In turn, FINMA would have to bar such people from running a bank which would lead to serious challenges to the stability of the bank.

Argument:

Only banks are affected. Even if, apart from UBS, other banks were affected as well, it is again the Swiss government who has to pull the bank's chestnuts out of the fire for irresponsible banks – and we do not approve of this!

Answer:

Outside the banking world, there are a large number of Swiss companies that are successfully operating in the US market – generating a substantial share of their turnover and profits in the USA. Therefore, a stable and untroubled economic relationship between Switzerland and the USA is crucial for their economic success and for the Swiss economy.

Argument:

The scenarios depicted by the economy are by far exaggerated.

The USA often does not implement their regulations. Therefore, the consequences augured by exponents of the economy are nowhere near as risky as depicted.

Answer:

As far as the economy is concerned, the USA does not always fully implement all regulation/decisions. Regarding tax offence, however, there is no precedence of inadequate implementation (c.f. Enron, Worldcom or Arthur Andersen). The anticipated consequences might not come true to the whole extent, but the danger is real. Switzerland must not expose itself to these risks.

The scenario that nothing will happen after a rejection in the Swiss Parliament is not very likely and it would be very dangerous to take this assumption. People loudly arguing for this no-consequences scenario better be experts on US government and equipped with very strong arguments!

Question:

Double Taxation Treaty (DTT). Where is the connection between the treaty and a new DTT? Does Switzerland need a new DTT?

Answer:

In March 2009, Switzerland agreed to adopt article 26 of the OECD Model Convention. Referring to the “old” DTT therefore doesn’t really make sense anymore. Rejection of the treaty would put ratification at risk on both sides of the Atlantic. In addition, companies need legal certainty as far as Double Taxation rules are concerned. Theoretically, even a cancellation of the current DTT by the USA would be possible. Apart from this, a rejection of the treaty by the Parliament would put Switzerland in an awkward position regarding the upcoming OECD peer-review.

Argument:

No treaty without any conditions. If Switzerland was to bail out UBS again, the government must impose strict conditions on the bank (large number of postulations by SP (Socialist Party) & SVP (People’s Party). The treaty must not be ratified until questions about systemic risks (Switzerland being open to blackmail) and about the excessive bonuses have been answered.

Answer:

The timeframe for the ratification of the treaty is very narrow. In terms of public interest, all parties should support the ratification. The demands of the Socialist Party to solve several key issues before agreeing to the CH-USA treaty is reasonable. However, party interests, even if justified, will complicate the whole process and will increase the risks involved massively. Once the ratification has been done, there will be enough options to meet requirements of all parties involved. A “taking of hostages” – linking the ratification to the above mentioned conditions – could lead to an unintended result.

Question:

Will there be any negative **consequences for SMEs** if the treaty is not ratified? If so, what are the concrete implications?

Answer:

In case the situation between Switzerland and USA is escalating, companies of the real economy will be hindered in doing business with and within the USA. While larger and globally active companies will eventually find solutions, most SMEs will be limited to their activities in Switzerland and will therefore face the full weight of the consequences.

Argument:

It is always up to Switzerland to give in.

In case the treaty was ratified, it would be just another example of Switzerland giving in to foreign countries, even abandoning its constitutional legality. It is not the rejection but the ratification of the treaty that will increase external pressure (OECD, G-20), because Switzerland will then have sent out another signal of weakness.

Answer:

The ratification of the treaty is neither a willingness to give in nor is it a sign of weakness – on the contrary: the treaty is a great example how Switzerland managed to argue the USA out of enforcing their interests unilaterally irrespective of Switzerland's legal system. The treaty with the USA was negotiated in order to solve a difficult bilateral problem. Fulfilling this contract is the traditional attitude of a constitutional and law-abiding nation.

Question:

Does the treaty impair the Banking Secrecy?

Answer:

No, it does not. The treaty is about the interpretation of the "old" Double Taxation Treaty in cases of repeated, severe tax offence. Due to a strict formal interpretation of the DTT by the Federal Administrative Court, the parliament has to ratify this treaty. According to the new DTT, administrative assistance will in future apply for comparable cases.

Argument:

Switzerland must not create a precedent.

If Switzerland was going to give in this particular case, it will have to concede as well to requirements of other countries. (in other words: they could also insist on retroactivity).

Answer:

It is not about giving in. The matter in hand is a simple implementation of a legal and binding contract. In terms of precedents, Switzerland has no similar treaties with other nations, and such treaties will not be needed in light of the revised DTT also covering tax evasion cases.

Question:

Retroactivity. Doesn't the ratification and implementation of the treaty violate the ban on retroactivity?

Answer:

Retroactivity is given if a new law is applied to facts of a case that has been concluded before the new law came into effect. This is illegal. This rule applies to substantive law. In procedural law (enforcement of substantive law) a new law is applied immediately to all facts, irrespective of whether those facts are in the past or not. According to the consistent jurisdiction of the Federal Court, prescriptions of legal and administrative cooperation are part of procedural law. Hence the Federal Court concludes that such ordinances – once implemented – can also be applied to cases lying in the past without complying with the fact of retroactivity. The ratification of the treaty does therefore not violate the ban on retroactivity.