The Legal Framework of Swiss International Trade and Investments

Part II: Protection

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I. INTRODUCTION

In Part I of this article, I discussed the promotion, the admission and the treatment of Swiss exports and outbound investments. In the present part, which represents the second half of this study of the legal framework of Swiss international trade and investments, I address the legal remedies available to Swiss exporters and investors for protecting their interests whenever trade is hampered or their investment harmed in the importing or host country.

Remedies are discussed following the time sequence in which they are generally used; thus, preventive remedies in the form of guarantee (Section II) precede curative remedies. Among the latter, I tentatively distinguished those following a formal, codified, or semi-formal procedure and being of a judicial or quasi-judicial nature (Section III) from those of a diplomatic one (Section IV). A general conclusion bears on the two Parts of this study (Section V).

The "protection" to which the title of this Part refers deserves further qualification. In fact, in Part I of this article on the "promotion" of Swiss international trade and investments, I already addressed the protection of investments as a *principle* from the perspective of the guarantee of fair and equitable treatment and its corollary, the obligation of indemnification in case of expropriation.[1] What I examine in this Part are the *means* available to investors, and traders, for obtaining such protection in case it is at threat.[2]

II. GUARANTEES

"*Prévenir c'est guérir.*"[3] Guarantee schemes are available both to exports and investments. They reduce the risk of failure to pay for the former and of capital or

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[1] *See* Part I of this article, IV.3(b)(ii), "Protection, Fair and Equitable Treatment and Most-favoured-nation treatment".

[2] *See, e.g.*, the recent Treaty on Investment (TOI) between European Free Trade Area (EFTA) Member States (minus Norway) and South Korea, FF 2006 p. 963, art. 3, "Protection and Treatment", 13, "Compensation and Indemnification" and 14 "Compensation of Losses"; and *compare with* art 16, "Disputes Between an Investor and a State-Party" and 17 (for financial services). *See also* Part I of this article, note 101 (on the TOI with South Korea).

[3] "To anticipate is to cure." French motto.

revenue repatriation for the latter. There is one instrument available to exporters and two to investors. The two first are Swiss, the last one multilateral.

A. *Swiss Insurance Against Export Risks*

The old Federal Act on Export Risks Guarantee of 1958[4] was revised in 2004 and has been replaced in 2006 by the new Federal Act on the Swiss Insurance Against Export Risks.[5] The revision's main new points are the introduction of the coverage of risk linked to private buyers[6] as well as the establishment of a public law entity.[7] The new fund, previously known as Export Risks Guarantee (GRE),[8] will be called Swiss Insurance Against Export Risks (ASRE).[9]

The GRE covers political and capital[10] transfer risks, the risk of insolvency for State or State-controlled buyers or guarantors and accredited banks. It applies to consumer and investment goods, services, licence and know-how transfer agreements and payment guarantees. Eligible are companies having their business and registered offices in Switzerland.[11] Premiums match the minimum prescribed by the Organisation for Economic Co-operation and Development's (OECD) Arrangement on Officially Supported Export Credits[12] and take into account the country risk[13] and the duration of the guarantee.

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[4] *See* Loi fédérale sur la garantie contre les risques à l'exportation, RS 946.11 (26 September 1958). *See also* its implementation order, Ordonnance sur la garantie contre les risques à l'exportation, RS 946.111 (15 June 1998).

[5] *See* Loi fédérale sur l'Assurance suisse contre les risques à l'exportation (LASRE), FF 2005 p. 6987 (16 December 2005). The Act was subject to the possibility of an optional, citizen-initiated referendum up until 6 April 2006. The referendum was not used; therefore, the Act will enter into force. The date of entry into force will be fixed by the Federal Council. *See also* CONSEIL FÉDÉRAL, MESSAGE CONCERNANT LA LOI FÉDÉRALE SUR L'ASSURANCE SUISSE CONTRE LES RISQUES A L'EXPORTATION, FF 2004 p. 5441 (24 September 2004).

[6] This coverage was not available under the old Act. Even though the old Act was generally competitive and had proven to serve its purpose throughout its history, among its direct competitors Switzerland was the only country not ensuring against this risk. As business patterns have changed, namely with the privatization of many former State or State-controlled entities, the old Act was no longer coping with the challenges of economic globalization.

[7] In French : "*établissement de droit public*". The export risk guarantee has existed so far in the form of a fund administered by the government. It will be transformed to an autonomous public law entity and re-organized in accordance with the New Public Management principles, namely as to the allocation of competences between the government and *Assurance suisse contre les risques à l'exportation* (ASRE).

[8] The acronym is based on the French: "*Garantie contre les risques à l'exportation*".

[9] The acronym is based on the French: "*Assurance suisse contre les risques à l'exportation*".

[10] Certain currencies are eligible for complimentary coverage; *see* Ordonnance du DFE sur les monnaies susceptibles de donner lieu à une garantie complémentaire lors de marchés conclus en monnaie étrangère, RS 946.111.5 (1 December 1998).

[11] The goods must contain a minimal Swiss added-value, though; *see* Ordonnance du DFE sur la part minimale de valeur ajoutée suisse dans le cadre des garanties contre les risques à l'exportation, RS 946.111.1 (18 November 2002).

[12] *See* Ordonnance du DFE sur la perception, par des organisations économiques, d'émoluments pour la garantie contre les risques à l'exportation, RS 946.112 (8 March 1999), and Ordonnance du DFE concernant la perception d'une prime minimale pour les garanties contre les risques à l'exportation, RS 946.112.1 (8 March 1999). *See also* OECD, Trade Directorate, Arrangement on Officially Supported Export Credits, 2005 Revision, TD/PG(2005)38/FINAL (6 December 2005). The OECD's Export Credit Division facilitates work relating to the policies and practices of OECD Member governments which provide Officially Supported Export Credits; *see* ‹www.OECD.org/department/0,2688,en_2649_34169_1_1_1_1_1,00.html›.

[13] *See* Ordonnance du DFE concernant le classement de pays importateurs dans les catégories de pays établies en relation avec la garantie contre les risques à l'exportation, RS 946.111.6 (19 August 2002). Countries are classified in accordance with the OECD's country risk scale from 1 (safe) to 7 (risky). *See* OECD, Trade Directorate, Country Risk Classifications of the Participants to the Arrangement on Officially Supported Export Credits (21 April 2006).

The GRE has been operated so far by the Swiss machine-tool federation (Swissmem)[14] under a mandate from the government. Decisions for guarantees below CHF 5 million are made by seco; by the Ministry of Economy for guarantees between CHF 5 and 10 million; and, above, by the same in agreement with the Ministry of Finance.[15] Decisions are made upon proposal of the GRE Commission. The proposal is based on a file prepared by Swissmem. The Commission is composed of eight members: four representatives of the private sector and four representatives of the government.[16] The GRE Bureau will be taken over by ASRE under the new Act. Switzerland has passed reinsurance agreements with nine EU countries[17] and is a Member of the Paris Club.[18]

B. *GUARANTEE AGAINST INVESTMENT RISKS*

The Guarantee Against Investment Risks (GRI) offered by the Swiss Confederation was foreseen by a Federal statute of 1970.[19] It enables the Swiss Confederation to facilitate investments abroad by granting guarantees against certain risks.[20] This facility is in principle limited to developing countries.[21] The investments must contribute to promote the economy of such countries and be closely linked to the Swiss economy. They must not be contrary to the general interests of Switzerland. The guarantee may only be granted to Swiss citizens or to companies with prevalent Swiss interests and having their seat in Switzerland. However, exceptions may be granted where only one of these two conditions is fulfilled but the applicant is closely related to the Swiss economy.[22]

The risks covered may be political events or acts of State harming the investor in one way or another: expropriation, formal or material; destruction or deterioration; impossibility of performance of the beneficiary of the investment; insolvency or refusal to pay.[23] All forms of State, State organs and State enterprises are aimed at.[24]

[14] *Industrie suisse des machines, des équipements électriques et des métaux* (Machine-Tool, Electrical Equipment & Metal Industry); *see* ‹www.swissmem.ch›. For the GRE Bureau, *see* ‹www.swiss-erg.ch›.

[15] The Federal Council shall occasionally rule on guarantees and decisions of principle of a particular magnitude and importance.

[16] The President of the Commission is currently the Head of Economic Promotion (*Promotion de la place économique*) at seco.

[17] Austria, the Czech Republic, France, Germany, Italy, the Netherlands, Poland, Spain and Sweden. The agreements were passed between 2001 and 2005. *See* RS 0.946. These agreements are exclusively reinsurance, not insurance, agreements, and therefore do not directly involve the exporter.

[18] The Paris Club is an informal group of public creditors the role of which is to find co-ordinated and sustainable solutions to the payment difficulties experienced by debtor States. Paris Club creditors agree to reschedule debts owed to them. *See* ‹www.clubdeparis.org›.

[19] *See* Loi fédérale sur la garantie contre les risques à l'investissement (GRI), RS 977.0 (20 March 1970). *See also* its implementation order, Ordonnance d'exécution de la loi fédérale sur la garanties contre les risques de l'investissement, RS 977.02 (2 September 1970). *See also* Arrêté fédéral concernant le maximum des engagements totaux pouvant être pris au titre de la garantie contre les risques de l'investissement, RS 977.01 (9 October 1970) (on GRI's total ceiling).

[20] *See* Loi sur la GRI cited *id.*, art. 1(1).

[21] Including Eastern European countries which are technically known as "transitional economies", a development stage somewhat more advanced than that of developing countries. The list of these countries is established by the GRI Commission and is available on GRI Bureau's website at ‹www.swiss-irg.ch/politik/f/index.htm›.

[22] *See* Loi sur la GRI cited *supra* note 19, art. 4.

[23] Risks linked to private creditors or guarantors, voluntary capital repatriation, or exchange risks are not covered. *See* Ordonnance sur la GRI cited *supra* note 19, art. 1-3.

[24] *See* Loi sur la GRI cited *supra* note19, art. 5.

The guarantee will cover a maximum of 70 per cent of the investment.[25] A different proportion may be fixed for investment incomes.[26] It may last up to 15 years. This duration may be extended.[27] The guarantee is reduced yearly by a percentage to be determined, which shall usually be less than 5 per cent.[28] The beneficiary shall pay interest, the amount of which may vary according to the risks, the amount of the guarantee and the duration.[29] The guarantee is granted upon motivated application filed before the investment is made.[30] The beneficiary has a duty of mitigation.[31] The indemnity shall be paid once the beneficiary has dedicated his best endeavors to recovering an adequate and effective compensation. Such indemnity may be submitted to the conditions that the beneficiary transfer his rights to the Confederation.[32]

Like GRE, GRI is operated by Swissmem.[33] In the case of GRI, however, decisions are chiefly made by the Ministry of the Economy, in agreement with the Ministry of Foreign Affairs and the Ministry of Finance, upon proposal of the GRI Commission. The Commission is composed of six members: three representatives of the private sector and three representatives of the government.[34]

Investments representing a reputation risk for Switzerland, such as an environmental risk, or a risk for Switzerland's development aid policy are submitted to a deeper assessment. The principles of the OECD's Declaration on International Investment and Multinational Enterprises[35] are observed. GRI is a Member of the Berne Union.[36]

C. *THE MULTILATERAL INVESTMENT GUARANTEE AGENCY*

The Multilateral Investment Guarantee Agency (MIGA)[37] pertains to the World Bank Group.[38] As Switzerland is a Member of MIGA,[39] it is accessible to Swiss investors[40] and offers a valuable alternative to GRI, which it mirrors in many aspects.

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[25] *Id.*, art. 6. Investments are defined as capital stakes in money or in the nature of loans. *Id.*, art. 3. The level of coverage of capital revenues is limited to 24 per cent of the capital whereas coverage of the revenue itself is limited on a case-by-case, yearly basis. *See* Ordonnance sur la GRI cited *supra* note 19, art. 3(2).

[26] *See* Loi sur la GRI cited *supra* note 19, art. 6.

[27] *Id.*, art. 7.

[28] *Id.*, art. 9.

[29] *Id.*, art. 10.

[30] *Id.*, art. 11.

[31] *Id.*, art. 17.

[32] *Id.*, art. 18.

[33] *See supra* note 14. For the GRI Bureau, *see* ‹www.swiss-irg.ch›.

[34] The President of GRI is the same as for GRE, *see supra* note 16.

[35] *See* Part I of this article, IV.C.1(b), "*The Declaration on International Investment and Multinational Enterprises*".

[36] Officially known as the International Union of Credit & Investment Insurers, the Berne Union is the leading international organization and community for the export credit and investment insurance industry. The Berne Union actively facilitates cross-border trade by supporting international acceptance of sound principles in export credits and foreign investments and by providing a forum for professional exchanges among its members. *See* ‹www.berneunion.org.uk/›.

[37] *See* ‹www.miga.org›.

[38] *See* Part I of this article, IV.C.3, "The World Bank".

[39] *See* Convention portant création de l'Agence multilatérale de garantie des investissements, RS 0.975.1 (signed in Seoul, Republic of Korea on 11 October 1985).

[40] Provided the investment is not made in Switzerland. Under certain conditions, however, investments made by nationals of the host country may also be eligible, but not in Switzerland, since Switzerland isnot a developing country.

A corporation is eligible for coverage if it is either incorporated and has its principal place of business in a Member country or if it is majority-owned by nationals of Member countries.[41] A State-owned corporation is eligible if it operates on a commercial basis.[42] MIGA insures new[43] cross-border investments originating in any MIGA Member country, destined for any developing Member country.[44] New investment contributions associated with the expansion, modernization, or financial restructuring of existing projects are also eligible,[45] as are acquisitions that involve the privatization of State-owned enterprises.[46]

Types of foreign investments that can be covered include equity investments, shareholder loans, and shareholder loan guarantees.[47] Loans from unrelated borrowers (commercial banks) can be insured, provided the loan is granted or guaranteed by a shareholder of the investor.[48] Other forms of investment, such as technical assistance and management contracts, and franchising and licensing agreements, may also be eligible for coverage.[49] In keeping with MIGA's objective of promoting economic growth and development, investment projects must be financially and economically viable, environmentally sound, and consistent with the labor standards and other development objectives of the country hosting the investment.[50]

MIGA offers coverage against risks related to money transfer,[51] expropriation,[52] war and civil disturbance, terrorism and sabotage, and breach of contract by the host government.[53] Beyond insuring risks, MIGA mainly helps to deter harmful actions by using leverage in protecting investments through its relationship with shareholder governments and by mediating disputes.[54]

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[41] *See* Convention cited *supra* note 39, art. 13(a)(ii).

[42] *Id.*, art. 13(a)(iii).

[43] *Id.*, art. 12(c).

[44] *Id.*, art. 14. There are 144 such Members as of 15 October 1985; *see* ‹www.miga.org/sitelevel2/level2.cfm?id=1152›. *See also* Convention cited *supra* note 39, Appendix A, Category II at 33, and "Champ d'application de la Convention" at 39. However, both lists are outdated.

[45] *Id.*, art. 12(c)(i).

[46] New investments are those that have neither been made nor irrevocably committed to by the time the investor submits a preliminary application for guarantee to MIGA. Other investments may be eligible and are considered on a case-by-case basis.

[47] Provided the loans have a minimum maturity of three years.

[48] *See* Convention cited *supra* note 39, art. 12(a).

[49] *Id.*, art. 12(b).

[50] *Id.*, art. 12(d).

[51] Transfer restriction coverage protects against losses arising from an investor's inability to convert local currency (capital, interest, principal, profits, royalties, or other monetary benefits) into foreign exchange for transfer outside the host country. The coverage also insures against excessive delays in acquiring foreign exchange caused by the host government's actions or failure to act. Currency devaluation is not covered.

[52] Expropriation coverage offers protection against loss of the insured investment as a result of acts by the host government that may reduce or eliminate ownership of, control over, or rights to the insured investment. This policy also covers partial losses, as well as "creeping expropriation", a series of acts that over time have an expropriatory effect. *Bona fide*, non-discriminatory measures taken by the host government in the exercise of its legitimate regulatory authority are not considered expropriatory.

[53] *See* Convention cited *supra* note 39, art. 11. Breach of contract coverage protects against losses arising from the host government's breach or repudiation of a contractual agreement with the investor. In the event of such an alleged breach or repudiation, the investor is covered if no judicial remedy or arbitration is available; no decision is rendered within a deadline defined in the insurance policy; or such decision cannot be enforced. *See id.*, art. 11(a)(iii).

[54] *See infra* III.A.4, "The Multilateral Investment Guarantee Agency".

Premiums are calculated on a case-by-case basis. As for GRI, guarantees last up to 15 years.[55] Equity investments can be covered up to 90 per cent and debt up to 95 per cent. MIGA may insure up to US$ 200 million and, if necessary, more can be arranged through syndication of insurance.

It is worth mentioning that MIGA also offers a Small Investments Program (SIP). Investments in the non-financial sector are eligible for coverage under SIP if they are related to the establishment of a small or medium-sized enterprise (SME), or made into an existing SME, in a developing Member country.[56] The SIP has no restrictions with respect to the size of the investor, but MIGA shall waive the application fee only for small or medium–sized investors (SMIs), which have to meet certain criteria.[57]

III. FORMAL DISPUTE RESOLUTION

I have chosen to take a pragmatic approach and to distinguish remedies directly available to exporters and investors ("diagonal" remedies) (Section A) from disputes between State parties ("horizontal" remedies) (Section B).

A. *DIAGONAL REMEDIES*

1. BILATERAL INVESTMENT TREATIES[58]

The distinctive feature of Swiss bilateral investment treaty (BIT) dispute resolution mechanisms as from the 1980s[59] is that they contain not only horizontal but, notably, diagonal arbitration clauses, thus enabling investors to claim directly against the host

[55] Possibly 20, if justified by the nature of the project.

[56] The SME must fulfill two out of the three following criteria: (1) no more than 300 employees; (2) total annual sales should not be more than US$ 15 million; (3) total assets should not be more than US$ 15 million. Investments in the financial sector are eligible if the investment is geared towards providing financial services for SMEs and at least 50 per cent of the clients related to the investment are SMEs as defined above.

[57] In order to qualify as an SMI, an investor must have no more than 375 employees and fulfill one of the following criteria: have no more than (1) US$ 50 million in assets or (2) US$ 100 million in annual sales. The application fee is waived for SMIs.

[58] On bilateral investment treaties (BITs) generally, *see* Part I of this article, IV.A.3, "Treaties on the Protection of Investments". On dispute resolution in particular, *see* Part I of this article, IV.A.3(b)(v), "Dispute Resolution".

[59] Before the ICSID Convention of 1965 and the creation of the International Centre for Settlement of Investment Disputes, BITs generally contained "horizontal" clauses—dispute resolution clauses between States. At that time, diagonal clauses—investor–host State clauses—were only inserted, if at all, in investment contracts agreed directly between the investor and the host State. Swiss BITs signed between 1961 and 1978 only contain one horizontal clause. Switzerland signed the ICSID Convention in 1967 but did not insert a diagonal clause into its BITs until 1981. It has done so systematically ever since, with only two exceptions. These two exceptions are the BIT with Morocco signed in 1985 (art. 9) and the BIT with Thailand signed in 1997. There was only one BIT between the first Swiss BIT including a diagonal clause (the BIT with Sri Lanka signed in 1981, art. 9) and the BIT with Morocco: the BIT with Panama signed in 1983, which contains both a horizontal clause (art. 10) and a diagonal clause (art. 9). The BIT with Thailand contains one horizontal clause (art. 10) and one diagonal ICSID conciliation and arbitration clause (art. 11). However, this clause shall enter into force only when Thailand becomes a Member of the ICSID Convention. Thailand signed the Convention on 6 December 1985 but had not yet ratified it as of 25 January 2006. In the meantime, only the horizontal clause is operative. Thus, the 31 Swiss BITs signed between 1961 and 1978 only contain one horizontal clause. With the two exceptions noted above, since 1981 Swiss BITs systematically contain two separate clauses: one horizontal clause and one diagonal clause. *See* J.-C. Liebeskind, *One-Hundred-Two Swiss Bilateral Investment Treaties: An Overview Of Investor-Host-state Dispute Settlement Clauses*, 19 ASA SPECIAL SERIES 81 (2002), notes 16-21.

State. Therefore, BITs systematically distinguish disputes between State parties, on the one hand, and between State party and investor, on the other hand.

Diagonal clauses generally provide for a consultation period followed, if the dispute persists, by an arbitration. The diplomatic channel is in principle excluded. The requirement of a consultation period appears to be standard in Swiss BITs. It is generally of 12 months. Consultation or "cooling off" periods have been criticized as causing more harm than good,[60] *a fortiori* since most arbitration rules foresee that a settlement may intervene at any time.[61]

If consultations are unsuccessful, an ICSID[62] arbitration is usually favoured. Alternatively, generally in this preference order and to the choice of the other State party, Switzerland would negotiate an UNCITRAL[63] arbitration clause to be inserted in the BIT. UNCITRAL is less favoured since, unlike ICSID, it does not offer administrative support and facilities and does not specialize in investment disputes. The advantage of UNCITRAL is that is does not require the other State party to be a Member of the Washington Convention, as is the case for ICSID.

ICC[64] is a popular alternative to UNCITRAL. Even though not exclusively specialized in investment disputes, the ICC has a great deal of experience, has rules accepted worldwide, and offers administrative support and facilities.

Intermediary solutions are quite commonly found with States parties which are not Members of ICSID, especially when these are applying to or contemplating to apply to the Washington Convention in a foreseeable future. In such cases, another dispute resolution mechanism would be chosen until that State party becomes a Member of the Washington Convention. From that point onwards, an ICSID clause—already built into the BIT although inoperative at the time of its signature—shall apply.

Alternatively the ICSID Additional Facility[65]—which allows access to ICSID in case of dispute with an investor being a national of a State Member of ICSID even if the host

[60] For example, if a party overtly refuses consultation, should the other party still expect to wait 12 months? What if the party implicitly refuses? In the meantime, the investor—especially in the case of small and medium-sized undertakings with limited financial means—may suffer considerable, if not fatal and irreparable, harm. For a critical appraisal *see, e.g.*, Tibor Varady, *The Courtesy Trap: Arbitration "If No Amicable Settlement Can Be Reached"*, Vol. 6 No. 2 ARBITRATION AND ADR 27 (I.B.A. October 2001). On consultation or negotiation periods generally, *see e.g.*, NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 793-6 (6th ed., L.G.D.J. 1999); G. Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, *in* RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 442-4 (Nijhoff 1998); CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC, TOME V, LES RAPPORTS CONFLICTUELS 259-60 (Sirey 1983); D.P. O'CONNELL, INTERNATIONAL LAW, VOL. 2 1067 (Stevens & Sons 1970).

[61] *See, e.g.*, art. 43 ICSID Rules; art. 34 UNCITRAL Rules; art. 26 ICC Rules.

[62] International Centre for Settlement of Investment Disputes, set up by the Washington Convention of 18 March 1965. *See infra* III.A.3, "The Convention for the Settlement of Investment Disputes Between States and Nationals of Other States". A list of Member States is to be found at ‹www.asser.nl/ica/wash_sign.htm›. On ICSID arbitration clauses in Swiss BITs, *see* Christian Dominicé, *La clause CIRDI dans les traités bilatéraux suisses de protection des investissements*, *in* IM DIENST AN DER GEMEINSCHAFT, FESTSCHRIFT FÜR DIETRICH SCHINDLER ZUM 65. GEBURTSTAG 457 (1989).

[63] United Nations Commission on International Trade Law. The UNCITRAL Arbitration Rules are to be found at ‹www.uncitral.org/en-index.htm›.

[64] *I.e.* the Court of Arbitration of the International Chamber of Commerce.

[65] *See* ‹www.worldbank.org/ICSID/facility/facility.htm›.

State is not a Member of the Washington Convention, with the latter's agreement—also sometimes provides an intermediary solution. In this case, the agreement of the other State party might be given in advance and permanently in the BIT itself. If neither ICSID nor UNCITRAL are acceptable, then an *ad hoc* arbitration clause is occasionally, albeit rarely, agreed upon.

Even though the diplomatic channel is systematically excluded as a matter of principle, this exclusion is not absolute. It may still be used provided that either the arbitral institution or tribunal or the mediation body, as the case may be, declares itself incompetent or if the other party does not abide by the arbitral award or ignores the recommendations of the mediation body[66] after they have been rendered. The arbitral award shall usually be final and binding.

Alternatively, conciliation might be preferred to arbitration. Two-step (or three-step, including the consultation period) or "multi-tier" dispute resolution mechanisms are also agreed upon from time to time.[67] There is a great variety of cases. Thus, the parties may be offered a choice between, say, an ICSID arbitration or an *ad hoc* UNCITRAL arbitration.[68]

For example, the case of the BIT with Brazil is remarkably sophisticated: provided conciliation fails, it offers a multiple choice between domestic litigation and arbitration. In the latter case, the party may choose between ICSID and *ad hoc* UNCITRAL arbitration. However, since Brazil was not a Member of the Washington Convention at the time of signing the BIT, the parties can choose an ICSID arbitration as soon as Brazil becomes a Member. In the meantime, they may use the Additional Facility, to which by implication Brazil permanently agrees in advance. Finally, an investor who submitted a dispute to the national jurisdiction may still have recourse to arbitration if, before a decision is taken by the national court, it withdraws its case from the latter.

The case of India[69] is even more complex. If consultations are unsuccessful, the parties may choose between national courts or UNCITRAL conciliation, not arbitration. Only if either is a failure may the parties then choose again between ICSID or *ad hoc* UNCITRAL arbitration this time. However, since India was not a Member of the Washington Convention at the time of signing the BIT,[70] the same solution as in the case of Brazil (Additional Facility, then ICSID arbitration as soon as India becomes a Member of the Washington Convention) is offered. Last but not least, UNCITRAL rules are modified in so far as the appointing authority shall be the President of the International Court of Justice (ICJ).[71] It is also to be noted that the arbitral tribunal must state the basis of its decision and give reasons upon the request of either party.[72]

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[66] Unless the mediation clause itself provides for arbitration or litigation in case the mediation is not successful.

[67] In such cases, the dispute resolution mechanism often loses its efficiency, as it enables the dispute to extend indefinitely in time.

[68] *See, e.g.*, the case of the BIT with El Salvador, art. 9, RS 0.975.232.3.

[69] Art. 9, RS 0.975.242.3.

[70] India is still not a Member of the Washington Convention as of 25 January 2006.

[71] Or its substitutes, as provided by art. 9(3)(c)(i) of the BIT.

[72] Art. 9(3)(c)(iv) of the BIT.

The BIT with Cuba[73] even gives a choice among three possibilities: ICSID (i.e. its Additional Facility until Cuba becomes a Member of the Washington Convention); ICC; or UNCITRAL arbitration.[74]

Complementary provisions provide that no party may raise its immunity or that the other party has already been compensated by an insurance.[75] They may also specify the hierarchy between the various rules of law (including agreements between the parties) available.[76] The consultation period may vary.[77]

The efficiency of complex, namely multi-tier, clauses is questionable. For example, in the case of a dispute between a Swiss investor and India, the first phase (the consultation period) would last six months at least. The second phase (mediation) would then probably last, say, approximately one year, let alone alternative proceedings before Indian courts, the duration of which is unpredictable. The last phase (arbitration) is generally estimated to last not less than two years. If, for some unfortunate reason, the *ad hoc* UNCITRAL arbitration is chosen, then the tribunal nomination mechanism (by the ICJ President) may—and often does in practice—give rise to further delays. If and after an award is finally rendered, it may still need to be enforced, which could last between one year or more—if it ever is successfully enforced, being reminded that a State or State-controlled party often gives rise to additional difficulties. As a result, it is reasonable to deem that no dispute could be resolved in less than, say, five years (unless it is settled in the meantime). Many investors would not have the financial capacity to sustain their disputed investment in the meantime let alone the expensive (but indispensable, considering the complexity of the dispute) legal fees.

2. BILATERAL AGREEMENTS WITH THE EUROPEAN UNION[78]

Most of the provisions contained in the Bilateral Agreements have a direct effect,[79] which means that the individuals to whom these norms eventually apply are entitled to invoke them before the courts of the country where such norms are applied. Thus, the main characteristic of the Bilateral Agreements between Switzerland and the EU is that they contain diagonal dispute resolution clauses enabling individuals to bring their claims before national authorities, i.e. administrative authorities and courts. Such clauses also foresee procedural guarantees assuring fair treatment, namely that a decision be rendered in a reasonable period of time.[80] The claimant has to proceed in two steps and

[73] Art. 10, RS 0.975.229.4.
[74] In this order.
[75] *See, e.g.*, the case of the BIT with El Salvador, *supra* note 68.
[76] *See, e.g.*, the case of the BIT with Brazil (not published), art. 8(6).
[77] In several cases, it is reduced to six months. *See, e.g.*, the case of the BIT with India, art. 9(2), *supra* note 69.
[78] On the Bilateral Agreements generally, *see* Part I of this article, IV.B.1(b), "Bilateral Agreements".
[79] On the direct effect of the Bilateral Agreements generally, *see* Fabrice Filliez, *Application des accords sectoriels par les juridictions suisses: quelques rapports*, *in* 8 DOSSIERS DE DROIT EUROPÉEN 183 ff. (Daniel Felder & Christine Kaddous eds., 2001).
[80] Such judicial protection is granted by EC law as a matter of principle, even in the absence of a specific provision in the agreement or the regulation invoked.

bring its claim before the competent administrative authority first, then before the national court.[81] Furthermore, each EU citizen, including, in the ambit of the Bilateral Agreements, Swiss individuals, has the right to file a claim with the European Commission, provided ordinary administrative and judicial remedies have been exhausted.[82] Each sectoral agreement also contains a horizontal dispute resolution mechanism providing for a Mixed Committee.[83]

Switzerland is a Member of the Lugano Convention of 1988 on Judicial Competence and the Enforcement of Judicial Decisions in the Field of Civil and Commercial Law,[84] the content of which is identical in substance[85] to the Brussels Convention of 1968[86] prevailing in the EU. The Lugano Convention actually meant to extend the benefit of the Brussels Convention to both the European Free Trade Area (EFTA) and the EU Member States.[87] It applies to 18 European countries.[88] The material and geographical scope of the Lugano Convention is extended by several Hague conventions which aim at facilitating cross-border judicial assistance.[89]

Overall, the Lugano Convention and these Hague conventions are regarded as efficient. Thus, in case of investment disputes related to Swiss investments in Europe, Swiss investors often need do no more than bring their claim before the national court of the host country. Arbitration does not always offer a decisive comparative advantage. Litigation is likely gaining importance since the entry into force of the Bilateral Agreements I on 1 June 2002 and II as of 2005.[90]

3. THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

ICSID was established under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the Washington Convention or

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[81] *See, e.g.*, art. 11 of the Free Circulation of Persons Agreement, Accord entre la Confédération suisse, d'une part, et la Communauté européenne et ses Etats membres, d'autre part, sur la libre circulation des personnes, RS 0.142.112.681 (21 June 1999). An identical provision is contained in each sectoral agreement.

[82] Traité instituant la Communauté européenne (version consolidée), Journal officiel no C 325 (24 December 2002), art. 230(4).

[83] *Id.*, art. 14. An identical provision is contained in each sectoral agreement.

[84] *See* Convention concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale, RS 0.275.11 (16 September 1988). The Convention entered into force in Switzerland on 1 January 1992.

[85] Title VII expressly deals with the Brussels Convention.

[86] Of 27 September 1968.

[87] On the Lugano Convention generally, *see* L'ESPACE JUDICIAIRE EUROPÉEN: LA CONVENTION DE LUGANO DU 16 SEPTEMBRE 1988 (Nicolas Gillard ed.), CEDIDAC (Lausanne 1992).

[88] Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Iceland, Italy, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom.

[89] Namely in the fields of civil procedure (*Convention relative à la procédure civile* signed at The Hague on 1 March 1954, RS 0.274.12), service (*Convention relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale* signed at The Hague on 15 November 1965, RS 0.274.131) and discovery (*Convention sur l'obtention des preuves à l'étranger en matière civile ou commerciale* signed at The Hague on 18 March 1970, RS 0.274.132). This list is not exhaustive; there are numerous other conventions related to civil procedure.

[90] *See* Part I of this article, note 83.

the ICSID Convention), which came into force on 14 October 1966.[91] ICSID is an autonomous international organization. However, it has close links with the World Bank. All of ICSID's Members are also Members of the Bank.[92]

Pursuant to the Washington Convention, ICSID provides facilities for the conciliation and arbitration of disputes between Member countries and investors who qualify as nationals of other Member countries.[93] Recourse to ICSID conciliation and arbitration is entirely voluntary. However, once the parties have consented to arbitration under the ICSID Convention, neither can unilaterally withdraw its consent. Moreover, all ICSID Contracting States, whether or not parties to the dispute, are required by the Convention to recognize and enforce ICSID arbitral awards. ICSID gathers 154 Member States to date.[94] Switzerland joined ICSID from the outset.[95]

Thus, apart from the fact that Swiss BITs have been increasingly submitting investment-related disputes to ICSID arbitration, the Washington Convention plays a substantial role for the 59 countries[96] with which Switzerland has no BIT but which are Members of the Convention.

Furthermore, besides providing facilities for conciliation and arbitration under the ICSID Convention, the Centre has since 1978 had a set of Additional Facility Rules[97] authorizing the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals which fall outside the scope of the Convention. These include conciliation[98] and arbitration[99] proceedings where either the State party or the home State of the foreign national is not a Member of ICSID. Thus, the Additional Facility Rules can not only provide a *forum conveniens* for the 15 countries[100] with which Switzerland has no BIT and which are not Members of the Washington Convention but also a diagonal alternative, albeit on a voluntary basis, for the 17 Swiss BITs which only contain a horizontal clause.

An important complimentary feature of the Additional Facility is that conciliation and arbitration are also available for cases where the dispute is not an investment dispute, provided it relates to a transaction which has "features that distinguish it from an ordinary commercial transaction". The Additional Facility Rules further allow ICSID to administer a type of proceedings not provided for in the Convention, namely

[91] *See* Convention du 18 mars 1965 pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, RS 0.975.2 (18 mars 1965).

[92] ICSID has an Administrative Council and a Secretariat. The Administrative Council is chaired by the World Bank's President and consists of one representative of each State which has ratified the Convention. Annual meetings of the Council are held in conjunction with the joint Bank/Fund annual meetings.

[93] *See* Convention, *supra* note 91, art. 54.

[94] As of 25 January 2006.

[95] *See* Convention, *supra* note 91. The Convention entered into force in Switzerland on 14 June 1968.

[96] These countries represent 32 per cent of the 185 countries to which Switzerland is bound by a trade-or investment-related treaty. *See infra* Annex, "List of Dispute Resolution Mechanisms in Swiss Trade-and Investment-Related Treaties".

[97] *See* ICSID Doc. 11, ICSID Additional Facility (June 1979).

[98] *Id*., Annex B, Conciliation (Additional Facility) Rules.

[99] *Id*., Annex C, Arbitration (Additional Facility) Rules.

[100] Angola, Antigua, Canada, Dominica, Holy See, Iraq, Liechtenstein, Macao, Maldives, Monaco, Myanmar, Palestinian National Authority, San Marino, Suriname and Taiwan.

fact-finding proceedings,[101] to which any State and foreign national may have recourse if they wish to institute an inquiry "to examine and report on facts". However, unlike in disputes in which both the investor's home State and the host State are Members of the ICSID Convention, the Convention is inapplicable to proceedings carried out under the Additional Facility.[102] Besides the agreement of the parties to the dispute to submit it to the Additional Facility, the parties must get the preliminary approval of the Secretary-General of ICSID.[103] The Additional Facility is not available for the settlement of ordinary commercial disputes.[104]

A third activity of ICSID in the field of the settlement of disputes has consisted in the Secretary-General of ICSID accepting to act as the appointing authority of arbitrators for *ad hoc*, often UNCITRAL, arbitration proceedings.[105]

The ICSID Convention, Regulation and Rules were last amended on 10 April 2006.[106]

4. THE MULTILATERAL INVESTMENT GUARANTEE AGENCY[107]

Since 1996, MIGA provides free mediation services to the investors it covers—among whom Swiss investors qualify—by using its good offices to help settle disputes between a borrower/investor and the host country. If the parties are unable to settle their dispute and a claim for compensation is brought by an investor under a MIGA guarantee, the Agency will review the facts of the dispute and make a formal determination. If MIGA finds for the insured investor, it will pay the compensation to which the investor is entitled under the guarantee.[108] Under the terms of the international convention establishing MIGA, the Agency is then permitted to seek reimbursement of such payments from the host government.[109] To mitigate against the risk of loss in the case of investment disputes, investors are required to notify MIGA as early as possible of difficulties with a host government that might give rise to a claim of loss under the guarantee. Cases of lesser importance are not taken up by the agency.

MIGA claims to have resolved a considerable number of cases since it began offering its mediation services and that this service has been very effective to date, with nearly all cases reaching an amicable resolution.[110]

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[101] *See* ICSID Doc. 11, ICSID Additional Facility (June 1979), Annex D, Fact-Finding (Additional Facility) Rules.

[102] *See* ICSID Doc. 11, ICSID Additional Facility (June 1979), art. 3.

[103] *Id.*, art. 4(1)–(2).

[104] *Id.*, art. 4(3).

[105] On the ICSID Convention generally, *see* CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY, Cambridge University Press (2001).

[106] *See* ‹www.worldbank.org/icsid/basicdoc/basicdoc.htm›.

[107] On the guarantee itself, *see supra* II.C, "The Multilateral Investment Guarantee Agency".

[108] *See* Convention cited *supra* note 39, art. 17.

[109] *See id.*, art. 18.

[110] On MIGA generally, *see* P. SCHAUFFELBERGER, LA PROTECTION JURIDIQUE DES INVESTISSEMENTS INTERNATIONAUX DANS LES PAYS EN DÉVELOPPEMENT, ETUDE DE LA GARANTIE CONTRE LES RISQUES DE L'INVESTISSEMENT ET EN PARTICULIER DE L'AGENCE MULTILATERALE DE GARANTIE DES INVESTISSEMENTS (AMGI), *in*: 83 ETUDES SUISSES DE DROIT INTERNATIONAL, SOCIÉTÉ SUISSE DE DROIT INTERNATIONAL, Schulthess (ed.), 1993.

B. *Horizontal Remedies*

Since horizontal remedies are only available to State parties, it implies that individual traders or investors which intend to rely on them will have to request diplomatic support[111] or protection.[112]

1. Bilateral investment treaties[113]

In case of disputes between State parties (with respect to the investment made by the investor of one State party in the other State party), disagreements on the interpretation and the application of the BIT shall be resolved through the diplomatic channel. If no settlement intervenes within the consultation period, then the dispute shall be resolved by arbitration. If the parties cannot agree or decline to nominate the tribunal, usually the President of the ICJ shall provide for it.[114] The procedure is *ad hoc* and the award is final and binding.

If no diagonal clause is available, the investor will have to request diplomatic support[115] or protection[116] in order to trigger the horizontal clause. Alternatively, he might resort directly to ICSID[117] or, provided he enjoys a guarantee, to MIGA.[118]

2. Treaties of commerce[119]

Whereas BITs present a relative homogeneity, the dispute resolution mechanisms contained in Treaties of Commerce (TOCs)[120] are characterized by a great diversity. Even though TOCs also provide for both informal and diagonal dispute resolution, they essentially rely on formal or semi-formal and horizontal modes. However, I will treat TOCs as a whole in this Section.

The importance of TOC-based dispute resolution may be considered as marginal since the inception of the World Trade Organization,[121] the far-reaching scope and the sophisticated dispute resolution of which can be expected to cover most trade-related disputes. TOCs have not been abrogated because of the membership of both parties to the WTO, however, so they still play a residual role for those areas which are not covered

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111 *See infra* IV.B, "Diplomatic Support".
112 *See infra* IV.A, "Diplomatic Protection".
113 *See supra* note 58.
114 Alternatives are provided if the President or his substitutes is prevented from doing so.
115 *See supra* note 111.
116 *See supra* note 112.
117 *See supra* III.A.3, "The Convention for the Settlement of Investment Disputes Between States and Nationals of Other States".
118 *See supra* III.A.4, "The Multilateral Investment Agency".
119 On Treaties of Commerce (TOCs) generally, *see* Part I of this article, IV.A.2, "Treaties of Commerce".
120 Or, in case of mixed treaties containing provisions on both investments and trade, dispute resolution mechanisms applicable to the provisions on trade.
121 The same statement can be made for the countries Members of the then EC, now EU, with which Swiss trade had been gradually integrating at an even earlier stage. The treaties with the EU leave ample room for diagonal dispute resolution. *See supra* III.A.2, "Bilateral Agreements with the European Union".

by the General Agreement on Tariffs and Trade (GATT).[122] If one excepts the fact that in case of a dispute between the national of one State party with the other State party a fraction of the TOCs expressly guarantee access to the courts of the other State party, the dispute resolution mechanisms contained in TOCs are exclusively horizontal.[123]

Almost half of the 88 Swiss TOCs provide for a Mixed Committee for facilitating the implementation of the treaty, including resolving any dispute which may arise between the State parties. Disputes as such are generally not expressly mentioned but may be hinted at by a mere reference to any "difficulties" or just "questions" in the application of the agreement,[124] whereas one TOC further foresees arbitration in case of disputes which the Mixed Committee failed to resolve amicably.[125] Arbitration is the sole remedy available in five of the early TOCs.[126] Two TOCs refer to a separate dispute resolution treaty, existing or not.[127]

On the informal mode, the mere intent of the State parties to resolve their disputes amicably is expressed in various forms in approximately 10 per cent of the TOCs. Related provisions range from a simple best-endeavour commitment[128] to consultations or negotiations.[129] In case a Mixed Committee exists, an Examination sub-Committee[130] shall occasionally be set up for this purpose.[131] A couple of TOCs foresee consultations in connection with a *rebus sic stantibus* clause only.[132] Finally, one third of the TOCs do not address dispute resolution at all.[133] From the diagonal point of view noted above, approximately 15 per cent of the TOCs guarantee access by the nationals of one State party to the courts of the other State party.[134]

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[122] Certain TOCs even contain an express reference to GATT and/or the WTO; *see, e.g.*, TOC with Georgia, art. 2, RS 0.946.293.601.

[123] This implies that the trader will have to request diplomatic support or protection to trigger the horizontal clause of the TOC, like an investor relying on a BIT's horizontal clause would have to do. *See supra* III.B.1, "Bilateral Investment Treaties", and notes 111 and 112.

[124] *See, e.g.*, TOC with Sweden, art. 5, RS 0.946.297.142.

[125] TOC with Chad, art. 11, RS 0.946.297.361.

[126] *See, e.g.*, TOC with Greece, art. 9, RS 0.946.293.721.

[127] *See* TOC with Croatia, art. 19(2), RS 0.946.292.911, referring to the Arbitration Treaty of 23 May 1995, RS 0.193.412.91. *See also* TOC with Paraguay, art. 8, RS 0.946.296.321. In the latter case, such a separate arbitration agreement was never concluded, even though the TOC was signed in 1969. *See also infra* II.B.3, "International Disputes Settlement Agreements".

[128] *See, e.g.*, TOC with Peru, art. 4, RS 0.946.296.411, by which the parties "commit to study with utmost care any suggestion the other party could submit as to a better application of the treaty provisions".

[129] Even though these expressions are used indifferently from one treaty to another, their meaning is identical. *Compare, e.g.*, TOC with Mozambique, art. 7, RS 0.946.295.741 ("consultations") *with* TOC with New Zealand, art. 3, RS 0.946.296.142 ("negotiations").

[130] In French: "*Comité d'examen*".

[131] *See, e.g.*, TOC with Yugoslavia, art. 19(2), RS 0.946.298.184.

[132] *See* TOC with Argentina, art. 17, RS 0.946.291.541. This provision foresees that in case the trade or monetary conditions which prevailed at the time of signing the treaty substantially change, any party may immediately request consultations for adapting the treaty. If no agreement can be reached within two months, the treaty shall be terminated for the following month. *See also* TOC with Brazil, art. 5, RS 0.946.291.981.

[133] *See, e.g.*, TOC with Egypt, RS 0.946.293.211. Those treaties containing provisions on both investments and trade generally contain dispute resolution provisions for investment-related disputes, if not for trade. *See, e.g.*, TOC with Togo, art. 8, RS 0.946.297.491. The fact that the TOC does not provide for trade-related dispute resolution does not prevent the trader from requesting diplomatic support or protection; *see supra* notes 111 and 112. Absent specific dispute resolution provisions, the State parties would then deal with the dispute through the diplomatic channel, i.e. negotiation or consultation, or possibly, if any, under an International Disputes Settlement Agreement; s*ee infra* III.B.3, "International Disputes Settlement Agreements".

[134] *See, e.g.*, TOC with the United Kingdom and its former colonies, art. III(2), RS 0.142.113.671. This does not imply that such access is not guaranteed by the domestic law of the rest of the States parties to a TOC. Such guarantee offers an additional protection at the level of international law, however.

3. INTERNATIONAL DISPUTES SETTLEMENT AGREEMENTS

To date, Switzerland is bound by an International Disputes Settlement Agreement with 37 countries.[135] These agreements are of general scope; they are not specifically intended for trade or investment disputes but, as a matter of principle, such disputes are not excluded from these agreements' scope, either. In fact, certain TOCs expressly refer to such agreements.[136] They provide for arbitration, if not for a multi-tier mechanism foreseeing consultation or negotiations followed by mediation and eventually arbitration, and are horizontal only (disputes between State parties).

Switzerland's International Disputes Settlement Agreements were concluded in three waves, with a halt of approximately three decades between each wave;[137] the last one was concluded in 1995.[138] Given the historical expansion of Switzerland's network of trade- and investment-related treaties, namely with its BITs, the Washington Convention and the WTO, one could conclude that these agreements would only exceptionally apply to disputes in these fields nowadays.[139]

Nevertheless, these agreements retain a residual interest in the cases in which the TOC, if any, only provides for a Mixed Committee having no power to render a binding decision or where the TOC does not provide for dispute resolution, as is the case for the majority of those agreements.[140]

4. THE EUROPEAN FREE TRADE AGREEMENT[141]

Disputes between Member States of EFTA are resolved by consultation.[142] In doing so, the Member States may bring their dispute before the Council,[143] which shall make recommendations by unanimous vote.[144] If consultation fails, Member States may resort

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[135] *See* RS 0.193, Réglement des conflits internatiomaux.

[136] *See supra* note 127.

[137] Twenty-one International Disputes Settlement Agreements were concluded between 1921 and 1931; nine between 1962 and 1965, and three between 1992 and 1995.

[138] With Croatia; *see* RS 0.193.412.91.

[139] Iran appears to be the only case in which such agreement would apply, since this country has no BIT with Switzerland and is a Member of neither the Washington Convention nor the WTO. However, the International Disputes Settlement Agreement relies on one provision contained in the Treaty of Friendship between Switzerland and the then Empire of Persia of 1934 (art. 4), and even though it is technically still in force from a Swiss perspective, whether Iran would recognize it nowadays is uncertain. *See* RS 0.142.114.361. Furthermore, Brazil and Poland are not Members of the Washington Convention, but Switzerland has entered into a BIT with each of them.

[140] *See supra* note 133.

[141] On EFTA generally, *see* Part I of this article, IV.B.1(a), "The 1972 EFTA Bilateral FTAs and the 1994 EFTA-EEA Agreements", and IV.B.2, "The European Free Trade Agreement".

[142] Stockholm Convention (Consolidated Version of 21 June 2001), art. 47(1). The Stockholm Convention is the founding instrument of EFTA. *See* Part I of this article, IV.B.1(a), "The 1972 EFTA Bilateral FTAs and the 1994 EFTA-EEA Agreements".

[143] The Council is one of the organs and the governing body of EFTA.

[144] *Id*., art. 43(1)(h) and (5), and art. 47(2). The latter provision only refers to consultations and does not expressly state that the Council has the right to make binding decisions, but art. 43(4) appears to empower the Council to do so and this is not excluded by art. 47. It is expected that the Council will only issue recommendations and that if the parties do not agree consensually they will resort to the arbitration foreseen by art. 48.

to arbitration.[145] In case of non-implementation of the award, the claiming Member State may suspend the benefits of the Stockholm Convention *vis-à-vis* the other Member State.[146]

Free Trade Agreements (FTAs) and Declarations on Co-operation (DOCs) with third countries,[147] including other regional organizations,[148] usually provide for a Joint Committee with more (FTA) or less (DOC) powers. They would generally take decisions by consensus and not be empowered to render binding decisions. The latest dispute resolution mechanism is sophisticated and includes a genuine arbitration clause as a last resort, enabling the arbitral panel to take decisions by the majority of its members under its own rules and to render final and binding awards.[149]

Finally, the Brussels FTA between Switzerland and the EEC for Industrial Products of 1972[150] provides for a Mixed Committee empowered to take decisions with gradually coercive effects.[151]

As an exception to the horizontal[152] remedies treated in this Section, the first Treaty on Investment signed by EFTA Members (minus Norway), with South Korea,[153] provides for a diagonal clause for the first time in an EFTA treaty. This sophisticated mechanism is multi-tier, alternative and differentiates ordinary from financial services-related disputes.[154]

The EFTA Court is exclusively dedicated to disputes arising out of the European Economic Area (EEA), to which Switzerland is not a Member,[155] and is therefore not relevant for this study.

5. THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT[156]

Again, OECD regulations are not directly applicable. Therefore, investors pretending to rely on them must rely on diplomatic protection or support.[157] As noted, dialogue, consensus and peer pressure are at the very heart of the OECD. Implementation of the Codes, in particular by removal of restrictions on cross-border capital flows and trade in

[145] *Id.*, art. 48 and Annex T. The arbitration is *ad hoc*, subject to the Optional Rules for Arbitrating Disputes between Two States of the Permanent Court of Arbitration, unless otherwise agreed between the parties (art. 1(6)). If the parties are unable to nominate a tribunal, the President of the ICJ shall do so (art. 1(5)).

[146] Annex T, art. 3(1)(b).

[147] *See, e.g.*, art. 23 of the FTA with Turkey which was the first FTA signed by EFTA with a third-country.

[148] *See, e.g.*, Chapter III of the DOC signed by Mercosur.

[149] *See, e.g.*, Chapter VIII of the FTA with Mexico.

[150] Accord entre la Confédération suisse et la Communauté économique européenne, signed in Brussels on 22 July 1972, RS 0.632.401.

[151] *See id.*, art. 27 ff.

[152] *See supra* note 123.

[153] *See* FF 2006 p. 963. *See also* Part I of this article, note 101.

[154] *See id.*, art. 16-7. Art. 16 (ordinary disputes) provides for consultations for six months, then for ICSID or *ad hoc* arbitration or litigation. Art. 17 (financial services) foresees that the dispute shall be notified by the State party to the Sub-Committee for Financial Services, which shall either render a decision itself or authorize the investor to submit the dispute to international arbitration.

[155] *See* Part I of this article, IV.B.1(a), "The 1972 EFTA Bilateral FTAs and the 1994 EFTA-EEA Agreements".

[156] On the OECD generally, *see* Part I of this article, IV.C.1, "The Organisation for Economic Co-Operation and Development".

[157] *See supra* note 123.

services and the concomitant lifting of country reservations against the Codes, involves peer pressure exercised through policy reviews and country examinations to encourage unilateral rather than negotiated liberalization. Therefore, the Codes contain a very soft dispute regulation mechanism with no real coercive consequences in case of non-compliance.[158]

6. THE WORLD TRADE ORGANIZATION[159]

WTO trade disputes between Member States are resolved by its Dispute Settlement Body (DSB) under the Dispute Settlement Understanding (DSU).[160] A procedure for settling disputes existed under the old GATT, but it had no fixed timetables, rulings were easier to block, and many cases dragged on inconclusively for a long time. The Uruguay Round Agreement introduced a more structured process, effectively enabling prompt settlement. Under the new rules, a case should not normally take more than about one year—15 months if the case is appealed.

The Uruguay Round Agreement also made it impossible for the country losing a case to block the adoption of the ruling. Under the previous GATT procedure, rulings could only be adopted by consensus, meaning that a single objection could block the ruling. Now, rulings are automatically adopted unless there is a consensus to reject a ruling—any country wanting to block a ruling has to persuade all other WTO Members (including its adversary in the case) to share its view.

Under the new rules, emphasis is put on consultations between the governments concerned at the first stage, and even when the case has progressed to other stages, consultation and mediation are still always possible.[161] Disputes not resolved by consultation are settled by the DSB, which consists of all WTO Members. The DSB has the sole authority to establish panels of experts to consider the case and to accept or reject the panels' findings or the results of an appeal. It monitors the implementation of the rulings and recommendations and has the power to authorize retaliation when a country does not comply with a ruling.

A panel's ruling can be appealed on points of law only. Each appeal is heard by three members of a permanent seven-member Appellate Body set up under the DSU and broadly representing the range of WTO membership. These persons have to be individuals with recognized standing in the field of law and international trade and not affiliated with any government. The appeal can uphold, modify or reverse the panel's legal findings and conclusions. Normally, appeals should not last more than 60 days, with an absolute maximum of 90 days. The DSB has to accept or reject the appeals report within 30 days—and rejection is only possible by consensus.

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[158] *See* art. 13 of both the Code of Liberalisation of Capital Movements and the Code of Liberalisation of Invisible Transactions of May 2001.

[159] On the WTO generally, *see* Part I of this article, IV.C.2, "The World Trade Organization". *See also supra* III.B.2, "Treaties of Commerce".

[160] Uruguay Round Agreement, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes (15 April 1994).

[161] The procedure is exclusively horizontal. *See supra* note 123.

If, after 20 days, no satisfactory compensation is agreed, the complaining side may ask the DSB for permission to impose limited trade sanctions ("suspend concessions or other obligations") against the other side. The DSB must grant this authorization within 30 days of the expiry of the "reasonable period of time" unless there is a consensus against the request. The DSU is currently under review.[162]

C. *ENFORCEMENT*

Just as promotion makes no sense without protection, dispute resolution is pointless without enforcement. Indeed, some investors may have lost their faith in BITs after several years of consultation and arbitration resulting in no effective enforcement.

As far as arbitration is concerned, the New York Convention on the Recognition and Enforcement of Foreign Awards of 1958[163] considerably improved the predictability of enforceability.[164] Nevertheless, practice still is far from theory, as the abundance of the jurisprudence on the New York Convention testifies.[165]

There were 137 States Members of the New York Convention as of 1 January 2006. Among those countries with which Switzerland has entered into a BIT or a TOC, only 12 are not party to the New York Convention.[166] Rather, what matters is that certain host countries may not rigorously apply the Convention.[167] This aspect will be discussed below from the perspective of diplomatic protection and support.

As far as judicial decisions are concerned, I have already mentioned that, for EU and EEA Members, Switzerland is a Member of the Lugano Convention,[168] which applies not only to judicial competence but also to recognition and enforcement. In addition, Switzerland is bound by a treaty on the recognition and enforcement of judicial decisions with three countries that are not Members of the Lugano Convention.[169]

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[162] A 1994 Ministerial Decision said that dispute settlement rules should be reviewed by 1 January 1999. The review started in the DSB in 1997. The deadline was extended to 31 July 1999, but there was no agreement. In November 2001, at the Doha Ministerial Conference, Member governments agreed to negotiate to improve and clarify the DSU. These negotiations take place in special sessions of the DSB.

[163] Done on 10 June 1958. U.N.T.S., vol. 330, p. 38, No. 4739 (1959).

[164] Switzerland had passed a small number of treaties on the recognition and enforcement of judicial and arbitral decisions with certain European countries which are technically still in force but which became practically obsolete at the entry into force of both the New York and the Lugano Conventions. *See* RS 0.276. For the Lugano Convention, *see supra* note 84.

[165] *See, e.g.*, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: FORTY YEARS OF APPLICATION OF THE NEW YORK CONVENTION (Albert Jan Van Den Berg ed., Kluwer November 1999).

[166] Among these, the only country economically significant for Switzerland appears to be Saudi Arabia.

[167] It should also be noted that almost one third, or 48 Member States, posed reservations with respect to the "commercial" nature of the dispute; i.e. they will not enforce an award if they deem that the dispute is not "commercial" as per their domestic law. Norway will not enforce awards related to immovable property or rights. These reservations can considerably reduce the scope of the Convention.

[168] *See supra* note 84.

[169] These countries are Liechtenstein, the Czech Republic and Slovakia (formerly Czechoslovakia). These treaties also apply to arbitral awards but are practically obsolete from this point of view since all three countries have subsequently become Members of the New York Convention. *See* RS 0.276.195.141, Convention entre la Confédération suisse et la Principauté de Liechtenstein sur la reconnaissance et l'exécution de décisions judiciaires et de sentences arbitrales en matière civile (25 April 1968); RS 0.276.197.411, Convention du 21 décembre 1926 entre la Suisse et la République tchécoslovaque relative à la reconnaissance et à l'exécution de décisions judiciaires (21 décembre 1926); RS 0.276.197.431 (application to the Czech Republic); and RS 0.276.196.901 (application to Slovakia).

IV. Informal Dispute Resolution

A. *Diplomatic Protection*

What is meant here is diplomatic protection *stricto sensu*, i.e. following the definition given by international public law, which I recall below. However, this study will also touch diplomatic protection *lato sensu* or informal diplomatic protection, i.e. mere diplomatic support. I discuss these two aspects separately.

Diplomatic protection is an international law customary institution by which a sovereign State is entitled to claim that the violation of international law towards its nationals by another State be repaired. Unlike in the case of horizontal clauses, it is the individual, not the State, which is harmed, and unlike in the case of diplomatic support, there is a novation, and the State is vested with the rights of its citizen, by which the State is asserting its own right. There is a substitution of a private person by a subject of international public law.[170]

Diplomatic protection is not an individual right; it is in essence a discretionary political decision which must meet the protecting State's public interest. The only limit is the prohibition of the arbitrary.[171]

Diplomatic protection is used in exceptional circumstances, and its conditions are strict. It is subject to two formal and one material conditions. Formally, and firstly, the victim must be a national of the State from which it requests protection.[172] Secondly, the victim must have exhausted all the internal judicial remedies.

The latter rule is not absolute, namely when such remedies are inefficient.[173] The host or importing State cannot invoke it if it cannot prove that it is because of the victim's own failure that the administrative authorities or courts could not repair an infringement of international law.[174] An appeal shall not be insisted upon when it appears "obviously futile".[175] It suffices to use effective, i.e. not pointless, remedies.[176] This exception is interpreted restrictively, though. Materially, there must be a violation of international law.[177]

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[170] *See, e.g.*, Nguyen *et al.* *supra* note 60 at 769-78, No. 488 ff.; Pierre-Marie Dupuy, Droit international public at 453 ff., No. 477 ff. (Dalloz 2000). The so-called Calvo clause (part of the Calvo doctrine mentioned in Part I of this article, note 44) prescribed that the investor must renounce in advance resort to diplomatic protection. This clause was soon declared null and void by international judges and arbitrators. *See, e.g.*, Nguyen Quoc Dinh, Patrick Daillier & Alain Pellet, Droit international public (7th ed., L.G.D.J. 2002) at 808-16.

[171] J.A.A.C. 61.75, cons. 2.

[172] This condition is often problematic in the case of companies or groups of companies which are owned by investors—which are often institutional themselves—of different nationalities and which are registered, and which run operations, in multiple jurisdictions.

[173] *See, e.g.*, Dominicé, *supra* note 62, at 457, 524, No. 5.

[174] *See* Nguyen *et al.*, *supra* note 170, p. 813.

[175] Arbitral Tribunal U.S.A. v. U.K., 22 May 1923, *R. Brown*, R.S.A. vol. VI, p. 120; *see also* arbitration Unden of 29 March 1933, *Forêts du Rhodope central*, R.S.A., vol. III, p. 1405; arbitration Hutcheson, 1937, U.K. v. U.S.A., *S.-S. Lisman*, R.S.A. vol. III, p. 1767, cited by Nguyen *et al.*, *supra* note 60.

[176] C.E.D.H., arrêt du 18 juin 1971, *Vagabondage*, para. 61-2; E.C.H.R., Decision of 9 May 1982, *De Varga*, cited by Nguyen *et al.*, *supra* note 170, pp. 813-4.

[177] J.A.A.C. 61.75, cons. 3.3.

In 1980, Switzerland enacted a statute for collective claims which sets the framework within which diplomatic protection shall be requested and granted for indemnification requests towards foreign States.[178] The Ministry of Foreign Affairs (MOFA) shall determine whether the conditions of diplomatic protection are fulfilled.[179] The Swiss government may renounce granting diplomatic protection for cases of minor importance.[180] After an indemnification agreement has been negotiated, the government may empower a commission to supervise the agreement's performance. The commission's decisions may be appealed; however, the appeal may not rely on the ground of non-opportunity.[181]

Diplomatic protection is a subsidiary, exceptional means of dispute resolution. It is not available where there is a BIT with an arbitration clause, except where the dispute resolution mechanism is rendered inoperative by acts of State of the host State (and provided the other conditions of diplomatic protection are fulfilled). Diplomatic protection is not available either in case of a diagonal clause, since it would be redundant.

B. *DIPLOMATIC SUPPORT*

By diplomatic support, is meant here diplomatic protection *lato sensu* or informal diplomatic protection. As noted above, unlike in the case of diplomatic protection, in this case the supporting State is not vested with the rights of its citizen.

Even though there is no specific legal basis for diplomatic support, this institution enjoys general recognition.[182] As in the case of diplomatic protection, Swiss exporters and investors have no positive right to diplomatic support, even though in practice the authorities would always consider such requests even if eventually they might politely turn them down.

The competence of Swiss federal authorities as far as Swiss exporters or investors are concerned are divided between two entities: the Federal Department (ministry) of Foreign Affairs;[183] and seco,[184] which depends on the Federal Department of the Economy.[185] Roughly, MOFA cares for political and legal aspects; seco for economical or commercial aspects; but the allocation is soft, and positive as much as negative conflicts of interest happen. Several other organizations among the internal actors of Swiss external economic promotion[186] might be directly or indirectly involved in

[178] Loi fédérale sur les demandes d'indemnisation envers l'étranger, RS 981 (21 March 1980).
[179] *Id.*, art. 2(2).
[180] *Id.*, art. 2(3).
[181] *Id.*, art. 4(1), 7 and 8(3).
[182] *See, e.g.*, art. 27(2) of the Washington Convention, which expressly refers to "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute". The preliminary consultations or negotiations generally foreseen in BIT's diagonal clauses often involve such diplomatic support.
[183] *Département fédéral des affaires étrangères* (DFAE) (hereinafter MOFA).
[184] *Secrétariat d'Etat à l'économie.*
[185] *Department fédéral de l'économie* (DFE). *See* Part I of this Article, III, "The Internal Actors".
[186] *See* Part I of this article, III, "The Internal Actors".

supporting an exporter or investor, most frequently the Swiss embassy or consulate in the host or importing country as well as the Swiss Office of Commercial Expansion's local "Hub", when there is one. Given the weight, sometimes considerable, represented by Swiss aid in certain developing countries, the *Direction du développement & de la coopération* (DDC) can also occasionally play a role.

Apart from providing expert advice, one of the major incentives offered by diplomatic support is pressures on the host State. These pressures can be direct or indirect.

1. BILATERAL PRESSURES

Even though Switzerland is a small country and has internationally a limited political weight, it ranks among the largest countries not only for outbound investments but also for development aid, if not for trade.[187]

Development aid has traditionally underlined Switzerland's external economy policy, as the former is believed to favour the latter in the long run. Development aid has a constitutional basis and is defined by the external economic policy of which it is part.[188] This policy rests on three pillars: co-operation to development;[189] technical co-operation and financial aid;[190] and humanitarian help.[191] Even though Switzerland is sincerely committed to contributing to reduce the world's poverty and humanitarian concern stands on the first line, economic interests are also considered.[192]

With respect to the possible interaction between development aid and the protection of exports and outbound investments, it is interesting to have a look at the Federal Act on Co-operation to Development and International Humanitarian Help.[193] Indeed, at its Article 2, the Act prescribes that co-operation to development and international humanitarian help "rely on mutual respect of the rights and the interests

[187] In 2004, the total amount of Switzerland's aid to developing countries (APD) and transition economies amounted to CHF 2,045 million. That is 6.2 per cent of Swiss foreign direct investment flows the same year; *see* Part I of this article, note 3. APD alone (CHF 1.921 billion) represented 0.41 per cent of Swiss gross domestic product (GDP) in 2004. The Swiss government's policy is that APD shall reach 0.4 per cent of GDP by 2010. This objective appears to have already been reached in 2004 (APD had reached 0.39 per cent in 2003). As per OECD statistics (December 2005), in 2004 Switzerland ranked as the 13th biggest donor of APD in absolute figures but 8th in percentage of GDP; *see* the Website of DDC, La coopération internationale de la Suisse en chiffres, ‹www.deza.admin.ch›. In 2003, DDC's budget was fivefold seco's; *see* Part I of this article, note 31.

[188] *See* Part I of this article, notes 15 and 16.

[189] *See* MESSAGE DU CONSEIL FÉDÉRAL CONCERNANT LA CONTINUATION DU FINANCEMENT DES MESURES DE POLITIQUE ÉCONOMIQUE ET COMMERCIALE AU TITRE DE LA COOPÉRATION AU DÉVELOPPEMENT (20 November 2002), FF 2003 p. 155.

[190] *See* MESSAGE DU CONSEIL FÉDÉRAL CONCERNANT LA CONTINUATION DE LA COOPÉRATION TECHNIQUE ET DE L'AIDE FINANCIÈRE EN FAVEUR DES PAYS EN DÉVELOPPEMENT (28 May 2003), FF 2003 p. 4155. *See also* RS 0.973 for a list of bilateral financial aid treaties, and RS 0.974 for bilateral scientific and technical co-operation treaties.

[191] *See* MESSAGE DU CONSEIL FÉDÉRAL CONCERNANT LA CONTINUATION DE L'AIDE HUMANITAIRE INTERNATIONALE DE LA CONFÉDÉRATION (14 November 2001), FF 2002 p. 2087.

[192] It has been calculated that every Swiss franc spent for development aid yields 1.5 franc to the Swiss economy. In 2003, development aid represented 15,000 jobs in Switzerland. *See* MESSAGE *supra* note190, p. 4158.

[193] Loi fédérale sur la coopération au développement et l'aide humanitaire internationales of 19 March 1976, RS 974.0.

of partners".[194] The measures taken by virtue of the Act can be realized by bilateral, multilateral or autonomous action.[195] It also mentions private Swiss aid organizations.[196] The Act further mentions investments as one of the possible forms of co-operation and that different forms of co-operation may be combined.[197] The Swiss government may also, "in the frame of the means put at its disposal, sustain the activity of private institutions which respond to the aims formulated by the Act. These institutions must contribute to it by adequate performances."[198] The Act provides for a consultative commission.[199]

The implementation order[200] mostly deals with competencies. In particular, it mentions that DDC,[201] seco[202] and the Federal Department (or ministry) of Finance elaborate in common the global conception of the Swiss contribution to international co-operation to development.[203] In particular, DDC shall be competent for bilateral aid;[204] seco shall be competent for commercial policy measures;[205] in both cases, they shall consult each other.

It would be wrong to believe that in case a consignment of exported goods or an investment is harmed in a country aided by Switzerland it would be quite enough to make a phone call to the DDC, which would immediately threaten such country with closing the tap as a powerful incentive for reaching a prompt settlement. Ethical concerns, as well as Switzerland's best long-term interests, would be carefully weighed against the short-term interest of a single, private exporter or investor, and the former would often outweigh the latter.

However, such harmful action would be considered[206] in connection with Swiss aid. If aid would not be used as direct leverage against the harming country, that might occasionally be the case indirectly, whereas, in any event, aid would offer a helpful parallel negotiation channel in a context generally better inclined to favour a settlement than those existing between the parties directly involved. Even though there is no positive right available to Swiss exporters and investors in this context, diplomatic support through aid may be worth remembering when formal remedies prove inoperative.

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[194] *Id.*, art. 2(1). "*Elles* [*la coopération au développement et l'aide humanitaire*] *sont fondées sur le respect mutuel des droits et intérêts des partenaires*."

[195] *Id.*, art. 3.

[196] For example, the International Committee of the Red Cross.

[197] Loi sur la coopération au développement, *supra* note 193, art. 6.

[198] *Id.*, art. 11. ("*Activités privées*"). "*Le Conseil fédéral peut, dans le cadre des moyens à sa disposition, soutenir des activités d'institutions privées qui répondent aux buts formulés dans la présente loi. Ces institutions doivent y contribuer par des prestations adéquates*."

[199] *Id.*, art. 14(1). "*Commission consultative de la coopération au développement*".

[200] Ordonnance concernant la coopération au développement et l'aide humanitaire internationales, RS 974.01.

[201] *See* Part I of this article, note 30.

[202] *See* Part I of this article, note 31.

[203] Ordonnance concernant la coopération au développement, *supra* note 200, art. 4.

[204] *Id.*, art. 7(1).

[205] *Id.*, art. 9.

[206] Good public governance is one of the concerns of Switzerland's aid policy; *see* MESSAGE *supra* note190, p. 4157.

2. MULTILATERAL PRESSURES

We have seen that besides Swiss aid, developing countries are also funded, directly or indirectly, sometimes heavily, by multilateral financial institutions, mainly the World Bank Group—i.e. its three institutions, the International Bank for Reconstruction & Development (which is the Bank itself), the International Development Association, and the International Finance Corporation[207]—as well as by their regional counterparts, i.e., the African Development Bank Group, the Asian Development Bank, the Inter-American Bank of Development and the European Bank for Reconstruction & Development.[208] Switzerland is a Member of all of these and thus indirectly finances these countries through these institutions, too. This list is not exhaustive, and again there are numerous other, perhaps smaller or less prestigious, regional or multilateral organizations funding or assisting developing countries in one way or another and of which Switzerland may be a member or with which it may have entered into a treaty.[209]

Even though this article cannot discuss in detail the almost infinite number of possibilities offered by this extended network, like for bilateral aid it is worth noting the sometimes decisive impact that interventions through such institutions can possibly have on the favourable outcome of a conflict opposing an exporter or investor to an aided country. An intervention may rely on Swiss diplomatic support, but since the process is informal, individual interventions by exporters or investors directly to these institution are also considered.

Since all these institutions have now incorporated good public governance as a requirement which they expect to be met to varying degrees before granting funds, a developing country is generally inclined to settle when an institution on which such country relies has been informed that it arbitrarily harmed a Swiss exporter or investor. Even though such intervention shall rarely fatally threaten the grant of an aid loan, it generally contributes to stimulate negotiations.

V. GENERAL CONCLUSION

Switzerland's network of treaties on trade and investment is remarkably dense, extended and dynamic for a country which, after all, is relatively small. Whereas statistics cannot establish accurately a direct relationship between these treaties and Switzerland's external economy, the robustness of the latter[210] strongly suggests that this network contributes to create and to sustain a favourable trade environment.

On the world scale, as Switzerland is a member of virtually all major multilateral treaties and organizations and has bilateral or regional agreements with almost all countries, its network of trade and investment treaties can be said to be nearly seamless, whereas Swiss diplomacy is working relentlessly at filling in the gaps.

[207] *See* Part I of this article, IV.C.3, "The World Bank".
[208] *See* Part I of this article, IV.B.3, "Regional Financial Institutions".
[209] *See* RS 0.972 for a list of multilateral financial aid treaties entered into by Switzerland.
[210] *See* Part I of this article, I, "Introduction", and notes 1-4.

A close look at the related remedies available shows that traders and investors in most, if not all, cases may resort to one or several more or less formal dispute resolution mechanisms. When they are not directly available, these remedies are completed by a vast palette of horizontal clauses and by indirect pressures accessible through diplomatic support, let alone diplomatic protection.

I have identifed three tendencies which this network may follow in the future. First, Switzerland's network of FTAs may expand to match its network of BITs beyond the borders of its regional EFTA and EU partners.[211] Second, a multilateral instrument on investment with membership as extensive as the WTO's may be eventually agreed upon whereby such instrument would grant to investments the same right of treatment and admission as for exports.[212] Third, agreements on trade and investments may gradually integrate into each other.[213]

Regionally, Switzerland's network of treaties is characterized by its special relationship with its neighboring partners, the EU and EFTA. Now that Switzerland has successfully negotiated its bilateral relationship with the EU, it is expected that it will not integrate into the EU as a full Member for some time.[214] The situation may evolve as its bilateral integration intensifies, however.[215]

EFTA Members' combined economies increase Switzerland's bargaining weight by roughly 60 per cent, thus proving to be a valuable tool for negotiating FTAs. However, the political significance of EFTA has also been shrinking over time.[216] As Switzerland relies on its own parallel network and is increasingly integrating with the EU, whether its membership in EFTA, if not EFTA itself, will last will depend on the evolution of Switzerland's economic interests with the EU and with EFTA's other partners.[217]

As Switzerland's network grows in size, so does it grow in complexity, and it thus faces increasing difficulties to gain acceptance from its own people, who can hardly grasp the far-reaching economic, legal and political implications of free trade and investment

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[211] The recent disappointment caused by the tentative negotiations with the United States is not slowing down Switzerland's efforts in other regions where negotiations carry on, namely through EFTA, although perhaps with less ambitious objectives. *See* Part I of this article, notes 45 and 94. *See also, e.g.*, the recent FTA concluded with South Korea, Part I of this article, note 102. *See also* the negotiations with Canada, Part I of this article, IV.B.2(g), "Regional Organizations".

[212] *See* Part I of this article, IV.C.1(c), "The Policy Framework for Investment (PFI)". Switzerland had actively supported the Multilateral Agreement on Investment (MAI); *see* Part I of this article, notes 53 and 124. The PFI also seems to be welcomed by the government; *see* Part I of this article, note 129.

[213] The Preamble of the recent FTA between EFTA Members and South Korea, which was signed simultaneously with a Treaty on Investment, affirms that free trade will generate a stable and predictable environment for investments. Even though TOCs have contained provisions on both trade and investments in the past, I believe that the relationship between trade and investment has rarely been expressed so clearly and strongly in the past. *See* Part I of this article, note 102, Recital 2. *See also* Part I of this article, note 101 (on the TOI).

[214] *See* Part I of this article, note 65.

[215] *See* Part I of this article, note 66.

[216] The fact that Norway abstained from signing the TOI that Switzerland, Liechtenstein and Iceland signed with South Korea may raise questions about the future of EFTA's cohesion. *See* Part I of this article, note 101.

[217] The fact that EFTA's external policy is arguably more flexible and more dynamic than the EU's may favour the continuity of Switzerland's adhesion to the former, however. *See* Part I of this article, IV.B.2, "The European Free Trade Agreement".

treaties. There are diverging views as to the extent to which Switzerland should keep engaging in globalization.[218] Because of Switzerland's democratic system,[219] such opposition has already forced the Swiss government to bend its European integration policy.[220] In the future, this policy will be challenged with every enlargement of the EU, on both sides, since Switzerland's special status has also generated some impatience from its EU partners.

The recent successes of the last popular votes on the Bilateral Agreements[221] seem to indicate that rational thinking is currently prevailing over emotion, however, and that Switzerland will maintain its progressive[222] policy rather than indulge the protectionist temptation.

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[218] *See, e.g.*, Part I of this article, note 28 (on the audit report on external trade promotion).

[219] Art. 141(1)(d)(1-3) of the Swiss Constitution requires that international treaties which are not of a determined duration, which cannot be denounced, which provide for adhesion to an international organization, or which contain important rules of law or require to be implemented by federal laws, shall be submitted to a referendum if 50,000 citizens or eight cantons request one within 100 days from the treaty's publication. This is the case every time the EU extends to another country, as was the case for the extension of the agreement on the free movement of persons to the ten new EU Members. *See* Part I of this article, IV.B.1(b)(iii), "Extended Free Movement of Persons".

[220] The EEA Agreement was rejected in Switzerland by popular vote on 6 December 1992, contrary to the government's expectations. Subsequently, it interpreted the people's will as a mandate to negotiate "sectoral" bilateral agreements with the EU which would suppress or reduce the downsides of not being an EEA Member. *See* Part I of this article, IV.B.1(a), "The 1972 EFTA Bilateral FTAs and the 1994 EFTA-EEA Agreements", and IV.B.1(b), "Bilateral Agreements".

[221] Among the Bilaterals II, a referendum was requested on the agreement on the Schengen system, which was accepted by popular vote on 5 June 2005. *See* Part I of this article, note 84. The additional protocol on the extension of the agreement on the free movement of persons to the ten new EU Members was equally accepted by popular vote following a referendum on 25 September 2005. *See* Part I of this article, IV.B.1(b)(iii), "Extended Free Movement of Persons".

[222] Switzerland's adhesion to the United Nations, which was accepted by popular vote on 3 March 2002 following a popular initiative, illustrates this tendency, even though Switzerland remains neutral within the United Nations. The adhesion, proposed by the government, had previously been rejected by popular vote on 16 March 1986. *See* CONSEIL FÉDÉRAL, MESSAGE RELATIF À L'INITIATIVE POPULAIRE POUR L'ADHÉSION DE LA SUISSE À L'ORGANISATION DES NATIONS UNIES (ONU), FF 2001 p. 1117 (4 December 2000).

GLOSSARY[223]

ADR	Alternative dispute resolution
ADB	Asian Development Bank
ADBG	African Development Bank Group
ALCA	*Area de Libre Comercios de las Americas*, Free Trade Area of the Americas (*see also* FTAA)
APD	*Aide publique au développement*, Public Aid to Development
ASEAN	Association of South-East Asian Nations
ASN	*Association suisse de normalisation*, Swiss Association for Normalization
ASRE	*Assurance suisse contre les risques à l'exportation*, Swiss Insurance Against Export Risks
Berne Union	International Union of Credit & Investment Insurers
BIT	Bilateral investment treaty
Brussels Convention	Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (concluded in Brussels on 27 September 1968)
CCIS	*Chambres de commerce & d'industrie suisses*, Chambers of Commerce & Industry of Switzerland
CF	*Conseil fédéral*, Federal Council
Cst	Swiss Federal Constitution
DDC	*Direction du développement & de la coopération*, Agency for Development & Co-operation
DFAE	*Département fédéral des affaires étrangères*, Ministry of Foreign Affairs (*see also* MOFA)
DFE	*Département fédéral de l'économie*, Ministry of the Economy (*see also* MOE)
DOC	Declaration on Co-operation
DSB	Dispute Settlement Body (WTO)
DSU	Dispute Settlement Understanding (WTO)
EBRD	European Bank for Reconstruction & Development
EC	European Community
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Agreement
EU	European Union
Euratom	European Atomic Energy Community
FDI	Foreign direct investment
FTA	Free trade agreement
FTAA	Free Trade Area of the Americas (*see also* ALCA)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs & Trade
GCC	Gulf Co-operation Council
GDP	Gross domestic product
GRE	*Garantie contre les risques à l'exportation*, Guarantee Against Export Risks
GRI	*Garantie contre les risques à l'investissement*, Guarantee Against Investment Risks
IBRD	International Bank for Reconstruction & Development
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (opened to signature in Washington on 18 March 1965)
IDA	International Development Association
IDB	Inter-American Development Bank
IFC	International Finance Corporation

[223] As far as Swiss organizations are concerned, only the French names and acronyms have been used. The former, if any, is given in *italics*, followed by the free translation in English.

IMF	International Monetary Fund
J.A.A.C.	*Journal des autorités administratives de la Confédération*
LASRE	*Loi fédérale sur l'Assurance suisse contre les risques à l'exportation*, Federal Act on the Swiss Insurance Against Export Risks
Lugano Convention	*Convention concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale*, Convention on Judicial Competence and the Enforcement of Judicial Decisions in the Field of Civil and Commercial Law (concluded in Lugano on 16 September 1988)
MAI	Multilateral Agreement on Investment
Mercosur	*Mercado Común del Sur*, Common Market of the South (South America)
MIGA	Multilateral Investment Guarantee Agency
MOE	Ministry of the Economy (*see also* DFE)
MOFA	Ministry of Foreign Affairs (*see also* DFAE)
NAFTA	North American Free Trade Area
New York Convention	Convention on the Recognition and Enforcement of Foreign Awards (done in New York on 10 June 1958)
OECD	Organisation for Economic Co-operation and Development
OFAG	*Office fédéral de l'agriculture*, Federal Agriculture Office
OSEC	*Office fédéral d'expansion commerciale*, Swiss Office of Commercial Expansion
PCA	Permanent Court of Arbitration
PFI	Policy Framework for Investment (OECD)
RS	*Recueil systématique des lois fédérales*, Systematic Collection of Federal Acts
SACU	Southern Africa Customs Union
seco	*Secrétariat d'état à l'économie*, State Secretariat to the Economy
SIP	Small Investments Program (MIGA)
SMEs	Small and medium-sized enterprises
SOFI	Swiss Organization for Facilitating Investments
SwissCham	Association of Foreign Chambers of Commerce
Swissmem	*Industrie suisse des machines, des équipements électriques et des métaux*, Machine-Tool, Electrical Equipment & Metal Industry
TOC	Treaty of Commerce
TOF	Treaty of Friendship
TRIMs Agreement	Agreement on Trade-Related Investment Measures
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade & Development
Vorort	Swiss Federation of Commerce & Industry
Washington Convention	*See* "ICSID Convention"
wf	Society for the Promotion of the Swiss Economy
WTO	World Trade Organization

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ANNEX: LIST OF DISPUTE RESOLUTION MECHANISMS IN SWISS TRADE- AND INVESTMENT-RELATED TREATIES[224]

Country[225]	M[226]	BIT[227]	TOC[228]	S[229]	EFTA[230]	EU	OECD	WTO	W[231]	D[232]	H[233]	NY[234]	J[235]
Afghanistan	✓		n/a						D	1	0	✓	
Albania	✓	D	H (A)		H			H	D	2	3	✓	
Algeria	✓	D	H (MC)		H				D	2	2	✓	
Angola	✓							H		0	1		
Antigua	✓							H		0	1	✓	
Argentina	✓	D	H (C/N)		H		H[236]	H	D	2	3	✓	
Armenia	✓	D	H (MC)					H	D	2	2	✓	
Australia			n/a				H	H	D	1	2	✓	
Austria			H (MC)	✓		D	H	H	D	2	3	✓	L

[224] For details on the treaties referred to hereunder, namely their current status, *see* Part I of this article, Annex Tables 1–4. For acronyms other than those specifically defined below, *see* the Glossary appended to this article. All errors and omissions are the author's own. Only the official publication is legally binding. All published treaties are available at ‹www.admin.ch/ch/f/rs/iindex.html›. *See also* ‹www.eda.admin.ch/eda/f/home/foreign/intagr/dabase.html› (for additional information, namely on non-published treaties and a classification by country), as well as ‹www.seco.admin.ch/themen/aussenwirtschaft/investitionen/index.html?lang=fr› (for an up-to-date list of BITs, namely non-published). seco's *Ressort investissements internationaux et entreprises multinationales* is available for information.

[225] Countries are listed by short name, not by their official name, except when qualification is necessary, e.g., "Congo (Brazzaville)" or "Korea, North" and "Korea, South". They are listed under their present name; for example, "Dahomey" is listed under "Bénin".

[226] MIGA Developing Country Members as of 27 October 2005. *See supra* note 44. The mark "✓" indicates that an investment in the country considered is eligible for a guarantee and MIGA's mediation. The mark between parenthesis "(✓)" signals countries in the process of fulfilling membership requirements.

[227] "D" = diagonal clause. "H" = horizontal clause. "S. TOC" = see TOC (Column 4). Parenthesis "(D)" or "(H)" mean that the BIT had not yet come into force as of 1 May 2006. The existence of one diagonal clause necessarily implies that of one horizontal clause; therefore, the latter is not expressly mentioned but merely implied. Likewise, such horizontal clause is not counted in the total of horizontal clauses (Column 12). *See infra* note 233.

[228] "H" = horizontal clause. "H (A)" = arbitration. "H (C/N)" = consultations or negotiations. "H (M)" = mediation. "H (MC)" = Mixed Committee. "H (MC/A)" = Mixed Committee followed by arbitration. "n/a" means that the TOC does not contain any dispute resolution mechanism. This list may contain references to TOFs, certain provisions of which amount to a TOC. This classification may not correspond to the RS and is the result of the author's own judgment.

[229] Countries with which Switzerland has signed an International Disputes Settlement Agreement; *see supra* Section III.B.3, "International Disputes Settlement Agreements".

[230] "H" = horizontal clause. "H/H" = horizontal clause contained in both a DOC and an FTA. "(H)" = horizontal clause contained in a treaty for which official negotiations have been opened.

[231] Washington Convention. *See supra* Section III.A.3, "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States". Status as of 25 January 2006. Parenthesis "(D)" means that the Convention had not yet come into force in the country considered as of 1 May 2006.

[232] Total of diagonal clauses available. Does not count MIGA's mediation (Column 2) since its availability depends on the existence of a guarantee. A parenthesis "(+1)" means that the treaty containing the clause counted has not yet come into force in the country considered.

[233] Total of horizontal clauses available. If the BIT (Column 3) contains both one horizontal and one diagonal clause, the total only counts the latter and ignores the former, which is merely implied.

[234] New York Convention. *See supra* note 163.

[235] Treaties on the recognition and the enforcement of judicial decisions. "L" = Lugano Convention. *See supra* notes 84 and 169.

[236] Adhering country to the OECD Guidelines for Multinational Enterprises. *See* Part I of this article, note 121.

Country[225]	M[226]	BIT[227]	TOC[228]	S[229]	EFTA[230]	EU	OECD	WTO	W[231]	D[232]	H[233]	NY[234]	J[235]
Azerbaijan	✓	(D)	H (MC)						D	1(+1)	1	✓	
Bahamas	✓								D	1	0		
Bahrain	✓				H			H	D	1	2	✓	
Bangladesh	✓	D						H	D	2	1	✓	
Barbados	✓	D						H	D	2	1	✓	
Belarus	✓	D	H (MC)						D	2	1	✓	
Belgium			H (MC)	✓		D	H	H	D	2	3	✓	L
Belize	✓							H	(D)	1	(1)		
Bénin	✓	S. TOC	H (M)					H	D	1	2	✓	
Bolivia	✓	D						H	D	2	1	✓	
Bosnia	✓	D	H (MC)						D	2	1	✓	
Botswana	✓	D			(H)			H	D	2	1 (+1)	✓	
Brazil	✓	D	n/a	✓	H		H[237]	H		1	3	✓	
Brunei								H	D	1	1	✓	
Bulgaria	✓	D	H (MC)		H/H			H	D	2	3	✓	
Burkina Faso	✓	S. TOC	H (MC)					H	D	1	2	✓	
Burundi	✓							H	D	1	1		
Cabo Verde	✓	D								1	0		
Cambodia	✓	D						H	D	2	1	✓	
Cameroon	✓	S. TOC	H (MC)	✓				H	D	1	2	✓	
Canada	✓		n/a		(H)		H	H		0	2 (+1)	✓	
Central African Republic	✓	S. TOC	n/a					H	D	1	1	✓	
Chad	✓	S. TOC	H (MC/A)					H	D	1	2		
Chile	✓	D	n/a		H		H[238]	H	D	2	3	✓	
China[239]	✓	D	H (MC)					H	D	2	2	✓	
Colombia	✓		n/a	✓				H	D	1	1	✓	
Comoros									D	1	0		
Congo, Democratic Republic	✓	H	H (MC)					H	D	1	3		
Congo[240]	✓	S. TOC	H (MC)					H	D	1	2		
Costa Rica	✓	H		✓				H	D	1	2	✓	
Côte d'Ivoire	✓	S. TOC	H (MC)	✓				H	D	1	2	✓	

[237] *Id.*
[238] *Id.*
[239] *See also* Hong Kong, Macao.
[240] Brazzaville.

Country[225]	M[226]	BIT[227]	TOC[228]	S[229]	EFTA[230]	EU	OECD	WTO	W[231]	D[232]	H[233]	NY[234]	J[235]
Croatia	✓	D	H (MC)	✓	H/H			H	D	2	3	✓	
Cuba		D	n/a					H		1	1	✓	
Cyprus	✓					D		H	D	2	1	✓	
Czech Republic	✓	D	H (MC)	✓		D	H	H	D	3	3	✓	✓[241]
Denmark			n/a	✓		D	H	H	D	2	2	✓	L
Djibouti		D						H		1	1	✓	
Dominica	✓							H		0	1	✓	
Dominican Republic	✓	(D)						H	(D)	(2)	1	✓	
East Timor	✓								D	1	0		
Ecuador	✓	H	n/a	✓				H	D	1	2	✓	
Egypt	✓	H	n/a		H/(H)			H	D	1	3 (+1)	✓	
El Salvador	✓	D	n/a					H	D	2	1	✓	
Eritrea	✓									0	0		
Estonia	✓	D	H (A)			D	H[242]	H	D	3	3	✓	
Ethiopia	✓	D	n/a						(D)	1 (+1)	0		
European Communities[243]								H		0	1	✓	
Fiji	✓							H	D	1	1		
Finland				✓		D	H	H	D	2	2	✓	L
France	✓		H (MC)	✓		D	H	H	D	2	3	✓	L
Gabon	✓							H	D	1	1		
Gambia	✓	D	n/a					H	D	2	1		
Georgia	✓		H (MC)					H	D	1	2	✓	
Germany			H (MC)	✓		D	H	H	D	2	3	✓	L
Ghana	✓	D	n/a					H	D	2	1	✓	
Greece			H (A)	✓		D	H	H	D	2	3	✓	L
Grenada	✓							H	D	1	1		
Guatemala	✓	D	n/a					H	D	2	1	✓	
Guinea	✓	S. TOC	H (MC)					H	D	1	2	✓	
Guinea Bissau	(✓)							H	(D)	(1)	1		
Guyana	✓	(D)						H	D	1 (+1)	1		
Haiti	✓							H	(D)	(1)	1	✓	

[241] *See supra* note 169.
[242] *See supra* note 236.
[243] The European Communities is a Member of the WTO in addition to its Member States individually.

Country[225]	M[226]	BIT[227]	TOC[228]	S[229]	EFTA[230]	EU	OECD	WTO	W[231]	D[232]	H[233]	NY[234]	J[235]
Holy See										0	0	✓	
Honduras	✓	D						H	D	2	1	✓	
Hong Kong[244]		D						H	D[245]	2	1	✓	
Hungary	✓	D		✓		D	H	H	D	3	2	✓	
Iceland			n/a		H		H	H	D	1	3	✓	L
India	✓	D	n/a					H		1	1	✓	
Indonesia	✓	H	H (MC)	✓				H	D	1	3	✓	
Iran	✓	D	n/a	✓						1	0	✓	
Iraq			H (MC)							0	1		
Ireland	✓					D	H	H	D	2	2	✓	L
Israel	✓		n/a	✓	H		H[246]	H	D	1	3	✓	
Italy	✓		n/a	✓		D	H	H	D	2	2	✓	L
Jamaica	✓	D						H	D	2	1	✓	
Japan			n/a	✓			H	H	D	1	2	✓	
Jordan	✓	D	H (M)		H/H			H	D	2	3	✓	
Kazakhstan	✓	D	H (M)						D	2	1	✓	
Kenya	✓							H	D	1	1	✓	
Korea, North		D							D	2	0	✓	
Korea, South	✓	D[247]			(H/D[248])		H	H		1	3 (+1)	✓	
Kuwait	✓	D			H			H	D	2	2	✓	
Kyrgyz Republic	✓	D	H (M)					H	(D)	1 (+1)	2	✓	
Laos	✓	D								1	0	✓	
Latvia	✓	D	H (A)		H	D	H[249]	H	D	3	2	✓	
Lebanon	✓	D			H				D	2	1	✓	
Lesotho	✓	(D)			(H)			H	D	1 (+1)	1 (+1)	✓	

[244] *See also* China.

[245] The Washington Convention had been extended to Hong Kong by virtue of the United Kingdom's accession from the inception of the Convention in 1965. Article 70 of the Convention provides that it shall apply to all territories for whose international relations a contracting State is responsible, unless a written notice of exclusion has been deposited with ICSID. China is a signatory of the Washington Convention since 1990 (entered into force in 1993) and no such notice was deposited, whereas China confirmed the application of the Convention to Hong Kong after the Handover; *see* Letter of 20 June 1997 from the People's Republic of China to the Secretary General of the United Nations, UN Document NV/97/35, 36 I.L.M. 1675 (1997). However, while there have been many ICSID cases involving Hong Kong, none has occurred since 1997.

[246] *See supra* note 236.

[247] This clause, which is contained in the BIT between Switzerland and South Korea, will be replaced by the diagonal clause contained in the Treaty on Investment concluded subsequently between EFTA State Members (minus Norway) and South Korea; *see* Part I of this article, note 165.

[248] "D" = diagonal clause. *See supra* note 163.

[249] *See supra* note 236.

Country[225]	M[226]	BIT[227]	TOC[228]	S[229]	EFTA[230]	EU	OECD	WTO	W[231]	D[232]	H[233]	NY[234]	J[235]
Liberia	(✓)		n/a	✓					D	1	0	✓	
Libya	✓	D								1			
Liechtenstein					H			H		0	2	✓	✓[250]
Lithuania	✓	D				D	H[251]	H	D	3	1	✓	
Luxembourg	✓		H (MC)	✓		D	H	H	D	2	3	✓	L
Macao[252]								H		0	1		
Macedonia, T.F.Y.R.	✓	D	H (MC)		H/H			H	D	2	3	✓	
Madagascar	✓	S. TOC	H (MC)	✓				H	D	1	2	✓	
Malawi	✓							H	D	1	1		
Malaysia	✓	H						H	D	1	2	✓	
Maldives	✓							H		0	1		
Mali	✓	H	H (MC)					H	D	1	3	✓	
Malta	✓					D		H	D	2	1	✓	
Mauritania	✓	S. TOC	n/a					H	D	1	1	✓	
Mauritius	✓	D						H	D	2	1	✓	
Mexico		D	H (C/N)		H		H	H		1	4	✓	
Micronesia	✓								D	1	0		
Moldova	✓	D	H (MC)					H	(D)	1 (+1)	2	✓	
Monaco										0	0	✓	
Mongolia	✓	D						H	D	2	1	✓	
Morocco	✓	H			H/H			H	D	1	3	✓	
Mozambique	✓	D	H (C/N)					H	D	2	2	✓	
Myanmar								H		0	1		
Namibia	✓	D			(H)			H	(D)	1 (+1)	1 (+1)		
Nepal	✓							H	D	1	1	✓	
Netherlands			H (MC)	✓		D	H[253]	H	D	2	3	✓	L
New Zealand	(✓)		H (C/N)				H	H	D	1	3	✓	
Nicaragua	✓	D						H	D	2	1	✓	
Niger	(✓)	S. TOC	H (MC)	✓				H	D	1	2	✓	
Nigeria	✓	D						H	D	2	1	✓	
Norway				✓	H		H	H	D	1	3	✓	L

[250] *See supra* note 169.
[251] *See supra* note 236.
[252] *See also* China.
[253] *See supra* note 236.

Country[225]	M[226]	BIT[227]	TOC[228]	S[229]	EFTA[230]	EU	OECD	WTO	W[231]	D[232]	H[233]	NY[234]	J[235]
Oman	✓	D			H			H	D	2	2	✓	
Pakistan	✓	D	n/a					H	D	2	1	✓	
Palau	✓									0	0		
Palestinian National Authority					H					0	1	✓	
Panama	✓	D						H	D	2	1	✓	
Papua New Guinea	✓							H	D	1	1		
Paraguay	✓	D	n/a		H			H	D	2	2	✓	
Peru	✓	D	H (C/N)		H			H	D	2	3	✓	
Philippines	✓	D	n/a					H	D	2	1	✓	
Poland	✓	D		✓		D	H	H		2	2	✓	L
Portugal	✓			✓		D	H	H	D	2	2	✓	L
Qatar	✓	M			H			H		0	2	✓	
Romania	✓	D	H (MC)	✓	H/H		H[254]	H	D	2	4	✓	
Russia	✓	D	H (MC)						(D)	1 (+1)	1	✓	
Rwanda	✓	H[255]						H	D	1	2		
Samoa	✓								D	1	0		
San Marino										0	0	✓	
Sao Tome and Principe									(D)	(1)	0		
Saudi Arabia	✓	(D)			H			H	D	2	1 (+1)	✓	
Senegal	✓	S. TOC	H (MC)					H	D	1	2	✓	
Serbia	✓	(D)	H (MC)		H			[256]	(D)	(2)	2	✓	
Seychelles	✓								D	1	0		
Sierra Leone	✓							H	D	1	1		
Singapore	✓	H			H			H	D	1	3	✓	
Slovakia	✓	D	H (MC)	✓		D	H	H	D	3	3	✓	✓[257]
Slovenia		D				D	H[258]	H	D	3	1	✓	
Solomon Islands	✓							H	D	1	1		
Somalia									D	1	0		
South Africa	✓	D	n/a		(H)			H		1	1 (+1)	✓	
Spain				✓		D	H	H	D	2	2	✓	L
Sri Lanka	✓	D						H	D	2	1	✓	

[254] *See supra* note 236.
[255] Temporarily applied since its signature.
[256] Serbia and Montenegro applied separately to the WTO, but so far they have been treated as one State by Switzerland.
[257] *See supra* note 169.
[258] *See supra* note 236.

Country[225]	M[226]	BIT[227]	TOC[228]	S[229]	EFTA[230]	EU	OECD	WTO	W[231]	D[232]	H[233]	NY[234]	J[235]
St. Kitts	✓							H	D	1	1		
St. Lucia	✓							H	D	1	1		
St. Vincent	✓							H	D	1	1	✓	
Sudan	✓	(H)							D	1	(1)		
Suriname	✓							H		0	1		
Swaziland	✓				(H)			H	D	1	1 (+1)		
Sweden	✓		H (MC)	✓		D	H	H	D	2	3	✓	L
Syria	✓	H	H (MC)						D	1	2	✓	
Tajikistan	✓									0	0		
Taiwan								H		0	1		
Tanzania	✓	H						H	D	1	2	✓	
Thailand	✓	H (D)[259]			(H)			H	(D)[260]	(1)	1 (+1)	✓	
Togo	✓	S. TOC	n/a					H	D	1	1		
Tonga									D	1	0		
Trinidad	✓							H	D	1	1	✓	
Tunisia	✓	H	H (MC)		H/H			H	D	1	5	✓	
Turkey	✓	D	H (A)	✓	H		H	H	D	2	4	✓	
Turkmenistan	✓								D	1	0		
Uganda	✓	H						H	D	1	2	✓	
Ukraine	✓	D	H (MC)		H				D	2	2	✓	
United Arab Emirates	✓	D			H			H	D	2	2		
United Kingdom			n/a	✓		D	H	H	D	2	2	✓	L[261]
United States of America			n/a	✓			H	H	D	1	2	✓	
Uruguay	✓	D	n/a		H			H	D	2	2	✓	
Uzbekistan	✓	D	H (MC)						D	2	1	✓	
Venezuela	✓	D						H	D	2	1	✓	
Viet Nam	✓	D	H (C/N)							1	1	✓	
Vanuatu	✓									0	0		
Yemen	✓								D	1	0		
Zambia	✓	H						H	D	1	2	✓	
Zimbabwe	✓	D						H	D	2	1	✓	

[259] The BIT with Thailand contains one horizontal clause (Article 10) and one diagonal ICSID conciliation and arbitration clause (Article 11). However, this diagonal clause shall enter into force only when Thailand becomes a Member of the ICSID Convention. Thailand signed the Convention on 6 December 1985 but has not yet ratified it. In the meantime, only the horizontal clause is operative. *See supra* note 59.

[260] *Id.*

[261] Including Gibraltar.

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