

# The Legal Framework of Swiss International Trade and Investments

## *Part I: Promotion*

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### I. INTRODUCTION

In 2004, Switzerland ranked as the 16th-biggest importer and 21st-biggest exporter of goods and the 10th-biggest importer and 18th-biggest exporter of services worldwide,<sup>1</sup> a remarkable figure for a country with a population of less than seven-and-a-half million persons.<sup>2</sup> At the same time, it ranked 15th for inbound foreign direct investment (FDI) flows but 9th for outbound investment flows.<sup>3</sup> The stocks of inbound FDI amounted to 50.6 per cent of Switzerland's gross domestic product (GDP) thus ranking 13th, but the stocks of outbound investments exceeded Swiss GDP by 9.8 per cent or a notable 5th rank.<sup>4</sup> Obviously, Switzerland's external economy represents a vital component of its economy.

To support this, Switzerland has developed a remarkably sophisticated internal and external legal framework. I identified more than four hundred instances in which Switzerland can rely on a framework, trade or investment, bilateral or multilateral treaty, yet little has been written on this significant aspect of the international relationships of Switzerland.

This study covers indifferently trade<sup>5</sup> and investments.<sup>6</sup> While there are fundamental differences, at the same time they are so closely interrelated that they are indissociable

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<sup>1</sup> With imports of US\$ 144 billion and exports of US\$ 175 billion in goods and commercial services. See *International Trade Statistics 2005*, WTO, Tables I.5, I.7 and I.9.

<sup>2</sup> 7.46 million in December 2005, of which 1.64 million, or 21.9 per cent, were foreigners in 2004. See the Website of the Federal Office of Statistics at <http://www.bfs.admin.ch/bfs/>.

<sup>3</sup> With US\$ 4.478 billion and US\$ 25.207 billion, respectively. See *World Investment Report 2005*, Annex Table B.2, United Nations Conference on Trade and Development.

<sup>4</sup> It represented 109.8 per cent of Swiss GDP; *id.*, Annex Tables B.2-3. with the total amounts of inbound and outbound FDI stocks were US\$ 181.033 billion and US\$ 393.019 billion, respectively. As for the latter, Switzerland ranked quite remarkably ahead of Italy, Canada and Japan.

<sup>5</sup> International trade can be understood as involving only the movement of goods and services across national borders. Trade in services also covers transactions that involve the cross-border movement of factors of production (capital and labour). See [http://www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto06/wto06\\_9.htm#note2](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto06/wto06_9.htm#note2). See also General Agreement on Trade in Services (GATS), Article I(2).

<sup>6</sup> The International Monetary Fund (IMF) defines FDI as an investment made to acquire lasting interest in enterprises operating outside of the economy of the investor. Further, the investor's purpose is to gain an effective  
(footnote continued on next page)

elements of the external economy here addressed as a whole. To distinguish them is not the topic of this article. Some instruments or organizations focus on investments, like bilateral investments treaties (BITs), whereas others put emphasis on trade, as does, for example, the World Trade Organization, but none ignores or entirely excludes the other.<sup>7</sup> The same remark applies to services, government procurement, intellectual property, double-taxation, technical and scientific assistance, etc., all of which contribute to a certain degree to the external economy but to which this article cannot possibly stretch endlessly.

Another distinction should be made between bilateral trade and investments, on the one hand, and development and co-operation, on the other. Again, while this study focuses on the former, there is a large grey zone in which they blur, so that the latter cannot be neatly severed. Because of its magnitude,<sup>8</sup> aid indirectly supports trade and investments. Therefore, co-operation and development will also be touched upon.

This article is published in two parts. The present first part offers an overview of the legal instruments offered by Swiss law, including the treaties to which Switzerland is a party, for the promotion and support of Swiss exports and outbound investments. The second part will discuss the protection offered by these instruments and the remedies available whenever trade is hampered or investments are damaged.

## II. THE BASIS

The Swiss external economic policy purports to safeguard the interests of the Swiss economy abroad.<sup>9</sup> The Confederation, represented by the Federal Council, enjoys a general competence for foreign affairs.<sup>10</sup> It redefines regularly its external economic policy in a yearly report which constitutes guidelines for improving access by Swiss companies to foreign markets.<sup>11</sup>

voice in the management of the enterprise. See *Balance of Payments Manual: Fifth Edition (BPM5)*, IMF (Washington, D.C. 1993). See also *Detailed Benchmark Definition of Foreign Direct Investment: Third Edition (BD3)*, Organisation for Economic Co-operation and Development (OECD) (Paris 1996) (summarized at <http://www.UNCTAD.org/Templates/Page.asp?intItemID=3146&lang=1>). The 1965 Washington Convention abstains from defining the notion of investment. See *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* of 18 March 1965, Article 25(1). See also Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, BERD, para. 27 (18 March 1965).

<sup>7</sup> There are three main areas of work in the WTO on trade and investment: (i) a Working Group established at the 1996 WTO Ministerial Conference in Singapore conducts analytical work on the relationship between trade and investment; (ii) the Agreement on Trade-Related Investment Measures (TRIMs) (*see infra* IV.C.2.(d), "The Agreement on Trade-Related Investment Measures"); and (iii) the General Agreement on Trade in Services (GATS), which addresses foreign investment in services as one of four modes of supply of services (*see infra* IV.C.2.(b), "The General Agreement on Trade in Services"). The relationship between trade and investment was dropped from the Doha agenda on 1 August 2004, however (*see infra* note 126). The European Free Trade Agreement's (EFTA) 40th Anniversary Declaration expressly addressed the possibility of extending trade agreements to both investments and services (*see infra* IV.B.2.(c), "The 40th Anniversary Declaration"). See also *infra* note 96).

<sup>8</sup> In 2005, Switzerland's foreign aid reached CHF 1.9 billion, or 0.41 per cent of the country's GDP.

<sup>9</sup> Swiss Federal Constitution (Cst) Article 101(1), *Recueil systématique des lois fédérales* (RS) 101.

<sup>10</sup> *Id.*, Article 54(1).

<sup>11</sup> See *Loi fédérale sur les mesures économiques extérieures*, Article 10, RS 946.201 (25 June 1982). The latest report is the 2005 report; see CONSEIL FÉDÉRAL, RAPPORT SUR LA POLITIQUE ÉCONOMIQUE EXTÉRIEURE 2005, FF 2006 p. 1635 (11 January 2006). See also WTO, Trade Policy Review Reports by Switzerland and Liechtenstein, WT/TPR/G/141 (17 November 2004). For an elaborated account of the legal basis of the Swiss external economic policy, see <http://www.seco.admin.ch/themen/aussenwirtschaft/grundlagen/index.html?lang=fr&PHPSESSID=073CF171CFdcf250987f3357e50655d>.

In its 2004 Report, the Government revealed a new strategy and described the objectives of the Swiss external economic policy. It outlined globalization and the increasing importance of services, finance and intellectual property, as well as the ever closer interdependence between the internal and external markets. Switzerland's involvement in multilateral organizations, as well as its support to developing and under-developed countries, were reaffirmed, as they contribute to a stable external economic development.<sup>12</sup>

The new Federal Act on Export Promotion which entered into force in 2001 enables the government to sub-contract the promotion of Swiss external trade and was designed to support that strategy.<sup>13</sup>

The development and co-operation policy of Switzerland also has a constitutional basis<sup>14</sup> and is defined by the external economic policy of which it is part.<sup>15</sup>

### III. THE INTERNAL ACTORS

Numerous Swiss government bodies, as well as State-controlled and private organizations, are involved in the promotion and support of Swiss exports and outbound investments. On the governmental level, the implementation of the external trade policy is shared between the Federal Department (or ministry) of Foreign Affairs (DFAE, hereinafter MOFA), represented abroad by the Swiss embassies and consulates,<sup>16</sup> which focuses on political aspects, and the State Secretariat to the Economy (seco), which puts an emphasis on economic issues.<sup>17, 18</sup> Both rely on two semi-private, State-controlled organizations, i.e., the Swiss Office of Commercial Expansion (OSEC)<sup>19</sup> and the Swiss Organization for Facilitating Investments (SOFI).<sup>20, 21</sup>

<sup>12</sup> See CONSEIL FÉDÉRAL, RAPPORT SUR LA POLITIQUE ÉCONOMIQUE EXTÉRIEURE 2004, FF 2005 p. 993 (12 January 2005). See also seco, *Nouvelle stratégie pour la politique économique extérieure de la Suisse* (communiqué) (January 2005).

<sup>13</sup> Loi fédérale sur la promotion des exportations, RS 946.14 (6 October 2000, entered into force on 1 March 2001). See also CONSEIL FÉDÉRAL, MESSAGE CONCERNANT LA LOI FÉDÉRALE SUR LA PROMOTION DES EXPORTATIONS, FF 2000 p. 2002 (23 February 2000). On the criticisms prompted by the defective implementation of this Act, see *infra* III, "The Internal Actors".

<sup>14</sup> Cst, Article 54(2), RS 101.

<sup>15</sup> See CONSEIL FÉDÉRAL, RAPPORT SUR LA POLITIQUE EXTÉRIEURE 2000, PRÉSENCE ET COOPÉRATION: LA SAUVEGARDE DES INTÉRÊTS DANS UN MONDE EN COURS D'INTÉGRATION (15 November 2000).

<sup>16</sup> See <http://www.eda.admin.ch/eda>.

<sup>17</sup> seco is subordinated to the Federal Department (or ministry) of the Economy (DFE) [hereinafter: MOE] not of Foreign Affairs. See <http://www.seco.admin.ch>. The relationship between MOFA and MOE is defined in a framework agreement cited in CONTRÔLE FÉDÉRAL DES FINANCES, POLITIQUE FÉDÉRALE DE PROMOTION DES EXPORTATIONS, ÉVALUATION DES COÛTS ET DE LA COORDINATION ENTRE LES ACTEURS (January 2005) at 40.

<sup>18</sup> Other related institutions worth mentioning include the Export Risks Guarantee and the Investment Risks Guarantee schemes, both of which will be addressed in the second part of this article, on the protection of exports and investments, as well as the Export Aid to Transformed Agricultural Products scheme of the Federal Customs Administration (AFD).

<sup>19</sup> Also known as Business Network Switzerland. Founded in 1927, OSEC is a non-profit organization and has been mandated by the Swiss government to support Swiss companies abroad. It coordinates a network of 13 representative offices or "hubs" worldwide which deliver modestly priced information, consulting and marketing services. OSEC is subordinated to seco under a Service Agreement. However, the 11 hubs hosted by an embassy or consulate are subordinated to MOFA. See <http://www.OSEC.ch>.

<sup>20</sup> Created in 1997 by seco to facilitate investments in countries with developing and transition economies. The Swiss government operates SOFI in collaboration with KPMG. See <http://www.sofi.ch>.

<sup>21</sup> Other State-controlled organizations include the Swiss Association for Normalization (ASN), which is concerned about exports standards, and the Export Aide for Wine, Cheese, Milk Products, Potatoes, Fruits & Cattle scheme of the Federal Agriculture Office (OFAG).

The implementation of the external trade policy is shared between MOFA, seco and OSEC.<sup>22</sup> seco is primarily responsible to the Federal Council, but operationally it is OSEC which is in charge, under the monitoring of seco. MOFA, through its embassies and consulates, supports OSEC's representations or "hubs" abroad. The assessment, the coordination, the negotiation of treaties and the information related to the Swiss EU policy has been entrusted to a special Bureau run jointly by MOFA and the Ministry of the Economy (MOE).<sup>23</sup>

Private organizations mainly include the bilateral Swiss chambers of commerce.<sup>24, 25</sup> There are several other organizations involved to various degrees in the Swiss policy of external trade, all of which cannot be listed here. Among the most important, it is worth mentioning the federation of the Swiss chambers of commerce representing specific fields of industry and services in Switzerland, Chambers of Commerce & Industry of Switzerland (CCIS),<sup>26</sup> as well as *economiesuisse*, an influential lobbying organization representing the Swiss economy and regularly active on the Swiss external trade scene. *economiesuisse* is the result of a merger in 2000 of the then-influential Swiss Federation of Commerce and Industry (*Vorort*) with the Society for the Promotion of the Swiss Economy (*wf*).<sup>27</sup>

The activity and, more to the point, the interaction among these numerous actors has been, upon request of the Parliament, recently assessed and severely judged by the Federal Audit Office in a report on the federal policy of external trade.<sup>28</sup>

The State Guarantee Against Investment Risks (GRI) is operated by the Swiss Federation of Machine-Tool Industry (Swissmem)<sup>29</sup> whereas the Guarantee Against Export Risks (formerly GRE) is due to be run as from 2006 by the new Swiss Insurance

<sup>22</sup> Competence-sharing is regulated by an internal document, *Kompetenzauslegung zwischen OSEC-seco-EDA—Funktionsdiagramm in der Exportförderung* (no date) cited in CONTRÔLE FÉDÉRAL DES FINANCES, *supra* note 17, note 47 at 44.

<sup>23</sup> Bureau de l'intégration DFAE/DFE. Formally subordinated to MOE, it also collaborates closely with MOFA. See <http://www.europa.admin.ch>.

<sup>24</sup> Some of the bilateral Swiss chambers of commerce are members of the Association of Foreign Chambers of Commerce (SwissCham), which, despite its deceiving name, gathers bilateral chambers, Swiss- or foreign-controlled, in Switzerland and abroad. See <http://www.swisscham.ch>.

<sup>25</sup> The annual cost of external trade promotion supported by the Swiss government was estimated at CHF 47 million per year in 2005, of which 50 per cent for MOFA, 5 per cent for seco, 35 per cent for OSEC, 10 per cent for SOFI, and less than 1 per cent for the bilateral chambers of commerce. See CONTRÔLE FÉDÉRAL DES FINANCES, *supra* note 17, p. i.

<sup>26</sup> See <http://www.cci.ch>. Certain cantonal or regional chambers of commerce in Switzerland also promote the external trade policy.

<sup>27</sup> *economiesuisse* is the largest umbrella organization representing the Swiss economy. Its members include trade and industry associations, cantonal chambers of commerce and individual companies. See <http://www.economiesuisse.ch>.

<sup>28</sup> In a nutshell, the Federal Audit Office criticized the fact that there were too many actors, the lack of coordination among them, as well as of the decision-making, financing and controlling processes, and the fact that OSEC did not delegate more to private service providers (principle of subsidiarity). See CONTRÔLE FÉDÉRAL DES FINANCES, *supra* note 17. See in particular "Recommendations", *id.* p. 82 ff. See also CONSEIL FÉDÉRAL, RAPPORT SUR LA POLITIQUE ÉCONOMIQUE EXTÉRIEURE 2004 ET MESSAGE CONCERNANT DES ACCORDS ÉCONOMIQUES INTERNATIONAUX, FF 2005 p. 993, n. 7.3 at 1116 (12 January 2005).

<sup>29</sup> See <http://www.swiss-irg.ch>.

Against Export Risks (ASRE).<sup>30</sup> The development and co-operation policy of Switzerland has been entrusted to both the Swiss Agency for Development & Cooperation (DDC)<sup>31</sup> and seco's Economic Cooperation to Development.<sup>32, 33</sup>

#### IV. THE INSTRUMENTS AND THE EXTERNAL ACTORS

This Section will discuss successively (a) bilateral, (b) regional and (c) multilateral treaties.

##### A. *BILATERAL TREATIES*

As far as trade and investments generally are concerned, there are three main types of treaties to consider:

1. treaties of friendship;
2. treaties of commerce; and
3. treaties on the protection of investments.<sup>34</sup>

##### 1. TREATIES OF FRIENDSHIP

Historically, the treaties of friendship (TOF) are the oldest. They date back to the mid-19th century and were signed up until the 1960s.<sup>35</sup> Therefore, they are relatively simple in nature and short. Generally, after a strong statement affirming the eternal friendship between the two nations (hence the name), they would mix issues mostly related to administrative and legal matters involving the nationals of one country in the territory of the other, namely establishment. These issues would often include trade, albeit in a summary form. FDI (which at the time would not even be identified as such) would be indirectly touched upon through provisions on establishment, but not expressly. FDI was specifically addressed at a later stage with treaties on the protection of investments. Even though many TOFs are still in force, nowadays they mostly retain an historical interest; therefore I am not discussing them in detail.<sup>36</sup>

<sup>30</sup> So far, it has also been entrusted to Swissmem, which will keep operating it until ASRE takes over; see <http://www.swiss-erg.ch>. Both guarantees will be discussed in Part II of this article.

<sup>31</sup> See <http://www.DDC.admin.ch>. In 2003, DDC's budget was almost fivefold seco's.

<sup>32</sup> See <http://www.seco-cooperation.ch>.

<sup>33</sup> See DDC/seco, RAPPORT ANNUEL DE LA COOPÉRATION INTERNATIONALE DE LA SUISSE 2004. The relevance of this policy with respect to the protection of exports and investments will be discussed in Part II of this article.

<sup>34</sup> Switzerland has entered into a wealth of bilateral treaties or agreements of all kinds, probably thousands of them. Only treaties which are concerned with trade and investments generally, rather than with some specific area or purpose, are discussed here. All published treaties are available at <http://www.admin.ch/ch/f/rs/iindex.html>. See also <http://www.eda.admin.ch/eda/f/home/foreign/intagr/dabase.html> (for additional information, namely on non-published treaties, and a classification by country).

<sup>35</sup> The oldest TOF is the treaty with the United States of America of 1850, RS 0.142.113.411, followed by the treaty with the British Empire in 1855, RS 0.142.113.671. The first is still in force; the second has been split and succeeded to by certain of the States which succeeded to the former British colonies.

<sup>36</sup> TOFs are classified under RS 0.142.

## 2. TREATIES OF COMMERCE

A second stage was reached with treaties of commerce (TOCs).<sup>37</sup> Often complementing a TOF, they focused on trade and were signed throughout the 20th century. From the 1960s, as the protection of investments was identified as an issue, several TOCs would contain specifically related provisions, thus sparing a separate treaty. This practice was gradually abandoned in the 1970s as BITs gained in popularity. Switzerland has both a TOC and a BIT with most countries, but not systematically.<sup>38</sup> In most cases (but not all), TOCs were signed first and paved the way to a BIT. No TOC has been signed since 2001, probably reflecting the fact that since its inception in 1995 most countries have become Members of the WTO, the provisions of which are considerably more sophisticated.<sup>39</sup> TOCs still retain an interest in the few cases in which Switzerland's counterpart is not yet a Member of the WTO<sup>40</sup> or in the case, probably limited in scope, where some subject-matter was not covered by the General Agreement on Tariffs and Trade (GATT). Therefore I am not discussing them in detail, either.<sup>41</sup>

## 3. TREATIES ON THE PROTECTION OF INVESTMENTS

As bilateral commercial relationships developed, trade increasingly gave rise to investments and to the need to protect them specifically. This was done from the 1960s with BITs, which represent the third, and last, stage of this evolution. Despite their short named legal classification,<sup>42</sup> BITs are equally concerned with the protection (or treatment), the promotion (or encouragement) and the admission of investments.

A sound understanding of Swiss BITs requires a preliminary reminder of the historical development of such treaties as well as their standard features.

### (a) *Historical Background*

Switzerland has signed more than 100 BITs.<sup>43</sup> It has the second-largest BIT network worldwide after Germany. It is one of the first European countries to have started to conclude BITs in the aftermath of the Second World War.

Switzerland concluded its first BIT with Tunisia in 1961. In the course of their evolution, Swiss BITs followed trends resulting from a mix of political, legal and regional or cultural influences. During the 1960s, first-generation BITs were mostly concerned with the

<sup>37</sup> The penultimate but last TOF for four decades was signed in 1963; however the last TOF was signed with Albania in 1995, RS 0.142.111.232.

<sup>38</sup> Switzerland has a TOC with 91.7 per cent of the countries with which it has a BIT, or 88 out of 96.

<sup>39</sup> See *infra* IV.C.2, "The World Trade Organization".

<sup>40</sup> Or has an FTA with EFTA. There are only 13 such countries left, all of which are under-developed or developing countries, one noteworthy exception being Russia.

<sup>41</sup> TOCs are classified under RS 0.946.

<sup>42</sup> See RS 0.975.

<sup>43</sup> See *infra* "Annex Table 1: List of Swiss Bilateral Investment Treaties and Treaties of Commerce".

protection of foreign investments rather than with their promotion, and little concerned with investments from developing countries in developed countries. BITs were mostly entered into with African (including Maghreb) countries and with a few South American countries.

During the 1970s, second-generation treaties reflected anti-multinational corporation concerns from developing countries claiming that Western investors were enjoying excessively favourable status and robbing their national resources. Emphasis was put on the regulation of nationalizations, which could explain some slowing down in the pace of BIT-making. Treaties were still mostly entered into with African countries as well as with, for the first time, Asian countries.

This slow pace lasted approximately until the mid-1980s, when the fall of the Eastern bloc suddenly gave rise to joint ventures, which characterized third-generation treaties. The rhythm of BITs then considerably increased, to reach a peak of as many as nine BITs a year, until the end of the 1990s. Most, if not all, Eastern European countries concluded BITs with Switzerland, soon joined by several ex-U.S.S.R. Central Asian countries and ex-communist Asian countries, as well as the ex-Yugoslavia Balkan States. BITs with South America<sup>44</sup> and (market economy) Asia continued at a steady pace. Ultimately, the late 1990s opened the doors to Arab countries.

The enthusiasm initially prompted by the joint-venture model faded over time with sometimes exaggerated and disappointed expectations. While BITs continue to be signed with States from all continents at a somewhat calmer rhythm, the 21st century gave birth to the fourth generation of treaties. The last generation of BITs focuses on the setting-up of a pro-business environment by putting emphasis upstream of the investment process on good governance rather than downstream on dispute resolution. More treaties are currently in the process of negotiation, and Switzerland is making continuous efforts to strengthen this network.<sup>45</sup>

#### (b) *Standard Clauses*

The legal basis for Swiss BITs used to lay on a short Federal Order of 1963 which only mentioned the possibility of a most-favoured-nation clause, free movement of capital and an arbitration clause.<sup>46</sup> There is obviously not a standard Swiss BIT for all countries but these are generally negotiated on the basis of a general pattern. Some of them are entirely redrafted; many of them roughly follow the standard pattern; all of them are adapted and modified to one extent or another.

<sup>44</sup> BITs with several South American countries had in the meantime been brought to a halt with the so-called Calvo doctrine, which advocated in particular that foreign investors should not be treated better than locals. This doctrine was later dropped, enabling BITs to resume.

<sup>45</sup> Notably, Switzerland had been considering negotiating a free trade agreement (FTA) with the United States of America since the EFTA's attempts failed, but this project was abandoned in 2005. *See infra* note 94.

<sup>46</sup> Arrêté fédéral concernant la conclusion de traités relatifs à la protection et à l'encouragement des investissements de capitaux, RS 975 (27 September 1963). After having been extended regularly, this order expired on 13 February 2004. Indeed, the Federal Council believed that a further extension was not justified since Switzerland has now concluded BITs with most countries. *See* CHANCELLERIE FÉDÉRALE (forthcoming 2006). I deduce from the foregoing that the Federal Council remains competent but that such competence now falls back under the general competence clause of Cst Article 54(1), *see supra* note 10.

A standard Swiss BIT starts with a preamble stressing the mutual desire of both countries to intensify their economic co-operation and to create and maintain conditions favourable to investments originating from the other country and to recognize the necessity to encourage and protect foreign investments with a view to promote economic prosperity in both countries.

Standard provisions then mainly cover (i) encouragement and admission of investments; (ii) their protection, fair and equitable treatment and most-favoured-nation treatment; (iii) free movement of capital; (iv) expropriation; and (v) dispute resolution. Miscellaneous and final provisions are also included.

(i) *Encouragement and admission*

The first provisions deal with definitions and scope: investor; investment; territory; etc. The BIT then moves on to the core provisions: promotion; and protection. Promotion is dealt with in an encouragement and admission clause, according to which each party commits itself to encourage, "as far as possible", investments of the other party's investors on its territory and to admit these investments in accordance with its laws and regulations. This includes the delivery of the authorizations necessary to such investments, including, for example, the performance of licence agreements and technical, commercial or administrative assistance agreements. This commitment also extends, whenever necessary, to foreign experts and consultants. Even though the aim of this provision is equal treatment, the use of the formula "as far as possible" leaves room for flexibility. Exceptions would presumably be negotiated beforehand.

This clause is typically a "best endeavours" provision. BITs are mostly concerned with the post-investment phase and do not vest the investor with a right to invest. This is perhaps the main difference between FDI and trade. Indeed unlike BITs, the WTO's GATT, which nowadays applies to most of the world trade, does guarantee such admission.<sup>47</sup> Nowadays, this lacuna characterizing FDI is regarded as insufficient to address the challenge of global trade, but so far attempts to secure a genuine right to invest have proven fruitless.<sup>48</sup>

(ii) *Protection, fair and equitable treatment and most-favoured-nation treatment*

The next provision is usually concerned with the other core principle of BITs mirroring promotion, i.e. protection.<sup>49</sup> In a clause also called "treatment", each party commits itself to protect on its territory the investments made (in conformity with its laws and regulations) by the investors of the other party. According to the principle of

<sup>47</sup> See *infra* IV.C.2, "The World Trade Organization".

<sup>48</sup> See *infra* IV.C.1.(c), "The Policy Framework for Investment (PFI)".

<sup>49</sup> The protection of investments will be discussed at length in Part II of this article, on the protection of exports and investments. However, as BITs form a whole, provisions on the protection, expropriation and dispute resolution are briefly discussed here.

equal treatment, the parties shall not hinder, by unjustified or discriminatory measures, the other party's investment. All forms of investments are covered in order to avoid all kinds of indirect hindrances, too. Thus, such aspects as the management, maintenance, use, enjoyment, increase, sale and, if any, the liquidation of such investments shall be protected. The clause also usually contains a reminder that the authorization mentioned in the promotion clause shall be delivered.

More concretely, the protection and treatment clause guarantees the now well-established national treatment and most-favoured-nation principles. Thus, each party shall assure on its territory a treatment not less favourable than that it grants to its own investors. In addition, that treatment shall be not less favourable than that offered by each party to investments made on its territory by investors of the most favoured nation, if that latter treatment is more favourable.

The scope of this principle has been dramatically extended by the *Maffezzini* case, in which the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Tribunal confirmed that, say, a Swiss investor in Russia is entitled to rely on the BIT between Russia and Finland if, with respect to the same subject-matter, the latter contains provisions more favourable to Finnish investors than a BIT between Russia and Switzerland allows to Swiss investors.<sup>50</sup>

The most-favoured-nation principle is, however, limited and shall not apply to privileges a party grants to the investments of a third State-party by virtue of its participation or association to a free trade area, a customs union or a common market.<sup>51</sup> Finally it shall not be mistaken with the more-favourable-conditions principle discussed below.<sup>52</sup>

There are, therefore, two levels of protection. The first, general, is the principle of fair and equitable treatment, a fundamental principle of public international law. This principle provides a safety net when more detailed guarantees have not been expressly formulated. The second is granted by that principle's two more specific corollaries, which are the principle of national treatment and the most-favoured-nation clause. The principle of national treatment is the dominating principle in foreign investment law, however.<sup>53</sup>

<sup>50</sup> *Maffezzini v. Kingdom of Spain*, ICSID Case ARB/97/7, Decision on Jurisdiction of 25 January 1999, p. 14 n. 38 ff at [http://www.worldbank.org/icsid/cases/emilio\\_DecisiononJurisdiction.pdf](http://www.worldbank.org/icsid/cases/emilio_DecisiononJurisdiction.pdf). The *Maffezzini* case was mostly concerned about the arbitration clause. Even though it relied on precedents, it considerably strengthened this principle. It has potentially far-reaching consequences for Switzerland as far as inbound investments are concerned, considering Switzerland has almost 100 BITs.

<sup>51</sup> See also *id.*

<sup>52</sup> See *infra* IV.A.3.(b).(vi), "Miscellaneous Provisions".

<sup>53</sup> It has been regretted that the distinction between "treatment" and "protection" is often blurred, despite them being substantially different concepts. Arguably, protection intervenes only if and after fair treatment has not been granted and is afforded by the provisions on dispute resolution (and to some extent on expropriation), not those on treatment. See DOMINIQUE CARREAU & PATRICK JUILLARD, *DROIT INTERNATIONAL ÉCONOMIQUE*, 2nd ed. (Précis Dalloz ed., Paris 2005), p. 438 ff. The draft MAI expressly distinguished treatment from protection. See *infra* note 124, OECD, Parts III and IV.

(iii) *Free movement of capital*

This provision, known as “free transfer”, guarantees that each party on the territory of which investors of the other party are making investments shall grant them free transfer of payments related to these investments. The need for free movement of capital in connection with FDI was soon identified as a necessary corollary of the provisions mentioned so far since, absent free financing, those provisions would be inoperative.

This provision is meant to be far reaching, and all aspects of capital movements are covered, i.e. interest, dividends, benefits and other ongoing incomes; reimbursement of borrowings; amounts aimed at covering expenses related to investment management; charges and other payments resulting from monetary debts and rights to any performance having an economic value, intellectual property rights, concessions and similar rights; supplemental capital amounts necessary to the maintenance or the development of these investments; product of the sale or of the partial or total liquidation of an investment, including possible profits.

(iv) *Expropriation*<sup>54</sup>

Even though, as noted above, the protection of FDI is already generally provided for, expropriation deserves special treatment since it is the most extreme form of damage to FDI. In accordance with this clause, usually denominated “dispossession and compensation”, no party shall, directly or indirectly, take expropriation or nationalization measures or any other measure having the same character or effect against investments of investors of the other party.

There is an exception for the public interest. However, following now widely accepted international standards, it shall be admissible only provided the measures are not discriminatory, in agreement with legal requirements and that an effective and adequate indemnity be paid. The indemnity, including interest, shall be paid in the currency of the country where the investment originated (or any other freely convertible currency) and be paid promptly (“without delay”) to the beneficiary, notwithstanding its domicile or place of business. This clause thus integrates the latest liberal tendency in the field of expropriation compensation.

War and other similar events are treated separately. Investors of a party having suffered losses because of war or any other armed conflict, revolution, state of emergency or of revolt that has occurred on the territory of the other party shall benefit, from the latter, from the fair-and-equitable as well as of the most-favoured-nation principles mentioned above. Such investors shall be indemnified in any event. Even though one may be skeptical as to its efficiency, this provision at least firmly reiterates the principle that wars and similar events shall not be considered to be *force majeure* and cannot deprive damaged investors of their right to compensation. It purports to pave the way to indemnification, in many instances through diplomatic solutions, wherever possible.

<sup>54</sup> See *supra* note 49.

(v) *Dispute resolution*<sup>55</sup>

Swiss BITs traditionally distinguish disputes between the two State-parties (“horizontal” clauses) on the one hand and disputes between State-party and investor (“diagonal” clauses) on the other hand. In the former case (disputes between State-parties), disputes on the interpretation and the application of the BIT shall be resolved through the diplomatic channel. If no settlement is reached within the consultation period, the dispute shall be resolved by arbitration. In the latter case (disputes between State-party and investor), the dispute resolution clause shall provide for a consultation period followed, if the dispute persists, by an arbitration. The diplomatic channel shall be in principle excluded.

While arbitration in case of a dispute between State-party and investor is usually governed by the arbitration rules of ICSID, the United Nations Commission on International Trade Law (UNCITRAL) or the International Chamber of Commerce (ICC), arbitration between State-parties is generally *ad hoc*. The first Swiss BITs only provided for State-parties’ arbitration. For many years, however, diagonal clauses have systematically complemented horizontal clauses.<sup>56</sup>

(vi) *Miscellaneous provisions*

BITs shall usually extend to investments made prior to the agreement, in so as far as they comply with the other party’s laws and regulations.

Wherever conditions more favourable than those contained in the BIT have been agreed with an investor, such conditions shall be maintained even if the BIT foresees less favourable conditions.

When a State-party has granted a financial guarantee against non-commercial risks to one of its investors, the other State-party shall recognize the rights of the first State-party following the principle of subrogation in the rights of the investor if a payment has been made by virtue of this guarantee.

The well-known principle *pacta sunt servanda* is reiterated in a separate clause at the end of the BIT. Each party shall at any time ensure the respect of its commitments towards the investments of the investors of the other party.

(vii) *Final provisions*

Swiss BITs usually provide that the agreement shall enter into force the day both parties will have notified each other that their internal constitutional requirements have been satisfied, i.e. that the agreement has been approved. From then, the BITs shall generally remain valid for a first long period, ranging from 5 to 20 years. If it is not denounced six months before the expiry of this initial period, it shall be considered to

<sup>55</sup> See *supra* note 49.

<sup>56</sup> On this topic generally, 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).

be renewed for another short period, for example, between two and five years, and so on. It is worth noting that even in case of denunciation, the BIT shall still apply during another relatively long period, between five or ten more years, to the investments already made before the denunciation.

## B. REGIONAL ORGANIZATIONS AND TREATIES

BITs must be seen in a global context, in connection with regional and multilateral treaties. Two regional organizations are of particular importance to Switzerland: the European Free Trade Association (EFTA), of which Switzerland is a member, and the European Union (EU), of which Switzerland is not a Member but with which it has signed bilateral agreements.

### 1. THE EUROPEAN UNION<sup>57</sup>

The destiny of EFTA and the EU are, from a Swiss perspective, so closely interrelated that it forms a whole permanently interacting. Since the policy of EFTA is determined to a large extent by this interaction, the following discussion will briefly introduce EFTA for the purpose of discussing, firstly, the relationship between Switzerland and the EU. A detailed discussion of EFTA will follow.

The relationship between Switzerland and the EU nowadays is governed by the so-called "Bilateral Agreements", two sets of which were signed in 1999 and 2004, respectively. However, a sound understanding of the Bilateral Agreements requires a brief historical reminder of the European Economic Area (EEA), to which all present EFTA Members but Switzerland became Members.<sup>58</sup>

#### (a) *The 1972 EFTA Bilateral FTAs and the 1994 EFTA-EEA Agreements*<sup>59</sup>

As just noted, a significant feature of Switzerland's regional policy is that it is not a Member of the EU but is a Member of EFTA. The latter was founded by Austria, Denmark, Norway, Portugal, Sweden, the United Kingdom and Switzerland in 1960 with the signing of the Stockholm Convention. Finland became an Associate Member in 1961 (it became

<sup>57</sup> Due to their complex history, the terminology of the European institutions is somewhat confusing. European Communities was the name given collectively to the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (Euratom), when in 1968, they were first merged under a single institutional framework with the Merger Treaty signed in Brussels on 8 April 1965. That treaty created the European Commission and the Council of the European Communities. The European Community (EC), most important of three European Communities, was originally founded on 25 March 1957 by the signing of the Treaty of Rome under the name of European Economic Community (EEC). The "Economic" was removed from its name by the Maastricht Treaty in 1992, which at the same time effectively made the EC the first of three pillars of the European Union (EU), called the Community (or Communities) Pillar.

<sup>58</sup> For comprehensive resources, including the legal bases, on both the EU and EFTA, see the Website of the Bureau de l'intégration DFE-DFAE at <http://www.europa.admin.ch/f/index.htm>. Only selected legal bases will be given here. See also EFTA's Website at <http://www.efta.int>.

<sup>59</sup> By "EFTA Bilateral FTAs" and "EFTA-EEA Agreements", for the sake of short titling, is actually meant bilateral FTAs signed by EFTA Members and the Agreement entered into by EFTA Members and the EEA. Indeed, EFTA has no legal personality as such; only its Members have.

a full Member in 1986) and Iceland joined in 1970. The United Kingdom, Denmark and Ireland joined the EC in 1972 and hence ceased to be EFTA Members. Portugal also left EFTA for the European Community (EC) in 1985. Liechtenstein joined in 1991 (previously its interests in EFTA had been represented by Switzerland). Finally, Austria, Sweden and Finland joined the EC in 1995 and hence ceased to be EFTA Members. There are only four Members left: Iceland, Liechtenstein, Norway and Switzerland. Now, all the EFTA States, except Switzerland, also belong to the EEA.

The Stockholm Convention establishes free trade between the EFTA Member States as a means to reach vaster objectives, such as sustained economic activity, full employment, productivity growth and rational use of resources, economic stability promotion and continuous improvement of living standards in Member countries, etc. In 1972 and 1973, the EFTA States concluded free trade agreements (FTAs) with the EC, limited to industrial products.<sup>60</sup> Even though these treaties were concluded under the auspices of EFTA, they were bilateral, i.e. concluded by EFTA's Member States bilaterally, not by EFTA proper.<sup>61</sup> In 1992, the then-EFTA Members except Switzerland acceded to the EEA. Even though the Swiss government was in favour of this accession, it was rejected by popular vote<sup>62</sup> and Switzerland could not take part in the EEA Agreement. Iceland, Norway and Liechtenstein terminated their bilateral FTAs with the EC, as those agreements were replaced by the EEA Agreement. Switzerland did not do the same, and, as a matter of fact, its bilateral FTA (as an EFTA Member) with the EC (now the EU) is still in force, even though this FTA has relatively lost importance since the inception of the bilateral agreements between Switzerland and the EU and as the direct relationship between Switzerland and the EU keeps developing.

The EEA can be roughly described as establishing an economic area where goods, persons, services and capital can move more freely. In essence, it extends the EU's Internal Market to the EEA EFTA States.<sup>63</sup> Moreover, the EEA has been enlarged to include the ten new Members of the EU as of 1 May 2004.<sup>64</sup>

<sup>60</sup> Accord entre la Confédération suisse et la Communauté économique européenne, RS 0.632.401 (signed in Brussels on 22 July 1972).

<sup>61</sup> See *supra* note 59.

<sup>62</sup> The EEA Agreement was rejected in Switzerland by popular vote on 6 December 1992.

<sup>63</sup> The EEA Agreement was signed in Oporto, Portugal on 2 May 1992 and entered into force on 1 January 1994. This Treaty institutes the four fundamental liberties of the EU, i.e. free movement of goods, services, capital and persons. The objectives of the EEA are namely to improve competitiveness of undertakings and to raise the wealth of the population, to promote free competition with the four basic liberties, to improve the economic and technical basis of European industry, and to structure the relationships between States without restricting their autonomy to make decisions, in particular their capacity of concluding international treaties. At the same time, EEA Members, not being EU Members, maintain custom controls; they do not take part in the European Monetary Union, have no say on the decisions taken by the EU and have, in particular, no voting rights in the legislative process. The EEA is seen as a preliminary step to EU full membership, which certain EEA Members did indeed obtain after some time. See CONSEIL FÉDÉRAL, MESSAGE RELATIF À L'APPROBATION DE L'ACCORD SUR L'ESPACE ÉCONOMIQUE EUROPÉEN, FF 1992 IV p. 1 (18 May 1992).

<sup>64</sup> As of 1 May 2004, the EU has been enlarged to include ten new Members: Cyprus; the Czech Republic; Estonia; Latvia; Lithuania; Hungary; Malta; Poland; Slovenia; and the Slovak Republic. The EU Treaty of Accession 2003 of 16 April 2003 explicitly states that a country becoming a Member of the EU shall also apply for membership of the EEA (Article 128). The terms and conditions for such participation shall be the subject of an agreement. On this basis, the European Commission, the EEA EFTA States and the ten applicant countries in the first half of 2003 negotiated the EEA Enlargement Instrument, which ensured the entry of the ten new EU Member

*(footnote continued on next page)*

(b) *Bilateral Agreements*

In the aftermath of the rejection of EEA membership, the Swiss government 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. Therefore, it negotiated an extensive set of agreements on a contractual basis. It has been the intention of the Swiss government that Switzerland ultimately becomes a Member of the EU, but nowadays emphasis is put on the Bilateral Agreements, while membership has become not more than an open option.<sup>65, 66</sup>

(i) *Bilaterals 1*

The first stage of these negotiations,<sup>67</sup> known as "Bilaterals 1", succeeded in 1998<sup>68</sup> in reaching seven agreements with the then 15 EU Member States<sup>69</sup> in the following sectors: ground transport, air transport, free movement of persons, research, public procurement, technical barriers to trade and agriculture.<sup>70</sup> This time, the agreements were accepted by popular vote following a successful referendum in 2000.<sup>71</sup> They entered into force on 1 June 2002.<sup>72</sup>

All those sectors (except perhaps research)<sup>73</sup> are directly relevant to Switzerland's

States into the EEA. The legal texts of the EEA Enlargement Instrument were signed on 11 November 2003 and ratified in the parliaments of all 28 EEA States. The goal was to ensure a simultaneous enlargement of the EU and the EEA on 1 May 2004. The Internal Market has thus increased to comprise some 455 million consumers; common EEA rules and standards which facilitate trade in an enlarged EEA; and citizens will have the opportunity to work and live in new countries.

<sup>65</sup> See "Retirer la demande d'adhésion au moment où le peuple conforte notre politique européenne serait un autogol", LE TEMPS, 26 September 2005. Another federal popular initiative requesting that Switzerland adhere to the EU was massively rejected by 77 per cent of the voters on 4 March 2001. For more information on the Swiss external policy in the 1990s, see CONSEIL FÉDÉRAL, RAPPORT SUR LA POLITIQUE EXTÉRIEURE DE LA SUISSE DANS LES ANNÉES NONANTE, FF 1994 I p. 150 (29 November 1993). See also Bureau de l'intégration DFAE/DPE, *La politique européenne de la Suisse*, at <http://www.europa.admin.ch/europapol/expl/pol/E/index.htm>.

<sup>66</sup> Following the successful vote on the last treaty on the extension of the free movement of persons to the ten new EU Member States (see *infra* IV.B.1.(b).(iii), "Extended Free Movement of Persons"), the Swiss and EU Ministers of Foreign Affairs informally mentioned in a press conference the possibility of negotiating a framework treaty which would comprehensively coordinate the existing treaties. See *L'idée d'un accord-cadre avec Bruxelles est désormais sur la table*, LE TEMPS, 28 September 2005.

<sup>67</sup> The negotiations started in 1994.

<sup>68</sup> The Agreements were concluded on 11 December 1998 in Vienna and were signed on 21 June 1999.

<sup>69</sup> See *supra* note 64. The then 15 Member States of the EU were Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. More precisely, the Bilaterals 1 were concluded with the EU, with the exception of the Agreement on free movement of persons, which was concluded with the EU and each of its Member States individually, and the Agreement on research (i.e. on scientific and technological co-operation), which was concluded with the EU and Euratom.

<sup>70</sup> See RS 0.122. See also Bureau de l'intégration DFAE/DPE (Section information), *Suisse-Union européenne: négociations bilatérales sectorielles, Fact Sheets, édition spéciale IV* (Bern summer 1998).

<sup>71</sup> The referendum took place on 21 May 2000. As much as 67 per cent of the voters accepted the agreements, in sharp contrast with the 1992 vote on the EEA. The European Parliament approved the agreements on 4 May 2000.

<sup>72</sup> Ground transport: RS 0.740.72; air transport: RS 0.748.127.192.68; free movement of persons: RS 0.142.112.681; research: RS 0.420.513.1; public procurement: RS 0.172.052.68; technical barriers to trade: RS 0.946.526.81; and agriculture: RS 0.916.026.81.

<sup>73</sup> This agreement allows Swiss research establishments to participate on an equal footing in all programmes and activities of the Fifth and, thanks to an additional agreement, to the present Sixth EU Framework Research Programme (2003–2006).

external trade policy. In a nutshell, the agreement on free movement of persons provides a progressive opening of the employment market. The agreement also provides for the mutual recognition of professional diplomas and a coordination of social insurance schemes.<sup>74</sup> That on ground transport entitles Switzerland to tax heavy goods trucks in order to encourage rail transit.<sup>75</sup> That on air transport opens a reciprocal access to the civil air transport market. That on agriculture partially liberalizes the market by reducing or eliminating non-tariff barriers and improving market access for certain products.<sup>76</sup> That on public procurement liberalizes procurement for State enterprises.<sup>77</sup> Lastly, that on technical barriers to trade achieves mutual recognition of conformity for most industrial products.

As of 1 May 2004, six of the seven agreements, as well as the 1972 EFTA bilateral FTAs between Switzerland and the EC<sup>78</sup> were automatically extended to the ten new EU members, except for the agreement on the free movement of persons, which was negotiated separately.<sup>79</sup>

#### (ii) *Bilaterals II*

As the negotiations between Switzerland and the EU continued, they resulted in a second set of agreements known as the “Bilaterals II”. These agreements bear on savings taxation, cross-border judicial assistance for indirect taxation fraud, the Schengen/Dublin systems<sup>80</sup> and the Bilaterals I “Leftovers”.<sup>81</sup> They touch both economic and political<sup>82</sup> issues.

The economic issues mainly impact the agro-food industry, financial services and tourism. As a result, banking secrecy has been indefinitely guaranteed despite Switzerland’s commitment to savings taxation as well as to cross-border judicial assistance for direct taxation matters within the Schengen/Dublin systems and for indirect taxation fraud. Thanks to savings taxation, Swiss corporations with subsidiaries in the EU will pay fewer taxes. Export taxes have been reduced for food and agriculture products. Tourism will benefit from the Schengen visa. The negotiations of the Bilaterals II started in 2002 and succeeded in 2004. The agreements were gradually

<sup>74</sup> Free movement of persons for employment purposes will be introduced in Switzerland after a period of 12 years if it confirms the agreement after seven years.

<sup>75</sup> This agreement is coupled with a very large rail infrastructure project in Switzerland.

<sup>76</sup> Cheese, fruits and vegetables.

<sup>77</sup> This agreement extends beyond WTO rules (which apply to water, transport and energy) to touch other entities and fields (local authorities, telecommunications, rail transport, and private enterprises operating on the basis of concessions).

<sup>78</sup> See *supra* IV.B.1.(a), “The 1972 EFTA Bilateral FTAs and the 1994 EFTA–EEA Agreements”.

<sup>79</sup> See *infra* IV.B.1.(b).(iii), “Extended Free Movement of Persons”.

<sup>80</sup> The Schengen and the Dublin systems institute co-operation in the fields of police, judicial assistance, asylum and migration.

<sup>81</sup> The “Leftovers” were listed in an addendum to the Final Acts of the Bilaterals I and included transformed agricultural products, statistics, environment, MEDIA (an EU movie promotion programme), education, pension schemes and services.

<sup>82</sup> Political issues include security, asylum, environment, statistics, culture and education.

entering into force as of 2005.<sup>83</sup> Among the “Leftovers”, the negotiations on services were severed from the Bilaterals II in 2003 and are following their own agenda.<sup>84</sup>

(iii) *Extended free movement of persons*

In 2004, Switzerland and the EU reached an agreement on the extension of the agreement on the free movement of persons<sup>85</sup> to the ten new EU Members<sup>86</sup> in the form of an additional protocol.<sup>87</sup> The Swiss work market will gradually open to East European workers. Switzerland will have the right to maintain restrictions up until 30 April 2011. The Swiss government also drafted antidumping measures to protect salaries and social schemes.<sup>88</sup> Although an optional, citizen-initiated referendum was requested against the extension of the agreement and the antidumping measures, this agreement was accepted by referendum on 25 September 2005. Thus, together with the Schengen/Dublin victory, this vote significantly reinforces the ties between Switzerland and the EU.

2. THE EUROPEAN FREE TRADE AGREEMENT<sup>89</sup>

Even though three of its seven members left, EFTA has paradoxically regained importance since the 1990s. EFTA's third-country relations became more dynamic with the end of the Cold War in 1989 when the EC initiated the so-called European Agreements with the transition economies of Central and Eastern Europe.<sup>90</sup> These agreements aimed at free trade in industrial goods, posing a threat of discrimination in these markets to businesses based in the EFTA States. There was therefore an economic need to react.

It then appeared to EFTA States that if they did not want to find themselves with a strong competitive disadvantage compared to the aggressive external economic policy of the EU, they had better boost their own external economic policy and establish a parallel

<sup>83</sup> Savings taxation: RS 0.642.026.81; cross border judicial assistance for indirect taxation fraud: RS 0.351.926.81; Schengen: RS 0.360.268.1; Dublin: RS 0.142.392.68. “Leftovers”, i.e. transformed agricultural products: RS 0.632.401.23 and RS 0.632.401.2; statistics: RS 0.431.026.81; environment: RS 0.814.092.681; MEDIA: RS 0.784.405.226.8; pension schemes: RS 0.672.926.81. Education was not settled in the form of an agreement but of mutual letters of intent; see <http://www.europa.admin.ch/nbv/off/abkommen/f/index.htm>.

<sup>84</sup> The post-negotiations stage of the Bilaterals II is particularly complex. The negotiations were started in June 2002 and successfully concluded one year later for seven out of nine agreements. The difficulties, mostly related to banking secrecy, were overcome for the two last agreements on 19 May 2004. The nine agreements were signed on 26 October 2004. Seven agreements were submitted to optional, citizen-initiated referendums. One such referendum was requested against the agreement on the Schengen/Dublin systems, but that agreement was accepted by 54.6 per cent of Swiss voters on 5 June 2005. The agreements are now gradually entering into force. See CONSEIL FÉDÉRAL, MESSAGE RELATIF À L'APPROBATION DES ACCORDS BILATÉRAUX ENTRE LA SUISSE ET L'UNION EUROPÉENNE, Y COMPRIS LES ACTES LÉGISLATIFS RELATIFS À LA TRANSPOSITION DES ACCORDS (“ACCORDS BILATÉRAUX II”) (1 October 2004), FF 2004 p. 5593 (9 November 2004). See also Bureau de l'intégration DFAE/DFE, “Signature et approbation”, at <http://www.europa.admin.ch/nbv/uebersicht/f/index.htm>.

<sup>85</sup> See *supra* IV.B.1.(b).(i), “Bilaterals I”.

<sup>86</sup> See *supra* note 64.

<sup>87</sup> FF 2004 p. 5573 (9 November 2004).

<sup>88</sup> RS 142.20.

<sup>89</sup> See also *supra* IV.B.1.(a), “The 1972 EFTA Bilateral FTAs and the 1994 EFTA–EEA Agreements”. However, the 1972 and 1994 treaties are hardly relevant under this heading since the former is bilateral and Switzerland the only EFTA Member left for which it still is in force, whereas Switzerland is not part of the EFTA–EEA Agreements.

<sup>90</sup> See *EFTA and EU Enlargement*, EFTA BULLETIN (September 2004).

network of treaties, both bilateral and multilateral, including BITs or, in the case of the EFTA FTAs, substantial chapters on FDI. This was done quite successfully, considering the limited means available to EFTA compared to those available to the EU. Thus, in the last decade, EFTA States established an extensive network of contractual relations in Central and Eastern Europe as well as in the Mediterranean region and even beyond.

As recalled at the EFTA Ministerial Meeting in Vaduz, Liechtenstein, in June 2005, EFTA is strongly committed to the multilateral trading system as developed under the WTO. Acting as a supplement to this system, EFTA sees its FTAs as playing an important role to safeguard competitiveness and increase market access in a world where regional and preferential trade agreements are proliferating.

In addition to this economic motivation, EFTA's third-country policy was also driven by the desire to contribute to the reconstruction of the former "command economies" and support their transition towards market-based economies and democracy, with the overall aim of consolidating prosperity and stability throughout the continent. This policy had been initially established in Gothenburg, Sweden in 1990, where EFTA Ministers decided to build their own network of co-operation with third-country partners based on parallelism to the European Economic Community's external-relations approach.

EFTA's third-country relations basically rely on three instruments elaborated in the course of its recent history: (a) the Bergen Declaration; (b) the Vaduz Convention; and (c) the 40th Anniversary Declaration.<sup>91</sup> To achieve its external policy, EFTA uses three types of agreements with third countries: Declarations on Co-operation (d); FTAs (e); and Treaties on Investment (f). A brief look at agreements with regional organizations (g) closes the discussion.

(a) *The Bergen Declaration*

The focus of EFTA's third-country relations has gradually shifted from Central and Eastern Europe to the Mediterranean area and further afield. A Ministerial Declaration, adopted in Bergen, Norway in 1995, extended the geographical scope beyond the immediate confines of Europe for the first time. It confirmed the will of the EFTA States to respond in a dynamic and independent manner to the growing need for political, social and economic stability in Europe as well as in adjacent regions.

The Bergen Declaration reinforced and established certain basic principles for EFTA relations with third countries: the EFTA States would pursue a joint third-country policy approach in accordance with shared interests, with flexibility concerning geographical focus and scope of the agreements. In addition, the EFTA States would strive to participate in the formulation and implementation of broader concepts of regional co-operation within Europe and beyond.

<sup>91</sup> For comprehensive resources, including legal bases, on EFTA, see *supra* note 58.

Soon after, EFTA affirmed its expansion ambitions in the Mediterranean zone by initiating the Barcelona Process.<sup>92</sup> At its Ministerial Meeting in Lillehammer, Norway in June 1999, EFTA considered the possibility of engaging in negotiations with other countries outside Europe. An FTA with Mexico and a Declaration on Trade and Investment Co-operation (DOC) with Mercosur,<sup>93</sup> both signed in 2000, extended this network across the Atlantic. An FTA with Singapore signed in 2002 enlarged it into Asia. At the time being, Switzerland is bound by 43 treaties (FTAs or DOCs). In addition, eight treaties are currently under negotiation.<sup>94, 95</sup>

(b) *The Vaduz Convention*

Following an offer from the Swiss government to its EFTA partners to reciprocally extend the benefits and level of co-operation established in the Swiss–EU Bilateral Agreements to the other EFTA States, EFTA Ministers decided at the Lillehammer Meeting of 1 June 1999 to initiate an updating of the EFTA Convention. In most of the areas covered by the Bilateral Agreements, the EEA EFTA States had already established common rules through the EEA Agreement. Thus, the task was to create an interface between the two sets of agreements. Developments in EFTA's relations with third countries and in the WTO context were also taken into account.

On 21 June 2001, the EFTA Member States signed the Vaduz Convention by which they agreed on significant amendments to the EFTA Convention in order to modernize it and bring it up to a similar level of co-operation as that which existed between the EFTA States and the EU, especially considering the Bilateral Agreements.

Notably, the Vaduz Convention extended the scope of the EFTA Convention to include new trade areas such as trade in services and investments, in accordance with the 40th Anniversary Declaration.<sup>96</sup>

(c) *The 40th Anniversary Declaration*

In a Declaration adopted in Geneva in December 1999 to mark EFTA's 40th anniversary, EFTA States Ministers reaffirmed their commitment to the further development of EFTA's network of FTAs and indicated the potential for widening their scope so as to include fields such as services and investments. The Declaration also

<sup>92</sup> In Barcelona, Spain, on 27–28 November 1995, the governments of 27 countries, the EU Council and the European Commission established the Euro-Mediterranean Partnership (EMP or Barcelona Process) and adopted the Barcelona Declaration, which, among other things, aims at a free trade zone by 2010.

<sup>93</sup> See *infra* note 104.

<sup>94</sup> In addition to the negotiations already officially started, at its Ministerial Meeting in Vaduz, Liechtenstein on June 2005, EFTA expressed its interest in China, Japan, Syria, Russia and Ukraine. A high-level meeting on trade and investment facilitation with the United States of America took place in Washington, D.C. on 15 June 2004 but did not result in the opening of official negotiations. A similar attempt by Switzerland was also abandoned in 2005.

<sup>95</sup> EFTA also set up an Industrial Development Fund for Portugal.

<sup>96</sup> Chapter IX of the Vaduz Convention on "Investment" covers establishment and capital movements. For the full text of the Vaduz Convention, see the EFTA Website at <http://secretariat.efta.int>.

confirmed the EFTA States' commitment to continue to strengthen their relations with the countries in the Mediterranean as well as adjacent regions.

(d) *Declarations on Co-operation*

Declarations on Co-operation (DOCs) are a first step on the road to free trade between the partners, with the following objectives: to promote the harmonious development of their economic relations; to create an environment supportive of private entrepreneurship, of free competition and of economic activity based on market forces; and to examine ways and means of expanding and liberalizing their trade relations. In addition, they are based on mutual benefit, non-discrimination and reciprocity and cover co-operation on trade-related issues such as technical barriers to trade, information on foreign trade, competition, public procurement markets and intellectual property rights. Ultimately, they aim at improving conditions for the implementation of private-sector co-operation projects.

These are, in essence, letters of intent and therefore have no constraining effect other than a non-legally binding commitment of the parties to make their best endeavours to attain the goals outlined in the DOC, which are meant to pave the way to a binding FTA.

(e) *Free Trade Agreements*

Free trade agreements pretend to establish between the partners a free trade area similar to that prevailing among the EFTA States themselves, with free trade in industrial products and processed agricultural goods, as well as in fish and other marine products.<sup>97</sup>

FTAs are regularly adapted and upgraded in consideration of three main objectives: to make them as effective as possible; to ensure that they take into account developments in the WTO; and to make them compatible with the evolution within the wider European economic integration framework. They are primarily concerned, in their day-to-day management, with customs and origin matters and with processed agricultural products.

(f) *Treaties on Investment*

In the spirit of the 40th Anniversary Declaration, as well as the Vaduz Convention, FTAs have gradually evolved from a mere declaration of intent<sup>98</sup> to sophisticated and

<sup>97</sup> Special arrangements apply for processed agricultural products, while trade in basic agricultural products is subject to bilateral protocols.

<sup>98</sup> All EFTA FTAs but a couple of the earliest (with Bulgaria and Turkey) contain at least a provision expressing the parties' intent to consider extending their agreement to investment and services in the future. More evolved clauses contain a best-endeavour commitment, including express reference to a BIT; see, for example, the FTA with Lebanon, Article 26(b). Despite not applying to investments as such, these treaties generally contain a binding clause on the transfer of investments and their repatriation including revenues; see, for example, the FTA with Jordan, Article 15(3).

comprehensive sets of rules on services (including financial) and investments (or establishment<sup>99</sup>).<sup>100</sup> Ultimately, the first full-blown Treaty on Investment (TOI) was signed between EFTA Members and South Korea<sup>101</sup> (even though Norway abstained) simultaneously to, but separately from, an FTA (signed by all EFTA Members in this latter instance).<sup>102</sup> Despite its somewhat ambiguous nature, I believe that this TOI will be followed by more.

(g) *Regional Organizations*

In addition, EFTA has established contacts not only with individual partner countries but also with regional groupings, such as the Gulf Co-operation Council (GCC),<sup>103</sup> Mercosur,<sup>104</sup> the Southern Africa Customs Union (SACU),<sup>105</sup> and the Association of South-East Asian Nations (ASEAN).<sup>106</sup> It signed a DOC with the GCC on 23 May 2000 and a Declaration on Trade and Investment Co-operation with Mercosur on 12 December 2000. The Barcelona Process<sup>107</sup> creates the necessary conditions for the EFTA States, notably for their economic operators, to participate in a future Euro-Mediterranean Free Trade Area.<sup>108</sup>

In 1998, EFTA responded to a Canadian initiative and opened negotiations with the aim of creating a Trans-Atlantic Free Trade Area. Conceivably, this could pave the way to an agreement with the North American Free Trade Area (NAFTA).<sup>109</sup>

<sup>99</sup> The FTA with Chile does not mention investments but refers to "establishment"; see Chapter III.

<sup>100</sup> The FTAs with Mexico, Singapore and Chile contain a comprehensive set of rules on investments and services, as well as on public procurement, competition and protection of intellectual property. The FTA with Croatia, which can be seen as the precursor of the last generation, is less evolved but already contains a most-favoured-nation clause as well as express best-efforts commitments; see Article 16, namely 16(2).

<sup>101</sup> See FF 2006 p. 963. This will replace the 1971 BIT between Switzerland and South Korea after ratification. Despite the fact that Norway abstained from signing, and the Treaty's title reading "*Accord sur l'investissement entre la République d'Islande, la Principauté du Liechtenstein, la Confédération suisse et la République de Corée*", Switzerland, Liechtenstein and Iceland are literally addressed as "the EFTA Parties" ("*les Parties à l'AELE*"). The TOI forms expressly part of the FTA. See *id.*, Preamble, p. 963. Norway is said to have withdrawn from the negotiations on investments because of reservations related to its Constitution; see MESSAGE CONCERNANT L'ACCORD DE LIBRE-ÉCHANGE ENTRE LES ÉTATS DE L'AELE ET LA RÉPUBLIQUE DE CORÉE, L'ACCORD SUR L'INVESTISSEMENT ENTRE L'ISLANDE, LE LIECHTENSTEIN, LA SUISSE ET LA CORÉE, AINSI QUE L'ACCORD AGRICOLE ENTRE LA SUISSE ET LA CORÉE, FF 2006 p. 908 (9 December 2005). Therefore, I believe that this TOI can be legitimately regarded as a genuine and the first EFTA TOI.

<sup>102</sup> See FF 2006 p. 929. Unlike the BIT, the FTA unambiguously refers to the "EFTA States" in its title, which reads "*Accord de libre-échange entre les Etats de l'AELE et la République de Corée*"; compare with *supra* note 101.

<sup>103</sup> The GCC gathers Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates. So far, Switzerland has entered into BITs only with Kuwait and the United Arab Emirates.

<sup>104</sup> Mercosur gathers Argentina, Brazil, Paraguay and Uruguay. However, as discussed below, it has extensive relationships with most Latin American countries and is therefore seen as the leading free-market organization in the region.

<sup>105</sup> SACU gathers Botswana, Lesotho, Namibia, South Africa and Swaziland.

<sup>106</sup> ASEAN gathers Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam. Switzerland has entered into a BIT with all of these countries except Brunei and Myanmar. On 11 December 1996, ASEAN and EFTA held their first Ministerial Meeting in Singapore and issued a joint press statement expressing their mutual commitment to work in closer co-operation. No formal negotiations have been opened so far, though.

<sup>107</sup> See *supra* note 92.

<sup>108</sup> *Id.*

<sup>109</sup> The NAFTA gathers the United States of America, Canada and Mexico.

One may speculate that the agreements entered into by EFTA with other regional organizations will, by a snowball effect, lead to agreements with their regional partners. Thus, for example, Mercosur signed a framework agreement of inter-regional association, political co-operation and coordination with the EU; a framework agreement with the Andean Community to negotiate a free trade zone; and a framework agreement of commerce and investment with the Central American Common Market. At present, Mercosur is negotiating with another 30 countries of the hemisphere the creation of a Free Trade Area of the Americas (FTAA). Even though the EFTA DOC signed with Mercosur does obviously not imply that its benefit will be extended to the countries<sup>110</sup> and organizations with which Mercosur has entered into an agreement, it still creates a favourable environment for further negotiations. The case of Canada is also stimulating since, unlike EFTA, the EU has not even started bilateral negotiations with this country, let alone consider an inter-regional, transatlantic FTA. Ultimately, the DOC signed with the GCC and the contacts made with ASEAN open new perspectives with the Arab and the Asian worlds.

It is worth recalling that EFTA States care that their treaties be Euro- and WTO-compatible. Therefore, they are systematically notified to both organizations.

### 3. REGIONAL FINANCIAL INSTITUTIONS

Most developing countries are funded, sometimes heavily, by regional banks. Generally closely related to, but independent from the United Nations, they focus on developing economies. They mainly are the African Development Bank Group (ADBG),<sup>111</sup> the Asian Development Bank (ADB)<sup>112</sup> and the Inter-American Bank of Development (IAB).<sup>113</sup> The EU's development bank is the European Bank for Reconstruction & Development (EBRD).<sup>114</sup> In line with its development policy, Switzerland is a member of all of them and participates in numerous funds set up by these organizations. This list is not exhaustive; again, there are innumerable other multilateral organizations funding or assisting, in one way or another, developing countries of which Switzerland may be a member or with which it may have entered into a treaty, often in the form of a mixed credit.<sup>115</sup>

On the Swiss side, the regional banks' partners are seco and DDC.<sup>116</sup> Provided Switzerland is a member, as is the case of the institutions mentioned above, Swiss

<sup>110</sup> However, see *supra* IV.A.3.(b).(ii), "Protection, Fair and Equitable Treatment and Most-favoured nation Treatment".

<sup>111</sup> See RS 0.972.31. Switzerland is also a Member of the African Development Fund, RS 0.972.32. In addition, it has concluded agreements with the East-African Development Bank, the West-African Development Bank and the Madagascar Central Bank.

<sup>112</sup> See RS 0.972.2. Switzerland has also concluded an agreement with ASEAN.

<sup>113</sup> See RS 0.972.4. The IAB mostly cares for Latin America.

<sup>114</sup> See RS 0.972.1. Switzerland has also concluded an agreement with the European Investment Bank.

<sup>115</sup> See RS 0.972 for a list of multilateral financial aid treaties entered into by Switzerland. See also RS 0.973, which includes bilateral aid. See also the DFAE Website at [http://www.eda.admin.ch/intagr/f/foreign/index\\_o.html](http://www.eda.admin.ch/intagr/f/foreign/index_o.html) for a list of the international organizations with which Switzerland has signed a treaty.

<sup>116</sup> See *supra* note 31.

investors have the right to tender for development projects and apply for loans. Even though private investors are often unaware of them, these institutions manage considerable funds and are very active.

### C. MULTILATERAL ORGANIZATIONS AND TREATIES

It would be beyond the scope of this article to analyse in great detail multilateral organizations and related treaties concerned with international trade and foreign investments. What does fall within its scope, however, is to mention their existence as far as they apply to Swiss traders and investors and to briefly discuss to what extent the former benefit the latter. At least two such organizations and treaties are of great relevance from this point of view: the Organisation for Economic Co-operation and Development (OECD); and the WTO.

#### 1. THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Although relatively less known, the OECD, of which Switzerland has been a Member since its inception in 1961, plays a vital role in the free movement of capital, without which most FDI would be impossible. The OECD groups 30 Member countries, most of which are Western, mainly European, developed countries.<sup>117</sup> OECD Members share a commitment to democratic government and the market economy.<sup>118</sup> With active relationships with some 70 other countries, non-governmental organizations and civil societies, it has a global influence.

The OECD produces internationally agreed instruments, decisions and recommendations to promote the rules of the game in areas where multilateral agreements are necessary for individual countries to make progress in a globalized economy. Sharing the benefits of growth is also crucial, as is shown in activities such as emerging economies, sustainable development, territorial economy and aid. Dialogue, consensus and peer pressure are the functioning principles of the OECD.<sup>119</sup>

#### (a) *The Code of Liberalisation of Capital Movements and the Code of Liberalisation of Current Invisible Operations*

The Code of Liberalisation of Capital Movements and the Code of Liberalisation of Current Invisible Operations constitute legally binding rules that stipulate

<sup>117</sup> OECD gathers Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, the Republic of Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States of America. See also *infra* note 121.

<sup>118</sup> China is not a member of the OECD because it has failed to meet these criteria so far. The OECD has been referred to with some contempt as a “*club de riches*” by certain Chinese officials.

<sup>119</sup> For comprehensive resources, including legal bases, on the OECD, see the OECD Website at <http://www.oecd.org>.

progressive, non-discriminatory liberalization of capital movements, the right of establishment and current invisible transactions (mostly services). All non-conforming measures must be listed in the Member States' reservations on the Codes. The Codes were initially adopted in 1961 but have since been revised and expanded in scope. Important recent additions were the right of establishment (1986) and cross-border financial services (1992). New works to promote the liberalization of insurance services and professional services have been launched. For most Member countries, remaining reservations against the Codes' obligations relate to foreign direct investment, the purchase of real estate by non-residents and the prohibition of certain types of securities operations.<sup>120</sup> The Codes were last updated in September 2004.

(b) *The Declaration on International Investment and Multinational Enterprises*

The Declaration on International Investment and Multinational Enterprises is a broad political commitment adopted by the OECD Governments in 1976 to facilitate direct investment among OECD Members. The Declaration consists of a package comprising four instruments for international co-operation, the best known of which are the *Guidelines for Multinational Enterprises* discussed below. Under the *National Treatment Instrument*, adhering countries commit themselves to treat foreign-controlled enterprises operating in their territories not less favourably than domestic enterprises in similar situations. The instrument on *Conflicting Requirements* calls on adhering countries to avoid or minimize conflicting requirements imposed on multinational enterprises by governments of different countries. The instrument on *International Investment Incentives and Disincentives* provides for efforts among adhering countries to improve co-operation on measures affecting FDI.

The *Guidelines* are recommendations addressed by governments to multinational enterprises operating in or from adhering countries.<sup>121</sup> They provide voluntary principles and standards for responsible business conduct in a variety of areas.<sup>122</sup> They are the only multilaterally endorsed and comprehensive code that governments are committed to promoting. The *Guidelines'* recommendations express the shared values of governments of the countries that are the source of most of the world's FDI flows and home to most multinational enterprises. They aim to promote the positive contributions multinationals can make to economic, environmental and social progress.

Observance of the *Guidelines* is voluntary. The assumption is not that enterprises need to be "controlled" but that internationally agreed guidelines can help prevent misunderstandings and build an atmosphere of mutual confidence and predictability between business, labour and governments. The *Guidelines* rely on the support of the

<sup>120</sup> On the Codes, see, for example, CARREAU & JUILLARD, *supra* note 53 pp. 416–417.

<sup>121</sup> The 30 OECD Member countries plus nine non-Member countries: Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia.

<sup>122</sup> Including employment and industrial relations, human rights, environment, information disclosure, competition, taxation, and science and technology.

business community, labour representatives and non-governmental organizations. Several non-OECD Members have already adhered to the Guidelines. They were last reviewed in 2000.<sup>123</sup>

(c) *The Policy Framework for Investment (PFI)*

It is worth recalling that between 1995 and 1998 OECD Members held negotiations on a Multilateral Agreement on Investment (MAI).<sup>124</sup> This project faced fierce criticisms and was abandoned, however.<sup>125</sup> Since the WTO decided in August 2004 to set aside the drafting of a new multilateral agreement on FDI for the time being, the OECD Codes are to remain the most important multilateral set of rules on FDI for the coming years.<sup>126</sup>

Nevertheless, the idea of a multilateral agreement on investment seems to return by the back door in the less constraining form of the draft Policy Framework for Investment (PFI).<sup>127</sup> The PFI aims at helping governments improve their investment environment, taking into account the broader interests of the communities in which investors operate. It is drawing on good practices from OECD and non-OECD experiences. The PFI proposes a set of practical policy considerations in ten inter-related areas that contribute to a healthy investment environment.<sup>128</sup> While the PFI is addressed to governments, it is to be seen in the broader context of other converging international initiatives to improve the investment climate, including the OECD Guidelines for Multinational Enterprises.

The Framework is being developed by a Task Force through a partnership process involving OECD and non-OECD government representatives, in co-operation with civil society and international organizations. This draft is work currently in progress. Whether it will be more successful than the MAI remains to be seen.<sup>129</sup>

## 2. THE WORLD TRADE ORGANIZATION

The WTO now gathers 149 Member States, and this number keeps growing. Of all the trade- and FDI-related treaties to which Switzerland is a party, the WTO Agreements

<sup>123</sup> The 2000 Review was adopted by the OECD on 27 June 2000.

<sup>124</sup> See OECD, Directorate for Financial, Fiscal and Enterprise Affairs, *The MAI Negotiating Text* (last version of 24 April 1998), at <http://www.OECD.org/data/OECD/46/40/1895712.pdf>. This project was actively supported by Switzerland, which had submitted a draft. See also *supra* note 53 *in fine*.

<sup>125</sup> On the MAI, see for example, CARREAU & JUILLARD, *supra* note 53 pp. 425–427 and 459–460.

<sup>126</sup> See also the Doha Declaration of the Fourth WTO Ministerial Conference in Doha, Qatar in November 2001, which provides for negotiations on a range of WTO-related issues, at [http://www.wto.org/English/tratop\\_e/dda\\_e/dda\\_e.htm#dohadeclaration](http://www.wto.org/English/tratop_e/dda_e/dda_e.htm#dohadeclaration). On the multilateral investment framework in general, see, for example, CARREAU & JUILLARD, *supra* note 53 pp. 379 and 427.

<sup>127</sup> See OECD, Investment Division, Directorate for Financial and Enterprise Affairs, *Policy Framework for Investment (PFI)*, Draft text for public consultation (until 10 February 2006), at [http://www.oecd.org/document/42/0,2340,en\\_2649\\_34529562\\_35725418\\_1\\_1\\_1\\_34529562,00.html](http://www.oecd.org/document/42/0,2340,en_2649_34529562_35725418_1_1_1_34529562,00.html).

<sup>128</sup> These are: investment policy; investment promotion and facilitation; trade policy; competition policy; tax policy; corporate governance; policies for promoting responsible business conduct; human resource development; infrastructure and financial services; and public governance.

<sup>129</sup> It appears to be welcomed by the Swiss government; see CONSEIL FÉDÉRAL, *RAPPORT SUR LA POLITIQUE ÉCONOMIQUE EXTÉRIEURE* 2005, FF 2006 p. 1635, No. 3131 at 1681 (11 January 2006).

are those binding the largest number of countries. WTO's membership exceeds the number of TOCs signed by Switzerland by 40 per cent. Switzerland has been a Member since WTO's inception in 1995.<sup>130</sup>

The current set of WTO rules is the outcome of the 1986–1994 Uruguay Round of multilateral trade negotiations, which included a major revision of the original General Agreement on Tariffs and Trade (GATT), which was also the former name of the WTO. The GATT is now the WTO's principal rule-book for trade in goods. The Uruguay Round also created new rules for dealing with trade in services, relevant aspects of intellectual property, dispute settlement, and trade policy reviews. The complete set consists of about 60 agreements and separate commitments (called schedules)<sup>131</sup> made by individual Members in specific areas such as lower customs-duty rates and services market-opening, i.e. in the areas of customs tariffs, agriculture, textiles, services, intellectual property, anti-dumping, subsidies, emergency safeguards, technical and bureaucratic barriers, civil aircraft, government purchases, beef, and dairy products.

Through these agreements, WTO Members operate a non-discriminatory trading system that spells out their rights and their obligations. Each country receives guarantees that its exports will be treated fairly and consistently in other countries' markets. Each promises to do the same for imports into its own market. The system also gives developing countries some flexibility in implementing their commitments. This is also the main difference with FDI, which benefits neither from a comparable multilateral treaty nor from a guarantee of admission. In other words, the WTO confers a right to trade, but BITs do not confer a right to invest.<sup>132</sup>

The most significant areas for investors covered by the WTO Agreements are goods, under the GATT; services, under the GATS; and intellectual property rights, under the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). Even though it is comparatively less important, it is also worth mentioning in this context the Agreement on Trade-Related Investment Measures (the TRIMs Agreement). This present article will not discuss dispute settlement<sup>133</sup> and trade policy reviews.<sup>134</sup>

#### (a) *The General Agreement on Tariffs and Trade*

The origin of the WTO (then the GATT) lies with trade in goods. From 1947 to 1994, the GATT was the forum for negotiating lower customs-duty rates and other trade

<sup>130</sup> Switzerland has been a Member since 1 July 1995. The WTO Agreement was opened to signature on 1 January 1995.

<sup>131</sup> The WTO rules comprise approximately 30,000 pages.

<sup>132</sup> See *supra* IV.C.1.(c), "The Policy Framework for Investment (PFI)".

<sup>133</sup> Dispute settlement will be discussed in the second part of this article on the protection of exports and investments.

<sup>134</sup> The purpose of the Trade Policy Review Mechanism is to improve transparency, to create a greater understanding of the policies that countries are adopting, and to assess their impact. Many Members also see the reviews as constructive feedback on their policies. All WTO Members must undergo periodic scrutiny, each review containing reports by the country concerned and by the WTO Secretariat. Over 45 Members have been reviewed since the WTO Agreement came into force. See also WTO *supra* note 11.

barriers. The text of the GATT spelled out important rules, particularly non-discrimination. Since 1995, the updated GATT has become the WTO's umbrella agreement for trade in goods. It has annexes dealing with specific sectors, such as agriculture and textiles, and with specific issues, such as state trading, product standards, subsidies and actions taken against dumping. The same principles apply in the GATS.

(b) *The General Agreement on Trade in Services*

Banks, insurance firms, telecommunications companies, tour operators, hotel chains and transport companies looking to do business abroad can now enjoy the same principles of freer and fairer trade that originally only applied to trade in goods. These principles appear in the new GATS. WTO Members have also made individual commitments under the GATS stating which of their services sectors they are willing to open to foreign competition and how open those markets are.

(c) *The Agreement on Trade-Related Aspects of Intellectual Property Rights*

The WTO intellectual property agreement, or the TRIPS Agreement, amounts to rules for trade in ideas and creativity. The rules state how copyrights, trademarks, geographical names used to identify products, industrial designs, integrated circuit layout-designs and undisclosed information such as trade secrets should be protected when trade is involved.

(d) *The Agreement on Trade-Related Investment Measures*

The TRIMS Agreement, negotiated during the Uruguay Round, applies only to measures that affect trade in goods. Recognizing that certain investment measures can have trade-restrictive and -distorting effects, it states that no Member shall apply a measure that is prohibited by the provisions of GATT Article III (national treatment) or Article XI (quantitative restrictions).<sup>135</sup>

### 3. THE WORLD BANK

Among the many organizations pertaining to the United Nations, which Switzerland joined only in 2002, the World Bank is one of the United Nations specialized agencies and its development bank.<sup>136</sup> Three of its institutions, the

<sup>135</sup> Examples of inconsistent measures, as spelled out in the Annex's Illustrative List, include local-content or trade-balancing requirements. The Agreement contains transitional arrangements allowing Members to maintain notified TRIMS for a limited time following the entry into force of the WTO.

<sup>136</sup> A specialized institution of the United Nations, the World Bank is in fact a group, the World Bank Group, consisting of five institutions: the International Bank for Reconstruction & Development (IBRD) (not to be mixed up with the European Bank for Reconstruction & Development (EBRD), see *supra* IV.B.3, "Regional Financial Institutions"), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Centre for Settlement of Investment disputes (ICSID). Switzerland is a Member of all of them. See RS 0.972.2-4 and 0.975.1-2. MIGA and ICSID will be discussed in the second part of this article on the protection of exports and investments.

International Bank for Reconstruction & Development (which is the Bank itself), the International Development Association and the International Finance Corporation offer to Swiss investors, on a multilateral scale, opportunities comparable to the regional banks mentioned above.<sup>137</sup>

*This article will be continued in a second part on the protection of exports and investments. A general conclusion is drawn at the end of the second part.*

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<sup>137</sup> See *supra* IV.B.3, “Regional Financial Institutions”.

ANNEX TABLE 1: LIST OF SWISS BILATERAL INVESTMENT TREATIES AND TREATIES OF COMMERCE<sup>138</sup>

Country <sup>139</sup>	BIT		TOC (TOF) <sup>140</sup>	
	RS	Date <sup>141</sup>	RS	Date
Afghanistan			0.142.111.141	17.2.1928
Albania	0.975.212.3	22.9.1992	0.142.111.231	10.6.1929
Algeria		30.11.2004	0.946.291.271	5.7.1963
Argentina	0.975.215.4	12.4.1991	0.946.291.541	25.11.1957
Armenia	0.975.215.6	19.11.1998	0.946.291.561	19.11.1998
Australia			0.142.113.671 <sup>142</sup>	6.9.1855
Austria			0.946.291.631	15.9.1954
Azerbaijan		(23.2.2006)	0.946.291.641	30.10.2000
Bangladesh	0.975.216.7	14.10.2000		
Barbados	0.975.216.8	29.3.1995		
Belarus	0.975.216.9	28.5.1993	0.946.291.691	28.5.1993
Belgium			0.946.291.722 <sup>143</sup>	1.6.1957
Bénin <sup>144</sup>	S. TOC		0.946.291.741	20.4.1966
Bolivia	0.975.218.9	6.11.1987		
Bosnia		5.9.2003		<sup>145</sup> 11.9.2001
Botswana	0.975.219.4	26.6.1998		
Brazil		11.11.1994	0.946.291.981 <sup>146</sup>	24.7.1936
Bulgaria	0.975.221.4	28.10.1991	0.946.292.141	23.11.1972
Burkina Faso <sup>147</sup>	S. TOC		0.946.292.161	6.5.1969
Cabo Verde	0.975.223.4	28.10.1991		
Cambodia	0.975.222.3	12.10.1996		
Cameroon	S. TOC		0.946.292.271	28.1.1963
Canada			0.142.113.671 <sup>148</sup>	6.9.1855
Central African Republic	S. TOC		0.946.292.361	28.2.1973
Chad	S. TOC		0.946.297.361	21.2.1967
Chile	0.975.224.5	24.9.1999	0.946.292.451.1	31.10.1897
China	0.975.224.9	12.11.1986	0.946.292.491 <sup>149</sup>	20.12.1974
Colombia			0.142.112.631	14.3.1908
Congo (Brazzaville)	S. TOC		0.946.292.721	18.10.1962

<sup>138</sup> Status as of 1 May 2006. Treaties for which a reference to the *Recueil systématique des lois fédérales* (RS) is missing have not been published yet. All errors and omissions are the author's own. Only the official publication is legally binding. All published treaties are available at <http://www.admin.ch/ch/t/rs/index.html>. See also <http://www.eda.admin.ch/eda/t/home/foreign/intagr/database.html> (for additional information, namely on non-published treaties and a classification by country), as well as <http://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. Under BITs, the entry S. TOC means "See TOCs".

<sup>139</sup> 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".

<sup>140</sup> 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.

<sup>141</sup> Date of signature. A date between parentheses means that the BIT had not yet come into force as of 1 May 2006.

<sup>142</sup> See also RS 0.142.111.581.

<sup>143</sup> See also TOC of 26 August 1929, RS 0.946.291.721.

<sup>144</sup> Formerly Dahomey.

<sup>145</sup> FF 2002 p. 1405, 1474.

<sup>146</sup> "Temporary" treaty.

<sup>147</sup> Formerly Haute-Volta.

<sup>148</sup> See also RS 0.142.112.321.

<sup>149</sup> See also TOF of 13 June 1918, RS 0.142.112.491.

ANNEX TABLE 1: LIST OF SWISS BILATERAL INVESTMENT TREATIES AND TREATIES OF COMMERCE<sup>138</sup>

Country <sup>139</sup>	BIT		TOC (TOF) <sup>140</sup>	
	RS	Date <sup>141</sup>	RS	Date
Congo, Democratic Republic <sup>150</sup>	0.975.282.1	10.3.1972	0.946.298.211	10.3.1972
Costa Rica	0.975.228.5	1.8.2000 <sup>151</sup>		
Côte d'Ivoire	S. Toc		0.946.292.891	26.6.1962
Croatia	0.975.229.1	30.10.1996	0.946.292.911	12.3.1999
Cuba	0.975.229.4	28.6.1996	0.946.292.941	30.3.1954
Czech Republic	0.975.274.1	5.10.1990	0.946.297.411 <sup>152</sup>	24.11.1953
Denmark			0.142.113.141	10.2.1875
Djibouti		4.2.2001		
Dominican Republic		(27.1.2004)		
Ecuador	0.975.232.7	2.5.1968	0.946.293.272 <sup>153</sup>	8.10.1957
Egypt	0.975.232.1	25.7.1973	0.946.293.211 <sup>154</sup>	19.4.1930
El Salvador	0.975.232.3	8.12.1994	0.946.293.231	11.2.1954
Estonia	0.975.233.4	21.12.1992	0.946.297.725	14.10.1925
Ethiopia	0.975.234.1	26.6.1998	0.142.113.361	24.5.1933
Finland	<sup>155</sup>			
France			0.946.293.492 <sup>156</sup>	28.11.1957
Gambia	0.975.235.8	22.11.1993		
Georgia			0.946.293.601	11.3.1999
Germany			0.946.291.361	15.12.1977
Ghana	0.975.236.3	8.10.1991	0.142.113.671 <sup>157</sup>	6.9.1855
Greece			0.946.293.721 <sup>158</sup>	29.11.1926
Guatemala		9.9.2002	0.946.293.761	1.4.1955
Guinea	S. Toc		0.946.293.811	26.4.1962
Guyana		(13.12.2005)		
Honduras	0.975.241.4	14.10.1993		
Hong Kong	0.975.241.6	22.9.1994		
Hungary	0.975.241.8	5.10.1988		
Iceland			0.142.114.451 <sup>159</sup>	3.4.1963
India	0.975.242.3	4.4.1997	0.142.114.231	14.8.1948
Indonesia	0.975.242.7	6.2.1974	0.946.294.271 <sup>160</sup>	30.12.1954
Iran		8.3.1998	0.946.294.362 <sup>161</sup>	1.2.1964
Iraq			0.946.294.321	11.2.1978

<sup>150</sup> Formerly Zaïre.<sup>151</sup> Replaced BIT of 1 September 1965.<sup>152</sup> See also RS 0.946.297.431.<sup>153</sup> See also TOF of 22 June 1888, RS 0.142.113.271.<sup>154</sup> "Temporary" treaty.<sup>155</sup> See, however, TOF of 7 May 1935, RS 0.142.113.451. Even though this treaty is a treaty of friendship, it contains clear provisions on bilateral investments. As such, it could arguably be the oldest Swiss BIT. Several other TOFs contain provisions theoretically applicable to FDI, but they are very summary and vague. See *supra* IV.A.1, "Treaties of Friendship".<sup>156</sup> See also Toc of 31 March 1937, RS 0.946.293.491.<sup>157</sup> See also RS 0.142.113.631.<sup>158</sup> "Temporary" treaty.<sup>159</sup> See also TOF of 10 February 1875, RS 0.142.113.141.<sup>160</sup> See also TOF of 19.8.1875, RS 0.142.116.361 and RS 0.142.114.271.<sup>161</sup> See also "temporary" Toc of 28 August 1928, RS 0.946.294.361, and TOF of 25 April 1934, RS 0.142.114.361.

ANNEX TABLE 1: LIST OF SWISS BILATERAL INVESTMENT TREATIES AND TREATIES OF COMMERCE<sup>138</sup>

Country <sup>139</sup>	BIT		TOC (TOF) <sup>140</sup>	
	RS	Date <sup>141</sup>	RS	Date
Israel			0.946.294.491	14.9.1956
Italy			0.946.294.542 <sup>162</sup>	21.10.1950
Jamaica	0.975.245.8	11.12.1990		
Japan			0.142.114.749	21.6.1911
Jordan <sup>163</sup>		25.2.2001 <sup>164</sup>	0.946.294.701	11.11.1976
Kazakhstan		12.5.1994	0.946.294.701	12.5.1994
Korea, North		14.12.1998		
Korea, South	0.975.228.1	7.4.1971 <sup>165</sup>		
Kuwait	0.975.247.6	31.10.1998		
Kyrgyzstan		29.1.1999	0.946.294.741	10.5.1997
Laos	0.975.248.1	4.12.1996		
Latvia	0.975.248.7	22.12.1992	0.946.297.726	4.12.1924
Lebanon		3.3.2000		
Lesotho		(16.6.2004)		
Liberia			0.142.114.941	23.7.1963
Lithuania	0.975.251.6	23.12.1992		
Luxembourg			0.946.291.722 <sup>166</sup>	1.6.1957
Libya		8.12.2003		
Macedonia, T.F.Y.R.	0.975.252.0	26.9.1996	0.946.295.201	8.1.1996
Madagascar	S. TOC		0.946.295.231	17.3.1964
Malaysia	0.975.252.7	1.3.1978		
Mali	0.975.254.1	8.3.1978	0.946.295.411	8.3.1978
Mauritania	S. TOC		0.946.295.581	9.9.1976
Mauritius	0.975.255.4	26.11.1998		
Mexico		10.7.1995		<sup>167</sup> 7.10.1998
Moldova	0.975.256.5	30.11.1995	0.946.295.651	30.11.1995
Mongolia	0.975.257.2	29.1.1997		
Morocco	0.975.254.9	17.12.1985		
Mozambique	0.975.257.4	29.11.2002	0.946.295.741	22.10.1979
Namibia	0.975.257.7	1.8.1994		
Netherlands			0.946.291.721 <sup>168</sup>	26.8.1929
New Zealand			0.946.296.142 <sup>169</sup>	5.5.1938
Nicaragua	0.975.258.5	30.11.1998		
Niger	S. TOC		0.946.295.891	28.3.1962
Nigeria	0.975.259.4	30.11.2000		
Oman	0.975.261.6	17.8.2004		
Pakistan	0.975.262.3	11.7.1995	0.142.113.671 <sup>170</sup>	6.9.1855

<sup>162</sup> See also 27 January 1923, RS 0.946.294.541.<sup>163</sup> Replaced the BIT of 11 November 1976.<sup>164</sup> See also BIT of 11 November 1976, RS 0.975.248.1.<sup>165</sup> Will be replaced by the TOI which Switzerland signed together with its EFTA partners Liechtenstein and Iceland (but not Norway) on 15 December 2005 after ratification of the latter. See also the related FTA signed the same day by EFTA Member States (including Norway); see *infra* note 186.<sup>166</sup> See also TOC of 26 August 1929, RS 0.946.291.721.<sup>167</sup> See also TOC of 2 September 1950, RS 0.946.295.631.<sup>168</sup> See also TOC of 19 August 1875, RS 0.142.116.361.1.<sup>169</sup> See also TOC of 6 March 1957, RS 0.946.296.142.1, and TOF of 6 September 1855, RS 0.142.113.671 and RS 0.142.116.141.<sup>170</sup> See also RS 0.142.116.231.

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ANNEX TABLE 1: LIST OF SWISS BILATERAL INVESTMENT TREATIES AND TREATIES OF COMMERCE<sup>138</sup>

Country <sup>139</sup>	BIT		ToC (ToF) <sup>140</sup>	
	RS	Date <sup>141</sup>	RS	Date
Panama	0.975.262.7	19.10.1983		
Paraguay	0.975.263.2	31.1.1992	0.946.296.321	2.4.1969
Peru	0.975.264.1	22.11.1991	0.946.296.411	20.7.1953
Philippines	0.975.264.5	31.3.1997	0.142.116.369	30.8.1956
Poland	0.975.264.9	8.11.1989		
Qatar	0.975.265.6	12.11.2001		
Romania	0.975.266.3	25.10.1993	0.946.296.631	13.12.1972
Russia	0.975.277.2	1.12.1990	0.946.296.651	12.5.1994
Rwanda	<sup>171</sup>	15.10.1963		
Saudi Arabia		(1.4.2006)		
Senegal	S. Toc		0.946.296.811	16.8.1962
Serbia		(7.12.2005)		
Serbia <sup>172</sup>			0.946.298.184 <sup>173</sup>	21.11.2001
Singapore	0.975.268.9	6.3.1978		
Slovakia	0.975.274.1	5.10.1990	0.946.297.412 <sup>174</sup>	7.5.1971
Slovenia	0.975.269.1	9.11.1995		
South Africa	0.975.211.8	27.6.1995	0.142.113.671 <sup>175</sup>	6.9.1855
Sri Lanka	0.975.271.2	23.9.1981		
Sudan		(24.10.2002) <sup>176</sup>		
Sweden			0.946.297.142 <sup>177</sup>	20.6.1951
Syria	0.975.272.7	22.6.1977	0.946.297.271	29.11.1976
Tanzania	0.975.273.2	3.5.1965		
Thailand	0.975.274.5	17.11.1997		
Togo	S. Toc		0.946.297.491	17.1.1964
Tunisia	0.975.275.8	2.12.1961	0.946.297.581	23.12.1976
Turkey	0.975.276.3	3.3.1988	0.946.297.631	13.12.1930
Uganda	0.975.261.8	23.8.1971		
Ukraine	0.975.276.7	20.4.1995	0.946.297.671	20.7.1995
United Arab Emirates	0.975.232.5	3.11.1998		
United Kingdom			0.142.113.671	6.9.1855
United States of America			0.142.113.361	25.11.1850
Uruguay	0.975.277.6	7.10.1988	0.946.297.761	4.3.1938
Uzbekistan	0.975.262.1	16.4.1993	0.946.296.211	16.4.1993
Venezuela	0.975.278.5	18.11.1993		
Viet Nam	0.975.278.9	3.7.1992	0.946.297.891	6.7.1993
Zambia	0.975.282.3	3.8.1994		
Zimbabwe	0.975.282.7	15.8.1996		

<sup>171</sup> FF 1964 I p. 413, 405. Temporarily applied since its signature.

<sup>172</sup> Formerly Yugoslavia. The full name of post-Yugoslavia Serbia used to be "Republic of Serbia and Montenegro", but the status of this country is currently changing. See *infra* note 218.

<sup>173</sup> See also ToC of 27 September 1948, RS 0.946.298.181.

<sup>174</sup> See also RS 0.946.296.902.

<sup>175</sup> See also RS 0.142.111.181.1.

<sup>176</sup> Will replace the BIT of 17 February 1974, RS 0.975.269.8.

<sup>177</sup> See also ToC of 20 March 1924, RS 0.946.297.141.

ANNEX TABLE 2: LIST OF EFTA TREATIES<sup>178</sup> WITH THIRD COUNTRIES<sup>179</sup>

Country <sup>180</sup>	DOC <sup>181</sup>	FTA <sup>182</sup>	TOI <sup>183</sup>
Albania	10.12.92		
Algeria	12.12.02	<sup>184</sup>	
Bulgaria	10.12.91	29.3.93/1.7.93	
Canada		N (1998)	
Chile		26.6.03/1.12.04	S. FTA
Croatia	19.6.00	21.6.01/1.4.02	S. FTA <sup>185</sup>
Egypt	8.12.95	N	
Israel		17.9.92/1.1.93	
Jordan	19.6.97	21.6.01/1.9.02	
Korea, South		15.12.05 <sup>186</sup>	15.12.05 <sup>187</sup>
Lebanon		24.6.04	
Macedonia, T.F.Y.R.	29.3.96	19.6.00/1.5.02	
Mexico		27.11.00/1.7.01	S. FTA
Morocco	8.12.95	19.6.97/1.12.99	
Peru	24.4.06		
Palestinian Authority		30.11.98/1.7.99	
Romania	10.12.91	10.12.92/1.5.93	
Serbia <sup>188</sup>	12.12.00		
Singapore		26.6.02/1.1.03	S. FTA
Thailand		N (10.05)	
Tunisia	8.12.95	17.12.04/1.6.05 <sup>189</sup>	
Turkey		10.12.91/1.4.92	
Ukraine	19.6.00		

<sup>178</sup> Status as of 1 May 2006. Treaties concluded by EFTA's Member States bilaterally; *see supra* note 59.

<sup>179</sup> On 1 May 2004, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia joined the EU. Consequently, they terminated their DOCS and FTAs with EFTA, as they now benefit from the agreement between EFTA and the EU within the EEA. *See supra* IV.B.1.(a), "The 1972 EFTA Bilateral FTAs and the 1994 EFTA-EEA Agreements".

<sup>180</sup> *See supra* note 139.

<sup>181</sup> Date of signature.

<sup>182</sup> Date of signature/entry into force. Only one date means that the treaty has been signed but has not yet entered into force. "N": negotiations (year of start of the negotiations, absent a DOC).

<sup>183</sup> Treaties on Investment.

<sup>184</sup> Negotiations were envisaged at the EFTA Ministerial Meeting held in Vaduz, Liechtenstein in June 2005.

<sup>185</sup> *See supra* note 100.

<sup>186</sup> *See* FF 2006 p. 929.

<sup>187</sup> *See* FF 2006 p. 963. Signed by Switzerland, Liechtenstein and Iceland (but not Norway). *See also supra* notes 101 and 165.

<sup>188</sup> *See supra* note 172.

<sup>189</sup> Temporary application, RS 0.632.317.581.

ANNEX TABLE 3: LIST OF EFTA TREATIES<sup>190</sup> WITH REGIONAL ORGANIZATIONS

Organization	DOC <sup>191</sup>	FTA <sup>192</sup>
Gulf Co-operation Council	23.5.00	N
EU (EC)		22.7.72/1.1.73 <sup>193</sup>
EU (EEA)		1.1.94 <sup>194</sup>
Mercosur	12.12.00	
Southern Africa Customs Union		N (2001)

<sup>190</sup> See *supra* note 178.

<sup>191</sup> See *supra* note 181.

<sup>192</sup> See *supra* note 182.

<sup>193</sup> This treaty is in fact a bilateral agreement concluded under the auspices of EFTA. Switzerland is the only EFTA Member left for which this treaty is still in force. See *supra* IV.B.1.(a); "The 1972 EFTA Bilateral FTAs and the 1994 EFTA-EEA Agreements".

<sup>194</sup> Date of entry into force. Switzerland is not a member; see *id.*

ANNEX TABLE 4: LIST OF MAIN TREATIES RELATED TO TRADE AND FOREIGN DIRECT INVESTMENT TO WHICH SWITZERLAND IS A PARTY

Country <sup>195</sup>	BIT <sup>196</sup>	TOC <sup>197</sup>	EFTA <sup>198</sup>	EU <sup>199</sup>	OECD <sup>200</sup>	WTO <sup>201</sup>	Total <sup>202</sup>
Afghanistan		✓					1
Albania	✓	✓	DOC			✓	4
Algeria	✓	✓	DOC				3
Angola						✓	1
Antigua						✓	1
Argentina	✓	✓	R (M'sur)		✓ <sup>203</sup>	✓	5
Armenia	✓	✓				✓	3
Australia		✓			✓	✓	3
Austria		✓		✓	✓	✓	4
Azerbaijan	✓	✓					2
Bahrain			R (GCC)			✓	2
Bangladesh	✓					✓	2
Barbados	✓					✓	2
Belarus	✓	✓					2
Belgium		✓		✓	✓	✓	4
Belize						✓	1
Bénin	S. TOC	✓				✓	2
Bolivia	✓					✓	2
Bosnia	✓	✓					2
Botswana	✓		(R) (SACU)			✓	3
Brazil	✓	✓	R (Mercosur)		✓ <sup>204</sup>	✓	5
Brunei						✓	1
Bulgaria	✓	✓	DOC/FTA			✓	5
Burkina Faso	S. TOC	✓				✓	2
Burundi						✓	1
Cabo Verde	✓						1
Cambodia	✓					✓	2
Cameroon	S. TOC	✓				✓	2
Canada		✓	(FTA)		✓	✓	3
Central African Republic	S. TOC	✓				✓	2
Chad	S. TOC	✓				✓	2
Chile	✓	✓	FTA		✓ <sup>205</sup>	✓	5
China <sup>206</sup>	✓	✓				✓	3
Colombia		✓				✓	2

<sup>195</sup> See *supra* note 139.<sup>196</sup> See *supra* Annex Table 1, "List of Swiss Bilateral Investment Treaties and Treaties of Commerce".<sup>197</sup> *Id.*<sup>198</sup> See *supra* Annex Table 2, "List of EFTA Treaties with Third Countries", and Annex Table 3, "List of EFTA Treaties with Regional Organizations". "R": regional treaty, followed by the name of the organization counterparty to the treaty considered. (FTA) or (R) means that official negotiations have been opened for the FTA or regional treaty considered.<sup>199</sup> *Id.*<sup>200</sup> As of 1 May 2006.<sup>201</sup> As of 11 December 2005.<sup>202</sup> References to TOCs in the BIT column, and EFTA's FTAs or regional treaties currently negotiated, are not counted in the total. Treaties signed but not yet entered into force are counted. For the entry into force, see Annex Tables 1-3.<sup>203</sup> Adhering country to the OECD Guidelines for Multinational Enterprises, see *supra* note 121.<sup>204</sup> *Id.*<sup>205</sup> *Id.*<sup>206</sup> See also Hong Kong, Macao.

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ANNEX TABLE 4: LIST OF MAIN TREATIES RELATED TO TRADE AND FOREIGN DIRECT INVESTMENT  
TO WHICH SWITZERLAND IS A PARTY

Country <sup>195</sup>	BIT <sup>196</sup>	TOC <sup>197</sup>	EFTA <sup>198</sup>	EU <sup>199</sup>	OECD <sup>200</sup>	WTO <sup>201</sup>	Total <sup>202</sup>
Congo <sup>207</sup>	S. TOC	✓				✓	2
Congo, Democratic Republic	✓	✓				✓	3
Costa Rica	✓					✓	2
Côte d'Ivoire	S. TOC	✓				✓	2
Croatia	✓	✓	DOC/FTA			✓	5
Cuba	✓	✓				✓	3
Cyprus				✓		✓	2
Czech Republic	✓	✓		✓	✓	✓	5
Denmark		✓		✓	✓	✓	4
Djibouti	✓					✓	2
Dominica						✓	1
Dominican Republic	✓					✓	2
EC <sup>208</sup>						✓	1
Ecuador	✓	✓				✓	3
Egypt	✓	✓	DOC/(FTA)			✓	4
El Salvador	✓	✓				✓	3
Estonia	✓	✓		✓	✓ <sup>209</sup>	✓	5
Ethiopia	✓	✓					2
Fiji						✓	1
Finland				✓	✓	✓	3
France		✓		✓	✓	✓	4
Gabon						✓	1
Gambia	✓	✓				✓	3
Georgia		✓				✓	2
Germany		✓		✓	✓	✓	4
Ghana	✓	✓				✓	3
Greece		✓		✓	✓	✓	4
Grenada						✓	1
Guatemala	✓	✓				✓	3
Guinea	S. TOC	✓				✓	2
Guinea Bissau						✓	1
Guyana	✓					✓	2
Haiti						✓	1
Honduras	✓					✓	2
Hong Kong <sup>210</sup>	✓					✓	2
Hungary	✓	✓		✓	✓ <sup>211</sup>	✓	5
Iceland		✓	Member		✓	✓	4
India	✓	✓				✓	3
Indonesia	✓	✓				✓	3
Iran		✓					1
Iraq		✓					1
Ireland				✓	✓	✓	3
Israel		✓	FTA		✓	✓	4

<sup>207</sup> Brazzaville.<sup>208</sup> The EC is a Member of the WTO in addition to its Member States individually.<sup>209</sup> See *supra* note 179.<sup>210</sup> See *also* China.<sup>211</sup> See *supra* note 179.

ANNEX TABLE 4: LIST OF MAIN TREATIES RELATED TO TRADE AND FOREIGN DIRECT INVESTMENT  
TO WHICH SWITZERLAND IS A PARTY

Country <sup>195</sup>	BIT <sup>196</sup>	TOC <sup>197</sup>	EFTA <sup>198</sup>	EU <sup>199</sup>	OECD <sup>200</sup>	WTO <sup>201</sup>	Total <sup>202</sup>
Italy		✓		✓	✓	✓	4
Jamaica	✓					✓	2
Japan		✓			✓	✓	3
Jordan	✓	✓	DOC/FTA			✓	5
Kazakhstan	✓	✓					2
Kenya						✓	1
Korea, North	✓						1
Korea, South	✓ <sup>212</sup>		FTA/TOI		✓	✓	4
Kuwait	✓		R (GCC)			✓	3
Kyrgyzstan	✓	✓				✓	3
Laos	✓						1
Latvia	✓	✓	FTA	✓	✓ <sup>213</sup>	✓	6
Lebanon	✓		FTA				2
Lesotho	✓		(R) (SACU)			✓	2
Liberia		✓					1
Liechtenstein			Member			✓	2
Lithuania	✓			✓	✓ <sup>214</sup>	✓	4
Luxembourg		✓		✓	✓	✓	4
Libya	✓						1
Macao <sup>215</sup>						✓	1
Macedonia, T.F.Y.R.	✓	✓	DOC/FTA			✓	5
Madagascar	S. TOC	✓				✓	2
Malawi						✓	1
Malaysia	✓					✓	2
Maldives						✓	1
Mali	✓	✓				✓	3
Malta				✓		✓	2
Mauritania	S. TOC	✓				✓	2
Mauritius	✓					✓	2
Mexico	✓	✓	FTA		✓	✓	5
Moldova	✓	✓				✓	3
Mongolia	✓					✓	2
Morocco	✓		DOC/FTA			✓	4
Mozambique	✓	✓				✓	3
Myanmar						✓	1
Namibia	✓		(R) (SACU)			✓	3
Nepal						✓	1
Netherlands		✓		✓	✓	✓ <sup>216</sup>	4
New Zealand		✓			✓	✓	3
Nicaragua	✓					✓	2
Niger	S. TOC	✓				✓	2
Nigeria	✓					✓	2
Norway			Member		✓	✓	3
Palestinian Authority			FTA				1

<sup>212</sup> See *supra* note 165.<sup>213</sup> See *supra* note 179.<sup>214</sup> *Id.*<sup>215</sup> See also China.<sup>216</sup> Including the Netherlands Antilles.

## SWISS INTERNATIONAL TRADE AND INVESTMENTS

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ANNEX TABLE 4: LIST OF MAIN TREATIES RELATED TO TRADE AND FOREIGN DIRECT INVESTMENT  
TO WHICH SWITZERLAND IS A PARTY

Country <sup>195</sup>	BIT <sup>196</sup>	TOC <sup>197</sup>	EFTA <sup>198</sup>	EU <sup>199</sup>	OECD <sup>200</sup>	WTO <sup>201</sup>	Total <sup>202</sup>
Oman	✓		R (GCC)			✓	3
Pakistan	✓	✓				✓	3
Panama	✓					✓	2
Papua New Guinea						✓	1
Paraguay	✓	✓	R (M'sur)			✓	4
Peru	✓	✓	DOC			✓	4
Philippines	✓	✓				✓	3
Poland	✓			✓	✓	✓	4
Portugal				✓	✓	✓	3
Qatar	✓		R (GCC)			✓	3
Romania	✓	✓	DOC/FTA		✓ <sup>217</sup>	✓	6
Russia	✓	✓					2
Rwanda	✓					✓	2
Saudi Arabia	✓		R (GCC)			✓	3
Senegal	S. TOC	✓				✓	2
Serbia	✓	✓	DOC			<sup>218</sup>	3
Sierra Leone						✓	1
Singapore	✓		FTA			✓	3
Slovakia	✓	✓		✓	✓	✓	5
Slovenia	✓			✓	✓ <sup>219</sup>	✓	4
Solomon Islands						✓	1
South Africa	✓	✓	(R) (SACU)			✓	3
Spain				✓	✓	✓	3
Sri Lanka	✓					✓	2
St. Kitts						✓	1
St. Lucia						✓	1
St. Vincent						✓	1
Sudan	✓						1
Suriname						✓	1
Swaziland			(R) (SACU)			✓	1
Sweden		✓		✓	✓	✓	4
Syria	✓	✓					2
Taiwan						✓	1
Tanzania	✓					✓	2
Thailand	✓		(FTA)			✓	2
Togo	S. TOC	✓				✓	2
Trinidad						✓	1
Tunisia	✓	✓	DOC/FTA			✓	5
Turkey	✓	✓	FTA		✓	✓	5
Uganda	✓					✓	2
Ukraine	✓	✓	DOC				3
United Arab Emirates	✓		R (GCC)			✓	3
United Kingdom		✓		✓	✓	✓	4

<sup>217</sup> See *supra* note 179.<sup>218</sup> Serbia and Montenegro applied separately to the WTO, but so far they have been treated as one State by Switzerland.<sup>219</sup> See *supra* note 179.

ANNEX TABLE 4: LIST OF MAIN TREATIES RELATED TO TRADE AND FOREIGN DIRECT INVESTMENT  
TO WHICH SWITZERLAND IS A PARTY

Country <sup>195</sup>	BIT <sup>196</sup>	TOC <sup>197</sup>	EFTA <sup>198</sup>	EU <sup>199</sup>	OECD <sup>200</sup>	WTO <sup>201</sup>	Total <sup>202</sup>
United States of America		✓			✓	✓	3
Uruguay	✓	✓	R (Mercosur)			✓	4
Uzbekistan	✓	✓					2
Venezuela	✓					✓	2
Viet Nam	✓	✓					2
Zambia	✓					✓	2
Zimbabwe	✓					✓	2
Total	96 <sup>220</sup>	88	43 <sup>221</sup>	25	38 <sup>222</sup>	147	439

*A glossary and a bibliography will be published at the end of the second part of this article on the protection of exports and investments.*

<sup>220</sup> 103 including the TOCs containing provisions amounting to a BIT.

<sup>221</sup> 51 including treaties currently being negotiated.

<sup>222</sup> See *supra* note 179.

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