Switzerland and International Investment Law: Why it Matters

An Introduction to the Scientific Conference in the Framework of the Annual Meeting of the Swiss Society of International Law (SSDI/SVIR) held in Lausanne on 13 November 2020

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International Investment Law has become one of the hot topics of the current debate on a future sustainable international economic order. Several international fora (OECD, UNCTAD, ICSID, UNCTAD, EU) keep working on a reform of this area (in particular the dispute settlement) and newsletters and blogs are full of criticism of the current system both with regard to the substance and the procedures. At the same time, this is not a new phenomenon and especially in the case of Switzerland the respective discussions go back for more than a century. This is not surprising when one looks at the importance of foreign direct investment (FDI) for this country and the legal practice that the Swiss administration has developed to remain an attractive seat of foreign investors and a competitive place for the settlement of (investment) disputes. This (short) introduction to the contributions from the scientific conference held in the framework of the Annual Meeting of the Swiss Society of International Law (SSDI/SVIR) held in Lausanne on 13 November 2020 tries to show why the current debate on international investment law is so important for Switzerland and which questions will occupy the administration, practicing lawyers, tribunals, academia and civil society in the years to come.

Keywords: foreign direct investment (FDI) – bilateral investment treaties (BIT) – Investor State Dispute Settlement (ISDS) – diplomatic protection – Switzerland

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I. Diplomatic Practice in the 19th and early 20th Century

A. Treaties of Friendship and Establishment

In the diplomatic practice of Switzerland, the presence of Swiss investors abroad has played an important role since the 19th century. This is originally due to the small size of the country and the need to procure raw materials and important inputs into domestic production abroad. Furthermore, due to a very rapid industrialisation of the country in second half of the 19th century, the presence of Swiss companies abroad involved in the sale of Swiss manufactured products (textiles, watches, chemicals and later machines and pharmaceutical products) became more and more important.[1] This effect was exacerbated by the need to have production facilities in foreign markets to overcome existing tariff barriers and other obstacles to trade. In addition, the fact, that the country has no direct access to the sea (except by the Rhine from its international port at Basel)[2] and for a long time not commercial ships under its flag (i.e. registered in Switzerland) led to a need to use ships under foreign flag or secure foreign shipping and transport services to stabilize the supply of the country and its industry.

It comes therefore at no surprise that when it became possible Switzerland tried to secure its interests in bilateral treaties during the late 19th century following the model established by the UK and other important economic players in Europe (and to a lesser extent overseas).[3] Treaties of Friendship were negotiated with the United Kingdom in 1855, with France in 1855, with the Habsburg Empire in 1869, with the newly established German Empire in 1870 and with the Netherlands in 1875. They normally included provisions on the establishment of foreigners and the protection they were entitled to. Later Switzerland negotiated also specific treaties of establishment, e.g. with Belgium in 1887, with Serbia in 1888 or with Spain in 1879.[4]

B. Diplomatic Protection

In the 20th century, an increasing number of cases Swiss investors abroad turned to the Swiss Government to obtain diplomatic protection following foreign govern-

1 See, for example, Andreas R. Ziegler, «Der völkerrechtliche Status der Schweiz», 29 Swiss Rev. Int'l & Eur. L. (2019), 549–580; Jean-François Bergier, Magdalena Bless-Grabher & Trude Fein, Wirtschaftsgeschichte der Schweiz, 2nd ed., Zurich 1990; Patrick Halbeisen, Wirtschaftsgeschichte der Schweiz im 20. Jahrhundert, Basel 2012.

2 Secured through international treaties but obviously vulnerable during times of crisis of armed conflict. See, for example, Walter Zürcher, Schweizer Flagge zur See, Bern 1986.

3 For details see, Andreas R. Ziegler, Droit international économique, 2nd ed., Bern 2017, at 24.

4 See for a list of currently still applicable treaties of establishment (many going back to this time): <https://www.sem.admin.ch/dam/sem/de/data/rechtsgrundlagen/weisungen/auslaender/recht/niederlassungsvertraege-d.pdf.download.pdf/niederlassungsvertraege-d.pdf> (visited on 14 March 2021).

mental measures that were considered unfriendly or a violation of international standards. As a result, one of the only two cases Switzerland took to the Permanent Court of Arbitration was related to diplomatic protection of a Swiss investor abroad. A Swiss construction company (Losinger & Cie. SA) that had entered into a construction contract with the Kingdome of Yugoslavia requested the help of the Swiss Government after the Kingdom of Yugoslavia had adopted a new law that barred the recourse to international arbitration (as guaranteed in the construction contract). This breach of contract triggered the intervention of the Swiss Government and a claim before the PCIJ.[5] Before a judgment could be delivered Switzerland and Yugoslavia found an amicable solution.[6]

Another important factor for the Swiss policy regarding the treatment of its citizens and companies abroad was the experience following the revolution in Russia leading to the creation of the Soviet Union in 1918/19. As for other Western European countries, the 19th century had seen an important number of Swiss leaving the country – be it to escape widespread poverty or otherwise to find a better fate. An important number of Swiss had emigrated to Russia and the country was an interesting destiny for Swiss investments (like from other Western economies). The confiscation and expropriation of Swiss assets in Russia after 1918 led to protest by the Swiss Government which even shortly considered counter-measures in the form of freezing Russian assets.[7] In 1918 the diplomatic relations with Russia were suspended and due to some further problems resulting from the murder of a high representative of the Soviet Union in Lausanne (the so-called Corradi Affaire) remained tense for decades.[8] This experience can be seen as typical example of the unwarranted side effects diplomatic protection can have in certain situations.

C. Dubious Nationality and the Control Theory

This was particularly important during armed conflicts or in cases where Swiss investors abroad were not recognized as such because it was difficult to develop a specific country profile distinct from its bigger neighbours, in particular the German Empire after its unification. In particular, during WWI and WWII it became increasingly important for the Swiss Government to protect Swiss investors who only controlled

5 Affaire Losinger & Cie. (Suisse c. Yougoslavie), 1936 C.P.J.I. (ser. A/B) No. 69 (Ordonnance du 14 décembre).

6 See also Lucius Caflisch, Internationaler Gerichtshof (2007), in: Historisches Lexikon der Schweiz (hereinafter: HLS), online.

7 See Peter Collmer, Russland (2016), in: HLS online.

8 See Andreas R Ziegler, «Die Rolle des Völkerrechts in aussenpolitischen Krisen der Schweiz – Wichtige völkerrechtlicher Streitfälle, Verträge, diplomatische Dokumente und Urteile betreffend die internationalen Beziehungen der Schweizerischen Eidgenossenschaft», 138 Zeitschrift für Schweizerisches Recht (2019), 429–456.

foreign investment but had a foreign (in particular German) nationality or citizenship. In view of the perceived stability and neutrality of the country many foreign investors chose Switzerland for incorporating vehicles that would control their investment in third countries. Only later specific legislative measures were adopted to remain attractive: limited legal and administrative assistance for tax evasion (banking secrecy) dates from 1934 and the favourable tax treatment of foreign holding companies from the 1950 though already before an attractive tax treatment had led to an increased attractiveness of Switzerland for foreign investors.[9]

During WWI it was the case of Carl Ingenohl, the main owner of a tobacco company with important operations in the Philippines named The Orient Tobacco Manufactory that rose to fame. He had obtained Belgian citizenship through naturalization, but his ancestors were German.[10] At the same time, Swiss citizens had purchased important participations in his conglomerate (e.g. Walter Edelmann from Zurich). When the US authorities confiscated the company, the Belgian and Swiss Governments intervened defending the claim that the investors were not German but from the officially neutral countries Belgium and Switzerland.[11]

Another case during WW I concerned the Basler Missionsgesellschaft, a trading company that had its origin in a protestant missionary movement founded in Basel at the beginning of the 19th century. Over time, the trading activities became more important and the company's assets in India were expropriated by the British Government as the company seemed too close to the German enemy.[12]

It should come as no surprise that these questions became also increasingly interesting and important for academia and practising lawyers advising their clients. The Swiss Society of International Law (SVIR/SSDI) discussed issues related to the diplomatic protection (of investors) on various occasions between the two world wars. As early as 1919 «The nationality of legal persons» was the topic of the scientific debate held in the framework of the annual meeting and led to the publication of four reports by the SVIR/SSDI. Again in 1931 the annual conference was dedicated to the topic «The nationality of trading companies» and on several occasion the treatment of neutral States during WW I and WW II was discussed, also with regard to the nationalisation of the property of investors from neutral States.[13] Also important

9 See Lea Haller, Transithandel, Zurich 2019, at 319 et seq.

10 His brother Gustav Heinrich Ernst Friedrich von Ingenohl had been the admiral in charge of the German European fleet until 1915, see Hugh Farmer, Carl Ingenohl – owner of the Orient Tobacco Manufactory Company, in: The Industrial History of Hong Kong Group, February 24, 2016 (online).

11 See Lea Haller, supra n. 9, at 170-2.

12 See Gustav Adolf Wanner, Jubiläumsschrift – Die Basler Handels-Gesellschaft A. G. 1859–1959, Basel 1959, Chapter IV.3.

13 See Hans Fritzsche, «Die Schweizerische Vereinigung für Internationales Recht», in: Vom Krieg und vom Frieden: Festschrift der Universität Zürich zum siebzigsten Geburtstag von Max Huber, Zurich 1944, 77–97.

contribution in the research of Swiss authors were dedicated to diplomatic protection, in particular also of foreign investors.[14]

During WW II the lack of a proper flag (no ships registered in Switzerland) led to the confiscation of cargos owned by Swiss companies being transported by ships under foreign flags. This motivated the Swiss Government to immediately promote the registration of ships in Switzerland in order to signal the true nationality of the ships and thereby protect the supply of Switzerland and the cargos of Swiss investors that now could use these ships. Some ships had used a Swiss flag before (in addition to the flag of the place of registration), but from 1941 it became possible to register ships in Switzerland.[15]

The most prominent case regard diplomatic protection of Swiss investors abroad is without any doubt the Interhandel saga.[16] It can be seen as a further after-effect of the alleged abuse of Switzerland to circumvent the financial and economic sanctions against the Axis powers by Allies during WW II and was thus related to the problems already known from WW I. The resulting dispute led to one of the few proceedings with Swiss participation before the International Court of Justice (ICJ) and was to burden Switzerland's relations with the USA for years. The company was originally founded in Basel in 1928/9 as a holding company of the German IG Farben Group (initially under the name I.G. Chemie).[17] In 1937-40, legal steps were taken to make the company appear Swiss (and no longer German) in order to protect IG-Farben subsidiaries in the USA from Allied sanctions. The US authorities found the operation implausible and nevertheless confiscated the subsidiaries in the USA (in particular the General Aniline and Film Corporation – GAF) after the entry into the war in 1942 (as enemy assets under the United States Trading with the Enemy Act). The Swiss authorities also apparently had doubts about the nationality of the company and had a thorough audit of the companies involved carried out in 1945/6 (the so-called Rees Report).[18] Due to close personal ties, there remained doubts regarding the German control, but the Federal Council withheld the report from public inspection and backed Interhandel. The owners took legal action in the USA without a judgement being reached within a reasonable period of time. However, this was also due to the fact that the Swiss authorities refused to hand over files for fear of violating bank-

14 See most prominently, Lucius C. Caflisch, La protection des sociétés commerciales en droit international public, thèse, La Haye 1969.

15 See Hans-Ulrich Schiedt, Schifffahrt (2012), in: HLS online.

16 See Mario König, Interhandel, in: HLS online, and id., Interhandel – die schweizerische Holding der IG Farben und ihre Metamorphosen – eine Affäre um Eigentum und Interessen 1910–1999, Zurich 2001.

17 The companies Hoechst, Bayer and BASF have their origin in this conglomerate.

18 Revisions-Bericht. Internationale Gesellschaft für Chemische Unternehmungen A.G. (I.G. Chemie), Basel, [since 19 December 1945 Internationale Industrie- und Handelsbeteiligungen A.G., Basel], Bankhaus E. Sturzenegger & Cie., Basel [formerly Ed. Greuter & Cie., Basel], at 551, (Digitalisat in the database «Dodis der Diplomatischen Dokumente der Schweiz»), online: <https://dodis.ch/9266>.

ing secrecy and economic intelligence in the interests of another state.[19] In 1957, the original owners withdrew and the major bank SBG (today part of UBS) later took over the majority of shares. On 1 October 1957, Switzerland brought an action against the USA before the International Court of Justice and demanded that the USA release the seized assets of Interhandel in the USA. On 3 October 1957, Switzerland also applied for provisional measures to prevent the USA from selling the affected parts of the company. The provisional measures were rejected on 24 October 1957, and the judgement was issued on 21 March 1959. Although the domestic legal proceedings appeared to have little chance of success and had been pending for a very long time, the court considered that the domestic remedies had not been exhausted, as would have been necessary for diplomatic protection.[20] It was not until 1963-65 that UBS was able to obtain around 40% of the original property in an out-of-court settlement with the US authorities.[21] To protect the bank's interests against further legal challenges, the Federal Council kept the Rees Report under wraps until the investigations by the Independent Commission of Experts (UEK) Switzerland – Second World War (2002), which fuelled speculation about its contents.[22]

II. Modern Swiss Investment Treaty Practice

A. Switzerland as a Pioneer in BIT negotiations

After Germany, Switzerland was the first Western country to negotiate and sign a bilateral investment treaty of the kind that we still consider today as the main model for such agreements. In 1961 such an agreement was concluded with Tunisia.[23] With regard to the typical structure of these agreements they are comparable to those concluded by other Western countries, in particular following a similar approach like Germany, the Netherlands, or the United Kingdom. Initially (approximately from

19 See Volker Koop, Das schmutzige Vermögen. Das Dritte Reich, die IG Farben und die Schweiz, Munich 2005, and Shraga Elam, Die Schweiz und die Vermögen der I.G. Farben: Die Interhandel-Affäre, 13 Zeitschrift für Sozialgeschichte des 20. und 21. Jahrhunderts (1998) 13, 61–91, online: <https://shraga-elam.blogspot.de/2013/06/die-schweiz-und-die-vermogen-der-ig.html>.

20 International Court of Justice, Interhandel (Switzerland v. United States of America), all documents online: <https://www.icj-cij.org/en/case/34>.

21 In the 1980s, «I.G. Farben in Liquidation» brought an unsuccessful lawsuit against SBG in Germany (cf. the documents in DODIS of the UEK, <http://dodis.ch/26246>). Furthermore, in the 1990s, protests by former forced labourers and other Holocaust victims of IG Farben led to the creation of a foundation for the compensation of victims of IG Farben, which was dissolved in 2015 due to a lack of funds.

22 See König, supra n. 16, und UEK, supra n. 21.

23 See Anne-Juliette Bonzon, La protection des investissements suisses à l'étranger dans le cadre des accords de protection et de promotion des investissements, Basel 2012, at 40 and 43. For the treaty see FF 1962 I 634. It was renegotiated in the early 1970s, see Accord de coopération technique et scientifique entre la Confédération suisse et la République tunisienne, conclu le 27 octobre 1972, RS 0.974.275.8.

1961 to 1978) these agreements were mostly concluded with newly independent countries (i.e. former colonies) in Africa in order to create a beneficial framework for Swiss investors either already present or looking at entering those markets. With regard to today's legal debates it is important that these agreements did not yet include any provisions allowing private investors to ask for the settlement of disputes with the host country by way of international arbitration (Investor State Dispute Settlement – ISDS).[24]

In the 1980s, however the negotiations in this field were considerably intensified and a large number of agreements was negotiated, normally including provision on ISDS. The Agreement with Sri Lanka of 1981 was the first agreement in this group.[25] Another peculiarity was that these agreements no longer included important development cooperation activities but solely focused on the promotion and protection of investments. As it is the case of other important exporters of capital, the number of treaties negotiated after 1990 with former communist countries and transitions countries in Europe skyrocketed.[26]

B. Change of Tide?

At the end of the 1990s and in the early years of the 21st century, Switzerland benefitted from the general climate favouring new trade and investment agreements, especially between emerging economies and industrialized countries. This led to the negotiation of combined economic agreements containing an investment chapter[27] (normally also including commitments with regard to market access or establishment for foreign investors) or the parallel negotiation of trade and investment agreements.

The latter was especially useful when Switzerland wanted to use its preferred format of negotiating agreements as a member of the European Free Trade Association (together with Norway, Iceland and Liechtenstein) but could not include a (comprehensive) investment chapter (or at least certain important provisions) due to resistance within EFTA, in particular Norway.[28] In cases where Switzerland could not use

24 See Bonzon, supra n. 23, at 46.

25 Accord entre le Gouvernement de la Confédération suisse et le Gouvernement de la République démocratique socialiste de Sri Lanka concernant l'encouragement et la protection réciproque des investissements, conclu le 23 septembre 1981, RS 0.975.271.2.

26 See Bonzon, supra n. 23, at 51.

27 For example, Accord de libre-échange du 27 novembre 2000 entre les États de l'AELE et les États-Unis du Mexique (avec acte fin., prot. d'entente et annexes), RS 0.632.315.631.1 or Accord de libre-échange du 26 juin 2002 entre les États de l'AELE et la République de Singapour (avec prot. d'entente et annexes), 0.632.316.891.1.

28 See for example Accord sur l'investissement du 15 décembre 2005 entre la République d'Islande, la Principauté du Liechtenstein, la Confédération suisse et la République de Corée (avec annexes), RS 0.975.228.1 negotiated in parallel to Accord de libre-échange du 15 décembre 2005 entre les États de l'AELE et la République de Corée (avec annexes et prot. d'entente), RS 0.632.312.811.

the EFTA framework because of other areas where no agreement with the third country could be reached, Switzerland included normally important investment chapters in its new comprehensive economic agreements, such as in the case with Japan.[29]

However, even the purely bilateral or parallel approach becomes increasingly difficult in recent years. In certain instances, it became impossible to reach agreement on the exact content of the appropriate substantive standards and, in particular on ISDS. For example, the bilateral trade agreement with China of 2013 contains only provisions on promotion of investments and a review clause in view of future negotiations.[30] The same is true for the Agreement with the Philippines of 2016[31] or the most recent agreement with Indonesia in 2019.[32]

This difficulty is exacerbated by the fact that a number of long-standing treaty partners of Switzerland have terminated existing bilateral investments treaties, and the attempted negotiations of new ones are highly controversial. Examples are the termination of their respective agreements with Switzerland (but also other countries) by South Africa, India, or Indonesia. The last traditional agreement on the promotion and protection of investments was concluded by Switzerland with Georgia in 2014.[33]

Although there were some early academic writings on the topic, the area remained known and was discussed only by a relatively small group of experts be it in the administration or the investors who would benefit from these agreements. The main reason for the absence of a real debate outside of very narrow circles of academics, administration and the multinational companies concerned (in particular represented by the respective business lobby) lies in the fact that the Federal Government had managed between 1963 and 2004 to exclude Parliament from the approval process of such agreements.[34] As a matter of fact, the Parliament had delegated full power to the Federal Government (and the administration) to negotiate bilateral investment treaties. This system was also maintained after the inclusion of ISDS provisions into these agreements. In 2006, however, the Federal Government accepted that the

29 See Accord du 19 février 2009 de libre-échange et de partenariat économique entre la Confédération suisse et le Japon, RS 0.946.294.632.

30 See Chapter 9 of the Accord de libre-échange du 6 juillet 2013 entre la République populaire de Chine et la Confédération suisse (avec annexes et prot. d'entente), RS 0.946.292.492.

31 Accord de libre-échange du 28 avril 2016 entre les États de l'AELE et les Philippines (avec annexes), RS 0.632.316.451, Chapter 10.

32 See Message concernant l'approbation de l'accord de partenariat économique de large portée entre les États de l'AELE et l'Indonésie, FF 2019 5009, 5260 ff.

33 See seco, Liste des accords concernant la protection des investissements conclus à ce jour par la Suisse, online: <https://www.seco.admin.ch/seco/fr/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale_Investitionen/Vertragspolitik_der_Schweiz/overview-of-bits.html> (visited 14 March 2021).

34 Arrête fédéral of 27 September 1963 (prolonged in 1973, 1983 and 1994). See for details RO 1994 1766) and for details Bonzon, supra n. 23, at 59.

increasing important of BITs, the resulting disputes and their controversial character no longer justified the total exclusion of these negotiations and agreements from parliamentary debate and a more open discussion by the general public.[35]

III. Switzerland's Special Role in ISDS

A. Switzerland as a Seat of Arbitration

While Switzerland is certainly in a similar situation with regard to the historic use of diplomatic protection and the development of BITs since the 1950 as other developed nations it shares only with very few other states the status of a preferred place for the related investor-State dispute settlement (ISDS).This is certainly related to its general appeal for arbitration and the respective government policies to favour it.[36] In the area of commercial arbitration (including sports), the country benefits from the presence of international companies and institutions as well as a legal framework that make it attractive for the establishment of arbitration tribunals. In addition, one should mention that this presence of many foreign companies (including state-owned entities) and, even more so, its role as a financial and trading centre lead to an important position when it comes to the enforcement of arbitral wards. This is also true for ISDS.

Switzerland is in a similar positions as the Netherlands (due to the presence of the Permanent Court of Arbitration and many multinational companies), Sweden (due to the presence of the Stockholm Chamber of Commerce and its role in energy disputes) or venues like Vienna, Singapore or Hong Kong while places like Washington, New York, London, Paris or Madrid are traditional centres due to their history and the resulting infrastructure. This role within the settlement of disputes involving States can lead to certain challenges between the State where a court is seated and the state party to such legal proceedings and justifies also a proper analysis regarding the responsibility regarding the architecture and the outcome of the system as a whole.[37]

B. The Role of the Swiss Feral Supreme Court

One consequence of the attractiveness of Switzerland as a seat for international arbitration and as a financial centre is the role of Swiss courts in the review of arbitral decisions be it because an arbitral award as such is challenged or in proceedings re-

35 See Message fu 22 septembre 2006 concernant les accords de promotion et de protection réciproque des investissements avec la Serbie-et-Monténégro, le Guyana, l'Azerbaïdjan, l'Arabie saoudite et la Colombie, FF 2006 8041

36 See on this topic a current research project entitled «Essor de l'arbitrage commercial international en Suisse (1958–1989)» by Guillaume Beausire at the University of Lausanne.

37 See on this topic a current research project undertaken at the Law School of the University of Lausanne a Ara Papyan, supervised by Andreas R. Ziegler.

lated to the enforcement[38] of such an awards. The most striking development in this respect with regard to the topic treated in this contribution is the number of ISDS cases leading to challenges before the Swiss Federal Supreme Court (as single instance provided for under Article 190 IPRG).[39] While in the first decade of the 21st century the Swiss Federal Supreme Court had to deal with a handful of cases involving ISDS arbitral awards based on BITs[40], the number of such cases has mushroomed since 2015[41], involving sometimes very controversial question regarding the interpretation of the language of these BITs and the Energy Charter Treaty (ECT).

Certain of these cases where of a highly political nature (such as a case relating to the annexation of Crimea by Russia[42]), and almost all of these cases were of a certain importance for the countries concerned. Admittedly the competence to review these cases is relatively limited (arbitration-friendly) but this does not automatically justify the outcome or prevent certain (political) reactions by the States involved. Despite the professional and impartial approach normally attempted by the courts (and certainly the Federal Supreme Court), this situation is not without challenges and could lead to dangerous tensions in the future.[43] This is one reason why ICSID and a multilateral investment court (MIC, as proposed currently by the EU)[44] would avoid this involvement of (certain) national courts in ISDS. A debate on the role of domestic courts has been launched[45] but with regard to Swiss courts or the specific role of the Swiss Federal Supreme Court this debate needs still to be launched.

38 See on this issue Alexander Laute & Andreas R. Ziegler, «Vereinbarkeit des Merkmals der ‹hinreichenden Binnenbeziehung› mit dem New Yorker Übereinkommen zur Anerkennung und Vollstreckung von ausländischen Schiedssprüchen – Zugleich Besprechung des Urteils des Bundesgerichts v. 7. Sept. 2018 – Az.: 5A_942/2017», 18 SchiedsVZ – German Arbitration Journal (2020), 286–293.

39 Federal Law on International Private Law, RS 291.

40 The most relevant are 4P.114/2006, 4P.98/2005, 4P.154/2005, 4P.200/2001, and 1P.113/2000.

41 The most relevant are 4A_461/2019, 4A_306/2019 (146 III 142), 4A_80/2018 (publication in the official record pending), 4A_65/2018, 4A_396/2017 (144 III 559), 4A_398/2017, 4A_157/2017, 4A_98/2017 (143 III 462), 4A_616/2015, 4A_34/2015 (141 III 495).

42 See 144 III 559.

43 See on this topic a current PhD project by Manon Schlaepfer (supervised by Andreas R. Ziegler) at the Law School of the University of Lausanne.

44 See the discussion on a Multilateral Investment Court (MIC) such as summarized in Marc Bungenberg & August Reinisch, Draft Statute of the Multilateral Investment Court, Baden-Baden 2021, and Andreas R. Ziegler, «Common Commercial Policy (CCP)», in: Gormley Laurence et al. (eds.) Online Encyclopaedia of European Union Law, Oxford (forthcoming).

45 See, for example, Gabrielle Kaufmann-Kohler & Michele Potestà, «The Path to Reform of ISDS: What Role for National Courts?», in: Investor-State Dispute Settlement and National Courts. European Yearbook of International Economic Law, Heidelberg 2020 (<https://doi.org/10.1007/978-3-030-44164-7_4>).

C. The Role of Practitioners Based in Switzerland

The use (and promotion) of Switzerland as an attractive seat of arbitral tribunals and the reputation for a stable, neutral and service-oriented legal profession translates also into the presence of specialized law firms and the prominent role of persons active in Switzerland as arbitrators, counsel[46] and expert witness. As an illustration, one can mention figures assembled by UNCTAD in 2017 where among the ten arbitrators most often appointed in known ISDS arbitral proceedings figures Gabrielle Kaufmann Kohler (appointed in 49 procedures between 1987 and 2017, being only one of the two women in this list). Though for a long time a part-time member of the Geneva Law Faculty, she had been working as arbitrator for most of her active career, originally as member of well-established Geneva law firms[47] and later with her own boutique firm.[48] Other names of Swiss practitioners (or based in Switzerland) that appear regularly with numerous appointments in rankings regarding of known ISDS arbitrations (compiled by UNCTAD) are Pierre Tercier, Laurent Lévy, Charles Poncet and Veijo Heiskanen.[49]

On 29 January 2021, the State Secretariat for Economic Affairs (seco) published a new Swiss list of ICSID arbitrators and mediators. A public call for tenders was held for the first time in autumn 2020.[50] What is striking about the new list is that, also as a first, parity between women and men was enforced by the Federal Council. In addition, six of the eight persons on the list are practitioners who offer their services commercially, while only two of the women named on the list can be described as actual academics. From this, a fundamental support by the Federal Council of the strongly commercial and practical nature of today's investment arbitration can be inferred, which is certainly also due to Switzerland's importance as an arbitration centre.

Other actors, especially the EU, are much more critical in this regard.[51] The corresponding negotiations to realise reform efforts in UNCITRAL[52] and ICSID[53] are ongoing. The Swiss Government has included Gabrielle Kaufmann Kohler as mem-

46 See on this issue which cannot be developed here further: Andreas R. Ziegler & Jonathan R. Kabre, «The Legitimacy of Private Lawyers Representing States Before International Tribunals», in: Freya Baetens (ed.), Unseen Actors in International Law, Cambridge 2019, 544–565.

47 From 1985 to 1995 as a partner with Baker & McKenzie and between 1996 and 2007 with Schellenberg Wittmer.

48 In 2008 she was a co-founder of the law firm Lévy Kaufmann-Kohler.

49 See <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

50 Call of 30 November 2020, online.

51 See Bungenberg & Reinisch, supra n. 44.

52 UNCITRAL – Working Group III: Investor-State Dispute Settlement Reform, 40 the session 8–12 February 2021, Vienna.

53 ICSID launched the current amendment process in October 2016, inviting member states to propose issues that merit consideration. In January 2017, the ICSID Secretariat issued a similar invitation to the public requesting proposals for rule changes.

ber of the official delegation for the reform negotiations. She figures also on the Swiss ICSID list.

IV. Challenges for the Future

As one can easily see from this short introduction, the importance of these current debates and developments of international investment law for Switzerland are obvious and can be summarized like this:

- The existence of a multilateral framework or a network of bilateral treaties could remain important also in the future to protect interest of Swiss investors abroad. The presence of various global players (large multinational companies) but also of an important number of medium-sized companies in Switzerland that are established abroad or have important economic relations and activities abroad depends partly on (or at least benefits strongly from) these guarantees. Will Switzerland still be able to conclude such agreements? Will a multilateral framework be realistic in the near future?
- The rather broad scope of these agreements when it comes to the definition who qualifies as a Swiss investor and the business-friendly provisions of such agreement help the country to attract foreign capital that uses Switzerland to manage and control foreign investments (in addition to other benefits that the country has to offer). At the same time, the attractiveness of Switzerland for important players (e.g. in controversial areas like trading of raw materials or mining) may lead to a reputational risk (or at least exposure) and a call for mor stringent regulation at domestic level (or the limitation of treaty benefits). Will it be possible and domestically acceptable for Switzerland to conclude treaties that follow its traditional business-friendly model? Should the country take a more pro-active position in rebalancing obligations and rights contained in such treaties?
- When it comes to dispute settlement the questions regarding the possibility and appropriateness to include the option of ISDS will have to be addressed. In addition, the question whether the existing arbitration model shall be used and favoured or whether the EU-sponsored model of a Multilateral Investment Court (MIC) should be endorsed will cannot be avoided in the long run. Should the EU manage to impose its MIC-based system, will this certainly have effects on the use of traditional arbitral tribunals for ISDS in Switzerland – this could be positive or negative. Domestic criticism could enforce the international discussion and require a revised approach or at least a debate on the choices made.
- When it comes to the role of counsel and the Federal Supreme Court in Switzerland, there could be a discussion whether the existing tradition and the current legal framework with a relatively lean control of arbitral awards is appropriate and whether the position of the country as a whole benefits from the existing model.

Here again, domestic criticism could easily lead to a need to more pro-actively revisit the existing legal framework and the replacement of an arbitration-based model in favour of a multilateral solution established by a group of like-minded states.