The Unknown Innovator: Switzerland and the Beginning of the Investment Treaty Regime

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Switzerland is the second country that started negotiating bilateral investment treaties (BITs), only being preceded by (West) Germany. This article analyses Switzerland's unknown role in influencing the content of early international investment law. It uses records from Swiss public and private archives, amongst others, to elucidate the process of Swiss investment law policy during the end of the 1950s and the early 1960s. The article illustrates how early Swiss BIT policy was shaped by the symbiotic relationship between the government (the *Handelsabteilung* and *Eidgenössisches Politisches Departement)* and business interest associations *(Vorort* and the *Vereinigung schweizerischer Industrie-Holdinggesellschaften*, amongst others). It demonstrates Switzerland's early influence on international investment law by tracing how Swiss policymakers spearheaded the use of the transfer, national treatment and most favoured nation clause in early investment treaties, and influenced the «European approach» of short investment agreements focused solely on investment protection.

Keywords: International Investment Law – Multilateral Investment Treaty – Bilateral Investment Treaties (BITs) – History Of International Law – Business Lobbying – Switzerland

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I. Introduction

For an open, export-oriented economy with many multinational companies like Switzerland, international economic law in general and international investment law in specific have always mattered.[1] Recent data from the Organisation for Economic Cooperation and Development (OECD) indicates that Switzerland still ranks amongst the ten countries with the highest foreign direct investment (FDI) stocks, whilst its nationals are also the fourth largest holders of FDI stocks as a percentage of gross domestic product.[2] As data by the Swiss State Secretariat for Economic Affairs (SECO) shows, Switzerland also has a prominent place in international investment law with more than 120 signed investment agreements, surpassed only by Germany and China.[3]

Since Switzerland signed its first investment treaty with Tunisia in 1961, there has been some, albeit relatively sparse, academic literature on Switzerland's BIT policy. Until the 1990s, much of this literature was written by diplomats and civil servants involved in the Swiss BIT programme.[4] As investment law became more politically salient through the rise of investor-state dispute settlement (ISDS) and the «boom» in BITs signed worldwide in the 1990s, more academic literature on the Swiss BIT programme appeared, now primarily by legal academics.[5]

Even though Switzerland was a clear «innovator», the second country worldwide to start negotiating international investment agreements, relatively little is known about the historical context of this policy decision or the possible influence that early Swiss investment agreements had on the treaty practice of other countries. This con-

1 Andreas R. Ziegler, «Switzerland and International Investment Law: Why It Matters», 31 Swiss Rev. Int'l & Eur. L. (2021), 179–191.

2 Organisation from Economic Cooperation and Development, «OECD International Direct Investment Statistics 2021», Paris, 2022.

3 State Secretariat for Economic Affairs (SECO), «Switzerland's Investment Treaty Policy», 24 January 2023, <www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale_Investitionen/Vertragspolitik_der_Schweiz. html#:~: text= Switzerland%20has%20signed%20over%20120,a%20location%20for%20international%20investments>.

4 In particular, see Kurt Schärer, «Die bilateralen Investitionsschutz-Abkommen der Schweiz», Der Schweizer Treuhänder (1979), 26–30; Philippe Lévy & Heinrich Gattiker, «Behandlung und Schutz der Auslandsinvestitionen: Konzepte im Wandel», 35 Aussenwirtschaft (1980), 53–77; Mathias-Charles Krafft, «Les accords bilatéraux sur la protection des investissements conclus par la Suisse», in: D. Dicke (ed.), Foreign investment in the present and a new international economic order, Fribourg 1987, 72–101; Marino Baldi, «Völkerrechtlicher Schutz für internationale Direktinvestitionen», 8 Recht: Zeitschrift für juristische Aufbildung und Praxis (1990), 5–15.

5 In particular, see Jean-Christophe Liebeskind, «The Legal Framework of Swiss International Trade and Investments: Part I Promotion», 7 The Journal of World Investment & Trade (2006), 331–70; Jean-Christophe Liebeskind, «The Legal Framework of Swiss International Trade and Investments: Part II Protection», 7 The Journal of World Investment & Trade (2006), 469–506; Anne-Juliette Bonzon, La protection des investissements suisses à l'étranger dans le cadre des accords de promotion et de protection des investissements, Bâle, 2012; Michael Schmid, Switzerland, in: C. Brown (ed.), Commentaries on Selected Model Investment Treaties, Oxford 2013, 651–696.

trasts with, for example, the origins of the German, British, or US investment treaty programmes, which have all been recently studied using archival records.[6] The earliest agreements «matter», particularly because recent research has shown that in international investment law, legal language used in past treaties tends to influence subsequent negotiators and that the design of international investment agreements can, to a considerable extent, be explained by one country copying rules from the other.[7]

This article explains why Switzerland was an early mover in international investment law and shows how some of its decisions have had a lasting influence on the content of modern international investment law. The article does so by analysing previously unused primary sources. Until now, analysis of Swiss investment treaty practice has focused on the published texts of BITs, investor-state dispute settlement cases based on Swiss BITs and other official documents (e.g. Swiss parliamentary documents).

Instead, this article looks at a set of archival records of (primarily) Swiss archives to elucidate the origins of Swiss investment treaty policy. On the one hand, I assess records of the *Handelsabteilung* (the predecessor of SECO) and the *Politische Departement* (the predecessor of the Federal Department for Foreign Affairs [EDA]), both of which are kept at the Swiss Federal Archives (*Schweizerisches Bundesarchiv).*[8] It also uses a set of records of business interest associations most involved in early Swiss investment protection policy. First, these are the archival records of Vorort (the predecessor of *Economiesuisse),* the most important peak Swiss business interest association, kept at the *Archiv für Zeitgeschichte* in Zurich. Secondly, I analyse records of the Association of Swiss Transit- and World Trading Companies (*Verband Schweizerischer Transit- und Welthandelsfirmen),* a minor Swiss business interest association. Finally, I also assess records of two members (the consumer food manufacturer Héro and the erstwhile aluminium company Alusuisse) of the *Vereinigung schweizerischer Industrie-Holdinggesellschaften* (Industrie-Holding, the predecessor of SwissHoldings), the business inter-

6 See for example Kenneth J. Vandevelde, The First Bilateral Investment Treaties: U.S. Postwar Friendship, Commerce, and Navigation Treaties, Oxford 2017; Jarrod Hepburn, Martins Paparinskis, Lauge Poulsen & Michael Waibel, «Investment Law before Arbitration», 23 Journal of International Economic Law (2020), 929–39; Ingo Venzke & Philipp Günter, «Völkerrechtlicher Investitionsschutz made in Germany? Zur Genese und Gestalt des ersten BIT zwischen Deutschland und Pakistan (1959)», 82 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (2022), 73–120.

7 Wolfang Alschner, «Locked in Language: Historical Sociology and the Path Dependency of Investment Treaty Design», in: M. Hirsch & A. Lang (eds.), Research Handbook on the Sociology of International Law, Cheltenham 2018, 347–368; Lauge Poulsen & Michael Waibel, «Boilerplate in International Economic Law», 115 American Journal of International Law Unbound (2021), 253–257.

8 Every topic dealt with by the Swiss public administration receives a separate «reference code», which makes it easier to find data in the archives. For the *Handelsabteilung,* most files related to investment agreements can be found under the reference code 821 (Handelsverträge mit der Schweiz/Investitionsschutzabkommen). For the *Politische Departement,* files classified under reference codes C.41.124.1 (Schweiz. Kapitalexport), C.41.124.5.1 (Bilateraler Investitionsschutz) and C.41.124.5.2 (Multilateraler Investitionsschutz) were particularly relevant.

est association for Swiss-based multinational enterprises. Records for these groups are kept at the Swiss Economic Archives in Basel.[9] To assess the influence of Switzerland on international investment law in Western Europe, I also refer to a range of other European archives (the OECD Archives, the National Archives of the Netherlands, the Belgian Diplomatic Archive).

The article proceeds as follows. Section 2 focuses on multilateral investment law initiatives during the 1950s and1960s, particularly the failed attempt to negotiate a Draft Convention on the Protection of Foreign Property at the OECD and its predecessor the Organisation for European Co-operation (OEEC) (II.A). I highlight the Swiss contribution to this exercise, showing that a Swiss government draft of 1957 (II.B) was instrumental in seeing the transfer clause, the national treatment (NT) clause and the most favoured nation (MFN) clause introduced in the text of the OECD Draft (II.C). Section 3 moves from the multilateral to the bilateral. First (III.A), it shows how one business actor in particular, namely Industrie-Holding, was seminal in the initial Swiss policy decision to negotiate BITs, and how the creation of the first Swiss Model BIT resembled an internal negotiation between a more cautious Swiss public administration and a private investor community striving for stronger protective provisions. Secondly (III.B), I illustrate the influence of the first Swiss Model BIT on the early practice of other countries, particularly the Netherlands, Belgium-Luxembourg[10] and France. These cases demonstrate how Switzerland served as a critical influence for what has been called the «European approach» to BITs, namely the use of «lean, focused instruments to protect and promote foreign investment between two parties».[11]

II. Multilateral Investment Law: Switzerland and the OECD Draft Convention (1957–1967)

A. The OECD Draft Convention

The story of the OECD Draft Convention on the Protection of Foreign Property, a failed attempt to negotiate a multilateral investment treaty at the OECD from 1957 to 1967, is relatively well-known. Contemporary observers wrote articles on the Draft, which was discussed as one possible legal solution (next to investment insurance and investor-state arbitration) to improve the legal protection of foreign investment.[12]

9 On the history of Industrie-Holding, see Sabine Pitteloud, Les multinationales suisses dans l'arène politique (1942–1993), Genève 2022.

10 Belgium and Luxembourg have traditionally negotiated BITs under the aegis of the Belgium-Luxembourg Economic Union (BLEU).

11 Rudolf Dolzer, «The European Approach to BITs», 24 ICSID Review (2009), 368–399.

12 Ignaz Seidl-Hohenveldern, «The Abs-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the Round Table», 10 Journal of Public Law (1961), 100–112; Arghyrios A. Fatouros, «The Quest for Legal Security of Foreign Investments-Latest Developments», 17 Rutgers Law Review (1963), 257–303.

The initial impetus to start work on the OECD Draft Convention came from the private sector, primarily centred around the German banker Hermann Abs and the British lawyer, politician and then director of the oil company Shell, Lord Hartley Shawcross. Both were members of a business interest association entitled the Association for the Promotion and the Protection of Private Foreign Investments (APPI) which counted influential Western businessmen amongst its members and played an important role in propagating ideas for multilateral investment protection.[13]

Although both Abs and Shawcross had initially developed separate proposals for a multilateral investment convention, the two eventually came together to create the so-called Abs-Shawcross Draft Convention on Investments Abroad, which was finalised in 1959.[14] This ten-article draft contained several legal provisions that have become key to the current international investment law regime, such as the requirement to ensure fair and equitable treatment to the property of the nationals of the other Parties (the FET clause), to accord property most constant protection and security (the FPS clause), the prohibition to impair the management, use, and enjoyment of the investment by taking unreasonable or discriminatory measures (Art. 1), or the requirement to ensure the observance of any undertakings (Article 2, the umbrella clause), to name a few examples. The West German government submitted this draft – and a previous draft sponsored solely by Abs in 1957 – to the (then) OEEC in 1959 on behalf of Abs.

Despite the strong private interests pushing in favour of convention's conclusion, the OECD never managed to have the convention signed and ratified by its member states. Above all, this was due to three interlocking factors that made the instrument politically challenging to negotiate. First of all, opposition by some of the capital-importing states of the OECD, such as Greece or Turkey, which successfully weakened various drafting versions. Secondly, resistance by the United States, which for a long time preferred the bilateral approach above a multilateral treaty before changing back in the mid-1960s. Thirdly, the fact that the two leading proponents of the OECD's work, Germany and Switzerland, progressively lost interest as they negotiated ever more bilateral investment treaties.[15]

During the period 1960 to 1962, a draft 14-article text (plus an «Annex relating to the statute of the arbitral tribunal») was created and subsequently slightly amended in 1965 to take into account some input from the United States' delegation. Although

13 See in particular Taylor St. John, The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences, Oxford 2018; Nicolás M. Perrone, Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules, Oxford 2021; Filip Batselé, «Foreign Investors of the World, Unite! The International Association for the Promotion and Protection of Private Foreign Investments (APPI) 1958–1968», 34 European Journal of International Law (2023), 415–447.

14 For the text of the Abs-Shawcross convention, see Hermann Abs & Hartley Shawcross, «The Proposed Convention to Protect Private Foreign Investment: A Round Table – Introduction», 9 Journal of Public Law (1960), 115–124.

15 For more background, see St. John, supra n. 13, at 87–99; Batselé, supra n. 13, at 429–436.

the OECD's draft had been weakened over various drafting stages, from the perspective of foreign investors, it still resembled, to a significant extent, the efforts of Abs and Shawcross, including the choice to include «Notes and comments» to the convention which reflected the drafters' thinking.[16]

Still, due to the three reasons mentioned above, it was impossible to finalise the work. This forced the OECD's member states to reach for unorthodox solutions. Simply ending the work was seen as potentially setting a bad example (namely, the fear that alleged customary international law provisions on the protection of foreign property could come under threat if even the mostly capital-exporting countries gathered in the OECD could not agree on a treaty[17]), so a solution was found to keep the semblance of unity alive. On 12 October 1967, the OECD Council, the organisation's highest organ, adopted a resolution (with Spain and Turkey abstaining) whereby member states «Reaffirm[ed their] adherence to the principles of international law embodied in the Draft Convention; Commend[ed] the Draft Convention as a basis for further extending and rendering more effective the application of these principles; approv[ed] the publication of the Draft Convention as well as this Resolution».[18]

Even though the OECD Draft failed to materialise, it would have an enduring influence on international investment law. Whereas Newcombe and Paradell's statement that «many of the BITs in this period [the 1960s/1970s] were based on the 1962 and 1967 OECD Draft Convention» probably is too general a statement considering our current lack of empirical data on the origins of BIT programs of many European countries, the OECD Draft Convention has undeniably had some influence. For example, Denza and Brooks, former UK BIT negotiators, noted that when developing the first UK Model BIT during the early 1970s, «careful regard was paid to the work done between 1959 and 1967 by the Organisation for Economic Cooperation and Development, which led to the OECD Draft […]».[19] Likewise, whereas a quantitative assessment using a textual similarity analysis between the OECD Draft and subsequently negotiated BITs has shown an average similarity of (only) about 30%, Alschner noted that some of the clauses of the OECD Draft Convention (such as Article 1, which contained the FET, FPS and unreasonable or discriminatory measures clause), do seem to have shaped subsequent BIT design to a substantial extent.[20]

16 Ibid.

17 St. John, supra n. 13, at 95–96.

18 OECD, «OECD/LEGAL/0084 Resolution of the Council on the Draft Convention on the Protection of Foreign Property», <https://legalinstruments.oecd.org/public/doc/242/242.en.pdf>.

19 Eileen Denza & Shelagh Brooks, «Investment Protection Treaties: United Kingdom Experience», 36 The International and Comparative Law Quarterly (1987), 908–923, at 910.

20 Wolfgang Alschner, Manfred Elsig & Simon Wüthrich, «Main Act or Side Show? Model Agreements by International Institutions and Their Reuse in Investment Treaty Texts», 25 Journal of International Economic Law (2022), 592–610.

B. Switzerland's 1957 Draft International Convention Concerning Guarantees for the Investment of Foreign Capital

Even though posterity has remembered the contribution of Abs and Shawcross, it was not only this German government-sponsored plan that influenced the text of the OECD Draft Convention. A second proposal did so too, the so-called 1957 «Draft International Convention concerning Guarantees for the Investment of Foreign Capital» sponsored by the Swiss government. This instrument seems to have been all but forgotten in subsequent literature on Swiss BIT practice, even Bonzon's comprehensive overview of Swiss BIT practice only mentioning the Swiss initiative of 1957 in passing.[21]

That Switzerland had an interest in investment protection should scarcely be surprising. It was one of the few European countries whose economy had been relatively untainted by World War II. Switzerland's private FDI probably doubled in the 1950s[22], and the banking sector played a key role in this development. During that decade, Swiss banks became vastly larger, provided extensive loans to other countries, and even formed protection committees *(Schutzkomitees)*.[23]

Already in 1953, the president of the Swiss Bankers Association pleaded in favour of «an agreement, open to all nations, according to which each signatory would undertake to renounce, in times of war, to sequester or expropriate foreign private property and to lift unconditionally, at the end of hostilities, all blocking measures».[24] Still, it took a few more years for the ideas of Swiss business actors to come to fruition, also because the Swiss government considered that the Bankers Association's proposal for a convention protecting foreign property during wartime was psychologically difficult in the aftermath of the war. Instead, an agreement on the peacetime protection of foreign property deserved priority.[25]

When Swiss private business actors proposed such an initiative in 1956, it had more success. This time, the Association of Swiss Transit- and World Trading Companies (*Verband Schweizerischer Transit- und Welthandelsfirmen),* a small Swiss business interest association for transit traders, blew the whistle.[26] Inspired by a speech of Hermann Abs (who had by then not drafted his own convention yet), this grouping reached out to other Swiss business interest associations (the Association of Swiss Companies in

21 Bonzon, supra n. 5, at 45.

22 Urs Brogle, Zur Frage des schweizerischen Kapitalexports, Zürich 1963, at 24.

23 Max Oetterli, «Der Schutz der Auslandsinvestitionen», 3 Wirtschaft und Recht (1957), 190–199.

24 Protokoll der vierzigsten Generalversammlung der Schweizerischen Bankiervereinigung dd. 26.09.1953, in: Schweizerisches Bundesarchiv, E2001E#1970/217#6256*, Az. C.41.124.2, Erschliessung unentwickelter Gebiete, 1956–1957.

25 Politisches Departement (EPD) Notiz für Herrn Minister Kohli dd. 4.03.1957, in: Schweizerisches Bundesarchiv, E2001E#1970/217#6255*, Az. C.41.124.1 Schweiz. Kapitalexport, 1952–1957.

26 On the history of transit traders in Switzerland, see Lea Haller, Transithandel: Geld-und Warenströme im globalen Kapitalismus, Berlin 2019.

Germany and Industrie-Holding) to start work on a multilateral investment treaty.[27] As the United Nations was seen as negatively predisposed towards such a proposal (in the words of a representative of Industrie-Holding, «the influence of the underdeveloped countries is so large, that it is doubtful, whether any proposals from the UN would be satisfactory in terms of content»), the associations focused on drafting a proposal for the OEEC.[28]

The Swiss government quickly co-opted this proposal. At the time, it was in a difficult situation at the OEEC. In 1956, the United Kingdom had proposed to launch negotiations for a free trade agreement within the OEEC, partially as a reaction to the Treaty Establishing the European Economic Community, then under negotiation in Rome.[29] As part of these OEEC discussions, member states also discussed the possible creation of an investment bank, which Switzerland regarded as a dirigiste initiative that could potentially hinder the operations of the free market and Swiss banks. As a result, the *Handelsabteilung* and the *Politische Departement* saw value in proposing a multilateral investment convention as a «private» counterpart to a proposed public investment bank.[30]

The drafting process proceeded quickly. The basis of the Swiss multilateral draft convention was a July 1957 memo from the *Politische Departement* setting out the main ideas to be included in such an instrument, partially based on the investment provisions of Friendship, Commerce and Navigation (FCN) treaties the US had been negotiating since the end of World War II.[31] The Swiss government saw the free movement of capital as the crux of any convention.[32] Furthermore, Switzerland proposed to back up free transferability with certain guarantees, specifically non-discriminatory tax treatment, MFN treatment on expropriation (accompanied by equitable compensation), and a state-state dispute settlement procedure.[33]

From July to November 1957, these ideas were drafted into legal text during meetings between the relevant Swiss ministries and private business representatives.[34] By

27 Ausführungen von Herrn W. Burkhard-Wuhrmann anlässlich der Generalversammlung des Verbandes Schweizerischer Transit- und Welthandelsfirmen vom 13. Juli 1956, in: Schweizeriches Wirtschaftsarchiv (hereafter: CH SWA), HS 421 G5.

28 Letter from Industrie-Holding to ICC Swiss National Committee, dd. 20.02.1957, in: CH SWA, HS 421 G5.

29 Richard T. Griffiths, «The Origins of EFTA», in: B. Guðmundur (ed.), EFTA 1960–2010: Elements of 50 Years of European History, Reykjavik 2010, 43–60.

30 Letter from Heinrich Homberger (Vorort) to Walter Schiess (Verband schweizerischer Transit- und Welthandelsfirmen) dd. 15.06.1957, in Archiv für Zeitgeschichte (hereafter: AfZ): IB Vorort-Archiv / 463.1.3; EPD to Handelsabteilung dd. 25.06.1957 in: Schweizerisches Bundesarchiv, E2001E#1970217#6328, Az. C.41.753, Arbeitsgruppe Nr. 23, 1957.

31 On postwar US FCNs, see Vandevelde, supra n. 6.

32 EPD Memo: Libération des mouvements de capitaux dd. 05.07.1957, in: Schweizerisches Bundesarchiv, E2001E#1970217#6328, Az. C.41.753, Arbeitsgruppe Nr. 23, 1957.

33 Ibid.

34 In comparison with the early meetings, the Association of Swiss Transit- and World Trading Companies was no longer individually represented (it being a small association, Vorort took its place), though the

November 1957, the Swiss government had landed on a 7-article draft everyone could agree on.[35] This proposal protected the investments made by residents of the high contracting parties investing within the territory of another high contracting party (Article 1). The draft included a national treatment and most favoured nation clause (Article 1 j. Article 2), as well as an expropriation clause («payment of adequate compensation to be determined before such compulsory acquisition or nationalisation [...] country which has carried it out shall authorise the transfer [...]») (Article 6). It also included an obligation for states to conclude agreements «designed to avoid all discrimination [in taxation] and double taxation» (Article 5).

The key clause, from the Swiss perspective, was Article 3, which provided that the country in which the investment is made «shall undertake to authorise the free transfer to the country of residence of the person entitled thereto of any of the following», followed by a list (interests, dividends and the like; payments made under a contract by way of amortisation; sums intended to meet incidental expenses and charges relating to the management of the investment; sums arising out of the liquidation of the investment). There was no clause limiting some of these obligations by referring to the Articles of Agreement of the International Monetary Fund (IMF), a restriction sometimes included in later BITs (a so-called balance of payments exception).[36] Once agreed, the Swiss government submitted this draft to the European Payments Union (EPU), an institution established within the OEEC framework.[37]

C. The Swiss Imprint on the OECD Draft Convention

The OECD Draft Convention's negotiation can best be divided into three periods. From 1957 to 1959, the OEEC held initial discussions on the drafts submitted by Germany and Switzerland. This led to an extensive report by the OEEC's Committee for Invisible Transactions, which concluded that an initiative by the organisation on foreign investment could be useful.[38] This conclusion was politically endorsed by the OEEC Council in 1960, which provided a mandate to negotiate an «international convention for the

Bankers Association and Industrie-Holding were, as was the Swiss Insurance Association (*Verband schweizerischer Versicherungsgesellschaften).*

35 Dodis, «Konvention zum »Schutz der Auslandsinvestitionen», <https://dodis.ch/64667>. I thank Mr. Mattia Mahon of the Diplomatic Documents of Switzerland (Dodis) for the digitisation of this file. The text of this convention has been reproduced in Annex I to this article.

36 August Reinisch & Christoph Schreuer, International Protection of Investments: The Substantive Standards, Cambridge 2020, 986.

37 Jacob Julius Kaplan & Günther Schleiminger, The European Payments Union: Financial Diplomacy in the 1950s, Oxford 1989.

38 OEEC Doc. C (59) 289, Council: Protection of Foreign Investments (Report by the Committee for Invisible Transactions) dd. 16.12.1959, in: OECD Archives, 213752.

protection of foreign investments, open for adherence by non-Member countries».[39] The convention was subsequently drafted during two years of negotiations by a drafting committee within the Committee for Invisible Transactions, which eventually led to a draft in 1962 that was sent to the OECD Council.[40] Because of political disagreement on signing the convention, the only decision was to allow the OECD's Secretary-General and member countries to make the text available to non-member states and other interested circles for their input.[41] This led to five years more of on-and-off talks from 1962 to 1967, the eventual conclusion being that interest by non-member states was meagre, that there was growing opposition to the project from within the OECD's capital-importing states, which eventually led to the October 1967 resolution to endorse the principles behind the OECD Draft but not to sign it as an international treaty.[42]

Switzerland influenced the negotiations both politically and legally. Politically, it was most active during the first few years. An internal note by the OECD Secretariat in 1962 described the negotiating dynamics as encompassing «many shades and degrees of interest ranging from warm support to cool indifference», noting in particular the «very active sponsorship of Germany and Switzerland».[43] Although Switzerland and Germany both sponsored a separate draft, the two sides also informally agreed not to play one against the other, considering both strived towards the same goal of stronger multilateral investment protection.[44] The Swiss negotiating delegation itself showed the close collaboration between industry and state, as it consisted not only of two officials from the *Politische Departement* (Emanuel Diez and Robert Karl Montandon[45]), but also Robert Dunant[46], the secretary of the Swiss Bankers Association, who regularly passed on information from foreign business contacts pushing for the convention to the Swiss government.[47]

39 OEEC Doc. C/M (60) 9 (Prov.), Council Minutes of the 465th Meeting, 7th April 1960 dd. 14.04.1960, in: OECD Archives, 213751.

40 OECD Doc. C (62) 133, Council: Draft Convention on the Protection of Foreign Property dd. 23.07.1962, in: OECD Archives, 213751.

41 OECD Doc. C/M (62) 23 (Prov.) dd. 11.12.1963, in: OECD Archives, 213751.

42 OECD Doc. C (67) 102, Council: Resolution on of the Council on the Draft Convention on the Protection of Foreign Property dd. 16.10.1967, in: OECD Archives, 213754.

43 Brief on the work of the organisation on a draft convention on the protection of foreign property dd. 07.03.1962, in OECD Archives, 213751.

44 Memo from EPD to several other ministries/business interest associations: Internationale Konvention zum Schutz der Auslandsinvestitionen dd. 08.10.1959, in: Schweizerisches Bundesarchiv, E2001E#197233#937, Az. C.41.124.1, Kapitalexport (1959).

45 Diez was a high official at the Directorate of Public International Law, whereas Montandon worked at the Economic and Financial Service and later at the Swiss delegation to the OECD. See Dodis, «Diez, Emanuel», < https://dodis.ch/P1692>, Dodis, «Montandon, Robert Karl», < https://dodis.ch/P23605>.

46 Dunant was the association's secretary from 1935 to 1970, see Dodis, «Dunant, Robert», < https://dodis.ch/P400>.

47 See for example the letter from Robert Dunant to Emanuel Diez, Convention OCDE sur la protection des biens à l'étranger dd. 08.07.1963 (passing on information from English and German sources on the views

Switzerland remained a proponent of signing the OECD Draft right until 1967. Still, it became less active in the negotiations around 1961–1962, when it was dismayed by the difficulty of the talks and the successive weakening (from an investor's point of view) of the draft over various rounds of negotiations. At the same time, Switzerland moved ever more towards focusing on bilateral investment treaties (Infra III.A). When the OECD Draft's text was ready in 1962, Switzerland was the only OECD state asking for its immediate signing (even Germany favoured more talks to convince waverers within the OECD), noting that Bern «had reached the limit of [its] concessions».[48] Subsequently, Switzerland became less involved, although it remained in favour of signing the convention to provide a minimum floor of treatment that bilateral treaties could supplement. When the negotiations ended not with a bang but a whimper by merely endorsing the principles behind the draft in 1967, the Swiss delegation internally described this as a «first class funeral», conveying its strong disappointment towards its OECD partners.[49]

Legally, Switzerland also influenced the course of the OECD Draft Convention negotiations and the later course of international investment law. Of course, the OECD Draft Convention had several «intellectual fathers». The OECD's first draft, presented by its legal adviser Alexander Elkin, clearly bore the imprint of the Abs-Shawcross convention, including provisions on FET, FPS, the prohibition of unjustified or discriminatory measures (Article 1) or the umbrella clause (Article 2).[50] Many of these clauses already had some precedent in United States Friendship, Commerce and Navigation Treaties, something which the OECD secretariat was quick to notice.[51] At the same time, some provisions were new, such as the umbrella clause. Previous research has already shown that this provision was developed by lawyers affiliated with oil companies – in particular the British international lawyer Elihu Lauterpacht –, who had often negotiated investor contracts with oil-producing countries and who could potentially benefit from an internationalisation of possible conflicts with these states through treaty-based umbrella clauses.[52] However, the Swiss draft was particularly

of developing countries towards the convention), in: Schweizerisches Bundesarchiv, E2001E#1976/17#875*, C.41.124.5.2 – Multilateraler Investitionsschutz (Entwurf OECD etc.) (1962–1963).

48 OECD Doc. CE/M (62) (Prov.), Executive Committee: Summary Record of the 33rd Meeting on Thursday, 11th October 1962, in: OECD Archives, 213751.

49 EPD to Swiss delegation OECD, Aktennotiz dd. 24.01.1967, in: Schweizerisches Bundesarchiv, E2001E#1978/84#1264*, C.41.124.5.2, Multilateraler Investitionsschutz. Entwurf OECD usw. (1964–1967); OECD Doc. C/M (67) 19, Council: Minutes of the 150th Meeting held on Thursday, 12th October, 1967, in: OECD Archives, 213754.

50 OECD Doc. TIC (60) 21 dd. 08.06.1960, in: Schweizerisches Bundesarchiv, E6306#2015/5#4841*, D7-D10 Protection des biens étrangers (investissements) Vol. 1 (1954–1960).

51 OECD Doc. TIC (60) 23, Protection of foreign property in treaties concluded by the United States after the Second World War dd. 23.06.1960, in: OECD Archives, 213751.

52 See in particular Anthony C. Sinclair, «The Origins of the Umbrella Clause in the International Law of Investment Protection», 20 Arbitration International (2004), 411–434; Yuliya Chernykh, «The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention», in:

influential in the drafting of three substantive clauses, mostly lacking in the Abs-Shawcross draft, of the OECD Draft Convention: the national treatment and most favoured nation clause, and the transfer clause.

The transfer clause is a particularly important imprint of the Swiss influence. This clause, which allows freely transferring funds related to investments (e.g., capital, profits, royalties, liquidation value, etc.), has undergone a remarkable transformation over the past seven decades.[53] Nowadays, it is generally not considered a clause of primary importance in BITs, mainly because the case law is relatively scarce, itself partially a result of the fact that the IMF became an international norm-setter in favour of free capital mobility from the 1970s onwards.[54] This was different until at least the 1980s, a time during which fewer countries were part of the IMF (Switzerland itself only became a member in 1992) and more countries had transfer restrictions. Previous archival research has also confirmed that the clause was one of the most salient and essential to negotiate during early investment treaty negotiations.[55]

At the time, there existed some international law on free transferability in bilateral (primarily FCN treaties) and multilateral treaties. Regarding the latter, the IMF's 1944 Articles of Agreement included provisions on current and capital transactions.[56] In particular, the IMF leaves less freedom to its members when it comes to restricting current transactions («[subject to certain provisions] no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions» (Article VIII, Section 2 (a) IMF Articles of Agreement) than to restrictions on capital transfers («Members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3(b), and in Article XIV, Section 2»).[57] Still, the IMF's membership was far from universal in the early 1960s, and contemporary scholars were clear that outside of the obligations imposed by the IMF agreement or other

S. Schill, C. Tams & R. Hofmann (eds.), International Investment Law and History, Cheltenham 2018, 241–285; Batselé, supra n. 12.

53 Reinisch & Schreuer, supra n. 35, at 970–976.

54 Michael Waibel, «BIT by BIT: The Silent Liberalization of the Capital Account», in: Ch. Binder, U. Kriebaum, A. Reinisch & St. Wittich (eds.), International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer, Oxford 2009, 497–518; Anna de Luca, «Transfer Provisions of BITs in Times of Financial Crisis», 23 The Italian Yearbook of International Law Online (2014), 113–130.

55 Hepburn et al., supra n. 6.

56 Current transactions are defined as «payments which are not for the purpose of transferring capital» (in contrast to capital transactions) (Art. XXX (d) IMF Articles of Agreement). In the context of international investment law, income derived from investments is generally defined as current transactions. The transfer of liquidation proceeds is an example of a capital transaction in the area of foreign investment.

57 James G. Evans, «Current and Capital Transactions: How the Fund Defines Them», Finance and Development 5, no. 3 (1968), 30–35.

bilateral treaties, there existed no specific customary international law obligation obliging states to allow the free transfer of current or capital transactions.[58]

The decision to include free transfer clauses in investment treaties was also not obvious. The Abs-Shawcross draft omitted them, except for the compensation due for expropriation, Industrie-Holding having heard from its contacts that this was primarily because Shawcross, whose home state, the United Kingdom, had persistent balance of payments problems in the 1960s, considered it a politically difficult point to negotiate.[59] It was above all due to Switzerland's decision to focus on « certain particular problems of a more technical nature such as transferability », as the OEEC secretariat remarked, that the transfer clause appeared in the various drafts of the OECD Draft Convention, transfer clauses remaining common in BITs up to today.[60]

In the short term, the Swiss success in linking transfer clauses with the OECD Draft Convention would prove to be a pyrrhic victory. From 1960 to 1962, the clause that eventually appeared in the OECD Draft was successively weakened, primarily because of the very vocal Greek delegation which, as a capital-importing state, had severe misgivings about free transfer clauses that went beyond domestic investment laws.

The original Swiss clause, which proposed an international transfer guarantee without any recourse to the transferability limitations of the IMF agreement, was progressively dismembered during the talks. If the OECD Secretariat's first draft still contained a hard transfer guarantee («Each Party shall [...] authorise the transfer [..., followed by a list of current transactions as well as the liquidation value of the investment]»:[61], the second draft already allowed members of the IMF to impose transfer restrictions «to the extent specifically approved by the Fund», but without prejudice to possible concessions made via specific undertaking with the investor, or the compensation due for expropriation.[62] The third draft moved closer towards the hortatory, merely providing that each party «should [...] endeavour to permit the transfer», but still adding that this clause did not prejudice the application of Articles 1 to 3 of the convention, as well as obligations arising from other international agreements (the IMF Agreement).[63] Under pressure from the Greek delegation, which stated that it «could not accept even a recommendation concerning transfers which would apply to

58 Stanley D. Metzger, «Exchange Controls and International Law», Legal Problems of International Trade (1959), 311–327.

59 Industrie-Holding to EPD, Schutz von Auslandsinvestitionen dd. 21.07.1958, in: AfZ: IB Vorort-Archiv/463.1.3.

60 OEEC Doc. C (59) 289, Council: Protection of Foreign Investments (Report by the Committee for Invisible Transactions) dd. 16.12.1959, in: OECD Archives, 213752.

61 OEEC Doc. TIC (60) 21 dd. 08.06.1960, in: Schweizerisches Bundesarchiv, E6306#2015/5#4841*, D7–D10 Protection des biens étrangers (investissements) (1954–1960).

62 OECD Doc. TIC (60) 21, CIT: Draft Convention on the Protection of Foreign Property, Second Preliminary Draft with Notes and Comments by the Legal Adviser dd. 09.03.1961, in: OECD Archives, 213751.

63 OECD Doc. TIC (60) 21 (2nd revision) dd. 26.09.1961, in: OECD Archives, 213751.

property or even to investments», the clause was further weakened.[64] In the end, both the published 1962 and 1967 versions of the OECD Draft Convention merely contained a recommendation on transfers, which recognised the «principle of the freedom of transfer» but which «does not contain any obligation» (beyond the free transfer clause included in the expropriation clause), a far way removed from the original Swiss proposal.[65] Still, even if the OECD Draft only resulted in a very weak transfer guarantee, Switzerland had scored a victory in the realm of ideas: partially because of its 1957 Draft, investment treaties and transfer clauses would remain intimately linked, almost all later BITs containing a transfer clause.

The Swiss 1957 Draft was also influential in a second way. When it came to the treatment of foreign property, the drafters of the Abs-Shawcross and Swiss drafts had again taken different approaches. In the Abs-Shawcross Draft, provisions on fair and equitable treatment, most constant protection and security and unreasonable or discriminatory measures (Article I) were included, clauses which, even if mostly having precedents in US FCN treaties, were largely untested in arbitral practice and had a certain vagueness around them. The OECD Secretariat also noted this vagueness, asking the drafters of the Abs-Shawcross Draft whether their approach was based «on what decisions of international tribunal and some textbooks call the ‹international minimum standard›».[66] A broad discussion of the international minimum standard goes beyond the scope of this article; suffice it to say that it is based on the idea that customary international law obligations exist on the treatment of foreign nationals and their property, independent of host state laws.[67] That this was indeed the intention of the drafters of the Abs-Shawcross Draft was confirmed by Elihu Lauterpacht himself, who stated at a meeting of the Committee for Invisible Transactions that, indeed, the FET clause was meant to refer to the minimum standard and that an obligation not to take «unreasonable» measures was «inherent in international law».[68] Little wonder then that the Swiss summary of the meeting with Lauterpacht read that the «rather vague

64 OECD Doc. TFD/INV/173 CIT dd. 22.12.1961, in: Schweizerisches Bundesarchiv, E2001E#1976/17#869*, Az. C.41.124.1, Schweizerischer Kapitalexport (Vorarbeiten betr. Internationale Konvention zum Schutz der Auslandinvestitionen) (1961–1963).

65 The 1967 version of the OECD Draft Convention is also published (i.a.), in: «OECD Draft Convention on the Protection of Foreign Property», 2 International Lawyer (1968), 331–53.

66 OEEC Doc. TIC (59) 18, CIT: General and legal questions arising out of the revised draft convention of April 1959 submitted by the German Society to Advance the Protection of Foreign Investments dd. 02.06.1959, in: OECD Archives, 213752.

67 For a general overview see Hollin Dickerson, «Minimum Standards», Max Planck Encyclopedia of International Law 2010, and more extensively Martins Paparinskis, The International Minimum Standard and Fair and Equitable Treatment, Oxford 2013.

68 OEEC Doc. C (59) 289 dd. 16.12.1959 (Annex III: Explanations on Draft A), in: OECD Archives, 213752.

provisions of the [Abs-Shawcross] project contain a great deal of content, unfortunately also of the explosive kind».[69]

Even though the Swiss negotiators did not deny the existence of an international minimum standard, their draft opted for a different approach. Article 1 of the Swiss draft referred to obligations to provide treatment at least as favourable as the most favoured nation treatment and the treatment given to the host state's own nationals (national treatment). Again, even though including most favoured nation and national treatment provisions in investment-related treaties was not novel in itself (the US FCNs again provided precedents), the OEEC/OECD secretariat was still clearly influenced by this Swiss proposal during the drafting of the OECD Draft Convention. The earliest versions of the OECD Draft Convention combined the Abs-Shawcross «vague» approach with the Swiss approach of using NT/MFN, the OECD Secretariat using the Swiss draft as its main inspiration to include an NT/MFN clause (for example, Art. 1 (b) of the OECD's second draft stated that «[…] nationals of each Party shall in no case be accorded with regard to their property, within the territory of any other party, treatment less favourable than that accorded, in like situations, to nationals of that Party or to nationals of the most favoured nation»).[70]

Still, on this clause, too, the Swiss victory was more in the realm of ideas, as national treatment and most favoured nation clauses were included in many later bilateral investment treaties, rather than in the outcome of the OECD Draft Convention. The NT and MFN clause were progressively dismembered in the OECD Draft Convention until the 1962/1967 texts eventually omitted any direct reference to them (though one could still argue that they were implicitly contained in the prohibition to take unreasonable or discriminatory measures), the convention's text only providing that «The fact that certain nationals of any State are accorded treatment more favourable than that provided for in this Convention shall not be regarded as discriminatory against nationals of a Party by reason only of the fact that such treatment is not accorded to the latter» (Article 1 (a) 1962/1967 OECD Draft Convention). Despite the multilateral failure, Switzerland had more success seeing its ideas and drafting practices exported bilaterally, to which this article now turns.

69 EPD to several ministries/business interest associations – Konvention zum Schutz der Auslandsinvestitionen dd. 17.07.1959, in: Schweizerisches Bundesarchiv, E2001E#197233#937, Az. C.41.124.1, Kapitalexport (1959).

70 OECD Doc. TIC (60) 21, CIT: Draft Convention on the Protection of Foreign Property, Second Preliminary Draft with Notes and Comments by the Legal Adviser dd. 09.03.1961, in: OECD Archives, 213751. A note by the legal adviser clarified that this provision was «*inspired by Article 1 of Draft B* [the Swiss draft]», albeit using nationality instead of residence.

III. Bilateral Investment Treaties Made in Bern

A. Swiss BITs as a Cooperation between Private Industry and State

Some four years passed between the submission of the 1957 Draft International Convention Concerning Guarantees for the Investment of Foreign Capital and the signing of Switzerland's first BIT, with Tunisia, in 1961. Two reasons explain the sudden switch towards bilateralism: on the one hand, an active push by Swiss business actors to start a bilateral investment treaty and national investment insurance programme and, on the other hand, the disappointment of the Swiss government concerning the lacklustre progress on the OECD Draft Convention.

From the private industry side, Industrie-Holding increased its interest in bilateral investment protection in 1959. As internal records indicate, this was linked to (West) Germany having started negotiating BITs, the first of which was signed with Pakistan that year, and creating its national investment insurance programme – in the slipstream of already existing programmes in the US and Japan. This insurance programme, which found its basis in the annual German budget law, allowed the German government to provide German investors with guarantees against political risks (chiefly losses that occur as a result of currency transfer restrictions, expropriation and political violence) for certain investments in developing countries, on the condition that a BIT had been negotiated with that country, or that the host state's domestic legal order provided sufficient protection to foreign investments.[71] When Industrie-Holding learned of the developments in Germany, it asked its members whether this provided a rationale for Switzerland also to develop a national investment insurance system, the members deciding in the positive.[72]

To bring Industrie-Holding's plan to fruition, two parliamentarians friendly to the group's interests, namely the industrialist Max Schmidheiny in the *Nationalrat* (National Council) and the liberal politician Willi Rohner in the *Ständerat* (Council of the States), submitted postulates in 1960, obliging the Swiss government to examine and report whether to submit a bill or take a certain measure. The postulates, in identical terms, asked the Federal Council to examine (1) if Switzerland would be willing to join a multilateral investment convention, (2) if, as long as such a convention did not exist, or to complement such a convention, Switzerland should follow the example of other states and consider negotiating bilateral investment treaties with developing coun-

71 For the first reference in the German budget law, see § 18, BGBl. II, S. 79 (Gesetz über die Feststellung des Bundeshaushaltsplans für das Rechnungsjahr 1959 [Haushaltgesetz 1959]). On the German investment insurance system, also see Jochen Salow, Bundesgarantien für Kapitalanlagen im Ausland und internationaler Investitionsschutz, Baden-Baden 1985.

72 Industrie-Holding to Members, Risikogarantie und Schutz für Auslandsinvestitionen dd. 01.12.1959, in: CH SWA PA 600f A-201-26.

tries, and (3) whether the existing state-led export credit guarantee system should also be expanded to cover investment insurance in developing countries.[73]

Still, Industrie-Holding's plan could only come to fruition because of the change in opinion within the Swiss administration. During a first discussion of the two postulates at the *Politische Departement* in March 1960, a bilateral initiative was deemed unnecessary as, «at present, there are good prospects that this work can be completed successfully [at the OECD]». In that context, negotiating bilaterally made little sense for Swiss officials as long as no «international text that will provide guidance» existed.[74] It took less than a year for the internal shift to take place. With the continued US opposition, the Greek dilution of the OECD Draft Convention's text, and Germany's increasingly successful BIT programme, a policy change quickly came. In November 1960, the *Handelsabteilung* started preparing first drafts for a Swiss model BIT and a Swiss national investment insurance mechanism.[75] A few months later, this decision was explicitly linked to the faltering OECD Draft: «the realisation of the multilateral investment convention within the OEEC can no longer be expected».[76]

Even though investment insurance and investment protection treaties were initially discussed as part of one package, the fate of the two initiatives soon diverged. The Swiss investment guarantee system would only be created ten years later, in 1970, with the *Bundesgesetz über die Investitionsrisikogarantie*, which states that «The Confederation may facilitate the making of investments abroad by providing guarantees against particular risks» (Article 1 paragraph 3).[77] The link between BITs and insurance was also weaker than in Germany, as the law (in Article 1 paragraph 3) only provided that the granting of a guarantee may be made conditional on the existence of an investment agreement. That the system took so long to create was mainly linked to private business actors' disagreement on the system's merits. Whereas some, such as Industrie-Holding, pleaded strongly in favour, other business actors disapproved of the state

73 «Postulat Schmidheiny» dd. 08.03.1960 and «Postulat Rohner» dd. 09.03.1960, in: Schweizerisches Bundesarchiv, E2001E#1972–33#937, C.41.124.1, Postulat Schmidheiny-Rohner vom 8. und 9.3.1960 (1960). The link between Industrie-Holding and these two politicians is confirmed in EPD Notiz: Sitzung vom 10. März betreffend Postulat von Herrn Nationalrat Schmidheiny vom 8. März 1960 dd. 29.03.1960, in: Schweizerisches Bundesarchiv, E2001E#1972-33#937, C.41.124.1, Postulat Schmidheiny-Rohner vom 8. und 9.3.1960 (1960). For the text of the postulate Rohner, as submitted by Willi Rohner in the Council of States in September 1960, see Dodis, «8004. Investitionen in Entwicklungsländern», <https://dodis.ch/65425>.

74 EPD Notiz: Sitzung vom 10. März betreffend Postulat von Herrn Nationalrat Schmidheiny vom 8. März 1960 dd. 29.03.1960, in: Schweizerisches Bundesarchiv, E2001E#1972-33#937, C.41.124.1, Postulat Schmidheiny-Rohner vom 8. und 9.3.1960 (1960).

75 See a memo from Edwin Stopper (Handelsabteilung) to several colleagues (as well as Vorort) dd. 01.11.1960, in: Schweizerisches Bundesarchiv, E2001E#1972-33#937, C.41.124.1, Postulat Schmidheiny-Rohner vom 8. und 9.3.1960 (1960)

76 See Vorort to Handelsabteilung, Freundschaftsverträge mit Liberia, Tunesien, Ghana, Liberia dd. 15.02.1961, in: Schweizerisches Bundesarchiv, E7110#1972/32#1700*, Az. 821, Handelsvertrag (1961).

77 Bundesgesetz über die Investitionsrisikogarantie vom 20. März 1970, BBl 1970 I 499.

intervention involved in creating and administrating the system. Pitteloud has extensively discussed the creation of Switzerland's investment guarantee system, suffice it to say that in later years, it was evaluated as a failure, as the number of guarantee requests remained very limited in comparison to, for example, Germany, possibly because the annual premium an investor had to pay was significantly higher in Switzerland.[78]

Switzerland moved significantly quicker in developing its first model investment agreements. Although it has sometimes been stated that Switzerland «has never had a Model BIT», this is only correct to the extent (as Schmid does) that one equates a model with a text made publicly available and formally endorsed by the government.[79] For all practical intents and purposes, Switzerland did use various model texts during investment treaty negotiations, as is amply confirmed by archival records. The term «texts» is in order here, as, as previous commentators have also noted, early Swiss investment treaty practice consisted of both standalone investment treaties and broader treaties on trade, investment protection and technical cooperation, the latter most commonly negotiated with newly independent African states.[80] In both cases, these agreements were negotiated based on a model text.

I only briefly discuss the first standalone model, mainly because the other model was more influential in Western European BIT practice. This standalone BIT model was developed from 1960 to 1962 and was first intended for negotiations with Pakistan (also Germany's first BIT partner). The *Politische Departement* drafted the model, with close collaboration from industry, primarily Vorort and Industrie-Holding. Industrie-Holding was particularly active, preparing its own 9-article counterdraft in January 1961, which it used to lobby the administration in favour of more investor-friendly clauses wherever possible.[81] This lobbying also had some success: for example, the FET clause was not included in the administration's first models but was included in Industrie-Holding's counterdraft, its secretary arguing it could serve as an independent obligation (beyond NT/MFN).[82] In the end, the administration compromised on this point, inserting an FET clause in the article dealing with NT and MFN obligations («Each Contracting Party shall in particular ensure fair and equitable treatment within its territory to the property of the nationals or companies of the other Contracting Party; this treatment shall be at least equal to that granted by the Party to its own nationals

78 Lévy & Gattiker, supra n. 4, at 64–65; Sabine Pitteloud, «Multinationals' Need for State Protection: The Creation of the Swiss Investment Risk Guarantee in the 1960s», in: J. M. Kleinoder & N. Christian (eds.), Security and Insecurity in Business History, Baden-Baden 2021, 111–134.

79 Schmid, supra n. 5, at 658.

80 Huu-Tru, supra n. 4, at 582–583; Bonzon, supra n. 5, at 46–50.

81 This draft can be found in Industrie-Holding to Members, Bemerkungen zum Entwurf eines bilateralen Investitions-Schutzvertrages dd. 04.01.1961, in: CH SWA PA 600f A-201-26.

82 Ibid.

or companies or to the treatment granted to nationals or companies of the most favoured nation if the latter is more favourable»).[83]

The model agreed upon in 1962 consisted of 8 articles and was originally published together with a commentary explaining the meaning of certain provisions.[84] Several other texts had inspired the model: whereas the first drafts in 1960 still strongly bore the imprint of the 1957 Swiss multilateral proposal by focusing on the free transfer of capital[85], this and subsequent drafts also showed the influence of early German BITs and the negotiations of the OECD Draft Convention. After a preambular clause, the model's Article 1 referred to the prohibition to impair the foreign property through unreasonable or discriminatory measures, the requirement to grant necessary permits, treatment at least equal to NT/MFN (whichever is more favourable) and FET. Article 2 retained the «hard» Swiss transfer clause, with an international transfer guarantee not mitigated by a reference to the IMF agreement. Article 3 contained an expropriation clause along classical Western lines (with the requirement to pay effective and adequate compensation), Article 4 a clause on technical and scientific cooperation and Article 5 a non-derogation clause for more favourable treatment provided outside of the convention. Article 6 contained definitions (with companies being defined based on incorporation or control, and with a broad definition of property), Article 7 a state-state dispute settlement clause (with reference to ad hoc arbitration) and Article 8 dealt with the ratification and duration of the agreement, as well as containing a sunset clause of 10 years.[86] Although Switzerland's negotiations with Pakistan failed, it negotiated several BITs based on this (and amended versions of this) model. The first agreement that was successfully signed based on this model was the (8-article long) BIT with Costa Rica in 1965.[87]

However, as explained in the next section, it was be the second Swiss model that influenced the practice of other European states to a greater extent. This model agreement on trade, investment protection and technical cooperation was developed alongside the standalone model BIT in the early 1960s. Switzerland developed this separate model for a few practical reasons: its private investors had very little investment in the newly independent African states, meaning standalone BITs were often not deemed a

83 Article 1 (2), Swiss Draft 24th April 1962, in: Schweizerisches Bundesarchiv, E2001E#1976/17#4109*, Az. C.41.1570.0, Schweizerische Investitionen in Pakistan (1958–1963). This model is unpublished.

84 Commentaire des articles du projet suisse de convention avec le Pakistan sur la protection des investissements dd. 24.02.1962, in: Schweizerisches Bundesarchiv, E7110#1972/32#2424*, Az. 821, Handelsvertrag (1961).

85 Erster Entwurf – Vertrag zur Sicherung von Investitionen dd. 01.11.1960, in: Schweizerisches Bundesarchiv, E2001E#1972-33#937, C.41.124.1, Postulat Schmidheiny-Rohner vom 8. und 9.3.1960 (1960).

86 Swiss Draft 24th April 1962, in: Schweizerisches Bundesarchiv, E2001E#1976/17#4109*, Az. C.41.1570.0, Schweizerische Investitionen in Pakistan (1958–1963).

87 Switzerland-Costa Rica BIT 1965, available at UNCTAD, «International Investment Agreements Navigator – Costa Rica – Switzerland BIT (1965)», < https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1053/costa-rica---switzerland-bit-1965->.

priority. This model agreement also contained provisions on non-investment-related matters, such as MFN treatment for import tariffs or provisions limiting quantitative import restrictions, which were of interest to Switzerland as it only became a member of the General Agreement on Tariffs and Trade in 1966.[88]

Content-wise, the investment-related clauses in the Model Agreement on Trade, Investment Protection and Technical Cooperation closely mirrored the clauses of the standalone BIT, but were shorter. Article 7, the clause on investment protection, contained the FET, NT and MFN standard (Paragraph 1), a free transfer clause (Paragraph 2), a compensation for expropriation clause (Paragraph 3) and a mandate to possibly negotiate a standalone BIT at a later point (Paragraph 4).[89] In effect, the first three paragraphs mirrored articles 1 to 3 of the standalone BIT. Article 8 provided the mirror image of Article 7 of the standalone model, containing the state-state dispute settlement clause (with reference to international arbitration).[90]

88 For a memo explaining the Swiss rationale for this second model, see Aktennotiz betr. Abschluss von Verträgen mit Entwicklungsländern dd. 04.10.1961 (the agreed draft is appended to this memo), in: Schweizerisches Bundesarchiv, E2001E#1976/17#869*, Az. C.41.124.1, Schweizerischer Kapitalexport (Vorarbeiten betr. Internationale Konvention zum Schutz der Auslandinvestitionen) (1961–1963).

89 The first three paragraphs of Article 7, in their original French version, read as follows: « Article 7- Protection des investissements:
Les investissements ainsi que les biens, droits et intérêts appartenant à des ressortissants, fondations, associations ou sociétés d'une des Hautes Parties Contractantes dans le territoire de l'autre bénéficieront d'un traitement juste et équitable, au moins égal à celui qui est reconnu par chaque Partie à ses nationaux ou, s'il est plus favorable, du traitement accordé aux ressortissants, fondations, associations ou sociétés de la nation la plus favorisée.
Chaque partie s'engage à autoriser le libre transfert du produit du travail ou de l'activité exercé sur son territoire par les ressortissants, fondations, associations ou sociétés de l'autre Partie, ainsi que le libre transfert des intérêts, dividendes, redevances et autres revenus, des amortissements et, en cas de liquidation partielle ou totale, du produit de celle-ci.
Au cas où une Partie exproprierait ou nationaliserait des biens, droits ou intérêts appartenant à des ressortissants, fondations, associations ou sociétés de l'autre Partie ou prendrait à l'encontre de ces ressortissants, fondations, associations ou sociétés toutes autres mesures de dépossession directes ou indirectes, elle devra prévoir le versement d'une indemnité effective et adéquate, conformément au droit des gens. Le montant de cette indemnité, qui devra être fixé à l'époque de l'expropriation, de la nationalisation ou de la dépossession, sera réglé dans une monnaie transférable et sera versé sans retard injustifié à l'ayant-droit, quel que soit son lieu de résidence. Toutefois, les mesures d'expropriation, de nationalisation ou de dépossession ne devront être ni discriminatoires ni contraires à un engagement spécifique.»

90 Like the standalone Model BIT, this text has never been formally published. It can be found in Schweizerisches Bundesarchiv, E2001E#1976/17#869*, Az. C.41.124.1, Schweizerischer Kapitalexport (Vorarbeiten betr. Internationale Konvention zum Schutz der Auslandinvestitionen) (1961–1963). For an example of an agreement that is textually very close to this model, see the Guinea-Switzerland Treaty on Commerce, Investments and Technical Cooperation 1962, UNCTAD, «International Investment Agreements Navigator – Guinea-Switzerland BIT (1962)», <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1844/guinea---switzerland-bit-1962->.

B. Switzerland as the Originator of the «European Approach» to BITs

That Switzerland's model agreement influenced other countries was above all due to a historical coincidence, not of Switzerland's but of Tunisia's making. In 1961, Tunisia adopted a decree- law (*Décret-Loi* N 61-14 of August 30 1961) which was intended to help with the Tunisification of the local economy pursued by Tunis in the early 1960s.[91] The decree-law limited the extent to which foreign companies could operate in Tunisia, and required foreign companies to establish a local subsidiary in Tunisia, owned at least 50% by Tunisians (Article 2 juncto Article 3, 1°). There were, however, exceptions to this rule. One of these exceptions, enumerated in Article 4 of the decree-law, was that the law's restrictions did not apply to «nationals of a State which has concluded with Tunisia a convention on reciprocal guarantees concerning investments and under the conditions provided for by the convention».[92] It is difficult to establish how this reference got into the Tunisian law, though Tunisia might have been inspired by its already ongoing BIT negotiations with Germany (an agreement that was only signed in 1963).[93]

When Tunisia adopted this decree-law, Switzerland was the first country to act, having a natural advantage because it had already decided to start negotiating investment treaties. Considering Switzerland was already planning to negotiate a commercial agreement with Tunisia, the *Politische Departement* quickly requested and received a mandate from the Federal Council to conclude a commercial agreement with investment protection provisions with Tunisia.[94] Because of the low level of Swiss investments in Tunisia, Switzerland initially proposed to negotiate an agreement on trade, investment protection and technical cooperation instead of a standalone BIT.[95] At Tunisia's insistence, because the country wanted to attract Swiss private investment and send a signal, the investment clauses were eventually separated from the broader agreement and negotiated as a standalone agreement. [96]

91 For more background, see Marc Nerfin, Entretiens avec Ahmed Ben Salah: sur la dynamique socialiste dans la Tunisie des années 1960, Paris 1974.

92 Décret-loi N°61-14 du 30 août 1961, available at Portail de l'information scientifique et technique, «Décret-loi N° 61-14 du 30 août 1961 (19 rabia I 1381), relatif aux conditions d'exercise de certaines activités commerciales, <www.pist.tn/jort/1961/1961F/J003561.pdf>.

93 On these early negotiations, see the folder Politisches Archiv des Auswärtiges Amts, B 56, REF. 404__IIIB3__406.

94 EPD to Bundesrat, Négociations commerciales avec la Tunisie dd. 13.11.1961, in: Schweizerisches Bundesarchiv, E2200.158-03#1981/75#141*, O.13.4, Relations Suisse-Tunisie, Accord commercial (1961).

95 Handelsabteilung – Notice à Monsieur le Ministre Long dd. 26.09.1961, in: Schweizerisches Bundesarchiv, E7110#1972/32#1700*, Az. 821, Handelsvertrag (1961).

96 Handelsabteilung Memo: Négociations commerciales avec la Tunisie dd. 08.11.1961, in: Schweizerisches Bundesarchiv, E7110#1972/32#1700*, Az. 821, Handelsvertrag (1961). Also see Dodis, Botschaft des Bundesrates an die Bundesversammlung betreffend die Genehmigung des Vertrages über den Schutz und die Förderung der Kapitalinvestitionen und des Abkommens über die technische und wissenschaftliche Zusammenarbeit, beide abgeschlossen zwischen der Schweizerischen Eidgenossenschaft und der Tunesischen Republik (vom 12.3.1962), <https://dodis.ch/35019>.

The result was the 6-article agreement Switzerland and Tunisia signed in Bern on 2 December 1961, Switzerland's first BIT.[97] In this BIT, the two articles on investment protection of the Swiss Model Agreement on Trade, Investment Protection and Technical Cooperation were split up into six articles, with minor changes. The main concession Tunisia negotiated was in Article 2 of the BIT, which, instead of the «hard» free transfer clause preferred by Switzerland, contained only a standstill provision whereby both sides agreed to provide transfer facilities in accordance with their current legislation, or any possible more favourable future legislation. Switzerland made concessions because it was aware of the difficult situation of the Tunisian economy at the time.[98] Furthermore, the agreement contained an expropriation clause (Article 3), a state-state dispute settlement clause (Article 4), a clause on the future negotiation of a more comprehensive BIT (Article 5) and provisions on ratification, entry into force and a sunset clause (Article 6).

Unbeknownst until now, this specific BIT exercised a significant influence on the early BITs of several other Western European countries. The direct link is most evident in the first BITs negotiated by the Netherlands (1963), France (1963) and Belgium-Luxembourg (1964), all with Tunisia.

In the case of the Netherlands, the archival evidence confirms that the Tunisia-Switzerland BIT was used as a template for Dutch negotiations with Tunis, the Netherlands' first-ever BIT. As a Dutch negotiator stated in an internal memo, the Netherlands decided from the start to use the Swiss agreement as its main source of inspiration, because it believed that «the draft needs to be as simple as possible, if it wants to be acceptable to the Tunisians».[99] This copying went so far that when the ministries involved finalised their first draft in September 1962, they indicated the cases where they had deviated from the text of the Switzerland-Tunisia BIT, and why.[100] In most cases, these changes were minor, such as drawing some inspiration from the founding documents of the Hague-based Permanent Court of Arbitration for the procedural requirements of the state-state dispute settlement clause (Article 4), or by including a reference to the applicability of the agreement to the non-European parts of the Kingdom of the Netherlands (then Suriname and the Netherlands Antilles, Article 6). In a few other cases, the Swiss agreement was amended by adding some language from the OECD Draft Convention, such as including a non-derogation provision

97 Switzerland-Tunisia BIT 1961, available at UNCTAD, «International Investment Agreements Navigator – Switzerland-Tunisia BIT (1961)», <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/2997/switzerland---tunisia-bit-1961->.

98 See Exposé en vue des négociations commerciales avec la Tunisie dd. 23.11.1961, in: Schweizerisches Bundesarchiv, E7110#1972/32#1700*, Az. 821, Handelsvertrag (1961).

99 BZ memo, Investeringsverdrag Nederland-Tunesië dd. 04.05.1962, in: Nationaal Archief, Den Haag (hereafter: NL-HaNa), Buitenlandse Zaken_Code-Archief 55-64, 2.05.118, Inv.nr 10864.

100 BEB Memo: Ontwerp Investeringsgarantie-overeenkomst Nederland-Tunesië, in: NL-HaNa, Buitenlandse Zaken_Code-Archief 55-64, 2.05.118, Inv.nr 10510. This draft agreement has not been published.

(Article 5) or the obligation to provide «non-discriminatory» treatment (Article 1).[101] This first model inspired later Dutch models, such as its 1964 Model Agreement on Economic and Technical Cooperation, a broader treaty with investment provisions used to negotiate with (primarily) African countries in the 1960s and 1970s (again resembling Swiss practice).[102] Finally, when the Netherlands prepared its first standalone Model BIT in 1969, the drafters were again quite candid in admitting that they were «partly guided by the text of the Swiss model treaty».[103]

In Belgium, there was a very similar course of events. When the Belgian Foreign Ministry first became aware of the Tunisian Décret-Loi N 61-14, it considered an investment agreement desirable.[104] Belgian negotiators also looked at the Switzerland-Tunisia BIT 1961, assuming that «the size of [Switzerland's] expatriate community and interests are similar to our own».[105] When, via an interministerial process, Belgium developed its textual proposal for Tunisia, the draft text indicated that «the text of the project […] has been developed taking into account, on the one hand, the agreement between Tunisia and Switzerland […] and, on the other hand, the text of the OECD Draft Convention».[106] Belgium copied the overall structure of the Tunisia-Switzerland BIT, as the five-articles proposed text closely mirrored Swiss clauses (e.g. like the Swiss proposal, Article 1 covered the treatment of investments, Article 2 free transferability, Article 3 compensation for expropriation, etc.). Compared to the Netherlands, Belgium drew somewhat more inspiration from the OECD Draft Convention, as Article 1 contained separate references, in different paragraphs, to FET, FPS and the prohibition of taking unjustified or discriminatory measures, much like the OECD Draft did.[107] During the negotiations, the Belgian delegation closely compared what Tunisia was willing to offer with what it had previously conceded to Switzerland and the Netherlands.[108]

101 Ibid.

102 For a draft of this model, see IRHP 68-14: Ministeriële goodwill-missie naar enige landen in Afrika dd. 1964, in: NL-HaNa, EZ_BEB, 2.06.107, inv.nr 1138.

103 Verslag van de 4e vergadering van de interdepartementale Commissie Herverzekering Investeringen op 1 oktober 1969 dd. 10.1969, in: NL-HaNA, Buza Code-archief 1965-1974, 2.05.313, inv.nr. 7617.

104 Belgian Embassy Tunisia to MAE (Ministère des Affaires Etrangères), Restrictions aux activités commerciales des Etrangers en Tunisie dd. 09.09.1961, in: Archives Diplomatiques, 6.404 B2 Tunisie – Accord sur la protection des investissements.

105 Belgian Embassy Tunisia to MAE, signature d'accords commerciaux, financiers et économiques avec l'Italie et la Suisse dd. 09.12.1961, in: Archives Diplomatiques, 6.404 B2 Tunisie – Accord sur la protection des investissements.

106 Projet de convention entre le royaume de Belgique et le Grand-Duché de Luxembourg, d'une part, et la république tunisienne, d'autre part, relative à la protection et à l'encouragement des investissements de capitaux dd. 03.05.1963, in: Archives Diplomatiques, 6.404 B2 Tunisie – Accord sur la protection des investissements.

107 Ibid.

108 Belgian Embassy Tunisia to MAE, Négociations en vue de la mise au point d'un projet de convention pour la protection des investissements dd. 14.02.1964, in: Archives Diplomatiques, 6.404 B2 Tunisie – Accord sur la protection des investissements.

Again, this initial BIT, inspired by Swiss practice, cast a long shadow. A year later, when the BLEU started BIT negotiations with Morocco (leading to its second signed BIT in 1965), the Swiss-inspired text of the Belgium-Luxembourg's BIT with Tunisia was used and fine-tuned.[109]

Recent research has revealed that the Switzerland-Tunisia BIT has played a key role even for a larger state with much more substantial economic interests in Tunisia, namely France. France also used the Switzerland-Tunisia BIT as a template for its 1963 agreement with Tunisia. As Yackee has noted, at the time «France had no investment treaty program which might have provided a home-grown model, and the French Ministry of Foreign Affairs had been following the Swiss initiative with some interest».[110] Again, this provides proof of Switzerland's imprint on the investment treaty regime, even though France did not negotiate further BITs until the 1970s.[111]

More fragmentary evidence suggests that Switzerland's early advocacy of investment protection treaties also exercised a significant influence on the BIT programmes of other countries, and future archival research on other «early adopters» of BITs (e.g. the Scandinavian countries) might bring to light more ways in which Switzerland influenced early international investment law. In the case of the United Kingdom, which only started negotiating BITs in the 1970s, two previous negotiators have noted how the early UK Model BIT was inspired by the OECD Draft Convention, mentioning also the sizeable BIT practice of West Germany and Switzerland by then.[112] In the case of the United States, Kenneth Vandevelde, himself involved in the negotiation of US BITs during the period 1982 to 1988, noted that when the US developed its BIT programme at the end of the 1970s, it «studied and borrowed ideas from the bilateral investment protection agreements so successfully negotiated by the Europeans, particularly those of the Federal Republic of Germany and Switzerland».[113] Likewise, John Blair, a legal expert on investment treaties working at the oil major Shell, whose role in lobbying for early international investment treaties has been commented on in recent publications, stated in 1968 that «[t]he Swiss [investment] treaties are by far the best, and their

109 Cabinet Brasseur (Minister of Foreign Trade and Technical Assistance) to MAE dd. 16.07.1964 and MAE to Cabinet Brasseur, Projet de convention, entre l'UEBL et le Maroc, relatif à l'encouragement des investissements de capitaux et à la protection des biens dd. 02.02.1965, in: Archives Diplomatiques, 6402 – Maroc B. 3) Négociation d'une convention relative à la protection des investissements, 1963–1965.

110 Jason W. Yackee, «The First French BIT», University of Wisconsin Law School Legal Studies Research Paper No. 1767 (2023), 1–22.

111 On early French BITs, see in particular Patrick Juillard, «Les conventions bilatérales d'investissement conclues par la France», 106 Journal du droit international (1979), 274–325.

112 Denza & Brooks, supra n. 19.

113 Kenneth J. Vandevelde, United States Investment Treaties: Policy and Practice, Alphen aan den Rijn 1992.

respective clauses are anyway copied by other industrialised countries».[114] In short, the early Swiss BITs cast a long shadow on later investment treaty practice.

IV. Conclusion

This article has shown how Switzerland has been able to punch above its weight when it came to the diffusion of legal ideas related to early international investment law, despite being neither the first nor the largest country to have started negotiating these treaties.

On the multilateral level, the all-but-forgotten Swiss 1957 Draft International Convention Concerning Guarantees for the Investment of Foreign Capital was the second most important source for the drafters of the OECD Draft Convention. Swiss ideas solidified the link between free transferability provisions and investment protection, and helped to see national treatment and most favoured nation clauses included in investment treaties.

Bilaterally, Switzerland has also played a significant role in the diffusion of BITs. The combination of Switzerland's early decision to negotiate BITs, prompted by both its business sector and the government's disappointment with the lacklustre progress on the OECD Draft Convention, and the Tunisian decree-law of 1961, meant that Swiss BITs exercised a significant influence on other early BITs of Western European countries. The first French, Dutch and Belgian BITs were, to a significant extent, «made in Bern», and Switzerland also influenced the practice of other countries.

These findings are relevant for a number of reasons. Firstly, they teach us something about the diffusion of legal rules and the fact that (relatively) smaller countries can profoundly influence the development of a new legal regime, too, especially if they are among the first to experiment with new treaties. Secondly, these findings help to bring to life the «politics» behind BITs. Early Swiss BITs were developed in close collaboration between industry and the state. As a result of legal copying, the legal imprint of that influence has since been replicated in many treaties, even though the political considerations might have changed. These findings also illustrate how archival evidence can add much to our understanding of international investment law, particularly for the period pre-1990s, when the secondary literature on international investment law was still relatively sparse. Although country studies have become relatively popular in the study of international investment law, large and English-speaking countries have been at the centre of attention. Little research, using qualitative empirical evidence such as archives or expert interviews, exists on the role played by early negotiators such as Switzerland, the Netherlands or even France, to name but a few. This is

114 Nicolás M. Perrone, «Bridging the Gap between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment», 7 Business and Human Rights Journal (2022), 375–396; Batselé, supra n. 13, at 436.

a pity for, as this article has shown, there is more than a kernel of truth to the statement that «BITs were made in Bern».

Annex I : Projet de convention internationale sur les garanties à donner aux investissements de capitaux étrangers

Préambule
Les Hautes Parties Contractantes (HPC), désireuses de favoriser le développement de leur économie par des investissements de capitaux et reconnaissant la nécessité de mettre ces investissements au bénéfice de certaines garanties, ont convenu ce qui suit :

Art. 1
Les investissements effectués sur le territoire d'une HPC par un résident d'une autre HPC bénéficient d'un traitement au moins aussi favorable que celui consenti aux résidents du pays où l'investissement est réalisé et le traitement accordé aux résidents de la nation la plus favorisée.

Afin de garantir les investissements ainsi réalisés, les résidents des HPC sont autorisés à assumer des obligations dans la monnaie du créancier ou dans une monnaie tierce, ou à donner des garanties de change.

Art. 2
Le traitement prévu à l'art. 1 s'applique à tout ce qui concerne la gestion, la défense, l'entretien, l'extension et la liquidation des biens et droits des non-résidents.

Art. 3
Le pays qui a reçu l'investissement s'engage à autoriser le libre transfert vers le pays de résidence de l'ayant-droit :
a) des intérêts, dividendes, gains et autres revenus, sans en limiter le montant ou le pourcentage;
b) des amortissements contractuels;
c) des sommes destinées à couvrir les dépenses et frais accessoires afférant à leur gestion;
d) du produit de la liquidation partielle ou totale, ce dernier comprenant le capital initial et les plus-values.

Art. 4
Ce pays n'empêchera pas l'émission d'actions nouvelles, la vente des droits de souscription ou toute autre opération affectant la participation des résidents d'une HPC. Il ne

leur imposera pas de conditions autres ou plus onéreuses que celles applicables aux résidents du pays qui a reçu l'investissement ou aux résidents de tout autre pays.

Art. 5
Les HPC concluront des accords destinés à éviter toute double imposition et discrimination, lorsqu'elles ne l'ont pas déjà fait; elles adapteront aux circonstances nouvelles les traités qu'elles ont déjà passés entre elles, afin d'éviter des taxations qui mettent un frein aux investissements internationaux.

Art. 6
L'expropriation ou la nationalisation d'un bien ou d'un droit appartenant au résident d'une HPC donne lieu au paiement d'une indemnité qui doit être adéquate et fixée préalablement à l'expropriation ou la nationalisation. Dès que l'expropriation et la nationalisation deviennent effectives, le pays qui a exproprié ou nationalisé autorise le transfert de l'indemnité vers le pays de résidence de l'ayant-droit.

Art. 7
Les contestations qui pourraient surgir au sujet de l'application ou de l'interprétation de la présente convention seront directement soumises à la décision du tribunal arbitral créé à cet effet (tribunal arbitral de la zone de libre échange), si l'une des HPC en fait la demande.

Cette disposition est applicable à la question préjudicielle de savoir si les contestations se rapportent à l'application ou l'interprétation de la présente convention.

La sentence du tribunal arbitral sera obligatoire sur le territoire de toutes les HPC.