Switzerland's Investment Treaty Policy: An Overview

Conference «Tax Issues in International Investment Arbitration»

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Programme

1. Economic Importance of FDI for Switzerland
2. The Swiss BIT Network
3. Use of Investor State Dispute Settlement
4. Current Priorities in BIT Negotiations
5. Priorities in Improving BITs
6. Multilateral Priorities
7. Outlook

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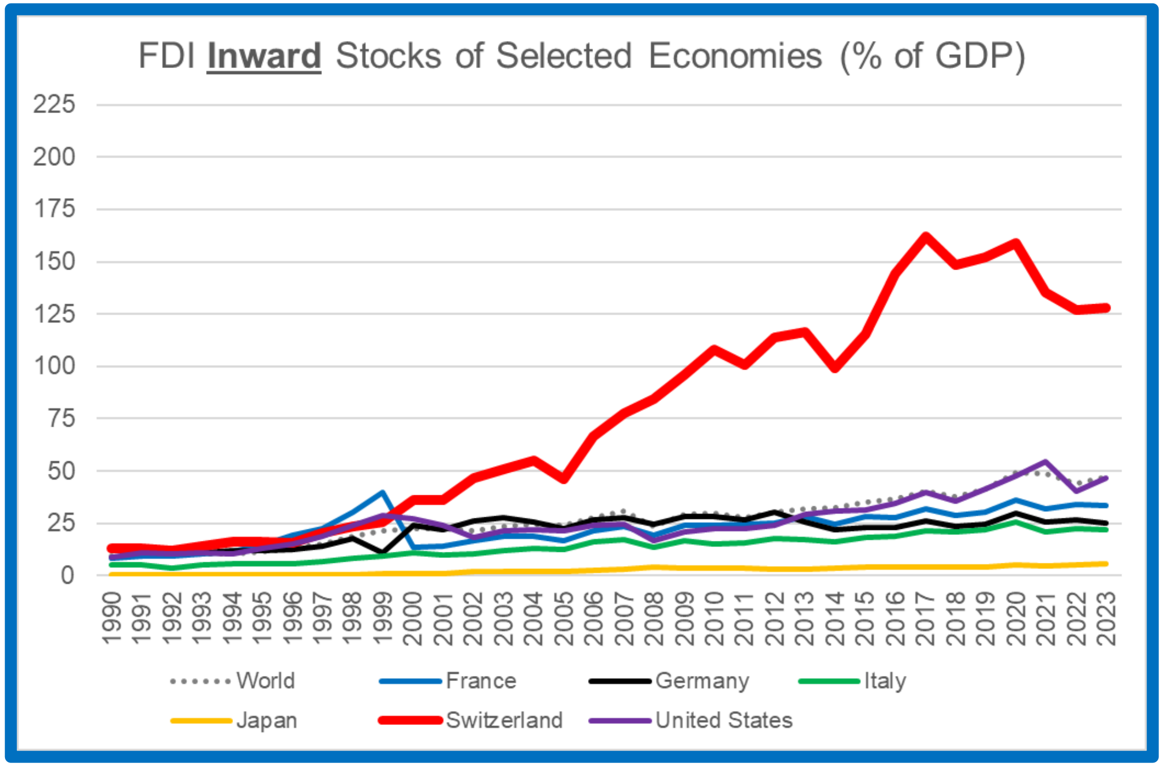
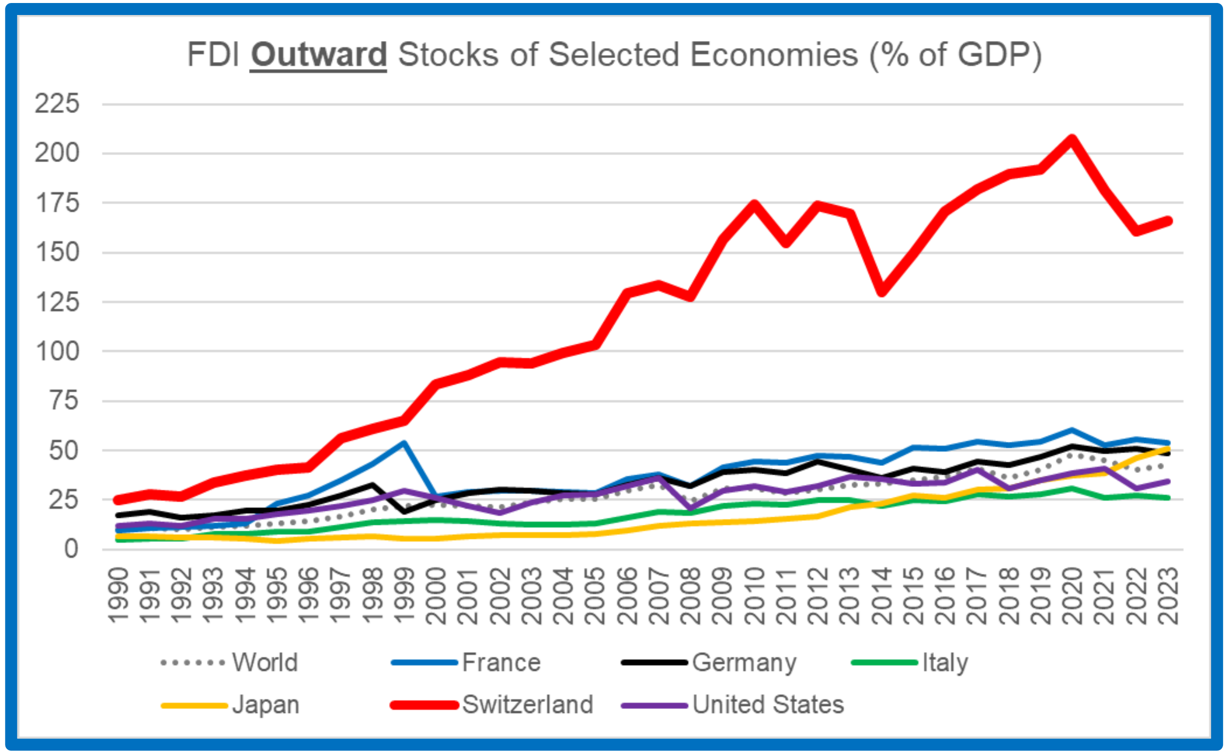
1 Economic Importance of FDI for Switzerland

FDI Inward and Outward Stocks – Evolution over time

(selected economies; in % of GDP; 1990 – 2023)



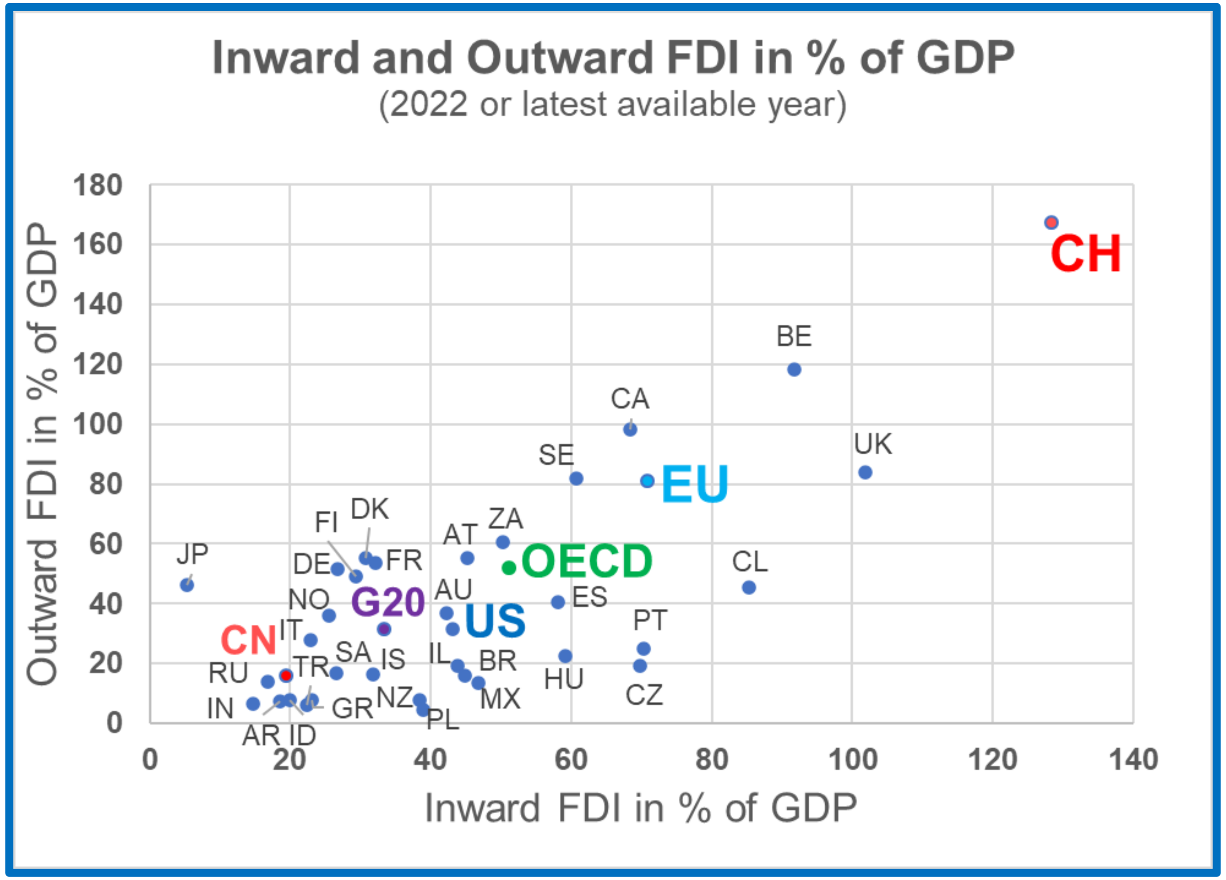


Data Source: UNCTAD Data Center, https://unctadstat.unctad.org/datacentre/dataviewer/US.FdiFlowsStock; Data download: 27 August 2024
Graph: © Thomas A. Zimmermann

1 Economic Importance of FDI for Switzerland

FDI Inward and Outward Stocks – International comparison

(in % of GDP; 2022 or latest year available)



Values for Switzerland:
Inward FDI to GDP Ratio: 128%
Outword FDI to GDP Ratio: 167%

Note: Ireland, the Netherlands and Luxemburg are outside the display area of this Chart because of higher FDI-to-GDP ratios:

Ireland:
Inward FDI to GDP Ratio: 264%
Outward FDI to GDP Ratio: 222%

Netherlands:
Inward FDI to GDP Ratio: 275%
Outward FDI to GDP Ratio: 336%

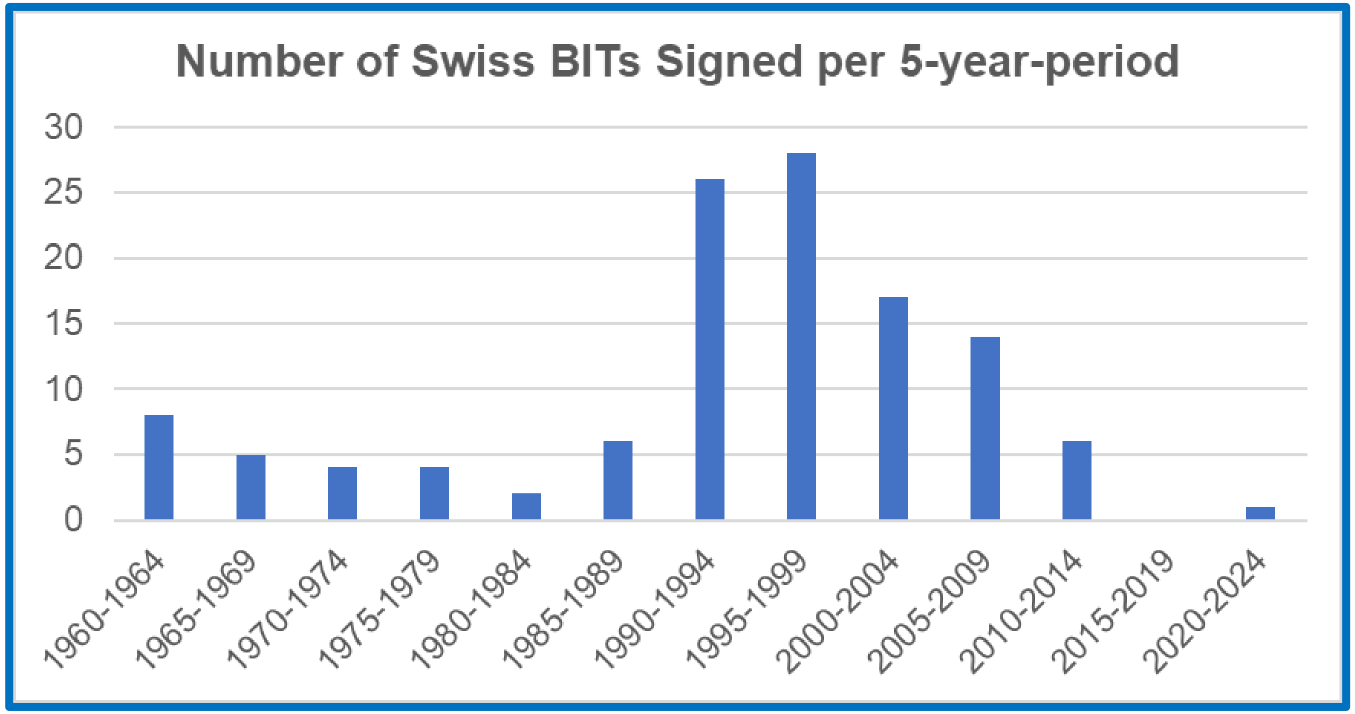
Luxemburg:
Inward FDI to GDP Ratio: 1’460%
Outward FDI to GDP Ratio: 1’967%

Data Source: https://data.oecd.org/fdi/fdi-stocks.htm;
Data download: December 2023
Graph: © Thomas A. Zimmermann

2 The Swiss BIT Network

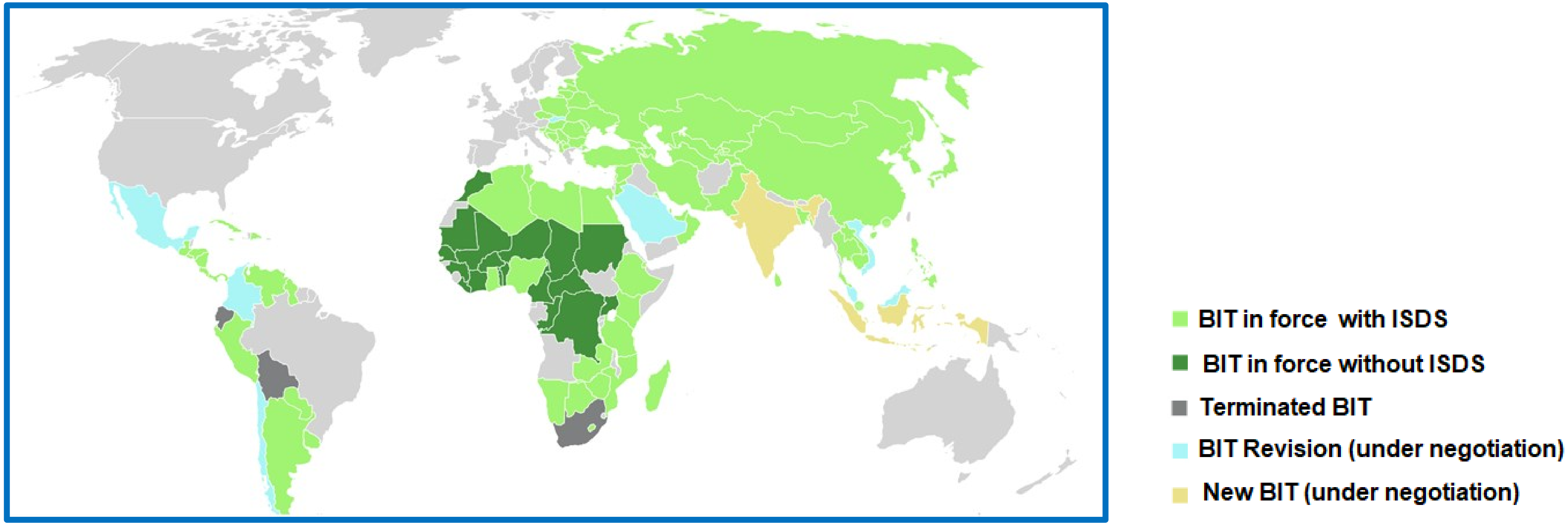
Evolution of Swiss BIT network over time

(Number of Swiss BIT signed per 5-year-period)



Note: The above numbers also include BIT which have been terminated. Renegotiated BIT are counted in the year in which the renegotiated BIT has been signed.
Data Source: State Secretariat for Economic Affairs SECO, [Overview of BITs (admin.ch)](); Data download: 26 August 2024
Graph: © Thomas A. Zimmermann

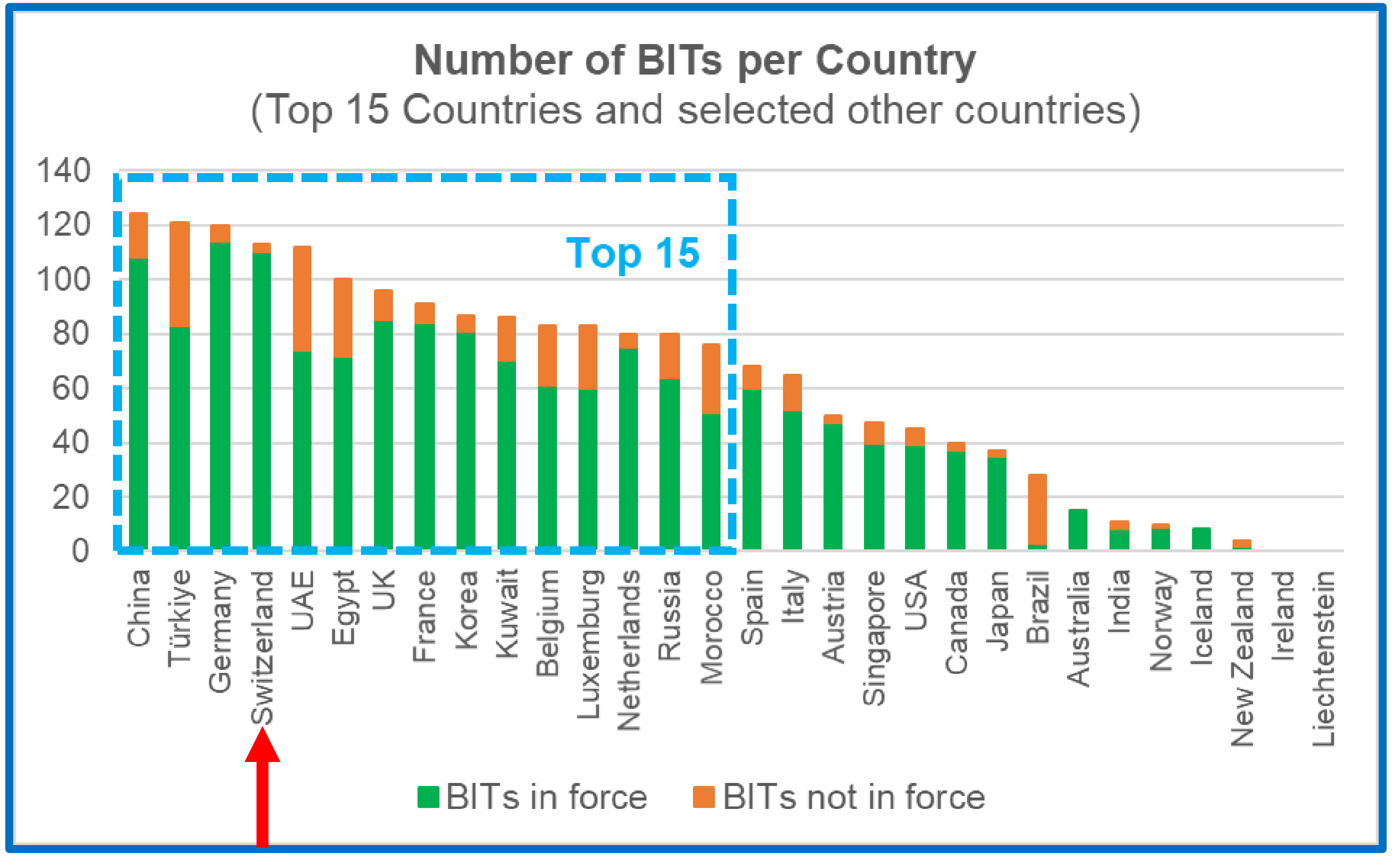
The Swiss BIT Network Today



Data Source: State Secretariat for Economic Affairs SECO, [Overview of BITs (admin.ch)](); Data download: 26 August 2024
Graph: © State Secretariat for Economic Affairs SECO

2 The Swiss BIT Network

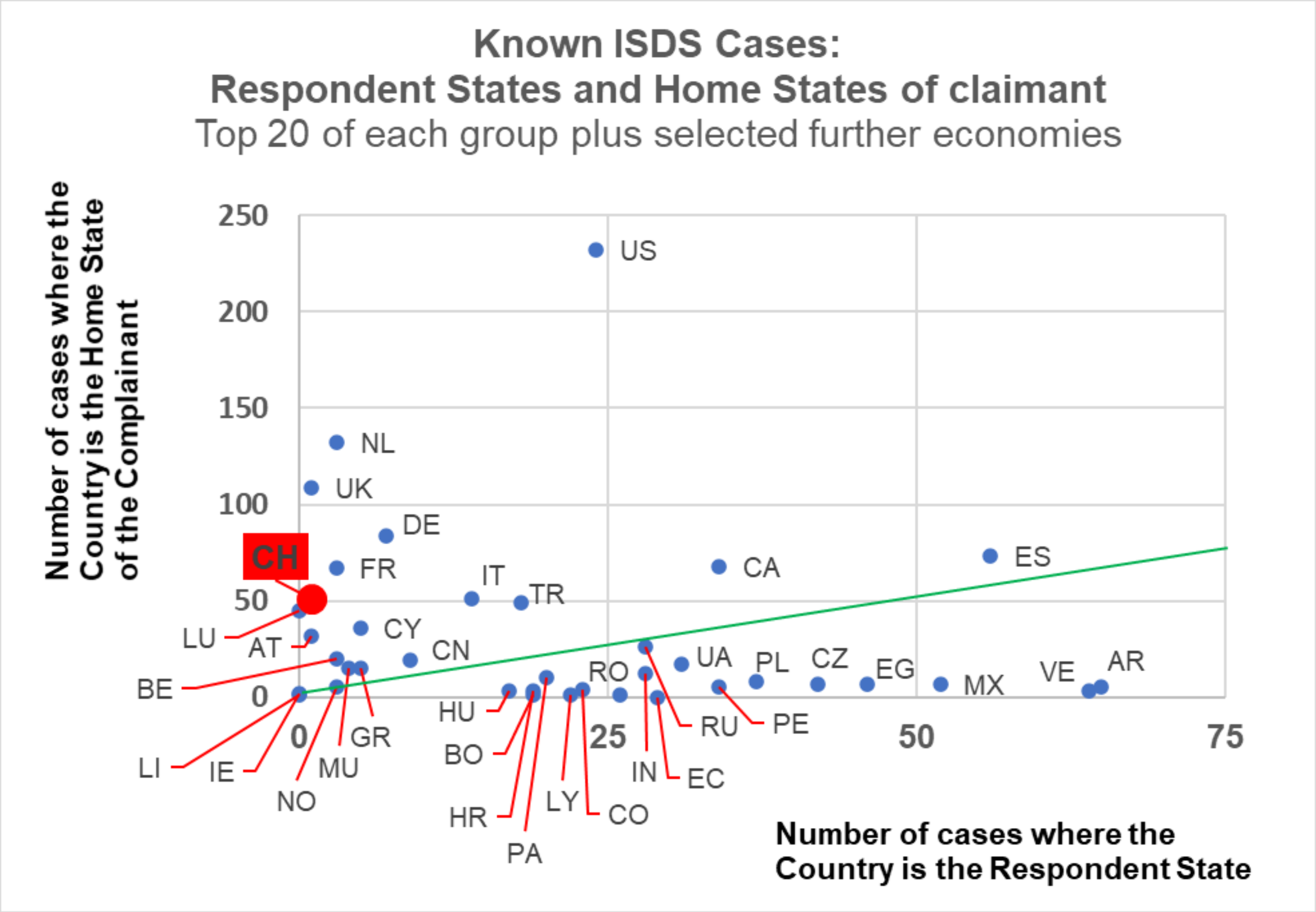
The Swiss BIT Network in International Comparison



Data Source: UNCTAD, [International Investment Agreements Navigator | UNCTAD Investment Policy Hub]; Data download: 26 August 2024
Graph: © Thomas A. Zimmermann

3 Use of Investor State Dispute Settlement

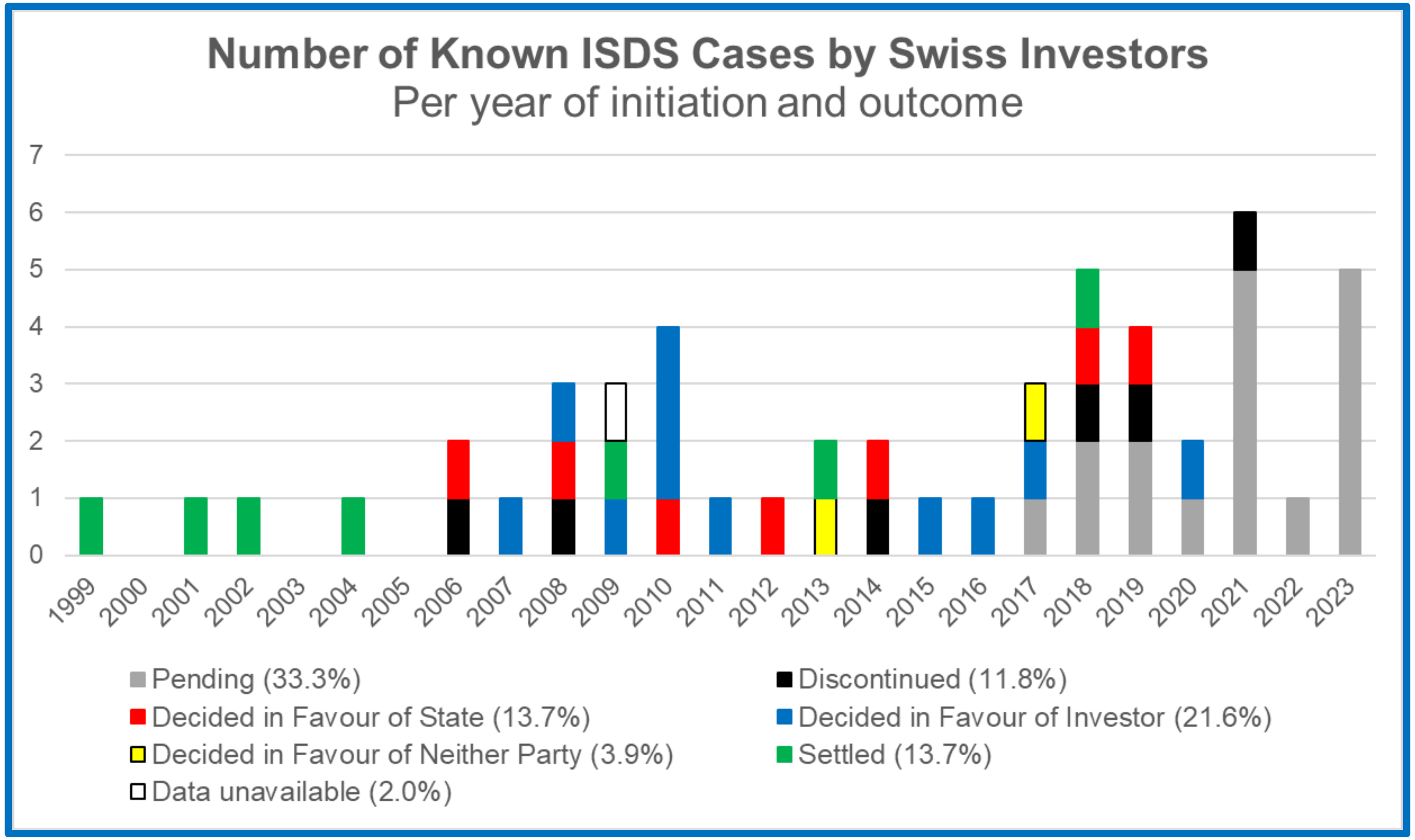
International Perspective



Data Source: UNCTAD; [Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub](); Data download: 30 August 2024
Graph: © Thomas A. Zimmermann

3 Use of Investor State Dispute Settlement

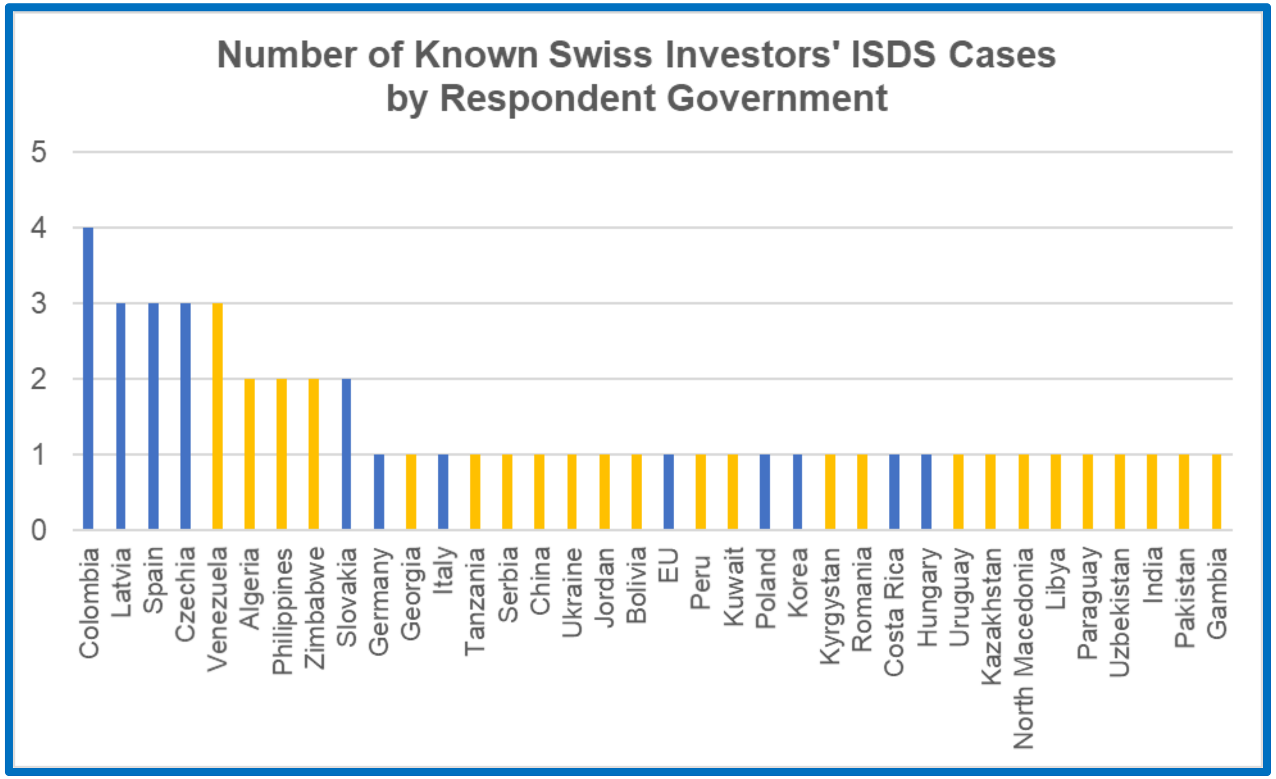
Known ISDS Cases by Swiss Investors I (BIT, FTAs and ECT)



Data Source: UNCTAD; [Switzerland | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub](); Data download: 29 August 2024; Basis: 51 cases
Graph: © Thomas A. Zimmermann

3 Use of Investor State Dispute Settlement

Known ISDS Cases by Swiss Investors (II)



Note: Blue columns designate ISDS cases brought against OECD and/or EU countries (including the EU itself; 22 cases = 43% of all 51 cases)) whereas orange columns designate ISDS cases brought against non-OECD countries (29 cases = 57% of all 51 cases).

Data Source: UNCTAD; Switzerland | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub; Data download: 29 August 2024; Basis: 51 cases.
Graph: © Thomas A. Zimmermann

3 Use of Investor State Dispute Settlement

ISDS Cases Against Switzerland

- 1 Case so far: Human Right Defenders Inc. vs. Switzerland (discontinued due to non-payment [by the complainant] of the first advance in accordance with ICSID Administrative and Financial Regulation 14(3)(d))

Data Source: UNCTAD; Switzerland | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub; Data download: 29 August 2024
Graph: © Thomas A. Zimmermann

4 Current Priorities in BIT Negotiations

On-Going BIT Negotiations

Modernisation of BITs:

- Saudi Arabia (terminated by SA)
- Chile
- Colombia
- Hungary
- Malaysia
- Mexico
- Slovakia
- Vietnam

New BITs:

- Indonesia (revised BIT entered into force on 1 August 2024)
- India

4 Current Priorities in BIT Negotiations

Planned BIT Negotiations

Modernisations:
- UAE

New BITs:
- South Africa
- Bahrain

5 Priorities in Improving BITs

Recent Developments in Switzerland's negotiating approach

- Maintaining a **high level of investment protection** in BITs
- **Avoiding discrimination of Swiss investors** vis-à-vis other investors
- **Improving ISDS**
- **Concretisation of the Fair-and-Equitable-Treatment (FET) standard**
- **Specification of the provision on indirect expropriation**
- Safeguarding and strengthening **political coherence with SDGs** by
  - Expanding the preamble to include sustainable development objectives (2012)
  - Drafting new treaty provisions on, inter alia,
    - increased transparency, making UNCITRAL Transparency Rules applicable
    - the right to regulate
    - to encourage CSR
    - to prohibit corruption
    - not to lower standards with a view to attracting FDI
    - use of joint treaty interpretations
    - sustainability provisions on labour and the environment

… but it takes two to tango!

5 Priorities in Improving BITs

Swiss positions in the area of taxation

- No full carve-out of specific sectors (taxation, etc.) in Swiss BIT but open to discuss targeted exceptions
- Works at the multilateral level (OECD)
- Taxation measures very relevant in practice for investors
- Recent BIT CH-Indonesia: filter mechanism

  -> consultations between the competent authorities of both contracting parties prior to the arbitral proceedings

6 Multilateral Priorities

UNCITRAL Working Group III on ISDS Reform

Reforms Already Achieved

- **UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration** (entry into force in 2014)
- **Mauritius Convention** (2014; entry into force for CH: 2017): possibility to apply transparency rules on ISDS cases based on BITs concluded before 1 April 2014)
- **Code of conduct for Arbitrators** (approved by UNCITRAL in July 2023)
- **Model rules of mediation** (approved by UNCITRAL in July 2023)

6 Multilateral Priorities

UNCITRAL Working Group III on ISDS Reform

Second stage of ISDS Reform (ongoing negotiations)

- **Institutional reforms**, regarding the creation of
  - Permanent multilateral investment court (to replace *ad hoc* panels);
  - Appeals mechanism
- **Procedural rules**
  - e.g. access to ISDS, conduct of procedures, third party financing etc.
- **Creation of a Multilateral Advisory Centre**
  - Support to developing countries and LDCs in international investment disputes
- **Multilateral Instrument with Protocols** (finalisation planned for 2026)

7 Outlook

Main Challenges (and Opportunities?)

- **Challenges to international investment protection on the international level**
  - Increased skepticism of governments, also in light of own ISDS experience
  - Threat of BIT terminations; exodus from the ECT
  - Maintaining protection standards when revising BITs (e.g. avoiding carveouts)
  - Increasing sophistication of negotiations and practice (technical and political)

  → Maintaining the level of investment protection is an international challenge.

- **Challenges to international investment protection on the domestic level**
  - Fading political support and risk of referendums on new BITs
  - Increasing political divisions on international economic issues in general
  - Delicate balance between investment protection and non-economic considerations

  → Maintaining political support for investment protection is a domestic challenge

- **Unclear chances of success of multilateral initiatives** in a geopolitically fragmented, polarised world.

Discussion, Questions & Answers

Thank you for your attention!