Insight

The new Swiss negotiation approach – Implications for Swiss foreign investors

Authors

Marc D Veit
Partner
Zurich

Lorette Giacometti
Associate
Zurich

The newly-concluded bilateral investment treaty (BIT) between Switzerland and Indonesia is based on Switzerland's new negotiation approach and gives Swiss investors a taste of what protection standards they can expect in the future.

The new BIT with Indonesia[1] was signed on 24 May 2022 at this year's World Economic Forum in Davos and is Switzerland's first BIT based on its new negotiation approach.[2] It contains more detailed provisions which limit the arbitral tribunals' discretion to interpret and apply the treaty, with additional provisions aimed at balancing investor protection, alongside sustainable development.

It will enter into force once the contracting States have completed their internal ratification procedures. The Swiss consultation period ended on 26 September 2022[3] and the Swiss parliament must approve the treaty (article 166 para. 2 Swiss Constitution) before the Federal Council can proceed with its ratification.[4]

Why did Switzerland change its negotiation approach?

Switzerland is the world's ninth largest source of outward foreign investment,[5] with over CHF 1,460 billion in direct investments abroad, generating billions in profits and securing millions of jobs.[6]

When the process of decolonisation[7] began, the Swiss government was quick off the mark, concluding its first BIT in 1961, the second State to conclude a BIT after Germany.[8] It now has 111 BITs in force – the world's third-largest treaty network after Germany and China.[9]

Many of those early BITs are considered to be "old-style BITs"[10], being short and broadly drafted, with only investment protection standards (*i.e.*, they do not usually contain any obligations for investors).[11] This lack of investor obligations in the BITs made it difficult for the host State to reject protection of investments or raise counterclaims.

The old-style BITs give arbitral tribunals wide discretionary powers and do not allow contracting States to influence their interpretation and application, leading some States and non-governmental organisations to criticise the lack of provisions allowing States to exercise control, alongside the impact the BITs purportedly had on the States' regulatory environment.

Consequently, more and more capital-importing States have strengthened their negotiation capacity and skills in recent years (supported by UNCTAD[12]), with some demanding renegotiation of their old-style BITs. Some have even terminated their old-style BITs, where States were not willing to renegotiate.[13]

In this new landscape, negotiations take much longer: the Swiss/Indonesian BIT concluded after seven negotiation rounds.[14] Such intensive negotiation should lead to a better understanding of the treaty content and therefore foster sustainable co-operation between contracting States, while also protecting foreign investments – crucial if the UN Sustainable Development Goals are to be realised (for which massive additional investment in developing countries is needed).[15]

What might future Swiss BIT's look like?

Looking at the Swiss/Indonesian BIT, new Swiss BITs could contain the following:[16]

1. **An exclusion of government procurement** from the scope of the BIT and clarification that national treatment does not apply to **subsidies or grants** awarded by a contracting State (Art. 2 BIT CH-ID);
2. A **tax carve-out** or some sort of filter mechanism (Art. 3 BIT CH-ID);
3. A **less broad Fair and Equitable Treatment (FET)** clause, which specifies the scope of protection with a list of measures that violate this standard (see Art. 4 BIT CH-ID);
4. A so-called "**anti-Maffezini clause**" limiting the application of the most favoured nation clause to substantive rights (as opposed to procedural rights) (Art. 6 BIT CH-ID);
5. A meticulously drafted provision on **expropriation**; Annex A of the new BIT describes in detail what is covered by the term expropriation and, in particular, indirect expropriation (Art. 7 and Annex A BIT CH-ID);
6. A clarification as to when a contracting State can **prohibit transfers of money** without violating the BIT (Art. 9(3) BIT CH-ID; Art. 10 BIT CH-ID);
7. A confirmation of the contracting States' **right to regulate** (Art. 12 BIT CH-ID);
8. A provision on **responsible business conduct** (Article 13 BIT CH-ID; for the first time in a Swiss BIT, this states that the contracting States undertake to encourage companies on their territory to comply with internationally-recognised standards of responsible business conduct that are supported by the host State);
9. An explicit **prohibition of acts of corruption** (Art. 14 BIT CH-ID);
10. Significantly **more (and more detailed) dispute settlement provisions** (Art. 15-31 BIT CH-ID; transparency of arbitral decisions and awards; possible prior mediation or conciliation; rules regarding security for costs, third-party funding, claims manifestly without legal merit);
11. **Time limits and other requirements for the filing of claims** (Art. 19 BIT CH-ID);
12. A **denial of benefits provision** (setting out circumstances under which a host State may deny the investor its protection under the BIT; Art. 38 BIT CH-ID);
13. Provisions promoting **transparency** (Art. 16, 39, 40 BIT CH-ID);
14. **Exceptions** (defining which acts of a contracting State do not constitute a violation of the BIT; Arts. 41 and 42 BIT CH-ID);
15. The new BIT also contains a **code of conduct for arbitrators** (Annex B BIT CH-ID).[17]

More detailed provisions to limit the arbitral tribunals' discretion

This new negotiation approach follows a general trend in treaty negotiations, aimed at limiting arbitrators' discretionary powers and allowing contracting States to exert more influence on the subsequent interpretation and application of their treaties.[18] Contract negotiators try to draft the provisions to prevent an interpretation and application of treaty provisions leading to "outlier awards"; investment-law practitioners will recognise many elements of the established arbitral practice in the new-style BITs.

We can see how arbitral tribunals' discretion is limited if we look at the example of the new FET provision. In old-style BITs these clauses are broad,[19] whereas the new Swiss negotiation approach lists measures considered to breach the FET standard (Art. 4(2) BIT CH-ID[20]):

A Party violates the obligation of fair and equitable treatment referred to in paragraph 1 of this Article if a measure or series of measures constitutes the following:

(a) A denial of justice in criminal, civil or administrative proceedings;

(b) A fundamental violation of the rule of law, including a fundamental violation of the duty of transparency in judicial and administrative proceedings;

(c) manifest arbitrariness;

(d) Targeted discrimination on manifestly unjustifiable grounds such as gender, race or religious belief; or

(e) Abusive treatment such as coercion, duress or harassment.

The list of offensive State conduct is obviously inspired by existing arbitral practice on FET. However, arbitral tribunals have identified additional situations that constitute a violation of the FET standard, such as the *lack of respect for the obligation of vigilance and protection*;[21] the *failure to offer a stable and predictable legal framework;*[22] *unjust enrichment*;[23] and – most importantly – the *non-observance or frustration of investors' legitimate expectations*.[24] In the new BIT, such "legitimate expectations" are only supposed to play a subordinate role. According to article 4(5) BIT CH-ID, the arbitral tribunal "in applying the fair and equitable treatment obligation set out above, […] may take into account whether a Party made a specific written commitment to an investor to induce the investor to make an investment that created a legitimate expectation and on which the investor relied in deciding to make or maintain the investment, but which the Party subsequently failed to comply with". Article 4(6) BIT CH-ID further holds that "[t]he mere fact that a Party takes or refrains from taking a measure and in so doing does not meet the expectations of an investor shall not constitute a breach of this Article, even if loss or damage to the investment results therefrom".

So, whereas under the old-style BITs the arbitral tribunal could hardly derive anything from the wording of the provisions to identify a breach of the FET standard, the arbitral tribunal must now navigate within the framework set by the wording of the new-style provision. Both the exhaustive list of measures and the instruction on how to take into account the investor's legitimate expectations significantly limits the arbitral tribunal's discretionary powers.[25]

More provisions to balance the investor's rights with the rights of the host State

This more precise language is accompanied by provisions aimed at balancing the investor's rights with the rights of the host States, including:

- provisions on the State's right to regulate;[26]
- denial of benefit clauses;
- general and security exceptions;
- corporate social responsibility provisions;
- anti-corruption provisions;
- provisions protecting the State's balance of payments; and
- provisions regarding claims manifestly without legal merit.[27]

Old-style BITs usually contained around 15-20 articles – the new BIT with Indonesia has 44 provisions and two annexes.

These new provisions have wide-ranging implications. We discuss two such effects below.

1. **Exceptions**: Under certain circumstances, investments will no longer be entitled to protection. Where investors are potentially affected by such exceptions,[28] they could consider a restructuring of their investment or seek additional legal protection through specific written commitments by the host State,[29] depending on the investment and the kind of exception that may apply.
2. **Time limits and requirements to submit a claim to arbitration**: More procedural aspects will be regulated in the treaties in the future,[30] including time limits for the submission of claims to arbitration. Under article 19(1) BIT CH-ID, a dispute may be referred to arbitration after 12 months from the written request for consultation. However, the investor may only submit a claim to arbitration, if, among other things:
   - The claimant serves a written notice on the respondent Party at least 90 days before the dispute is submitted (Art. 19(5)(a) BIT CH-ID).[31]
   - The investor discontinues all pending domestic and international proceedings and does not initiate new proceedings on the same matter (Art. 19(5) BIT CH-ID).

The new BIT contains several such new time limits and other requirements (see also Art. 30 BIT CH-ID). Investors should pay particular attention to the statute of limitations in Article 19(7) and (8) BIT CH-ID.[32]

What to do when legal disputes arise

Investors must not lose sight of the new rules – not only when a legal dispute arises, but ideally at the time of the investment. If a legal dispute arises, they should keep a close eye on the BIT deadlines (especially the statute of limitations) and react swiftly. Because communicating with host States is not without challenges and can be time-consuming, investors should immediately **initiate the following in parallel**.

1. **SECO**: investors should immediately contact the Bilateral Economic Relations team of the State Secretariat for Economic Affairs (SECO). They advise and assists investors, and – with worldwide contacts in embassies and trade organisations – can support investors[33] to find an out-of-court settlement with the host State. This is particularly helpful in host States where the competences in the administration are unclear and/or communication with the competent authority is difficult. Where communication with States is difficult, SECO is able, if appropriate, to relay messages from investors to the host State at government level. The goal should always be a quick and uncomplicated resolution through diplomatic channels.
2. **Law firm**: since treaty deadlines may already be running, investors should also contact – in parallel – a law firm specialising in international investment law. Such specialised law firms can assist investors in the early stages of the dispute and, if necessary, help to organise third-party funding. They are also competent to represent investors in arbitration proceedings against the host State if a satisfactory solution cannot be found through other means of dispute settlement. Wherever possible, arbitration should aim to restore the investment and the relationship with the host State, rather than merely provide for the restitution of the damages.

If you have further questions or require advice about any of the issues raised in this article, please contact the authors.

References

[1] See https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6416/download.

[2] Explanatory report on the opening of the consultation procedure, available at: https://www.newsd.admin.ch/newsd/message/attachments/71812.pdf

[3] See SECO press release dated 03.06.2022, available at: https://www.seco.admin.ch/seco/de/home/seco/nsb-news/medienmitteilungen-2022.msg-id-89127.html#:~:text=Das%20Abkommen%20schliesst%20die%20Vertragsl%C3%BCcke,Schweiz%20%2D%20Schutz%20vor%20politisc

[4] In principle, the Federal Council submits BITs for approval in its yearly Foreign Economic Policy Reports (*i.e.*, in January), see https://www.seco.admin.ch/seco/en/home/Publikationen_Dienstleistungen/Publikationen_und_Formulare/Aussenwirtschafts/Berichte_zur
.

[5] IMF Outward Direct Investment Positions (Top 20 Counterpart Economies) as of end-2020, available at: https://data.imf.org/regular.aspx?key=61227424

[6] In 2020, earnings from direct investment abroad fell by 27% year-on-year from CHF 105 billion to CHF 77 billion (due to the influence of the Corona pandemic), while Swiss-controlled companies employed 2,019,000 people in their subsidiaries abroad; see the report on direct investment of the Swiss National Bank 2020, available at: https://www.snb.ch/de/iabout/stat/statrep/id/statpub_fdi_all.

[7] Decolonisation forced Switzerland to redefine its foreign economic policy towards the newly-emerged countries. In this context, Switzerland decided to protect Swiss investments with the help of BITs.

[8] The first Swiss BIT was concluded with Tunisia; more info is available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2997/switzerland—tunisia-bit-1961;

information about Switzerland's Investment Treaty Policy in general can be found at:. https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Internationa

[9] *Ibid;* Germany concluded 160 and China 128 BITs.

[10] Some further divide the old-style BITs into those without ISDS (first generation BITs; 1961-1978) and those with ISDS (second generation BITs; generally from 1981).

[11] In the Swiss portfolio of BITs, all BITs up to the treaty concluded with Georgia in 2014 can be considered old-style BITs.

[12] The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 as an intergovernmental organisation intended to promote the interests of developing States in world trade.

[13] India has tightened its investment protection framework and asked its treaty partners to renegotiate their old-style BITs. Towards the end of 2016, it served notice of termination on those States that refused to renegotiate – 58 States, including Switzerland. The Swiss-Indian BIT ceased to apply from 6 April 2017. Switzerland concluded its first BIT with Indonesia in 1974. In 2014, the Indonesian government decided to terminate its BITs, including the BIT

with Switzerland. The 1974 BIT therefore ceased to apply, without replacement, on 8 April 2016.

[14] Explanatory report on the opening of the consultation procedure, available at: https://www.newsd.admin.ch/newsd/message/attachments/71812.pdf.

[15] According to the UN, these goals can only be achieved with additional investments in developing countries of around 2.5 trillion US dollars annually over 15 years, see the Swiss Foreign Economic Policy Report 2017, p. 834 *et seq.* available at: https://www.seco.admin.ch/seco/de/home/Publikationen_Dienstleistungen/Publikationen_und_Formulare/Aussenwirtschafts/Berichte_zur
.

[16] A public "national model BIT" can potentially limit the scope for negotiation. Switzerland has not published its "national model BIT", to remain flexible in negotiations with negotiating partners. We can only therefore gauge what provisions the internal "Swiss national model BIT" contains by analysing the content of its concluded BITs.

[17] Arbitrators must disclose all interests and relationships that could lead to a conflict of interest and the appearance of bias, and must also ensure that arbitration proceedings are conducted in a fair and timely manner. They must also ensure their independence and impartiality, and guarantee the protection of confidential information. Finally, they must ensure that their assistants and employees know and observe the rules of conduct. In view of the ICSID/UNCITRAL Code of Conduct, it has to be seen if contracting States will continue to include their own Code of Conduct in their BITs.

[18] See also the text of the modernised ECT.

[19] Article 4(1) of the Switzerland-Georgia BIT – a provision based on the old negotiating approach – is worded very broadly: "Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment […]."; This BIT was the last that Switzerland concluded before changing its negotiating approach. However, the BIT with Georgia is *not* an old-style BIT, as it includes newer elements based on the results of a Working Group BIT (this report is available at: https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Internationa
). It should, therefore, be understood as an "intermediate-style BIT".

[20] This list approach is used by various negotiators, see *e.g.*, Article 8.10(2) CETA, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22017A0114(01)#d1e3804-23-1; see also the modernised ECT.

[21] See *Mobil v. Argentina*, Decision on Jurisdiction and Liability, ICSID Case No ARB/04/16, 10 April 2013, para.810, para.811; *Wena Hotels v. Egypt*, Decision on Application for Annulment, ICSID Case No ARB/98/4, 5 February 2002, para.84.

[22] See *Impregilo v. Argentina (I)*, Award, ICSID Case No ARB/07/17, 21 June 2011, para.315, para.326, para.330, para.331, para.370; *Enron v. Argentina*, Award, ICSID Case No ARB/01/3, 22 May 2007, para.286.

[23] *Saluka v. Czech Republic*, Partial Award, PCA, 17 March 2006, para.450.

[24] *Alpha Projektholding v. Ukraine*, Award, ICSID Case No ARB/07/16, 8 November 2010, para.420, para.422; *Mobil and others v. Venezuela*, Award of the Tribunal, ICSID Case No ARB/07/27, 9 October 2014, para.256; *Micula v. Romania (I)*, Final Award, ICSID Case No ARB/05/20, 11 December 2013, para.725, para.872.

[25] *Ibid;* Explanatory report on the opening of the consultation procedure, available at: https://www.newsd.admin.ch/newsd/message/attachments/71812.pdf.

[26] Some older BITs already contain a provision on the right to regulate, see Art. 9 BIT Switzerland-Georgia; it can also be argued that the right to regulate is customary international law, as it has been recognised by arbitral practice, even if the BIT did not contain an explicit provision: see *Philip Morris v. Uruguay*, Award, ICSID Case No. ARB/10/7, 8 July 2016.

[27] See also Canada's new model BIT 2021, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6341/download.

[28] Or narrower scope of the BIT/investor State dispute settlement (ISDS), *e.g.*, due to the ownership structure of the investment (article 15(4) BIT CH-ID).

[29] The new BIT does not, however, contain an umbrella clause – see article 4(5) BIT CH-ID.

[30] The ISDS used to be governed by one single provision in the old-style BITs. The new BIT CH-ID now contains 16 provisions.

[31] *I.e.*, the written notice can be served on the respondent Party, at the earliest, 9 months after the written request for consultation and, at the latest, 21 months after the written request for consultation.

[32] Article 19(7) BIT CH-ID: "If the investor has not submitted the dispute to international arbitration under paragraph 1 within **24 months** from the date of receipt of the written request for consultations by the respondent Party, the investor **shall be deemed to have withdrawn** its request for consultations and may no longer submit the same dispute to international arbitration under paragraph 1. […]"; article 19(8) BIT CH-ID: "The **consent of the Parties** to the submission of a dispute to arbitration under subsection 1 in accordance with the provisions of this Section shall be subject to the condition that the investment dispute was submitted within **five years from** the date on which the complaining investor became aware or reasonably should have become aware of a **breach of an obligation** under the Agreement. […]".

[33] However, there is no obligation to do so. Based on an analysis of the case, SECO will determine whether help is possible and indicated.