Arbitration in Switzerland

The Practitioner’s Guide

SECOND EDITION

Manuel Arroyo (ed)

VOLUME I

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I  INTRODUCTION

The role and significance of foreign investment has grown in modern times in two major waves. In the first period, between 1870 and 1914, increased international financial mobility led to an enormous growth in foreign investment. This was accomplished by way of national laws opening up economic frontiers. After 1945, the pace of growth of foreign investment accelerated slowly after a period of reconstruction, but came to a first peak in the 1990s following the end of the Cold War, spurred by technological innovations and reduced costs for transport. While the worldwide total inflow of foreign direct investment amounted to USD 916 billion in 2005, it reached the amount of USD 1.23 trillion in 2014 before reaching USD 1.76 trillion in 2015.

II  GENERAL FEATURES OF INVESTMENT ARBITRATION

A  Treaty-Based Arbitration

This new outburst of foreign investment following the end of the Cold War was accompanied by the conclusion of many bilateral investment treaties (BITs). Investment treaties allow foreign investors to advance international claims against States, with claims being adjudicated by arbitral tribunals. Because investment treaties utilize the enforcement structure of the New York Convention and the ICSID Convention, the awards of arbitral tribunals are widely enforceable. When a BIT is concluded with a State that is not a party to the New York Convention, it is recommended to insert a provision in the BIT requiring the State party to recognize

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5 The number of BITs grew from 500 in 1990 to over 2900 today. The most significant trends in the evolution of BIT practice in the past decade concerns the negotiation of BITs by Asian States with the conclusion of over 120 BITs by China and over 80 BITs by India. Another trend noticeable in recent years is, conversely, the termination of BITs by states. For instance, South Africa decided in 2015 to terminate most of its BITs with European states, and replaced them by an Investment Bill. And most recently, Italy and Denmark proposed to mutually terminate their intra-European BITs with other European countries, in order to avoid the risk of breach of European law. A further trend is for states to only enter into BITs, respectively, FTAs, that provide for a state-state dispute resolution mechanism involving the participation of an ombudsman, and thus do not provide for the possibility of a direct claim against the state by an investor; see for example Brazil’s recent FTA with a number of African and Latin American countries.
7 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (also referred to as the ICSID Convention or the Washington Convention), adopted in 1965 and entered into force in 1966. The ICSID Convention, which established the International Centre for Settlement of Investment Disputes (ICISD), records 153 Contracting States. Switzerland has been a member State of the ICSID Convention since 14 June 1968, see Database of ICSID Contracting States at <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx> (last accessed 20 January 2017).
and enforce the award. This has been done, for example, in the BITs concluded by Switzerland with Poland, Czech Republic, Cap Verde and Bulgaria.

B Contract-Based Arbitration

Investment arbitration may also arise from a dispute resolution clause in an investment contract between a State and an investor. The investment contract will reflect the bargaining power of both sides under the circumstances of the individual project; thus, no general pattern has emerged in practice. Although such agreements still reflect a significant proportion of present ICSID cases, they have become less common in recent times as States have an increased tendency to act as regulators rather than direct market participants.

State responsibility for breach of international law is distinct from the liability of a State for breach of its contracts. However, there may be a degree of overlap, in particular where the applicable BIT contains a so-called umbrella clause. Following the Vivendi Annulment decision, the SGS v. Pakistan case, and the SGS v. Paraguay case, it is established that a particular course of action by a host State may well constitute both a breach of contract and a violation of international law. The two categories are therefore by no means mutually exclusive. Rather, two different standards are usually applied to determine whether either breach has occurred.

C Principles of Foreign Investment Law

Until the early 1990s, the field of foreign investment was characterized by a limited set of rules of general international law and by a limited number of bilateral treaties. State contracts were the main vehicle of foreign investment, leading to contract-based disputes on the basis of the arbitration clause contained therein. In the absence

9 Art. 9(5) of the Switzerland-Poland BIT (in free translation from the French original): "Unless otherwise agreed by the parties to a dispute, the tribunal shall determine its own procedural rules. Its decisions are final and binding. Each Contracting Party shall recognize and ensure the enforcement of the arbitral decision."
10 Art. 9(1)(c) of the Switzerland-Czech BIT: "Unless the parties to the dispute have agreed otherwise, the tribunal shall determine its procedure. Its decisions are final and binding. Each Contracting Party shall recognize the recognition and execution of the arbitral award."
11 Art. 9(3)(d) of the Switzerland-Cap Verde BIT (in free translation from the French original): "Each Contracting Party shall recognize and enforce the arbitral decision."
12 Art. 11(5) of the Switzerland-Bulgaria BIT: "The arbitral tribunal’s decisions are final and binding upon the parties to the dispute. Each Contracting Party shall give effect to such decisions."
13 See paras. 86–91 below.
17 Compaiaria de Aguas del Aconcagua S.A. and Vivendi Universal v. the Argentine Republic, Decision on application for annulment dated 3 July 2002, ICSID Case No. ARB/97/3, para. 161: “A state may breach a treaty without breaching a contract, and vice versa […] whether there has been a breach of the BIT and whether there has been a breach of the contract are different questions”.

of such a contract, the only available solution for the foreigner aggrieved by his treatment in the host State was to seek diplomatic protection from his home State. However, the legal development that has transformed the landscape of modern investment protection, through the proliferation of bilateral investment treaties, has seen the emergence of the widespread provision, within those investment treaties, for the direct invocation of arbitration claims by investors themselves against the host State. Foreign investment law now thus largely consists of general public international law and of distinct rules particular to its domain, based on investment treaty standards.

1 General Public International Law

Customary international law remains highly relevant for the practice of investment arbitration. The meaning of investment treaties’ operative terms must be interpreted by reference to the relevant rules of international law applicable to the relations between the parties. Arbitral tribunals have even given consideration to whether customary international law on diplomatic protection should override the agreement of the States contained in a treaty. However, the relationship between investment treaties and public international law has its limits, particularly in light of common legal principles of investment protection.

2 Common Legal Principles of Investment Protection

While no de jure doctrine of precedent exists in investment arbitration, a de facto doctrine has been building for some time. The extensive exchange of ideas between tribunals has been facilitated by the wide publication of awards, as well as by scholarly journals and committees. The process of the formulation and conclusion of investment treaties, as well as the vindication of the rights contained in those treaties in arbitration, has produced a set of general international principles about the meaning of common substantive clauses, as well as the general system of investment arbitration.

Although an arbitral tribunal is not considered to be legally bound by the decision of another arbitral tribunal in an earlier case, it has been suggested that investment arbitration is moving toward a jurisprudence constante in the civil law meaning: a line of cases creating a well-established and persuasive practice, possibly evolving into customary law. Indeed, a number of arbitration tribunals have recognized

18 The rules governing foreign investment may also incorporate aspects of laws of the host State.
20 Kaufmann-Kohler, Arb. Int. 2007, p. 373; Kaufmann-Kohler, Consistency, p. 138; Reed/Paulsson/Blackaby, p. 73.
22 Kaufmann-Kohler, Consistency, pp. 139–140; Reed/Paulsson/Blackaby, p. 96. See: Yusuf/Yusuf, pp. 71–81.
the need to establish a coherent and consistent caseload for the promotion of international investment law.23

10 However, with regard to ICSID arbitration under a Swiss BIT, the arbitral tribunal in the SGS v. Philippines case24 emphasized, when taking views different from those of the arbitral tribunal in the SGS v. Pakistan case,25 that “there is no doctrine of precedent in international law”. Referring to Art. 53(1) ICSID Convention, the tribunal added: “In the Tribunal’s view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State.”26 A similar position has been adopted by a UNCITRAL tribunal in the Romak case based on the Switzerland-Uzbekistan BIT.27 More recently, the Hague District Court, setting aside six arbitral awards rendered by a UNCITRAL tribunal also stated, with reference to interpretation of a “limitation clause” of the ECT, that “significance should … not be attached to the circumstance that the Tribunal’s opinion is supported by the opinion of another tribunal – Chaired by the same person, incidentally – in another ECT-based arbitration].”28

III FEATURES OF SWISS BILATERAL INVESTMENT TREATIES

11 The first ever BIT was the one concluded between Germany and Pakistan in 1959.29 Switzerland, for its part, began its BIT program in 1961 with the conclusion of the BIT with Tunisia.30 Today, with 118 signed BITs (of which 116 are in force), Switzerland

23 Victor Pey Casado and President Allende Foundation v. Republic of Chile, Award dated 8 May 2008, ICSID Case No. ARB/98/2, para. 119: “Nevertheless, the current Tribunal is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rules of law.” (free translation from Spanish) See also SAIFEM S.p.A. v. The People’s Republic of Bangladesh, Award dated 30 June 2009, ICSID Case No. ARB/05/7 at para. 90 and Mr. Saba Fakes v. Republic of Turkey, Award dated 14 July 2010, ICSID Case No. ARB/07/20 at para. 96. Those last two awards apply the same language as the Victor Pey Casado award.


29 Germany-Pakistan BIT, which was signed on 25 November 1959 and entered into force on 28 April 1962; Schmid, Investment Protection, p. 4.

30 Liebeschid, ASA Special Series no.19, p. 82, footnote 7; Schmid, Investment Protection, p. 4. For an analysis of the first BIT concluded by Switzerland, see Nguyen, Revue Générale de Droit International Public (DGI) 1988, pp. 577-571.
is the State to have signed the third most BITs, behind Germany and China.18 The Swiss government’s pro-investment treaty policy is publicly stated in the official website of the State Secretariat for Economic Affairs.19 Although UNCTAD published a so-called Swiss model BIT in 1996,18 Switzerland does not systematically follow this or any model when negotiating BITs.20 As a result, the final wording of Swiss BITs is the product of negotiation25 and varies depending on when the BITs were signed and on the counterparty.

A Overview of Cases Brought under Swiss BITs

Switzerland has never appeared as a respondent in investment arbitration proceedings. It is however preparing to face its first investment treaty claim brought by two Turkish nationals.26 Further, Swiss BITs have been relied upon in thirty cases either reported by an institution or in the (arbitration) media.27 The ICSID cases include the following: Holiday Inns v. Morocco,28 Swiss Aluminium v. Iceland,29 Alimenta S.A. v.
14 There are also several known UNCITRAL cases under Swiss BITs: the Switzerland-Uzbekistan BIT has been relied upon in the investment arbitration initiated under the UNCITRAL rules before the PCA in the Romak v. Uzbekistan case. In 2011, the

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40 Alimenta S.A. v. Gambia, ICSID Case No. ARB/99/5: the case was settled and the tribunal issued the order taking note of discontinuance of the proceedings on 3 May 2001.
41 SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/03/13: a Decision on Objections to Jurisdiction was rendered on 6 August 2003 and after reaching a settlement, the parties requested the proceedings to be discontinued. The tribunal issued the order taking note of the discontinuance on 23 May 2004.
42 SGS Société Générale de Surveillance S.A. v. Philippines, ICSID Case No. ARB/02/6: a Decision on Objections to Jurisdiction was rendered on 29 January 2004. The parties ultimately settled and the tribunal rendered an award embodying the parties’ settlement on 11 April 2008.
43 Branimir Mensik v. Slovakia, ICSID Case No. ARB/06/09: the tribunal issued an order for the discontinuance of the proceedings on 9 December 2008, for lack of payment of advances and is now concluded.
45 Holcim Limited, Holderness B.V. and Caricentum B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/09/3: the request for arbitration was filed on 10 April 2009 and the request for discontinuance of the proceedings on 10 September 2010.
48 Bernhard von Pezold and others v. Republic of Zimbabwe, Award dated 28 July 2015, ICSID Case No. ARB/10/15. Annulment proceedings, registered on 2 November 2015, are underway.
53 Cervin Investissements S.A. and Rhone Investissements S.A. v. Costa Rica, Decision on Jurisdiction dated 15 December 2014, ICSID Case No. ARB/13/2. The decision on the merits is pending.
54 Alpiq A.G. v. Romania, ICSID Case No. ARB/14/28: the case was registered on 17 November 2014 and the tribunal constituted on 3 September 2015.
tribunal in another UNCITRAL arbitration applied the Switzerland-Slovakia BIT in the 
Alps Finance v. Slovakia case. The Switzerland-Libya BIT has been successfully 
relied upon in 2010 in an UNCITRAL arbitration, opening the door to Swiss investors 
to be reimbursed for their investments in Libya.

Additional UNCITRAL investor-State arbitrations have included a case filed under 
the Swiss-Kazakh BIT by GEM Equity Management AG, another case initiated 
in 2004 involving Credit Suisse First Boston and India which was settled as well 
as a case initiated in 2005 involving a Swiss energy company and a South American 
Government. It has further been reported that a Swiss investor in 2003 successfully 
relied upon the Switzerland-South Africa BIT in a further UNCITRAL arbitration.

And more recently, in October 2015, Swiss fertilizer company Amerpro has notified 
the Russian Federation of a potential investment treaty claim seeking protection 
under the Switzerland-Russia BIT.

Further cases under Swiss BITs have been reported without any details as to the rules 
or type of arbitration. This is the case for Swiss company Konsortium Oekonomismus 
that initiated a claim in arbitration under the Czech Republic-Switzerland BIT, which 
was ultimately dismissed in 2011. Further, a notice of dispute was lodged by Swiss 
company Gennady Mykhailenko & United Pipe Export Company Trading Ag in August 
2013 under the Switzerland-Latvia BIT along with a Ukrainian investor against the 
Republic of Belarus. The Switzerland-Latvia BIT was recently relied upon: first, in a claim 
brought by Swiss controlled company Bryn Services Ltd. against the Republic of 
Latvia; and second, in a claim by Swiss company R.S.E. Holdings Ag in an ad hoc 
arbitration against the Republic of Latvia in August 2014. The former claim was 
settled in 2014. In November 2016, it was also reported that Swiss pharmaceuticals 
group Novartis relied on the Switzerland-Colombia BIT in order to file a formal

57 Alps Finance and Trade AG v. Slovakia, Decision on Jurisdiction dated 5 March 2011, UNCITRAL.
58 Intersema Ben AG v. Libya, Award on Merits rendered in January 2010, UNCITRAL (see: Investment 
Arbitration Reporter, Vol. 5, No. 12, 1 July 2012, p. 6). See also, Le Temps, 24 January 
2010, Une firme suisse a arraché des millions aux Libyens.
59 See further <http://investmentpolicyhub.unctad.org/ISDS/Details/150> (last accessed 17 February 2016) 
and see also Investment Arbitration Reporter, Vol. 6, No. 20, 22 October 2013, p.6.
60 See further <http://investmentpolicyhub.unctad.org/ISDS/Details/331> (last accessed 17 February 2016) 
and see also The Telegraph India, 21 July 2005, SC clears Dabhol settlement.
61 This case previously appeared in the UNCTAD Database but the link is no longer available. 
See further <http://investmentpolicyhub.unctad.org/ISDS/CountryCases/203?partyRole=1> 
(last accessed 4 May 2016).
62 Swiss investor prevailed in 2003 in confidential BIT arbitration over South Africa (see: Investment 
63 Swiss investor alleges that Russian courts have aided competitor (see: Investment Arbitration 
Reporter, Vol. 8, No. 25, 3 November 2015, p. 11–12). 
64 Konsortium Oekonomismus v. Czech Republic: a decision for the termination of the proceedings 
was rendered on 5 December 2011 and an award on costs on 22 February 2012 (see: Investment 
65 Gennady Mykhailenko & United Pipe Export Company Trading Ag v. The Republic of Belarus: 
the case is pending (see: Investment Arbitration Reporter, Vol. 6, No. 22, 18 November 2013, 
pp. 19–22).
66 Latvia faces another Swiss BIT claim – R.S.E. Holdings v. Latvia – relating to a different bank 
67 Foreign bank depositor’s claim against Latvia arising out of banking crisis was settled after 
tribunal was put in place (see: Investment Arbitration Reporter, 27–28).
notice of dispute with regards to Colombia’s plans to force Novartis to reduce the price of a cancer drug developed and sold by Novartis.68

B Jurisdictional and Procedural Issues

17 Since 1981, Swiss BITs systematically contain investor-State dispute settlement clauses or so-called diagonal clauses, allowing the investor to bring a claim directly against the host State.69 Before then, all the BITs concluded by Switzerland only contained so-called horizontal clauses which obliged investors to seek diplomatic protection in order to bring a claim against a host State.70 Historically, Switzerland appears to have been of the opinion that diplomatic protection was more time and cost-efficient than diagonal clauses.71 The first diagonal clause by which the investor could directly sue the host State was inserted in the Switzerland-Sri Lanka BIT of 1981.72 Switzerland has since been renegotiating its BITs in order to include diagonal arbitration clauses allowing investors to initiate claims directly against the host State.73

1 Choice of Forum

18 ICSID and UNCITRAL are the predominant mechanisms used in investment treaty arbitration. Swiss BITs generally provide for both ad hoc arbitral tribunals and ICSID tribunals.74 Around 71% of Swiss BITs provide for ICSID arbitration and 64% provide for ad hoc arbitration (including UNCITRAL). Some Swiss BITs provide for


69 Schmid, Investment Protection, p. 17. See also Burger, J.Int Arb. 2010, p. 485 at the end; Liebeskind, ASA Special Series no. 19, p. 81; Liebeskind, ASA Bull. 2002, pp. 29, 34–36. Most Swiss BITs provide for investor-state arbitration, with the exception of a few BITs (Switzerland-Congo BIT, Switzerland-Ecuador BIT, Switzerland-Egypt BIT, Switzerland-Indonesia BIT, Switzerland-Jordan BIT, Switzerland-Korea BIT, Switzerland-Malaysia BIT, Switzerland-Morocco BIT, Switzerland-Panama BIT, Switzerland-Singapore BIT, Switzerland-Sri Lanka BIT, Switzerland-Sudan BIT, Switzerland-Tanzania BIT, Switzerland-Tunisia BIT, Switzerland-Uganda BIT, Switzerland-Zaire BIT) and the majority of Swiss Free Trade Agreements (Switzerland-Benin FTA, Switzerland-Central African Republic FTA, Switzerland-Cameroon FTA, Switzerland-Chad FTA, Switzerland-Congo FTA, Switzerland-Gabon FTA, Switzerland-Ivory Coast FTA, Switzerland-Liberia FTA and Switzerland-Madagascar FTA).

70 About one fifth of Swiss BITs are pre-1981 BITs and as such do not contain a diagonal clause (see Schmid, ASA Special Series no. 19, p. 17; Liebeskind, ASA Bull. 2002, pp. 29, 30–34).


72 Burger, J.Int Arb. 2010, p. 485 at the end; Schmid, ASA Special Series no. 19, p. 17, footnote 84; Art. 9 of the Switzerland-Sri Lanka BIT provides (in free translation from the French original) that: “In the event of a dispute between a national or a company from a Contracting Party and another Contracting Party regarding an investment made on the territory of such Contracting Party, the dispute shall be subject to arbitration, provided that both parties agree, at the International Centre for Settlement of Investment Disputes, established by the Washington Convention on the Settlement of Disputes between States and Nationals of other States of 18 March 1965."


ICC arbitration.\textsuperscript{75} Around 60\% allow a choice between ICSID or UNCITRAL, such as, for example, the BIT concluded with Kenya\textsuperscript{76} or with Costa Rica.\textsuperscript{77}

a \textbf{UNCITRAL}

Arbitrations conducted under the UNCITRAL Rules\textsuperscript{78} are the most common non-ICSID investment treaty arbitrations.\textsuperscript{79} In some cases, Swiss BITs refer indirectly to UNCITRAL by inviting the arbitral tribunal to determine its own procedural rules “in conformity with” or by being “guided” by the UNCITRAL Rules.\textsuperscript{80}

b \textbf{ICSID}

ICSID has five pertinent features: (a) foreign companies and individuals can directly bring a suit against their host State; (b) State immunity from jurisdiction is severely restricted; (c) international law can be applied to the relationship between the host State and the investor; (d) the rule regarding exhaustion of local remedies is excluded in principle; and (e) ICSID awards are directly enforceable within the territories of all State parties to ICSID.

A great number of investment treaties, bilateral and multilateral, refer to ICSID as a forum for dispute settlement. One of the major advantages of the ICSID system is that investment disputes become “depoliticized” in the sense that it distances the dispute from the home State of the investor. The self-contained nature of the process under the ICSID Convention also avoids many of the pitfalls that may otherwise arise in the pursuit of a claim before a national court or commercial arbitration body.

Additionally, ICSID’s institutional support to arbitrations is viewed as one of the main advantages of ICSID as the forum of arbitration. As a result, ICSID has become the main forum for the settlement of investment disputes as the field of foreign investment law has expanded dramatically in the past three decades.\textsuperscript{81} Today, at

\textsuperscript{75} See, e.g., Art. 10(2) of the Switzerland–South Africa BIT; Liebeskind, \textit{ASA Bull.} 2002, p. 40.

\textsuperscript{76} Art. 9(2) of the Switzerland-Kenya BIT.

\textsuperscript{77} Art. 9(4) of the Switzerland-Costa Rica BIT. Art. 9(5) of the 1991 Switzerland-Argentina BIT, which was the first Swiss BIT to offer a choice between ICSID and UNCITRAL arbitration (see Liebeskind, \textit{ASA Special Series no. 19}, p. 89, footnote 71).

\textsuperscript{78} The UNCITRAL Rules were initially adopted in 1976. A process of revision of the Rules was launched in September 2006 by the Working Group II of UNCITRAL with the aim, inter alia, to make the Rules more adapted to investment arbitration. This process was completed in February 2010. The 2010 Rules apply to disputes that are admitted to arbitration on the basis of arbitration agreements concluded after 15 August 2010 (Art. 1(2) UNCITRAL Rules). In 2013, a new article 1), paragraph 4 was added to the 2010 Rules in order to incorporate the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration for arbitration initiated pursuant to an investment treaty concluded on or after 1 April 2014. In all other respects, the 2013 UNCITRAL Arbitration Rules remain unchanged from the 2010 revised version. The text of the new UNCITRAL Rules, as revised in 2013, can be found at: <http://www.uncialral.org/uncial/en/en/orul_towl/texts/arbitration/2010Arbitration_rules.html>.

\textsuperscript{79} For instance, the rules of procedure of the Ican-US Claims Tribunal are based on the UNCITRAL Rules.

\textsuperscript{80} Liebeskind, \textit{ASA Special Series no. 19}, p. 97. See Art. 11(4) of the Switzerland-Bulgaria BIT and Art. 9(2)(b)(ii) of the Switzerland-Vietnam BIT.

\textsuperscript{81} The first ICSID arbitration under a BIT was registered in 1987. During the 10 years from 1996 to 2005, 166 claims by investors were registered at ICSID, compared to 35 in the previous 30 years. In 2015, the number of cases that had been registered increased to 560.
least in relation with cases that are publicly known, those cases brought under the ICSID Convention account for a majority of investment disputes.82

23 The ICSID Convention imposes certain mandatory conditions which must be fulfilled in order for ICSID to have jurisdiction over a given dispute: the respondent State and the State of the investor must be parties to the ICSID Convention83 and the dispute submitted must be a legal dispute arising directly out of an investment.84 As all parties must be Members of the ICSID Convention in order for an ICSID provision to be effective,85 Switzerland has, in some BITs, inserted a clause allowing the parties to submit a dispute to ICSID once the counter-party State becomes a member of the ICSID Convention.86 The starting point, in any case, is the existence of Parties' consent in order to assert the jurisdiction of ICSID.87 However, not all Swiss BITs render ICSID jurisdiction mandatory,88 on the contrary, an analysis of the Swiss BITs shows that most BITs provide for ICSID jurisdiction as one possible option.89

2 Consent to Arbitration

α Consent under Contract-Based Arbitration

24 Consent may be encompassed in an arbitration clause included in the parties' investment contract, in a separate arbitration agreement or in other instruments. Regardless of the form, consent must have been given for the specific dispute that is submitted for resolution to the arbitral tribunal.90

25 One of the fundamental protection mechanisms within the ICSID regime is that a valid consent to ICSID arbitration creates an exclusive forum unless the parties agree

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82 As at February 2016, there were 209 ICSID cases pending.
83 Art. 25 ICSID Convention.
84 Art. 25 ICSID Convention.
85 Art. 25 ICSID Convention.
86 See, e.g., Art. 9(5) of the Switzerland-Cape Verde BIT (in free translation from the French original): "(5) When both Contracting Parties are party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965, the dispute shall, upon the investor's request, be brought before the International Centre for Settlement of Investment Disputes (ICSID) instead of the procedure set forth in section (3) of this article." Cape Verde signed and ratified the ICSID Convention in December 2010 and the Convention has been binding since its starting on 26 January 2011. As of this date, investors are no longer able to resort to the ad hoc arbitration provided for in Art. 9(3) of the BIT, but only have the option to initiate arbitration proceedings before ICSID. See also Art. 9(3) of the Switzerland-Uzbekistan BIT; Liebeskind, ASA Special Series no. 19, p. 93.
87 Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention, 1 ICSID Reports, 18 March 1965, para. 23: "[c]onsent of the parties is the cornerstone of the jurisdiction of the Center".
88 Liebeskind, ASA Special Series no. 19, pp. 93-94.
89 See, e.g., Art. 9(2) of the Switzerland-Kenya BIT (in free translation from the French original): "[...] the investor may choose between:
(a) The International Centre for Settlement of Investment Disputes (ICSID), established by the Washington Convention on the Settlement of Disputes between States and Nationals of Other States of 18 March 1965 (hereinafter "the Washington Convention"); and
(b) An ad hoc arbitral tribunal, unless otherwise agreed by the parties to the dispute, which shall be convened in accordance with the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL)."
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otherwise or the State has required exhaustion of local remedies as a condition of consent.53

b  Consent under Treaty-Based Arbitration

The established consensus is that the BIT contains an offer to arbitrate and that this

accepted when the investor sends a notice of arbitration or by any other

of consent stipulated in the relevant BIT. Once the offer has been accepted, there is a perfected agreement to arbitrate between a qualifying investor and the host State.52

Initially most Swiss BITs did not expressly address the issue of the consent of the State

party to arbitrate, although all they provided for a dispute resolution mechanism.53 The first Swiss BIT to expressly provide for the consent of the host State to resort

arbitrate was the BIT concluded with Jamaica in 1990.54 Since then, the inclusion of

an express provision on consent to arbitration has not yet become common practice

Swiss BITs, although it is found more frequently in recent BITs.55

When included in the BIT, the provision will generally be drafted in the following

terms: “Each Contracting Party hereby consents to the submission of an investment
dispute to international arbitration.”56 However, Swiss BITs contain a variety of

consent provisions, which vary in their wording and their scope. Some provisions

require the consent of both parties to submit the dispute to arbitration,57 others

merely indicate that the dispute shall be submitted to arbitration without expressly

providing for the consent of the host State.58 Such mandatory requirements to refer

disputes to arbitration, using the word “shall”, can be considered as an implied

91 See paras. 17–18 above.
oyer of Ecuador, Decision on Jurisdiction dated 5 September 2008, ICSID Case No. ARB/06/1, para.
74.
of the Switzerland-Jamaica BIT provides (in free translation from the French original) that:
“(…) the Contracting Party shall give its consent, pursuant to article 36 of the Convention, to
the national or the company of the other Contracting Party to submit the dispute to arbitration
in accordance with said article provided all other remedies have been exhausted pursuant to
international law”.
96 Schmidt, Investment Protection, p. 21; see, e.g., Art. 12(3) of the Switzerland-Serbia-Montenegro
BIT; Art. 8(3) of the Switzerland-Azerbaijan BIT; Art. 11(3) of the Switzerland-Colombia BIT
or Art. 9(3) of the Switzerland-Mozambique BIT.
97 See, e.g., Art. 9(1) of the Switzerland-Sri Lanka BIT (in free translation from the French
original): “In the event of a dispute between a national or a company of a Contracting Party
and the other Contracting Party regarding an investment made on the territory of such other
Contracting Party, the dispute shall be subject to arbitration, provided that both parties agree
to such, at the International Centre for Settlement of Investment Disputes (…)”.
98 See, e.g., Art. 9(2) of the Switzerland-Panama BIT (in free translation from the French original):
“If these amicable consultations do not bring about a resolution within six months, the interested
parties must make use of the specific procedures agreed to by the Contracting Party and the
national or company from the other Contracting Party. In the absence of any such specific
procedures, the dispute shall be subject to international arbitration in accordance with the
consent of the host State to arbitrate.99 However, most BITs only provide that the dispute "may" be submitted to arbitration.100 A few BITs provide that the extent of the consent varies with the scope of the investment dispute.101 For example, in some cases, the express consent of the host State will be required for specific types of investment disputes.102 In other cases, the preliminary consent of the host State to submit the dispute to arbitration may be excluded for certain types of investment disputes, either in the BIT itself,103 or in a reservation made by the host State when ratifying the ICSID Convention.104

3 Fork-in-the-Road

29 The "fork-in-the-road" provision aims to avoid parallel arbitral and domestic court proceedings in the same dispute. A typical fork-in-the-road provision recognizes the possibility for the investor to initiate both domestic court and arbitral proceedings against the host State, but provides that once an investor has chosen one or

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99 Liebeskind, *ASA Bull. 2002*, p. 47; see, e.g., Art. 9(2) of the Switzerland-Cape Verde BIT (in free translation from the French original): "If such amicable consultations do not bring about a resolution within six months from the date upon which the dispute was first raised, the dispute shall, upon the investor's request, be brought before an arbitration tribunal" and Art. 9(2) of the Switzerland-Vietnam BIT (in free translation from the French original): "If such amicable consultations do not bring about a resolution within six months from the date upon which the dispute was first raised, the dispute shall, upon the investor's request, be brought before: (a) either an organization for commercial arbitration in the host country; or (b) an ad hoc arbitral tribunal. Such ad hoc arbitral tribunal shall be established in the following manner (...)".

100 Liebeskind, *ASA Bull. 2002*, p. 47. See e.g., Art. 9(3) of the Switzerland-Peru BIT which states (in free translation from the French original) that "the dispute may be submitted to an ad hoc arbitral tribunal" or Art. 11(2) of the Switzerland-Bulgaria BIT which states (in free translation): "Disputes arising out of the obligations under art. 7 section (1) of this Agreement may be submitted by the investor to an international arbitral tribunal."


102 This is the case of the BIT signed with Poland which provides that a dispute related to the transfer of funds or expropriation shall be submitted to arbitration, but that disputes based on other provisions of the BIT will be submitted to arbitration only if both the host State and the investor agree to it. Art. 9(2) of the Switzerland-Poland BIT (in free translation from the French original): "If these amicable consultations do not bring about a resolution within six months from the date of the written demand for consultations, the parties to the dispute may proceed as follows: A dispute with regard to an obligation pursuant to art. 5 and 6 of this Agreement shall be submitted to an arbitral tribunal, upon the investor's request. B) In the event of a dispute not governed by section (2)(a) of this article, and if the parties mutually agree, the dispute may be submitted to an arbitral tribunal."

103 See, e.g., Art. 11(3) of the Switzerland-Colombia BIT (in free translation from the French original): "Each Party hereby gives its unconditional and, irrevocable consent to submission to international arbitration in accordance with section (2) above, for any dispute arising out of an investment except those specifically covered under article 10 section (2) of this Agreement."

104 This is, for example, the case of Saudi Arabia which reserved its rights to submit oil disputes to ICSID. The reservation made by the country on 8 May 1980 reads as follows: "[T]he Kingdom reserves the right of not submitting all questions pertaining to oil and pertaining to acts of sovereignty to the International Centre for the Settlement of Investment Disputes whether by way of conciliation or arbitration." See also the reservation made by China on 7 January 1993: "[P]ursuant to Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the International Centre for Settlement of Investment Disputes disputes over compensation resulting from expropriation and nationalization", available at <http://icsid.worldbank.org/ICSID/PortalServlet>.
the other type of proceedings, that choice is final.\textsuperscript{105} With the exception of the Switzerland-Colombia and Switzerland-Kosovo BITs, Swiss BITs which provide for investor-state arbitration do not contain a fork-in-the-road clause. Some other BITs, like the Switzerland-China BIT provide that if the investor initiates domestic court proceedings first, it may resort to arbitration thereafter provided the domestic court has not yet made a final ruling on the dispute and provided it withdraws its claims before the domestic courts.\textsuperscript{106} It is possible that a fork-in-the-road provision in a given BIT may be avoided by invoking a MFN provision in the same BIT allowing for the application of a dispute resolution clause in another BIT entered into by the host State which does not contain a fork-in-the-road provision.\textsuperscript{107}

In order for fork-in-the-road provisions to bar an investor’s access to arbitral proceedings, tribunals have generally required that the “triple identity” test be met. The test requires that (a) the claims asserted in the disputes are identical, in other words they must have the same legal basis;\textsuperscript{108} (b) the subject-matter of the disputes is identical;\textsuperscript{109} and (c) the parties in the domestic proceedings are identical to the parties in the arbitration. This last condition is interpreted restrictively.\textsuperscript{108}

\textsuperscript{105} See, e.g., Art. 10 of the Switzerland-Saudi Arabia BIT; Art. 8 of the Switzerland-Azerbaijan BIT; Art. 9(2) of the Switzerland-Romania BIT.

\textsuperscript{106} See, e.g., Art. 11(4) of the Switzerland-China BIT: “A dispute that has been submitted, in accordance with paragraph (2), to competent court of the Contacting Party concerned, may only be submitted to international arbitration after withdrawal by the investor of the case from the domestic court.”


\textsuperscript{108} Excon Corporation and Ponderosa Assets L.P. v. the Argentine Republic, Decision on Jurisdiction dated 2 August 2004, ICSID Case No. ARB/01/3, para. 98.

\textsuperscript{109} See, e.g., Mr Eudoro Olguín v. Republic of Paraguay, Decision on Jurisdiction dated 8 August 2000, ICSID Case No. ARB/98/5, para. 30: the tribunal rejected the respondent’s attempt to rely on a fork-in-the-road provision on the basis that the claimant had initiated bankruptcy proceedings before a domestic court, as the bankruptcy proceedings were not an attempt to “collect payment in fulfillment of [Paraguay’s] obligations, which [the claimant] is seeking to collect in the present arbitration.”; Alex Genis, Eastern Credit Limited v. The Republic of Estonia, Award dated 25 June 2001, ICSID Case No. ARB/99/2, para. 32: the company in which the claimants in the arbitration were shareholders had instituted proceedings before the Administrative Court challenging the revocation by the Bank of Estonia of its licence. The tribunal ruled that the investors had no choice but to litigate this question before the appropriate courts in Estonia, as “no other jurisdiction was competent to deal with the restoration of the status quo”. The tribunal distinguished these domestic proceedings from the ICSID arbitration by noting that the latter related to losses arising from alleged breaches of the BIT.

\textsuperscript{110} See, e.g., Acuña Corp. v. The Argentine Republic, Decision on Jurisdiction dated 8 December 2003, ICSID Case No. ARB/01/12, para. 90: the local company in which the claimant had
31 With regard to the first condition, the so-called identity of disputes, certain tribunals have held that contract claims and treaty claims, even where they deal with the same subject matter, are not brought on the same basis and are as a result not identical.\textsuperscript{111} Therefore, according to these tribunals, an investor can commence domestic court proceedings on the basis of the respondent State’s breach of contract, as well as arbitration for breach of the State’s treaty obligations. However, in the Vivendi case, it was ruled that if the investor brought a contract claim before domestic courts, it would be barred from bringing either a contract or treaty claim to arbitration.\textsuperscript{112} In Pantechniki v. Albania, the tribunal endorsed the Vivendi annulment decision and dismissed the investor’s claim on similar grounds. The investor in that case had obtained a series of unfavorable decisions from the host State courts before turning to ICSID arbitration. The sole arbitrator deemed the claim in the Albanian courts to have the same “fundamental basis” as the treaty claim, because the claim did not have “an autonomous existence outside the [underlying] contract.”\textsuperscript{113} The claim was thus caught by the fork-in-the road provision in the applicable BIT. The tribunal in H\&H v. Egypt arrived to the same conclusion and declined jurisdiction due to the fact that the claims had the same fundamental basis as regards those previously submitted before another arbitral tribunal and before Egyptian courts.\textsuperscript{114}

4 Exhaustion of Local Remedies

32 While some Swiss BITs only mention recourse to domestic courts as an option,\textsuperscript{115} others provide that domestic court remedies must be exhausted before arbitration may be initiated.\textsuperscript{116} However, several of those BITs contain an “opt out” provision,
providing that if no decision has been rendered by the national court within a certain time limit, arbitration may be requested.\footnote{117} This type of provision is intended to guarantee the efficiency of the BIT and to prevent it from becoming inoperative in the event that national proceedings become protracted.\footnote{118}

Article 26 of the ICSID Convention offers the possibility for a Contracting State to require "the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration" under the ICSID Convention. Therefore, in an ICSID arbitration, the absence of such a requirement implies a renunciation of the exhaustion of local remedies as a jurisdictional or admissibility requirement.

An ICSID arbitral tribunal recently had to interpret the "opt out" provision of the Switzerland-Uruguay BIT in its Art. 10(2).\footnote{119} Such a provision compels a contracting party to submit a dispute "with respect to investments" first to the host State's local courts and only subsequently, in case no judgment is rendered within a period of 18 months, before an arbitral tribunal. The debate between the Parties focused on which type of dispute must have been alleged in the domestic arena in order to satisfy the domestic litigation requirement. The arbitral tribunal took the view that the meaning of "disputes with respect to investments" was to be interpreted broadly and embraced either domestic law claims or BIT claims. Therefore an investor bringing a domestic law claim that was "based on substantially similar facts and subject matter as the BIT claim" and which was thereafter submitted before an arbitral tribunal satisfied the domestic litigation requirement.\footnote{120} The arbitral tribunal further concluded that the 18-month domestic litigation requirement was "compulsory" and that in the light of the ICI's \textit{Mavrommatis} principle,\footnote{121} it was unnecessary to determine whether it should be considered a jurisdictional or an admissibility question. Under such principle, jurisdiction can be affirmed "where requirements for jurisdiction were not met at the time of instituting the proceedings were met subsequently"\footnote{122} which would have been precisely the case. The arbitral tribunal therefore dismissed the jurisdictional objection by the respondent State that the claimant had not fulfilled the (limited) local remedies requirement.

5 Cooling-off Period

A provision setting out a period during which an investor is precluded from initiating arbitration can be found in "many, if not most BITs,"\footnote{123} and in every Swiss
BIT, where the length of the cooling-off period varies from three to eighteen months. The purpose of such a provision is to encourage parties to negotiate and attempt to settle their dispute. Negotiations can prove to be successful as demonstrated in the case between the Swiss cement company Holcim and Venezuela, following the nationalization of the industry by Venezuela in 2008. However, tribunals do not always hold the claimants in arbitration to the cooling-off period, on the basis that it is merely a procedural requirement, not a jurisdictional one, and that requiring the parties to resubmit their application after the cooling-off period would be an overly formalistic approach. As noted by the tribunal in SGS v. Pakistan:

"Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction."

However, some investment treaty tribunals have nevertheless ruled the cooling-off period to be a jurisdictional requirement. In one of those cases, the claimant had complied with the cooling-off period in respect of its primary claims, but later sought to add supplementary claims when initiating the arbitration. The tribunal ruled that, as a result of the cooling-off period being a jurisdictional requirement, it did not have jurisdiction to consider supplementary claims submitted by the claimant at the stage of the arbitration. Authors have argued however that the significance of this precedent for other cases is limited, as the cooling-off clause in question "went considerably beyond those of the treaties applicable in other cases." Indeed, in a

125 In most Swiss BITs the period is of six months, but there are also cooling-off periods of three months (Switzerland-Cuba BIT, Switzerland-Kenya BIT, Switzerland-Romania BIT, Switzerland-South Africa BIT and the ECT), twelve months (Switzerland-Bolivia BIT, Switzerland-Gambia BIT, Switzerland-Hungary BIT, Switzerland-Jamaica BIT, Switzerland-Kazakhstan BIT, Switzerland-Moldova BIT, Switzerland-Pakistan BIT, Switzerland-Turkey BIT and Switzerland-Zambia BIT), and twenty-four months (Switzerland-Peru). For a typical cooling-off period clause, see, e.g., Art. 10 of the Switzerland-Malaysia BIT: (1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement shall, if possible, be settled through consultation or negotiation. (2) If a dispute between the Contracting Parties cannot thus be settled within six months, it shall at the request of either Contracting Party, be submitted to an arbitral tribunal.” Friedman, p. 555.
126 The parties announced the settlement of the dispute in September 2010.
127 See, e.g., Ethyl Corp. v. Canada, NAFTA/UNCITRAL, Award on Jurisdiction dated 24 June 1998, para. 58; Bayindir Insaat Turizm Ticaret Ve Sanayi S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29; Lander v. Czech Republic, (UNCITRAL) Award dated 3 September 2001. Such an approach is consistent with that taken by the ICI in connection with treaty clauses requiring States to negotiate their disputes before bringing them to the Court; see Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America, Jurisdiction and Admissibility, Judgment, I.C.J. Rep. 1984, pp. 428-429).
129 Antoine Goetz and others v. Burundi, Award dated 10 February 1999, ICSID Case No. ARB/95/3.
similar context, in *Ernun v. Argentina*, the tribunal ruled that it had jurisdiction over the supplemental claims as they merely extended the principal claim. It has been stated that the decisive element as to whether a cooling-off period must be complied with is whether or not negotiations would be futile.  

More recently, the ICSID tribunal in the *Murphy v. Ecuador* case refused to hear the case on the basis that the claimant did not comply with the six-month consultation and negotiation period that was prescribed in the US-Ecuador BIT. The tribunal stated that the cooling-off period constituted “a fundamental requirement that the Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules.” On the question whether the negotiations would have been futile or not, the arbitral tribunal underlined that the obligation to negotiate is an obligation of means, not of result and that in order to determine if negotiations would succeed it is necessary to initiate such negotiations in the first place. However, the tribunal’s decision appears to have been based primarily on the absence of any effort to negotiate and might have been different if the parties had at least attempted negotiations.

### C Determination of the Investor

Given that international investment law is designed to protect private investors, States acting directly as investors will not fall under its protection, although wholly or partly government-controlled entities can be afforded protection depending on the circumstances of the case. For example, the tribunal in the Swiss-Venezuela BIT case *Flughafen Zürich v. Venezuela*, rejected the allegation that Flughafen Zürich was acting as an agent of the Swiss State due to the fact that it was partly owned.

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135 A similar decision had been reached some months earlier by another ICSID tribunal in *Burlington Resources Inc. v. Ecuador*, Decision on Jurisdiction dated 2 June 2010, ICSID Case No. ARB/08/5.
138 Schreuer, para. 270 at Art. 25; Dolzer/Schreuer, p. 44.
139 *Československá Obchodní Banka, A.S. v. The Slovak Republic*, Decision on Jurisdiction dated 24 May 1999, ICSID Case No. ARB/97/4; the tribunal determined that if the entity was not discharging an essentially governmental function, despite being almost entirely publicly owned, it had access to the ICSID Convention. The Switzerland-Saudi Arabia BIT, Switzerland-Kuwait BIT and Switzerland-UAE BIT provide that the government of these states may also qualify as an investor. For instance, Article 1(a)(iiii) of the Switzerland-UAE BIT provides that the term investor shall also mean: “the Government of the State of the United Arab Emirates acting either directly or indirectly through their local and federal financial institutions as well as development funds, agencies or other similar government institutions having their seats in the United States Emirates.” See also, Salacuse, 2015, p. 212, which notes that “it appears that no tribunal has refused jurisdiction in an investor-state dispute because a claimant is owned or controlled by a government. And although questions have also been raised about whether the ICSID Convention should properly apply to a case in which a state-entity is a complaining party, tribunals that have dealt with the question have always found that such entities are within tribunal’s jurisdiction.”
by sub-divisions of this same State and thus the case lacked jurisdiction ratione
personae. The tribunal however held that Flughafen Zürich was not a government
instrumentality of the Swiss State considering: that it does not act in the name
and for the benefit of the Swiss State; the majority of shares was privately owned
(the sub-divisions of the State, in this case the Canton and the city of Zurich, held
less than 40% of the shares); it is a company listed in the Swiss Exchange and its
 corporate purpose was to create value rather than defending the public interests
of Switzerland.\footnote{140}

40 However, the primary factor in determining whether an investor qualifies for
protection is its nationality. For this determination, reference is not only made to
the relevant investment treaty or agreement, but also to the concept of nationality
that has developed in the diplomatic protection context.

1 Determination of Nationality when the Investor is a Natural Person

41 Most Swiss BITs provide that the nationality of the investor will be determined
according to the law of the contracting party.\footnote{141} A typical provision on nationality
provides that investors are “the private persons who, in accordance with the legisla-
tion of the Contracting Party, are considered as its nationals”.\footnote{142} None of the Swiss
BITs contains a clause prohibiting a dual national from bringing a claim against the
host State of which he is a national.\footnote{143}

42 The ICJ first gave a definition of the notion of nationality in the Nottebohm case
where it stated that “it is for every sovereign state, to settle by its own legislation
the rules relating to the acquisition of its nationality” but that “it is international
law which determines whether a State is entitled to exercise protection and to
seize the Court”.\footnote{144} It was held in that case that the host State was not obliged
to recognize the investor’s nationality as there was no genuine and effective link. The
effective nationality requirement was subsequently stated to be a general principle
of international law by the Iran-US Claims Tribunal\footnote{145} in the case of dual nationality
of an individual.

\footnote{140 Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Venezuela, Final Award dated 18
November 2014, ICSID Case No. ARB/10/19, paras. 283–286.}

\footnote{141 Burger, J.Int Arb. 2010, p. 475; Schmid, Investment Protection, p. 16.}

\footnote{142 See, e.g., Art. 1(1)(a) of the Switzerland-Kenya BIT.}

\footnote{143 Burger, J.Int Arb. 2010, pp. 475–476; Schmid, Investment Protection, p. 16. However, a few
Swiss BITs include provisions on dual nationality (Switzerland-Argentina BIT; Switzerland-Chile
BIT; Switzerland-Kosovo BIT; and Switzerland-Paraguay BIT; all BITs with countries that have
a historically strong migration from or to Switzerland).}

\footnote{144 Nottebohm (Liechtenstein v. Guatemala), Judgment dated 6 April 1955 I.C.J. 20, 21, 23: the
ICJ defined nationality as “(...) a legal bond having as its basis a social fact of attachment,
a genuine connection of existence, interests and sentiments, together with the existence of
reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that
the individual upon whom it is conferred, either directly by the law or as a result of an act of
the authorities, is in fact more closely connected with the population of the State conferring
nationality than with that of any other State which has made him its national.”}

\footnote{145 The Iran-US Claims Tribunal deemed it necessary to assess all relevant factors including “habitual
residence, center of interests, family ties, participation in public life and other evidence of
attachment”. See also McLaughlan/Shore/Weiniger, pp. 5–11.}
The ICSID Convention extends the jurisdiction of ICSID to a dispute arising between a contracting State and a national of another contracting State.\(^{146}\) For this purpose, the ICSID Convention states that nationality is ascertained “on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered” and not at another time. It is therefore possible that, although Art. 25 ICSID Convention expressly excludes dual nationals who have the nationality of the host State, an individual who previously held the nationality of both States, but then renounced the nationality of the host State before the critical date, would have access to ICSID.\(^{147}\)

2 Determination of Nationality when the Investor is a Legal Entity

The concept of nationality of a legal entity is much more complex than that of an individual. There is no uniform approach under international law on how to determine a legal entity's nationality. The ICJ first addressed this issue in the Barcelona Traction case,\(^ {148}\) referring to the two criteria of place of incorporation and seat. These criteria were confirmed also by the authors of Oppenheim.\(^ {149}\)

The ICSID Convention provides that a legal entity may qualify as an investor if it has the nationality of a Contracting State other than the State party to the dispute or if it has the nationality of the State party but where, because of foreign control, the parties have agreed it should be treated as a national of another Contracting State.\(^ {150}\)

In Swiss BITs, the definition of a legal entity relies on notions of place of incorporation and seat, but also on the concept of control.\(^ {151}\) Where a BIT grants jurisdiction

\(^{146}\) Art. 25 ICSID Convention: “[a] national of another Contracting State means any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered (…) but does not include any person who on either date also had the nationality of the Contracting State party to the dispute.”

\(^{147}\) For cases dealing with the determination of the nationality of a natural person, see Champion Trading Company and others v. Arab Republic of Egypt, ICSID Case No. ARB/02/9; Waghui Elle George Shag and Gorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15; and Ioan Micala, Viorel Micala and others v. Romania, ICSID Case No. ARB/05/20.

\(^{148}\) Barcelona Traction, Light and Power Co., Ltd (Belgium v. Spain), Judgment of 5 February 1970, 1970 I.C.J. 3, para. 70. “[The traditional rule attributes the right to diplomatic protection of a corporate entity to the States under the laws of which it is incorporated and in whose territory it has its registered office. The two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist (…) though in the particular field of diplomatic protection of corporate entities, no absolute test of ‘genuine connection’ has found general acceptance.” See also, Bishop/Crawford/Reisman, p. 516.

\(^{149}\) Jennings/Watts, pp. 859–864.

\(^{150}\) Art. 25(2)(b) ICSID Convention: “any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”

\(^{151}\) See, e.g., the Switzerland-Colombia BIT (control criteria); the Switzerland-Azerbaijan BIT (incorporation criteria); Burger, J., Int. Arb. 2010, pp. 476–477. Art. 1(1) of the Swiss non-official model BIT reads: “The term ‘investor’ refers with regard to either Contracting Party to: (b) legal entities, including companies, corporations, business associations and other organizations, which are constituted or otherwise duly organised under the law of the Contracting Party and
on the basis solely of the place of incorporation, tribunals have tended to interpret such provisions narrowly although the issue remains controversial. The latter test of control is a broad concept that can include equity participation of minority shareholders, voting rights or management responsibilities, which must be examined on a case-by-case basis. Where a BIT contains an agreement that grants jurisdiction to a tribunal over a dispute between a host State and a locally incorporated company subject to foreign control, the question is whether the tribunal should examine only immediate control by the shareholder of a locally incorporated company, or whether the tribunal should examine the entire chain of companies to search for the ultimate controller in order to determine whether the ultimate controller is a national of the host State and thus not entitled to protection under the BIT. The tribunal in TSA v. Argentina examined the corporate chain to determine the nationality of the real source of control which was also the methodology followed by the tribunal in Von Pezold v. Zimbabwe, a case under the Switzerland-Zimbabwe BIT. Other tribunals, such as those in the Amco v. Indonesia case or the Aguas del Tunari v. Bolivia case either refused to go beyond the first holding level or determined that the identification of an entity having legal and not necessarily also real and effective control was sufficient. The same approach was followed in Swisssion v. Macedonia under the Switzerland-Macedonia BIT where the tribunal was satisfied

have their seat, together with real economic activities, in the territory of that same Contracting Party; (c) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities, in the territory of that Contracting Party. Many Swiss BITs follow the same wording. See, e.g., Art. 1(1)(b) of the Switzerland-Chile BIT; Art. 1(1)(b) and (c) of the Switzerland-Kenya BIT; Art. 1(1)(b) and (c) of the Switzerland-Pakistan BIT; Art. 1(1)(b) and (c) of the Switzerland-Bulgaria BIT; Art. 1(1)(b) and (c) of the Switzerland-Argentina BIT; Art. 1(1)(b) and (c) of the Switzerland-Czech and Slovak Republic BIT; Art. 1(1)(b) and (c) of the Switzerland-Hungary BIT.

152 Tokios Tokelis v. Ukraine, Decision on Jurisdiction dated 29 April 2004, ICSID Case No. ARB/02/18, para. 40; Ronpetrol Group N.V. v. Romania, Decision on Jurisdiction dated 18 April 2008, ICSID Case No. ARB/06/3, See, however, TSA Spectrum de Argentina S.A. v. Argentine Republic, Award dated 19 December 2008, ICSID Case No. ARB/05/5, para. 146; and Loewen Group, Inc. and Raymond L. Loewen v. United States, Decision on Jurisdiction dated 5 January 2001, ICSID Case No. ARB(AF)/98/3 (NAFTA), para. 77.


155 TSA Spectrum de Argentina v. Argentina, Award dated 19 December 2008, ICSID Case No. ARB/05/5, para. 147.

156 Berthard von Pezold and others v. Republic of Zimbabwe, Award dated 28 July 2015, ICSID Case No. ARB/10/15, para. 215: the tribunal held that the chain of control was not broken by intermediary companies and that the evidence clearly demonstrated the “overall control” and “ultimate control” of such companies by Swiss investors.

157 Amco et al. v. Indonesia, Decision on Jurisdiction dated 25 September 1983, ICSID Case No. ARB/81/1.


159 With the exception of the Switzerland-Saudi Arabia BIT, Switzerland-Russia BIT, Switzerland-Mexico BIT, Switzerland-Syrian Arab Republic BIT, Switzerland-Libyan Arab Jamahiriya BIT, all Swiss BITs provide that an investor may be a legal person controlled, “directly or indirectly”, by nationals of the contracting party. A number of Swiss BITs, on the other hand, refer to “effective control” as the relevant criterion (see, e.g., Switzerland-China BIT, Switzerland-UAE BIT, Switzerland-Chile BIT, Switzerland-Iran BIT). A very few Swiss BITs actually define “control” (see, e.g., Art. 1(1)(c) Switzerland-Singapore BIT, which refers to juridical persons: “(j) in which more than 50 per cent of the equity interest is beneficially owned by persons of
that the investor was a Swiss entity, "whatever the nationality of the ultimate user [...] may be." 160

Often, in order to fall within the scope of a Swiss BIT, the legal entity must have (or must be controlled by a legal entity which has) real economic activities in the Contracting State. 161 Thus a shell company would not satisfy this test. In 2011, the UNCITRAL tribunal in Alps Finance v. Slovakia accordingly declined jurisdiction on the basis that Alps Finance could not be considered an "investor" under the Switzerland-Slovakia BIT due to the absence of real economic activities. 162 "Real" economic activities was held to mean economic activities which are ‘‘actual’, or ‘effective’, or ‘genuine’, or ‘verifiable’, or ‘visible’, or ‘tangible’, or ‘objective’. 163 More generally, the factors evaluated by tribunals to determine what constitutes economic activities can be found in the decisions in AMTO v. Ukraine 164 and Tokios Tokeles. 165

D Determination of the Investment

Tribunals have emphasized repeatedly that an investment typically consists of several interrelated economic activities, each of which should not be viewed in isolation. 166 In arbitral practice, a wide range of activities has been subsumed under the term "investment". 167

that Contracting Party; or (ii) in relation to which persons of that Contracting Party have the power to name the majority of their directors or otherwise legally direct their actions.").

160 Switzerland DOO Skopje v. Macedonia, Award dated 6 July 2012, ICSID Case No. ARB/09/16, para. 132.

161 See Art. 1(1)(b) of the Switzerland-Kazakhstan BIT, (b) legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organized under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that Contracting Party; (c) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities, in the territory of that Contracting Party": see also Art. 1(1)(b) of the Switzerland-Slovakia BIT and Art. 1(1)(b) of the Switzerland-Argentina BIT.


165 Tokios Tokeles v. Ukraine, Decision on Jurisdiction dated 29 January 2004, ICSID Case No. ARB/02/18, para. 37.

166 See Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, Decision on Jurisdiction dated 29 December 2004, ICSID Case No. ARB/97/4, para. 72; Erron Corporation and Ponderosa Assets L.P. v. the Argentine Republic, Award dated 22 May 2007, ICSID Case No. ARB/01/3, para. 70.

Rationale Materiae: The Subject-Matter of Investments

a

ICSID Cases

49 Article 25 of the ICSID Convention sets out mandatory jurisdictional requirements in order for an investment dispute to be eligible for ICSID arbitration. These include the requirement that the dispute must arise directly out of an investment, but the ICSID Convention does not provide a definition of the term “investment”. Thus, Art. 25 provides for a broad framework for the definition of investment.

50 In practice, ICSID tribunals have concluded there was an investment where the project or transaction at hand had a significant duration, provided a measurable return to the investor; involved an element of risk on both sides; involved a substantial commitment on the part of the investor; and was significant to the State’s development. This latter criterion is certainly the most controversial.


Art. 25(1) of the Washington Convention reads: “(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

It has been said, however, that the threshold should not be “excessively rigorous” and that a period of two years should be sufficient (see Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, Decision on Jurisdiction dated 16 June 2006, ICSID Case No. ARB/04/13, paras. 93–95; and LESE, S.p.A. and Asialdi, S.p.A. v. People’s Democratic Republic of Algeria, Award, ICSID Case No. ARB/05/3, para. 52).


Any significant financial resource or transfer of knowhow, equipment and personnel will count as a “contribution” by the investor. Bayindir İnşaat Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, Decision on Jurisdiction dated 14 November 2005, ICSID Case No. ARB/03/29, para. 131; Satiper S.p.A. v. The People’s Republic of Bangladesh, Decision on Jurisdiction and Recommendation on Provisional Measures dated 21 March 2007, ICSID Case No. ARB/05/7, para. 100. However, an investment does not include any pre-investment expenses: Mihaly International Corporation v. Sri Lanka, Award dated 15 March 2002, ICSID Case No. ARB/00/2, para. 61.

See Philip Morris Brands S.A., Philip Morris Products S.A. and Abal Hermans S.A. v. Oriental Republic of Uruguay, Decision on Jurisdiction dated 2 July 2013, ICSID Case No. ARB/10/7, paras. 206–207, where the tribunal refers to this criterion as “controversial” and concludes that determination of whether an investment did contribute to the economic development of the host state or not, would require a “second-guessing” of a tribunal, i.e. “post hoc evaluation of the business, economic, financial and/or policy assessments that prompted the claimant’s activities” in İkdale İnşaat Limited Şirketi v. Turkmenistan, Award dated 8 March 2016, ICSID Case No. ARB/10/24, para. 291; the tribunal considered that “[w]hile the Preamble of the ICSID Convention does mention “the need for international cooperation for economic development, and the role of private international investment therein” as one of the aims of the Convention, it cannot be inferred from this general aim that each and every private foreign investment must,
While some tribunals refuse to apply this criterion too strictly, the ICSID ad hoc Committee in Mitchell v. Congo went as far as annulling an award on the ground that the activities of a US law firm in the Congo did not contribute to the country’s development and hence did not constitute an investment. Some tribunals have ruled that the contract itself must contribute to the development of the host State.

In any event, these conditions operate as general benchmarks rather than as strict jurisdictional requirements. While these criteria are generally recognized as constituting the definition of an investment, it remains open whether and to what extent each requirement has to be met in each case. Tribunals have demonstrated a certain degree of flexibility in their approach. It has been said that the factors must be reviewed as a whole and assessed in light of the circumstances of each case. The arbitral tribunal in Saba Fakes v. Turkey determined the existence of the investment on the basis of only three cumulative criteria: that the claimant could demonstrate a contribution, a certain lasting duration and involving an element of risk.

The Phoenix Action v. Czech Republic decision expanded the criteria for an investment to six: a contribution in money or other assets, a certain duration of the investment, an element of risk, an investment made in order to develop an economic activity in the host State, assets invested in accordance with the laws of the host State and assets invested bona fide. However, the tribunal explained that an extensive scrutiny of all the requirements was not always necessary.

on its own, make a significant or even measurable contribution to the economic development of the economy of the host State. Such contribution—which should not be confused with the contribution of capital to a business venture, which is part and indeed forms the core of the definition of “investment”—is rather the role of foreign private investment as a whole, or in aggregate, which is indeed what the Preamble provides, when read with care (“the role of private international investment therein,” i.e., in the economic development of the host State). The Preamble does not refer to any particular individual investment; it refers to the activity of private international investment as a whole.”

173 Consorzio Imprese LEST-UNIPENDA v. Algeria, Award dated 12 July 2006, ICSID Case No. ARB/03/08, para. 73.

174 Patrick Mitchell v. Democratic Republic of the Congo, Decision on the Application for the Annulment of the Award dated 1 November 2006, ICSID Case No. ARB/99/7, paras. 27–41; see also Malaysian Historical Salvors, SDN, BHD v. Malaysia, Decision on Jurisdiction dated 17 May 2007, ICSID Case No. ARB/05/10, paras. 113–146.


176 These conditions are commonly referred to as the Saltini test and after the ICSID case Saltini Construttori S.P.A. and Italisind S.P.A. v. Morocco, where those criteria were listed: Award on Jurisdiction dated 23 July 2001, ICSID Case No. ARB/00/3, paras. 52–57.

177 Schreuer, para. 153 at Art. 25. See also, Ambiente Ufficio S.P.A. and others v. Argentine Republic, Decision on Jurisdiction and Admissibility dated 8 February 2013, ICSID Case No. ARB/08/9, para. 479; Hassan Audi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania, Award dated 2 March 2015, ICSID Case No. ARB/10/13, para. 197.


179 Saba Fakes v. Republic of Turkey, Award dated 14 July 2010, ICSID Case No. ARB/07/20, para. 110.

In subsequent awards, ICSID tribunals have taken a less rigid interpretation of Art. 25 ICSID Convention when determining if the Claimant has made an investment. In the Alpha Projektholding Gmbh v. Ukraine case, the tribunal considered that the approach taken by previous ICSID tribunals assumed that there is one universal definition of investment although this was not the intention of the drafters of the ICSID Convention.\textsuperscript{181} This approach has also been taken by a number of other tribunals, such as the tribunal in the Biwater Gauff v. Tanzania\textsuperscript{182} case as well as by the ad hoc Committee in the Malaysian Salvers v. Malaysia case.\textsuperscript{183}

\textit{b} Cases under Swiss BITs

Many Swiss BITs include a non-exhaustive list of what is to be considered as an investment which includes: movable and immovable property; any kind of participations in companies; industrial property rights or claims to money or performance having an economic value.\textsuperscript{184} The Swiss non-official model BIT provides a definition of "investment" that seeks to incorporate various economic, financial and business accounting concepts of investment.\textsuperscript{185}

With regard to the definition of investment provided in the Swiss BITs entered into with Pakistan, the Philippines and Paraguay, the SGS cases have explicitly expanded the notion of investment to include services. The extension of the notion of investment to services is an illustration of the broad notion of the concept of investment.\textsuperscript{186}

The tribunal in SGS v. Pakistan\textsuperscript{187} had to determine whether the services provided by SGS could be considered as an investment made in the territory of Pakistan pursuant to Art. 1(2) of the Switzerland-Pakistan BIT.\textsuperscript{188} In concluding that they did, the

\begin{itemize}
  \item \textsuperscript{181} Alpha Projektholding Gmbh v. Ukraine, Award dated 8 November 2010, ICSID Case No. ARB/07/16, para. 312.
  \item \textsuperscript{182} Biwater Gauff Ltd. v. Tanzania, Award dated 24 July 2008, ICSID Case No. ARB/05/22, paras. 312-318.
  \item \textsuperscript{183} Malaysian Salvers v. Malaysia, Decision on Annulment dated 16 April 2009, ICSID Case No. ARB/05/10, paras 69, 80.
  \item \textsuperscript{184} There are two different types of clauses that appear in Swiss BITs listing the different assets that may be considered an investment, one which provides for "every kind of asset, and in particular: (a) ..." (see, e.g., Article 1 of the Switzerland-China BIT), and the other which provides for "every kind of asset, in particular, but not exclusively. (a) ... (see, e.g., Article 1 of the Switzerland-Thailand BIT).
  \item \textsuperscript{185} Art. 1(2) of the non-official model BIT provides: "The term ‘investments’ shall include every kind of assets in particular:

  \begin{itemize}
    \item (a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;
    \item (b) shares, parts or any other kinds of participation in companies;
    \item (c) claims to money or to any performance having an economic value;
    \item (d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;
    \item (e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law”.
  \end{itemize}
  \item \textsuperscript{186} Gaillard, Jurisprudence, p. 829.
  \item \textsuperscript{187} SGS Société Générale de Surveillance S.A. v. Pakistan, Decision on Objections to Jurisdiction dated 6 August 2003, ICSID Case No. ARB/01/13.
  \item \textsuperscript{188} This provision is identical to the one set out in the non-official model Swiss BIT: Investments are defined to include movable and immovable property as well as any other rights in rem, such as
A rigid interpretation of Art. 1(2) of the BIT has made an investment. The tribunal considered that the definition of the drafter of the BIT, as defined in a number of other cases, such as the Tanzania case. The tribunal noted that the definition of investment provided in the Switzerland-Pakistan BIT is a particularly broad one.

In SGS v. Philippines, the tribunal also had to determine if the agreement signed between SGS and the Philippines could be considered as an investment within the meaning of the BIT. The tribunal noted that: "a substantial and non-severable aspect of the overall service was provided in the Philippines." In light of this, together with the findings that the operations were organized through a liaison office in Manila and that "it was a cost to SGS to provide the service", the tribunal concluded that SGS had made an investment in the territory of the Philippines.

The award in SGS v. Paraguay is a good example of an ICSID Tribunal's interpretation of a BIT where the contract — subject matter of the dispute — as well as the services performed under it were considered "assets" covered by Art. 1(2) of the Switzerland-Paraguay BIT.

In Von Pezold v. Zimbabwe, the Tribunal also had to decide whether the assets of the controlled companies by the claimants were protected under Art. 1(2) of the Switzerland-Zimbabwe BIT. The Tribunal determined that it "would be artificial and unjust" to limit the claim for indirect expropriation to the shareholding and not also to the underlying assets of the local companies, even to the extent of restitution of those assets.

With regards to another ratione materiae objection, the Respondent raised the question as to whether the (ultimately) local origin of the funds invested was a bar to jurisdiction. The Tribunal concluded that there was no requirement that the funds invested had to be foreign, under either the wording of the Swiss-Zimbabwe BIT or the ICSID Convention.

Servitudes, mortgages, liens and pledges. They equally cover shares, parts or any other kind of participation in companies, claims to money or to any performance having an economic value. The definition makes express reference to copyrights as well as industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how, and goodwill. Lastly, it mentions specifically concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.

189 SGS Société Générale de Surveillance S.A. v. Pakistan, Decision on Objections to Jurisdiction dated 6 August 2003, ICSID Case No. ARB/01/13, para. 135.
191 Art. II of the Switzerland-Philippines BIT reads: "Investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party, whether prior to or after the entry into force of the Agreement."
195 Bernhard von Pezold and others v. Republic of Zimbabwe, Award dated 28 July 2013, ICSID Case No. ARB/10/15, paras. 325-326.
As to the interpretation of the Salini test under Swiss BITs, the tribunal in Philip Morris v. Uruguay criticized this test by concluding that its criteria are “not a ‘set of mandatory legal requirements’”, even less so the criterion of contribution to economic development of the host State. In a similar fashion, the tribunal in Von Pezold v. Zimbabwe held that “there seems to be a move away from Salini” but then still went on to determine that the conditions of contribution, duration and risk had been satisfied. On the other hand, in Flughafen Zürich v. Venezuela, the tribunal followed the Salini test in asserting its jurisdiction. Contrary to Venezuela’s allegations, the Tribunal confirmed that the investors had made a contribution in industry, in kind and in cash and that the investment entailed an element of risk as the investors did not know ab initio whether their investment would deliver benefits.

In the UNCITRAL case Romak v. Uzbekistan, the arbitral tribunal had to determine whether a supply agreement qualified as an investment under the Switzerland-Uzbekistan BIT. The provision in the BIT defining the term “investment” is identical to the one contained in the non-official model BIT and the Switzerland-Pakistan BIT. The arbitral tribunal interpreted the ordinary meaning of the terms of the BIT in their context and in light of their object and purpose, as provided by Art. 31 of the Vienna Convention on the Law of Treaties. Because the BIT allowed the parties to resort to either ICSID or UNCITRAL arbitration, the arbitral tribunal rejected the argument that the term “investment” should have a wider definition under the UNCITRAL Rules than under ICSID and defined the term “investment” as having “an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitration) entailing a contribution that extends over a certain period of time and that involves some risk”.

In the UNCITRAL case Alps Finance v. Slovakia, the tribunal adopted a similar test. Taking into account that the investment in the case at issue was not of a certain duration but rather a one-off transaction and that the investment did not contribute to the growth of Slovak economic prosperity, the tribunal rejected the notion that an assignment contract for the acquisition of receivables constituted a qualifying investment under the Switzerland-Slovakia BIT.

Another issue that has been categorized, according to some arbitral tribunals, as pertaining to the ratione materiae scope of an investment is whether the investment is in conformity with the laws and regulations of the State where the investment is

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201 Art. 1(2) of the Switzerland-Uzbekistan BIT.
204 Romak S.A. v. Uzbekistan, Award dated 26 November 2009, PCA Case Not. AA280, para. 207.
made. A number of Swiss BITs include a provision that investments must be made in a Contracting State “in accordance with its laws and regulations.”²⁰⁷ In Flughafen Zürich v. Venezuela it was alleged that the investment was made on the basis of corrupt acts and in violation of local laws and that therefore the tribunal lacked jurisdiction ratione materiae.²⁰⁸ The tribunal dismissed the corruption allegations due to lack of relevant evidence,²⁰⁹ and reached the conclusion that the investment had been made in accordance with the local laws.²¹⁰ In Swisstoplo v. Macedonia, the tribunal considered that allegations that investments were made illegally or in bad faith were not “a priori established” and therefore they had to be analyzed only at the merits phase.²¹¹ The illegality objection was also submitted in Von Pezold v. Zimbabwe, and in this case the Tribunal held that the allegedly violated rules did not exist when the investment was made and thus no breach was possible.²¹²

2 Ratione Temporis: The Timing of Investments

There are four issues relating to timing that may arise: first, whether the investment was made before or after the conclusion of the treaty; second, whether the claim arose before or after the conclusion of the treaty; third, whether the breach occurred before the BIT came into force; and fourth whether an investment has ceased to exist.

As to the first issue, certain BITs explicitly apply only to investments made after the conclusion of the BIT.²¹³ However, most Swiss BITs are broad in scope in terms of timing of the investment.²¹⁴ As to the timing of the claim, a few BITs provide that they protect investments made before the BIT was entered into but after a specific

²⁰⁷ A number of Swiss BITs, particularly with African countries (e.g. Switzerland-Burkina Faso BIT, Switzerland-Togo BIT, Switzerland-Cameroon BIT) do not include this language, however. There is a debate as to whether, if there is no express legality provision in the BIT, the legality requirement should be assumed nonetheless. And, conversely, if there is such a provision, whether it constitutes an essential “legality requirement” such that “illegal” investments are then excluded from coverage by the treaty’s substantive protections (see, Kafkis/Baldan/Silberman, pp. 132–133).
²⁰⁸ Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Venezuela, Award dated 18 November 2014, ICSID Case No. ARB/10/19, para. 112.
²¹² Bernhard von Pezold and others v. Republic of Zimbabwe, Award dated 28 July 2015, ICSID Case No. ARB/10/15, paras. 420–422. For a further analysis on the notion of investment and the Salini test discussed by the tribunal in Romak S.A. v. Uzbekistan see Halonen, Bridging the Gap in the Notion of Investment between ICSID and UNCITRAL Arbitrations: Note on an Award Rendered under the Bilateral Investment Treaty between Switzerland and Uzbekistan (Romak SA v. Uzbekistan), ASA Bull. 2011, pp. 312–320.
²¹³ See Reed/Paulsson/Blackaby, p. 66. Some German BITs, for instance the Germany-Democratic Republic of Congo BIT, found a middle course by providing that the BIT would extend to existing investments only if the capital-exporting country made a special request and it was approved by the host government.
²¹⁴ See, e.g., Art. 3(1) of the Switzerland-Iran BIT stating that “The present Agreement shall apply to investments [...] whether prior to or after the entry into force of the Agreement.” See also Art. 6 of the Switzerland-Uruguay BIT, Art. 2 of the Switzerland-Libya BIT, Art. 6 of the Switzerland-Zambia BIT, Art. 6 of the Switzerland-Uzbekistan BIT, Art. 2 of the Switzerland-Costa Rica BIT.
date.

Such a provision was considered in *Maffeizini v. Spain*. In that case, the tribunal upheld jurisdiction to hear a claim based on acts that took place up to three years before the entry into force of the BIT. The tribunal ruled that the critical date was the date on which the "conflict of legal views and interests came to be clearly established." Conversely, in *Luchetti v. Peru*, the tribunal applied a similar provision to decline its jurisdiction on the basis that the dispute had "crystallized" before the BIT came into force, as the investor had commenced administrative proceedings in local courts before the entry into force of the BIT.

In principle, the State's acts which occur before the BIT comes into force cannot constitute a breach. Nonetheless, as stated by the tribunal in the *Mondev v. United States* case, "events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation" if the events subsist after the date of the entry into force of the BIT. Which acts are considered to be continuing acts (as opposed to a series of composite acts) is a controversial question and the extent to which "earlier actions or omissions" can be taken into account is not clear-cut.

Where an investment has ceased to exist, it has been held that such an investment will not cease to be covered under a treaty as a result. In *Jan de Nul v. Egypt*, it was argued by the respondent that the BIT and ICSID Convention did not apply because at the time of the dispute the investment no longer existed. The tribunal rejected

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215 See, e.g., Switzerland-Bulgaria BIT, Switzerland-Indonesia BIT, Switzerland-Czech Republic and Slovak Republic BIT, Switzerland-Russia BIT, Switzerland-Pakistan BIT, Switzerland-Hungary BIT and Switzerland-Poland BIT.
216 See, e.g., Art. 2 of the Switzerland-Saudi Arabia BIT; Art. 2 of the Switzerland-Syrian Republic BIT.
217 *Emilio Agustin Maffeizini v. Kingdom of Spain*, Decision on Jurisdiction dated 25 January 2000, ICSID Case No ARB/97/7 concerning the application of the Argentine-Spain BIT.
220 *Luchetti v. Republic of Peru*, Award dated 7 February 2005, ICSID Case No. ARB/03/4, paras. 585–587 concerning the application of the Chile-Peru BIT.
222 *Mondev International Ltd v. United States*, Award dated 11 October 2002, ICSID Case No. ARB(AF)/99/2, paras. 58, 70. A similar approach was taken by the tribunal in *Victor Pey Casado and the President Allende Foundation v. Chile*, Award dated 8 May 2008, ICSID Case No. ARB/98/2.
223 See *Técnicas Medioambientales, Tecnosed S.A. v. Mexico*, Award dated 29 May 2009, ICSID Case No. ARB(AF)/00/2; *Victor Pey Casado and the President Allende Foundation v. Chile*, Award dated 8 May 2008, ICSID Case No. ARB/98/2, para. 610; *McI Power Group LC and New Turbine Inc v. Ecuador*, Award dated 31 July 2007, ICSID Case No. ARB/03/6. All these cases examined a series of composite acts that commenced prior to the entry into force of the relevant BIT and continued thereafter.
this argument, recognizing that accepting it would defeat the logic of investment protection treaties. 225

The issue of the relationship between the timing of a dispute and the existence of the investment arose under a Swiss BIT in the case Cervin Investissements v. Costa Rica, where it was alleged that the ICSID tribunal lacked jurisdiction because the dispute arose from a litigious context that existed prior to the realization of the investment. The arbitral tribunal concluded that claimants had sufficiently identified acts that constituted the basis of the dispute and the alleged responsibility of the State after the investment had been made. Thus, the fact that there was already a litigious environment before carrying out the investment was not a bar for the tribunal to assert its jurisdiction with regards to the facts that occurred after the investment was made. 226

3 Ratione Voluntatis: Restructuring Investments

It is customary for businesses and individuals to plan and structure their investments in accordance with the availability of international instruments (e.g. BIT, FTA) that offer procedural and substantive protections to such investments. 227 Sometimes investors, for instance because of certain political risks, also seek to improve the degree of protection and ability to bring a claim before the host State by restructuring their corporate holdings. 228 While restructuring as such is allowed in principle, there are limits as to the permissible timing and rationale. In Cervin Investissements v. Costa Rica, the arbitral tribunal found that the claimant’s corporate restructuring had not been done mala fide and with the sole purpose of obtaining the protections under the Switzerland-Costa Rica BIT, and was thus permissible. 229

E Applicable Law

The question of the law applicable to the dispute is crucial in investment treaty arbitration, as both the host State and the investor have a significant interest in ensuring that the applicable law favors them. While the host state will try to ensure that its national sovereignty is protected, the investor’s main concern is to preserve a legal order that provides a stable and predictable legal environment for its investment.

1 Law Applicable as a Result of the Agreement of the Parties

Applying the principle of party autonomy, the parties are free to choose the law applicable to the merits of their dispute. 230 In the investment arbitration context, such a choice can be found in a contract between the investor and the host State,


227 For an in-depth analysis of investment structuring in Switzerland, see Gabriel, pp. 11–26.

228 Jugusch/Sinclair/Wickramasooriya, p. 175.


230 Art. 42(1) of the ICSID Rules provides “[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties” and Art. 33(1) of the UNCITRAL Rules
or in the BIT itself. It is quite common for BITs to contain choice of law provisions although Swiss BITs began to contain applicable law provisions only at the end of the 1990s and early 2000s.\textsuperscript{231} BITs usually provide that the dispute must be decided in accordance with the provisions of the Agreement itself,\textsuperscript{232} and they often add that this must be done in conjunction with principles of international law.\textsuperscript{233} Other BITs also include a reference to the domestic law of the host State,\textsuperscript{234} and to any agreements between the investor and host State specific to the investment which is the subject of the dispute.\textsuperscript{235}

2 Applicable Law in ICSID arbitrations

In the absence of an agreement of the parties, Art. 42(1)\textsuperscript{236} ICSID Convention provides for the application of the host State’s domestic law and of international law. There has been a long-running debate as to the proper relationship between the domestic law of the host State and international law. The predominant view has long been that international law merely has a supplemental and corrective function with respect to the domestic law of the host State.\textsuperscript{237} Opinion, however, later shifted toward putting the domestic law of the host State and international law on an equal footing.\textsuperscript{238}

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\textsuperscript{233} See, e.g., Art. 12(3) of the Switzerland-China BIT.

\textsuperscript{234} Dolzer/Schreuer, p. 190. See, e.g., Art. 9(7) of the Switzerland-Argentina BIT which reads (in free translation from the French original): “(7) The arbitral organization shall make its rulings based on the provisions in this Agreement or any other agreement applicable to the Contracting Parties, the provisions of specific agreements entered into for purposes of the investment, the laws of the Contracting Party to the dispute – including the rules regarding conflicts of laws –, as well as the applicable principles and provisions of international law”; Art. 11(5) of the Switzerland-Cuba BIT.

\textsuperscript{235} See, e.g., Art. 9(7) of the Switzerland-Argentina BIT.

\textsuperscript{236} Art. 42(1) of the ICSID Rules provides: “In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”

\textsuperscript{237} See, e.g., Klockner Industrie-Anlagen Gmbh and others v. United Republic of Cameroon and Société Camerounaise des Engrais, Annulment Decision of the ad hoc Committee dated 3 May 1985, ICSID Case No. ARB/81/2, para. 69; Amoco Asia Corporation and others v. Republic of Indonesia, Annulment Decision on Jurisdiction dated 10 May 1988, ICSID Case No. ARB/81/1, para. 20; Liberian Eastern Timber Corporation v. Republic of Liberia, Award dated 31 March 1986, ICSID Case No. ARB/83/2; and Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, Award dated 17 February 2000, ICSID Case No. ARB/96/1, para. 64.

3 Applicable Law in UNCITRAL Arbitrations

In the absence of an agreement between the parties, the UNCITRAL Rules leave a great deal of discretion to the tribunal to determine the applicable law. This is due to the fact that the UNCITRAL Rules were designed not only to govern investor-State disputes, but also international commercial disputes. Like ICSID tribunals, UNCITRAL investment treaty tribunals will usually apply a combination of international law and host state law.

F Standards of Protection

The standards of protection found in Swiss BITs are typical of "European-style" BITs and include provisions on: direct and indirect expropriation, fair and equitable treatment, arbitrary, unreasonable or discriminatory measures, full protection and security, free transfer of funds, national treatment and most-favored-nation treatment. Many Swiss BITs contain a so-called umbrella clause.

1 Expropriation

The Swiss BITs typically include provisions prohibiting the illegal taking or expropriation of foreign investments. Under customary international law, four requirements must cumulatively be fulfilled in order for a State to establish the legality of an expropriation: (i) the measure must serve a public purpose; (ii) it must not be arbitrary and discriminatory within the generally accepted meaning of the terms; (iii) the expropriatory measure must follow the principles of due process; and (iv) the expropriatory measure must be accompanied by prompt, adequate and effective compensation.

239 Art. 33 of the UNCITRAL Rules provides: "The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

240 Dolzer/Schreuer, p. 209; Heiskanen, Saffold Transnational Law Review 2009, pp. 367-408; Occidental Exploration and Production Company v. The Republic of Ecuador, Award dated 1 July 2004, LCIA Case No. UN3467, para. 93; Crompton (Chemnitz) Corp. v. Government of Canada, Award dated 2 August 2010, para. 107; William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bicol Delaware Inc. v. Government of Canada, Procedural Order No. 13 dated 11 July 2011, PCA Case No. 2009-04, para. 21. See also, Eastern Sugar B.V. v. Czech Republic, Partial Award of 27 March 2007, SCC Case No. 088/2004, para. 196, where the tribunal noted with reference to a provision of a BIT which included, inter alia, international law as law to be taken into account by the tribunal, that "international law generally applies. It is not just a gap-filling law. It is only where international law is silent that the Arbitral Tribunal should consider before reaching any decision how non conflicting provisions of Czech law might be relevant, and if so, could be taken into account."

241 Schmid, ASA Special Series no. 34, p. 8.

242 This condition figures prominently in the Iran-US Claims Tribunal decisions (see, e.g., American International Group Inc. v. Iran, 4 Iran-United States CTR 96) and ICSID decisions (see, e.g., ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, Award dated 2 October 2006, ICSID Case No. ARB/03/16).


244 See, e.g., AIG Capital Partners, Inc. and CSC Tera Real Estate Company v. Republic of Kazakhstan, Award dated 7 October 2003, ICSID Case No. ARB/01/6, para. 10.5.1; ADC & ADMC Management Limited v. Republic of Hungary, Award dated 2 October 2006, ICSID Case No.
adequate and effective compensation. These requirements are also often set out in the BIT itself. Only three Swiss BITs contain exceptions or carve-outs to these rules relating to expropriation.

77 According to a recent trend among treaty-based cases, emphasized and adopted by the arbitral tribunal in the Philip Morris v. Uruguay case, the States' exercise of police powers in matters of public health order or morality, should not be considered as amounting to indirect expropriation if it was carried out bona fide and was not-discriminatory and proportionate and thus does not entitle a claimant to compensation.

a  Direct Expropriation

78 Direct expropriation is when a State takes the step of openly taking a foreign investment property by assuming title over the property (for example, through nationalization). The test to differentiate direct from indirect expropriation is "whether the legal title of the owner is affected by the measure in question." Cases of direct expropriations are rare as, over the last few decades, States have become wary of jeopardizing their reputation as a favorable investment venue. Nevertheless, in the recent Swiss BIT case Flughafen Zürich v. Venezuela, Venezuela was found

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244 See, e.g., Art. 4(1) of the Switzerland-Lebanon BIT; Art. 6 of the Switzerland-Hungary BIT; Art. 5 of the Switzerland-Bolivia BIT; Art. 5 of the Switzerland-Argentina BIT or Art. 6 of the Switzerland-Czech Republic BIT.

245 The Switzerland-Costa Rica BIT provides that contracting parties will not be liable for expropriation resulting from measures adopted to implement obligations of international treaties to which both contracting parties are party; the Switzerland-Poland BIT provides that companies incorporated in third states controlled by investors may not claim compensation if they have already received compensation under a similar provision or treaty; and the Switzerland-Jamaica BIT provides that the contracting parties may limit the transfer of the amount of compensation to a minimum of 33.3 per cent per year when the amount is high and they encounter exceptional balance of payment difficulties.


247 Dolzer/Schreuer, p. 101. See also Salacuse, 2015, p. 322; Sempra Energy International v. Argentine Republic, Award dated 28 September 2007, ICSID Case No. ARB/02/16, para. 280: "The Tribunal does not in fact believe that there can be a direct form of expropriation if at least some essential component of the property right has not been transferred to a different beneficiary, in particular the State."
liable of engaging in direct expropriation measures.\textsuperscript{250} There is, furthermore, an older body of decisions on direct expropriation by the Iran–US Claims Tribunal and other ad hoc tribunals resulting from the nationalization of the oil industry in Iran, Libya and Kuwait.\textsuperscript{251}

b Indirect Expropriation

The typical form in which expropriations now take place is through indirect expropriations or measures having equivalent effect. Such measures generally leave the investor’s title to property untouched, but deprive the investor of the possibility to utilize the investment in a meaningful way. A wide variety of steps affecting or destroying the investment’s commercial value, taken by the host States’ authorities, have been held to constitute indirect expropriation or equivalent measures.\textsuperscript{252}

The decisive standard to determine the existence of an indirect expropriation is the effect of the measures on the investor’s property. An expropriation occurs if the

\textsuperscript{250} Flagghafer Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Venezuela, Award dated 18 November 2014, ICSID Case No. ARB/10/19, paras. 494–509.

\textsuperscript{251} See, e.g., AMOCO International Finance Corporation v. Iran, 15 IRAN–U.S. CTR; Philips Petroleum Co. v. Iran, 15 Iran-U.S. CTR; Mobil Oil Iran v. Iran, 16 Iran CTR; Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran, 9 IRAN-U.S. CTR 265; The Government of the State of Kuwait v. the American Independent Oil Company (AMINOIL), Award dated 24 March 1982, ad hoc arbitration; Libyan American Oil Company (LIAMCO) v. The Libyan Arab Republic, Award dated 12 April 1977; TeKaco Overseas Petroleum Co./California Atlantic Oil Co. v. The Government of the Libyan Arab Republic (TeKaco v. Libya), Award dated 19 January 1977, ad hoc arbitration.

\textsuperscript{252} Examples include the substantial deprivation of the commercial value of the investment (CME Czech Republic B.V. v. Czech Republic, Award dated 13 September 2001, UNCTAR Arbitration); an increase in taxes to an extent that the investment becomes economically unsustainable (Revere Copper and Brass Inc. v. Overseas Private Investment Corporation, Award dated 24 August 1978, 56 I.L.R. 257, AAA Arbitration; EnCana Corporation v. Republic of Ecuador, Award dated 3 February 2006, LCIA Case No. UN3481, UNCTAR Arbitration Rules; Occidental Exploration and Production Company v. The Republic of Ecuador, Judgment of the Court of Appeal Regarding Non-justiciability of Challenge to Arbitral Award dated 9 September 2005, LCIA Case No. UN3467); the replacement of the owner’s management by government imposed managers (Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc. v. the Government of the Islamic Republic of Iran, Bank Mihan, Bank Mihan, 4 Iran-United States CTR 122; Tippens, Alibett, McCarthy, Straton v. TAMS-AFA, Consulting Engineers of Iran, 6 Iran-United States CTR 219; Nykon Synergetics Technology Holding AB v. Lithuania, Award dated 16 December 2003, Arbitration Institute of the SCC – Case No. 118/2001, 33; PSEG Global Inc. and Konya Iliy Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey, Award dated 19 January 2007, ICSID Case No. ARB/02/5, para. 278); the revocation of a free zone permit (Antoine Goetz and others v. Republic of Burundi, Award dated 10 February 1999, ICSID Case No. ARB/95/3; Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt, Award dated 12 April 2002, ICSID Case No. ARB/99/6); interference with contract rights leading to a breach or termination of the contract by the investor’s business partner (CME Czech Republic B.V. v. Czech Republic, Partial award dated 13 September 2001, UNCTAR Arbitration Rules); the revocation of an operating license (Tecnics Medioambientales Tecnol S.A. v. The United Mexican States, Award dated 29 May 2003, ICSID Case No. ARB(AF)/00/2, NAFTA Arbitration), the revocation of concessions (Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia, Award dated 16 September 2015, ICSID Case No. ARB(06)/2), or rendering land estates worthless by directly expropriating other properties, which altogether created a larger venture (Bernhard von Pezold and others v. Republic of Zimbabwe, Award dated 28 July 2015, ICSID Case No. ARB/10/15). On indirect expropriation, see also, Heiskanen, JWT no. 2/2007, pp. 215–231.
interference is substantial and deprives the investor of all or most of the benefits of the investment\textsuperscript{255} and when the deprivation is permanent or at least lasted a substantial period of time.\textsuperscript{254}

81 Provisions on indirect expropriation are a standard feature of contemporary treaties dealing with the protection of investments and as such are included in the non-official Swiss model BIT and most Swiss BITs.\textsuperscript{256} Such provisions generally make references to “indirect expropriation”\textsuperscript{257} as well as measures “equivalent to”\textsuperscript{258} or “having the same nature or the same effect”\textsuperscript{259} as expropriation in order to cover a wide range of situations.

82 The threshold for providing an indirect expropriation is high. In the recent Philip Morris v. Uruguay award, for example, the arbitral tribunal emphasized that the test for indirect expropriation required “a major adverse impact” and “substantial deprivation” of the claimants’ investments.\textsuperscript{260} In many cases, tribunals have rejected investors’ claims that a measure amounts to an indirect expropriation, finding instead that it breaches other less stringent standards of protection, notably the standard of fair and equitable treatment.\textsuperscript{260}

2 \textbf{Fair and Equitable Treatment (FET)}

83 The requirement of fair and equitable treatment appears in most BITs and is the most frequently invoked standard in investment disputes. It is also the standard with the highest practical relevance in investment treaty arbitration, as a majority of successful claims are based on a violation of the FET standard. Broadly defined, the FET standard requires States to maintain a stable and predictable investment environment consistent with reasonable investor expectations. However, it is a highly flexible standard, and its application by tribunals is not uniform.\textsuperscript{260}

\textsuperscript{257} Art. 6(1) of the non-official Swiss model BIT reads: “Neither of the contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest (…).” See also Art. 6(1) of the Switzerland-Bangladesh BIT; Art. 5(1) of the Switzerland-Estonia BIT; Art. 7 of the Switzerland-Senegal BIT; Art. 5(1) of the Switzerland-South Africa BIT; Art. 5(1) of the Switzerland-Saudi Arabia BIT; Art. 6 of the Switzerland-Liberia BIT; Art. 6 of the Switzerland-Venezuela BIT. Only the BITs with Bulgaria and Zaire do not expressly mention indirect expropriation.
\textsuperscript{258} See, e.g., Art. 6(1) of the Switzerland-Armenia BIT; Art. 6(1) of the Switzerland-Bangladesh BIT; Art. 5(1) of the Switzerland-Estonia BIT.
\textsuperscript{259} See, e.g., Art. 5(1) of the Switzerland-South Africa BIT; Art. 5(1) of the Switzerland-Thailand BIT.
\textsuperscript{260} See, e.g., Art. 6(1) of the Switzerland-Libya BIT; Art. 5(1) of the Switzerland-Jamaica BIT; Art. 7(1) of the Switzerland-Syrian Arab Republic BIT; Art. 5(1) of the Switzerland-Uruguay BIT.
\textsuperscript{261} Philip Morris Brands Sàrl, Philip Morris Products S.A. and Alba Hermanos S.A. v. Oriental Republic of Uruguay, Award dated 8 July 2016, ICSID Case No. ARB/10/7, para. 192 (citing the Telenor v. Hungary, Metalclad, CME and Pope & Talbot cases).
\textsuperscript{262} See, e.g., Sempra Energia International v. The Argentine Republic, Award dated 28 September 2007, ICSID Case No. ARB/02/16, paras. 300–301.
\textsuperscript{263} See, e.g., Merrill and Ring Forestry LP v. Canada, Award dated 31 March 2010, ad hoc UNCITRAL Arbitration Rules, para. 213: The tribunal extensively discussed the FET standard and stated
Certain key aspects of the FET standard have however been identified in arbitral jurisprudence. The first is the protection of the legitimate expectations of investors: a reversal of assurances by the host State that have led to legitimate expectations will violate the FET standard. The investor’s legitimate expectations may be based on any undertaking and representations made explicitly or implicitly to the investor by the host State at the time the investment was made or in certain circumstances, on specific legislation enacted and treaties concluded by the host State that did not apply to the public in general but only or primarily to the investor. The second aspect is the requirement of transparency and stability: the legal framework for the investor’s operations must be readily apparent and any decisions affecting the investor must be traced to that legal framework. The first two aspects of the standard must however be balanced with the right of the host State to regulate economic sectors. A third aspect of the FET standard is the obligation of host States not to deny justice: a host State is under the obligation to establish a judicial system that

that “the applicable minimum standard of treatment of investors is found in customary international law and that, except for cases of safety and due process, today’s minimum standard is broader than that defined in the Neer case and its progeny. Specifically this standard provides for the fair and equitable treatment of alien investors within the confines of reasonableness.”

The tribunal in Swisstel v. Macedonia, for example, adopted a broad standard by subscribing to the view that the FET protection “basically ensures that the foreign investor is not unjustly treated […] and that it is a means to guarantee justice to foreign investors”, Swisstel DOO Skopje v. Macedonia, Award dated 6 July 2012, ICSID Case No. ARB/09/16, para. 273.

262 See, e.g., Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. the Argentine Republic, Decision on Liability dated 30 July 2010, ICSID Case No. ARB/03/17, para. 203; Bernard von Pezold and others v. Republic of Zimbabwe, Award dated 28 July 2015, ICSID Case No. ARB/10/15, paras. 547–551. In Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (Award and Dissenting Opinion dated 20 May 1992, ICSID Case No. ARB/84/3), the tribunal ruled that legitimate expectations are protected even without a treaty guarantee of FET. The arbitral tribunal in Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abdi Hermanos S.A. v. Oriental Republic of Uruguay, Award dated 8 July 2016, ICSID Case No. ARB/10/7, para. 426, emphasized that “legitimate expectations depend on specific undertakings and representations made by the host State to induce investors to make an investment. Provisions of general legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law.”

263 It was in Metalclad Corporation v. United Mexican States, Award dated 30 August 2000, ICSID Case No. ARB(AF)/97/1, that the tribunal made the first reference to the principle of transparency as an element of the FET standard. The tribunal in Canfor Corporation v. US; Tembec et al. v. US and Terminal Forest Products Ltd. v. US, UNCITRAL (NAFTA) sustained this interpretation in the context of more concrete procedural principles and expanded the standard to include the element of the investor’s legitimate expectations. Subsequent tribunals followed suit. Examples include Occidental Exploration and Production Company v. The Republic of Ecuador, Award dated 1 July 2004, LCIA Case No. UN-M67; CMS Gas Transmission Company v. the Argentine Republic, Award dated 12 May 2005, ICSID Case No. ARB/01/8; LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, Decision on Liability dated 3 October 2005, ICSID Case No. ARB/02/1, paras. 82–99; Enron Corporation and Ponderosa Assets L.P. v. the Argentine Republic, Award dated 22 May 2007, ICSID Case No. ARB/01/3.

264 Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic, Award, ICSID Case No. ARB/03/17, para. 236; Electraef S.A. v. Republic of Hungary, Decision on Jurisdiction, Applicable Law and Liability dated 30 November 2012, ICSID Case No. ARB/07/19, para. 7.7: “While the investor is promised protection against unfair changes, it is well established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably, taking into account the circumstances of the investment.”
allows the effective exercise of the substantive and procedural rights granted to the foreign investors in criminal, civil or administrative adjudicatory proceedings.\textsuperscript{265} Some arbitral tribunals have held a high threshold for establishing a denial of justice claim: when the judicial system “breached the standard by fundamentally unfair proceedings and outrageously wrong, final and binding decisions”\textsuperscript{266} or a situation where the national system failed “as a whole to satisfy minimum standards”\textsuperscript{267} or when “the impugned decision was clearly improper and discreditable.”\textsuperscript{268} Such a strict standard was for example adopted by the arbitral tribunal in the \textit{Philip Morris v. Uruguay} case.\textsuperscript{269} Almost all Swiss BITs contain the FET standard (the only exception is the Switzerland-Laos BIT). A typical FET clause contained in a Swiss BIT reads as follows:

"Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party."\textsuperscript{270}

\section*{Arbitrary, Unreasonable or Discriminatory Measures}

Although there is authority to suggest that arbitrary action against a foreigner is in violation of international law even without a treaty provision to that effect,\textsuperscript{271} many Swiss BITs explicitly include such a provision. In Swiss BITs the rule against arbitrariness is often combined with the prohibition of discrimination. A typical provision is:

"Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of such investments."\textsuperscript{272}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{265} The ICSID tribunal in the \textit{Flughafen Zürich v. Venezuela} case sided with this interpretation that denial of justice constituted a violation of the FET standard, see, \textit{Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Venezuela}, Award dated 18 November 2014, ICSID Case No. ARB/10/19, para. 630. The tribunal in \textit{Dan Cake (Portugal) S.A. v. Hungary}, Decision on Jurisdiction and Liability dated 24 August 2015, ICSID Case No. ARB/12/9, paras. 145–146, stated that the FET standard was violated by denial of justice, as the state court, even though obliged to convene a hearing refused to do so. For a discussion of the denial of justice concept, see, e.g., \textit{Robert Azizian and others v. United Mexican States}, Award dated 1 November 1999, ICSID Case No. ARB(AF)/97/2, paras. 102–103. See also Paulsson, 2010, and Salacuse, 2015, pp. 264–265.
\item \textsuperscript{266} \textit{Mr. Franck Charles Arif v. Republic of Moldova}, Award dated 8 April 2013, ICSID Case No. ARB/11/23, para. 445.
\item \textsuperscript{267} \textit{Mr. Oostergetel and Mrs. Laurentius v. The Slovak Republic}, Award dated 23 April 2012, UNCITRAL Ad Hoc Arbitration (redacted), para. 273.
\item \textsuperscript{268} \textit{Mondev International Ltd. v. United States of America}, Award dated 11 October 2002, ICSID Case No. ARB(AF)/99/2, para. 127.
\item \textsuperscript{269} \textit{Philip Morris Brands Srl, Philip Morris Products S.A. and Albal Hermanos S.A. v. Oriental Republic of Uruguay}, Award dated 8 July 2016, ICSID Case No. ARB/10/7, para. 500.
\item \textsuperscript{270} See \textit{Art. 4(1) of the non-official Swiss Model BIT; Art. 4 of the Switzerland-Azerbaijan BIT; Art. 4 of the Switzerland-Kenya BIT; Art. 4(1) of the Switzerland-Armenia BIT; Art. 4(1) of the Switzerland-Botswana BIT; Art. 4(1) of the Switzerland-Cambodia BIT; Art. 4(1) of the Switzerland-Guatemala BIT; Art. 4(1) of the Switzerland-Philippines BIT; Art. 4 of the Switzerland-Bosnia and Herzegovina BIT.}
\item \textsuperscript{271} Dolzer/Schreuer, p. 132.
\item \textsuperscript{272} See Art. 4(1) of the non-official Swiss Model BIT.
\end{itemize}
\end{footnotesize}
It is sometimes assumed that the two standards are largely identical and they do indeed overlap in many instances. However, the separate listing of the two standards, typically separated by the word “or”, suggests that each must be accorded its own interpretation and scope.

a) Arbitrary Measures

The terms arbitrary, unreasonable or unjustified are often used interchangeably.²⁷³ The tribunal in Lader considered the meaning of arbitrary to signify a measure that is “founded on prejudice or preference rather than on reason or fact”.²⁷⁴ In the recent Philip Morris award, the arbitral tribunal, stating that it is the standard definition under international law referred to by investment tribunals, took the definition of arbitrariness from the ELGI case before the International Court of Justice: “a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.” Given the nature and breadth of the concept of arbitrariness, arbitral tribunals often find that an arbitrary action will also violate the FET standard.²⁷⁵

b) Discriminatory Measures

In the context of foreign investment, discrimination often occurs on the basis of nationality. In practice, a determination of discrimination raises the question of the basis of comparison for the alleged discrimination²⁷⁶ and the question of whether discriminatory intent is a requirement for a finding of discrimination. With regard to the latter question, tribunals generally favor an objective approach, where the fact of unequal treatment is sufficient and intent to discriminate is secondary.²⁷⁷

²⁷³ However, in Saluka Investments S.V. v. Czech Republic, Partial Award dated 17 March 2006, UNCITRAL, para. 460, the tribunal gave a specific meaning to the “reasonableness” standard, as it stated that “[t]he standard of ‘reasonableness’ [...] requires [...] a showing that the State’s conduct bears a reasonable relationship to some rational policy.”

²⁷⁴ Lader v. Czech Republic, Final Award dated 3 September 2001, UNCITRAL, para. 221.

²⁷⁵ See, e.g., Saluka Investments S.V. v. Czech Republic, Partial Award dated 17 March 2006, UNCITRAL, para. 460, where the tribunal declined to distinguish the two standards. See also, Bernhard von Pezold and others v. Republic of Zimbabwe, Award dated 28 July 2015, ICSID Case No. ARB/10/15, para. 557. In Philip Morris Brands Sàrl, Philip Morris Products S.A. and Axiol Hernandez S.A. v. Oriental Republic of Uruguay, Award dated 8 July 2016, ICSID Case No. ARB/10/7, para. 410, the arbitral tribunal considered claimants’ claims of arbitrariness under the scope of the FET standard.

²⁷⁶ In Occidental Exploration and Production Company v. The Republic of Ecuador, Award dated 1 July 2004, LCIA Case No. UN3467, paras. 167—176, the tribunal rejected a narrow comparison that would have looked only at the same economic sector or activity; in Enron Corporation and Ponderosa Assets L.P. v. the Argentine Republic, Award dated 22 May 2007, ICSID Case No. ARB/01/3, para. 282, the tribunal looked at the question whether there had been “any capricious, irrational or absurd differentiation” in the treatment of different sectors of the economy.

²⁷⁷ See, e.g., Siemens A.G. v. Argentina, Award dated 6 February 2007, ICSID Case No. ARB/02/8, para. 321. In other cases, intent has been considered to be relevant (see, e.g., LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, Decision on Liability dated 3 October 2006, ICSID Case No. ARB/02/1, para. 146).
4  Full Protection and Security

89 Many Swiss BITs provide for the full protection and security standard.\(^{278}\) The concept of full protection and security traditionally requires a host State to take active measures to protect “the physical integrity of an investment against interference by use of force”,\(^{279}\) whether it is attributable to the host State or to private actors.\(^{280}\) Host States do not however have a strict obligation to prevent any and all infringements by private actors of the physical integrity of the investment. Instead, they have an obligation of due diligence or in other words, an obligation to “adopt all reasonable measures to protect assets and property from threats or attacks [...]”.\(^{281}\)

90 The scope of the standard of full protection and security has been expanded by certain tribunals to include protection against infringements of investors’ rights by the operation of laws and regulations of the host State.\(^{282}\) However, this extension of the scope of the full protection and security standard to legal security appears to lead to an overlap with the FET standard.\(^{283}\) Indeed, some tribunals have equated the two standards. However, the jurisprudence on the scope of the standard is not consistent as other tribunals appear to limit the scope of the full protection and security standard to protection against physical violence.\(^{284}\)

\(^{278}\) See, e.g., Art. 4(1) of the Switzerland-Armenia BIT; Art. 4(1) of the Switzerland-Mauritius BIT; Art. 4(1) of the Switzerland-Tanzania BIT; Art. 4(1) of the Switzerland-Zimbabwe BIT. Half of Swiss BITs provide that investments and returns of investments enjoy “full protection and security,” the other half only provides for the “protection” of investments. The Switzerland-Tanzania and Switzerland-Zaire BIT and most Swiss Free Trade Agreements do not contain a protection and security standard. However, an independent obligation may arise from customary international law whereby host States are required to protect investors against illegal interference.

\(^{279}\) Salaka v. Czech Republic, Partial Award dated 17 March 2006, UNCITRAL, para. 484.

\(^{280}\) See, e.g., Wena Hotels Ltd. v. Arab Republic of Egypt, Award dated 8 December 2000, ICSID Case No. ARB/98/4, para. 84; American Manufacturing & Trading Inc. v. Zaire, Award and Separate Opinion dated 11 February 1997, ICSID Case No. ARB/93/1, paras. 6.01–6.18; Tecnitas Medioambientales Termas, S.A. v. The United Mexican States, Award dated 29 May 2003, ICSID Case No. ARB(AF)/00/2, NAFTA Arbitration, paras. 175–177. ARB(AF)/00/2, NAFTA Arbitration, paras. 175–177. See also, Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica, Decision on Jurisdiction dated 15 December 2014, ICSID Case No. ARB/13/2, para. 367, where the tribunal stated that the State had not breached its obligation of full protection and security against actions of private actors, as the claimant had not required the State to prosecute and pursue the private actors.


4 Free Transfer of Funds

Rules on the transfer of funds are found in virtually all BITs. They deal with the investor's right to make transfers and payments. Swiss BITs specifically provide that free transfer of funds related to an investment must be guaranteed and give a non-exhaustive list of the types of funds concerned by this provision.285

A major point of divergence among treaties relates to the question of whether the right to transfer funds concerns only the transfer out of the host country or whether it covers inward transfers as well. Whenever transfers are allowed in general terms, such as in Swiss BITs which state that the provision applies to "amounts relating to these investments", both directions of transfers are generally covered.286 However, tribunals have held that this protection only comes into effect once the investment has been made and does not apply for the purposes of establishing or acquiring the investment.287

6 National Treatment

Under the national treatment standard, the host State must treat foreign investments no less favorably than the investments of its own nationals and companies so that foreign investments enjoy the same competitive opportunities and treatment as national investors. This provision is common in Swiss BITs, many of which contain a combined national treatment/MFN clause.288 Typical wording is set out in Art. 4 of the Switzerland-Kenya BIT:

"(2) Each Contracting Party shall in its territory accord investments or returns of the other Contracting Party treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of any third State, whichever is more favourable to the investor concerned.

(3) Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards the management, use, enjoyment or disposal of their investments, treatment no less favourable than that which
it accords to its own investors or investors of any third State, whichever is more favourable to the investor concerned."

94 While the wording of national treatment clauses varies, their application is relatively homogeneous in practice. The application of the national treatment standard is factspecific, requiring the determination of whether treatment accorded to the foreign investor is at least as favorable as the treatment accorded to domestic investors. In order to determine the existence of a differentiation, investment arbitration tribunals have taken various approaches. For some tribunals, a discriminatory measure is simply one that fails to provide national treatment. However, a purely incidental differentiation resulting from misguided policy decisions does not suffice to show differential treatment. In any case, it is widely accepted that differentiations are justifiable if rational grounds are demonstrated.

7 **Most Favored Nation Treatment (MFN)**

95 MFN status means that the beneficiary State will be granted all competitive advantages that any other nation also receives with respect to matters to which the particular MFN clause applies. In some investment treaties, the scope of application of the MFN clause may extend to the entire content of the treaty. However, in many Swiss BITs the MFN clause is linked to the FET clause, which may be argued to limit the scope of the MFN clause. Other Swiss BITs limit the application of the MFN clause to the investors “as regards the management, maintenance, use, enjoyment or disposal of their investment”. Almost all Swiss BITs expressly provide that the MFN clause does not extend to the benefits of membership to a customs union, monetary union or free trade area, or to taxation agreements and/or taxation legislation.

96 The proper application and interpretation of a particular MFN clause therefore requires careful examination of the text in its context. However, there are arbitral decisions that have addressed the scope of MFN provisions generally. The *Maffeiti*
tribunal found that the MFN clause at issue covered procedural protections relevant to dispute settlement, but that the MFN clause could not be interpreted to apply to terms that the parties understood to be fundamental conditions of their consent to be bound by the BIT. Similarly, the Temed tribunal considered that there are certain matters that, due to their importance, go to the core of issues that must be deemed to have been negotiated specifically and which play a decisive role in the acceptance of the treaty and that as such cannot be modified by the extension of the MFN clause. More recent jurisprudence on the issue demonstrates that tribunals take varying views on the question, depending on the wording of the applicable BITs. In Rosinvest v. Russia, the tribunal ruled that the claimant was entitled to rely on an MFN clause in the UK-Soviet BIT to invoke a more favorable dispute resolution clause in the Denmark-Russia BIT. Conversely, in the Rent a 4 v. Russia case, the tribunal ruled, also based on the wording of the applicable MFN clause, that it could not be used to import dispute settlement provisions from other BITs. In Tza Yap Shum v. Peru the tribunal held that MFN clauses cannot be used to extend the scope of dispute settlement provisions to substantive claims not specifically referenced in those provisions.

In the light of this ICSID jurisprudence, the question arises whether the broad and varied wording of the MFN clauses of some Swiss BITs would allow the application of the *ejusdem generis* principle to limit the scope of implementation of these clauses, for example to the effect that they do not apply to provisions relating to the negotiation process or dispute settlement. One author has proposed that the broad language of the MFN clauses contained in some Swiss BITs cannot be interpreted to exclude the importation of dispute settlement provisions from other BITs and that the lack of consistency in the wording of MFN clauses in Swiss BITs could be interpreted as an absence of public policy and that, as a result, there is no limit to the application of the MFN clause.

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296 Emilio Agustín Maffezini v. Kingdom of Spain, Decision on Jurisdiction dated 25 January 2000, ICSID Case No. ARB/97/7, paras. 56, 64.
298 Técnicas Medioambientales Temed S.A. v. The United Mexican States, Award dated 29 May 2003, ICSID Case No. ARB(AF)/00/2 (NAFTA Arbitration).
299 Técnicas Medioambientales Temed S.A. v. The United Mexican States, Award dated 29 May 2003, ICSID Case No. ARB(AF)/00/2 (NAFTA Arbitration), para. 69.
301 Rent a 4 S. V.S.A et al. v. Russian Federation, SCC No. 24/2007 (Spain/Russia BIT), para. 119.
302 Tza Yap Shum v. Republic of Peru, Decision on Jurisdiction and Competence dated 19 June 2009, ICSID Case No. ARB/07/6, para. 220.
303 The only Swiss BIT excluding the application of the MFN clause for the importation of dispute resolution dispositions is the Switzerland-Colombia BIT.
304 Schmid, Investment Protection, pp. 42-44.
305 Schmid, Investment Protection, pp. 43-47.
8 Umbrella Clause

98 A feature common to BITs is that they do not refer to obligations between private individuals, but rather to obligations undertaken by the State. An "umbrella clause" is a provision that requires the host State to honor all contractual obligations and other undertakings (including unilateral ones) entered into with the foreign investor. The purpose of these clauses is to provide additional protection to investors; umbrella clauses are directed at covering investment agreements that host States frequently conclude with foreign investors. The proper interpretation of the clause depends on the specific wording of the particular treaty, its ordinary meaning, context, the object and purpose of the treaty as well as the negotiating history or other indications of the parties' intent. According to a negotiator of Swiss BITs, the purpose of the umbrella clause "is to provide protection under international law for commitments assumed by the host State which were conducive to the investment and which the investor could rely in good faith".

99 Since the BIT that was concluded with China in 1986, the Swiss treaty practice is to include umbrella clauses in its BITs that contain an investor-state dispute settlement provision. It has been estimated that slightly less than a half of the Swiss BITs include such a clause. Most Swiss BITs have taken as a source of inspiration the umbrella clause contained in the OECD draft convention on the Protection of Foreign Property, although the wording of the umbrella clause varies. However, the most common wording found in the Swiss BITs follows the non-official model BIT clause. The clause is in most cases inserted under the title "other commitments"

307 It is estimated that, of the 2’500 or more BITs currently in existence, approximately forty per cent contain an umbrella clause.
308 For an example of an umbrella clause, see the Switzerland-Pakistan BIT: "Each Contracting party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party." See OECD Working Paper on International Investment No. 3/2006: Interpretation of the Umbrella Clause in Investment Agreements, p. 3 (cf. h t t p: // www.oecd.org/dataoecd/3/20/37579220. pdf ); see also L. Halonen, Containing the scope of the umbrella clause, Investment Treaty Arbitration and International Law, Weiler, ed., J urisNet 2008), pp. 27–38.
311 Schmid, ASA Special Series no. 34, p. 21.
312 Schmid, ASA Special Series no. 34, p. 13.
313 Burger, J.Int.Arb. 2010, p. 490. Even in the absence of an umbrella clause, the FET standard has been interpreted to incorporate the customary international law notion of pacta sunt servanda, and has been interpreted by tribunals to protect the legitimate expectations of the investor. This is considered by some as requiring observation of contracts; see Research Institute of Economy, Trade & Industry (RIETI), Foreign Investment Protection under International Treaties: h t t p: // www.rieti.go.jp/en/events/bbl/06070601. html >.
314 Schmid, ASA Special Series no. 34, p. 12. This draft convention was never adopted. Its umbrella clause reads: "Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party."
315 Schmid, Investment Protection, p. 3.
316 The non-official Swiss model BIT, Art. 10(2) provides: "Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party."
and separated from the substantive provisions of the BIT by two dispute resolution clauses and a subrogation clause.\textsuperscript{317}

The interpretation of umbrella clauses in Swiss BITs has been analyzed by ICSID arbitral tribunals in the SGS v. Pakistan and SGS v. Philippines cases.\textsuperscript{318} In particular, these cases have brought to the forefront the question of whether the umbrella clause applies to obligations arising under otherwise independent investment contracts between the investor and the host State.

In SGS v. Pakistan,\textsuperscript{319} the tribunal made a restrictive interpretation of Art. XI of the BIT\textsuperscript{320} and refused to elevate the contractual breach into a treaty breach\textsuperscript{321} on the basis that this would have far-reaching legal consequences and that the parties had not established that such was the intent of Pakistan and Switzerland at the time of signing the BIT.\textsuperscript{322} This decision was criticized as depriving the umbrella clause of practical meaning and Switzerland protested against this narrow interpretation of the umbrella clause by sending a Note to the ICSID Secretariat.\textsuperscript{323}

Conversely, in SGS v. Philippines, the tribunal found that the umbrella clause contained in Art. X(2) of the BIT\textsuperscript{324} had the effect of elevating contractual obligations

\textsuperscript{317} OECD Working Paper on International Investment No. 3/2006: Interpretation of the Umbrella Clause in Investment Agreements, p. 10 [cf. <http://www.oecd.org/dataoecd/3/20/37579220. pdf >]. Most umbrella clauses in Swiss BITs apply to “any obligation;” however, a few umbrella clauses specify that they apply to particular commitments (Article 12(2) of the Switzerland-Bosnia and Herzegovina BIT specifies that the umbrella clause applies to obligations assumed with respect to a “specific investment”), contractual obligations (see Article 10 of the Switzerland-Qatar BIT), or written commitments (e.g. Article 9(2) of the Switzerland-Colombia BIT).


\textsuperscript{320} Art. 11 of the Switzerland-Pakistan BIT stated: “Either Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to the investments of the other Contracting Party.”

\textsuperscript{321} ICSID Tribunal’s Interpretation of BIT Art. 11. Worries Swiss, Mealey’s I.A.R. 19, no. 2 (2004), p. 3.


\textsuperscript{323} Switzerland provided its interpretation of umbrella clauses stating: “they are intended to cover commitments that a host State has entered into with regard to specific investments of an investor or investment of a specific investor, which played a significant role in the investor’s decision to invest or to substantially change an existing investment, i.e. commitments which were of such a nature that the investor could rely on them. It is furthermore the view of the Swiss authorities that a violation of a commitment of the kind described above should be subject to the dispute settlement procedures of the BIT” (ICSID Tribunal’s Interpretation of BIT Art. 11. Worries Swiss, Mealey’s I.A.R. no. 2/2004, p. 4). The subsequent official statements affirmed that the breaches of umbrella clauses should be subject to the BIT’s dispute settlement provisions (see Schmid, ASA Special Series no. 34, p. 25). In Phillip Morris Brands S.A., Phillip Morris Products S.A. and Abel Hernandez S.A. v. Oriental Republic of Uruguay, Award dated 8 July 2016, ICSID Case No. ARB/10/7, para. 476, the arbitral tribunal considered the interpretative weight that should be given to this Note. It stated that “[i]t would be quite novel and potentially raise due process concerns in investment arbitration cases if a subsequent unilateral statement by one State could be given substantial, let alone decisive, weight.”

\textsuperscript{324} Art. X(2) of the Switzerland-Philippines BIT provides: “Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors
into treaty obligations thus submitting the dispute to the jurisdiction of the ICSID tribunal. The tribunal found that "the object and purpose of the BIT supports an effective interpretation of Art. X(2)" of the BIT, and explained that this provision "does not convert the issue of the extent or content of such obligations into an issue of international law. That issue (...) is still governed by the investment agreement". The SGS v. Paraguay decision supports this interpretation. In the same vein, a tribunal under the Swiss-Libya BIT had previously ruled that the umbrella clause is applicable to both contractual and non-contractual obligations only in the event that the State had assumed such obligations in the exercise of its sovereign authority.

103 It has been noted that since the SGS decisions, the wording of the umbrella clauses contained in Swiss BITs has evolved and that the Swiss authorities are "unequivocal on the fact that the protection by the umbrella clauses focuses on specific commitments rather than on those of a general nature". This was recently confirmed in the Philip Morris v. Uruguay award where the arbitral tribunal stated that the umbrella clause in the Switzerland-Uruguay BIT does "not cover general obligations imposed by the law of the host State."

G Remedies

104 Like other international courts and tribunals, investment arbitration tribunals have a great deal of flexibility with respect to the types of remedies they can order. Under international law, the overarching principle in a tribunal’s determination of remedies is that it must, as far as possible, restore the situation that would have existed had the legal act not been committed.

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331 Schmid, ASA Special Series no. 34, p. 22.


334 See Case concerning the Factory of Chorzów, 1927 P.C.I.J. Series A, no. 9/47: the principle expressed in this case is often used as a starting point by arbitral tribunals in their discussion of repatriations; Art. 31 of the ILC Articles on State Responsibility states: "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."
The International Law Commission (ILC) Articles on State Responsibility set out the three types of reparations or remedies: restitution, compensation and satisfaction. The three forms of reparation may be ordered singly, or in combination with each other. In addition, in the case of an ongoing breach, the fact that a tribunal orders reparations does not relieve a State of its duty to respect the breached obligation and to cease a continuing wrongful act. However, the remedies that are available to a claimant may be limited by the applicable bilateral or multilateral investment treaty.

1 Restitution

Restitution “involves the reestablishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act”. Typically, it will involve the return of confiscated property or of a right which was withdrawn. Although restitution is the primary remedy under the law of State responsibility for an internationally wrongful act committed by a State, it is “frequently unavailable or inadequate (…) despite its primacy as a matter of legal principle”. As such, it is rarely claimed in investment treaty arbitrations. Restitution has nevertheless been ordered. In a recent award based on the Swiss-Zimbabwe BIT dealing with Zimbabwe’s land reform policies and the expropriation of agricultural estates, the arbitral tribunal upheld the right to restitution and concluded that “a compelling case for restitution has been made out, bearing in mind the severity of the breaches of international law which have taken place and the paramount principle of providing full reparation to wipe out all consequences of the Respondent’s unlawful acts.”

336 Art. 35 of the ILC Articles on State Responsibility.
337 Art. 36 of the ILC Articles on State Responsibility.
338 Art. 37 of the ILC Articles on State Responsibility.
339 Art. 34 of the ILC Articles on State Responsibility.
340 Arts. 29–34 of the ILC Articles on State Responsibility.
341 Crawford, p. 216.
342 Art. 36 of the ILC Articles on State Responsibility. A tribunal can order restitution except if the restitution is materially impossible or if the restitution involves a burden out of all proportion to the benefit derived from restitution rather than compensation (Art. 35 of the ILC Articles on State Responsibility). See also Sabahi, p. 61: “Restitution has been recognized as the primary legal remedy in international law”. The principle that restitution is the primary legal remedy for international wrongs can be found in the Factory at Chorzow case: Chorzow Factory, 1928 P.C.I. J. Series A, n°17, p. 47.
343 Crawford, p. 216. See also, Ripinsky/ Williams, p. 57.
344 Delzer/Schrayer, p. 294.
345 See, e.g., Antoine Coetz and others v. Republic of Burundi, Award dated 10 February 1999, ICSID Case No. ARB/95/3, paras. 132–133, where an ICSID tribunal gave the impugned State the choice of either re-establishing the corporate status of the claimant, of which it had been wrongfully deprived, or of paying compensation for the injury caused thereby; see also CMS Gas Transmission company v. the Argentine Republic, Award dated 12 May 2005, ICSID Case No. ARB/01/8, para. 406, where the tribunal recognized that “restitution is by far the most reliable solution to make injured party whole as it aims at the re-establishment of the situation existing prior to the wrongful act.” However, it opted for monetary compensation, noting that “It would be utterly unrealistic for the Tribunal to order to turn back the regulatory framework existing before the emergency measures were adopted”.
One of the reasons for the tribunal to grant restitution was that its decision would not “constitute material impossibility”, that it would have no “systemic influence across Zimbabwe” but was limited to the claimants and that it would be “not disproportionate”. In practice, the availability and the choice of the claimant to request restitution will thus depend on the circumstances of the case, and a wrongdoing State may not invoke the provisions of its internal law as circumstances making restitution materially impossible.

2 Compensation

108 Monetary compensation in the form of damages is the most commonly sought remedy in practice. Damages will be awarded by an arbitral tribunal where they correspond to the financially assessable damage suffered by the injured party. The objective of awarding damages is to ensure that the injured party shall “so far as possible be placed financially in the position in which it would have found itself, had the breaches not occurred”. The assessment of the damage will depend on the breach and can be quite complex. In any case, the difficulty to ascertain damages does not relieve an arbitral tribunal of its duty to assess and award damages in the event of a breach.

109 Compensation is defined in most Swiss BITs as having to be “effective and appropriate”. It is only in some BITs that a more detailed description of how the compensation should be determined is provided. For example, the Switzerland-Philippines BIT provides that the amount of compensation will be the market value of the investment on the day before the expropriation was known or executed and that the compensation will include the interest due from the day of the expropriation until the date on which the compensation is paid.

3 Satisfaction and Other Forms of Relief

110 Satisfaction is a remedy for injuries which are not financially assessable, also called “non-material injuries”. According to the ILC Articles on State Responsibility,

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347 Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award dated 28 July 2015, paras. 733, 735.
348 For an example, see ICJ, Case concerning the Temple of Preah Vihear, Judgment on the Merits, 1962 I.C.J. 6.
349 Crawford, p. 216.
352 Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, Award dated 20 May 1992, ICSID Case No. ARB/84/5, para. 215; Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. United Mexican States, Decision on the Request for Correction, Supplementary Decision, and Interpretation dated 10 July 2008, ICSID Case No. ARB(AF) 04/05, para. 38; Swission DOO Skopje v. Macedonia, Award dated 6 July 2012, ICSID Case No. ARB/09/16, para. 345.
353 The same wording can be found in Art. 6 of the Switzerland-Venezuela BIT.
354 Art. VI of the Switzerland-Philippines BIT.
355 Crawford, p. 231.
as that its decision would be no “systemic influence and that it would be “not
the choice of the claimant circumstances the case,” and a
international law as circumstances

most commonly sought tribunal by the injured. The
red party shall “so far as it would have found itself, amage will depend on the
ability to ascertain damages and award damages in the

be “effective and appropriate” of how the compensation Switzerland-Philippines BIT
market value of the investment executed” and that the

of the expropriation until

respectively assessable, also called on State Responsibility,

0 Case No. ARB/10/15, Award
tear, Judgment on the Merits,

350, UNCITRAL Arbitration, para.
dated 25 May 2004, ICSID Case

Republic of Egypt, Award dated 20
Midland Company and Tate &
on the Request for Correction,
08, ICSID Case No. ARB(AF)
ed 6 July 2012, ICSID Case No.

enezuela BIT.

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satisfaction is appropriate where an injury “cannot be made good by restitution or compensation”. It may take the form of declaratory or injunctive relief.

Although the availability of the relief is well-established in international law, satisfaction is not a common remedy in investment treaty arbitration. Eminent authors have noted that it “plays a subordinate role in investment law.” The issue of injunctive relief has been controversial, as States have traditionally objected to its availability on the basis of State sovereignty. This has not prevented international tribunals to confirm their power to order such relief.

4 Contractual Remedies

Which remedies are available under an investment contract will depend on the law applicable to the contract. In general, however, an investor can claim specific performance or damages for breach of contract.

356 Art. 37 of the ILC Articles on State Responsibility.
357 Doller/Schreuer, p. 294.
358 See, e.g., Enron Corporation and Ponderosa Assets L.P. v. the Argentine Republic, Decision on Jurisdiction dated 14 January 2004, ICSID Case No. ARB/01/3, where Argentina argued that the ICSID tribunal did not have jurisdiction to order injunctive relief. On the basis of the Rainbow Warrior ruling (R.I.A.A., Vol. XX, 1990, p. 217, at 270, para. 114), the tribunal confirmed that it had the power to order injunctive relief (para. 79).
359 Enron Corporation and Ponderosa Assets L.P. v. the Argentine Republic, Decision on Jurisdiction dated 14 January 2004, ICSID Case No. ARB/01/3; see also Biwator Gaffi (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22.
360 Moral damage includes injuries such as pain and suffering and loss of reputation (see Crawford, p. 202). See also, Ehle/Dawidowicz, pp. 293–326, and Ripinsky/Williams, pp. 307–312.
361 Art. 31 of the ILC Articles on State Responsibility.
363 Desert Line Projects LLC v. The Republic of Yemen, Award dated 6 February 2008, ICSID Case No. ARB/05/17; the tribunal awarded USD 1 million in moral damages.
364 Berhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award dated 28 July 2015, paras. 916, 921, 923. See, the case of Al-Kharafi and Sons Co. v. Libya and others where an ad hoc tribunal granted USD 30 million in moral damages to a Kuwaiti company in Award dated 22 March 2013 (see: Investment Arbitration Reporter, story of 24 July 2013).
365 See Ehle/Dawidowicz, pp. 308–313.
114 Some tribunals may be reluctant to order specific performance due to the principle of State sovereignty, as shown by a decision on provisional measures issued by an ICSID tribunal in 2007.\textsuperscript{367} Following this tribunal’s reasoning, it would be next to impossible for a claimant in investment treaty arbitration to successfully obtain specific performance. However, the tribunal’s decision must be considered with caution and interpreted in its specific context of a request for provisional measures.

**IV POST AWARD PROCEEDINGS**

A Challenge of Investment Awards in Switzerland

115 The legal framework in respect of annulment proceedings varies greatly depending on whether an international investment arbitration is conducted under the ICSID Convention or not.

116 The annulment of ICSID awards is governed by Art. 53 ICSID Convention, which provides for a self-contained process governed by international law.\textsuperscript{368} Non-ICSID investment treaty awards on the other hand will be treated in the same way as an award issued in the context of an international commercial arbitration. The legal framework governing annulment proceedings relating to non-ICSID investment treaty awards is therefore the domestic arbitration law of the seat of the arbitration. In Switzerland, the legal framework for the annulment of international arbitral awards is Chapter 12 of the PILS, and in particular Art. 190 PILS, which sets out the grounds on which annulment can be sought.

1  Annulment of Non-ICSID Convention Awards

117 It is generally recognized that, in the absence of an agreement between the parties, the annulment of an award cannot be sought in a jurisdiction other than the place, or seat, of arbitration.\textsuperscript{369} Annulment proceedings are conducted before the competent domestic courts of the seat of arbitration.\textsuperscript{370} This highlights the importance of carefully choosing the seat of a non-ICSID investment treaty arbitration.

118 As mentioned, in Switzerland, the setting aside of international arbitral awards is governed by Art. 190 PILS. Specifically, Art. 190(2) PILS sets out an exhaustive list of grounds on which an award can be challenged.\textsuperscript{371} The Swiss Federal Supreme Court has recognized that each of the grounds set out in Art. 190(2) PILS is to be interpreted narrowly.\textsuperscript{372} The approach is clearly reflected in the statistics and “makes successful challenges rare, and provides for a highly efficient procedure”.\textsuperscript{373} Indeed, of

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367 Occidental Exploration and Production Company v. The Republic of Ecuador, Decision on Provisional Measures dated 17 August 2007, ICSID Case No ARB/06/11, paras. 84–85.
368 Art. 53 ICSID Convention provides: “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”
370 In some cases, it is however possible for parties to choose another court for annulment proceedings (see Lew/Mistelis/Kröll, p. 667).
371 On recognition and enforcement of awards, see in detail Chapter 12 below.
372 BGE 316 II 721 para. 6; BGE 115 II 105 para. 3a; Gesinger/Frossard, p. 155.
373 Scherer/Heikkenen/Moss, ASA Bull. 2009, p. 258.
\end{flushright}
289 annulment cases brought before the Supreme Court between 1989 and June 2009, only 7 per cent have resulted in a complete or partial setting aside of the award.\textsuperscript{374} Switzerland is one of the leading seats of investment treaty arbitration.\textsuperscript{375} As a result, the Swiss Federal Supreme Court has had the opportunity to also examine a number of challenges to investment arbitral awards. To date, the Supreme Court has issued nine decisions concerning the annulment of investment awards (two of which dealt with the same dispute) and dismissed all nine challenges.\textsuperscript{376}

In \emph{Republic of Poland v. Saar Papier}, a case with Zürich as the place of arbitration, the Supreme Court addressed the preliminary question whether the dispute resolution provision in a bilateral investment treaty could qualify as an arbitration clause within the meaning of Chapter 12 of the PILS, given that the investor claimant was not a direct party to the relevant Germany-Poland BIT. The Court found that the BIT could be characterized as a contract concluded in the interest of a third party and constituting an offer to enter into an arbitration agreement that had been accepted by the investor’s initiation of proceedings. The Court however left open exactly which of the parties’ acts had constituted their agreement to arbitrate, since Poland had not claimed that the arbitration provision in the BIT was not also applicable to the investor claimant and because Poland had not objected to participate in the arbitration proceedings. The Court concluded that Chapter 12 of the PILS was applicable on the grounds that the seat of the arbitration was Zürich, that neither of the parties was domiciled in Switzerland, and that the parties had not excluded in writing the application of the PILS. The Court added that the arbitrability of an investment treaty dispute is not affected by the fact that one of the parties is a State.\textsuperscript{377}

The Court also had to consider whether an erroneous interpretation of the applicable law constituted a breach of public policy and ruled in line with its existing jurisprudence that an award may only be considered in breach of public policy if the wrong interpretation amounted to a violation of a fundamental principle of law. In line with its jurisprudence, the Court also held that a challenge of the award on the basis that the arbitral tribunal had breached a party’s right to be heard could only be examined where the party had raised the objection in a timely manner during the arbitration.\textsuperscript{378}

In \emph{Czech Republic v. Salaka}, a case dealing with the challenge of a partial award rendered in an investment arbitration applying the Czech-Netherlands BIT under the UNCTCRL Rules with seat in Geneva, the Swiss Federal Supreme Court had

\textsuperscript{374} Dassier, ASA Bull. 2010, pp. 82–83.

\textsuperscript{375} Scherer/Heiskanen/Moss, ASA Bull. 2009, p. 257; see in detail Chapter I, IV above (Switzerland as a leading international arbitration venue today).


to examine again whether the dispute resolution provision in the relevant Czech-Netherlands BIT could qualify as an arbitration clause within the meaning of Chapter 12 of the PILS. Like in Republic of Poland v. Saar Papier the Court found that the dispute resolution provision in a BIT could qualify as an arbitration clause within the meaning of Chapter 12 of the PILS even though the investor was not a direct party to the BIT, and that the arbitrability of a BIT dispute is not affected by the fact that one of the parties is a State.\footnote{Czech Republic v. Salakia (Netherlands): BGer. 4P.114/2006 para. 4.1, ASA Bull. 2007, pp. 132–133.}

123 The Court also had to consider whether the parties had waived their right to seek an annulment of the award on the basis of the wording of the arbitration clause in the Czech-Netherlands BIT. Under Art. 192(1) PILS, parties to an arbitration may waive their right to challenge an award and may exclude grounds of Art. 190(2) PILS from being invoked. This is however possible only for parties which are not domiciled or based in Switzerland.\footnote{See in detail the above commentary on Art. 192 PILS (Chapter 2); see also Baizeau, Int. A.L.R. 2005, pp. 1–15.} In order to be valid, the waiver “must reveal in a clear and distinct manner the common intention of the parties to waive their right to challenge the decisions of the Arbitral Tribunal on the grounds provided for in [Art. 192(1) PILS].”\footnote{BGeR. 4P.236/2004 para. 4.2.3.1, ASA Bull. 2005, pp. 514–516.} The Swiss Federal Supreme Court considered that the wording of the BIT providing that the arbitral tribunal’s decision “shall be final and binding” was not a valid waiver of the right to challenge pursuant to Art. 192(1) PILS.\footnote{Czech Republic v. Salakia: BGer. 4P.114/2006 para. 5.3, ASA Bull. 2007, pp. 138–139.}

124 However, in Republic of Lebanon v. France Télécom Mobiles International SA & FTLM SAL,\footnote{Republic of Lebanon v. France Télécom Mobiles International SA (France) & FTLM S.A.L. (Lebanon): BGeR. 4P.98/2005 para. 4.2, ASA Bull. 2006, pp. 100–101.} also concerning an investment arbitration seated in Geneva, the Swiss Federal Supreme Court considered that one of the clauses of the arbitration agreement concluded between the parties was a valid waiver to challenge the jurisdiction of the arbitral tribunal. The clause read:

“The Parties undertake that they will not challenge the jurisdiction of the UNCITRAL Tribunal whether before the UNCITRAL Tribunal itself or before any national courts. For the avoidance of any doubt, the parties and Y. do not hereby waive their right to challenge any award in the UNCITRAL Arbitration in the place where the award is made or to resist enforcement thereof in the country or countries where enforcement is sought (...)”\footnote{Republic of Lebanon v. France Télécom Mobiles International SA (France) & FTLM S.A.L. (Lebanon): BGeR. 4P.98/2005 para. 4.2, ASABull. 2006, p. 95.}

125 In its second decision in the dispute in Republic of Lebanon v. France Télécom Mobiles International SA & FTLM SAL,\footnote{Republic of Lebanon v. France Télécom Mobiles International SA (France) & FTLM S.A.L. (Lebanon): BGeR. 4P.154/2005 para. 2, ASA Bull. 2006, pp. 105–114. There have been two decisions by the Supreme Court in this case, both ruled upon on 10 November 2005. The first decision was a judgment on Lebanon’s challenge of the main award (BGeR. 4P. 98/2005, ASA Bull. 2006, pp. 92–104), while the second one was a judgment on Lebanon’s challenge of the arbitral tribunal’s dismissal of a request for correction of the main award (BGeR. 4P. 154/2005, ASA Bull. 2006, pp. 106–114).} the Court then also confirmed that a corrected award or a decision declining a request to correct an award could be challenged
separately from the main award.\textsuperscript{386} In the recent challenge of an investment award in Switzerland before the Swiss Federal Supreme Court, in \textit{EDF v. Hungary}, a case dealing with Energy Charter Treaty (ECT) and seated in Zurich, the Court rejected the setting aside petition based on the allegations of lack of jurisdiction, violation of the right to be heard and of public policy invoked by Hungary. As regards the jurisdictional argument, the Court found that the tribunal had rightly determined that EDF's claim constituted a treaty claim protected by the FET standard as provided under the ECT and thus it did not fall under the umbrella clause to which Hungary had made a reservation. According to the Court, the arbitral tribunal had therefore rightly upheld its jurisdiction. Hungary also alleged that by adopting EDF's damage calculations based on third party data to which it did not have access, the arbitral tribunal had violated its right to be heard. The Court found that Hungary could have done more to question the reliability of such evidence and that such a complaint at this stage of the proceedings defied the principle of good faith. Finally, Hungary claimed that if it had to pay the compensation granted to EDF in the award, it would be breaching EU law and therefore public policy. The Court again dismissed this allegation concluding that the arbitral tribunal had carefully explained why it could uphold EDF's claim without violating EU law and that there was no contradiction between the ECT and EU law.\textsuperscript{387}

In the more recent \textit{Recofi SA v. Vietnam} case, the Swiss Federal Supreme Court upheld a Geneva-seated UNCITRAL tribunal's decision to reject jurisdiction over a French investor's claims against the Socialist Republic of Vietnam.\textsuperscript{388} Recofi sought the annulment of the award on jurisdiction on the basis of Art. 190(2) (b) and (d) of the PILS: first, the tribunal had failed to recognize jurisdiction due to the erroneous interpretation of the notion of protected investment under the France-Vietnam BIT and second, it had violated its right to be heard by improperly applying the burden of proof in the case. The Court rejected both claims. As to the interpretation of the term "investment", the Court held that the notion of investment was controversial and that the tribunal had correctly interpreted it in light of the France-Vietnamese BIT and principles of treaty interpretation. Ultimately, the Court concluded that it would not analyze the tribunal's definition of investment, as this was a finding of facts, which is not within the Court's purview. With regards to the issue of the burden of proof, the Court indicated that such a rule does not belong to material public policy and thus subject to review under Art. 190(2) PILS and furthermore, that there was no evidence demonstrating that Recofi had been deprived of the right to be heard concerning the presentation of Vietnam's ratification materials relating to the BIT.

2 \textbf{Annulment of ICSID Convention Awards}

Article 52 of the ICSID Convention governs the annulment proceedings of awards issued under the ICSID Convention. The entire process is self-contained and governed by international law, both when it comes to the making of the award.

\textsuperscript{386} Scherer/Heiskanen/Moss, p. 275.
and to issues of annulment. 389 This feature is considered to be a key advantage of the ICSID system. 390

128 Upon receipt by the Secretary-General of the request for annulment, the Chairman of the Administrative Council (which is the president of the World Bank) appoints from the Panel of Arbitrators an ad hoc Committee of three persons to examine the particular case. 391 The place of the annulment proceedings is Washington D.C. unless the parties agree otherwise. 392

129 The application for annulment must state which part of the award exhibits flaws that constitute grounds for annulment. The information contained in the application is then developed by the requesting party in subsequent phases of the proceeding. In particular, a State should request in its application the stay of the enforcement of the award in order for such stay to be effective.

130 The general time limit to file an annulment request is 120 days calculated from the date on which the award was rendered. In the case of an allegation of corruption of the tribunal, the time limit of 120 days is calculated from the date the corruption is discovered, with an absolute cut-off date of three years after the award was rendered to file the request. 393 All grounds for annulment must be put forward within the relevant time limit. The ad hoc Committees may allow arguments to be raised at a later stage, provided that they were either explicitly or implicitly covered by the application. 394

131 The decision on annulment is binding on the parties and is not subject to any appeal or remedy except as provided in the ICSID Convention. Decisions on annulment must be recognized and enforced by all State parties to the Convention. 395 If the ad hoc Committee annuls the award, either party may resubmit the dispute to a new tribunal constituted afresh under the ICSID Convention. It is considered that parties cannot validly waive their right to submit the ICSID award to the annulment process. 396

132 Article 52(1) of the ICSID Convention sets out five limited grounds for annulment on the basis of which an ad hoc Committee is entitled to annul the whole or part of a final award and submit the case to a new arbitral tribunal. The ad hoc Committee

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389 Art. 53 ICSID Convention provides: “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention”.
390 Schwartz, Fauslity, quoting Paulsson at p. 44, footnote 3. Some commentators noted that: “[t]he hope was that by barring recourse to municipal courts on points of law or actions to quash awards, and so on, ICSID arbitration would be a swift, predictable procedure. That hope has not been wholly realized." Collier/Lowe, p. 70.
391 Art. 52(3) ICSID Convention. The members of the Panel are appointed by the Contracting States (each Contracting State is entitled to appoint four arbitrators) or by the President of the World Bank (who can appoint a maximum of ten persons).
392 In practice, where the respondent State is a European State and the majority of the members of the ad hoc Committee have a European nationality or are domiciled in or close to Europe, the parties usually agree that the annulment proceedings take place in Paris, Geneva, London, Frankfurt or The Hague.
393 Art. 52(2) ICSID Convention; Schreuer, paras. 448-449 at Art. 52.
394 See, e.g., Amco Asia Corporation and others v. Republic of Indonesia, Annulment Decision dated 16 May 1996, ICSID Case No. ARB/81/1.
395 Art. 52(4) ICSID Convention; Schreuer, para. 571 at Art. 52.
396 Schreuer, paras. 53-54 at Art. 52.
does not exercise the function of "a judge of appeal";\(^6\) and as such it does not judge or review the merits of the case. The grounds for annulment only allow the control of the regularity and the legitimacy of the ICSID Convention award;\(^6\) but not of its "substantive correctness."\(^6\) According to the ICSID Secretariat, the annulment of ICSID awards was not designed as "a mechanism to appeal alleged misapplication of the law or mistakes in fact."\(^6\)

The five limited grounds of annulment are:

(a) That the tribunal was not properly constituted.\(^6\)

(b) That the tribunal has manifestly exceeded its powers. Any excess of power must be manifest in the sense that it can be recognized with little effort.\(^6\)

Examples of excess of power include a decision on the merits by a tribunal that lacks jurisdiction,\(^6\) failure to exercise jurisdiction where jurisdiction

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599 Schreuer, para. 11 at Art. 52. See also, SGS Société Générale de Surveillance S.A. v. Paraguay, Annulment Decision dated 19 May 2014, ICSID Case No. ARB/07/29, para. 121: "[T]his Committee's responsibility is not to rule about the correctness of the Award."

400 ICSID Secretariat, Background Paper on Annulment for the Administrative Council of ICSID, 10 August 2012, p. 29.


402 See, e.g., Westin Hotels Ltd. v. Arab Republic of Egypt, Annulment Decision dated 5 February 2002, ICSID Case No. ARB/98/4, para. 35; Soufrati v. United Arab Emirates, Annulment Decision dated 5 June 2007, ICSID Case No. ARB/02/7, para. 40; AES Summit Generation Limited and AES-Tiszai Erőmű KFT v. Hungary, Annulment Decision dated 29 June 2012, ICSID Case No. ARB/07/22, para. 31. SGS Société Générale de Surveillance S.A. v. Paraguay, Annulment Decision dated 19 May 2014, ICSID Case No. ARB/07/29, para. 122: "[f]or an excess of power to be 'manifest' it has to be textually obvious and substantively serious."; Cartashe International Oil Company LLP v. Republic of Kazakhstan, Annulment Decision dated 21 February 2014, ICSID Case No. ARB/08/12, para. 83: "[t]he Committee agrees with Respondent that the term 'manifest' basically corresponds to 'obvious' or 'evident'; El Paso Energy International Company v. Argentine Republic, Annulment Decision dated 22 September 2014, ICSID Case No. ARB/03/15, para. 140: "'Manifest excess of power' has been defined as that which is obvious, clear, or selfevident; discernible without the need for elaborate interpretations."; Daimler Financial Services AG v. Argentine Republic, Annulment Decision dated 7 January 2015, ICSID Case No. ARB/05/1, para. 186: "[t]he Committee is of the view that an excess of power must be 'manifest'; in other words it must be plain, evident, obvious and clear to warrant annulment."

403 Patrick Mitchell v. Democratic Republic of the Congo, Annulment Decision, ICSID Case No. ARB/99/7, para. 47; see also Schreuer, para. 147 at Art. 52 ("A decision on the merits by a tribunal that lacks competence is the most obvious example of excess of powers"). See Reed/Paulsson/Blackaby, pp. 44–461. In Klockner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Eaux, Annulment Decision dated 3 May
does exist or failure to apply the applicable law.403

(c) That there was corruption on the part of a member of the tribunal.

1985, ICSID Case No. ARB/81/2, para. 4 the ad hoc Committee ruled that "[c]learly, an arbitral tribunal’s lack of jurisdiction, whether said to be partial or total, necessarily comes within the scope of an ‘excess of powers’" under Art. 51(2)(b) ICSID Convention. Consequently, an application for annulment may not only invoke lack of jurisdiction naturae materiae or naturae personae under Arts. 25 and 26 of the Convention, but may also contend that the award exceeded the tribunal’s jurisdiction as it existed under the appropriate interpretation of the ICSID arbitration clause. In Compañía de Aguas del Aconcagua S.A. and Viervelt Universal S.A. v. The Argentine Republic, Annulment Decision dated 3 July 2002, ICSID Case No. ARB/97/3, para. 86, the ad hoc Committee held that “[i]t is settled, and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments [...]”. In Ivan Micali, Vieri Micali and others v. Romania, Annulment Decision dated 26 February 2016, ICSID Case No. ARB/05/20, para. 125, the ad hoc Committee held that “[e]xcess of powers primarily refers to situations where a tribunal adjudicates dispute(s) not included in the powers granted by the parties. Thus, there is an excess of power if the tribunal: (i) asserts its jurisdiction over a legal or natural person or a State in respect to whom it does not have jurisdiction; (ii) asserts its jurisdiction over a subject-matter which does not fall within the ambit of the jurisdiction of the tribunal; or (iii) asserts its jurisdiction over an issue that is not encompassed in the consent of the parties. A deficiency in meeting any of these requirements would mean that there is no jurisdiction, which may constitute a manifest excess of powers if the excess of jurisdiction is manifest. “In Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru, Decision on annulment dated 5 September 2007, ICSID Case No. ARB/03/4, para. 112, the ad hoc Committee noted that it “is not charged with the task of determining whether one interpretation is ‘better’ than another, or indeed which among several interpretations might be considered the ‘best’ one and concluded that a determination as to jurisdiction is not ‘manifest’ where it is ‘clearly a tenable one’.”

404 See, e.g., Nöcker Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, Annulment Decision dated 3 May 1983, ICSID Case No. ARB/81/2, para. 149; MTD Equity Sdn. Bhd. & MTD Citlde S.A. v. Chile, Annulment Decision dated 1 June 2005, ICSID Case No. ARB/01/7, para. 47; Amoco Asia Corporation and others v. Republic of Indonesia, Annulment Decision dated 16 May 1986, ICSID Case No. ARB/81/1, Yearbook Commercial Arbitration XII (1987), 133, para. 9; quoted in Sempra Energy International v. Argentine Republic, Annulment Decision dated 29 June 2010, ICSID Case No. ARB/02/16, para. 174; Enron Creditors Recovery Corp., Ponderosa Assets, L.P. v. The Argentine Republic, Annulment Decision dated 7 October 2008, ICSID Case No. ARB/01/3, para. 25.25; Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, Annulment Decision dated 2 November 2015, ICSID Case No. ARB/06/11, paras. 50–52; In Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, Decision on Annulment dated 30 December 2015, ICSID Case No. ARB/11/28, para. 58, the ad hoc Committee held that “[i]t is the application of a law other than that agreed to by the parties may constitute an excess of powers and can be a ground for annulment. An error in the application of the proper law, even if it leads to an incorrect decision, is not a ground for annulment. Therefore, the misapplication of a particular rule, which is part of the correctly identified applicable law, does not amount to an excess of powers.” The Committee in Adam Dogan v. Turkmensistan, Annulment Decision dated 15 January 2016, ICSID Case No. ARB/09/9, para. 98, specified moreover that “[a] tribunal’s power to decide a dispute ex aequo et bono is subject to the parties’ agreement under Article 42(3) of the ICSID Convention. It is undisputed between the Parties that the Tribunal had not been granted such a power. A decision ex aequo et bono without the parties’ authorization is a failure to apply the proper law amounting to an excess of powers. If manifest, it may found the ground of annulment under Article 52(1)(b) of the Convention.”
(d) That there has been a serious departure from a fundamental rule of procedure. In order to constitute a ground for annulment, the deviation must be serious and have deprived the party of the benefit of the fundamental rule of procedure.405 Furthermore, a party must react immediately to a perceived violation of proper procedure by stating its objection in a timely manner and by demanding compliance. Failure to object will be interpreted as a waiver to object at a later stage.406

(e) That the award has failed to state the reasons on which it is based.407 Article 48(3) ICSID Convention contains a duty to state reasons which may not be disregarded by the tribunal. While the incompleteness of reasons has been argued as a ground in most ICSID annulment cases,408 ad hoc Committees have stressed that missing or incomplete reasons must be "sufficiently relevant"409 or that they "must constitute an appropriate foundation for the conclusions reached (...)."410 The ad hoc Committee in MINE v. Guinea found that the requirement to state reasons is satisfied if the reasons enable the reader to understand what motivated the decision of the tribunal.411

405 On the scope of this ground for annulment, see, e.g., the position of the Committee in MTD Equity Sàrl, Blvd. & MTD Chile S.A. v. Chile, Annulment Decision dated 21 March 2007, ICSID Case No. ARB/01/7, para. 49: "Relatively little needs to be said about this ground for annulment. Subsequent committees have approved the following passage from the Wena Hotels annulment decision: The Applicant has to identify the fundamental rule of procedure from which the Tribunal departed and it has to show that such departure has been serious. [Art. 52(1)(d)] refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defence and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other [...]. The issue is thus due process, not the substance of the Award itself, a matter addressed by paragraphs (b) and (e) of Article 52(1) of the ICSID Convention." Fundamental rules of procedure were defined by the ad hoc Committee in Victor Pey Casado and President Allende Foundation v. Republic of Chile, Annulment Decision dated 18 December 2012, ICSID Case No. ARB/09/2, para. 73, as "procedural rules that are essential to the integrity of the arbitral process and must be observed by all ICSID tribunals. The parties agree that such rules include the right to be heard, the fair and equitable treatment of the parties, proper allocation of the burden of proof and absence of bias." See also, Compañía de Aguas del Aconcagua S.A. and Vivienda Universal S.A. v. The Argentine Republic, ICSID ARB/97/3, Annulment Decision dated 3 July 2002, paras. 217-239: the arbitral tribunal did not annul the award but noted that the fact that one of the arbitrators was a member of the board of directors of a company connected to the Claimant and did not disclose this information could have constituted a serious departure from a fundamental rule of procedure if the arbitrator had known the connection at the time of its appointment and had failed to disclose it.


408 Landau, ICCA Congress Series no. 14, p. 192.


411 Maritime International Nominees Establishment (MINE) v. Republic of Guinea, Annulment Decision, ICSID Case No. ARB/84/4, para. 5.09: "In the Committee’s view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded.
Recognition and Enforcement of Investment Awards in Switzerland

1 Recognition and Enforcement of Non-ICSID Investment Arbitration Awards

134 A party seeking to have an award recognized or enforced must rely on the domestic legal framework of the jurisdiction in which recognition or enforcement is sought. Enforcement is made easier by the fact that almost all domestic legal frameworks on recognition and enforcement of international arbitral awards, including that of Switzerland, are governed by the New York Convention.412 The New York Convention provides a uniform set of rules governing recognition and enforcement of international arbitral awards in Switzerland.413

2 Recognition and Enforcement of ICSID Awards

135 Recognition is the official confirmation that the award is authentic. The obligation to recognize an ICSID award as binding under Art. 54(1) ICSID Convention is unconditional and State immunity cannot be used by a Contracting State to thwart proceedings for the recognition of an ICSID award.414

136 Recognition has two effects: it confirms that the award is final and binding (res judicata) and constitutes a preliminary step to enforcement. Awards are to be recognized (and enforced) subject to any interpretation, revision and annulment. After recognition, the ICSID award is a valid title for execution.415 Once recognition has been obtained in a specific country, for example Switzerland, execution of the award becomes easier should assets become available at a later stage in that country.

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412 Switzerland has been a party to the New York Convention since 1965 (see SR 0.277.12).
413 See in detail Chapter 12 above. See also Scherer/Moss, Inter-Pacific Bar Association Journal (September 2008), pp. 17–26. See also, Berge/Kellerhals 2015, pp. 713–742; Kaufmann-Kohler/Rigozzi 2015, pp. 518–533.
414 Schreuer, para. 48 at Art. 54. As stated in the Vivendi v. Argentina case, the autonomous and simplified ICSID regime was specifically designed to facilitate the enforcement of awards: “[O]ne of the fundamental issues which the drafters of the ICSID Convention were keen to achieve was a total divorce from the recognition and enforcement system which prevailed under domestic laws or under the 1958 New York Convention.” Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic, ICSID Case No ARB/97/3 (Second Annulment Proceeding), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (4 November 2008), para. 35.
415 Schreuer, para. 47 at Art. 54.
Article 53 of the ICSID Convention provides that ICSID awards are binding upon the parties to the proceeding and that the parties have an obligation to recognize and enforce these awards. Non-compliance with an ICSID award by a Contracting State is a breach of an obligation between the Contracting States and as such of an international legal obligation. Even if it can be said that investors and States generally comply with ICSID awards, it is also true that, in practice, payment is often the result of a post award settlement between the parties. Non-compliance with an ICSID award entails certain risks. In addition to the potential damage to the international reputation of the State, it has been suggested that the World Bank may not lend money to such a defaulting State. It is believed that nearly all ICSID awards have eventually been paid or settled, although there are at least 137

416 Article 53 ICSID Convention: “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”

417 Schneider/Knoll, p. 323.

418 The State of the investor would be entitled to bring an international claim against the host State before the ICJ to protect the interests of its national (Art. 27(1) ICSID Convention). Baldwin/Kantor/Nolan, J. Int Arb. 2006, Part V, pp. 20–22.

419 Griffith, TDM 1/2009, p. 5 (“voluntary compliance with arbitral (ICSID) decisions has been the norm”); Lew/Mistelis/Knoll, paras. 28–116 (“in practice most awards are performed voluntarily as generally a cost/benefit analysis is in favour of compliance. The damage to the international reputation of the state following from the non-compliance and the effect that can have on further investments [is], in most cases, greater than the amount to be paid under the award. In the past the secretary General of ICSID has officially communicated with recalculating parties and reminded them of their obligation”; Reed/Paulsson/Blackaby, p. 185; Schreuer, para. 7 at Art. 54 (commenting on the travaux préparatoires of the Convention: “[i]t was considered highly unlikely that a State party to the Convention would not carry out its treaty obligations under the Convention to comply with an award”).

420 Reed/Paulsson/Blackaby, p. 107 (giving an example for the year 2002: “[o]ut of the 20 some ICSID cases that resulted in damage awards through 2002, only three led to execution proceedings”).

421 In Patrick Mitchell v. Democratic Republic of the Congo, Annulment Decision dated 1 November 2006, ICSID Case No. ARB/97/7, para. 41, the ad hoc Committee indicated that: “A State’s refusal to enforce an ICSID award may have a negative effect on the state’s position in the international community with respect to the continuation of international financial or the inflow of other investments.”


“1. When a dispute over default, expropriation or governmental breach of contract comes to the attention of a Bank staff member, the staff member informs the Country Director (CD) and the Legal Vice Presidency (LEG) in consultation with the LEG, the CD recommends a Bank position to the Regional Vice President (RVP). If, on this basis, the RVP decides not to make any new loans to the member country or with the guarantee of the country, the RVP informs the relevant managing director and the Senior Vice President and General Counsel.

2. If, at the time a loan is presented to the executive directors for approval, there are any substantial amounts in dispute between the borrowing or guaranteeing country and suppliers or lenders to, or investors in, that member country, the matter is mentioned in the Project/Program Appraisal Document/President’s Report.

3. If the Bank decides to lend while a dispute over default of expropriation is pending, staff monitor the situation during project/program implementation to assess progress toward a settlement or decision”.

Although there is no evidence that this rule is strictly applied, suffice to say that until a reform, the General Counsel of the World Bank was also the ICSID Secretary General. See also Wood, TDM 3/2005, p. 2.
twelve cases where enforcement proceedings relating to an ICSID award have been pursued before national courts.\textsuperscript{138}

138 Additionally, ICSID awards are final. This means that once an ICSID award has been rendered and recognized in a specific State, the parties may not seek a remedy on the same dispute in another forum of that specific State or of another State.\textsuperscript{139} This res judicata effect applies in relation to other arbitration tribunals, including ICSID tribunals, as well as domestic courts.\textsuperscript{140} In the case of a partial annulment under Art. 52(3) ICSID Convention, this res judicata effect applies to those parts of the award that have not been annulled.\textsuperscript{141} In practice, the ICSID award becomes effectively binding upon the losing party when the latter has no remedies. ICSID awards subject to a stay of enforcement ordered by the ad hoc Committee may not be recognized and enforced.\textsuperscript{142}

139 ICSID tribunals do not have the power to order execution of their own awards. Therefore, the self-contained nature of the procedure has its limit when it comes to execution. However, it is widely accepted that the State court’s role is limited

\textsuperscript{138} While not all decisions of local courts or investor-State settlements are publicly available, at least the following cases have been identified: SARL Benvenuti & Bonfant v. SARL Benvenuti & Bonfant v. People’s Republic of Congo, decision of the Cour d’appel de Paris dated 26 June 1981, ICSID Case No. ARB/77/2; SOABI v. Senegal, Cour d’appel de Paris, 11 June 1991, ICSID Case No. ARB/82/1; LETCO v. Republic of Liberia, United States District Court, District of Columbia dated 16 April 1987, ICSID Case No. ARB/83/2; Afghan Capital Partners and others v. Kazakhstan, Judgment of the English High Court of Justice on Enforcement dated 20 October 2005, ICSID Case No. ARB/01/6. For a commentary on the local court proceedings in these four cases, see Baldwin/Kanter/Nolan, 1 Int. Arb. 2006, pp. 5-9. See Wannath Elie Georges Stag & Clorinda Vecchi v. Arab Republic of Egypt, Award dated 1 June 2009, ICSID Case No. ARB/05/15, on the enforcement proceeding before the US District Court for the Southern District of New York; Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16 and Euron Creditors Recovery Corporation (formerly Euron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, both cited in New York City Bar, Committee on International Commercial Disputes, *Recommended Procedures for Recognition and Enforcement of International Arbitration Awards* Rendered under the ICSID Convention* (2012) 20* <http://www2.nycbar.org/pdf/report/uploads/20072252-ProcedureforAwardsunderICSID.pdf> (last accessed 26 April 2016); CMS Gas Transmission Company v. Argentine Republic, Petition before the US District Court Southern District of New York dated 5 January 2010, ICSID Case No. ARB/01/8 (in this case, it was Blue Ridge Investments, LLC, as purchaser and assignee of the Award rendered in favor of CMS that submitted the petition for the enforcement proceedings) <http://www.italaw.com/sites/default/files/case-documents/italaw190.pdf> (last accessed 26 April 2016); Ares International S.R.L. and MetalGeo S.R.L. v. Georgia, ICSID Case No. ARB/05/23, as mentioned in Ioannis Karadassopoulos and Ron Fuchs v. Georgia, ICSID Case Nos ARB/05/18 and ARB/07/15, Decision of the ad hoc Committee on the Stay of Enforcement of the Award dated 12 November 2011, paras. 36–38; Venezuela Holdings B.V. and others (Mobil Cerro Negro) v. Bolivarian Republic of Venezuela, Opinion & Order of the United States District Court, Southern District of New York dated 13 February 2015, ICSID Case No. ARB/07/27; Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20, mentioned in Commercial Dispute Resolution (CDR) North America Newsletter January-February 2016, pp. 22–24; Sistem Mahendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic, where enforcement proceedings were pursued before the Geneva Debt Collection Office and ultimately dismissed by the Swiss Federal Supreme Court in its decision 5A_681/201 of 23 November 2011, ICSID Case No. ARB(AF)/06/1).


\textsuperscript{140} Schreuer, paras. 43–44 at Art. 54.

\textsuperscript{141} Schreuer, para. 674 at Art. 52.

\textsuperscript{142} Schreuer, para. 502 at Art. 53.
to ascertaining the award’s authenticity. Contrary to awards rendered under the New York Convention, Contracting States do not have the right to refuse the enforcement of an ICSID award on the ground that the ICSID award violates public policy or ordre public. Nevertheless, the State would be entitled under the ICSID Convention to refuse to enforce the non-pecuniary obligations resulting from the ICSID award, such as restitution of a licence or a seized property. This is because final awards on liability and quantum can be recognized and enforced according to the enforcement procedure of Art. 54 ICSID Convention. Obligations imposed by an ICSID award that are not expressed in monetary terms are not subject to the enforcement procedure of Art. 54 ICSID Convention but they are nevertheless binding and arguably enforceable under the New York Convention.

When an ICSID award is rendered against a constituent subdivision or agency of a State, the obligation to abide by and comply with the award is incumbent upon the constituent subdivision or agency rather than upon the host State. Conversely, an award against a State may not be enforceable against a separate juridical person that has some connection to the State. Even though under public international law, the concept of the State may include such separate entities, the scope is narrower in private international law, which can pose obstacles to enforcement.

To date, the Swiss Federal Supreme Court has only twice examined the enforcement of a (provisional measure) decision as well as a final award rendered by an ICSID tribunal. In the first case, an award was rendered against a Guinean State entity under the AAA Rules (but had not been affirmed by US courts).

428 Schreuer, paras. 37-41 at Art. 54. See also Van den Berg, “Some Recent Problems in the Practice of Enforcement under the New York Convention and ICSID Convention”, ICSID Review 1987, p. 441 (“award rendered pursuant to the ICSID Convention is enforceable within the Contracting States with no resistance to the enforcement possible”).

429 Schreuer, para. 79 at Art. 54 (“Not even the ordre public (public policy) of the forum may furnish a ground for refusal”). See also Amerasinghe, p. 815.

430 Accordingly, foreign investors who wish to obtain specific performance, such as restitution of a licence or of seized property, may tend to initiate a treaty-based international claim against the State under the UNCITRAL Arbitration Rules, the ICC Arbitration Rules or the SCC Arbitration Rules. See also Uchkunova/Themeik, ICSID Review 2014, p. 189.

431 See Lew/Miselis/Kröll, paras. 28-111 (“order for specific performance or other non-pecuniary obligations must be enforced under the New York Convention or the law of the state of enforcement”). Verhoosel, p. 24; see also Schneider/Scherer/Knoll, pp. 30-31.

432 See Di Pietro/Plate, pp. 194-195. See also, generally, Lalive, Liber Amicorum, p. 469.

433 See, e.g., A.A.R.L. Benvenuti & Bonfant v. People’s Republic of the Congo, Award dated 8 August 1980, ICSID Case No. ARB/77/2, where the prevailing investor attempted to enforce in France the ICSID award rendered against the Congo against Banque Commerciale Congolaise (BCC). BCC was not a constituent subdivision or agency designated under Art. 25(1) ICSID Convention. The attempt to enforce the award rendered against the State by seizing property of BCC failed. The French Cour de cassation, upholding a decision of the Cour d’appel de Paris dated 26 June 1981, held that Benvenuti & Bonfant was the creditor of the State of the Congo but not of BCC. The bank, though dependent on the State, could not be regarded as an emanation of the State of the Congo, Cour de cassation de Paris dated 21 July 1987. The control exercised by the State was not sufficient to regard it as an emanation of that State. This being said, the Congo ultimately paid the sum due under the award to the investor.


claimant in the arbitral proceeding, a Liechtenstein corporation, initiated enforcement proceedings before the Swiss and Belgian courts while an ICSID proceeding was also initiated against Guinea for failure to enforce the award. The Swiss courts granted an attachment order against Guinean bank accounts on the basis of the AAA award. Subsequently, however, Guinea obtained a provisional measure from the ICSID tribunal requesting the claimant to retract all existing attachment orders and to stop local courts proceedings. The Federal Supreme Court referred the question of the ICSID tribunal’s exclusive competence to the Geneva Court of First Instance. The Geneva Court of First instance found that by initiating the ICSID proceeding, the claimant had accepted the exclusive jurisdiction of the ICSID tribunal under Art. 26 ICSID Convention and waived its right to enforce the AAA award under the New York Convention. The court considered that the AAA award was therefore no longer binding under Art. V(1)(e) of the New York Convention and rejected MINE’s enforcement application. The Geneva Supervisory Authority over Debt Enforcement Matters came to the same conclusion and ordered the lifting of the attachment order.

142 In the second case, a final award was rendered by an ICSID tribunal against the Kyrgyz Republic. The claimant then sought the attachment of assets held in Geneva by the International Air Transport Association (IATA) in the name of Kyrgyzaerovnavigatsia, a Kyrgyz State company. By order of the Geneva Court, the Geneva Debt Collection Office enforced the attachment order but then revoked it on the basis that it violated Art. 92(1)(11) of the Debt Enforcement and Bankruptcy Statute (DEBS). After appealing before the Geneva Supervisory Authority, which confirmed the revocation, the claimant pursued its appeal before the Swiss Federal Supreme Court which ultimately rejected the appeal and confirmed that such assets were subject to immunity due to their allocation to activities performed by the Kyrgyz Republic in the exercise of its sovereign powers (jure imperii). This was in fact the first time that the Swiss Federal Supreme Court applied Swiss law on immunity in relation to the enforcement and execution of ICSID awards.

3 State Immunity from Execution

143 Enforcement against States has its limit in State immunity. An award against a host State need not be enforced if this would be in violation of the rules on State immunity as applied in the enforcing State. Having said this, in the context of

443 For an example of enforcement difficulties of an SCC award against the Russian Federation, see Sedelmeyer v. Russian Federation, Swedish Order, October 11, 2010, article by S. Perry, Global Arbitration Review, 15 October 2010.
the ICSID Convention and pursuant to Art. 55 ICSID Convention, the principle of State immunity only applies to the execution of the ICSID award; it does not provide immunity from jurisdiction of the tribunal or to proceedings for the recognition of an award.

a "The Legal Framework: Articles 54–55 ICSID Convention and the Doctrine of Binnenbeziehung"

Article 54 states that ICSID awards shall be enforced like final judgments of domestic courts. State immunity applies to the execution of an ICSID award in the same way as it would apply to the execution of a judgment of a State court. Article 55 of the ICSID Convention preserves State immunity from execution. Pursuant to the wording of Art. 55, a State against which execution of an ICSID award is sought in its own courts may also rely on any immunity it may enjoy in its courts under the local law. The law relevant to the execution of ICSID awards will normally be the law relating to State immunity from execution of judgments of domestic courts.

Switzerland has not yet adopted a general legislation on sovereign immunity. The legal framework is thus broadly defined by the practice of the courts. Swiss courts have adopted a restrictive conception of State immunity, limiting State immunity to cases in which foreign States act as sovereigns (acta jure imperii) as opposed to cases where States act as merchants and execute commercial acts (acta jure gestionis).

In addition to the distinction between sovereign and commercial acts, the Swiss Federal Supreme Court has developed the doctrine of Binnenbeziehung/rettachement suffisant, or requirement of an “appropriate” Swiss connection, in order to render enforcement acts against foreign States admissible. Ultimately and pursuant to the recent case law aforementioned, a further requirement has been established and that is that the assets targeted by the enforcement measures must not be assigned to tasks which are part of the Foreign State’s duty as a public authority.

444 Schreuer, para. 5 at Art. 55 (“Jurisdiction is governed by Art. 55 of the Convention and is determined by the tribunal under Art. 41. Domestic courts have no role to play in the determination of jurisdiction”).
445 Art. 54(19) ICSID Convention.
446 Art. 55 ICSID Convention: “Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution”. Art. 55 is considered to be a weakness of the ICSID Convention: see Schreuer, para. 100 at Art. 55.
447 To date, only nine States have adopted legislation on sovereign immunity: Argentina, Australia, Canada, Great Britain, Malaysia, Pakistan, Singapore, South Africa and the United States; see Uchikunova/Fennikov, ICSID Review 2014, p. 195.
448 Schneider/Knoll, p. 327.
449 Schneider/Knoll, pp. 338–344. See in particular Noga v. Office des Poursuites de Genève: BGE 134 III 122 paras. 5.2–5.3, ASA Bull. 2006, pp. 147–148, where the Swiss Federal Supreme Court expressed that the connection with Switzerland was established when the source of the obligation was created in Switzerland, or when the State had purported in Switzerland activities that created a place of execution of this obligation in the country. See also LIAMCO v. Libya: BGE 106 Ia 142 para. 4, a case concerning an award rendered in Switzerland, where the Supreme Court ruled that the choice of Geneva as the place of arbitration by the arbitrator did not constitute a sufficient connection to Switzerland.
writers consider that the doctrine of *Binnenbeziehung* is only applicable to the enforcement of awards issued in Switzerland but not the enforcement of (foreign) awards issued in a country other than Switzerland, which are subject to the New York Convention.\(^{459}\) Nevertheless, it is stated that on the basis of Art. 54 ICSID Convention (which provides for the application of local laws of enforcement) the doctrine of *Binnenbeziehung* may however be applicable to the enforcement of ICSID awards.\(^{460}\)

Therefore, a Swiss court may determine that State assets are not immune from execution when three requirements are fulfilled: (1) the foreign State must have acted in a private capacity (*acta jure gestionis*); (2) the matter must have a sufficient connection to Switzerland (*Binnenbeziehung/rattachement suffisant*); and (3) the assets must not be assigned to tasks incumbent to the foreign State's exercise of its sovereign authority, as those assets are excluded from enforcement proceedings according to Art. 92(1)(11) DEBS. This interpretation has not yet been confirmed by the Swiss Federal Supreme Court but it would be consistent with Arts. 54 and 55 of the ICSID Convention.\(^{461}\) While the debate remains open and the application of the doctrine of *Binnenbeziehung* does not necessarily conform with the reality of the modern world and the international connections that exist with Switzerland, the Swiss Federal Supreme Court has thus now provided some guidance as to the rules applicable to execution of ICSID awards in Switzerland.

\[b\] Assets Subject to Immunity from Execution

State immunity from execution generally depends on the characterization of the nature of the assets which are to be the object of enforcement. Execution is permitted against commercial property belonging to the State, but not against property serving official or governmental purposes. The distinction between commercial property and property serving sovereign purposes is not always apparent.\(^{464}\) In the context of State immunity from execution the test usually involves an assessment of the purpose of the property in question.\(^{465}\)

For the purpose of determining the nature of certain State assets, Swiss courts will seek to determine for what purpose specific assets have been designated in Switzerland.\(^{466}\) Funds that are not earmarked for sovereign purposes are generally subject to execution; assets allocated for the performance of acts of sovereignty, which always include the assets of diplomatic missions, are immune from execution.

\(^{451}\) Schneider/Knoll, p. 344.

\(^{452}\) Schneider/Knoll, pp. 344–345.


\(^{454}\) This difficulty of distinction is even more pronounced when assessing the activities of Sovereign Wealth Funds (SWFs) whose purpose is to participate (financially) in the market place like a private player but who then may raise the defense of sovereign immunity from jurisdiction or enforcement when third parties bring claims against them. See Hahn, *SZW* 2012, pp. 103–118 and Hahn, *SZIB* 2013, pp. 225–241.

\(^{455}\) Schreuer, *State Immunity*, pp. 15–16, 145.

The concept of acts within the scope of the public authority is generally interpreted quite widely by the Swiss Federal Supreme Court.\textsuperscript{457} It is particularly difficult to distinguish commercial from sovereign property in the context of bank accounts as the future use of money is usually uncertain. As set out above, in practice, the decisive criterion is whether money is specifically earmarked for a particular public function. Funds that are allocated to serve specific official activities and are held by the agency carrying out that function are immune. In Switzerland, money, in cash or bank accounts, is exempt from seizure only if it has been clearly assigned to concrete public purposes, which implies a separation from other assets.\textsuperscript{458} However, bank accounts and other assets belonging to an embassy can be assumed to be for public purpose and are thus immune from enforcement.\textsuperscript{459} Bank accounts of embassies and diplomatic missions, which are subject to specific provisions in the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property,\textsuperscript{460} are therefore treated by Swiss courts with much caution.\textsuperscript{461} The same applies to funds specifically allocated to the purchase of arms\textsuperscript{462} or the cultural center/buildings for foreign citizens run by a foreign consulate in Switzerland.\textsuperscript{463}

Swiss statutes dealing with State immunity also provide special protection for central banks and other monetary authorities and their property. According to Art. 92(1) (11) DEBS, enforcement is excluded with respect to “assets belonging to a foreign State or a central bank and assigned to tasks which are part of their duty as public authorities.”\textsuperscript{464} Similarly, the International Law Commission’s Articles also exclude the property of the central bank of the foreign State from the scope of commercial property.\textsuperscript{465}

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457 BGE 134 III 122 para. 5.2.3. \\
458 BGE 134 III 122 para. 5.2.3; see also Giroud/Leroux, IBA International Litigation News September 2010, p. 46. \\
459 BGE 112 la 148 paras. 4–5. \\
460 The United Nations Convention on Jurisdictional Immunities of States and their Property of 2 December 2004 was ratified by Switzerland on 16 April 2010 (this convention has not yet entered into force: it is lacking the ratification of thirty States). \\
461 See Giroud/Leroux, IBA International Litigation News September 2010, p. 39: “Today, the Federal Supreme Court holds that sovereign immunity does not cover monetary assets, except if they have been earmarked for ‘public’ goals. On the contrary, Article 19(c) of the Convention provides that sovereign immunity covers all assets, except if they have been earmarked for ‘private’ goals. Therefore, current Swiss practice and the Convention approach the issue from opposite perspectives”; Ratification Report 2009, 25, para. 7 (in free translation from the French original). “Insofar as the relations between Switzerland and the other Contracting States are concerned, they shall substitute domestic law, specifically the principles developed in the case law of the Federal Tribunal”; available at: <http://www.admin.ch/ch/f/lge/gc/docs/1413/bericht.pdf >. \\
462 BGE 86 I 23 para. 5, where the Swiss Federal Supreme Court considered that funds specifically allocated to the purchase of arms were earmarked for a public purpose and thus protected from enforcement. Nevertheless, the earmark needs to be real and effective, otherwise the funds are not considered as “assigned to their original public purpose”. See more generally BGE 124 III 382 para. 4a (in free translation from the French original): “Case law places military activities under the jure imperii, or sovereign acts, rubric”. \\
463 BGE 112 la 148 paras. 4–5. \\
464 This was confirmed in a decision of the Swiss Federal Supreme Court: BGer. 5A_681/2011 of 23 November 2011, ASA Bull. 2012, p. 819. \\
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Waiver of Immunity

In light of the far-reaching protection of State-owned property from execution, an investor would have a strong interest in trying to secure a waiver of State immunity when it comes to the execution of an award against a State. Some authors consider it as the "only one hope". Other than cases where a waiver could be found in a contract, international treaties or a simple unilateral declaration may also contain an explicit waiver of immunity from execution. From a public international law standpoint, a partial waiver of immunity from execution is possible but an explicit waiver is difficult to obtain in practice. Moreover, no jurisdiction at present appears to allow for an absolute waiver.

The question of waiver of immunity was considered in 2007 by the Swiss Federal Supreme Court, albeit in a commercial arbitration context, in the context of the Noga case. Noga had obtained an arbitral award in its favor against the Russian Federation but was unable to get it enforced, in spite of some widely reported attempts to seize Russian assets. In February 2003, Noga started enforcement proceedings against certain assets of the Russian Federation with IATA in Geneva based on a settlement agreement. Because this agreement had been concluded in Switzerland, the Swiss Federal Supreme Court considered, on the basis of the Binnenbeziehung doctrine, that the Russian Federation’s assets with IATA could be rightfully seized. The Supreme Court also addressed the question of immunity from execution and while accepting that the immunity could be a bar to attachment, it followed the lower court’s view that the settlement agreement contained a waiver: "The Government recognizes expressly the private and commercial nature of the present settlement agreement and expressly and without reservation waives any immunity from jurisdiction and/or enforcement." The Court also considered that the waiver in the settlement agreement could not possibly be interpreted as covering only assets that belong to the activity jure gestionis of the Russian Federation for which in any event no immunity exists. Rather, the clear wording of the waiver made it clear that it aimed at assets that had been allotted by the State to the performance of public powers, jure imperii.

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467 Schreuer, para. 73 at Art. 55.
468 Schreuer, para. 73 at Art. 55.
469 BGE 134 III 122 para. 5.3 (Noga v. Office des poursuites de Genève). Russia’s resistance against international arbitral awards in favor of Noga was also at the core of a series of court decisions in a number of other countries, including France and the USA. See N. Radjab, YIAG Newsletter December 2008, pp. 18-20.
470 Free translation from BGE 134 III 122 para. 5.3.3.
471 BGE 134 III 122 para. 5.3.3.