

Swiss Bilateral Investment Treaties: A Survey

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This article focuses on Bilateral Investment Treaties (BITs) entered into between Switzerland and foreign countries, and introduces the key provisions contained in BITs, with concrete examples arising out of Swiss BITs. Switzerland has entered into more than one hundred BITs, and, as such, is one of the countries with the most BITs in force.

I. INTRODUCTION

Switzerland has a long history of concluding Bilateral Investment Treaties (BITs) with other countries. Some of these BITs were entered into as early as 1961. At the present time, Switzerland has entered into 125 BITs, of which 109 are in force.¹

In the Message² published on the occasion of the conclusion of the BIT with Kenya, the Swiss Federal Council (Conseil Fédéral) explained Switzerland's goal in entering into BITs as follows:

The purpose of BITs is to ensure that investments made in the contracting country by private persons and Swiss companies, and investments made in Switzerland by investors of the contracting country, are contractually protected against non-commercial risks. They are particularly concerned with state discrimination with respect to national investors, expropriations or restrictions of income transfers and other measures related to the investments. Dispute resolution procedures allow, if necessary, the bringing of a claim before an arbitral tribunal to enforce the application of a contractual norm. By

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¹ Michael Schmid, *Swiss Investment Treaties and Their Umbrella Clauses*, in PROTECTION OF FOREIGN INVESTMENTS THROUGH MODERN TREATY ARBITRATION, ASA Special Series No. 34; the text of the BITs is available at <www.admin.ch/ch/f/rs/0.97.html>.

² In principle, when a new law is enacted, the Swiss Federal Council (Conseil Fédéral) publishes a memorandum explaining the purposes of the law and providing an official interpretation of its articles. This memorandum is called in French a "Message." Few Messages have been published on the occasion of the conclusion of BITs.

entering into BITs, the contracting parties can improve the conditions of their economic framework and, accordingly, increase their ability to attract international investments.³

Switzerland does not have an official Model BIT, unlike countries such as the United States or Germany. The United Nations Conference on Trade and Development (UNCTAD) has published a form of Swiss BIT in its compendium of international investment instruments, but this document does not necessarily correspond to the one used internally by Swiss officials when negotiating BITs with foreign countries.⁴

Nevertheless, most Swiss BITs follow a similar structure, which is a fairly standard model for BITs entered into by European countries.⁵ A typical BIT commences with the definitions, in particular, of investor and investments, then deals with the territorial and temporal application, and with principles of admission and establishment. The next article usually provides standards of treatment, and is followed by an article indicating when free transfers of capital relating to investments can take place. Issues of expropriation and compensation follow, together with the principle of subrogation. The next articles usually relate to dispute resolution between the host state and the investor and between the signatory States. All Swiss BITs contain an umbrella clause.

The purpose of this article is to review the BITs concluded between Switzerland and foreign countries and explain their provisions in light of general principles of investment law and international investment case law.

II. THE SYSTEM OF BITs

Since the late 1950s, bilateral treaties for the promotion and (reciprocal) protection of investments have become the most widely used type of treaty in the field of foreign

³ Message concernant les accords de promotion et de protection réciproque des investissements avec le Kenya et la Syrie, January 16, 2008, Feuille Fédérale (FF) 903 (2008), *available at* <www.admin.ch/ch/f/ff/2008/903.pdf> (author's translation).

⁴ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), III INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM 177–83 (1996), *available at* <www.unctad.org/en/docs/dtci30vol3_en.pdf>.

⁵ A table showing the characteristics of Swiss BITs currently in force is included at the end of this article.

investment. BITs deal exclusively with issues concerning the admission, treatment, and protection of foreign investment.⁶

BITs exhibit a certain pattern of uniformity in their structure and content. Typically, BITs define the core concept of investor and investment, and prescribe the rights afforded to investors. These substantive rights, governed by public international law, usually include admission and establishment, fair and equitable treatment, protection against expropriation (direct and indirect), full protection and security, standards of treatment, and the rights provided by umbrella clauses. These substantive rights are completed by procedural rights granted by various dispute resolution mechanisms. Accordingly, if a host state breaches the substantive protections contained in a BIT in a manner that adversely affects an investor, the latter may often commence proceedings directly against the state. Many BITs, in particular, open the way to International Centre for the Settlement of Investment Disputes (ICSID) arbitration in the event of such a dispute between investor and state.⁷ ICSID, through Article 25 of the ICSID Convention which requires only that the parties “consent in writing” to the jurisdiction of the Centre, has accepted jurisdiction over arbitrations arising from consent to ICSID arbitration expressed in (i) the host state’s national legislation, (ii) a BIT between the host state and the investor’s home state, or (iii) a multilateral investment treaty between countries including the host state and the investor’s home state.⁸

III. SWISS BITS

A. DEFINITION OF INVESTOR AND INVESTMENTS

1. *Definition of Investor*

Because the system of BITs confers protection on investors according to their relation to the countries who are signatories of the BITs, the definitions of “investor” (natural or legal person) and “investment” are a key element in determining the scope of application of rights and obligations under international investment agreements. Typically, for natural persons, investment agreements protect investors based on their nationality as defined by the law of the state of claimed nationality. Some investment agreements also introduce alternative criteria such as a requirement of residency or domicile. For legal persons, tribunals nowadays

⁶ UNCTAD, *Key Terms and Concepts in IIAs: A Glossary*, in UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS 13 (2004), available at <www.unctad.org/en/docs/iteiit20042_en.pdf>.

⁷ LUCY REED, JAN PAULSSON, & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 38 (2004).

⁸ *Id.* at 35.

adopt the test of incorporation or seat rather than control when determining the nationality of a legal person.⁹

The investor's nationality is relevant for the purpose of guaranteeing that a treaty will only apply to the relevant nationals, and to determine the jurisdiction of an international tribunal.¹⁰ For instance, if the host state's consent to jurisdiction is given through a BIT, such consent will only extend to nationals of the two states which are parties to the BIT.

a. Individual as investor

The determination of the nationality of a particular individual depends on the national legislation of the relevant state. In the *Nottebohm* case, the International Court of Justice (ICJ) held that even though a state may decide of its own accord and in terms of its own legislation whether to grant nationality to a specific person, there must be a real connection between the state providing protection and the national in need of protection.¹¹

In the Swiss BITs, nationality is the criterion generally used to determine whether a natural person qualifies as an investor:

- (1) The term "investor" refers with regard to either Contracting Party to:
 - (a) natural persons who, according to the law of that Contracting Party, are considered to be its nationals;¹²

However, in the Switzerland–Hong Kong BIT (concluded in 1999), the definition of "investor" as regards Hong Kong designates natural persons who have the right to reside in the Hong Kong area.

No Swiss BIT contains a provision similar to Article 25(2)(c) of the ICSID Convention,¹³ which provides that a person may not bring a claim against the state of which

⁹ ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS 8 (2008).

¹⁰ RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 47 (2008).

¹¹ *Liechtenstein v. Guatemala*, 1955 ICJ Rep. 4; Engela C. Schlemmer, *Investment, Investor, Shareholders*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 72 (P. Muchlinski, F. Ortino, & C. Schreuer eds., 2008).

¹² Art. 1(1) of the Swiss BIT published in the UNCTAD compendium [hereinafter "UNCTAD Swiss BIT"].

¹³ Art. 25 of the ICSID Convention sets forth the requirements for a dispute before ICSID.

he is a national. Thus, dual nationals are not prevented from bringing a claim against the host state.¹⁴

b. Company as investor

The issues related to the nationality of legal persons are more complicated than those related to natural persons. Accordingly, it is the general practice in investment treaties to specifically define the objective criteria which make a legal person a national of a certain state for the purposes of the BIT, rather than simply to rely on the term “nationality” and international law.¹⁵ Generally, the definitions of investor in relation to legal persons are broad enough to include juridical persons, companies, and corporations, whether commercial or non-profit entities.¹⁶

In *Barcelona Traction Light & Power Co. Ltd. (Belgium v. Spain)*, the ICJ adopted the place of incorporation and principal seat theories of corporate nationality and rejected a control test that would allow for the lifting of the corporate veil between the company and its owners so as to establish the nationality of the owners as the effective nationality of the company. As a result, pursuant to the principles of *Barcelona Traction*, if a foreign investor were to incorporate a local subsidiary in the host country, it would lose the right to claim international institutional arbitration under a body such as ICSID, because the subsidiary would have the host state’s nationality. In order to avoid this result, Article 25(2)(b) of the ICSID Convention provides, inter alia, that the parties may agree that if a corporation has the nationality of the host state, but is controlled by foreign nationals, then that corporation will be treated as a national of another contracting state.¹⁷

In recent times, the *Barcelona Traction* approach has not been applied in investment treaty arbitrations.¹⁸ In *CMS Gas Transmission Co. v. Argentina*, the tribunal rejected the application of *Barcelona Traction* in the following terms:

¹⁴ The situation is different in, e.g., Australia, where some BITs follow the approach of the ICSID Convention. See Peter J. Turner, Mark Mangan, & Alex Baykitch, *Investment Treaty Arbitration: An Australian Perspective*, 24 J. INT’L. ARB. 103–28 (2007).

¹⁵ OECD, *supra* note 8, at 18.

¹⁶ CHRISTOPHER DUGAN, DON WALLACE, NOAH RUBINS, & BORZU SABAHI, INVESTOR–STATE ARBITRATION 304–5 (2008).

¹⁷ Schlemmer, *supra* note 10, at 75–76.

¹⁸ DUGAN, WALLACE, RUBINS, & SABAHI, *supra* note 15, at 311.

Besides accepting the protection of shareholder and other forms of participation in corporations and partnerships, the concept of limiting it to majority or controlling participations has given way to a lower threshold in this respect. Minority and non-controlling participations have thus been included in the protection granted or have been admitted to claim in their own right. Contemporary practice relating to lump-sum agreements, the decisions of the Iran–United States Tribunal, and the rules and decisions of the United Nations Compensation Commission, among other examples, evidence increasing flexibility in the handling of international claims. The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders.¹⁹

Swiss BITs follow these concerns by providing a double standard. The definition of corporate investor relies on notions of constitution or organization and seat, but also relies on the concept of control. Real economic activities in the territory of the contracting party are always a requirement:

- (1) 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 that Contracting Party and 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.²⁰

¹⁹ CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/08, Decision on Objection to Jurisdiction, July 17, 2003, 42 I.L.M. 788, 795 (2003).

²⁰ Switzerland–Chile BIT, September 24, 1999, art. 1(1)(b), (c), *available at* <www.admin.ch/ch/f/rs/i9/0.975.224.5.fr.pdf>.

As a result, some BITs apply the incorporation criteria (for example, the Switzerland–Azerbaijan BIT), and others apply the control criteria (such as the Switzerland–Guyana BIT and the Switzerland–Colombia BIT).²¹

2. *Definition of Investment*

The proliferation of different sources leads to the multiplication of definitions of investment. Historically, foreign investment under customary international law referred to direct investment, which required the transfer of funds, a longer-term project, the purpose of a regular income, the participation of the person transferring the funds, at least to some extent, in the management of the project, and a business risk. In contrast, portfolio investment did not involve an element of personal management.²²

Modern investment protection instruments, however, have expanded the legal definition of investment by including the categories of direct investment and portfolio investment within the definition of investment.²³ The definition of the term remains vague, and leaves broad discretion to tribunals when applying BITs.

Article 25 of the ICSID Convention, while using the term “investment,” does not define it. Therefore, one has to turn to case law to find definitions of investment. On the basis of ICSID case law, certain features of an investment can be identified:

- (a) the project should have a certain duration;
- (b) there should be a certain regularity of profit and return;
- (c) there is typically an element of risk for both sides;
- (d) the commitment involved has to be substantial; and
- (e) the operation should be significant for the host state’s development.²⁴

Many Swiss BITs provide as follows:

²¹ See Message concernant les accords de promotion et de protection réciproque des investissements avec la Serbie-Monténégro, le Guyana, l’Azerbaïdjan, l’Arabie Saoudite et la Colombie, September 22, 2006, FF 8023 (2006), *available at* <www.admin.ch/ch/f/as/2007/4475.pdf>.

²² DOLZER & SCHREUER, *supra* note 9, at 60.

²³ DUGAN, WALLACE, RUBINS, & SABAHI, *supra* note 15, at 248.

²⁴ OECD, *supra* note 8, at 61; *see also* Fedax v. Venezuela, Decision on Jurisdiction, July 11, 1997, 37 I.L.M. 1378 (1998); Salini v. Morocco, Decision on Jurisdiction, July 23, 2001, 42 I.L.M. 609 (2003).

The term “investment” shall include every kind of assets, in particular:

- (a) movable and immovable property as well as any other rights *in rem*, such as servitudes, mortgages, liens, pledges and usufructs;
- (b) shares, parts or any other kinds of participation in companies;
- (c) claims to money or to any performance having an economic value;
- (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;
- (e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as other rights given by law, by contract or by decision of the authority in accordance with the law.

The concept of investments in Swiss BITs, therefore, is based on direct investments aiming at a durable economic relation with material participation in companies through the right to vote or the creation of subsidiaries.²⁵ This definition is very similar to that found in the model BITs of the United Kingdom, Germany, France, and the Netherlands.

B. SCOPE OF APPLICATION

The territorial application of BITs, as well as their application *ratione temporis*, is usually expressed as follows:

The present Agreement shall apply to 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.

According to this Article, BITs will apply to investments made in the territory of the host state, in accordance with its laws and regulations, by investors of the other state. *Ratione temporis*, BITs will apply retroactively to investments made before the BIT’s entry into force.

²⁵ Message concernant l’Accord de libre-échange entre les Etats de l’AELE et la République de Corée, l’Accord sur l’investissement entre l’Islande, le Liechtenstein, la Suisse et la Corée, ainsi que l’Accord agricole entre la Suisse et la Corée, December 9, 2005, FF 901 (2006), *available at* <www.admin.ch/ch/f/ff/2006/901.pdf>.

C. ADMISSION AND ESTABLISHMENT

Admission and establishment relate to the entry of investments by foreign investors into a host country. Traditionally, these provisions are combined with the promotion of investments whereby the parties to the agreement undertake to promote and admit investments by investors of the other party.²⁶

Rules of admission designate the right of entry, while rules of establishment deal with the manner in which the activity of the investor will take place over the duration of the investment, and also with the protection of the type of presence that may be permitted.²⁷ Rules of admission are usually laid out in accordance with the laws and regulations of the host country. In contrast, a right of establishment is granted to a foreign investor under the treaty through the granting of national treatment at the pre-establishment phase.²⁸ The right of establishment entails not only a right to carry out business transactions in the host state, but also the right to set up a permanent business presence.²⁹

Different countries provide different approaches to admission in BITs. Traditional BITs usually follow the admission model, under which the host country does not grant positive rights of entry and establishment to investors from the other contracting party, and may apply such admission and screening procedures for foreign investment as it considers appropriate, and may determine the conditions under which foreign investors will be allowed to enter and operate in the country. Treaties following the admission model encourage the parties to promote favourable investment conditions between them, but leave the conditions of entry and establishment to the discretion of each country. Other BITs, despite containing an admission clause, also provide some rights, namely most-favoured-nation (MFN) treatment, to investors at the pre-establishment stage. Finally, treaties using the pre-establishment model grant foreign investors a positive right to national treatment and MFN treatment not only once the investment has been established, but also with respect to the actual entry and establishment of the investment.³⁰

²⁶ Anna Joubin-Bret, *Admission and Establishment in the Context of Investment Protection*, in STANDARDS OF INVESTMENT PROTECTION 9 (A. Reinisch ed., 2008).

²⁷ Ignacio Gómez-Palacio & Peter Muchlinski, *Admission and Establishment*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 230 (P. Muchlinski, F. Ortino, & C. Schreuer eds., 2008); DOLZER & SCHREUER, *supra* note 9, at 80.

²⁸ Joubin-Bret, *supra* note 25, at 9.

²⁹ *Admission and Establishment*, in UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS 12 n. 1 (2002), available at <www.unctad.org/en/docs/iteiit10v2_en.pdf>.

³⁰ Joubin-Bret, *supra* note 25, at 10–13.

The Swiss BIT published in the UNCTAD compendium adopts the so-called “controlled entry” approach, pursuant to which the application of the treaty to an investment is made conditional on its being approved in accordance with the laws and regulations of the host state.³¹ This is the model adopted by most European countries:³²

Each contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.³³

Some BITs contain clauses against “treaty shopping,” i.e., the seeking of home countries that have treaties with host countries where investments are to be made. Notably, U.S. BITs usually contain such provisions. These clauses typically allow the state to deny the benefits of the agreement to investors that have no “substantial business activities” in their putative home country.³⁴ However, Swiss BITs do not contain anti-treaty shopping provisions.

When a dispute arises, tribunals often have to verify whether the admission and establishment of a company in a country is real.³⁵ In other words, jurisdiction (and therefore BIT protection) can be refused if the tribunal does not consider that the company is established in the country whose BIT protection is requested.

The tribunal held that it had no jurisdiction in *Inceysa Vallisoletana v. El Salvador*,³⁶ in which the tribunal found that the claimant received its concession from El Salvador in a bidding process in which it presented false information. The tribunal considered that El Salvador, as well as Spain, had given their consent to ICSID jurisdiction on the condition that investors would act in accordance with the law. Consequently, illegal investments were not included within the scope of consent expressed by Spain and the Republic of El Salvador in the BIT and were not submitted to ICSID jurisdiction.

³¹ Gómez-Palacio & Muchlinski, *supra* note 26, at 240.

³² DOLZER & SCHREUER, *supra* note 9, at 81.

³³ UNCTAD Swiss BIT, art. 3(1).

³⁴ *Investor–State Disputes Arising from Investment Treaties: A Review*, in UNCTAD SERIES ON INTERNATIONAL INVESTMENT POLICIES FOR DEVELOPMENT 21–22 (2005), available at <www.unctad.org/en/docs/iteiit20054_en.pdf>.

³⁵ See, e.g., *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction of April 29, 2004.

³⁶ *Inceysa Vallisoletana v. El Salvador*, ICSID Case No. ARB/03/26, Award of August 2, 2006.

The tribunal came to the same conclusion in *Fraport v. Philippines*,³⁷ where Fraport sought to circumvent the provisions of Philippine law, applicable through the definition of investment of the Germany–Philippines BIT, which contained restrictions on shareholding and management of public enterprises by foreigners. The tribunal concluded that, in view of the investor’s conscious violation of the host state’s law, it had no jurisdiction.³⁸

D. STANDARDS OF TREATMENT

The most common standards of treatment specified in investment treaties are the “most-favoured-nation” standard, the “national treatment” standard, and the standard of “fair and equitable” treatment. These standards provide guarantees for the investor against discrimination in the host state.

National treatment ensures that foreign investors will be treated no less favourably than similarly situated domestic investors.³⁹ MFN treatment ensures that foreign investors will not be treated less favourably than investors from any third country.⁴⁰ The MFN standard and the national treatment standard do not define expressly the contents of the treatment they accord but establish it by reference to an existing legal regime, that of other aliens, on the one hand, and that of host state nationals, on the other.⁴¹ This is why they are usually called “relative” treatment obligations, since they require a comparison of the treatment accorded to the claimant and to investors of other nationalities.⁴² The standard of fair and equitable treatment prohibits arbitrary and discriminatory impairment of investments by the host state and is supposed to establish, through its formulation, an unchanging content.⁴³ In that sense, the standard of fair and equitable treatment provides for “absolute” or “objective” protection.

1. MFN Standard

The MFN standard is meant to ensure non-discrimination as between foreign investors of different (foreign) countries. The usual formal definition of the MFN standard refers to

³⁷ *Fraport v. Philippines*, ICSID Case No. ARB/03/25, Award of August 16, 2007.

³⁸ DOLZER & SCHREUER, *supra* note 9, at 87.

³⁹ *Id.* at 178; DUGAN, WALLACE, RUBINS, & SABAHI, *supra* note 15, at 397.

⁴⁰ DOLZER & SCHREUER, *supra* note 9, at 178.

⁴¹ UNCTAD, I INTERNATIONAL INVESTMENT AGREEMENTS: KEY ISSUES 25 (2004), available at <www.unctad.org/en/docs/iteiit200410_en.pdf>.

⁴² DUGAN, WALLACE, RUBINS, & SABAHI, *supra* note 15, at 491–92.

⁴³ *Id.* at 397; UNCTAD, *supra* note 40, at 25.

“treatment no less favourable” than that accorded to the “most-favoured nation,” in “like situations” or “in like circumstances.”⁴⁴

A MFN rule grants a claimant the right to benefit from substantive guarantees contained in third-country treaties.⁴⁵ Most MFN clauses are worded in a general way and typically just refer to the treatment of investments. Therefore, the question arises whether the effect of MFN clauses extends to the provisions on dispute settlement contained in the BITs.⁴⁶ In *Maffrezini v. Spain*, the tribunal held that the MFN clause was applicable to dispute resolution; thus, the claimant had the right to submit the dispute to arbitration without first accessing the Spanish courts.⁴⁷ Subsequent decisions have adopted the same solution.

Contrary to other BITs, Swiss BITs do not provide a list of matters to which the MFN clause is to apply. One commentator finds that, as a result, such clauses become ambiguous, because it is unclear from the text of the provision whether the state’s consent to arbitrate disputes, or the right to do so under particular conditions or according to specific rules, constitutes “treatment” for purposes of such clauses.⁴⁸

MFN clauses never apply to favourable treatment arising out of trade or economic unions such as the European Union:⁴⁹

If a Contracting Party accords special advantages to investors of any third state by virtue of an agreement establishing a free trade area, a customs union or a common market, or by virtue of an agreement on the avoidance of double taxation, it shall not be obliged to accord such advantages to investors of the other Contracting Party.

2. National Treatment Standard

⁴⁴ UNCTAD, *supra* note 40, at 25; Pia Acconci, *Most-Favoured Nation Treatment*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 365 (P. Muchlinski, F. Ortino, & C. Schreuer eds., 2008).

⁴⁵ DOLZER & SCHREUER, *supra* note 9, at 191.

⁴⁶ *Id.* at 254.

⁴⁷ *Maffrezini v. Spain*, Decision on Jurisdiction, January 25, 2000, 5 ICSID Rep. 396; DOLZER & SCHREUER, *supra* note 9, at 254.

⁴⁸ Noah Rubins, *MFN Clauses, Procedural Rights, and a Return to the Treaty Text*, in INVESTMENT TREATY ARBITRATION: A DEBATE AND DISCUSSION (T. Weiler ed., 2008), *cited in* DUGAN, WALLACE, RUBINS, & SABAHI, *supra* note 15, at 416.

⁴⁹ Message concernant l’approbation des accords de promotion et de protection réciproque des investissements avec le Turkménistan et Madagascar, January 14, 2009, FF 2009 751, *available at* <www.admin.ch/ch/f/ff/2009/751.pdf>.

The national treatment standard aims to provide a level playing-field for foreign investors, at least post-establishment.⁵⁰ In the case of the national treatment standard, the “treatment no less favourable” must be in comparison with the nationals and products of the host country. National treatment only protects foreign investors or investments that are in like circumstances to a national investor or investment.⁵¹

The majority of the jurisprudence to date on national treatment in investment treaties has preferred a relatively simple test of comparison with the most directly comparable local investors in the same business sector. If a difference of treatment is detected through such a process, then the tribunal will proceed to enquire whether the difference has a reasonable nexus to rational government policies, and whether it is discriminatory in its effect on foreign investors.⁵²

The Switzerland–Bangladesh BIT contains a combined national treatment/MFN clause which is found in many Swiss BITs and which provides as follows:

Each Contracting Party shall in its territory accord investments or returns of investors 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 investors of any third State, whichever is more favourable to the investor concerned.

Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards the management, maintenance, 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.⁵³

3. Fair and Equitable Treatment Standard

The meaning of “fair and equitable treatment” has been actively debated in investment protection law. Investors generally seek to apply the legal terms literally and broadly, while host states try to narrow the scope of protection as much as possible.

⁵⁰ CAMPBELL MCLACHLAN, LAURENCE SHORE, MATTHEW WEINIGER, & LOUKAS MISTELIS, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 251 (2007).

⁵¹ DUGAN, WALLACE, RUBINS, & SABAHI, *supra* note 15, at 400.

⁵² MCLACHLAN, SHORE, WEINIGER & MISTELIS, *supra* note 49, at 253–54.

⁵³ Switzerland–Bangladesh BIT, art. 4(2), (3), October 14, 2000, *available at* <www.admin.ch/ch/f/rs/i9/0.975.216.7.fr.pdf>.

Claimants usually advocate for the application of a “plain or ordinary meaning,” according to which, where a foreign investor benefits from fair and equitable treatment protection, a tribunal should assess whether the host state acted with respect to the investor and its investment in a manner that comports with the normal business understanding of fairness.⁵⁴ In *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, an ICSID tribunal made it clear that every investor must be able to expect that the host state will regulate in a stable, predictable, and transparent manner.⁵⁵

Investment agreements typically allow for a number of exceptions or qualifications. The most frequent among the express exceptions refer to matters relating to public order, health, and national security. Exceptions are usually recorded in “negative lists.” Positive lists, on the other hand, indicate the cases where the country allows for the relevant general standard of treatment.

The Switzerland–Azerbaijan BIT provides the following wording for fair and equitable treatment standard:

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. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of such investments.⁵⁶

Many other Swiss BITs contain similar language.⁵⁷

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⁵⁴ DUGAN, WALLACE, RUBINS, & SABAHI, *supra* note 15, at 504.

⁵⁵ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)(00/2), Award of May 29, 2003, 43 I.L.M. 133 (2004); Turner, Mangan & Baykitch, *supra* note 13, at 109.

⁵⁶ Switzerland–Azerbaijan BIT, February 23, 2006, art. 4(1), *available at* <www.admin.ch/ch/f/rs/i9/0.975.216.4.fr.pdf>.

⁵⁷ *See, e.g.*, the following BITs: Switzerland–Armenia, November 19, 1998, *available at* <www.admin.ch/ch/f/rs/i9/0.974.215.6.fr.pdf>; Switzerland–Botswana, June 26, 1998, *available at* <www.admin.ch/ch/f/rs/i9/0.975.219.4.fr.pdf>; Switzerland–Cambodia, October 12, 1996, *available at* <www.admin.ch/ch/f/rs/i9/0.975.222.3.fr.pdf>; Switzerland–Guatemala, September 9, 2002, *available at* <www.admin.ch/ch/f/rs/i9/0.975.237.6.fr.pdf>; Switzerland–Kuwait, October 31, 1998, *available at* <www.admin.ch/ch/f/rs/i9/0.975.247.6.fr.pdf>; Switzerland–Mozambique, November 29, 2002, *available at* <www.admin.ch/ch/f/rs/i9/0.975.257.4.fr.pdf>; Switzerland–Philippines, March 31, 1997, *available at* <www.admin.ch/ch/f/rs/i9/0.975.264.5.fr.pdf>.

Rules on the transfer of funds are found in most investment treaties because conditions for such transfer in and out of the host state are a key concern for the investor. The issues that arise are whether the right to transfer concerns only transfers outside the country, or also transfers inside the country; whether the right is limited to certain types of transfers; and in what type of currency the transfer can take place.⁵⁸

The Swiss BIT published by UNCTAD lists the types of payments covered by the transfer clause as follows:

Each Contracting Party in whose territory investments have been made by investors of the other Contracting Party shall grant those investors the free transfer of the amounts relating to these investments, in particular of:

- (a) returns;
- (b) repayment of loans;
- (c) amounts assigned to cover expenses relating to the management of the investment;
- (d) royalties and other payments deriving from rights enumerated in Article 1, paragraph (2), letters (c), (d) and (e) of this Agreement;
- (e) additional contributions of capital necessary for the maintenance or development of the investment;
- (f) the proceeds of the partial or total sale or liquidation of the investment, including possible increment values.

This list is usually non-exhaustive.⁵⁹ Both transfers of funds into the host state and out of the host state are covered by this provision.

F. DISPOSSESSION AND COMPENSATION

Investment protection is meant to protect the interests of foreign investors against host government actions unduly detrimental to their interests. Such actions fall into three broad categories:

⁵⁸ DOLZER & SCHREUER, *supra* note 9, at 192–93.

⁵⁹ *See* Message concernant les accords de promotion et de protection réciproque des investissements avec la Serbie-Monténégro, le Guyana, l’Azerbaïdjan, l’Arabie Saoudite et la Colombie, *supra* note 19.

- (1) measures that cause major disruptions to or even terminate investor operations in the host country, contrary to what could be legitimately expected or foreseen at the time of entry;
- (2) measures such as discriminatory taxation, disregard of intellectual property rights, or arbitrary refusal of licenses;
- (3) measures that affect investors in a disproportionate manner, compared to domestic enterprises, so that pertinent assurances are considered necessary.⁶⁰

Against these measures, BITs typically include provisions against taking of property or expropriation. Moreover, the non-discrimination standards (MFN, national treatment, fair and equitable treatment) provide support for discrimination claims.

The basic principles of customary international law on expropriation state that foreign-owned property may not be expropriated or subject to a measure tantamount to expropriation, unless four conditions are met: (i) the measure is for a public purpose; (ii) it is taken in accordance with applicable laws and due process; (iii) it is non-discriminatory; and (iv) full compensation is paid.⁶¹

The main types of government takings that lie within the concept of expropriation include:

- (a) the actual taking of property by direct means, such as for example nationalization (defined as the transfer of all foreign-owned assets in an industry or sector into national ownership) or expropriation (defined as the taking of specific assets);
- (b) indirect taking, where a measure that does not directly take property has the same impact by depriving the owner of the substantial benefits of the property. Such measures have been divided into creeping expropriation (the use of a series of measures in order to achieve a deprivation of the economic value of the investment) and regulatory expropriation (the measure is taken for regulatory purposes but has an impact on the economic value of the asset owned by the foreign investor sufficient to be deemed an expropriation).⁶²

⁶⁰ UNCTAD, *supra* note 40, at 31.

⁶¹ See UNCTAD Review, *supra* note 33, at 41.

⁶² *Id.* at 41–42; August Reinisch, *Expropriation*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 421–22 (P. Muchlinski, F. Ortino, & C. Schreuer eds., 2008).

Many cases have dealt with issues of expropriation. Tribunals are taking this issue seriously and are trying to develop a balanced approach between an emphasis on the effect, which tips the balance in favour of the investor, and on the purpose of the measure, which tips the balance in favour of the state. The regulatory intent behind the measure remains, however, a relevant criterion since a proportionality analysis would be impossible without taking this into account. To establish the expropriatory effect of a regulatory measure, the cases suggest a rigorous standard of significant economic deprivation of the value of the investor's assets, arising out of deliberate acts or omissions.⁶³ Equally, the investor's knowledge of the risks and rewards of the venture in question, given the actual business environment of the host country and the investor's experience of it, will be significant factors.⁶⁴

Clearly, expropriation provisions have evolved in light of the international law precedents arising in this context. The provisions contained in earlier BITs are far less sophisticated than that of more recent BITs. Compare, for instance, Article 6(2) of the Switzerland–Indonesian BIT, entered into force in 1976:

Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other 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, according to the rules of law, and provided that such provisions be made for effective and adequate compensation. The amount of the indemnity, which will be calculated at the time of the expropriation, of the nationalization or of the taking of ownership, will be set in the currency in which the authorized investment has been made.

with Article 4(1) of the Switzerland–Lebanon BIT:

Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other 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, on a non-discriminatory basis, and under due process of law, and provided that such provisions be made for effective and adequate

⁶³ For examples of cases involving omissions, *see* Reinisch, *supra* note 61, at 431–32.

⁶⁴ UNCTAD Review, *supra* note 33, at 46.

compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriatory action was taken or became public knowledge, whichever is earlier. The amount of compensation, interest included, shall be settled in the currency of the country of origin of the investment and paid without delay to the person entitled thereto without regard to its residence or domicile.

The difference between these two provisions is particularly important with respect to compensation. The earlier Switzerland–Indonesia BIT does not provide for a method of valuation. In contrast, the valuation method of the Switzerland–Lebanon BIT clearly points to market value without, however, referring to fair market value, which is the commonly used term.⁶⁵ Both provisions require the fixing of a date for the taking, which is particularly difficult in indirect expropriation cases.⁶⁶

G. PRINCIPLE OF SUBROGATION

The principle of subrogation applies to guarantees against non-commercial risks, granted to investors by their home country. When an investor receives compensation pursuant to such a guarantee after the loss of its investment, the state which granted compensation is subrogated to the rights of the investor against the host state:

Where one Contracting Party has granted any financial guarantee against non-commercial risks in regard to an investment by one of its investors in the territory of the other Contracting Party, the latter shall recognize the rights of the first Contracting Party by virtue of the principle of subrogation to the rights of the investor when payment has been made under this guarantee by the first Contracting Party.

H. DISPUTE RESOLUTION MECHANISMS

In the past, disputes between states and private parties were mostly settled either before national courts or through ad hoc arbitration. Investors had to request their government's support where a BIT had been infringed by a host state, as no direct claim

⁶⁵ See Switzerland–India BIT, April 4, 1997, available at <www.admin.ch/ch/f/rs/c0_975_242_3.html>.

⁶⁶ DUGAN, WALLACE, RUBINS, & SABAHI, *supra* note 15, at 574.

against the host state was available to the investor (under so-called horizontal clauses, as opposed to diagonal clauses, dispute resolution clauses between host states and foreign investors). As a result, individual claimants had very little chance of success if they wished to bring claims against states or state entities.⁶⁷

Matters have changed significantly with the adoption of the ICSID Convention in 1965. Through the system created by the ICSID Convention, private investors can now escape the traditional scheme of diplomatic protection, avoid national jurisdictions, and act directly against a state where an investment was made.⁶⁸ The following paragraphs will focus on diagonal dispute settlement mechanisms.

Swiss BITs contain a wide variety of dispute resolution clauses.⁶⁹ Swiss BITs signed between 1961 and 1978 only contained a horizontal clause. The first diagonal clause was inserted in 1981 in the Switzerland–Sri Lanka BIT. With the exception of the Switzerland–Morocco BIT, signed in 1985, and the Switzerland–Thailand BIT, signed in 1997, since 1981 all Swiss BITs contain one horizontal clause and one diagonal clause.⁷⁰ Earlier BITs which only contained a horizontal clause are being renegotiated, but the process is slow.

Diagonal clauses can translate into a wide variety of dispute settlement mechanisms. Through BITs, states can make a valid offer to consent to ICSID arbitration under Article 25 of the ICSID Convention. However, BITs can also contemplate domestic courts, ICC, UNCITRAL, or ad hoc arbitration as alternatives to ICSID dispute settlement. In practice, BITs frequently offer three options: ICSID, institutional, or ad hoc arbitration. The claimant can choose to which institution he wishes to submit its dispute at the time the dispute arises. When the claimant has a choice between filing a claim with the courts of the host state or submitting the dispute to arbitration, the provision that grants this choice is called a “fork-in-the-road” clause.⁷¹ Sometimes, BITs require that local remedies be exhausted before arbitration proceedings can be initiated.

1. ICSID Arbitration

⁶⁷ August Reinisch & Loretta Malintoppi, *Methods of Dispute Resolution*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 692 (P. Muchlinski, F. Ortino, & C. Schreuer eds., 2008).

⁶⁸ *Id.*

⁶⁹ For a detailed survey of such clauses, see Jean-Christophe Liebeskind, *State–Investor Dispute Settlement Clauses in Swiss Bilateral Investment Treaties*, 20 ASA BULL. 27–57 (No. 1, 2002).

⁷⁰ *Id.* at 27.

⁷¹ DUGAN, WALLACE, RUBINS, & SABAHI, *supra* note 15 at 368.

Pursuant to Article 26 of the ICSID Convention, once a state has consented to ICSID arbitration, such consent, in principle, excludes any other remedy, including the resort to domestic courts. As between investors and host states, however, participation in treaties does not establish jurisdiction. In other words, ICSID arbitration is not compulsory for states and investors from other states merely because both the investor and the host state are contracting parties to the Convention. Arbitration becomes binding only upon the written consent of the parties, which can be included in the investment contract between the investor and the host state or in a BIT.

The ICSID Centre provides facilities for the arbitration of investment disputes which include lists of possible arbitrators, screening and registering of arbitration requests, assisting in the constitution of arbitral tribunals and the conduct of proceedings, adopting rules and regulations, and drafting model clauses for investment agreements.

ICSID arbitration is designed to prevent the risk that one party having previously consented to arbitration obstructs the arbitration proceedings by its refusal to cooperate. With this overriding purpose in mind, the Convention provides that consent, once given, may not be unilaterally withdrawn, that arbitral tribunals have the exclusive competence to decide on their own jurisdiction, and that awards are binding and enforceable, and may not be disregarded or challenged on the ground of nullity except under the Convention's own annulment procedure.⁷²

Not all investment disputes may be brought before ICSID arbitration panels. Rather, access to ICSID arbitration depends upon the fulfilment of the jurisdictional requirements provided for in Article 25 of the Convention. According to Article 25 of the Convention, the subject matter jurisdiction of the Centre is limited to "legal disputes" arising "directly" out of an "investment."⁷³

These objective jurisdictional requirements, however, cannot be replaced by an agreement between the parties. In other words, even if parties to an investment agreement expressly gave their consent to ICSID arbitration, any arbitral panel would still have to demonstrate that the dispute arose directly from an investment, was of a legal nature, and that both the home state of the investor and the host state of the investment were contracting parties to the ICSID Convention.

Because of this limit to the jurisdiction of ICSID, the Additional Facility was created. The Additional Facility grants access to the Centre's arbitration even in situations where the

⁷² Reinisch & Malintoppi, *supra* note 66, at 699.

⁷³ *Id.* at 700.

ICSID Convention's objective jurisdictional requirements are not wholly met. Additional Facility Rules open ICSID arbitrations to disputes (i) where only one side is either a party to the ICSID Convention or a national of a party to the ICSID Convention; and (ii) which do not arise directly out of any investment, provided that at least one side is either a party to the ICSID Convention or a national of a party to the ICSID Convention. In addition, Additional Facility Rules provide for fact-finding proceedings between a state and a national of another state.

2. Institutional Arbitration

The International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the American Arbitration Association (AAA) all administer international arbitrations and can be chosen, if such choice is offered in the BIT, to administer investment arbitrations. Unlike as regards ICSID arbitration, the dispute does not need to arise out of investment per se in order to be submitted to ICC, LCIA, or AAA arbitration.

Like ICSID, these arbitral institutions do not arbitrate disputes themselves but supervise and monitor the arbitral procedures conducted under their auspices.

3. Permanent Court of Arbitration

The Permanent Court of Arbitration (PCA) is frequently chosen as appointing authority in dispute settlement provisions of BITs and may administer investment arbitrations under the UNCITRAL Rules. The PCA is not a judicial body, but holds a list of potential arbitrators and institutions administering arbitration, conciliation, and fact-finding. Each contracting state has the right to nominate four persons to the list of "Members of the Court" from which arbitrators are chosen in case of disputes between states.⁷⁴

4. Ad Hoc Arbitration

Ad hoc arbitration represents a potential fall-back option if ICSID or Additional Facility arbitration is not available, or for disputes of a "mixed" character, for example

⁷⁴ *Id.* at.709.

between a private investor and another private entity. More generally, ad hoc arbitration is desirable when claimants do not wish to resort to institutional arbitration and apply a fixed set of rules, but prefer to adopt procedural rules tailored to their specific needs.⁷⁵

5. *Dispute Resolution Mechanisms in Swiss BITs*

All Swiss BITs provide for a consultation period. It can vary between three and eighteen months, before arbitration proceedings or a procedure before national courts are commenced.⁷⁶

Thereafter, most Swiss BITs offer alternative dispute resolution procedures. Many include “fork-in-the-road” provisions, granting a choice to the claimant between bringing its claims to a state court or before an arbitral tribunal. If they choose an arbitral tribunal, the parties can often choose to have their arbitration proceedings administered by several different institutions, such as ICSID, ICC, or an ad hoc tribunal.⁷⁷

Article 7 of the Switzerland–Lebanon BIT illustrates this variety of choices:

For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party, consultations will take place between the parties concerned with a view to solving the case amicably.

If these consultations do not result in a solution within six months from the date of the written request for consultations, the investor may submit the dispute, at his choice, for settlement to:

- (a) the competent court of the Contracting Party in the territory of which the investment has been made; or
- (b) the International Centre for Settlement of Disputes (ICSID) instituted by the Convention on the Settlement of Disputes between States and Nationals of other States, opened for signature at Washington, on March 18, 1965, once both Contracting Parties have become members of this Convention; or
- (c) an ad hoc arbitral tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

⁷⁵ *Id.* at 710–11.

⁷⁶ Liebeskind, *supra* note 68, at 39.

⁷⁷ BITs entered into force prior to the creation of the Additional Facility provide that ICSID jurisdiction will be available only if the parties are parties to the ICSID Convention.

The Contracting Party which is a party to the dispute shall, at no time whatsoever during the procedures involving investment disputes, assert as a defense its immunity or the fact that the investor has received compensation under an insurance contract covering the whole or part of the incurred damage or loss.

Neither Contracting Party shall pursue through diplomatic channels a dispute submitted to international arbitration unless the other Contracting Party does not abide by and comply with the arbitral award.

The arbitral award shall be final and binding for the parties to the dispute and shall be executed according to national law.

This provision provides a fork-in-the-road: the choice between a domestic tribunal and arbitration. Recourse to a domestic tribunal, therefore, is only an option. On the contrary, some BITs, such as the one with Uruguay, make it compulsory to bring the matter to a domestic court before commencing an arbitration proceeding.⁷⁸

In the case of the Switzerland–Lebanon BIT, ICSID arbitration is reserved to the situation where both states are party to the ICSID Convention. In contrast, in BITs concluded with a state party not yet party to the ICSID Convention, Switzerland often inserted a conditional or “pre-ICSID” clause enabling the investor and the host state to submit their disputes to ICSID from the day the state becomes a member of the Convention.⁷⁹ Thereafter, most clauses provide that the parties may submit their disputes to ICSID, although some BITs make it an obligation.

6. *Challenges of Awards*

ICSID awards are subject only to the ICSID annulment procedure and cannot be challenged before local courts. In contrast, non-ICSID investment treaty arbitration awards can be challenged before local courts at the place of arbitration.

In Switzerland, four challenges have been brought to date before the Swiss Supreme Court.⁸⁰ The Supreme Court admitted the challenges, but consistent with its jurisprudence in

⁷⁸ Switzerland–Uruguay BIT, October 7, 1988, art. 10, *available at* www.admin.ch/ch/f/rs/c0_975_277_6.html.

⁷⁹ Liebeskind, *supra* note 68, at 29; *see, e.g.*, Switzerland–Bolivia BIT, November 6, 1987.

⁸⁰ For a detailed description of these cases, *see* Matthias Scherer, Veijo Heiskanen, & Sam Moss, *Domestic Review of Investment Treaty Arbitration: The Swiss Experience*, 27 ASA BULL. 256–79 (No. 2, 2009).

non-BIT cases, confirmed its restrictive approach to setting aside proceedings in the context of arbitrations. As pointed out by some authors, “the decisions also confirm Switzerland’s standing as an arbitration-friendly jurisdiction for international investment arbitration.”⁸¹

I. UMBRELLA CLAUSE⁸²

Umbrella clauses are found in slightly less than half of the Swiss BITs. Sometimes also called “observance of undertakings,” “sanctity of contract,” “pacta sunt servanda,” or “mirror effect” clauses, umbrella clauses are provisions in investment protection treaties that guarantee the observation of obligations assumed by the host state vis-à-vis the investor.⁸³

The interpretation of umbrella clauses, and in particular whether such clauses “elevate” breaches of contract to the level of breaches of international treaty law, has been at the centre of several investment arbitrations.⁸⁴ There is no general consensus at this stage concerning the interpretation of umbrella clauses. Two camps have emerged: the first views such clauses restrictively, limiting their application to sovereign acts and refusing to extend treaty protection to “mere” contractual breaches. The second camp insists that umbrella clauses “mean what they say,” elevating contractual breaches into treaty breaches.⁸⁵

In the Swiss BIT published in the UNCTAD compendium, the umbrella clause is separated from the other substantive provisions, and is placed near the end of the treaty, after the dispute resolution and subrogation clause. Under the title “other commitments,” Article 10(2) provides as follows:

Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.

⁸¹ *Id.*

⁸² For a detailed description of umbrella clauses found in Swiss BITs, see Schmid, *supra* note 1.

⁸³ Jean-Christophe Honlet & Guillaume Borg, *The Decision of the ICSID Ad Hoc Committee in CMS v. Argentina Regarding the Conditions of Application of an Umbrella Clause: SGS v. Philippines Revisited*, 7 L. & PRACT. INT’L CT. & TRIB. 1–32 (2008).

⁸⁴ See *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/91/13, Decision on Jurisdiction, August 6, 2003, 8 ICSID Rep. 383, 42 I.L.M. 1290 (2003); *Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, January 29, 2004, 8 ICSID Rep. 515; *Salini Costruttori S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, November 29, 2004.

⁸⁵ DUGAN, WALLACE, RUBINS, & SABAHI, *supra* note 15, at 544.

However, this provision has not been adopted in all Swiss BITs. Notably, the Switzerland–Pakistan BIT uses the following language:

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.

This provision is somewhat ambiguous. As a result, this led to a dispute in *Société Générale de Surveillance S.A. (SGS) v. Islamic Republic of Pakistan*, where the arbitral tribunal restrictively interpreted the umbrella clause and refused to elevate the alleged breach of contract by the state to an alleged breach of the BIT.⁸⁶

Following this decision, the Swiss government addressed a letter to ICSID stating that it was:

alarmed about the very narrow interpretation given to the meaning of [the umbrella clause] by the Tribunal, which not only runs counter to the intention of Switzerland when concluding the Treaty but is quite evidently neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments on such provisions. ... With regard to the meaning behind provisions such as Article 11 the following can be said: ... 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 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.⁸⁷

⁸⁶ Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, *supra* note 82.

⁸⁷ Note on the interpretation of art. 11 of the Switzerland–Pakistan BIT in the light of the Decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No. ARB/01/13 Société Générale de Surveillance SA v. Islamic Republic of Pakistan, attached to the letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy Secretary-General dated October 1, 2003, published in 19 MEALEY'S INT'L ARB. REP. E3 (Feb.) (2004), cited in Emmanuel Gaillard, *Investment Treaty Arbitration and Jurisdiction over Contract Claims: The SGS Cases Considered*, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (T. Weiler ed., 2005).

At the same time as it brought a claim against Pakistan, SGS also brought a claim against the Philippines based on the Switzerland–Philippines BIT.⁸⁸ Article 10(2) of the Swiss–Philippines BIT follows the language of the Swiss BIT in the UNCTAD compendium:

Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.

In *Société Générale de Surveillance S.A. (SGS) v. Republic of the Philippines*, the arbitral tribunal distanced itself from the interpretation of the clause in *SGS v. Pakistan*. Although it noted that the language of the Switzerland–Pakistan umbrella clause differs from that of the Switzerland–Philippines umbrella clause, it found the decision unconvincing and highly restrictive. It observed that the umbrella clause used the mandatory term “shall” in the same way as substantive articles of the treaty and that the term “any obligation” was capable of applying to obligations arising under national law, such as obligations arising under a contract. Consequently, the tribunal held that the umbrella clause:

makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of extent or content of such obligations into an issue of international law.⁸⁹

The extent and content of the obligations, therefore, remained an issue to be dealt with according to the law applicable to the investment agreement. Consequently, the tribunal required that if the investment agreement vested exclusive jurisdiction over disputes arising under its terms in another tribunal, whether a domestic court or an arbitral tribunal, then this tribunal would have primary jurisdiction over the tribunal competent pursuant to the BIT.⁹⁰

IV. CONCLUSION

The number of BITs entered into by Switzerland puts it in third place as the state with the most BITs, behind Germany (147) and the Netherlands (105), but ahead of France (103)

⁸⁸ *Société Générale de Surveillance S.A v. Philippines*, *supra* note 82; *see also* EMMANUEL GAILLARD, *I LA JURISPRUDENCE DU CIRDI* 865 (2004).

⁸⁹ *Société Générale de Surveillance S.A v. Philippines*, *supra* note 82, at 128.

⁹⁰ *Id.* at 128, 136–55.

and Great Britain (102).⁹¹ BITs entered into between Switzerland and foreign countries afford to investors all the protections they can expect from such treaties.

If the parties choose an arbitral tribunal seated in Switzerland, a challenge to the award will have to be brought before the Swiss Supreme Court.⁹² The Swiss Supreme Court has held that it is competent to review challenges against arbitral awards rendered in a dispute between an investor and a host state on the basis of a BIT.⁹³ Moreover, the Swiss Supreme Court has always had a strong influence on the evolution of public international law, and will hopefully continue to do so when confronted with an issue of international investment law.⁹⁴

Consequently, with the help of its many BITs entered into with foreign countries, Switzerland seems certain to remain an important player in the field of international investment law and arbitration.

APPENDIX

[take in table from separate file]

⁹¹ For a list of BITs signed by member states of the ICSID Convention, *see* <<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=SearchRH&actionVal=SearchSite&SearchItem=treaties>>.

⁹² *See* Swiss Private International Law, art. 176(1), 191(1) and Swiss Supreme Court Statute, art. 77.

⁹³ Swiss Supreme Court Decision (ATF) 1P.113/2000; ATF 4P.200/2001; ATF 4P.98/2005; ATF 4P.114/2006.

⁹⁴ The Swiss Supreme Court has been at the forefront of the international case law in the context of state and international organizations' immunities. *See* ATF 44 I 49; ATF 106 Ia 42; ATF 124 III 382; ATF 113 Ia 172; ATF 113 IB 257; ATF 118 Ib 562; ATF 130 III 136.