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1 Treaties: Current Status and Future Developments

1.1 What bilateral and multilateral treaties and trade agreements has your jurisdiction ratified?

Since the 1960s, Switzerland has concluded more than 120 bilateral investment treaties (BITs), most of which are currently in force. The updated list is available on the website of the Swiss State Secretariat for Economic Affairs (SECO). According to the United Nations Conference on Trade and Development (UNCTAD), Switzerland has the second-highest number of BITs currently in force, after Germany.

Switzerland has ratified the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) and the Energy Charter Treaty (ECT). It has been a member of the Organisation for Economic Co-operation and Development (OECD) since 1960 as well as of the World Trade Organization (WTO) since 1995.

1.2 What bilateral and multilateral treaties and trade agreements has your jurisdiction signed and not yet ratified? Why have they not yet been ratified?

Switzerland has ratified all multilateral treaties it has signed.

A (new) BIT between Switzerland and Indonesia was signed on 24 May 2022 and is still awaiting ratification; the consultation process took place from June to September 2022. The previous BIT between Switzerland and Indonesia had been unilaterally denounced by Indonesia in 2016.

A few other BITs signed by Switzerland have never entered into force, such as the one with Brazil that, like other BITs signed by Brazil with various countries, has not been approved by the Brazilian Parliament.

1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

There is no official Swiss model BIT. However, the SECO, which negotiates international investment agreements, maintains an internal working document for use in negotiations which is regularly updated. The SECO does not officially publish this document.

1.4 Does your jurisdiction publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

Switzerland publishes diplomatic notes, including regarding investment treaties.

1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

Investment treaties must be submitted to the Swiss Parliament for approval. In the context of the approval process, the Swiss Federal Council provides explanatory notes to the Swiss Parliament, which are public. Such notes provide guidance as to the intended meaning of the treaty provisions. Between 1963 and 2004, the Swiss Federal Council had the authority to conclude BITs without approval of the Parliament and, therefore, there are no public explanatory notes available for BITs concluded during that period.

2 Legal Frameworks

2.1 Is your jurisdiction a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Switzerland is a party to all three conventions.

2.2 Does your jurisdiction also have an investment law? If so, what are its key substantive and dispute resolution provisions?

To date, Switzerland does not have an investment law.

2.3 Does your jurisdiction require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Switzerland is attractive to foreign direct investments, adopting a liberal approach. To date, there is no general notification duty or approval requirement for foreign investments in Switzerland. However, prior government approval of foreign

investments is required under certain conditions in certain industries and sectors, such as banking and real estate. In addition, certain activities such as aviation, radio and television, telecommunications or nuclear energy are subject to specific licence requirements for foreign investors.

On 18 May 2022, upon adoption of a corresponding motion by the Parliament, the Swiss Federal Council initiated consultation on a new law to screen foreign direct investment and published a preliminary draft together with an explanatory report. The consultation period ran until 9 September 2022. The purpose of the draft law is to prevent acquisitions of Swiss companies by foreign investors that endanger or threaten public order or security. The draft law provides that certain specific categories of takeovers are subject to approval; non-approval decisions may be appealed to the Federal Administrative Court. On 10 May 2023, the Swiss Federal Council took note of the results of the consultation, and noted that the draft law was widely criticised, notably because it may reduce Switzerland's attractiveness as a business location. The Swiss Federal Council has therefore instructed the Federal Department of Economic Affairs, Education and Research to provide a new draft law limited to investments that are most critical to security by the end of 2023.

3 Recent Significant Changes and Discussions

3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

As a neutral country and arbitration-friendly jurisdiction, Switzerland is often chosen as the seat of arbitration in investment treaty cases. Awards rendered in arbitrations seated in Switzerland may be challenged before the Swiss Federal Supreme Court. The most recent key cases include the following.

In a decision dated 25 March 2020 (4A_306/2019, published in the official reports under DTF 146 III 142) in the *Clorox v. Venezuela* case, the Swiss Federal Supreme Court annulled an investment treaty award for the first time. The case related to a treaty claim against Venezuela based on the Spain-Venezuela BIT. The arbitral tribunal had considered that the claimant's shareholding did not qualify as investment under the Spain-Venezuela BIT, as the claimant did not actively invest in Venezuela but obtained the actions of the Venezuelan entity in the context of a restructuring "without transfer of value" in consideration. The Swiss Federal Supreme Court found that the Spain-Venezuela BIT does not contain any denial of benefit clause or origin of capital clause and is broadly formulated, and that, therefore, only the nationality of the investment holder was relevant for the purpose of jurisdiction. The Swiss Federal Supreme Court left the question of treaty abuse open, which was also raised by Venezuela in the context of the arbitration, and remitted the award to the arbitral tribunal for a decision on this and further possible objections to jurisdiction.

The *Clorox v. Venezuela* saga was continued in a decision dated 20 May 2022 (4A_398/2021, published in the official reports under DTF 148 III 330), which gives helpful guidance on nationality planning and treaty abuse. Following the remittance of the award, the arbitral tribunal denied that the restructuring by which the shares of the Venezuelan entity were transferred to the claimant qualified as abusive treaty shopping. The Federal Supreme Court noted that drawing the line between legitimate nationality planning and treaty abuse is not an easy task. According to the Court, the temporal element plays a crucial role in drawing this distinction. In principle, an investor should be denied the protection of an investment treaty if it entered into a transaction for the purpose of acquiring nationality at a time when the dispute giving rise to the arbitration proceedings was foreseeable, and if that transaction was to be regarded in good faith as having been entered into with a view to that dispute. Since abuse of rights can only be admitted in exceptional cases, the criterion of foreseeability of the dispute must be interpreted restrictively. The party claiming an abuse of rights (i.e. the respondent state) must prove that the dispute was foreseeable at the time of the restructuring. If it succeeds in doing so, it is presumed that the restructuring was abusive. The investor may, however, rebut this presumption by proving that the restructuring has in fact been carried out mainly for reasons other than claiming the protection of the BIT. In the decision 4A_398/2021, the Court found that the dispute was not foreseeable at the time of the restructuring of the investment.

In a decision dated 24 August 2022 (4A_492/2021, published in the official reports under DTF 149 III 131) in the case *Yukos Capital v. Russia*, the Swiss Federal Supreme Court upheld a USD 5 billion award in favour of Yukos Capital under the ECT, and addressed several key issues. The Court clarified that the filing of new legal opinions, commentaries, or case law is admissible in setting-aside proceedings if they reflect the state of the law as of the award date. However, new legal developments are inadmissible, as the Court reviews the award based on the law at the time of the award. In terms of the provisional application of the ECT, the Court noted that the applicant must prove incompatibility with domestic law, and that the assessment is based on the law when the arbitration commenced. The Court found that the applicant had failed to demonstrate that the ECT's provisional application was incompatible with Russian law in this case. The Court also upheld the tribunal's finding that it was sufficient for a loan to be granted in favour of a company active in the energy sector (here Yukos Oil) to qualify as a protected investment under the ECT, without the need to be assigned to the performance of an economic activity in the energy sector. The Court also dismissed Russia's claim of an abuse of rights by Yukos Capital, noting that investments for tax reasons were not against the purpose of the ECT. It also rejected Russia's argument pertaining to the illegality of the investment, in the absence of an express compliance clause in the ECT. Lastly, the Court also rejected Russia's argument that the award violated public policy by overcompensating Yukos Capital. The Court upheld the arbitral tribunal's decision ordering the payment of damages equivalent to the principal and interest due under the loan.

Other recent key decisions include those in the case *Deutsche Telekom v. India* dated 11 December 2018 (4A_65/2018), in which the Swiss Federal Supreme Court found that the Germany-India BIT also covers indirect investments, as long as the invested assets are located in the host state, and 8 March 2023 (4A 184/2022), in which the Court declared a request for review of the award inadmissible and belated.

3.2 Has your jurisdiction indicated its policy with regard to investor-state arbitration?

Since 1981, Swiss BITs usually contain investor-state dispute resolution clauses, typically *ad hoc* or ICSID arbitration. The principle of investor-state arbitration was not put into question in the latest report published by an internal working group of the SECO on the revision of certain provisions used for the negotiation of BITs. Switzerland's latest BIT to date, i.e. the BIT with Indonesia signed on 24 May 2022, contains a comprehensive dispute resolution clause in case of investor-state disputes, which provides that the investor may choose between state courts and arbitration (ICSID, *ad hoc* or, in case of agreement between the parties, any other institution). The fact that the latest BIT signed by Switzerland contains the possibility

of investor-state arbitration shows that Switzerland continues to consider arbitration as an appropriate means for the resolution of investment disputes.

3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc., addressed or intended to be addressed in your jurisdiction's treaties?

In 2012, the work carried out by a SECO internal working group resulted in the development of new provisions aiming at strengthening consistency with sustainable development objectives. References to sustainable development, anti-corruption, human rights as well as corporate social responsibility standards have been added in the preamble. One provision deals with the right of states to take measures in the public interest, including in relation to health, safety, labour and the environment. Another provision states that it is not appropriate to lower the level of protection provided for in these areas at national level for the sole purpose of encouraging investment. These new provisions are proposed in newer BITs negotiated by Switzerland. The Georgia-Switzerland BIT, signed on 3 June 2014 and in force since 17 April 2015, is the first Swiss BIT to include these new dispositions. The preamble of the newest Swiss BIT, i.e. the Indonesia-Switzerland BIT signed on 24 May 2022, contains references to sustainable development as well as health, safety, labour and the environment, and the treaty includes provisions dealing with corporate social responsibility and anti-corruption; it also provides for the right of the contracting parties to regulate in their respective territories in order to achieve legitimate public policy objectives, such as, among others, relating to the environment.

Switzerland has ratified the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention). Since 2014, Switzerland endeavours to include in its BITs a provision providing for the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, in force since 1 April 2014. The Georgia-Switzerland BIT, signed on 3 June 2014, contains such a clause. The Indonesia-Switzerland BIT contains a disposition regarding the transparency of arbitral proceedings, but it does not provide for the application of the UNCITRAL Rules on Transparency.

Swiss BITs usually contain a most favoured nation (MFN) clause. Newer Swiss BITs, such as, for instance, the Switzerland-Tunisia BIT, explicitly state that the MFN clause does not include mechanisms for the settlement of investment disputes contained in other international agreements concluded by the contracting parties.

In Swiss BITs, the definition of "investor" usually includes natural persons who are nationals of a contracting party, legal entities constituted or otherwise duly organised under the law of a contracting party, as well as legal entities not established under the law of the relevant contracting party but effectively controlled by nationals of that contracting party or by legal entities constituted or otherwise duly organised under the law of that contracting party. Recent BITs require that legal entities have their seat, together with substantial business activities, in the territory of the relevant contracting party. The definition of "investment" usually expressly includes shares, parts or any other kind of participation in companies. The newest Indonesia-Switzerland BIT expressly mentions indirect investments.

3.4 Has your jurisdiction given notice to terminate any BITs or similar agreements? Which? Why?

Switzerland has not given notice to terminate any of its current BITs or investment agreements.

Swiss BITs with Bolivia, Ecuador, India, Indonesia, South Africa and Malta were unilaterally denounced by those states in 2019, 2018, 2017, 2016, 2014 and 2005, respectively.

4 Case Trends

4.1 What investor-state cases, if any, has your jurisdiction been involved in?

So far, no investment arbitration decision has been rendered against Switzerland. There has only been one known investment treaty claim against Switzerland to date (ICSID Case No. ARB/20/29), in a claim based on the Hungary-Switzerland BIT. The proceedings were initiated by the Human Rights Defenders Inc. (a company organised under the laws of the Seychelles), as assignee of Mr. Natale Palazzo, Mr. Rodolfo Scodeller and Mr. Antonio Basile. On 18 January 2022, the tribunal, however, issued an order discontinuing the proceedings due to non-payment of the first advance (*cf.* ICSID Administrative and Financial Regulation 14(3)(d)).

To date, more than 45 known cases have been initiated by Swiss investors under BITs or other treaties concluded by Switzerland.

4.2 What attitude has your jurisdiction taken towards enforcement of awards made against it?

To date, there have been no known treaty awards rendered against Switzerland.

4.3 In relation to ICSID cases, has your jurisdiction sought annulment proceedings? If so, on what grounds?

As there have been no ICSID awards rendered against Switzerland, there have not been any annulment proceedings so far.

4.4 Has there been any satellite litigation arising, whether in relation to the substantive claims or upon enforcement?

As there has only been one known investment treaty claim against Switzerland, which has in the meantime been discontinued due to non-payment of the first advance, there is no satellite litigation.

4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

To date, there have been no known treaty awards rendered against Switzerland. Thus, common trends cannot be identified.

5 Funding

5.1 Does your jurisdiction allow for the funding of investor-state claims?

In Switzerland, there are no specific laws governing third-party funding. Nevertheless, in a decision dated 10 December 2004 (DTF 131 I 223), the Swiss Federal Supreme Court confirmed that third-party funding is permissible. Although this decision was rendered in the context of state litigation, it also applies to the funding of arbitration claims. In the context of a recent revision project of the Swiss Civil Procedure Code (CPC), which

is expected to enter into force in January 2025, the draft of the revised CPC requires the Swiss Federal Council to provide the public with adequate information regarding funding possibilities for litigation claims, which will further promote third-party funding in Switzerland.

5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

There is no known case law of the Swiss Federal Supreme Court regarding third-party funding in the context of investment arbitration. However, there are two key decisions that are regarded to be applicable to arbitration proceedings as well. Firstly, the Swiss Federal Supreme Court held that a general ban of third-party funding would violate the freedom of commerce guaranteed in the Swiss Constitution (DTF 131 I 223). Secondly, the Court stated that lawyers have a duty to advise their clients of the possibility of third-party funding (Decision 2C_814/2014 of 22 January 2015, consid. 4.3.1).

5.3 Is there much litigation/arbitration funding within your jurisdiction?

The first funders entered the market around the year 2000. Since then, third-party funding in general has been on the rise, especially over the last few years, with several international third-party funders starting operations in Switzerland. There are, however, no official statistics and the Swiss market remains comparatively small.

6 The Relationship Between International Tribunals and Domestic Courts

6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

In view of the principle of *res judicata*, arbitral tribunals cannot review judgments rendered by domestic courts of competent jurisdiction. According to the Swiss Federal Supreme Court (*cf.* for instance DTF 140 III 278), an award issued in an arbitration seated in Switzerland violating the principle of *res judicata* is contrary to procedural public policy, and may be challenged on the basis of Article 190(2)(e) of the Swiss Private International Law Act (PILA). In Switzerland, only state authorities may conduct criminal investigations and prosecute criminal offences, and such matters cannot therefore be decided by arbitral tribunals.

An investment treaty claim may, however, relate to alleged violation of treaty standards of protection by the host state in the context of such criminal investigations or judgments of domestic courts. The arbitral tribunal seized with such a claim has the authority to decide whether the host state has violated its international obligations with regard to such criminal investigations or judgments.

6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

Chapter 12 of the PILA (which is the Swiss *lex arbitri* for international arbitration proceedings) grants national courts jurisdiction to deal with selected issues arising out of arbitration.

National courts may be called upon to assist with the enforcement of interim and conservatory measures ordered by an arbitral tribunal (Article 183(2) PILA) or the taking of evidence (Article 184(2) PILA). Since 1 January 2021, a new provision (Article 185a PILA) grants direct access to and assistance from Swiss state courts to arbitral tribunals and parties to arbitrations seated outside of Switzerland with regard to the enforcement of interim and conservatory measures and the taking of evidence.

Unless the parties have agreed otherwise, national courts may also be called upon in the context of the selection or challenge of an arbitrator (Articles 179 *et seqq.* PILA).

Article 185 of the PILA contains a (subsidiary) general clause granting state courts at the seat of the arbitration jurisdiction for assistance that cannot already be requested under other provisions (i.e. the provisions mentioned above).

6.3 What legislation governs the enforcement of arbitration proceedings?

Chapter 12 of the PILA governs the recognition and enforcement of arbitration agreements and arbitral awards. Article 194 of the PILA refers to the New York Convention for the recognition and enforcement of foreign arbitral awards; Switzerland is indeed a party to the New York Convention and upholds its obligations thereunder. Switzerland is an arbitration-friendly jurisdiction and Swiss courts enforce and give effect to arbitration agreements.

6.4 To what extent are there laws providing for arbitrator immunity?

There are no specific laws in Switzerland providing for arbitrator immunity. According to legal doctrine, arbitrators can be held liable for breaches of their duty of care. As arbitrators need to be able to issue independent decisions and should not be restricted by fear of liability, it is widely accepted that liability should be limited to gross negligence or wilful misconduct (this is the solution retained in Article 45(1) of the Swiss Rules). Some authors even advocate full immunity with regard to an arbitrator's judicial functions.

6.5 Are there any limits to the parties' autonomy to select arbitrators?

Parties are in general free in their selection of arbitrators under the PILA. The only limitation is that arbitrators must be independent and impartial, otherwise they may be challenged (Article 180(1)(c) PILA).

6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

According to Article 179 of the PILA, the domestic courts at the seat of the arbitration may be called upon in order to appoint the arbitrators if the parties have not agreed on a method for selecting arbitrators or if the chosen method has failed.

6.7 Can a domestic court intervene in the selection of arbitrators?

Article 179 of the PILA allows a domestic court to be seized in the selection of arbitrators if there is no agreement regarding the selection process or if the process has failed. The domestic courts, however, cannot intervene without being called upon.

6.8 Are there any other key developments in the past year in your jurisdiction related to the relationship between international arbitration tribunals and domestic courts?

On 1 January 2021, a revised version of Chapter 12 of the PILA entered into force. The revision aimed at incorporating key elements of case law into law and clarifying a number of provisions. Some of these amendments relate to the relationship between arbitral tribunals and domestic courts. There have been amendments regarding the involvement of national courts in the selection and challenge of arbitrators (Articles 179 and 180 *et seqq.* PILA), as well as in the enforcement of interim and conservatory measures (Article 183 PILA) and the taking of evidence (Article 184 PILA). The new Article 185a of the PILA provides that arbitral tribunals seated abroad or parties to foreign arbitration proceedings may apply for the assistance of the Swiss state courts at the place where interim or conservatory measures are to be executed or evidence is to be taken.

7 Recognition and Enforcement

7.1 What are the legal requirements of an award for enforcement purposes?

Awards (both domestic and international) rendered by arbitral tribunals seated in Switzerland are final and directly enforceable in Switzerland from the date they were notified to the parties.

Article 194 of the PILA refers to the New York Convention for the recognition and enforcement of foreign arbitral awards, i.e. awards rendered by arbitral tribunals seated outside of Switzerland. Pursuant to Article IV(1) of the New York Convention, a party applying for recognition and enforcement shall submit (a) the duly authenticated original award or a duly certified copy thereof, and (b) the original arbitration agreement or a duly certified copy thereof. Pursuant to Article IV(2) of the New York Convention, if the award or arbitration agreement is not made in an official language of the country in which the award is relied upon, a translation certified by an official or sworn translator or by a diplomatic or consular agent shall be provided. English is not an official language of Switzerland. However, Swiss courts seized with requests for the enforcement of foreign awards often dispense with the translation of the award or arbitration agreement when these documents are in English.

7.2 On what bases may a party resist recognition and enforcement of an award?

Swiss awards (both domestic and international) may be challenged before the Swiss Federal Supreme Court on restrictive grounds. However, a challenge to the award does not automatically have suspensive effect, which means that even if challenged, the award remains enforceable, unless the competent authority grants suspensive effect.

The recognition and enforcement of foreign awards may be resisted in Switzerland on the basis of the grounds set forth in Article V of the New York Convention.

Switzerland being a member of the ICSID Convention, ICSID awards shall be enforced in Switzerland as if they were a final judgment of a Swiss court. They are only subject to the remedies provided for in the ICSID Convention.

7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

As there is no law in Switzerland specifically governing state immunity, this issue is mainly governed by case law of the Swiss Federal Supreme Court. The Swiss Federal Supreme Court applies a restrictive concept of sovereign immunity and distinguishes between acts performed in the foreign state's exercise of its sovereign power (*acta de jure imperii*) and acts performed by the foreign state in its private capacity (*acta de jure gestionis*).

When the foreign state acted in the exercise of its sovereign capacity (*jure imperii*), it may invoke immunity. This also applies to execution, i.e. assets of a state that are linked to the acts of the state in the exercise of its sovereign powers are covered by immunity. When the state acted in its private capacity (*jure gestionis*), case law provides that actions may be initiated against it before Swiss courts only if the transaction out of which the claim arises has a sufficient connection to Switzerland. The mere location of assets in Switzerland or the mere fact that the award was rendered by an arbitral tribunal seated in Switzerland does not create a sufficient connection. A recent decision of the Swiss Federal Supreme Court confirms that this case law also applies to ICSID awards (Decision 5A_406/2022 of 17 March 2023).

In addition, pursuant to Article 92(1) of the Swiss Debt Enforcement and Bankruptcy Act, assets belonging to a foreign state that are used for tasks incumbent on the foreign state as the holder of public authority may not be seized.

Accordingly, enforcement may be sought against state assets if three cumulative requirements are met: (i) the foreign state must have acted in its private capacity; (ii) the transaction out of which the claim arises must have a sufficient connection to Switzerland; and (iii) the assets are not related to tasks of the foreign state that are part of its duties as a public authority.

7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

According to case law of the Swiss Federal Supreme Court, the doctrine of piercing the corporate veil is also applicable to cases involving foreign states. However, the conditions are restrictive, and the corporate veil may be pierced only in exceptional circumstances. There must be an economic identity between the foreign state and the (separate) entity holding the assets, and the independence of the latter must be invoked in bad faith for the sole purpose of avoiding enforcement (*cf.* Decision 5A_871/2009 of 2 June 2010).

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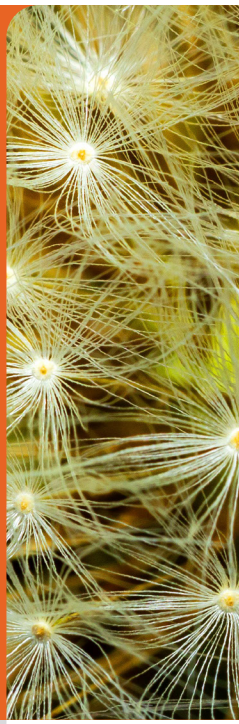

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