

Investment Protection - Swiss Style

Kluwer Arbitration Blog

September 25, 2014

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Please refer to this post as: Kirstin Dodge, Simon Vorburger and Gabrielle Nater-Bass, 'Investment Protection - Swiss Style', Kluwer Arbitration Blog, September 25 2014, <http://arbitrationblog.kluwerarbitration.com/2014/09/25/investment-protection-swiss-style/>

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While the press has been full lately of a reported backlash against investment arbitration, Switzerland has been making quiet progress in its efforts to update and expand on the treaty protections enjoyed by Swiss investors.

Switzerland historically has been an attractive location for international corporate headquarters. Corporations domiciled in Switzerland have a longstanding tradition of investing considerable amounts abroad. Despite Switzerland's relatively small size, it is the seventh-highest direct investor in the world.

Switzerland was the first State after Germany to enter into bilateral investment treaties ("BITs"), beginning in 1961. Since then Switzerland has signed more than 130 BITs, most of which are in force. This is the third largest network of such investment treaties, after Germany and China. Switzerland is also a signatory to the ICSID Convention and the Energy Charter Treaty.

Since it is not a member of the European Union, Switzerland continues to be responsible for negotiation of BITs with other States. Currently the Swiss State Secretariat for Economic Affairs (SECO) is engaged in a systematic effort to update and expand Switzerland's network of BITs. In the last five years, Switzerland has entered into BITs with China, Egypt, Kosovo, Trinidad and Tobago, Tunisia and Turkmenistan. Most recently, Switzerland signed a BIT with Georgia (which however has not yet been ratified).

There is no official Swiss model BIT, as Switzerland approaches such negotiations in a more flexible manner than some larger States. The "Swiss Model BIT" referenced in some articles is, in reality, a template or working document for internal use in negotiations which has somehow made its way into the public domain. SECO's internal template has been regularly updated over time and merely serves as a starting point for negotiations from the Swiss side. Nevertheless, some general observations can be made about the characteristics of Swiss BITs. Among other things, more recent Swiss BITs have directly addressed matters which have proven to be controversial in investment treaty arbitrations.

Swiss BITs typically define the term "investor" to include natural persons who are **citizens** of a contracting party, legal entities which are **incorporated or duly organized** under the laws of a contracting party, and legal entities which are **controlled by** citizens of or legal entities which are incorporated or duly organized under the laws of a contracting party. More recent BITs concluded by Switzerland also require that legal entities have **real economic activities** in the territory of the contracting party to qualify as an investor.

Switzerland's addition of the "real economic activities" requirement was intended to exclude entities without any substance in a contracting party's territory (*i.e.* mailbox companies) from BIT coverage. Thus, a Swiss company that merely forwards correspondence to a foreign parent company would have difficulty showing that it conducts "real economic activities" in Switzerland, as opposed to a Swiss company with officers, directors and employees in Switzerland.

Swiss BITs usually contain a very broad definition of "investment" that begins with a general clause stating that the term extends to every kind of asset and then lists several categories of examples. The examples listed typically include movable and immovable property and other rights in rem, shares and participations in companies, intellectual property rights, and concessions under public law. The examples also include claims to money or to any performance having an economic value, however Switzerland's most recent BITs explicitly exclude claims arising solely out of commercial contracts for the sale of goods or services.

Swiss BITs typically provide that investors shall be accorded fair and equitable treatment, shall enjoy full protection and security in the territory of the other contracting party, and shall not be discriminated against. Swiss BITs also guarantee the free transfer of funds related to the investment and include a national treatment clause and a most-favored-nation clause. Switzerland's most recent BITs explicitly state that the most-favored-nation clause does not extend to dispute resolution mechanisms provided for in other BITs concluded by the contracting parties.

This latter qualification could become quite important in some cases, as Swiss BITs contain a wide variety of dispute resolution options. More recent Swiss BITs provide that disputes may be submitted to international arbitration if a mandatory consultation phase does not result in an amicable settlement of the dispute. However, most Swiss BITs that were signed before 1981 merely contain a "state-state" or "horizontal" dispute resolution clause.

Nearly all Swiss BITs signed since 1981 also include "investor-state" or "diagonal" dispute resolution clauses. These are also quite varied but typically provide, at the investor's choice, either for ICSID arbitration or for ad hoc arbitration (usually under the UNCITRAL arbitration rules unless the parties agree on a different set of rules). Some BITs contain the additional option to submit the dispute to the ICC.

The protection from expropriation contained in Swiss BITs extends to direct and indirect expropriation. Especially in newer BITs, direct expropriation is subject to the explicit requirements that it is enacted for a public purpose, in a non-discriminatory manner and according to due process of law, and provided that provisions be made for prompt payment of effective and adequate compensation. Such compensation is further defined as the market value of the investment expropriated immediately before the expropriatory action was taken or became public knowledge, whichever is earlier.

Newer Swiss BITs also contain an umbrella clause providing that each contracting party shall observe any obligation or commitment it has assumed with regard to investments in its territory by investors of the other contracting party.

Switzerland took an active role in promoting transparency in investment arbitration in the negotiations regarding the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. Hence, it is anticipated that Switzerland will refrain from including in future BITs a provision opting out from the UNCITRAL Rules on Transparency. Indeed, the BIT between Switzerland and Georgia signed in 2014 (but not yet ratified or published) reportedly provides for application of the UNCITRAL Rules on Transparency.

As a capital exporting nation but also the host state for significant foreign direct investment,

Switzerland is sensitive to all sides of ongoing debates regarding protection of international investments. For example, in recent years SECO has been attentive to Switzerland's policy of promoting sustainable investment (for example, with respect to the environment, labor standards, etc.) and is seeking ways to incorporate this policy into Switzerland's BITs.

Notwithstanding various criticisms of "the BIT system", Switzerland is clearly committed to the availability of investor-state dispute settlement mechanisms as a means of protecting international investments and de-politicizing investment disputes. It also appears to be committed to addressing head-on controversial issues that have arisen in investment treaty cases by taking a modern and flexible approach to the negotiation and drafting of BITs.