

ONE-HUNDRED-TWO SWISS BILATERAL INVESTMENT TREATIES: AN OVERVIEW OF INVESTOR-HOST STATE DISPUTE SETTLEMENT CLAUSES

BY JEAN-CHRISTOPHE LIEBESKIND¹

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I. INTRODUCTION

In year 2000 Switzerland signed its one hundredth² Bilateral Investment Treaty ("BIT")³, all of which contain dispute resolution provisions. This study focuses on "diagonal" clauses contained in such BITs, i.e., on dispute settlement clauses between host states and foreign investors involving a Swiss investor in the foreign state party to the BIT, or a foreign investor of the latter in Switzerland.

¹ Attorney-at-Law, Lalive & Partners, Geneva, <jcliebeskind@lalive.ch>. The author wishes to express his gratitude to H.E. Dr Marino Baldi, Ambassador of Switzerland, Member of the Executive Board of the Swiss State Secretariat for Economic Affairs (SECO), to Dr Roberto Balzaretto, Head of the Section for International Legal Affairs, Swiss Federal Department of Foreign Affairs (DFAE), and to Dr Arthur E. Appleton, Attorney-at-Law, Lalive & Partners, Geneva, for their advice and assistance. The errors that remain are entirely the author's own. Offprint of the article published in Karl-Heinz Böckstiegel *et al.*, *Investment Treaties and Arbitration*, 19 ASA SPECIAL SERIES 81 (Gabrielle Kaufmann-Kohler ed., 2002), which can be ordered on the Swiss Arbitration Association (ASA) website, <<http://www.arbitration-ch.org>>.

² See *infra* note 9.

³ Following the Swiss treaty terminology, "BIT" is used in this article to mean Treaties of Promotion and Protection of Investments (Fr. "*Accords de promotion et protection des investissements*", abr. "APPI"), Treaties of Trade, Protection of Investments and Technical Promotion and Treaties of Trade and Protection of Investments. These treaties are found under Sect. 0.946 (External Trade, Fr. "*Commerce extérieur*") and Sect. 0.975 (Protection of Investment, Fr. "*Protection des investissements*") of the Swiss Systematic Collection of Federal Legislation (Fr. "*Recueil systématique du droit fédéral*", abr. "RS" [hereinafter the Systematic Collection]). This article covers neither bilateral Treaties on Technical and Scientific Co-operation (RS 0.974), nor Treaties on Friendship, Establishment and Trade (RS 0.142.1). A List of Swiss BITs is annexed to this article, see *infra* note 5. All translations in this article are unofficial and translated from the official French version.

After some introductory remarks, Part 2 of this article describes the basic dispute resolution mechanism of each type of clause. Part 3 discusses specific issues such as consultation, consent, scope, eligibility, applicable law, and recognition and enforcement. Occasionally comparisons shall be drawn with salient features of the dispute resolution clauses found in the model or standard draft BITS of other selected countries⁴. A tentative model clause will be discussed in Part 4. Following the conclusion (Part 5), a list of the BITS signed by Switzerland⁵ and a short bibliography⁶ are to be found as annexes to this article (Part 6).

Beginning in 1961⁷, Switzerland was the second state⁸ to construct a network of Bilateral Investment Treaties (BITS). It signed its one-hundredth BIT on 30 November 2000 with Nigeria, and it had signed 102 BITS at the time of writing this article⁹. Out of these, four have been terminated, out of which only one has been terminated unilaterally and not replaced; four have been only signed, out of which three are expected to be ratified soon¹⁰, while one has never been ratified since 1963¹¹, although it is provisionally applied in the meantime; the 96 remaining are ratified, i.e., in force¹². Switzerland's BITS network thus represents the

⁴ These are: Austria, Denmark, Germany (Federal Republic), Hong Kong, the Netherlands, the U.K. and the U.S.A. The corresponding provisions are drawn from DOLZER/STEVENS Annex I, pp. 165 ff., *see infra* note 6. These model BITS are referred to by the name of their country only.

⁵ *See infra* Sect. 6.1. Unless expressly specified otherwise, Swiss BITS mentioned in this article are referred to by the name of the state with which Switzerland signed a BIT. They shall not be referred to by the name of these states' legal successors, if any. These legal successors, the date of signature and the reference of the BIT to its official publication are found in this list.

⁶ *See infra* Sect. 6.2. Authors listed in the bibliography and mentioned hereinafter are referred to by their surname only.

⁷ Switzerland signed its first BIT with Tunisia on 2 December 1961.

⁸ Switzerland was preceded only by the Federal Republic of Germany which had already signed six BITS, starting with Pakistan in on 25 November 1959. The 1959 BIT between the Federal Republic of Germany and Pakistan is considered as the first modern BIT. *See* DOLZER/STEVENS p. 1.

⁹ I.e., as of 20 November 2001. This figure includes all BITS signed by Switzerland, i.e., as the case may be, ratified, replaced by a subsequent BIT or, as in one case, terminated.

¹⁰ These are the BIT with Brazil, the 2000 BIT with Costa Rica (which once ratified will replace the 1965 BIT) and the BIT with the Kyrgyz Republic. Since they are not ratified, these BITS are not in force yet. Even though they might be occasionally mentioned throughout this article for comparative purpose, they have to be considered with caution until they are ratified.

¹¹ BIT with Rwanda.

¹² For details, *see infra* the list of Swiss BITS, Sect. 6.1.

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second largest BITS network in the world¹³. Nineteen BITS have not been published¹⁴. This article covers all the 102 BITS, including those which have not been published¹⁵.

Before the ICSID Convention of 1965¹⁶ and the creation of ICSID¹⁷, BITS generally contained "horizontal" clauses — dispute resolution clauses between states. At that time diagonal clauses — investor-host-state clauses — were only to be found, if at all, in investment contracts agreed directly between the investor and the host state. Swiss BITS signed between 1961 to 1978¹⁸ only contain a horizontal clause. Switzerland signed the ICSID Convention in 1967¹⁹, but did not insert a diagonal clause in its BITS until 1981. Switzerland inserted a diagonal clause for the first

¹³ Switzerland remains behind Germany (112 BITS) in terms of BITS signed, but it is ahead of the U.K. (84), China (71), France (65), the Netherlands (58), Italy (48), the U.S.A. and Spain (37 each), Sweden (33) and Russia (32) to mention only the most important. For a list of BITS signed by member states of the ICSID Convention of 1965, see ICSID website, <<http://www.worldbank.org/icsid/treaties/treaties.htm>>.

¹⁴ I.e., neither in the Systematic Collection (see *supra* note 3), nor in the Swiss Official Collection of Federal Legislation (Fr. "*Recueil officiel du droit fédéral*", abr. "RO" [hereinafter the Official Collection]). The Official Collection is a chronological publication. Once they are ratified, BITS are published successively in the Official, then in the Systematic Collection. All these BITS are expected to be published, except two, see *infra* notes 372 and 380.

¹⁵ In "*State-Investor Dispute Settlement Clauses in Swiss Bilateral Investment Treaties*", 40 ASA BULL. 27 (1/2002), the author only covered the BITS published in the Systematic Collection. He wishes to thank the staff of the Section for International Legal Affairs of the Swiss Federal Department of Foreign Affairs (DFAE) for its assistance in providing the BITS not published in the Systematic Collection.

¹⁶ Convention on the Settlement of Investment Disputes between States and National of Other States, opened to signature in Washington on 18 March 1965 and entered into force on 14 October 1966, U.N. Treaty Series vol. 575, p. 159, reprinted in ICSID Doc. 15, ICSID Basic Documents (Jan. 1985) [hereinafter the ICSID Convention]. For a list of member states, see ICSID website, <<http://www.worldbank.org/icsid/constate/c-states-en.htm>>.

¹⁷ International Centre for the Settlement of Investment Disputes. ICSID is the permanent administrative body established by the ICSID Convention of 1965 for the purpose of providing facilities for arbitration and conciliation in accordance with the Convention, Art. 1. See ICSID website, <<http://www.worldbank.org/icsid.htm>>. The first ICSID arbitration clause for the settlement of disputes between investor and host state was inserted in the BIT between the Netherlands and Indonesia in 1968. See DOLZER/STEVENS p. 130. Switzerland signed a BIT with Indonesia in 1974 but it contains only an arbitral clause for the settlement of disputes between states party to the BIT.

¹⁸ The last Swiss BIT containing a horizontal clause and no diagonal clause is the BIT with Mali, with the two exceptions mentioned *infra* note 21.

¹⁹ The ICSID Convention was opened to signature to the members of the Bank for Reconstruction on 18 March 1965. Switzerland, although not a member of the Bank, was invited to sign the Convention under Art. 67 thereof, see ICSID Doc. 15, ICSID Basic Documents p. 5 (Jan. 1985). Switzerland signed the Convention on 22 September 1967 and ratified it on 15 May 1968. The Convention entered into force in Switzerland on 14 June 1968, RS 0.975.2.

time in the 1981 BIT with Sri Lanka²⁰ and has done so systematically ever since, with only two exceptions²¹. Thus the thirty-one treaties signed between 1961 and 1978 only contain a horizontal clause. With the two exceptions noted above, since 1981 Swiss BITs systematically contain two separate clauses: a horizontal clause and a diagonal clause.

Swiss investors in a host state with which a BIT was signed before 1981²² are obliged to seek recourse in diplomatic protection in case their interests are harmed since they have no means to file a claim directly under the BIT²³. The Swiss government is gradually renegotiating its old BITs and replacing them with BITs incorporating a horizontal and a diagonal clause. This process is slow and only a few BITs have been, or are in the process of being renegotiated. As a result, out of the ninety-six BITs now in force, thirty-one, i.e. not far from one over three, only contains a horizontal clause²⁴.

Previously there was some scepticism concerning the potential of diagonal clauses, mostly with respect to ICSID clauses. Krafft notes that Switzerland was long opposed to ICSID clauses because they implied a waiver of diplomatic protection²⁵. Diplomatic protection appears to have been viewed by Switzerland as more efficient, in particular more time- and cost-efficient than diagonal clauses. There also seems to have been persistent doubts about the ability of arbitral tribunals to provide adequate protection to investors²⁶. At the insistence of Switzerland's state counterparts²⁷, diagonal clauses eventually became a regular part of Swiss BITs. Convinced of the suitability of diagonal clauses, Krafft argued that ICSID

²⁰ BIT with Sri Lanka Art. 9. This was an ICSID clause.

²¹ These two exceptions are the 1985 BIT with Morocco and the 1997 BIT with Thailand. There was only one BIT between the first Swiss BIT including a diagonal clause (the 1981 BIT with Sri Lanka) and the 1985 BIT with Morocco: the 1983 BIT with Panama which contains a horizontal clause (Art. 10) and a diagonal clause (Art. 9). The 1997 BIT with Thailand contains a horizontal clause (Art. 10) and a diagonal ICSID conciliation and arbitration clause (Art. 11). However this clause shall enter into force only when Thailand will become a member of the ICSID Convention. Thailand signed the Convention on 6 December 1985 but has not yet ratified it. In the meantime only the horizontal clause is operative.

²² As well as in Morocco and Thailand, *see supra* note 21.

²³ Hereinafter pre-1981 BITs. This category should be understood as including the 1985 BIT with Morocco and the 1997 BIT with Thailand, *see supra* note 21.

²⁴ To the thirty-one BITs signed until 1978, the two exceptions of Morocco and Thailand have to be added, while the BIT with Gabon (terminated) and the 1976 BIT with Jordan (replaced) have to be subtracted. The 1965 BIT with Costa Rica will be replaced by the 2000 BIT as soon as the latter will be ratified. On Thailand, *see supra* note 21.

²⁵ Krafft p. 84.

²⁶ *See* Nguyen Huu-tru p. 658, note 158.

²⁷ *Id.* *See also* Krafft p. 84.

clauses should be systematically inserted in Swiss BITs²⁸. Dominicé made an in-depth assessment of the likely results of such a change and reached the same conclusion²⁹.

II. GENERAL FEATURES

A. HORIZONTAL CLAUSES

1. Diplomatic Protection

Diplomatic protection is the procedure by which a state asserts rights on behalf of its citizens harmed by another state when it believes that the harm is so serious that it represents a threat to its sovereignty³⁰. When an investor requests its government's support because a BIT has been infringed by a host state against which an investor cannot file a claim because the BIT only contains a horizontal clause, it is requesting diplomatic protection.

Diplomatic protection is used in exceptional circumstances and the conditions for its application are strict. As summarized by Dominicé, they are met:

(i) when the investor and the host state have foreseen (usually in the investment contract or possibly after the dispute arises) recourse to arbitration, diplomatic protection may be asserted for denial of justice resulting from hindrance, by the host state, to arbitration, or for refusal by this state to enforce the award. The preliminary exhaustion of internal remedies is not required³¹;

²⁸ Krafft pp. 86-7. Krafft was, at the time, Head of the Directorate of International Public Law of the Swiss Federal Department of Foreign Affairs.

²⁹ Dominicé p. 534.

³⁰ See N. Q. DINH/P. DAILLER/A. PELLET, *DROIT INTERNATIONAL PUBLIC*, 6th edn, L.G.D.J., 1999, pp. 769-78; P.-M. DUPUY, *DROIT INTERNATIONAL PUBLIC*, Dalloz 1998, pp. 431-3. The Calvo clause prescribed that the investor shall renounce in advance to diplomatic protection. This clause was soon declared null and void by international judges and arbitrators. See e.g., N. Q. DINH/P. DAILLER/A. PELLET, *DROIT INTERNATIONAL PUBLIC*, 6th edn, L.G.D.J., 1999, p. 778.

³¹ In addition if the arbitration clause refers to a pre-existing arbitration system, the extent of the intervention of the investor's state should be examined.

(ii) when the host state violates the BIT (or customary law on foreign property), but only provided that internal remedies have been exhausted, or because of denial of justice in the host state's courts;

(iii) a mere violation of the investment contract entered into by the investor and the host state does not permit diplomatic protection. If such violation is claimed before a host state's court, only the denial of justice may give rise to diplomatic protection³².

There are at least two major differences between horizontal and diagonal clauses. First, pursuant to horizontal clauses, before an investor can request its government to represent him, the investor must exhaust the internal administrative and judicial remedies available. This may take years. SECOND, even though an investor has exhausted all internal remedies, there is no right to diplomatic protection. Diplomatic protection is in essence a political decision. In contrast diagonal clauses may permit recourse to dispute settlement procedures (e.g., ICSID arbitration) on the sole initiative of the investor after a short consultation period. This alleviates the need to seek diplomatic protection.

Provided that the other conditions of diplomatic protection are fulfilled, diplomatic protection applies when there is a BIT with a diagonal clause, in particular where the host state prevents the investor from resorting to the diagonal clause. The ICSID Convention expressly provides for a waiver by the state parties to the BIT of the right to grant diplomatic protection³³, but also provides that the waiver shall not apply in case the host state does not abide by the arbitral award³⁴. The BIT with Kuwait provides not only so but also prevents the host state to file an "international claim"³⁵. It also specifies that diplomatic protection does not cover mere diplomatic negotiations only purporting to facilitating the settlement of a dispute³⁶.

³² Dominicé p. 524, Sect. 5.

³³ ICSID Convention Art. 27(1). It is this provision that prevented Switzerland until 1981 from inserting an ICSID clause in its BITs.

³⁴ The waiver applies only if the jurisdiction of ICSID is established. On diplomatic protection under the ICSID Convention, *see e.g.*, LAVIEC pp. 288-90, Sect. 78.

³⁵ Fr. "*Aucun Etat contractant n'accordera la protection diplomatique ni ne formulera de prétention internationale*", Art. 10(6)(c).

³⁶ Fr. "*les simples démarches diplomatiques tendant uniquement à faciliter le règlement d'un différend*", Art. 10(6)(c).

2. Other Aspects

As noted above, thirty-one³⁷ Swiss BITs in force today contain a "stand-alone" horizontal clause, i.e., a horizontal clause without a diagonal clause³⁸. In the absence of a diagonal clause, if the investment contract does not contain an arbitration clause and the investor and the host state do not agree to submit the dispute to arbitration after the dispute arises, an investor has no choice but to rely on the horizontal clause and diplomatic protection. Therefore, even though this section will discuss horizontal clauses generally, it will put some emphasis on stand-alone horizontal clauses.

Horizontal clauses all have the same pattern and they are much more homogenous than diagonal clauses. The variations they contain are outlined below.

All Swiss BIT clauses — horizontal and diagonal alike — start with a consultation requirement³⁹. Usually a minimum time period is established prior to which the parties are not entitled to have recourse to arbitration. With respect to the stand-alone horizontal clauses contained in Swiss BITs, with only one exception⁴⁰, the time period is always six months. Some Swiss BITs do not contain any time limit for consultation, apparently where the legal culture of the other state party favors non-contentious dispute resolution. Until 1978 this seems to have been the case, with only one exception⁴¹, in Asian⁴² and Arab⁴³ countries. Minimum time requirements for consultation can prove problematic⁴⁴.

If consultations are required and the time period elapses without producing a settlement, Swiss practice related to horizontal clauses

³⁷ See *supra* note 24.

³⁸ These are the BITs with (in chronological order): Tunisia, Niger, Guinea, Ivory Coast, Senegal, Congo (Brazzaville), Cameroon, Rwanda, Togo, Madagascar, Malta, Tanzania, Costa Rica (i.e., the 1965 BIT, *see supra* note 10), Dahomey, Chad, Ecuador, Upper Volta, South-Korea, Uganda, Zaire, the Central African Republic, Egypt, Indonesia, Sudan, Mauritania, Syria, Malaysia, Singapore, Mali, Morocco and Thailand.

³⁹ Only one BIT (the BIT with Uganda) uses the wording "negotiations" instead of "consultation". There appears to be no practical difference. *See infra* Sect. 3.1, in particular note 202.

⁴⁰ The BIT with Morocco provides for a nine months time period, Art. 9(2).

⁴¹ The BIT with Uganda (Art. 11(1-2)) is the only other case until 1978. The only examples afterwards appear to be the BIT with Argentina Art. 9(1-2) and the BIT with Peru Art. 9(1-2).

⁴² BITs with South-Korea, Indonesia and Malaysia, with the exception of Singapore.

⁴³ BITs with Egypt and Sudan.

⁴⁴ The consultation requirement is discussed in more details *infra* Sect. 3.1.

generally provides that each party is entitled to submit the dispute to an ad hoc arbitral tribunal composed of three members. If the parties do not appoint an arbitrator within two months, or if the two co-arbitrators do not nominate a president within the same time period, the arbitrators are appointed by the President of the International Court of Justice (ICJ) or his or her substitute⁴⁵. The horizontal clauses of two BITs contain a unique feature providing that the chairman shall be a national of a third state which has diplomatic relations with both contracting parties⁴⁶.

Unless the parties agree otherwise, the tribunal defines its rules of procedure. The award is binding. The foregoing is standard practice for all stand-alone horizontal clauses. Nevertheless several variations deserve mention. Only six⁴⁷ of the thirty-two stand-alone horizontal clauses do not state whether the award is final⁴⁸. The first Swiss BIT to specify the finality of the award was signed in 1971⁴⁹. This is a matter of concern given that the finality of an award is the Achilles heel of the enforcement of foreign awards. It is surprising that this provision has not been a part of Swiss BITs considering that Switzerland is a member of the New York Convention of 1958⁵⁰ since 1965⁵¹, and since the Convention states that the recognition or the enforcement of an award may be refused if the award "*has not yet become binding on the parties*"⁵².

Some BITs provide that the arbitral tribunal shall take its decision based on the majority opinion of its members; some provide in addition for the allocation of arbitration costs. Two stand-alone horizontal clauses deserve special mention. The BIT with Mali is the only one empowering the arbitral tribunal to decide the law applicable to the merits of the

⁴⁵ The ICSID Convention (Art. 64) provides that inter-state disputes on the interpretation or the application of the ICSID Convention are to be "referred" to the ICJ unless the state parties agree otherwise.

⁴⁶ BIT with Bulgaria, Art. 12(2); with Iran, Art. 10(2). On the diagonal clauses of these BITs, see *infra* notes 135 and 136.

⁴⁷ Seven with the BIT with Gabon, which was terminated in the meantime, see *infra* note 377.

⁴⁸ These are the BITs with (in chronological order): Uganda, Egypt, Indonesia, Sudan, Malaysia and Morocco.

⁴⁹ BIT with Uganda Art. 11(6).

⁵⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958 and entered into force on 7 June 1959, U.N. Treaty Series vol. 330, p. 38, No 4739 (1959) (hereinafter the Convention of New York or the New York Convention). For a list of members of the New York Convention see < <http://www.asser.nl/ica/nyca-eng.htm>>.

⁵¹ Switzerland accessed to the New York Convention on 1 June 1965. The Convention entered into force in Switzerland on 30 August 1965, RS 0.277.12.

⁵² New York Convention Art. V(1)(e).

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dispute⁵³. While this feature has appeared occasionally in diagonal clauses, it has never been incorporated systematically in such clauses⁵⁴.

The BIT with Egypt provides that in conformity with international law, local legal remedies shall be exhausted before any dispute may be brought before the international judicial authorities⁵⁵. At first sight it would appear that this provision does little more than restate the principle of exhaustion of local remedies⁵⁶. Further observation however demonstrates that the provision is ambiguous and confusing. To whom does this requirement apply? To the state party or to the investor? If it applies to the state party, what is the relationship with the arbitration clause⁵⁷ that precedes this provision? Should one infer that this provision applies to the investor and consequently gives him a direct right to invoke the BIT in a dispute before a state court? If so, what are the international judicial authorities mentioned in this provision? This clause could give rise to some practical difficulties. If the meaning of this provision is to express the exhaustion of internal remedies as a precondition of diplomatic protection, it adds nothing to already established principles of international law, and it opens the door to legal arguments that might deprive investors of legitimate protection.

Among post-1981 BITs, the BIT with Hong Kong⁵⁸ merits mention. Its horizontal clause is the only one, to the best of the author's knowledge, that provides for detailed rules of procedure⁵⁹. The BIT with Uruguay also contains a unique feature⁶⁰. It provides that, in case a dispute between the investor and the host state is submitted to the courts of the host state as required by the diagonal clause⁶¹, the arbitral tribunal nominated pursuant to the horizontal clause may render an award "*on all aspects of the dispute*" (between the investor and the host state) "*only after having stated that the national judgement violates a rule of international law, the*

⁵³ BIT with Mali Art. 9(6).

⁵⁴ On provisions concerning applicable law in diagonal clauses, *see infra* Sect. 3.5.

⁵⁵ BIT with Egypt Art. 11.

⁵⁶ On the exhaustion of local remedies *see infra* Sect. 2.2.b.v.

⁵⁷ BIT with Egypt Art. 10.

⁵⁸ *Id.* Art. 12.

⁵⁹ In contrast the diagonal clause contained in the same BIT (Art. 11) is one of the shortest in Swiss BITs. This BIT is a typical example of the influence a strong legal culture can impress on the wording of a BIT, compare with the Hong Kong model BIT, DOLZER/STEVENS pp. 205-7, Art. 8 and 9. For another example of detailed rules, *see* the U.S. model BIT, DOLZER/STEVENS p. 249, Art. VII(3). *See also supra* Sect. 2.2.a.

⁶⁰ BIT with Uruguay Art. 9(8).

⁶¹ *Id.* Art. 10(2).

provisions of [the BIT] inclusive, that [the national judgment] is obviously inequitable or that it constitutes a denial of justice."⁶² In other words, this provision expressly states the conditions under which diplomatic protection may be asserted⁶³.

B. DIAGONAL CLAUSES

1. Common Features

There is no systematic order in which horizontal and diagonal clauses appear in Swiss BITs; the diagonal clause can precede⁶⁴ or follow⁶⁵ the horizontal clause. In one case, the diagonal clause has been attached in an annex to the treaty⁶⁶. The diagonal clause often states that it applies notwithstanding the horizontal clause⁶⁷. Some BITs qualify the relationship between the horizontal and the diagonal clauses, specifying that in case of a dispute between an investor and the host state, recourse shall be made to the horizontal clause only in the event that the host state refuses or does not abide by the award rendered by the arbitral tribunal established pursuant to the diagonal clause⁶⁸. This provision is a standard feature of ICSID clauses. The rationale for such a provision lies in the concept of diplomatic protection, the limited application of which, in the context of a dispute between an investor and a host state, has already been discussed⁶⁹.

Like horizontal clauses, diagonal clauses systematically provide for preliminary consultation⁷⁰. Similarly should consultation fail, recourse to arbitration is permitted. Three types of arbitration are generally

⁶² Fr. "*le tribunal arbitral ... ne peut rendre de sentence portant sur tous les aspects de l'affaire qu'après avoir constaté que le jugement national viole une règle de droit international, les dispositions du présent Accord y comprises, qu'il est manifestement inéquitable ou constitue un déni de justice*", BIT with Uruguay Art. 9(8).

⁶³ See *supra* Diplomatic Protection, Sect. 2.1.a.

⁶⁴ See *e.g.*, the BIT with Panama.

⁶⁵ See *e.g.*, the BIT with China.

⁶⁶ BIT with Mexico Art. 11 (however the horizontal clause is found in the treaty itself, Art. 12). For other examples of annexes, see notes 104 and 257 *infra*.

⁶⁷ See *e.g.*, the BIT with Bolivia Art. 9(1).

⁶⁸ See *e.g.*, the BIT with Uruguay Art. 10(4). Formulations may vary with no material consequence. The BIT with Czechoslovakia prescribes that diplomatic means shall be disregarded unless the state party "does not abide by the award", Art. 9(5).

⁶⁹ See *supra* Diplomatic Protection, Sect. 2.1.a.

⁷⁰ This requirement will be discussed *infra*, Selected Issues, Consultation, Sect. 3.1.

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contemplated: ICSID, ad hoc (generally UNCITRAL), and ICC. Each are discussed separately. In addition, conciliation, redress in national courts, and/or dispute resolution procedures agreed directly between the investor and the host state in the investment contract are considered. These remedies may be combined alternatively (in multiple-fold options) and/or cumulatively (in successive steps) in what is sometimes a very original fashion. Multiple choice clauses represent a trend beginning in the early 1990s⁷¹. The BIT with Kuwait provides a good example of a flexible multiple-fold dispute resolution clause⁷². It offers alternatively, to the investor's choice: (a) any dispute resolution mechanism previously agreed (thus allowing in particular investor-host state clause contained in the investment agreement to apply); (b) arbitration, i.e., either (i) ICSID arbitration, or (ii) ICSID Additional Facility, or (iii) UNCITRAL arbitration, or (iv) ad hoc arbitration under any institutional rules agreed upon by the parties⁷³.

Most BITs provide that the arbitral tribunal shall be established on a case-by-case basis, which means that no permanent arbitral tribunal is created⁷⁴. A few, mostly early BITs, provide for a permanent or semi-permanent body, in the form of a Mixed Commission, in charge of implementing the treaty⁷⁵.

What is striking is the heterogeneity of the dispute resolution clauses in various Swiss BITs. Differences exist generally in style, structure and emphasis, rather than in unusual details⁷⁶. An exception, albeit infrequent,

⁷¹ The 1991 BIT with Argentina is the first Swiss BIT to offer a choice between an ICSID or an UNCITRAL arbitration, Art. 9(5). *See e.g.*, the 1991 BIT with Ghana following the BIT with Argentina, which offers the choice between either an ICSID arbitration, or an ICSID conciliation, or the ICSID Additional Facility, or an ad hoc three-members arbitral tribunal, or a single arbitrator. The ad hoc tribunal or the single arbitrator may be nominated under ad hoc or the UNCITRAL rules. *See also* the 1996 BIT with Cuba Art. 10.

⁷² Art. 10.

⁷³ Art. 10(2).

⁷⁴ *See e.g.*, the BIT with China Art. 12(2): (Fr.) "*Le tribunal sera désigné de cas en cas.*" On the meaning of "ad hoc", *see infra* note 121.

⁷⁵ *See e.g.*, the BIT with Niger Art. 9; with Guinea Art. 9. "Mixed Commissions" or "Joint Committees" of a permanent nature are also found in other investment related treaties such as EFTA Free Trade Agreements, Declarations on Co-operation, and OECD treaties such as the Code of Liberalisation of Capital Movements and the Code of Liberalisation of Current Invisible Operations.

⁷⁶ *See* the first diagonal being also the first ICSID clause contained in the BIT with Sri Lanka, which inserts the definition of a company between the general statement of the jurisdiction of ICSID, Art. 9(1), and the description of the dispute settlement mechanism, Art. 9(2), rather than inserting it afterwards, together with other ancillary provisions, as in subsequent BITs.

can be found in BITS with signatories having strong requirements, especially when they are economically influent. For example the diagonal clause contained in the BIT between Switzerland and Hong Kong is closer to the diagonal clause used by Hong Kong in its standard BIT⁷⁷ than to the diagonal clause used by Switzerland in its standard BIT⁷⁸; the BIT with Kuwait has apparently been inspired from the U.S. model BIT⁷⁹.

The BIT with Mexico is unique and deserves a mention on its own. It consists in an annex of not less than twelve articles, mixing material and procedural provisions. It includes provisions, unseen in other BITS, with respect to definitions⁸⁰, equal treatment and due process⁸¹, litispence⁸², statute of limitation⁸³, qualification requirements of the arbitrators⁸⁴, joinder procedure⁸⁵, interpretation⁸⁶, the scope of the award⁸⁷ or the publication of the latter⁸⁸. The language used contrasts sharply with the language uniformly used by other Swiss BITS and seems to be strongly influenced by the legal Spanish language⁸⁹.

See e.g., the BIT with Vietnam Art. 9(4); with Romania Art. 9(4); with Pakistan Art. 9(2), par. 2.

⁷⁷ *See* DOLZER/STEVENS p. 205-6, Art. 8.

⁷⁸ *Id.* p. 224, Art. 9.

⁷⁹ *See infra* notes 310 and 317.

⁸⁰ *See infra* note 89.

⁸¹ Art. 2(1) of the Annex, which states that the mechanism established therein guarantees to investors an equal treatment, in conformity with the international principle of reciprocity, and fair proceedings before an impartial tribunal.

⁸² *See infra* note 173.

⁸³ The investor is time-barred for filing a claim before the arbitral tribunal foreseen by the treaty if more than three years elapsed from the date on which the investor became aware or should have become aware of the damage, Art. 2(4) of the Annex.

⁸⁴ The arbitrators shall have experience in the fields of international law and investments, Art. 5(2) of the Annex.

⁸⁵ Fr. "*jonction d'instances*", Art. 6 of the Annex. This mechanism unique among Swiss BITS provides for a special ad hoc tribunal (Fr. "*tribunal de jonction d'instances*") under UNCITRAL rules, for multiple claims cases in which an investor controlling the company is claiming in the name of the latter along with other non controlling shareholders appearing in their own name for the same damage, or when multiple claims are filed for common factual and legal grounds. The Kompetenz Kompetenz principle is restated and the tribunal shall rule on the claims jointly, except if it establishes that the interests of a claimant may so be harmed.

⁸⁶ *See infra* note 290.

⁸⁷ *See infra* notes 280 to 284.

⁸⁸ Art. 11 of the Annex.

⁸⁹ The French wording of what appears to be a literal translation from Spanish is sometimes awkward. *See e.g.*, the definitions given in Art. 1 of the Annex: the distinctions drawn between "contesting investor", "contesting parties" (singular), "contesting party" (plural), "contesting Party" (capitalized), which appear to bring more confusion than clarity. The meaning of some French expressions is uncertain, *e.g.*, "*redressement*" (Art. 8(3)); "*irrévocabilité*" (Art. 9; *see also infra* note 291); "*procédure d'examen*" (Art. 9(2); *see also*

2. Specific Clauses

a) ICSID Clauses

Several ICSID clauses offer the possibility to choose between arbitration (under the ICSID Rules of Procedure for Arbitration) or conciliation (under the ICSID Rules of Procedure for Conciliation). The option is either left to the investor's choice⁹⁰ or submitted to the agreement of both parties⁹¹. Many clauses only refer to the ICSID Convention⁹² and/or to ICSID⁹³, arguably leaving both options open⁹⁴.

Most if not all clauses contain a separate subrogation provision, preventing the host state from relying on the indemnification of the investor by virtue of an insurance contract or of a guarantee provided by the investor's state⁹⁵ or on its sovereign immunity⁹⁶. Likewise, diplomatic protection is systematically excluded unless either of the two following alternative conditions are fulfilled: (a) ICSID⁹⁷ decides that it has no jurisdiction, or (b) the state party does not abide by the arbitral award⁹⁸. This is consistent with the limits of diplomatic protection described above⁹⁹. The BIT with Kazakhstan specifies that no appeal or other recourse shall be possible against the award¹⁰⁰. This precaution is generally omitted in other BITs¹⁰¹.

infra note 298). Likewise such expressions are sometimes unusual or obsolete: "*partie contestante*" (Art. 1); "*arbitre en chef*" (Art. 5(1)); "*rentrées*" (Art. 10).

⁹⁰ See e.g., the BIT with Hungary Art. 10(3).

⁹¹ See e.g., the BIT with Jamaica Art. 9(3).

⁹² See e.g., the BIT with Sri Lanka Art. 9(1).

⁹³ See e.g., the BIT with Argentina Art. 9(5).

⁹⁴ On consent see *infra* Sect. 3.2.

⁹⁵ See e.g., the BIT with Argentina Art. 9(6); with Bulgaria Art. 11(6).

⁹⁶ See e.g., the BIT with Romania Art. 9(4); with Ethiopia Art. 8(3). On the waiver to sovereign immunity, see *infra* Sect. 3.2.

⁹⁷ ICSID Secretary General, the arbitration tribunal or the conciliation commission.

⁹⁸ See e.g., the BIT with Kazakhstan Art. 9(6), which provides for a general exclusion; compare with e.g., the BIT with Namibia Art. 9(4), which provides for a detailed exclusion along the lines of the conditions outlined above.

⁹⁹ See *supra* Sect. 2.1.a.

¹⁰⁰ Art. 9(5).

¹⁰¹ It is however foreseen in, e.g., the ICSID diagonal clause contained in the model BIT of Germany, which precludes any appeal or remedy other than those provided for in the ICSID Convention. DOLZER/STEVENS p. 194, Art. 11(3) (Model I). For a more detailed provision related to horizontal arbitration, see also *ibid.*, Art. 10(6).

Since the 1990s, some Swiss BITs have provided that the parties must make a written request for arbitration pursuant to articles 28 and 36 of the ICSID Convention¹⁰². This provision aids investors unfamiliar with ICSID procedural requirements.

When a state party was not yet a member of the ICSID Convention, Switzerland managed in most cases to insert 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 Convention¹⁰³. Some countries expressed such an intent in a diplomatic note accompanying the BIT¹⁰⁴. Swiss BITs containing a pre-ICSID clause usually contain an ad hoc arbitration clause that applies until the other becomes a member of the ICSID Convention¹⁰⁵. Such ad hoc arbitration clauses occasionally state that the tribunal should base its rules of procedure on the ICSID Convention¹⁰⁶.

Most clauses provide that the day the other state party¹⁰⁷ becomes a member of the ICSID Convention the parties "may"¹⁰⁸ submit a dispute to ICSID¹⁰⁹. A few BITs provide that dispute "must" be submitted¹¹⁰ to ICSID instead of the procedure foreseen until the other state party becomes a member of the Convention¹¹¹. The first example suggests that the submission of the dispute to ICSID shall be optional the day the other party becomes a member of the ICSID Convention, while the second case suggests it shall be compulsory. In the first case, some BITs provide that recourse to the original mechanism shall be permitted even after the other state becomes a member of the ICSID Convention¹¹².

¹⁰² See e.g., the BIT with Zambia Art. 9(2)(2); with Pakistan Art. 9(2)(2).

¹⁰³ See e.g., the BIT with Uzbekistan Art. 9(3); with Albania Art. 11(3).

¹⁰⁴ See e.g., the Exchange of Letters of 12 November 1986 attached to the BIT with China and forming part thereof. See also *infra* note 257.

¹⁰⁵ The only exception is the BIT with Thailand, which is consequently the only recent BIT with a stand-alone horizontal clause until it will become a member of the ICSID Convention, see *supra* note 21.

¹⁰⁶ See e.g., the BIT with China Art. 12(4).

¹⁰⁷ Almost all BITs use the wording "*when both parties shall be members of the ICSID Convention*" even though Switzerland is a member of the ICSID Convention. This wording means to cover the case of withdrawal of a party from the Convention. There are a few clauses which only mention the other state, see e.g., the BIT with Cambodia Art. 8(2)(a).

¹⁰⁸ Fr. "*pourront*".

¹⁰⁹ See e.g., the BIT with Peru Art. 9(4); with Albania Art. 11(3).

¹¹⁰ Fr. "*le différend sera soumis*".

¹¹¹ See e.g., the BIT with Vietnam Art. 9(3).

¹¹² See e.g., the BIT with South Africa Art. 10(4); with Cuba Art. 10(4).

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The ICSID Additional Facility (under the ICSID Additional Facility Rules¹¹³) is also sometimes referred to in the diagonal clauses of Swiss BITs¹¹⁴. This mechanism enables a party to submit a dispute to ICSID under the Conciliation (Additional Facility) Rules¹¹⁵ or the Arbitration (Additional Facility) Rules¹¹⁶ even though (a) one of the parties to the dispute is neither a contracting state to the ICSID Convention nor a national of a contracting state, or (b) when at least one of the parties is a contracting state or a national thereof but the dispute does not directly arise out of an investment. It also offers fact-finding proceedings¹¹⁷. However unlike disputes in which both the investor state and the host state are members of the ICSID Convention, the Convention is inapplicable¹¹⁸. Besides the agreement of the parties to the dispute to submit it to the Additional Facility, the parties must get the preliminary approval of the Secretary-General of ICSID¹¹⁹. The Additional Facility is not available for the settlement of ordinary commercial disputes¹²⁰.

b) Ad Hoc (UNCITRAL) Clauses

State parties that are not ICSID members usually choose an ad hoc arbitral tribunal, i.e., a tribunal that does not rely on any pre-existing arbitral institution or rules at any stage of its operation¹²¹. This occasionally appears to be the case with BITs involving states that have a strong legal and/or political system and that do not wish to rely on an U.N. instrument such as the UNCITRAL rules¹²². Nevertheless, in the majority of

¹¹³ ICSID Doc. 11, ICSID Additional Facility (June 1979).

¹¹⁴ See e.g., the BIT with Ghana Art. 12(3)(a); with South Africa Art. 10(2)(a); with Cuba Art. 10(2)(a).

¹¹⁵ ICSID Doc. 11, ICSID Additional Facility, Annex B, Conciliation (Additional Facility) Rules (June 1979).

¹¹⁶ *Id.*, Annex C, Arbitration (Additional Facility) Rules.

¹¹⁷ *Id.*, Annex D, Fact-Finding (Additional Facility) Rules.

¹¹⁸ *Id.*, Additional Facility Rules Art. 3.

¹¹⁹ *Id.* Art. 4(1-2).

¹²⁰ *Id.* Art. 4(3).

¹²¹ In few Swiss BITs the term "ad hoc" is also occasionally used in connection with arbitral institutions such as the ICC, in the sense of non permanent tribunal rather than non institutional arbitration; see e.g., the BIT with Honduras, Art. 9(2)(b) and (c). This interpretation is confirmed by the BIT with Iran which refers to "*an arbitration tribunal which shall be constituted for each individual case (ad hoc tribunal)*", Art. 9(2). See also *supra* the BIT with China, note 74. However in this article by ad hoc we mean non institutional arbitration, e.g., UNCITRAL.

¹²² See e.g., the BIT with China Art. 11(2); with Hong Kong Art. 11; with Uruguay Art. 10(3) and 9(2-7).

such cases the dispute resolution mechanism is subject to a varying degree to UNCITRAL rules.

When a pre-established set of rules is relied upon, UNCITRAL rules are generally favored because they neither require adoption of an arbitration law based on the UNCITRAL Model Law, nor U.N. membership. Their inconvenience, compared to arbitration based on ICSID and ICC rules, arises from the fact that UNCITRAL arbitration is not institutional. At best UNCITRAL provides only a set of rules to be applied by an ad hoc arbitral tribunal. The selection of rules based on the UNCITRAL Model Law means foregoing a secretariat to take care of administrative matters, a body to recommend experienced arbitrators and publish arbitral jurisprudence, etc., and certain facilities, such as hearing rooms, that institutional bodies can provide. UNCITRAL clauses however are widely accepted and have been proven to be adequate in many kinds of disputes, including investment disputes.

The UNCITRAL dispute settlement clauses that have been incorporated in Swiss BITS generally only establish a nomination mechanism for arbitrators. However the parties are usually free to agree upon another nomination mechanism¹²³. In some cases, emphasis has been placed on the agreement between the parties rather than on a pre-established set of rules¹²⁴. Some BITS provide that the parties must nominate their arbitrators within a relatively short time limit, for example three months¹²⁵. If the parties do not agree within the given time limit, a pre-established nomination mechanism shall apply, generally UNCITRAL rules¹²⁶. Some clauses refer to the nomination mechanism contained in the horizontal clause, with some amendments¹²⁷. Other clauses merely refer to a mechanism to be agreed between the parties¹²⁸.

In case of a disagreement between the parties or the party-appointed arbitrators, the president of a prestigious international institution is often selected to nominate the arbitral tribunal. Minor variations exist with respect to the authority designated. In the majority of cases the President of the ICJ has been designated¹²⁹. Other international institutions (the

¹²³ See e.g., the BIT with Peru Art. 9(3) 1st and 2nd sentence; with El Salvador Art. 9(2)(b).

¹²⁴ See e.g., the BIT with South Africa Art. 10(2)(c); with Hong Kong Art. 11.

¹²⁵ See e.g., the BIT with Ukraine Art. 9(2); with South Africa Art. 10(3).

¹²⁶ *Id.*

¹²⁷ See e.g., the BIT with Uruguay (Art. 10(3)).

¹²⁸ See e.g., the BIT with Ghana Art. 12(3)(b).

¹²⁹ *Id.*

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PCA¹³⁰ or the ICC¹³¹) are also occasionally selected. Only two BIT provided for other institutions, the President of the Stockholm Chamber of Commerce¹³² and the Secretary-General of ICSID¹³³.

Most Swiss BITS provide for a three-members arbitral tribunal, but sole arbitrators may occasionally be agreed by the parties¹³⁴. The BIT with Iran requires that the chairman be a national of a state which has diplomatic relations with both contracting parties¹³⁵; the BIT with Bulgaria extends this requirement to all the members of the arbitral tribunal¹³⁶. The BIT with Cambodia offers the choice between "an ad hoc arbitral tribunal" and "a sole arbitrator", thus implying that the ad hoc tribunal should consist of more than one arbitrator¹³⁷.

A reference to, for example, UNCITRAL rules for the constitution of the arbitral tribunal does not require that the same procedural rules be applied. The choice of procedural rules is usually dealt with separately¹³⁸. However in some Swiss BITS, the nomination of the arbitral tribunal and the rules applicable to the arbitral proceedings are dealt with in the same provision¹³⁹, or no distinction is made between the rules applicable to the nomination and the procedural rules¹⁴⁰.

Most clauses refer to the UNCITRAL rules of procedure, but grant the tribunal the right to decide its own procedural rules¹⁴¹. An intermediary solution is to provide that the tribunal is free to decide its own rules "in conformity with the UNCITRAL rules"¹⁴² or that it shall "be guided" by UNCITRAL rules¹⁴³. If the state party is contemplating becoming a member

¹³⁰ See e.g., the BIT with Bulgaria Art. 11(3); with Panama Art. 9(2).

¹³¹ See e.g., the BIT with Poland Art. 9(4); with Czechoslovakia Art. 9(2)(b).

¹³² BIT with Vietnam Art. 9(2)(ii). This may have been the result of political considerations.

¹³³ BIT with Kuwait, Art. 10(3)(c) and (a).

¹³⁴ See e.g., the BIT with Ghana Art. 12(3)(b); with South Africa Art. 10(2)(c); with Cuba Art. 10(2)(c).

¹³⁵ Art. 9(2). The unique character of this feature has already been noted with respect to the horizontal clause, see *supra* note 46.

¹³⁶ Art. 11(3) in fine. With respect to the horizontal clause however, this BIT limits this requirement to the chairman, see *supra* note 46.

¹³⁷ BIT with Cambodia Art. 8(2)(b).

¹³⁸ See e.g., the BIT with Lithuania Art. 9(a-b) and 9(c); with Vietnam Art. 9(2)(b)(i-ii) and 9(2)(b)(iii).

¹³⁹ See e.g., the BIT with Belarus Art. 9(2)(c).

¹⁴⁰ See e.g., the BIT with Hong Kong Art. 11.

¹⁴¹ See e.g., the BIT with Paraguay Art. 9(2)(b); with the USSR Art. 8(5).

¹⁴² See e.g., the BIT with Bulgaria Art. 11(4).

¹⁴³ See e.g., the BIT with Vietnam Art. 9(2)(iii): (Fr.) "*le tribunal fixe lui-même sa procédure tout en s'inspirant des règles de procédure d'arbitrage de la [...] C.N.U.D.C.I.*"

of the ICSID Convention, the clause may prescribe that the arbitral tribunal shall be guided by ICSID rules when agreeing on its own rules¹⁴⁴.

Some clauses are silent on procedural rules¹⁴⁵, or provide that the tribunal shall decide its rules of procedure¹⁴⁶, unless the parties agree otherwise¹⁴⁷. The BIT with Kuwait expressly provides that the parties may modify the UNCITRAL rules, but this express wording seems to be rare¹⁴⁸. If a reference to the UNCITRAL rules is limited to the nomination of the tribunal, it is likely in practice that UNCITRAL procedural rules will nevertheless be applied. Other provisions may provide for majority voting, costs and/or the final and binding nature of the award¹⁴⁹.

Since the UNCITRAL rules are revised from time to time, it is useful to specify which version shall apply, for example, "as amended by the last amendment accepted by both Contracting Parties at the time of the request for initiation of the arbitration procedure."¹⁵⁰

c) ICC Clauses and other Dispute Settlement Clauses

There are very few arbitral institutions or rules referred to apart from ICSID and UNCITRAL. One other institution sometimes relied on is the ICC, although it is at best mentioned as an alternative to other institutions¹⁵¹. Vietnam provides a unique case, referring to "*an organism of economic arbitration in the host state*" (alternatively with an ad hoc and a pre-ICSID clause)¹⁵². In the BIT with Slovenia the state parties consent to submit the dispute to "an organ of international conciliation", and alternatively to an "international arbitration tribunal"¹⁵³. The BIT with India provides for

¹⁴⁴ See e.g., the BIT with China Art. 12(4).

¹⁴⁵ See e.g., the BIT with Romania Art. 9(2)(c); with Uzbekistan Art. 9.

¹⁴⁶ See e.g., the BIT with China Art. 12(4); with Estonia Art. 10(6).

¹⁴⁷ See e.g., the BIT with Uruguay Art. 10(3) and 9(6); compare with the BIT with China Art. 12(4) which, like the BIT with Uruguay, provides that the arbitral tribunal shall decide its rules of procedure, but which, unlike the BIT with Uruguay which provides that the parties may agree otherwise, is silent on a possible agreement between the parties on the procedural rules.

¹⁴⁸ Art. 10(3)(c).

¹⁴⁹ See e.g., the BIT with China Art. 12(3) and 12(5).

¹⁵⁰ Model BIT of Austria, DOLZER/STEVENS p. 173, Art. 8(2) ver. 2.

¹⁵¹ See e.g., the BIT with South Africa Art. 10(2)(b); with Cuba Art. 10(2)(b).

¹⁵² BIT with Vietnam Art. 9(2)(a). For another particularity of the same BIT, see also *supra* note 132.

¹⁵³ BIT with Slovenia Art. 10(3).

UNCITRAL conciliation¹⁵⁴. The BIT with Kuwait adopts a very liberal approach by offering the parties to submit their dispute, in addition to investor-host state clauses, ICSID arbitration and Additional Facility, and ad hoc UNCITRAL arbitration, to "an arbitral tribunal constituted in accordance with the arbitration rules of any other institution agreed by the parties to the dispute"¹⁵⁵.

The model BIT of the U.S.A. draws a useful distinction by offering the choice between "other arbitration institutions" and "other arbitration rules" agreed between the parties¹⁵⁶, thus allowing them, for example, to submit their dispute before an ad hoc arbitration tribunal applying the ICC rules without submitting their dispute to the ICC Court of Arbitration.

d) Investor-Host State Clauses

Several BITs refer to possible dispute resolution mechanisms agreed separately between the investor and the state party to the investment contract. Agreement may be contained in the investment contract or be reached after the dispute arises. The formulation of such provisions varies¹⁵⁷. For example, the BIT with Sri Lanka provides for an ICSID arbitration if a dispute cannot be resolved between the parties through recourse to internal remedies or "by other means"¹⁵⁸. The BIT with Panama refers to "specific procedures"¹⁵⁹ agreed between the state party and the investor with no further qualification; the parties may have recourse to an UNCITRAL arbitration only in the absence of such a procedure¹⁶⁰. The BIT with Hong Kong refers to the settlement procedures upon which the parties may have agreed and specifies that this procedure must provide for a "final" settlement¹⁶¹.

Such BITs rarely specify whether the investor and the host state shall have agreed before the dispute arises, or whether such agreement may

¹⁵⁴ BIT with India Art. 9(2)(b).

¹⁵⁵ Art. 10(3)(d).

¹⁵⁶ See DOLZER/STEVENS p. 247, Art. VI(3)(a)(iv).

¹⁵⁷ Compare with the clear wording of the U.S. Model BIT which provides that if the dispute cannot be settled amicably, the investor may choose to submit the dispute for resolution, among other remedies, "*in accordance with any applicable, previously agreed dispute-settlement procedures*", see DOLZER/STEVENS p. 247, Art. VI(2)(b).

¹⁵⁸ Fr. "*par d'autres moyens*", BIT with Sri Lanka Art. 9(2), 2nd sentence.

¹⁵⁹ Fr. "*procédures spécifiques*", BIT with Panama Art. 9(2).

¹⁶⁰ *Id.*

¹⁶¹ BIT with Hong Kong Art. 11.

also intervene afterwards. Unlike most Swiss BITS, the BIT with Kuwait, albeit implicitly, draws such a distinction. It refers to "*any dispute resolution procedure agreed [between the parties] beforehand*"¹⁶². Even though it does not specify "before the dispute", letter (d) of the same article, as noted above¹⁶³, then enables the parties to submit their dispute, in addition to investor-host state clauses, ICSID arbitration and additional facilities and ad hoc UNCITRAL arbitration, to "*an arbitral tribunal constituted in accordance with the arbitration rules of any other institution agreed by the parties to the dispute*"¹⁶⁴. It is submitted however that, as far as they have reached an agreement to that effect, the investor and the host state may depart anytime from the dispute resolution mechanism provided for by the BIT.

The treatment of investment contracts that apply a dispute settlement regime other than that contained in the BIT is complex. In cases where the investment contract between the state party and the investor provides for another mechanism, the question is whether the parties intended to depart from the BIT, or whether, on the contrary, the latter should always prevail. The issue is more difficult when the contract incorporates a mechanism similar to that of the BIT (to which it may even expressly refer), but alters certain modalities of the BITs dispute resolution mechanism without expressing the intent of the parties to depart from the BIT¹⁶⁵.

A few, mostly early BITS, do not deal with this problem through a specific provision¹⁶⁶. The BITS which do, provide for two possible solutions¹⁶⁷. The first solution is that the investment contract prevails if it is more favorable than the BIT¹⁶⁸. The second solution is that the more favorable provisions contained in the investment contract shall not be

¹⁶² Art. 10(2)(a). "Beforehand" is expressed in the official French version by "*préalablement*".

¹⁶³ See *supra*

¹⁶⁴ Art. 10(3)(d).

¹⁶⁵ For a recent discussion of these problems, see B. M. Cremades/D. J. A. Cairns, *The Brave New World of Global Arbitration*, Vol. 3 No 2 JOURNAL OF WORLD INVESTMENT 192 (2002).

¹⁶⁶ See e.g., the BITS with Tunisia, Niger, Guinea, Ivory Coast, Senegal, Congo (Brazzaville), Cameroon, Rwanda, Togo, Madagascar, Malta, Tanzania, Costa Rica (1965) and Zaire.

¹⁶⁷ Among foreign model BITS, the U.S. model BIT e.g., is not different in this respect than Swiss BITS, see DOLZER/STEVENS p. 250, Art. IX(c). Other foreign BITS only address relationships of the BIT with laws of the state parties, or with international obligations between them, not with investment agreements. See e.g., the model BIT of the U.K., DOLZER/STEVENS p. 238, Art. 11; of the Netherlands, DOLZER/STEVENS p. 211, Art. 3(5); of Germany, DOLZER/STEVENS p. 192, Art. 8(1).

¹⁶⁸ See e.g., the BIT with Ghana Art. 10, under the heading "Application of Other Conditions"; with Cuba Art. 8(2) ("Other Conditions"); with Bolivia Art. 7 ("More Favourable Conditions"). This solution seems to have prevailed in the long run, see e.g., the BIT with Nicaragua Art. 7; with Mauritius Art. 11(1); with Ethiopia Art. 7.

invalidated¹⁶⁹. The scope of these two solutions is unclear¹⁷⁰. What does "more favorable" mean? To which party should the provision be more favorable¹⁷¹? What happens if the provision is less favorable¹⁷²?

e) Local Remedies

A minority of BITs permits recourse to domestic tribunals. Consequently, having regard to the *lis pendens* principle, the arbitration permitted by the clause may be requested provided there are no national proceedings pending¹⁷³. By local remedies, Swiss BITs generally point at judiciary courts or administrative tribunals¹⁷⁴; however a clear definition is rarely given. In some cases the definition is so broad or vague that it is questionable whether a recourse to an administrative, non judicial authority could qualify as a local remedy¹⁷⁵.

Some BITs only mention recourse to domestic tribunals as an option¹⁷⁶, while others make recourse to national courts compulsory before recourse to arbitration¹⁷⁷. When recourse to domestic tribunals is

¹⁶⁹ See e.g., the BIT with Uganda Art. 9; with Panama Art. 6; with South-Korea Art. 9; with Malaysia Art. 7; with Mali Art. 7.

¹⁷⁰ Nguyen Huu-tru argues that it should imply a contrario that less favourable conditions contained in an investment contract should be replaced by more favourable conditions contained in a BIT. Nguyen Huu-tru points out that the consequences of such rule would be far reaching since the balance of the contract might be disturbed, Nguyen Huu-tru p. 656. On the relationships between investment contracts and BITs, see also LAVIEC Sect. VII, pp. 241-65.

¹⁷¹ The BIT with Kuwait (Art. 13) specifies that the provisions more favourable to the investor shall prevail. Such provision seems to be exceptional among Swiss BITs. The other questions remain unanswered.

¹⁷² Such questions may arise, e.g., where the investment agreement provides for a six months consultation period, while the BIT provides for a twelve months consultation period, and that the "more favourable" conditions of the investment agreement shall prevail, as it did in a non published arbitration known to the author.

¹⁷³ The BIT with Mexico is one the rare Swiss BITs addressing expressly this issue, Art. 2(3) of the Annex.

¹⁷⁴ See e.g., the BIT with Kuwait Art. 10(4), which mentions "*civil or administrative tribunals*". Compare with the BIT with India Art. 9(2)(a), mentioning "*the competent judicial or administrative bodies*"; with the BIT with Ethiopia Art. 8(2)(a), mentioning "*the competent tribunal*"; with the U.S. model BIT, DOLZER/STEVENS p. 247, Art. VI(2)(a), mentioning "*the courts or administrative tribunals*".

¹⁷⁵ See e.g., the BIT with India, quoted *supra* in note 174.

¹⁷⁶ See e.g., the BIT with Peru Art. 9(2); with Paraguay Art. 9(2); with India Art. 9(2)(a); with Argentina Art. 9(2).

¹⁷⁷ See e.g., the BIT with Jamaica Art. 9(5); with Uruguay Art. 10(2).

an option, it may be offered alternatively with arbitration¹⁷⁸. The BIT with Costa Rica draws a line in-between insofar as it offers to the investor the choice between domestic courts and arbitration but, once the investor has chosen the domestic courts, his choice shall be final¹⁷⁹. In addition, this provision prescribes that the state parties shall abstain to interfere in the dispute brought before the domestic courts¹⁸⁰. In some cases the host state reserves the right to require that domestic court remedies be exhausted before arbitration is initiated¹⁸¹. In other cases, a claim before the national courts may be filed by either the investor or the host state¹⁸².

The exhaustion of internal remedies as a pre-condition to the grant of diplomatic protection has been discussed¹⁸³. In the case of ICSID clauses, the rule is inverted. In exchange for the investor's waiver of the right to request diplomatic protection, the host state renounces to the requirement that internal remedies be exhausted¹⁸⁴. However the ICSID Convention only establishes a presumption; the state party to the BIT may still insist that the requirement of exhaustion of internal remedies be satisfied¹⁸⁵. This explains why few Swiss BITs require exhaustion of local remedies, even when an ICSID clause is incorporated. This may be regrettable given the doubts that have been expressed concerning due process in certain internal proceedings, namely in simplified administrative proceedings¹⁸⁶. The model BIT of Austria anticipates this problem by specifying that the consent to submit the dispute to ICSID "*implies the renunciation of the requirement that internal administrative or juridical remedies should be exhausted*"¹⁸⁷.

The BIT with Jamaica requires the consent of both parties when choosing between arbitration and conciliation. If the parties agree on arbitration, the host state reserves its right to require that the investor exhausts internal remedies before requesting arbitration. In case the

¹⁷⁸ See e.g., the BIT with Paraguay Art. 9(2), which provides alternatively for ICSID or UNCITRAL arbitration; with India Art. 9(2), which provides alternatively for UNCITRAL conciliation.

¹⁷⁹ BIT with Costa Rica of 1 August 2000 (*see supra* note 10), Art. 9(3). The opposite appears not to be true, i.e., if the investor chooses arbitration, his choice is not deemed to be final, compare with Art. 9(4).

¹⁸⁰ BIT with Costa Rica of 1 August 2000 (*see supra* note 10), Art. 9(3).

¹⁸¹ See e.g., the BIT with Jamaica Art. 9(4).

¹⁸² See e.g., the BIT with Uruguay (Art. 10(2)).

¹⁸³ See *supra* Sect. 2.1.a.

¹⁸⁴ ICSID Convention Art. 26. See also LAVIEC pp. 272-3.

¹⁸⁵ See LAVIEC p. 273, note 17.

¹⁸⁶ See e.g., LAVIEC p. 305, note 33.

¹⁸⁷ DOLZER/STEVENS p. 173, Art. 8(2) ver. 1.

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parties cannot choose between arbitration and conciliation, the host state is deemed to have given its consent to arbitration after three months, but only provided the investor has exhausted all internal remedies¹⁸⁸.

Several BITS contain an "exit" or "opting out" provision providing that, if no decision has been rendered by the national court within a certain time limit (e.g., twelve¹⁸⁹, eighteen¹⁹⁰ or up to twenty-four months¹⁹¹), arbitration may nevertheless be requested. This is meant to prevent the BIT from becoming inoperative in the event that national proceedings become protracted¹⁹². It has been argued that a twelve months time limit is so short that it may exclude recourse to internal remedies¹⁹³. The BIT with Brazil allows the investor to withdraw its case from court anytime, provided the national courts have not rendered a final judgment¹⁹⁴.

Exit provisions may derogate from the *lis pendens* principle insofar as in some legal systems, beyond a certain stage of the proceedings, it is not possible to withdraw a case from court without the agreement of the other party and/or the court. The BIT with Argentina requires the parties to withdraw their case before they submit their dispute to arbitration¹⁹⁵.

A problem may arise when the exit provision does not specify that the decision must be final. Some BITS provide that arbitration may be

¹⁸⁸ BIT with Jamaica Art. 9(4-5). Exhaustion shall occur "*in conformity with international law*".

¹⁸⁹ See e.g., the BIT with Sri Lanka Art. 9(2).

¹⁹⁰ See e.g., the BIT with Peru Art. 9(3); with Paraguay Art. 9(3); with Chile of 24 September 1999, Art. 9(3).

¹⁹¹ BIT with the United Arab Emirates Art. 9(3). The recourse to domestic litigation is compulsory before the dispute may be submitted to arbitration, if it has not been "settled" (Fr. "*réglée*") in the meantime.

¹⁹² There may be inconsistency within the same dispute settlement clause between the time period after which an investor may withdraw the dispute from domestic courts and submit the dispute to arbitration if no judgement has been rendered, and the minimum time period during which preliminary consultation must take place before the dispute may be submitted to arbitration. For example the BIT with Jamaica (Art. 9) provides for a twelve months time period for preliminary consultation, but contains no time limit for rendering a judgement. On the contrary, the BIT with Peru (Art. 9) provides no time period for preliminary consultation, but for a time limit of eighteen months for rendering a judgement. In both cases it might prove difficult for the investor to avoid protracted consultation or domestic proceedings before the dispute can be submitted to arbitration.

¹⁹³ See Nguyen Huu-tru p. 659, note 160, on the BIT with Sri Lanka, Art. 9(2). This provision does not expressly state that the judgement shall be "final", but that the dispute shall have been "settled" (Fr. "*réglé*"). On the finality of domestic judgements, see *infra*.

¹⁹⁴ BIT with Brazil (see *supra* note 10) Art. 8(2)(1) and 8(3).

¹⁹⁵ BIT with Argentina Art. 9(4).

requested only if a "judgment" has not been rendered within a certain time limit¹⁹⁶. If a first instance judgment rendered within the time limit provided for in the exit provision is appealed and the appeal proceedings exceed the time limit, does this judgment qualify for the purpose of the exit provision even though it is not final? The same question applies to an interim judgment. In order to avoid ambiguity, it is preferable that exit provisions provide that the judgment be "final"¹⁹⁷. However the BIT with Peru¹⁹⁸ also allows the parties to the dispute to request arbitration, even though the national court has rendered a judgment within the time limit prescribed, when either party believes that the judgment infringes the BIT¹⁹⁹. This is the only Swiss BITS containing this feature.

The BIT with Kuwait is the only one, among Swiss BITS, providing for interim measures before domestic courts, even when an arbitration is pending²⁰⁰. Where such remedy is not foreseen by the *lex arbitri*²⁰¹, this feature allows the investor to rely directly on the BIT for requesting the domestic court protection against irreparable damage during the arbitration.

III. SELECTED ISSUES

There are a number of areas that have proven to be problematic in the application of foreign investments related dispute settlement clauses. Among those to be discussed are the requirement of consultation before starting the arbitration (or any other agreed dispute settlement method); the requirement of consent of one or both parties to submit the dispute to arbitration; the eligibility of the parties to resort to arbitration; the scope of arbitrable disputes; the applicable law, and the recognition and enforcement of arbitral awards. These issues are frequently raised in ICSID

¹⁹⁶ See e.g., the BIT with Uruguay Art. 10(2); with Peru Art. 9(3).

¹⁹⁷ See e.g., the BIT with Turkey which prescribes that the judgement shall be "final" (Fr. "*définitif*"), Art. 8(3).

¹⁹⁸ Art. 9(3).

¹⁹⁹ BIT with Peru Art. 9(4).

²⁰⁰ Art. 10(4) of the BIT with Kuwait prescribes that "*notwithstanding the submission of a dispute to a constraining arbitration in accordance with [the BIT], the investor shall be entitled to request, with a view to preserve his rights and interests, to the civil or administrative courts of the State party to the dispute, before or during the arbitration procedure, to take provisional measures which shall not cause the payment of damage interests.*"

²⁰¹ See e.g., Art. 183(2-3) and 185 of the Swiss Federal Act on International Private Law of 18 December 1987.

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arbitrations. They are however not exclusive to ICSID. Each of these topics is examined and their relevance to Swiss BITs discussed.

A. CONSULTATION

All Swiss BITs foresee consultation before recourse to arbitration or other dispute settlement methods. Sometimes the term "negotiation" is used instead of "consultation", but there is little material difference²⁰².

The time limit for consultation varies between three and eighteen months. Typically it is six (in the majority of cases) or twelve months, with three and eighteen months requirements being exceptional²⁰³. Pre-1981 stand-alone horizontal clauses providing for a time-limit establish a six or twelve months negotiation period²⁰⁴, with only one exception of nine months²⁰⁵. Compared to the model agreements of other countries though, which often provide for three, at most six-months requirements, Swiss BITs appear to provide for the longest consultation periods²⁰⁶.

Few BITs require that the dispute be notified before the consultation period begins²⁰⁷. While the Swiss BIT with South Africa uses the wording "notification" and the BIT with Hong Kong refers to a "written notification", the BIT with Botswana provides only that arbitration may be requested if the consultation do not bring a solution within six months "from the date of the request to begin them"²⁰⁸. The BIT with Kuwait

²⁰² Some BITs even use both, *see* the BIT with Mauritius, Art. 10(1), *see also infra* note 216, while "consultation" and "negotiations" are sometimes dealt with separately, *see* the model BIT of Denmark, DOLZER/STEVENS p. 183, Art. 10(1), compare with *id.* p. 184, Art. 12. *See also* the model BIT of the Netherlands, DOLZER/STEVENS pp. 214-6, Art. 11 and 12(1), which refers to "diplomatic" negotiations. The stand-alone horizontal clauses of the BIT with Dahomey, Art. 9(1), mentions settlement through "the diplomatic way" (or channel) (Fr. "*la voie diplomatique*"); so does the BIT with Gabon, Art. 12(1), which was terminated in the meantime, *see infra* note 377.

²⁰³ *See e.g.*, the BIT with Rumania Art. 9(2); with South Africa Art. 10(1); with Cuba Art. 10(1).

²⁰⁴ It is also the case of the majority of post-1981 horizontal clauses.

²⁰⁵ BIT with Morocco Art. 9(2).

²⁰⁶ The diagonal clauses contained in the model BITs of Austria, Denmark and the U.K. provide for three months; of Germany and Hong Kong, for six months; the Swiss model diagonal clause is the only one providing for twelve months; however since 1997 all Swiss BITs depart from the model and provide for a six months period. *See however supra* note 191. The model BIT of the Netherlands does not specifies any time period.

²⁰⁷ *See e.g.*, the BIT with Hong Kong Art. 11; with South Africa Art. 10(1).

²⁰⁸ Fr. "*à compter de la demande de les engager*", BIT with Botswana Art. 8(2). *See also* BIT with Ethiopia Art. 8(2).

refers to the date at which one of the parties to the dispute has "*invited the other one to settle amicably the dispute*"²⁰⁹; the BIT with Chile²¹⁰ to the date a request for consultation has been made²¹¹. The BIT with Mexico is the only one imposing a double-condition, i.e., that six months have elapsed from the inception of the dispute, and that the investor has notified to the host state at least three months in advance its intention to resort to arbitration²¹².

Notification creates a legal start date, a *dies a quo*. This requirement is sensible since it avoids uncertainty, particularly in the case of a "soft" dispute, the beginning of which is unclear. Some horizontal clauses provide for a similar solution. For example, the BIT with South Africa states that "*provided negotiations and consultation bring no solution within six months from the request to initiate them and unless the parties agree otherwise*", arbitration may be requested²¹³.

Several horizontal clauses in Swiss BITs raise concerns related to the efficiency of consultation. A well known problem arises when one of the parties refuses to consult or remains silent, thus thwarting the purpose of consultation, and allowing consultation to be employed as a dilatory tactic. Some BITs appearing in horizontal clauses attempt to circumvent this problem by the use of various formulas.

The BIT with Turkey was the first treaty to address this concern. It provides that any dispute shall be (tentatively) settled by way of negotiations "*direct and honest*"²¹⁴. The BIT with South Africa is more sophisticated: it provides that in case of a dispute the parties shall "*consult [mutually] and negotiate*"²¹⁵. It further states that "*the parties shall devote the required understanding to these consultation and to these negotiations*"²¹⁶. *If the parties reach an agreement, they must record so in writing*"²¹⁷. It may be doubted that these requirements of good faith shall

²⁰⁹ Art. 10(2).

²¹⁰ Of 24 September 1999.

²¹¹ Art. 9(2).

²¹² Art. 4(1) of the Annex. Such double requirement obviously duplicates the requirement of the notice of arbitration foreseen by all arbitration rules anyway.

²¹³ BIT with South Africa Art. 11(2).

²¹⁴ Fr. "*directes et véritables*", BIT with Turkey Art. 9(1).

²¹⁵ Fr. "*les Parties contractantes conviennent de se consulter et de négocier*", BIT with South Africa Art. 11(1).

²¹⁶ *Id.* The BIT with Cuba provides for the same solution, Art. 11(1).

²¹⁷ Fr. "*Elles se prêtent avec la compréhension requise à ces consultation et négociations. Si les parties aboutissent à un accord, elles le consignent par écrit*", BIT with South Africa Art.

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prove to be more than wishful thinking²¹⁸. The model BIT of Austria goes one step further by requiring the notification of a "*sufficiently detailed claim*" before the consultation is deemed to have started²¹⁹. No equivalent formulation appears in diagonal clauses found in Swiss BITS.

A consultation with a minimum time requirement can become a lengthy hindrance to arbitration, which is itself a long process. Such clauses prevent recourse to arbitration or give, at best, rise to additional legal disputes, in particular when the other party refuses to negotiate, does not negotiate in good faith, or remains silent. In many instances they have proven to do more harm than good²²⁰. While such a clause may have been historically justified when there were no sophisticated investment dispute resolution mechanisms available, times have changed. Indeed all arbitration rules generally foresee that a settlement may occur at any time²²¹, which renders this requirement less meaningful. It is therefore suggested that time limits be abandoned, while the mention of consultation (with no time limit) be maintained.

Another solution would perhaps be that, as foreseen by the model BIT of the Netherlands, the tribunal may, at any stage of the proceedings, before it decides, propose to the parties to the dispute that the dispute be settled amicably. The same provision goes further by stating that the foregoing shall not prejudice settlement of the dispute *ex aequo et bono* if the parties so agree²²². This latter feature, unseen in Swiss BITS, seems appropriate in the context of BITS, where the economic and/or political weight of the parties to the dispute and/or to the BIT is sometimes very unequal, causing some decisions taken on the sole basis of the law to be

11(1). *See also* BIT with Mexico Art. 12(1); with Zimbabwe Art. 11(1). The BIT with Cuba did not retain the last sentence.

²¹⁸ Should a party to the dispute negotiate in bad faith, then the other party may at best attempt to initiate the arbitration, facing the risk of an objection from both the other party and the arbitration tribunal and/or institution that the minimum consultation requirement has not elapsed yet. That party is therefore, in practice, duty bound to lose its time and its money, even if it acts in good faith, before it succeeds in initiating the arbitration.

²¹⁹ DOLZER/STEVENS p. 172, Art. 8(2). What a "sufficiently detailed" claim is and who should say so is, once again, debatable.

²²⁰ For a critical appraisal of the consultation requirement *see* T. Varady, *The Courtesy Trap: Arbitration "If No Amicable Settlement Can Be Reached"*, Vol. 6 No 2 Arbitration and ADR 27 (IBA October 2001).

²²¹ *See* ICSID Arbitration Rules Art. 43; UNCITRAL Arbitration Rules Art. 34; ICC Arbitration Rules Art. 26 (by implication).

²²² DOLZER/STEVENS pp. 215-6, Art. 12(5). However this possibility is given only in the horizontal clause, not in the diagonal, compare with *id.*, p. 214, Art. 9.

unsatisfactory in practice. This concern should maybe also be addressed in future Swiss BITS.

B. CONSENT

The issue of consent of the state parties to arbitration has only been expressly addressed in Swiss BITS since the 1990s. Although Swiss BITS have always provided for a dispute resolution mechanism, in many cases they did not contain the explicit consent from the state parties to arbitration. Consent was only implied. Early BITS only provide that the dispute may (as opposed to "shall"²²³) be submitted to arbitration²²⁴.

There is a large variety of provisions governing the consent question. Some Swiss BITS require the consent of both parties²²⁵; some state that the dispute shall be submitted to arbitration but remain silent on the issue of the consent of the respondent²²⁶; some entitle the investor to request arbitration, but remain silent on the consent of the host state²²⁷; some require the consent of the investor in case the host state requests arbitration, but remain silent on the consent of the state party in case the investor requests arbitration²²⁸.

Most BITS use the word "may" which only implies that the parties have the possibility to submit the dispute to arbitration²²⁹. Only a few use the terms "shall" or "must", expressing a mandatory requirement and thus implying, to some extent, the consent of the state parties²³⁰. Some BITS play on subtle variations between "may" and "shall". For instance the BIT with the USSR²³¹ gives the impression that the dispute "shall" be submitted to an arbitral tribunal, but in fact it provides that the parties "may"

²²³ See *infra*.

²²⁴ See e.g., the BIT with Sri Lanka Art. 9(2); with Panama Art. 9(2); with Bolivia Art. 9(2).

²²⁵ See e.g., the BIT with Sri Lanka Art. 9(1); with Hungary Art. 10(2)(b).

²²⁶ See e.g., the BIT with Panama Art. 9(2), 2nd sentence.

²²⁷ See e.g., the BIT with China Art. 12(1); with Hungary Art. 10(2)(a).

²²⁸ See e.g., the BIT with Bolivia Art. 9(2); with Turkey Art. 8(3).

²²⁹ Fr. "*le différend pourra être soumis*". See e.g., the BIT with Argentina Art. 9(3) and 9(5); with Bulgaria Art. 11(2); with Peru Art. 9(2-4). Some variations occur, with no material consequences, such as in the BIT with South Africa providing that the parties to the dispute "*may decide together to submit the dispute*" to arbitration, Art. 10(1).

²³⁰ Fr. "*le différend sera soumis*". See e.g., the BIT with Cape Verde Art. 9(2) and 9(5); with Vietnam Art. 9(2-3).

²³¹ BIT with the USSR Art. 8(2)(a).

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proceed as follows (...), casting doubt on whether the consent of the respondent can be implied²³².

The concern for prior consent of the state parties to a BIT appears to have been prompted by the ICSID Convention, since ICSID jurisdiction relies on the consent of both parties to the dispute²³³. ICSID clauses in BITS would serve little purpose if state parties do not provide advance consent to submit investor disputes to the Centre. The model BIT of Austria specifies that such consent is valid "*even in the absence of an individual arbitral agreement between the [host state] and the investor*"²³⁴.

The first Swiss BIT which addressed this issue was the 1990 BIT with Jamaica. It expressly states that the host state shall give its consent to arbitration. However such consent is submitted to complicated rules. If consultation fail, the parties shall submit their dispute to conciliation or arbitration. If they agree on the latter remedy, the host state may request the exhaustion of local remedies. If, on the contrary, they do not reach an agreement, the host state consents to arbitration, but requests that local remedies be exhausted. Local remedies are open-ended, i.e., there is no time limit for rendering a final judicial decision, or opting-out clause, so that considerable delay in fulfilling the commitment to arbitrate is possible. Thus for the investor, at playground level, the successful submission of the dispute to the arbitration supposes (a) that the host state agrees on doing so and (b) that it does not require the exhaustion of local remedies. Insofar the host state is allowed in effect a double consent. Such provisions may enable the host state to render the dispute resolution mechanism inoperative and should be discouraged²³⁵.

The BIT with Ghana was the next to express the consent of the state parties²³⁶. State consent to arbitration in BITS with Switzerland is not yet a common practice²³⁷. but consent is found more frequently in recent BITS²³⁸. Even though it does not expressly provide for prior consent of the state parties, the 1987 BIT with China appears to be the first Swiss BIT

²³² For more examples on different forms of consent see DOLZER/STEVENS pp. 131-6.

²³³ ICSID Convention Art. 25(1).

²³⁴ DOLZER/STEVENS p. 172-3, Art. 8(2) ver. 1. This model BIT takes the same precaution for ad hoc UNCITRAL arbitration whenever applicable, DOLZER/STEVENS p. 173, Art. 8(2)(2).

²³⁵ BIT with Jamaica Art. 9(4-5).

²³⁶ BIT with Ghana Art. 12(4).

²³⁷ Among recent BITS see e.g., the BIT with Botswana Art. 8; with Ethiopia Art. 8; with Nicaragua Art. 9 (all signed in 1998) which remain silent on consent.

²³⁸ See e.g., the BIT with Uzbekistan Art. 9(4); with Belarus Art. 9(3); with Rumania Art. 9(3); with Ukraine Art. 9(4).

enabling an investor to submit the dispute to arbitration without the consent of the host state²³⁹. It provides that, if consultation was unsuccessful, the dispute shall be submitted to arbitration by either party to the dispute²⁴⁰.

State parties to investment disputes do not systematically argue that their consent cannot be implied. Nevertheless scholarly opinion supports the systematic incorporation of consent clauses in the dispute resolution provision of BITs in order to avoid any doubt on the availability of arbitration, and thus strengthen investor confidence²⁴¹. Indeed one cannot see how a state could refuse a consent clause without casting serious doubt on the sincerity of its commitment to investors. It is hoped that the acceptance of consent clauses will become a regular part of Swiss practice.

In some cases the requirement of consent varies with the scope of the "investment dispute" defined by the BIT. Investment disputes as defined by the BIT may be submitted to arbitration upon request of the investor notwithstanding the consent of the host state, while other disputes between the investor and the host state require the consent of the host state²⁴².

In several cases, Swiss BITs offer the option between arbitration and conciliation, upon agreement between the investor and the host state. Should no agreement be reached after a time limit, which is usually short, then the investor is free to proceed with arbitration, based on the host state consent in the BIT²⁴³. Many BITs do not expressly offer such an alternative²⁴⁴, but it may frequently be implied, in instances when the parties may depart from the dispute settlement clause provided for in the BIT²⁴⁵. Nothing prevents the parties from submitting the dispute to a

²³⁹ See P. SCHAUFFELBERGER, LA PROTECTION JURIDIQUE DES INVESTISSEMENTS INTERNATIONAUX DANS LES PAYS EN DÉVELOPPEMENT, ETUDE DE LA GARANTIE CONTRE LES RISQUES DE L'INVESTISSEMENT ET EN PARTICULIER DE L'AGENCE MULTILATÉRALE DE GARANTIE DES INVESTISSEMENTS (AMGI), *in*: 83 ETUDES SUISSES DE DROIT INTERNATIONAL, SOCIÉTÉ SUISSE DE DROIT INTERNATIONAL, Schulthess (ed.), 1993, p. 93. Schaufelberger does not discuss the fact that this consent is only implicit.

²⁴⁰ BIT with China Art. 11(2).

²⁴¹ See DOLZER/STEVENS pp. 131-6.

²⁴² See *e.g.*, the BIT with Hungary Art. 10(2)(b); with Poland Art. 9(2)(b) and 9(8) *in fine*.

²⁴³ See *e.g.*, the BIT with Jamaica Art. 9(5) and *supra* Specific Clauses, Local Remedies, Sect. 2.2.b.v.; see also the BIT with Namibia, Art. 9(2).

²⁴⁴ See *e.g.*, the BIT with Bolivia Art. 9(2); with Argentina Art. 9(3); with Cape Verde Art. 9(2); with Lithuania Art. 9(2).

²⁴⁵ See *supra* Sect. 2.2.b.iv.

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proceeding based on the ICSID Rules of Conciliation or to an ad hoc conciliation procedure. The BIT with Macedonia confirms this approach by providing that the state parties consent to submit any dispute to international conciliation or arbitration²⁴⁶.

The BIT with Kuwait exemplifies such liberal, pro-investor approach: not only does it allow the investor to choose between any dispute settlement mechanism previously agreed between the parties (usually in the form of a dispute resolution clause contained in the investment agreement), and four forms of arbitration²⁴⁷; it also submits arbitration to the written consent of the investor²⁴⁸. Finally, both state parties give very clearly their "unconditional consent" to submit any investment dispute to "constraining" arbitration²⁴⁹. This consent is also expressly worded for the purpose of the ICSID Convention²⁵⁰, including the Additional Facility, which is expressly mentioned, of the UNCITRAL Rules²⁵¹, and even of the New York Convention, as will be discussed below²⁵². This BIT is the only Swiss BIT the author is aware of which contains an express consent for the purpose of the UNCITRAL Rules and the New York Convention. Among the foreign model BITs examined, the U.S. is the only one qualifying consent as strongly as the Swiss BIT with Kuwait²⁵³.

C. ELIGIBILITY

Eligibility involves the question of how far a company incorporated in the host state or set up pursuant to its legislation by investors of the other state may be regarded as the investor party for purposes of the BIT. With respect to physical persons, eligibility may involve questions associated with the nationality of the investor. In both cases, the BIT is inapplicable if the company or the individual are not, for purposes of the BIT, from the other state.

²⁴⁶ BIT with Macedonia Art. 10(3).

²⁴⁷ ICSID arbitration; ICSID Additional Facilities; UNCITRAL; any other institutional rules agreed upon by the parties. Art. 10(3).

²⁴⁸ Art. 10(3).

²⁴⁹ Fr. "*à l'arbitrage contraignant*", Art. 10(5).

²⁵⁰ See *supra* note 233.

²⁵¹ I.e., Art. 1 of the UNCITRAL Arbitration Rules.

²⁵² See *infra* Sect. 3.6.

²⁵³ See DOLZER/STEVENS pp. 248-9, Art. VI(4). On consent related to the enforcement of the award, in particular the New York Convention, see *infra* Sect. 3.6.

For the BIT to apply, the company must be "controlled" by investors of the other state, while individual investors must be nationals of the other state. Accordingly, double-nationals are deprived of the benefit of the BIT. The relevant period is the time the dispute arises. This requirement, found in article 25(2)(a) and (b) of the ICSID Convention, has given rise to considerable discussion²⁵⁴.

It was not until the 1981 BIT with Turkey²⁵⁵ that the issue of eligibility, primarily corporate eligibility in an ICSID clause, arose in a Swiss BIT. Since then Swiss BITs sometime paraphrase the definition of eligibility provided in the ICSID Convention, to which they usually refer²⁵⁶. This precaution is meant to avoid misunderstandings as to the extent of ICSID's jurisdiction.

When a BIT contains a conditional ICSID clause, applicable when the other state party becomes a member of the ICSID Convention, the criteria related to eligibility may be modified to match ICSID practice²⁵⁷.

D. SCOPE

Many BITs specify the type of disputes to which the dispute resolution clause applies. Some do not. Others make a passing reference to "disputes related to an investment"²⁵⁸. Some dispute resolution clauses rely generally²⁵⁹ or specifically²⁶⁰ on other provisions in the BIT for the definition of covered disputes.

The definition may be fairly broad²⁶¹ or well defined²⁶². In the latter case the concerns of the other state party may vary considerably from one

²⁵⁴ See DOLZER/STEVENS pp. 136-44.

²⁵⁵ BIT with Turkey Art. 8(4).

²⁵⁶ See e.g., the BIT with Hungary Art. 10(4); with Jamaica Art. 9(7); with Gambia Art. 9(3); with Nicaragua Art. 9(3).

²⁵⁷ See e.g., the Protocol of 12 November 1986 attached to the BIT with China and forming part thereof. See also *supra* note 104.

²⁵⁸ See e.g., the BITs with Czechoslovakia Art. 9(1); with Macedonia Art. 10(1); with Cambodia Art. 8(1). The BIT with Bolivia mentions "divergences", Art. 9(1).

²⁵⁹ See e.g., the BIT with Turkey which defines an investment dispute as "*a dispute involving the non-respect [Fr. "non-respect"] of rights and obligations conferred or created pursuant to the present Agreement*", Art. 8(1).

²⁶⁰ See e.g., the BIT with Poland Art. 9(2)(a); with Hungary Art. 10(2)(a).

²⁶¹ See e.g., the BIT with Turkey Art. 8(4); with Hong Kong Art. 11; with Cuba Art. 10(1).

²⁶² See e.g., the BIT with Mexico, which refers to a loss or a damage by reason or following the non compliance of the other party with an obligation flowing from the BIT, Art. 2(2) of the Annex.

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BIT to another, based on municipal law requirements. For example the BIT with Sri Lanka carefully defines the term "investment"²⁶³. The BIT with China distinguishes disputes concerning expropriation indemnities from other disputes²⁶⁴. The BIT with the USSR²⁶⁵ covers "*the consequences of non-performance*²⁶⁶, *inappropriate performance, of the obligations related to the free transfer [of capital] as defined in the Agreement*"²⁶⁷, as well as disputes on the expropriation procedure and the related indemnity²⁶⁸. The BIT with Poland²⁶⁹ defines investment disputes by reference to provisions concerning transfer of capital²⁷⁰ and expropriation²⁷¹. Sometimes such scope is also defined negatively. For example the BIT with Mexico excludes from the scope of the dispute settlement investment restrictions because of national security²⁷². Finally the U.S. model BIT may also be mentioned, as it extends the definition of an investment dispute not only to disputes related to investment agreements, but also to investment authorizations and to rights conferred or created by the BIT²⁷³.

In most if not all these examples, the definition of investment distinguishes between three circles of disputes: a narrow circle of disputes in which arbitration may be requested with the agreement of both parties²⁷⁴; a larger circle of disputes in which the investor alone²⁷⁵ or either party separately²⁷⁶ may request arbitration; and a wide circle for

²⁶³ BIT with Sri Lanka Art. 8(5)(c).

²⁶⁴ BIT with China Art. 12(1)(a) and 7.

²⁶⁵ BIT with the USSR Art. 8(2)(a).

²⁶⁶ *See also* BIT with South Africa Art. 10(1).

²⁶⁷ BIT with the USSR Art. 5.

²⁶⁸ *Id.* Art. 6. Compare with the BIT with China *supra* note 264, which appears to be concerned with the indemnity, not with the procedure.

²⁶⁹ BIT with Poland Art. 9(2)(a). The disputes defined in this provision may be submitted to arbitration by the investor without consent of the host state.

²⁷⁰ *Id.* Art. 5.

²⁷¹ *Id.* Art. 6. Disputes other than those defined in Art. 9(2)(a) may be submitted to arbitration only with the consent of both parties, Art. 9(2)(b).

²⁷² Art. 12 of the Annex.

²⁷³ DOLZER/STEVENS pp. 246-7, Art. VI(1). Nevertheless this model BIT may not be as liberal as it seems *prima facie* since it is completed by an Annex providing for very far reaching unilateral exceptions ranging from air transportation to government securities, etc., thus dramatically threatening its scope, *see id.* Annex, pp.252-3.

²⁷⁴ *See e.g.*, the BIT with China Art. 12(1)(b); with Poland Art. 9(2)(b); with the USSR Art. 8(2)(b).

²⁷⁵ *See e.g.*, the BIT with China Art. 12(1)(a).

²⁷⁶ *See e.g.*, the BIT with Poland Art. 9(2)(a); with the USSR Art. 8(2)(a).

disputes which do not fall in the two first circles and are therefore not covered by the BIT²⁷⁷.

Only few Swiss BITs qualify the scope of the award. The BIT with Venezuela provides that the award be limited to establishing whether the state party to the dispute failed to meet an obligation pursuant to the BIT, and whether the investor suffered damage because of such a failure. Furthermore, the award shall decide the amount of the indemnity, if any, which the host state must pay to the investor²⁷⁸. The BIT with Kuwait specifies that the award may include the attribution of interest²⁷⁹. The BIT with Mexico is the most elaborated in this respect: it provides for the form of the compensation (monetary, including interest, or by restitution, separately or jointly)²⁸⁰, its beneficiaries²⁸¹, the rights of third-parties²⁸², punitive damages²⁸³, and for the material and personal scope of its binding effect²⁸⁴.

E. APPLICABLE LAW

Swiss BITs have only recently begun to contain provisions concerning the applicable law, and now only occasionally. The most elaborate formulation prescribes that the arbitral tribunal shall base its decision on the BIT, the other agreements applicable between the state parties, particular agreements related to the investment, the laws of the host state, including the rules on conflict of laws, as well as international law whenever applicable²⁸⁵. The horizontal clause contained in the BIT with Cuba prescribes that the tribunal shall take into account applicable national laws "in an appropriate fashion"²⁸⁶. So does the BIT with Zimbabwe, which refers in addition to "relevant" national laws²⁸⁷. The BIT with Mexico refers to the BIT itself and "the other rules of international law"²⁸⁸. By comparison, the model BIT of the Netherlands

²⁷⁷ On the scope of arbitrable disputes before ICSID, *see* DOLZER/STEVENS pp. 144-6.

²⁷⁸ BIT with Venezuela Art. 9(4).

²⁷⁹ Art. 10(9).

²⁸⁰ Art. 8(1) of the Annex.

²⁸¹ *Id.*, Art. 8(2).

²⁸² *Id.*, Art. 8(3).

²⁸³ *Id.*, Art. 8(4).

²⁸⁴ *Id.*, Art. 9(1).

²⁸⁵ *See e.g.*, the BIT with Argentina Art. 9(7); with Chile of 24 September 1999 Art. 9(7); BIT with Peru Art. 9(7); with Zimbabwe Art. 10(3).

²⁸⁶ BIT with Cuba Art. 11(5).

²⁸⁷ Fr. "*pertinentes*", Art. 11(5).

²⁸⁸ Art. 7(1) of the Annex.

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prescribes that the tribunal shall decide on the basis of "respect for the law"²⁸⁹. The meaning and the scope of this expression are unclear.

The above mentioned BIT with Mexico provides for precedents, stating that any interpretation of a provision of the BIT given and agreed by both parties shall bind any tribunal constituted under the BIT²⁹⁰. This provision is unseen in other Swiss BITs.

F. RECOGNITION AND ENFORCEMENT

With respect to non-ICSID clauses, only a minority of such BITs deals with recognition and enforcement of the award²⁹¹. Several states with which Switzerland has a BIT are members of the New York Convention. For states that are not members, a clause requiring the state parties to recognize and enforce the award should be inserted.

The 1989 BIT with Poland was the first Swiss BIT containing a diagonal clause dealing with recognition and enforcement. It provides that "*each party recognises and assures*²⁹² *the enforcement of the arbitral award*"²⁹³. Other BITs addressing this issue use similar wording²⁹⁴. The BIT with Bulgaria declares that each state party shall "*commit itself to give effect to the award*"²⁹⁵. Such a clause has also been inserted in a BIT when the other state party was already a member of the New York Convention²⁹⁶. The BIT with Mexico makes an unclear reservation, with respect to recognition²⁹⁷ and enforcement of the award, in the case of what seems to be an appeal against an interim award²⁹⁸.

²⁸⁹ DOLZER/STEVENS p. 215, Art. 12(5).

²⁹⁰ Art. 7(2) of the Annex.

²⁹¹ The title of the topical provision in the BIT with Mexico, Art. 9 of the Annex, mentions the "irrevocability" (Fr. "*irrévocabilité*") and the execution of the award instead, although this provision really appears to address recognition. The wording sometimes confusing of this BIT has been noted above, *see supra* note 89.

²⁹² Fr. "*assure*", BIT with Poland Art. 9(5).

²⁹³ BIT with Poland Art. 9(5). *See also* the BIT with Czechoslovakia Art. 9(2)(c).

²⁹⁴ *See e.g.*, the BIT with Cape Verde Art. 9(3)(d); with Czechoslovakia Art. 9(2)(c).

²⁹⁵ BIT with Bulgaria Art. 11(5).

²⁹⁶ *See* the BIT with the USSR which was a member of the New York Convention and in which the latter is expressly mentioned, Art. 8(5).

²⁹⁷ With respect to "recognition", *see supra* note 291.

²⁹⁸ Art. 9(2) of the Annex: (Fr.) "*sous réserve de la procédure d'examen applicable dans le cas d'une sentence provisoire*". The wording sometimes confusing of this BIT has been noted

Several Swiss BITS do not mention recognition or enforcement, even though the other state party is not a member of the New York Convention²⁹⁹. However most BITS indirectly refer to enforcement in the provisions related to subrogation³⁰⁰ and diplomatic recourse³⁰¹. Besides several BITS, whether they address recognition and enforcement at all or not, omit to specify that the award shall be final³⁰².

When the other state is a member of the New York Convention, care must be taken to use wording compatible with the New York Convention. For example, the BIT with Lebanon provides that the award shall be executed in conformity with "the national legislation"³⁰³; even though Lebanon has ratified the New York Convention on 9 November 1998³⁰⁴ and signed the BIT with Switzerland on 3 March 2000, there is no mention of the New York Convention in the BIT³⁰⁵. Hence the latter should prevail in case of incompatibility with the national legislation, pursuant to the principle *pacta sunt servanda*, apart of strictly limited exceptions³⁰⁶.

above, *see supra* note 89. In contrast, this BIT is one of the few Swiss BITS providing for the application of the New York Convention, *see infra* notes 308 and 310.

²⁹⁹ On 5 December 2001 twenty-three states (i.e. approximately two out of five) with which Switzerland signed a BIT were not member of the New York Convention. These are (by alphabetical order): Albania, Armenia, Brazil, Cape Verde, Chad, Congo (Brazzaville), Ethiopia, Gabon (terminated), Gambia, Honduras, Iran, Jamaica, Korea (North-), Malta, Namibia, Nicaragua, Pakistan, Rwanda, Sudan, Togo, United Arab Emirates, Zaire and Zambia. All are in force, or provisionally applied (BIT with Rwanda), but the BIT with Brazil (*see supra* note 10). Out of those, only four BITS provide for the recognition and the enforcement of the award: Albania Art. 11(2)(c), Armenia Art. 8(7), Cape Verde Art. 9(3)(d), and Ethiopia Art. 8(5). The BITS with Armenia and with Ethiopia specify that the award shall be enforced "*in conformity with the national legislation*", Art. 8(5), which may hinder the enforcement. On recognition and enforcement provisions in the ICSID Convention, *see infra* note 321 and accompanying text.

³⁰⁰ *See* the BIT with Vietnam which states that no party to the dispute shall neither during the arbitration nor during the enforcement object that it received an insurance indemnity, Art. 9(4).

³⁰¹ *Id.* The BIT states that the diplomatic channel shall be disregarded unless the other party does not comply with the award, Art. 9(5).

³⁰² This may also be the case where the other state is a member of the New York Convention or not. For BITS with countries being members of the New York Convention, *see e.g.*, the BIT with Bangladesh Art. 8; with Ghana Art. 12; with Hungary Art. 10. For BITS with countries not being members of the New York Convention, *see e.g.*, the BIT with The Gambia Art. 9, with Cape Verde Art. 9, with Iran Art. 9. *See also supra* Sect. 2.1.b and notes 48-49.

³⁰³ Art. 7(5).

³⁰⁴ <<http://www.asser.nl/ica/nyca-eng.htm#IT1>>.

³⁰⁵ *See also e.g.*, the BIT with Djibouti of 4 February 2001, Art. 9(6) (Djibouti became a contracting state of the New York Convention by succession on 14 June 1983); with Jordan of 25 February 2001, Art. 9(7) (Jordan has ratified the New York Convention on 15 November 1979); with Costa Rica of 1 August 2000 (*see supra* note 10), Art. 9(8) (Costa Rica has ratified the New York Convention on 26 October 1987).

³⁰⁶ Art. V.II of the New York Convention.

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Therefore such wording may open the door to disagreements on the scope of said exceptions³⁰⁷.

The BIT with Kuwait is the only Swiss BIT the author is aware of which deals extensively with enforcement under the New York Convention. It starts by expressing the consent of the state parties expressly for the purpose of the New York Convention³⁰⁸. It then moves by prescribing that any arbitration under the BIT shall take place, with the agreement of the parties to the dispute, in a state which is a member of the New York Convention³⁰⁹, thus minimizing interferences adverse to the enforcement from states not party to the Convention. It also states that any dispute under the BIT shall be deemed to be a "commercial dispute" in the sense of art. 1 of the Convention³¹⁰, thus preventing any attempt of misinterpretation. The BIT finally contains the general statement that each state party shall enforce the award without delay and shall take measures in view of their effective enforcement on their territory³¹¹. Enforceability thus finds itself maximized. One should hope that this BIT will inspire future Swiss BITs³¹².

The other countries the model BITs of which have been examined here do not appear to be more concerned than Switzerland in this regard. On seven countries, only the USA³¹³ provide extensively for the application of the New York Convention. Out of the six remaining, four³¹⁴ do not address enforcement at all³¹⁵, while the last two only refer to domestic

³⁰⁷ For a recent discussion of such concern, see B. M. Cremades/D. J. A. Cairns, *The Brave New World of Global Arbitration*, Vol. 3 No 2 JOURNAL OF WORLD INVESTMENT 205-8 (2002). The authors note that delocalization of arbitral law has correspondingly increased the significance of public policy as a mean of control by national courts of international arbitration, *id.* p. 205 and note 97.

³⁰⁸ I.e., Art. II of the New York Convention. The BIT with Mexico contains the indirect consent of the state parties since its states that the investor shall be entitled (Fr. "*pourra*") to request the enforcement of the award pursuant to the New York Convention. The ICSID Convention is also expressly mentioned, see *infra* note 322.

³⁰⁹ Art. 10(6)(b) 1st sentence.

³¹⁰ Art. 10(6)(b) 2nd sentence. This BIT goes, in this respect, even farther than the U.S. model BIT, see *infra*. The BIT with Mexico also contains such a statement, Art. 9(5) of the Annex.

³¹¹ Art. 10(9).

³¹² It has not so far, see *infra* note 359.

³¹³ See *infra*.

³¹⁴ Denmark, Hong Kong, the Netherlands and the U.K.

³¹⁵ Just like the Swiss model agreement, which is silent on recognition and enforcement, see DOLZER/STEVENS 224-5, Art. 9.

law³¹⁶. The U.S. model BIT provides, with respect to enforcement pursuant to the New York Convention, almost exactly like the Swiss BIT with Kuwait³¹⁷.

When the other state party is not a member of the New York Convention, the BIT should perhaps provide that the parties are to draw guidance from the principles contained in the Convention³¹⁸. There do not appear to be any Swiss BITs containing such a provision. Just as pre-ICSID clauses are now routinely inserted in BITs with countries that are anticipating becoming members of the ICSID Convention³¹⁹, pre-New York Convention clauses should be encouraged for countries that are not yet members of the New York Convention. A draft provision might provide that the other state party shall recognize and enforce the arbitral award pursuant to the New York Convention when it becomes a member, and that prior to membership it shall do so being guided by the New York Convention³²⁰.

Member states of the ICSID Convention accept a commitment to recognize and enforce the award rendered by an ICSID arbitral tribunal³²¹. This is comparable to the commitment taken by member states of the New York Convention. There seem to be only one Swiss BIT expressly referring, in this respect, to the ICSID Convention³²².

IV. TENTATIVE MODEL CLAUSE

Obviously there is no ideal clause. The diagonal clause contained in the Swiss BIT with Hong Kong fits in one paragraph³²³; comparatively the diagonal clause of the Swiss BIT with Mexico refers to a twelve articles

³¹⁶ Austria refers to the "*relevant laws and regulations*" of the host state, DOLZER/STEVENS p. 173, Art. 9(3); Germany to the "*domestic*" law, *id.* p. 194, Art. 11(3) (Model I) and p. 195, Art. 11(2) (Model II).

³¹⁷ DOLZER/STEVENS pp. 247-8, Art. VI(4)(b), 5 and 6. However as noted above the Swiss BIT with Kuwait goes, on one point, farther than the U.S. model BIT. *See supra* note 310.

³¹⁸ A similar solution is occasionally applied for the procedural rules of the arbitral tribunal, *see supra* Sect. 2.2.b.i. and Sect. 2.2.b.ii.

³¹⁹ *See supra* ICSID Clauses, Sect. 2.2.b.i.

³²⁰ Compare with *supra* note 144.

³²¹ ICSID Convention Sect. 6, Art. 53-6. Out of the Swiss BITs which do not provide for recognition and enforcement, four states party are neither members of the New York Convention nor members of the ICSID Convention. These are Brazil (*see supra* note 10), Iran, South-Korea and Malta.

³²² BIT with Mexico, Art. 9(2) of the Annex, which also refers to the New York Convention.

³²³ So does the diagonal clause contained in the model BIT of Hong Kong, *see supra* note 78.

long annex³²⁴. Such discrepancies are not typical of Swiss BITs: the diagonal clause in the model BIT of the Netherlands is also one paragraph long, while the U.S. model BIT provides for twenty. All these countries have been traditionally involved in foreign direct investments, and none of them needs lessons from anyone.

Rather than outlining differences in style, a bottom line may be tentatively drawn. Indeed what such clauses pretend is to protect the investor; insofar provisions hindering, *de iure* or *de facto*, such protection in a manner which is sometimes quasi pathological should be avoided. In this respect one should keep in mind that two particular elements distinguish investments disputes as contemplated by BITs from domestic, commercial disputes between private parties: the investor's adversary is a state, and his investment is abroad: therefore he is always the weaker party.

Requirements of particular significance in this respect include negotiations or consultation, consent, local remedies, enforcement and recognition, and investor-host state clauses. They shall be briefly addressed below. Obviously this list is not exhaustive.

Unless expressly mentioned otherwise, these observations are meant for the purpose of diagonal clauses providing for arbitration³²⁵.

1. Consultation

As suggested above, negotiations or consultation with minimum time requirements should be avoided. Since settlement is possible anytime after the beginning of the arbitration³²⁶, the parties to the dispute may be encouraged to negotiate or consult, but not prevented from initiating the arbitration³²⁷. Should such requirement be maintained, then formal

³²⁴ Even though it will be referred to from time to time, the diagonal clause contained in the Swiss model BIT is, therefore, of little significance. In particular it has been considerably departed from in the recent years.

³²⁵ As noted above, the Swiss Federal Department of Foreign Affairs is gradually renegotiating the BITs with stand-alone horizontal clauses, *see supra* Sect. 1.

³²⁶ *See supra* note 221.

³²⁷ *A fortiori* a double requirement, i.e., a second minimum time requirement in the form of a notice of arbitration to the other party after the negotiations or consultation have failed but before the arbitration is formally requested, obviously duplicates the requirement of the notice of arbitration foreseen by all arbitration rules anyway and should therefore be avoided. *See supra* note 212.

notification of the dispute should be prescribed, in order to avoid a "soft" *dies a quo*³²⁸. Following foreign practice, such time limit, if any, should not exceed six months³²⁹.

This is all the more so since good faith requirements appear to be illusory³³⁰. Empowering the arbitral tribunal to decide *ex æquo et bono*³³¹ would seem to address adequately the particular context of investment disputes and to represent an alternative to good faith requirements in negotiations or consultation.

2. Consent

A diagonal clause not containing the consent of the host state to submit the dispute to arbitration may be wishful thinking. Consent should be systematically and expressly addressed³³². It should be straightforward, i.e., it should not open the door to a tentative challenge. Equivocal or vague expressions or expressions only implying consent should be avoided³³³. Ideally consent should be qualified for the purpose of the ICSID Convention, the UNCITRAL Rules and the New York Convention³³⁴. A statement that the consent contained in the BIT is valid even in absence of an individual agreement between the investor and the host state³³⁵ is useful for preventing possible problems of relationships between the BIT and the investment contract, although we believe more appropriate to deal generally with this latter issue³³⁶.

³²⁸ Since 1997 all Swiss BITs provide for such a *dies a quo* but two, the BITs with India and with Thailand. The most recent BITs even specify that the request to start consultation shall be in writing, *see* BIT with Lebanon Art. 7(2); with Costa Rica (*see supra* note 10) Art. 9(2), with Jordan Art. 9(2).

³²⁹ Unlike the majority of Swiss BITs which provide for twelve month, like the Swiss model BIT, DOLZER/STEVENS p. 224, Art. 9(2). All Swiss BITs since 1997 provide for a six month period however, *see supra* note 206.

³³⁰ *See supra* note 218.

³³¹ *See supra* note 222. The suggestion, contained in the same provision, that the arbitral tribunal may encourage the parties to settle is useful but not necessary since, unlike the power of deciding *ex æquo et bono*, the tribunal is not prevented to do so if it has not been expressly foreseen in advance.

³³² It has been noted that the practice was, until recently, not established yet in this regard. *See supra* note 237.

³³³ *See supra* Sect. 3.2.

³³⁴ *See supra* the BIT with Kuwait, Sect. 3.6. and notes 308-311.

³³⁵ *See supra* note 234.

³³⁶ *See infra* Sect. 4.5.

A reservation of the host state consent is difficult to reconcile with the true intent of the state parties to promote and protect FDIs as well as with the tendency favoring investors nowadays.

Should such restrictions be maintained, consent should not be submitted to conditions voiding it of its substance by indirectly limiting it, i.e., for instance to a condition of open-ended exhaustion of local remedies³³⁷, to a limitation of the scope of the investment disputes³³⁸ or to restrictions not pertaining to the diagonal clause but located elsewhere in BIT³³⁹. In particular, even though municipal requirements of the other state party cannot be ignored, provisions on scope should not impose abusive indirect restrictions.

3. Recognition and Enforcement

An award is useless unless it is recognized and, if necessary, enforced. Recognition and enforcement should be systematically addressed, at least when the other state party is not a member of the New York Convention³⁴⁰. A further step may consist in inserting a pre-New York Convention clause, in the way of pre-ICSID clauses³⁴¹, prompting for an application by analogy of the New York Convention until the other state party becomes a member³⁴².

Where the other state is a member of the New York Convention, care should be taken in using compatible wording. In particular, the persisting reference to national legislation only even though both state parties are members of the Convention may give rise to disputes on the hierarchy of norms, which could be prevented by mentioning the Convention along with national legislation³⁴³. Qualified consent, appropriate definitions³⁴⁴ and a systematic mention that the award shall be final for the purpose of

³³⁷ See *supra* note 235.

³³⁸ See *supra* Scope, Sect. 3.2.

³³⁹ See *supra* note 273-273.

³⁴⁰ See *supra* note 227.

³⁴¹ See *supra* Sect. 2.2.a.

³⁴² See *supra* Sect. 3.6.

³⁴³ See *supra* note 303.

³⁴⁴ See *supra* the BIT with Kuwait, which represent the state-of-the-art among Swiss BITs to date in this respect, Sect. 3.6.

the Convention³⁴⁵ should also be encouraged, in order to prevent as much as possible any attempt of challenge.

4. Local Remedies

Compulsory recourse to local remedies, as well as reservations giving the right to the host state to require unilaterally such exhaustion, is contrary to the spirit of a BIT and should be avoided. Such requirement is particularly unfair where the other state is a member of the ICSID Convention, even though the Convention itself provides for such possibility, since the Convention implies a waiver to diplomatic protection³⁴⁶. Optional local remedies are acceptable, as far as the choice is the investor's. In any event, local remedies should be submitted to an opting-out or exit clause at all time, or at least after a short period of time, so that the investor is not deprived *de facto* of the protection offered by arbitration. A clause leaving this choice to the investor but considering such choice as final may be inappropriate to the particular context of a BIT.

In case an opting-out or exit clause is foreseen if no final decision has been rendered after a certain period of time, the meaning of "final" should be qualified. Likewise, possible confusion between judiciary tribunal and administrative authorities should be addressed by appropriate definitions.

5. Investor-Host State Clauses

Contradictions between the investment agreement and the BIT, i.e., here, their dispute resolution provisions, may have quasi pathological consequences if the relationships between the investment agreement and the BIT are not adequately anticipated in the BIT³⁴⁷. It has been noted that the solutions provided so far³⁴⁸ give rise to interpretation problems³⁴⁹. We

³⁴⁵ See *supra* note 302.

³⁴⁶ See *supra* note 33. See also *supra* Sect. 2.2.b.v., in particular note 184. It may be observed that this requirement is unfair in all such cases as far as Switzerland is concerned since Switzerland is a member of the ICSID Convention.

³⁴⁷ See *supra* Sect. 2.2.b.iv., in particular note 172 illustrating such problems.

³⁴⁸ The first solution is that the investment contract prevails if it is more favourable than the BIT, see *supra* note 168. The second solution is that the more favourable provisions contained in the investment contract shall not be invalidated, see *supra* note 169.

³⁴⁹ What does "more favourable" mean? To which party should the provision be more favourable? What happens if the provision is less favourable?

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do not pretend to give a simple answer to a question the difficulty of which has been acknowledged by the doctrine³⁵⁰. However one can see that the solutions offered by Swiss BITS as they stand may give rise to more problems than those they pretend to solve.

If one considers that BITS purport at offering the investor a strengthened protection because of the particular context of FDIs, a solution could be, pursuant to such *pro investorem* principle, to resolve any contradiction between the investment agreement and the BIT in favor of the investor³⁵¹. What "favorable" means would be to the investor's choice³⁵².

V. CONCLUSION

Forty years after the first Swiss BIT has been signed, the picture is contrasted. On one hand, one must acknowledge that over the time the protection of the investor through dispute settlement provisions has been, in many instance, strengthened. While all BITS may not be as sophisticated as the BIT with Kuwait³⁵³, the pattern which may, to some extent, be identified in recent BITS offers, in many if not all instances, an adequate protection to the investor³⁵⁴.

On the other hand, one may regret that, even in recent years, quasi pathological provisions have not been systematically avoided. Thus a random check of the five last years³⁵⁵ reveals, for instance, BITS being silent on the consent of the host state to submit the dispute to

³⁵⁰ See *supra* note 170.

³⁵¹ See *supra* note 171.

³⁵² Unlike the preceding question, this one does not, to the best of the author knowledge, appear to have been solved so far in Swiss BITS. This concern does not appear to be shared by foreign model BITS either, *see supra* note 167.

³⁵³ See *supra* in particular Sect. 2.2.a.; Sect. 3.2; and Sect. 3.6.

³⁵⁴ See *e.g.*, the BIT with Ethiopia (1998) Art. 8, the dispute settlement provisions of which follow a pattern frequently found in recent Swiss BITS, *see the* BITS with Mauritius (1998) Art. 9; with the Kyrgyz Republic (1999) (*see supra* note 10); with Lebanon (2000) Art. 7; with Djibouti (2001) Art. 8; *compare with* the BITS with Armenia (1998) Art. 8; with North Korea (1998) Art. 9; with Chile (1999) Art. 9; with Nigeria (2000) Art. 8; with Jordan (2001) Art. 9 which provide for minor variations. Although not systematically applied, *see the* BITS with Kuwait (1998) Art. 10; with the United Arab Emirates (1998) Art. 9; with Nicaragua (1998) Art. 9; with Costa Rica (2000) Art. 9 (*see supra* note 10); with Bangladesh (2000) Art. 8, this pattern could be considered as the present standard of diagonal clause.

³⁵⁵ Back to the BITS signed in 1997 included.

arbitration³⁵⁶; another BIT providing for compulsory local remedies with an extremely long³⁵⁷ exit provision³⁵⁸; BITs being silent on recognition and enforcement while the other state party is not a member of the New York Convention³⁵⁹, let alone of the ICSID Convention³⁶⁰; and a BIT with – *de facto* – a stand-alone horizontal clause³⁶¹; while no significant progress is noted with respect to contradictions between investment agreement and BIT³⁶².

What is disturbing is the inconsistency of such discrepancies. While politically the promotion of investments with certain states may justify some concessions at the expense of the protection of the investors³⁶³, variations in the degree of such protection from one BIT to another, in particular where they amount to deprive the investors of such protection, seem to escape logic in many instances, be such comparisons historical, geographic, cultural, economic or political³⁶⁴.

In 1985 Lavieć concluded his work regretting that there was no homogeneity or satisfactory co-ordination between internal remedies, transnational arbitration and inter-state settlements. He saw the diversity of such procedures as symptomatic of investment disputes³⁶⁵. Since then criticisms against globalization have continuously grown, and warnings are voiced that, if international arbitration allows itself to become too closely associated with a single legal culture or vision of arbitral practice,

³⁵⁶ BIT with Lebanon (2000) Art. 7; with Ethiopia (1998) Art. 8. Both BITs provides that the investor shall (Fr. "*pourra*") submit the dispute to (...), but remain silent on the consent of the host state.

³⁵⁷ BIT with the United Arab Emirates (1998) Art. 9(3), which provides for a twenty-four months exit clause, *see supra* note 191.

³⁵⁸ The BIT with India Art. 9(2-3) provides for either domestic litigation or open-ended UNCITRAL conciliation. Only if conciliation was unsuccessful may the investor submit the dispute to arbitration.

³⁵⁹ BITs with North Korea (1998); with Nicaragua (1998); with the United Arab Emirates (1998); with Iran (1998). The United Arab Emirates and Nicaragua are, however, members of the ICSID Convention, which implies a commitment to recognize and enforce the award rendered by an ICSID arbitral tribunal, *see supra* note 321.

³⁶⁰ BITs with North Korea (1998); with Iran (1998).

³⁶¹ BIT with Thailand, *see supra* note 21.

³⁶² *See supra* notes 351 and 352.

³⁶³ This may be the case of BITs with countries such as, *e.g.*, North-Korea or as Iran.

³⁶⁴ Compare, *e.g.*, the BIT with Kuwait, *see supra* note 353, with the BIT with the United Arab Emirates, *see supra* notes 357 and 359.

³⁶⁵ LAVIEĆ p. 307.

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then the result could easily be diminished use or even rejection of investor-host state arbitration³⁶⁶.

One should hope that a better homogeneity will be achieved in the future, helping to establish a standard for investor protection in international investment law, to strengthen such protection, and to favor the promotion of foreign investments. Having built the second largest network of BITS in the world, Switzerland has been a major contributor in this respect; therefore it bears a special responsibility in setting up such standard.

³⁶⁶ B. M. Cremades and D. J. A. Cairns, *The Brave New World of Global Arbitration*, Vol. 3 No 2 JOURNAL OF WORLD INVESTMENT 208 (2002).

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VII. ANNEXES

A. LIST OF SWISS BITS³⁶⁷

State ³⁶⁸	Status ³⁶⁹	RS/RO ³⁷⁰	Date ³⁷¹
Albania	R	RS 0.975.212.3	22.09.92
Argentina	R	RS 0.975.215.4	12.04.91
Armenia	R		19.11.98
Bangladesh	R		14.10.00
Barbados	R	RS 0.975.216.8	29.03.95
Belarus	R	RS 0.975.216.9	28.05.93
Bolivia	R	RS 0.975.218.9	06.11.87
Botswana	R	RS 0.975.219.4	26.06.98

³⁶⁷ This list contains all BITS that have been signed by Switzerland as of 20 November 2001, including those which have not yet been published neither in the Systematic Collection, nor in the Official Collection. BITS containing a stand-alone horizontal clause (*see supra* note 38) are mentioned in italic.

³⁶⁸ States are listed by short name, not by their official name. Qualification is added wherever necessary, e.g., "Congo-Brazzaville", "Korea, North" or "Korea, South". BITS are listed under the name of the state which signed the BIT, not under the name of its legal successor, if any. For example "Russia" is listed under "USSR", "Benin" under "Dahomey", etc. The name of the legal successor, if any, is mentioned in parenthesis.

³⁶⁹ As of 20 November 2001. "S": signed but not ratified, i.e. not yet entered into force (*see supra* note 10); "R": signed and ratified, i.e., entered into force; "(S)": signed but terminated before it was ever ratified; "(R)": ratified but subsequently terminated.

³⁷⁰ RS: (Fr) *Recueil systématique des lois fédérales*, Swiss Systematic Collection of Federal Legislation, *see supra* note 3. RO: (Fr.) *Recueil officiel des lois fédérales*, Swiss Official Collection of Federal Legislation, *see supra* note 14. The reference to the RO is mentioned only when the BIT has not been published in the RS yet. The BITS published in the RS are available on the internet, <<http://www.admin.ch/ch/f/rs/index.html>>. They are found under Sect. 0.946 (External Trade, Fr. "*Commerce extérieur*") and Sect. 0.975 (Protection of Investment, Fr. "*Protection des investissements*") of the Systematic Collection. The RO is also available on the internet as from 1998 included, <<http://www.admin.ch/ch/f/as/index.html>>. When no reference is mentioned in the list above, it means that the BIT has not yet been published, i.e., neither in the RS, nor in the RO. This is the case of five BITS which have not been ratified (two of which will never be, *see infra* notes 372 and 380) and of eighteen (out of ninety four plus one provisionally applied) BITS which have entered into force.

³⁷¹ Date of signature.

State ³⁶⁸	Status ³⁶⁹	RS/RO ³⁷⁰	Date ³⁷¹
Brazil	S		11.11.94
Bulgaria	R	RS 0.975.221.4	28.10.91
Cambodia	R	RS 0.975.222.3	12.10.96
<i>Cameroon</i>	<i>R</i>	<i>RS 0.946.292.271</i>	<i>28.01.63</i>
Cape Verde	R	RS 0.975.223.4	28.10.91
<i>Central African Republic</i>	<i>R</i>	<i>RS 0.946.292.361</i>	<i>28.02.73</i>
<i>Chad</i>	<i>R</i>	<i>RS 0.946.297.361</i>	<i>21.02.67</i>
Chile ³⁷²	(S)		11.11.91
Chile ³⁷³	R		24.09.99
China, PR ³⁷⁴	R	RS 0.975.224.9	12.11.86
<i>Congo-Brazzaville</i>	<i>R</i>	<i>RS 0.946.292.721</i>	<i>18.10.62</i>
<i>Costa Rica</i> ³⁷⁵	<i>R</i>	<i>RS 0.975.228.5</i>	<i>01.09.65</i>
Costa Rica ³⁷⁶	S		01.08.00
Croatia	R	RO 2002 p. 537	30.10.96
Cuba	R	RS 0.975.229.4	28.06.96
Czechoslovakia (Czech Republic)	R	RS 0.975.274.1	05.10.90
Czechoslovakia (Slovakia)	R	RS 0.975.274.1	05.10.90
<i>Dahomey (Benin)</i>	<i>R</i>	<i>RS 0.946.291.741</i>	<i>20.04.66</i>
Djibouti	R		04.02.01
<i>Ecuador</i>	<i>R</i>	<i>RS 0.975.232.7</i>	<i>02.05.68</i>
<i>Egypt</i>	<i>R</i>	<i>RS 0.975.232.1</i>	<i>25.07.73</i>
Estonia	R	RS 0.975.233.4	21.12.92
Ethiopia	R	RS 0.975.234.1	26.06.98

³⁷² This BIT has never been ratified and has been replaced by the BIT of 24 September 1999.

³⁷³ This BIT has replaced the BIT of 11 November 1991.

³⁷⁴ There is a separate BIT with Hong Kong.

³⁷⁵ This BIT will be replaced by the BIT of 1 August 2000 once the latter will be ratified.

³⁷⁶ This BIT will replace the BIT of 1 September 1965 once the former will be ratified.

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State ³⁶⁸	Status ³⁶⁹	RS/RO ³⁷⁰	Date ³⁷¹
<i>Gabon</i> ³⁷⁷	(R)	RO 1972 p. 2787	28.01.72
Gambia	R	RS 0.975.235.8	22.11.93
Ghana	R	RS 0.975.236.3	08.10.91
<i>Guinea</i>	R	RS 0.946.293.811	26.04.62
Honduras	R		14.10.93
Hong Kong	R	RS 0.975.241.6	22.09.94
Hungary	R	RS 0.975.241.8	05.10.88
India	R	RS 0.975.242.3	04.04.97
<i>Indonesia</i>	R	RS 0.975.242.7	06.02.74
Iran	R		08.03.98
<i>Ivory Coast</i>	R	RS 0.946.292.891	26.06.62
Jamaica	R	RS 0.975.245.8	11.12.90
<i>Jordan</i> ³⁷⁸	(R)	RS 0.975.246.7	11.11.76
Jordan ³⁷⁹	R		25.02.01
Kazakhstan	R		12.05.94
Korea, North	R		14.12.98
<i>Korea, South</i>	R	RS 0.975.228.1	07.04.71
Kuwait	R	RO 2001 p .1	31.10.98
Kyrgyz Republic	S		29.01.99
Laos	R	RS 0.975.248.1	04.12.96
Latvia	R	RS 0.975.248.7	22.12.92
Lebanon	R		03.03.00
Lithuania	R	RS 0.975.251.6	23.12.92

³⁷⁷ This BIT was terminated by Gabon pursuant to art. 15(2) of the BIT and became obsolete on 18 October 1986, RO 1989, p. 2113. (It was originally published in the Systematic Collection under RS 0.946.293.541 but withdrawn since then.) It is, to the author's best knowledge, the only Swiss BIT to have been terminated unilaterally to date, and other than by having been replaced by a new BIT. *See also*, however, the case of the BIT with Rwanda, which was signed in 1963 but never ratified, even though it is applied provisionally since then, *see infra* note 380.

³⁷⁸ This BIT was replaced by the BIT of 25 February 2001.

³⁷⁹ This BIT replaced the BIT of 11 November 1976.

State ³⁶⁸	Status ³⁶⁹	RS/RO ³⁷⁰	Date ³⁷¹
Macedonia	R	RS 0.975.252.0	26.09.96
<i>Madagascar</i>	<i>R</i>	<i>RS 0.946.295.231</i>	<i>17.03.64</i>
<i>Malaysia</i>	<i>R</i>	<i>RS 0.975.252.7</i>	<i>01.03.78</i>
<i>Mali</i>	<i>R</i>	<i>RS 0.975.254.1</i>	<i>08.03.78</i>
<i>Malta</i>	<i>R</i>	<i>RS 0.946.295.451</i>	<i>20.01.65</i>
<i>Mauritania</i>	<i>R</i>	<i>RS 0.946.295.581</i>	<i>09.09.76</i>
Mauritius	R	RO 2002 p. 42	26.11.98
Mexico	R		10.07.95
Moldavia	R	RS 0.975.256.5	30.11.95
Mongolia	R	RS 0.975.257.2	29.01.97
<i>Morocco</i>	<i>R</i>	<i>RS 0.975.254.9</i>	<i>17.12.85</i>
Namibia	R		01.08.94
Nicaragua	R	RS 0.975.258.5	30.11.98
<i>Niger</i>	<i>R</i>	<i>RS 0.946.295.891</i>	<i>28.03.62</i>
Nigeria	R		30.11.00
Pakistan	R	RS 0.975.262.3	11.07.95
Panama	R	RS 0.975.262.7	19.10.83
Paraguay	R	RS 0.975.263.2	31.01.92
Peru	R	RS 0.975.264.1	22.11.91
Philippines	R	RS 0.975.264.5	31.03.97
Poland	R	RS 0.975.264.9	08.11.89
Rumania	R	RS 0.975.266.3	25.10.93
<i>Rwanda</i> ³⁸⁰	<i>S</i>		<i>15.10.63</i>
Salvador, El	R	RS 0.975.232.3	08.12.94
<i>Senegal</i>	<i>R</i>	<i>RS 0.946.296.811</i>	<i>16.08.62</i>
<i>Singapore</i>	<i>R</i>	<i>RS 0.975.268.9</i>	<i>06.03.78</i>

³⁸⁰ This BIT was published in *Feuille fédérale* (FF) 1964, p. 413, but was neither published in the Official Collection, nor, consequently, in the Systematic Collection. Even though it was never ratified, it has been provisionally applied since its signature; nevertheless its legal status nowadays is questionable.

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State ³⁶⁸	Status ³⁶⁹	RS/RO ³⁷⁰	Date ³⁷¹
Slovenia	R	RS 0.975.269.1	09.11.95
South Africa	R	RS 0.975.211.8	27.06.95
Sri Lanka	R	RS 0.975.271.2	23.09.81
<i>Sudan</i>	<i>R</i>	<i>RS 0.975.269.8</i>	<i>17.02.74</i>
<i>Syria</i>	<i>R</i>	<i>RS 0.975.272.7</i>	<i>22.06.77</i>
<i>Tanzania</i>	<i>R</i>	<i>RS 0.975.273.2</i>	<i>03.05.65</i>
<i>Thailand</i> ³⁸¹	<i>R</i>	<i>RS 0.975.274.5</i>	<i>17.11.97</i>
<i>Togo</i>	<i>R</i>	<i>RS 0.946.297.491</i>	<i>17.01.64</i>
<i>Tunisia</i>	<i>R</i>	<i>RS 0.975.275.8</i>	<i>02.12.61</i>
Turkey	R	RS 0.975.276.3	03.03.88
<i>Uganda</i>	<i>R</i>	<i>RS 0.975.261.8</i>	<i>23.08.71</i>
Ukraine	R	RS 0.975.276.7	20.04.95
United Arab Emirates	R	RO 2001 p. 1	03.11.98
<i>Upper Volta (Burkina Faso)</i>	<i>R</i>	<i>RS 0.946.292.161</i>	<i>06.05.69</i>
Uruguay	R	RS 0.975.277.6	07.10.88
USSR (Russia)	R	RS 0.975.277.2	01.12.90
Uzbekistan	R	RS 0.975.262.1	16.04.93
Venezuela	R	RS 0.975.278.5	18.11.93
Vietnam	R	RS 0.975.278.9	03.07.92
<i>Zaire</i>	<i>R</i>	<i>RS 0.975.282.1</i>	<i>10.03.72</i>
Zambia	R	RS 0.975.282.3	03.08.94
Zimbabwe	R		15.08.96

³⁸¹ This BIT does contain a diagonal clause, but which is not operative yet; only the horizontal clause is. *See supra* note 21.

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