

INVESTMENT TREATY ARBITRATION

Switzerland



Investment Treaty Arbitration

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including into foreign investment profile and investment agreement legislation; international legal obligations under investment treaties and relevant conventions; foreign investment promotion, domestic laws, regulatory and disputes agencies; investment treaty practice; investment arbitration history; enforcement of awards against the state; and recent trends.

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Table of contents

BACKGROUND

Foreign investment

Investment agreement legislation

INTERNATIONAL LEGAL OBLIGATIONS

Investment treaties

ICSID Convention

Mauritius Convention

Investment treaty programme

REGULATION OF INBOUND FOREIGN INVESTMENT

Government investment promotion programmes

Applicable domestic laws

Relevant regulatory agency

Relevant dispute agency

INVESTMENT TREATY PRACTICE

Model BIT

Preparatory materials

Scope and coverage

Protections

Dispute resolution

Confidentiality

Insurance

INVESTMENT ARBITRATION HISTORY

Number of arbitrations

Industries and sectors

Selecting arbitrator

Defence

ENFORCEMENT OF AWARDS AGAINST THE STATE

Enforcement agreements

Award compliance

Unfavourable awards

Provisions hindering enforcement

UPDATE AND TRENDS

Key developments of the past year

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BACKGROUND

Foreign investment

What is the prevailing attitude towards foreign investment?

Switzerland has an open and welcoming attitude towards foreign investment, which is actively promoted and seen as a driver of economic growth and development. Since 2008, a private non-profit association, Switzerland Global Enterprise (SGE), assumed the responsibility of promoting Switzerland as a place of business and destination of foreign investments. SGE provides potential foreign investors with information about benefits Switzerland can offer, such as flexible labour markets; highly qualified workers; relatively low tax burden; political and economic stability; and a reliable legal system and judiciary among others. Switzerland has entered into 128 bilateral treaties for the promotion and protection of foreign investments (BIT) and is part of several multilateral treaties related to protection of foreign investment.

Law stated - 12 September 2022

What are the main sectors for foreign investment in the state?

The sector that accounts for the largest share of foreign direct investment (FDI) in Switzerland is services, in particular finance and holding companies. In 2020 (data for 2021 not yet available), capital inflows in the services sector amounted to 85 per cent of the total FDI. The manufacturing sector has consistently attracted between 10 and 20 per cent of the total FDI and the banking and financial institutions sector has declined from 30 per cent in 1990 to 3 per cent in 2020.

Law stated - 12 September 2022

Is there a net inflow or outflow of foreign direct investment?

In 2021, foreign direct investment (FDI) net inflows in Switzerland exceeded US\$1 billion, reversing a trend of the past three years of negative inflows. FDI net outflows for the same year increased to approximately negative US\$19 billion from negative US\$36 billion in 2020.

Law stated - 12 September 2022

Investment agreement legislation

Describe domestic legislation governing investment agreements with the state or state-owned entities.

Switzerland does not have specific legislation governing investment agreements with the state or state-owned enterprises. Such agreements are subject to Swiss general contract law. However, in certain areas, such as critical infrastructure in the transport sector, the energy industry, or basic services, restrictions, license requirements or special regulations may apply.

Law stated - 12 September 2022

INTERNATIONAL LEGAL OBLIGATIONS

Investment treaties

Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party, also indicating whether they are in force.

Switzerland has one of the largest networks of investment protection treaties globally. It has concluded 128 bilateral investment treaties (BIT), 37 treaties with investment provisions (TIP) and 28 investment related instruments (IRI). Most recently, Switzerland concluded a BIT with Guyana (which entered into force on 2 May 2018) and Indonesia (signed on 24 May 2022). The latter has not yet entered into force and is currently subject to public consultation. Switzerland has been party to the Energy Charter Treaty (ECT) since 1998. The ECT grants protection for investments in the energy sector against non-commercial risks and enables investors from a contracting state to submit investment-related disputes with other contracting states to arbitration. In addition, as member of the European Free Trade Association (EFTA), Switzerland is part to several free trade agreements (FTA) containing investment provisions. Moreover, Switzerland is member of the Organization for Economic Co-operation and Development and, in this context, it became party to the Code of Liberalisation of Capital Movements and the Code of Liberalisation of Current Invisible Operations. Switzerland has signed other IRIs such as the Convention Establishing the Multilateral Investment Guarantee Agency and is party to a number of instruments as a member the World Trade Organization (eg, the General Agreement on Trades in Services). However, unlike BITs and the ECT, FTAs and IRIs generally do not grant access to investor state dispute resolution mechanisms.

Law stated - 12 September 2022

If applicable, indicate whether the bilateral or multilateral investment treaties to which the state is a party extend to overseas territories.

Not applicable.

Law stated - 12 September 2022

Has the state amended or entered into additional protocols affecting bilateral or multilateral investment treaties to which it is a party?

Switzerland has entered into protocols amending and interpreting a number of its investment protection treaties. However, the status of a specific treaty potentially applicable to an investor-state dispute must be assessed on a case-by-case basis, considering that treaties can be revised and amended from time to time.

Law stated - 12 September 2022

Has the state unilaterally terminated any bilateral or multilateral investment treaty to which it is a party?

Switzerland has not unilaterally terminated any of its BITs. Six BITs have, however, been terminated by the other contracting states, mainly for political reasons. These BITs remain in force for some time by operation of their respective sunset/grandfather clause:

- Malta, with effect from 23 of February of 2005 (the BIT continues to apply for 10 years to investments made before the date of termination);
- South Africa, with effect from 1 November 2014 (the BIT continues to apply for 20 years to investments made before the date of termination);
- Indonesia, with effect from 8 April of 2016, although a new BIT with Switzerland was signed in 2022 (the previous BIT continues to apply for the authorised duration of investments that were admitted before the date of notification of termination);
- India, with effect from 6 April 2017 (the BIT continues to apply for 15 years to investments made or acquired before the date of termination);
- Ecuador, with effect from 11 September 2018 (the BIT continues to apply for 10 years to investments made before the notification of termination); and
- Bolivia, with effect from 17 May 2019 (the BIT continues to apply for 10 years to investments made before the notification of termination).

Law stated - 12 September 2022

Has the state entered into multiple bilateral or multilateral investment treaties with overlapping membership?

Switzerland is a member state to the ECT. A number of other ECT member states have also entered into BITs with Switzerland. Generally, these BITs apply in addition to and in parallel with the ECT.

Switzerland is a party to the ECT and has concluded BITs with several ECT member states, including with:

- Albania;
- Belarus;
- the Czech Republic;
- Estonia;
- Georgia;
- Hungary;
- Japan;
- Kazakhstan;
- Lithuania;
- Mongolia;
- North Macedonia;
- Poland;
- Romania;
- Slovenia;
- Tajikistan; and
- Ukraine.

Moreover, Switzerland is a member of EFTA together with Iceland, Liechtenstein and Norway. EFTA has signed 29 free trade agreements (FTAs) with states with which Switzerland has also signed BITs. These BITs apply in parallel with the ECT and the FTAs.

Law stated - 12 September 2022

ICSID Convention

Is the state party to the ICSID Convention?

Switzerland signed the ICSID Convention on 22 September 1967 and it entered into force for Switzerland on 14 June 1968.

Law stated - 12 September 2022

Mauritius Convention

Is the state a party to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)?

Switzerland signed the Mauritius Convention on 27 March 2015 and was the third state to ratify it on 18 April 2017, resulting in the entry into force of the convention on 18 October 2017.

Law stated - 12 September 2022

Investment treaty programme

Does the state have an investment treaty programme?

Switzerland does not have an investment treaty programme as such. However, the Swiss Secretariat for Economic Affairs (SECO) is continuously seeking to expand and update the network of Swiss BITs, to consider the latest developments in the field of investment protection, in particular the work of international organisations and the practice of other states. In the past years, SECO has set up several internal working groups in charge of reviewing and improving the Swiss BIT practice, in consultation with experienced international arbitrators.

Law stated - 12 September 2022

REGULATION OF INBOUND FOREIGN INVESTMENT

Government investment promotion programmes

Does the state have a foreign investment promotion programme?

Switzerland formally promotes foreign direct investment (FDI) through a non-profit private association, Switzerland Global Enterprise (SGE). SGE's main responsibilities include informing foreign investors about Switzerland business location advantages, connecting foreign investors with key local partners, and offering site visits, among other services. Switzerland's foreign investment promotion programme focuses especially on certain key technologies, including artificial intelligence, robotics, blockchain, personalised health and advanced manufacturing. SGE also offers free consultancy services to foreign companies that are considering investing in Switzerland. These services cover an array of topics, including legal, tax, operative and administrative advice and data information. At the cantonal level, SGE has delegated the promotion of foreign investment to regional business development organisations (eg, Greater Zurich Area, Greater Geneva Bern Area, St. Gallen Bodensee Area, and Basel Area Business & Innovation).

Law stated - 12 September 2022

Applicable domestic laws

Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

In Switzerland, foreign investments are generally not subject to any formal admission or registration requirements. An important exception to this principle is the so-called Lex Koller, a federal statute that subjects the acquisition of residential real estate to authorisation by the cantonal authorities. Furthermore, sector-specific authorisation, licensing and approval requirements may affect foreign investments in strategically important areas of the Swiss economy. In May 2022, the Swiss Federal Council launched a consultation procedure relating to a proposed bill introducing FDI controls. The proposed legislation seeks to prevent threats to public order and security as a potential consequence of foreign investors acquiring control of Swiss companies. If passed, takeovers of Swiss companies would be screened if the domestic target company operates in a sector that is critical to public order and security or if the foreign investor is a state-owned or state-related entity, in the latter case irrespective of the domestic target company's activities. The consultation ran until 9 September 2022, and is set to be followed by a final draft that will be deliberated in the Swiss parliament.

Law stated - 12 September 2022

Relevant regulatory agency

Identify the state agency that regulates and promotes inbound foreign investment.

The Swiss State Secretariat for Economic Affairs (SECO) is responsible for the promotion of inbound foreign investment. Since 2008, SECO has delegated the operational responsibility of Switzerland's location promotion programme to Swiss Global Enterprise (SGE). Foreign investment is promoted also at cantonal level by regional organisations. The general legal framework governing foreign investment is determined by the Swiss Federal Parliament, while cantonal governments have authority to regulate certain aspects of foreign investment such as the applicable tax regime.

Law stated - 12 September 2022

Relevant dispute agency

Identify the state agency that must be served with process in a dispute with a foreign investor.

There is no predetermined federal agency responsible for representing the Swiss Confederation in investor-state disputes. Switzerland may thus be served at any federal agency. Recently, in *Human Rights Defenders Inc v Swiss Confederation*, the first and sole ICSID case registered against Switzerland to date, the investor served the notice of dispute to the President of the Swiss Confederation. Later, SECO took over as the agency representing Switzerland in the dispute.

Law stated - 12 September 2022

INVESTMENT TREATY PRACTICE

Model BIT

Does the state have a model BIT?

Switzerland has no official model BIT. However, the Swiss State Secretariat for Economic Affairs (SECO), which is responsible for negotiating international investment agreements, takes guidance from a template BIT, which is not publicly available. This template is regularly updated in order to factor the latest developments in the field of investment protection. For instance, SECO announced that Switzerland will seek to include in all future BITs a reference to the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. SECO's internal working groups also consult experienced international arbitrators on suggested changes to Swiss BIT practice.

Law stated - 12 September 2022

Preparatory materials

Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

All documents of the Swiss federal government are available in the Swiss Federal Archives, which are located in Bern but are accessible online, after a retention period of minimum 30 years. Under certain conditions, however, archive records may be consulted before the expiry of the retention period. As for parliamentary ratification records, they are available online in the Federal Gazette. However, from 1963 to 2004, no parliamentary deliberations or ratifications were necessary as the Swiss Federal Council had sole authority to conclude BITs.

Law stated - 12 September 2022

Scope and coverage

What is the typical scope of coverage of investment treaties?

Swiss BITs usually define the term 'investor' as natural persons who are citizens of a contracting party; legal entities that are incorporated or duly organised under the laws of a contracting party and legal entities that are controlled by citizens of, or legal entities that are incorporated or duly organised under the laws of a contracting party. More recent Swiss BITs add the requirement that legal entities have 'real economic activities' in the territory of the contracting party, in order to exclude 'mailbox companies' from BIT coverage. The Swiss Supreme Court held, in a case involving international tax issues, that in the absence of 'administration, direction of current transactions and company management' in a certain country, there was no real economic activity of a company in that country. More recently, the Supreme Court distinguished legitimate nationality planning and abusive corporate restructuring (carried out to benefit from the protection of a BIT which otherwise would be inapplicable, ie, treaty shopping) and held that BIT protection should be denied when the investor acquired its nationality at a time when the specific dispute being arbitrated was already foreseeable and that the restructuring took place in anticipation of the dispute.

Swiss BITs usually contain a very broad definition of protected 'investment' as 'any kind of asset', followed by a non-limitative list of examples, which include movable and immovable property and other rights in rem; shares and participations in companies; intellectual property rights; concessions under public law and claims to money or to any performance having an economic value. Most recent BITs, however, explicitly exclude claims arising solely out of commercial contracts for the sale of goods or services. The BIT protection usually extends to investments made prior to or after the entry into force of the BIT, but not to disputes relating to events occurred prior to its entry into force. Some BITs contain an express requirement that the investment be made in accordance with the legislation of the host state.

Protections

What substantive protections are typically available?

The most common substantive protections contained in Swiss BITs are national treatment; most-favoured nation (MFN); fair and equitable treatment; and full protection and security. National treatment ensures that foreign investors will be treated no less favourably than similarly situated domestic investors, while MFN treatment ensures that foreign investors will not be treated less favourably than investors from any third country in like circumstances. The national treatment and MFN standard do not set the contents of the treatment to be granted. They are relative treatment obligations, which require a comparison of the treatment granted to the investor at stake and to investors of other nationalities. Newer BITs expressly state that the MFN clause does not extend to dispute resolution mechanisms provided for in other BITs concluded by the contracting parties. By contrast, the standards of fair and equitable treatment and full protection and security set an absolute standard of protection. Swiss BITs also guarantee the free transfer of funds related to the investment, usually both into and out of the host state. Swiss BITs also protect against direct and indirect expropriation and set specific criteria for compensation. Expropriation provisions contained in newer BITs are more precise and sophisticated than that of earlier BITs, especially in relation to compensation and methods of valuation (typically providing that compensation shall amount to the market value of the investment expropriated immediately before the action was taken or before it became public knowledge, whichever is earlier). Newer Swiss BITs also contain an 'umbrella clause' providing that each contracting party shall observe any obligation it has assumed with regard to investments made in its territory by investors of the other contracting party.

Law stated - 12 September 2022

Dispute resolution

What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

BITs signed between 1961 and 1978 only contained a 'horizontal' dispute resolution clause (ie, providing for arbitration between the two contracting states). This means that investors had no direct claim against the host state but had to request their government's support. All Swiss BITs signed after 1981 also include a 'diagonal' clause allowing investors to bring direct claims against the host state (except the BIT signed with Morocco in 1985). The BIT signed with Thailand in 1997 also provides a diagonal clause allowing investors to bring an ICSID arbitration against the host state provided the two contracting states are parties to the ICSID Convention, which is still not the case of Thailand (therefore, in practice, only the horizontal clause is available to investors under this BIT). Old BITs that only contain a horizontal clause are being renegotiated. Diagonal dispute resolution clauses systematically provide for a mandatory preliminary consultation phase (usually of six months) before recourse to arbitration is permitted. Two types of arbitration are generally contemplated, at the investor's choice: ICSID arbitration and ad hoc arbitration (usually under the UNCITRAL Arbitration Rules). Some BITs also provide for arbitration under the ICC Arbitration Rules. A minority of BITs mention recourse to domestic tribunals, either as an option (eg, the BITs with Peru, Paraguay and Argentina) or as a compulsory step before recourse to arbitration (eg, the BITs with Jamaica and Uruguay).

Law stated - 12 September 2022

Confidentiality

Does the state have an established practice of requiring confidentiality in investment arbitration?

Switzerland has no established practice subjecting investment arbitrations to confidentiality. The only investment treaty arbitration to which Switzerland has been party was not confidential (the notice of intent and the order of the arbitral tribunal discontinuing the proceedings are public). Moreover, Switzerland has been actively promoting transparency in investment arbitration in the past years. Immediately after the entry into force in 2014 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the UNCITRAL Rules on Transparency), SECO announced that Switzerland would seek to include in all future BITs a reference to the application of the UNCITRAL Rules on Transparency. This reference is included in the BIT with Georgia (in force since 2015). Furthermore, Switzerland signed the UN Convention on Transparency in Treaty-based Investor-State Arbitration in 2015 and ratified it in 2017, which further expands the scope of transparency in investment arbitration. Under this Convention, Switzerland agreed that the UNCITRAL Rules on Transparency (which are otherwise applicable only to arbitrations initiated under a BIT concluded after 1 April 2014 and governed by the UNCITRAL Arbitration Rules) shall apply to arbitrations initiated under BITs concluded before that date and regardless of the applicable arbitration rules.

Law stated - 12 September 2022

Insurance

Does the state have an investment insurance agency or programme?

Switzerland has no specific investment insurance agency or programme. However, Switzerland is a member of the Multilateral Investment Guarantee Agency. Moreover, Swiss Export Risk Insurance (SERV) is a public institution owned by the Swiss Confederation that insures Swiss exporters against political and commercial risks involved in exporting goods and services from Switzerland, when such risks are not covered, or insufficiently covered, by private insurers. SERV's products are available to all companies domiciled in Switzerland provided a certain percentage of the insured export's value has been added in Switzerland.

Law stated - 12 September 2022

INVESTMENT ARBITRATION HISTORY

Number of arbitrations

How many known investment treaty arbitrations has the state been involved in?

Switzerland has been involved in only one known investment treaty arbitration, initiated in 2020. The proceedings were discontinued early 2022 for non-payment of the required advances, in accordance with article 14(3)(d) of the ICSID Administrative and Financial Regulation.

Law stated - 12 September 2022

Industries and sectors

Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

The only known investment arbitration in which Switzerland has been involved concerned real estate. The claims arose out of a Swiss decree banning the sale of real estate within five years of its purchase (in order to restrict land

speculation) and the Swiss National Bank's decision to raise its discount rate, which allegedly resulted in creeping expropriation and financial losses for the claimant.

Law stated - 12 September 2022

Selecting arbitrator

Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

In the only known investment arbitration in which Switzerland has been involved, Switzerland appointed its own arbitrator.

Law stated - 12 September 2022

Defence

Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

In the only known investment arbitration in which it was involved, Switzerland was represented by external Swiss counsel.

Law stated - 12 September 2022

ENFORCEMENT OF AWARDS AGAINST THE STATE

Enforcement agreements

Is the state party to any international agreements regarding enforcement, such as the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Switzerland is a party to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which entered into force in Switzerland in 1965. Switzerland is also a party to several (old) bilateral treaties on the recognition and enforcement of arbitral awards, in particular with Germany, Sweden, Belgium and Liechtenstein. The New York Convention provides that the validity of other treaties is not affected by the Convention and that, whenever the Convention proves to be less favourable than the provisions of another treaty, the more favourable rules shall prevail. The Swiss Supreme Court has confirmed that if the recognition and enforcement in Switzerland of a foreign award may be governed by two different international conventions (such as the New York Convention and a bilateral treaty), priority must be given to the one that facilitates the recognition or enforcement of the award. Switzerland is also a party to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which entered into force in Switzerland in 1968. Switzerland thereby agreed that awards rendered under the ICSID Convention are final and binding (subject only to the remedies provided in the Convention) and shall be recognised and enforced as if they were a final judgment of a court in Switzerland.

Law stated - 12 September 2022

Award compliance

Does the state usually comply voluntarily with investment treaty awards rendered against it?

There are no known investment treaty awards against Switzerland.

Law stated - 12 September 2022

Unfavourable awards

If not, does the state appeal to its domestic courts or the courts where the arbitration was seated against unfavourable awards?

There are no known investment treaty awards against Switzerland.

Law stated - 12 September 2022

Provisions hindering enforcement

Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

Under the ICSID Convention, Switzerland committed to enforce any award rendered under the Convention as if it were a final judgment of a Swiss court. Hence, Switzerland could not raise a public policy defence to resist enforcement of an ICSID award within its territory. As for non-ICSID awards against Switzerland, the concept of public policy is extremely narrow. An award is incompatible with public policy if it disregards fundamental and broadly recognized principles which, according to the prevailing conceptions in Switzerland, should constitute the basis of any legal order. This very high threshold has been met only two times over the past decades. A sovereign immunity defence may be raised to resist enforcement of both ICSID and non-ICSID awards against Switzerland. However, the Swiss Supreme Court has a restrictive interpretation of sovereign immunity. The conditions to admit enforcement against state assets in Switzerland are:

- the claim must arise from an act performed *jure gestionis*;
- there is sufficient connection between the underlying legal relationship and Switzerland; and
- the state assets against which enforcement is sought are not affected to sovereign activities.

To enforce an award in Switzerland against the state, the challenge is therefore more a practical one (locating assets that qualify for enforcement) than a legal one.

Law stated - 12 September 2022

UPDATE AND TRENDS

Key developments of the past year

Are there any emerging trends or hot topics in your jurisdiction?

Switzerland continues to renegotiate its older BITs and enters into new ones. A new BIT was signed with Indonesia in May 2022 and submitted for consultation to cantons and business associations. As Switzerland is not part of the EU,

Swiss BITs are not affected by the EU ruling that arbitration provisions contained in intra EU-BIT are incompatible with EU law.

More generally, Switzerland continues to strengthen its position as an attractive location for investment, notably for holding companies interested in investing in Europe and throughout the world. A draft bill on foreign direct investments controls submitted to the Federal Council in May 2022 seeks, however, to introduce control of FDI of foreign investors acquiring control of Swiss companies (if the Swiss target company operates in a sector that is critical to public order and security, or if the foreign investor is a state owned or state related entity, irrespective of the Swiss target company's activities).

Switzerland has been increasingly designated as place of arbitration in investment arbitrations, which resulted in a higher number of setting-aside proceedings in investment matters, thereby allowing the Swiss Supreme Court to make important contributions to its growing body of jurisprudence in investment arbitration law.

Since February 2022, following the EU sanctions, Switzerland has updated its ordinance on measures related to the situation in Ukraine several times. The updated measures, which restrict activities in certain sectors and in relation to sanctioned entities, may have an impact on the inflow and outflow of foreign capital in Switzerland to the extent it concerns such sectors and entities.

Law stated - 12 September 2022

Jurisdictions

	Bangladesh	Vertex International Consulting
	Belgium	Linklaters LLP
	Canada	Wasel & Wasel
	China	Zhong Lun Law Firm
	Egypt	Shahid Law Firm
	European Union	Van Bael & Bellis
	France	Laborde Law
	Japan	Anderson Mōri & Tomotsune
	Malaysia	Cecil Abraham & Partners
	Romania	STOICA & Asociații
	Russia	BGP Litigation
	Switzerland	Schellenberg Wittmer
	United Kingdom	Quinn Emanuel Urquhart & Sullivan LLP
	USA	Quinn Emanuel Urquhart & Sullivan LLP
	Uzbekistan	Putilin Dispute Management
	Vietnam	LNT & Partners