Arbitrating Energy Disputes: Hot Topics

International Arbitration, Energy and Environmental Commissions

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National Report of SWITZERLAND

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1. ARBITRATING LONG-TERM CONTRACTS IN THE ENERGY SECTOR

1.1 In your jurisdiction: Is arbitration a widely accepted and used dispute resolution method in the energy sector when long-term contracts are in dispute? Do you see arbitration clauses in the agreements executed in the development of power plants? Do you normally include arbitration clauses in EPC and O&M Contracts? Do banks accept introducing arbitration clauses in credit agreements with the SPV and in the security package? What are the reasons for choosing arbitration as a preferred dispute resolution method over proceedings before state courts?[1]

Arbitration in Switzerland

For over a century, Switzerland has had a long-standing tradition in arbitration and it has been one of the preferred hosting venues for international arbitrations, whether (ad hoc or proceedings under the rules of the leading arbitration institutions). It remains today one of the most preferred places for international arbitration. Switzerland is one of the major venues for international arbitration. Many factors account for this reputation, in particular neutrality, a secure and predictable legal framework, access to qualified Swiss and foreign arbitrators and counsel as well as a developed infrastructure. Switzerland has a modern and liberal international arbitration law in Chapter 12 of the Swiss Private International Law Act (PILA), which grants the parties to arbitration wide party autonomy.

Arbitration clauses in EPC/O&M contracts

The dispute resolution procedure negotiated in many of the EPC and O&M Contracts provide for arbitration of disputes, commonly under the ICC Rules of Arbitration. Arbitration has prevailed over state court litigation for such contracts for various reasons. Probably most importantly it provides the parties with the opportunity to appoint arbitrators who understand the technical issues and who are familiar with the respective building operations and the nature of typical disputes in this field. State court judges are often not specialised and lack experience with international projects and their characteristics. Furthermore, parties often prefer to have any disputes resolved on neutral soil, in a neutral language of proceedings.

Although provisions regarding review are common in long-term (supply) agreements, changes of circumstances may be difficult to foresee at the drafting stage of the contract. If at a certain point the parties' views, e.g. on price revisions, differ and settlement negotiations fail, the agreement usually calls for arbitration as the preferred dispute resolution mechanism in the energy sector.

Flexibility, venue, confidentiality and expertise are also the main reason for choosing arbitration in the energy sector. Swiss (international) law also provides for the flexibility desired by the parties: the PILA provides that any dispute involving an economic interest

[1] Maximum flexibility? That parties can choose arbitrators experienced in the energy sector? That they can choose the venue? That they can agree on confidentiality and privacy? That it is easier to enforce an award in the international context than judgments in foreign jurisdictions? The neutrality of the arbitration proceedings? Any other considerations?

may be submitted to arbitration. Arbitration of domestic disputes is regulated by the Swiss Civil Procedure Code (CPC) which provides that any cause of action of which the parties are free to dispose of may be the subject of arbitration.

1.2 Do parties choose ad hoc or rather institutional arbitration for disputes regarding the revision of long-term contracts? What are the reasons?

In a complex international commercial dispute, such as a price revision dispute regarding a long-term gas supply agreement, an institutional arbitration may be more suitable as the institutional process provides established arbitration rules, support, supervision and guidance throughout the arbitration, review of the awards and it adds to the awards' credibility. In an institutional arbitration parties and arbitrators can seek assistance and advice from institutional staff.

In particular, the panel of arbitrators provided by an institution is made up of experts from various regions of the world and includes many different vocations. This allows parties to select an arbitrator possessing the necessary skill, experience and expertise to provide a quick and effective dispute resolution process.

In a less formal ad hoc arrangement, parties would have to approach the court in order to take the arbitration forward and this would inevitably be more time-consuming (and costly), which might be an important factor in the process of revising a long-term contract. Although there are no statistics available, it is well known that in Switzerland ad hoc arbitration in an international context is often governed by the UNCITRAL Arbitration Rules. Since August 2014, the parties may even turn to the Swiss Chambers' Arbitration Institution with a demand to act as appointing authority in ad hoc arbitration cases without agreeing on the application of the Swiss Rules of International Arbitration of the Swiss Chambers' Arbitration Institution (Swiss Rules). This might me a reason not to rule out ad hoc arbitration.

1.3 Expertise and Multiple Appointment of Arbitrators

1.3.1 Do arbitrators have the necessary legal, technical and economic expertise to decide on the revision of long-term contracts? Should technical experts be appointed as arbitrators in order to bring the required know-how to the panel?

Complex international disputes involve so many different fields that no individual can master them all. Arbitrators do hardly ever cover the entire range of expertise that is ideally required to conduct a revision of a long-term contract.

However, firstly, arbitration gives the parties the opportunity to make a significant contribution to the process, by adducing evidence and presenting argument to the arbitral body. Secondly, disputes in international arbitration often require expertise in fields other than law. As most arbitration rules do not provide for special requirements regarding professional or educational qualifications of an arbitrator, technical and economic expertise may be (and should be) introduced to arbitration through the nomination of technically qualified arbitrators. Although the appointment of one or several technically or

commercially qualified arbitrators (specialist arbitrators) is used relatively rarely, the technical knowledge and analytic expertise of an arbitrator that is not legally-trained arbitrator may be very helpful to understand the relevant facts.

However, one needs to keep in mind that in complex international disputes, in spite of the knowledge of the "technical arbitrator", additional in-depth knowledge will often be necessary in order to render an award and such knowledge is usually procured by means of an expert opinion. Furthermore, it might be difficult to determine the special knowledge required at the beginning of the arbitral proceedings. For this reason, it may be questionable to "replace" lawyers by technical experts as arbitrators.

1.3.2 Multiple appointments of arbitrators: The number of arbitrators having the necessary legal, economic and commercial expertise for these kinds of disputes might be limited in certain jurisdictions. Accordingly, the potential arbitrators are drawn from a smaller or specialized pool of arbitrators. However, Part II, Article 3.1.5 IBA Guidelines on Conflicts of Interest in International Arbitration 2014 ("IBA Guidelines 2014") states: The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties" Further, Part II, Article 3.1.3 IBA Guidelines 2014 states that "The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties." Both provisions are listed in the Orange List of the IBA Guidelines 2014. A potential arbitrator has to disclose any circumstances constituting these two grounds. Have these grounds been used by recalcitrant parties to object to the appointment of an arbitrator?

The circumstances described in the "Orange List" are counted among the reasons that most frequently give rise to uncertainties among the parties as they do not constitute a clear and serious conflict situation, neither are they completely trouble-free if there are certain facts that could give rise to raise reasonable doubts regarding the independence of an arbitrator owing to the circumstances of an individual case.

However, the fact that certain circumstances that are listed on the Orange List are disclosed must not be interpreted as a presumption of bias of the arbitrator in question. A party must challenge the arbitrator. Parties are free to agree on the challenge procedure in the arbitration agreement. If a Swiss judge is to rule on the challenge, he will certainly not take the circumstances of the Orange List for granted (the Swiss federal Supreme Court does not even review the circumstances under the "Non-waivable Red List" automatically, without an according objection by a party) and scrutinize the circumstances of an individual case. However, a recalcitrant party may use the Orange List to delay the arbitral proceedings.

1.3.3 Does the nationality of arbitrators play a more important role in arbitrations regarding the revision of long-term contracts than in other commercial arbitrations?

The arbitrators' nationality is probably more important than in other international arbitrations as (at least some of) the reasons that give rise to a revision of a long-term contract often lie in the peculiarities of the economy, market or politics of a certain country involved and a national of given country might be more likely to be in a position to determine whether a "change of circumstances" which gives rise to a revision of a long-term contract has actually taken place.

With this in mind, the requirement (or rather insistence) that the sole arbitrator or "third" arbitrator be of national neutrality, which is the practice under most international arbitration rules, might lead to unsatisfactory results. For instance, both the ICC and LCIA Rules expressly state that where the parties are of different nationality, the institution shall not appoint a sole arbitrator or chairperson of the same nationality as one of the parties. However, in contrast, the Swiss Rules do not contain a specific requirement of national neutrality of the sole arbitrator/chairman. Not to include such requirement was a conscious choice, in order to leave the institution the widest discretion in this respect. However, although the institution is not obliged under Swiss Rules to appoint a sole arbitrator/chairman of neutral nationality, this does not mean that it will not take into consideration the arbitrator's nationality when selecting. Nevertheless, this additional element of discretion may lead to better results in certain situations.

1.4 Do parties to long-term contracts favor a settlement over an award in which the arbitral tribunal decides on the revision of the price formulae or even ascertains a new price formula? If so, for which reasons?

The parties to a long-term agreement that are in dispute over its revision may find themselves in a situation that the tribunal exceeds the parties' suggestions and pleadings, and finally renders a ruling on a formula that does not fit the expectations of either party (see below 1.9.3.). The various unpredictable elements (and their complexity) that form part of the considerations in a revision process regarding a long-term contract should make a settlement draw the interest of the parties, in particular the ones that come from a different cultural and political background than the party that claims revision of the agreement. However, if the parties favour a settlement, according negotiations should only be entered if precise guidelines have been agreed upon (e.g. timeline).

Long-term interests in other fields of business may also be important. The common interests of the parties also make long-term contracts in the energy sector favourable to mediation. However, in Switzerland, although there are strong efforts from various institutions to make mediation more attractive (in particular since its inclusion in the CPC), the general mindset has not turned in favour of mediation yet.

1.5 "Price Review Clause" or Price Re-Opener Clauses"

1.5.1 Were (and are) price formulae usually indexed directly or indirectly to alternative competing fuels, e.g. oil, coal products? What are the (historical) reasons for this indexation?

Yes, price formulae are usually indexed. See below 1.9.2.

1.5.2 What is the difference between a "Price Review Clause" or a "Price Re-Opener Clause" in contrast to a "loyalty"- or "hardship-clause"? In your jurisdiction: Is the "Price Review Clause" a provision specialis in contrast to a general hardship clause?

A Price Review Clause or Price Re-Opener clause typically: (i) identifies 'trigger' criteria which cause or permit a review procedure to be invoked, (ii) sets out a procedure for arriving at the adjusted price, (iii) provides for dispute resolution if this is unsuccessful and (iv) provides a description as to how the adjusted price is to apply under the contract.

In contrast, a Hardship Clause in a contract is intended to cover only cases in which unforeseen events occur that fundamentally alter the equilibrium of a contract resulting in an excessive burden being placed on one of the parties involved. It obligates the parties to negotiate alternative contractual terms which reasonably allow for the consequences of the event.

Under Swiss law, a Price Review clause is not necessarily connected with an excessive burden being placed on one of the parties and therefore it is (usually) not a lex specialis.

1.6 "Trigger events"/Significant Change of Circumstances

1.6.1 Please give examples of a simple[2] and of more complex[3] trigger mechanism.

Simple trigger criteria

(a) A contract might give either party the right to initiate a price review periodically, e.g. every 3 years or 5 years;

(b) A contract might give each party the right to initiate a limited number of price reviews at any time during the contract term (so-called "*wild cards*");

(c) Review might be triggered if some objective benchmark is met – such as if the reference price changes more than a certain % in a given period.

2 E.g. that the parties agree that the passage of a certain timeframe will automatically trigger the price review.

3 E.g. that the claimant has to prove firstly the occurrence of circumstances beyond the control of either party and secondly that the circumstance results in a significant change to the energy market of the buyer compared to a specified date.

More complex trigger criteria

The trigger may also be less precisely defined:

(a) "…if at any time either party considers that economic circumstances in Syria beyond the control of the parties, while exercising due diligence, have substantially changed as compared to what it reasonably expected when entering into this Contract…";

or

(b) "The revision of the price shall consist in adapting it in a reasonable and fair manner to the economic circumstances then prevailing on the imported Natural Gas Market and on the market for the other imported energy supplies competing with this production in…. The parties shall take into account the individual characteristics of each of the above products including the quality, the continuity of deliveries, the production and transportation costs, etc..."

1.6.2 Does any definition of the term "significantly" exist in your jurisdiction? If not, how is the term interpreted if the curial law is that of your jurisdiction?

No. Although the term "significantly" is used throughout the laws of Switzerland, in particular in the Swiss Code of Obligations (CO), its meaning differs depending on the context. It often refers to the comparison of certain situations/settings and it (usually) is in the discretion of the judge to determine whether a change is "significant" or not.

However, there is (long-established) case law what a "significant" change of circumstances is. This gives parties a possibility to reliably assess the situation they themselves confronted with.

1.6.3 Please list facts/circumstances that a claimant has to adduce evidence for in order to prove that the circumstances have significantly changed[4]:

- Change of the economic circumstances in a certain country;
- The price formula no longer reflects the market as initially intended by the parties;
- Change in law;
- Structural changes in the underlying market;

[4] E.g. the growing liberalization, the liquidity and transparency in Europe, too much contracted/committed supply; excess of supply of natural gas; that the price of alternative completing fuels, such as oil or other oil products to which the price formulae are usually indexed, has changed etc.

1.6.4 Whether the requirement of a significant change of circumstances if fulfilled is a question of law and fact: Do you agree with this statement if the curial law is the substantive law of your jurisdiction and/or if the place of arbitration is in your jurisdiction?

Yes. (Under Swiss law,) the question, whether the facts/circumstances have changed is a question of fact and the question whether these changes constitute a "significant change" of circumstances is a question of law as it is the legal assessment of the (changed) circumstances.

1.6.5 According to Articles 5 and 6 of the IBA Rules on the Taking of Evidence in International Arbitration dated 29 May 2010 ("IBA Rules") a party may rely on a "Party-Appointed Expert" or the arbitral tribunal may appoint an independent "Tribunal-Appointed Expert". What is the preference in your jurisdiction: Do counsel, parties and arbitrators rather favor Party-Appointed Experts or Tribunal-Appointed Experts?

Although the arbitral tribunal will often have to appoint an independent expert in order to clarify a certain question in dispute and illustrated controversially by the Party-Appointed Experts, arbitrators in Switzerland will favour Party-Appointed Experts before an expert is appointed by the tribunal. Counsel sometimes question such approach, in particular if it is foreseeable that the Party-Appointed Experts' statements will not lead to a reliable outcome (which e.g. might be the case if a party's chief engineer is appointed as an expert witness). It is up to the parties to agree upon the (immediate) appointment of a Tribunal-Appointed Expert. After all, the parties are the "masters of the proceedings".

1.6.6 Is the use/appointment of consultants by the arbitral tribunal regarding the "translation" of a decision into a new price formula possible/desirable?

Right before (and during) the deliberation stage the role of a consultant to the arbitral tribunal becomes important and he may assist the arbitral tribunal in calculating its own solution, based on the tribunal's own assessment of the case. Although the arbitral tribunal – at the time of the deliberation stage – usually has a thorough understanding of the technical or commercial issues that are at stake, a panel composed of lawyers is likely to lack the technical or commercial expertise to convert the solution they consider to be correct into figures, or reflect in a technically or commercially suitable formula. Therefore, it is certainly desirable to appoint a consultant.

As a consultant supports the arbitral tribunal internally, he does not produce a report, nor does he have a decision-making power. The appointment of a consultant by the arbitral tribunal may have the following advantages:

- flexible information tool for the arbitral tribunal;
- Assurance of technical or commercial soundness of the final award;

- Avoidance of lengthy proceedings regarding the correction of an award due to technical or commercial misunderstandings or errors.

If an arbitration tribunal is seated in Switzerland, the Swiss legal system provides the parties with the fullest possible degree of freedom with regard to the applicable procedural rules. There are no specific provisions in the Swiss arbitration law (or the Swiss Rules) regarding the appointment of consultants to the arbitral tribunal. Nevertheless, it is the prevailing view that, based on party agreements, the arbitral tribunal may appoint consultants under the Swiss Rules.

It goes without saying that a consultant to the arbitral tribunal must remain impartial and independent from the parties, their counsel and the arbitral tribunal at all times. Therefore, the consultant should signs a statement of independence and impartiality (similar to the arbitrators') prior to his appointment, disclosing any facts or circumstances that may raise doubts as to his impartiality and independence in the eyes of a party.

1.7 If the "Price Review Clause" or the "Price Re-Opener Clause" does not require a trigger event: Under what requirements can a party also request revision/review of the price formula if the curial law is the substantive law of your jurisdiction?

As a principle of Swiss substantive law, clausula rebus sic stantibus provides for the unenforceability of a contract due to fundamentally changed circumstances if the parties have not had the possibility to anticipate such circumstances. According to the Federal Supreme Court, a party is in abuse of right if it adheres to an unchanged contract although a serious disruption in equivalence has taken place since its signing. In order to appeal to the clausula rebus sic stantibus, the following requirements need to be fulfilled:

- Subsequent change of circumstances;
- Serious disruption in equivalence;
- No possibility of foreseeing/avoiding the change of circumstances;
- Absence of contradictory conduct by the requesting party.

1.8 Confidentiality

1.8.1 Does a claimant have to substantiate sensitive business secrets in order to prove that the price formula needs adapting? For example, does a claimant have to submit the prices that its customers pay? Does a claimant have to submit what kind of prices the respondent charges to its customers?

In international arbitration, there is no imminent confidentiality obligation for the parties (or the arbitral tribunal) to observe. In order to increase the level of protection of business secrets, the parties may include specific provisions in their arbitration clause on how to treat business secrets.

A party fearing the inappropriate use of its business secrets will certainly desists from or contest to disclose the respective information. However the resisting party (in particular the claimant) must take into consideration that by keeping information confidential, it might not suffice its burden of proof because the arbitral tribunal might not be in a position to consider such information for its decision.

If the parties cannot (or did not) agree on how to treat business secrets or if it is contested between the parties whether a certain piece of information is a business secret or not, the arbitral tribunal should – whenever possible – on its own motion assess the nature of the information concerned and take the measures it deems adequate.

1.8.2 Do parties usually agree on a Request to Produce phase according to Article 3 IBA Rules? If a party objects to the production of documents invoking commercial confidentiality: Do arbitral tribunals adopt arrangements to ensure a suitable confidentiality protection (Article 9(4) IBA Rules) or do they rather dismiss a party's request to produce?

As a document production phase is a common practice in international arbitration, the question whether certain information is a business secret or not and whether such information needs to be disclosed, is rather recurring.

As document production does not have a (strong) tradition in Swiss procedural law, a Swiss arbitrator will be rather cautious in admitting extensive document production requests and certainly handle the question regarding relevance of the requested information rather strictly.

It is generally accepted that the arbitral tribunal has the power to conduct the arbitral proceedings in a manner as it considers appropriate, provided that it ensures equal treatment of the parties. The arbitral tribunal has the power to set procedural rules and enjoys a wide discretion to determine the rules governing the proceedings allowing it to deal with the peculiarities of each case.

E.g. sensitive information/documentation could be disclosed to an independent and impartial auditor whose mandate would include answering requesting party's questions related to the sensitive information without disclosing said information to the requesting party.

1.9 Scope of arbitral tribunal's mandate to revise the price formulae

1.9.1 What are the available remedies in your jurisdiction: Does an arbitral tribunal have the power to amend the contract terms? Does an arbitral tribunal have the power to replace e.g. unreasonable contract terms? Must the arbitral tribunal's power to change/revise the price formula be specifically mentioned in the contract? If not, can arbitrators resort to statutory provisions of the curial law? Or is the power limited to contract interpretation?

The remedies available to the arbitral tribunal very much depend on the applicable rules of arbitration. The Swiss Rules e.g. do not specify what sort of remedies a party may seek from the arbitral tribunal. The parties are free to agree on the arbitrators' powers as regards relief and remedies. If the parties wish to maintain some predictability with regard to the outcome of the revision process, they may draft their arbitration clause in such a way as to limit the arbitrators' powers to adjust the price formula. Another option to define the boundaries of the arbitral tribunal's jurisdiction with regard to the revision process would be to exclude the application of hybrid formulae.

Unless otherwise agreed by the parties, the arbitral tribunal has the power (i) to order a party to do or refrain from doing anything, (ii) to determine the existence or non-existence of a legal relationship, or, where appropriate, (iii) to decide on the formation, amendment or cancellation of a legal relationship. In addition, the arbitral tribunal may take any interim measures of protection it deems necessary. The specific relief or remedy sought must be contained in an according prayer for relief.

See also above 1.7.

1.9.2 If an arbitral tribunal is only mandated to amend an existing price formula, how are the price formulae usually worded? What are the potential risks, but also advantages if an arbitral tribunal has only this limited mandate?

In a formula, the existing price will normally be linked to a benchmark. Indexes exist, e.g. the Henry Hub index or Platts Indexes (www.platts.com/products-services). A European buyer may prefer a more accurate benchmark, e.g. the European Bulk prices "CIF NWE Basis ARA" (Published in Platt's Oilgram Report; NWE stands for "North West Europe", ARA for Amsterdam, Rotterdam, Antwerp Range). Parties may also want to link the prices to the market for alternative sources of energy, such as fuel oil or coal.

Disputes under a long-term supply agreement may be unrelated to price revisions. They may instead involve, e.g. the determination of the quality of the commodity in question. If the arbitral tribunal only has a limited mandate, the parties might have to address state courts (possibly in different jurisdictions) if it comes to claims on quality and condition. On the other hand, the parties maintain some predictability with regard to the scope of the arbitration.

1.9.3 If an arbitral tribunal is mandated to ascertain an entirely new price formula, how is the existing price formula then worded? What are the potential risks,

but also advantages if an arbitral tribunal has such a broad mandate? What are the necessary "tools" (see 1.3.1/1.76, 1.7.7 – expert arbitrators, appointed experts, consultants or the like) in order for the arbitral tribunal to draft a new price formula? What parts of the award have "res judicata effect"?

If an arbitral Tribunal is called upon to decide whether the price formula requires adjustment(s), it is possible that the price formula itself will have to be revised. Given the complexity of price formulae in a long-term supply agreement, the parties to such agreement may find that the tribunal will exceed the parties' suggestions and pleadings, and finally render a ruling on a formula that does not fit the expectations of either party (e.g. Gas Natural Aprovisionamientos, SDG, S.A. v Atlantic LNG Co of Trinidad and Tobago).

It is rather self-explanatory that an entire price review (based on factors such as the state of the market or several contracts) involves evidence of the market or contracts concerned and expert evidence as to the price based on that evidence. This is very time-consuming, often involves an extensive information gathering exercise including summoning of third parties. This exercise is usually the most time consuming in any arbitration, is often contentious and can result in the parties to the arbitration incurring significant costs.

The res iudicata effect is limited to the decision itself (conclusions) of the award.

2. ARBITRATING ENERGY DISPUTES UNDER ISDS

2.1 How many BITs has your country signed and how many of them are in force?

Switzerland was the first state after Germany to enter into bilateral investment treaties, beginning in 1961. Since then Switzerland has signed 124 bilateral investment treaties, of which 120 are in force. This is the third largest network of such investment treaties, after Germany and China.

2.2 What mechanisms of dispute resolution method does your country favor in its BITs?

Swiss BITs contain a wide variety of dispute resolution options, which is not surprising since they have been negotiated and signed over a span of more than 50 years. Swiss BITs provide that disputes may be submitted to international arbitration if a mandatory consultation phase of six to twelve months does not result in an amicable settlement of the dispute.

However, most Swiss BITs that were signed before 1981 (and two signed after) merely contain a state–state or horizontal dispute resolution clause. Nearly all Swiss BITs signed since 1981 also include investor–state or diagonal dispute resolution clauses. These are quite varied but typically provide, at the investor's choice, either for ICSID arbitration or for ad hoc arbitration (usually under the UNCITRAL arbitration rules unless the parties

agree on a different set of rules). Some BITs contain the additional option to submit the dispute to the ICC and to the courts or the administrative tribunals of the contracting party concerned.

Hence, most of the Swiss BITs provide therefor two types of dispute settlement mechanisms: The state-state dispute settlement mechanism, addresses disputes relating to the interpretation and application of the BIT, and the investor-state dispute settlement mechanism, which addresses specific conflicts arising between an investor and the recipient country on an investment that has been made.

Do investors have the choice to sue a host state in the state courts and in arbitration? Do investors have to choose between suing the host state either in the state courts or in arbitration (fork-in-the-road provision)?

Some of the BIT's Switzerland has signed with other countries allow the investor to submit the dispute either to the courts or the administrative tribunals of the contracting party concerned or to international arbitration (e.g. BIT between the Swiss Confederation and the Republic of Kosovo). In those cases investors have the choice to sue the host state in the state courts and in arbitration.

Other BIT's Switzerland has signed do not allow such choice for an investor (e.g. BIT between the Swiss Confederation and the Czech and Slovak Federal Republic). Hence, investors can only submit the dispute to an arbitral tribunal.

2.2.1 If investors can choose proceedings before state courts in your jurisdiction: Are there any cases in the last five years in which state courts in your jurisdiction had to decide on claims of (foreign) investors against your state?

No. There has never been a claim from foreign investors against Switzerland before a Swiss Court.

As in general: There has also never been a claim from foreign investors against Switzerland before an arbitration Court. However, in April 2014 the Swiss Authorities received a letter addressed as "notification de l'existence d'un différend", which referred to a BIT Switzerland has concluded with another country. The claimant states that their rights have been violated and claimed for compensation of damages. The federal council of Switzerland instructed the Federal Department of Justice and Police (FDJP) on 28th November 2014 to represent Switzerland both in the actual (pre-procedurally) phase as well as during a possible arbitration proceeding before the ICSID. In this process, the responsible Federal office of Justice (FOJ) putted the legal service out to tender on 21th January 2015 for a specialized law firm in arbitration. Until now there has not be filled a claim against Switzerland. According to the responsible person ath the Federal office of Justice it is not at all sure yet, whether there will be an arbitration case before the ICSID.

2.2.2 If so, were the decisions in favor of the country/host state or were they in favor of the investor?

See above 2.2.1.

2.2.3 Has your country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and nationals of other States (1968) (the ICSID Convention)? If not, does your state intend to accede to/ratify the ICSID Convention soon?

Yes, Switzerland has signed the ICSID-Convention on 22th September 1967.

2.3 If an investor can choose (only) arbitration as dispute resolution method:

2.3.1 If an investor can choose arbitration as dispute resolution method, are there conditions attached to it, such as a requirement to resort to state courts for a certain period of time or a requirement to attempt to arrive at amicable settlement within a certain period of time?

Yes, as stated above there is an initial mandatory phase whereby the parties to the dispute consult with one another for six to twelve months for the purpose of reaching an amicable agreement.

Generally speaking, mutually amenable solutions to investment-related disputes are usually found - with or without the help of the authorities of the country of origin - during this consultation phase.

2.3.2 If an investor can choose not only ICSID, but also other institutional rules such as SCC, ICC or ad hoc proceedings, or between various institutions in case the ICSID Convention is not signed/ratified by your country, which advantages or disadvantages do investors take into consideration in choosing between these arbitration rules?

Switzerland has not been party to any known investment treaty arbitration, hence has never been accused by a foreign investor. Therefore, this question regarding which advantages or disadvantages investors take into consideration in choosing between the arbitration rules when it comes to a dispute, cannot be answered.

2.4 Is your country a member state of the ECT? If not, has your country signed, but never (or not yet) ratified the ECT? If so, has your country exempted the ECT's provisional application prior to its ratification?

Yes, Switzerland is a member state of the ECT.

Because Switzerland has immediately initiated the ratification of the ECT, there was no need to exempt the ECT's provisional application.

2.4.1 If your country is not a member state to the ECT or has recently withdrawn from the ECT: What are the reasons?

2.4.2 According to Article 26 ECT an investor can choose arbitration either under (i) the ICSID Convention, (ii) the ICSID's Additional Facility Rules, (iii) under the arbitration rules of the SCC or (iv) ad hoc arbitration under the UNCITRAL Arbitration Rules. Do investors in your jurisdiction have any preference? If so, for what reasons?

As already mentioned before, Switzerland has not been a party to any known investment treaty arbitrations.

2.4.3 Has your country declared a reservation under Article 26(3)(b(i) ECT? If the answer is in the negative: Are there cases in which an investor has sued your country in parallel before the state courts and in arbitration? Did the parallel proceedings result in conflicting decisions?

No. Switzerland has not declared a reservation under Article 26(3)(b(i) ECT.

2.5 What are the key features in relation to the concept of "Investor" and "Investment" in your country's BITs? Is a "denial of benefits" clause usual in your country's BITs?

- **Key features in relation to the concept of "Investor" and "Investment"**

The term **"Investor"** refers with regard to both Contracting Parties to:

(a) a natural person who, according to the law of that Contracting Party, is considered to be its national. This shall not include a natural person that holds the nationality of both Contracting Parties unless such person has at the time of the investment and ever

since been domiciled outside the territory of the Contracting Party in which the investment was established or acquired.

(b) A legal entity, including companies, corporations, business associations an other organizations, which are constituted or otherwise duly organized under the law of that Contracting Party a have their seat, together with real economic activities, in the territory of the same Contracting Party.

(c) A legal entity not established under the law of that Contracting Party but owned or effectively controlled by a natural person as defined in (a) above or by a legal entity as defined in (b) above.

The term "**Investment**" means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party that has such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption or risk, including:

(a) Movable and immovable property, as well as any related rights, such as servitudes, mortgages, liens and pledges;

(b) A company, or shares, parts or any other kind of participation in a company;

(c) Claims to money or to any performance having an economic value, except claims to money arising solely out of commercial contracts for the sale of goods an services;

(d) Copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-jow and goodwill;

(e) Rights conferred pursuant to law, contract or decision of an authority such as concessions, licenses, authorizations and permits.

- **"Denial of benefits" clause**

No. In general there are no such clauses in the BIT's Switzerland has signed.

2.6 In light of the EU position on this matter: Is your country planning on withdrawing from the BITs signed in the past? If this is the case: What are the motives for doing so?

According to the information of the State Secretariat for Economic Affairs (SECO), Switzerland is not planning to withdraw from the BITs signed in the past.

2.7 In the context of the intra-EU treaties conflict: How is this issue affecting the commercial relationships between your State and others when it comes to choosing an effective dispute resolution mechanism?

According to the information of the State Secretariat for Economic Affairs (SECO), the commercial relationship between Switzerland and the EU Members during the contract

settlement phase did not get affected. Until today, the commercial relationship has not been affected while choosing an effective dispute resolution mechanism.

2.7.1 What approach would you take when seeking enforcement of a favorable award resulting from an intra-EU dispute? Would you counsel to seek enforcement in the courts of an EU member state or outside the EU? Have your national courts ever ruled on this issue?

Switzerland is a member of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which entered into force in Switzerland on 30 August 1965. In addition, as a member of the ICSID Convention (see above 2.2.3.), Switzerland has agreed that ICSID awards are final and binding subject only to remedies set out in the Convention and that Switzerland will comply with such awards. Furthermore, Switzerland is obliged to enforce ICSID awards as if such an award were a final judgment of a court in Switzerland. Switzerland is also a party to several bilateral treaties concerning recognition and enforcement of arbitral awards.

2.8 Does your country have a history of voluntary compliance with adverse investment treaty awards?

See above 2.2.1..

2.9 To what extent have local courts been supportive of investment treaty arbitration?

See above 2.2.1.

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