Enforcement of Investment Treaty Arbitration Awards

A Global Guide

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Switzerland

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1. Overview

1.1 General trends in Switzerland

Switzerland is generally regarded as a pro-enforcement jurisdiction. The country has a good track record with regard to the enforcement of international arbitration awards. While there have been no published cases on the enforcement of investment treaty awards, Swiss courts have been seized once, successfully, with jurisdiction to enforce a provisional measure decision by an investment treaty arbitral tribunal. Furthermore, Swiss BITs have been used by Swiss investors on several occasions to bring claims against other states before investment treaty arbitration tribunals.

As Switzerland is home to a large volume of financial assets held by foreign parties in Swiss banks, it is likely only a matter of time before the enforcement of an investment treaty final award is sought in Switzerland.

1.2 Historical background

Swiss courts have yet to be seized with jurisdiction to enforce a final ICSID arbitral award. Accordingly, there is no specific historical background in Switzerland in the context of enforcement of investment treaty arbitral awards, whether ICSID or non-ICSID.

It may be noted, however, that in general Switzerland has always been favourable to foreign investment protection. Switzerland became a party to the ICSID Convention on September 22 1962. The country concluded its first BIT (with the Republic of Niger) shortly afterwards, on September 27 1962.

Even though Switzerland has yet to be a respondent in investment treaty arbitration proceedings, there are 15 reported and three known cases in which Swiss BITs have been invoked. Thirteen of these cases have been filed with ICSID.[1]

The ICSID cases filed include *Alimenta v Gambia*,[2] *SGS v Pakistan*,[3] *SGS v Philippines*,[4] *Mensik v Slovakia*,[5] *SGS v Paraguay*,[6] *Philip Morris v Uruguay*,[7] *Swisslion v*

1 N Radjai & F X Stirnimann, "Chapter 9: Investment Arbitration in Switzerland", in Manuel Arroyo (Ed), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International, 2013), p 1208.

2 *Alimenta SA v Gambia* (ICSID Case ARB/99/5).

3 *Société Générale de Surveillance SA (SGS) v Pakistan* (ICSID Case ARB/01/13), Decision on Objections to Jurisdiction, August 6 2003.

4 *Société Générale de Surveillance SA (SGS) v Philippines* (ICSID Case ARB/02/6), Decision on Objections to Jurisdiction, January 29 2004.

5 *Branimir Mensik v Slovakia* (ICSID Case ARB/06/09).

Macedonia,[8] *Von Pezold v Zimbabwe*,[9] *Border Timbers v Zimbabwe*[10] and *Flughafen Zürich v Venezuela*.[11] Two cases filed by Swiss companies under the Switzerland-Pakistan and Switzerland-Iceland BITs were settled by the parties before they could be considered by arbitral tribunals.[12]

Several UNCITRAL cases are also known to have been brought under Swiss BITs. The Switzerland-Uzbekistan BIT was relied upon in an investment arbitration initiated under the UNCITRAL Arbitration Rules before the Permanent Court of Arbitration in *Romak v Uzbekistan*.[13] The Switzerland-Libya BIT was successfully relied upon in 2010 in an UNCITRAL arbitration, opening the door for Swiss investors to be reimbursed for their investments in Libya.[14] In 2011, the arbitral tribunal in another UNCITRAL arbitration, *Alps Finance v Slovakia*,[15] applied the Switzerland-Slovakia BIT.

2. International conventional instruments

2.1 International agreements

Since Switzerland is a party to the ICSID Convention, final ICSID awards are regarded as final court decisions of the Swiss judiciary following recognition.[16]

Switzerland is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which it ratified on March 9 1959. The Swiss Federal Statute on Private International Law 1987 (Private International Law Act or PILA) simply refers to the New York Convention and does not contain any other provisions on the enforcement of foreign arbitral awards. Accordingly, non-ICSID investment awards may be recognised and enforced under to the New York Convention.

2.2 Model investment treaties

The Swiss 'model' BIT is not an official model but only a template or working document used by the Swiss government in negotiations.[17] While each Swiss BIT is

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6 *Société Générale de Surveillance SA (SGS) v Paraguay* ICSID Case ARB/07/29, Award, February 10 2012.
7 *Philip Morris v Uruguay* (ICSID Case ARB/10/7). The request for arbitration was registered in March 2010.
8 *Swisslion DOO Skopje v Macedonia* (ICSID Case ARB/09/16).
9 *Bernhard von Pezold v Republic of Zimbabwe* (ICSID Case ARB/10/15).
10 *Border Timbers Limited v Republic of Zimbabwe* (ICSID Case ARB/10/25).
11 *Flughafen Zürich AG v Venezuela* (ICSID Case ARB/10/19).
12 *Holcim Limited v Bolivarian Republic of Venezuela* (ICSID Case ARB/09/3) (the request for arbitration was filed on April 10 2009 and the request for discontinuance of proceedings on September 10 2010); *Swiss Aluminium Limited v Iceland* (ICSID Case ARB/83/1) (the request for arbitration was registered on June 16 1983 and the request for discontinuance of proceedings on March 6 1985).
13 *Romak v Uzbekistan* (PCA Case AA280), Award, November 26 2009.
14 *Le Temps*, January 24 2010: "*Une firme suisse a arraché des millions aux Lybiens*".
15 *Alps Finance and Trade AG v Slovakia* (UNCITRAL), Decision on Jurisdiction, March 5 2011.
16 Article 54 of the ICSID Convention provides: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."
17 V Heiskanen, "Of Capital Import: the Definition of 'Investment' in International Investment Law", in *Protection of Foreign Investments through Modern Treaty Arbitration*, ASA Special Series, No 34 (2010), p 55 fn 11; K Dodge, S Vorburger & G.Nater-Bass, "Switzerland, Getting the Deal Through", in *Investment Treaty Arbitration* (2014) p 74; L Burger "Swiss Bilateral Investment Treaties: A Survey" (2010) 27 *J Int'l Arb* 473.

negotiated individually by the government, however, many Swiss BITs share some essential characteristics.

According to figures kept by the Swiss Federal Department of Economic Affairs, Switzerland is party to more than 120 BITs.[18]

Many Swiss BITs include a non-exhaustive list of what constitutes an 'investment'. This includes movable and immovable property, any kind of participation in companies (eg, shareholdings), industrial property rights or claims to money or performance having an economic value.[19] The Swiss unofficial model BIT thus provides a broad definition of 'investment' that seeks to incorporate various economic, financial and business accounting concepts of investment.[20]

Most Swiss BITs are broad in scope in terms of the timing of the investment and do not require that an investment be made after conclusion of a BIT in order for it to benefit from the protections of the BIT.[21]

Many Swiss BITs provide a detailed definition of a 'non-natural' investor. Under most Swiss BITs, a legal entity must, in order to bring a claim against the signatory host state, be incorporated in the home state and prove that it is engaged in "real economic activity" in the home state.[22] This requirement limits the possibility of shell companies incorporated in Switzerland benefiting from Swiss BITs.[23]

The standards of protection found in Swiss BITs are similar to many 'European-style' BITs and include provisions on direct and indirect expropriation,[24] fair and equitable treatment,[25] arbitrary, unreasonable or discriminatory measures,[26] full protection and security,[27] free transfer of funds,[28] national treatment[29] and most-favoured nation (MFN) treatment.[30]

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18 See Federal Department of Economic Affairs website, available at www.seco.admin.ch/themen/00513/00594/04450/?lang=en.

19 See, for example, Article 1(2) of the Switzerland-Barbados BIT; Article 1(5) of the Switzerland-Hong-Kong BIT.

20 Article 1(2) of the unofficial model BIT provides: "The term 'investments' shall include every kind of assets [*sic*] in particular:
(a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;
(b) shares, parts [*sic*] or any other kinds of participation in companies;
(c) claims to money or to any performance having an economic value;
(d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill; ..."

21 See, for example, Article 3(1) of the Switzerland-Iran BIT, which states: "The present Agreement shall apply to investments ... whether prior to or after the entry into force of the Agreement." See also Article 6 of the Switzerland-Uruguay BIT, Article 2 of the Switzerland- Libya BIT, Article 6 of the Switzerland-Zambia BIT and Article 6 of the Switzerland-Uzbekistan BIT.

22 Radjai & Stirnimann (note 1 above), p 1217. See also Article 1(1)(b) of the Switzerland-Kazakhstan BIT; *Alps Finance and Trade AG v Slovakia* (UNCITRAL), Decision on Jurisdiction, March 5 2011, paras 219-227; *Philip Morris v Uruguay* (ICSID Case ARB/10/7), Decision on Jurisdiction, July 2 2013.

23 Simon Gabriel, "Investment Planning via Switzerland" (2013) 31 *ASA Bulletin* 20; *Alps Finance and Trade AG v Slovak Republic* (UNCITRAL 2011), declining jurisdiction over a claim against Slovakia after determining that the claimant was not an 'investor'); N Bernasconi-Osterwalder & and V Jha, "Recent Developments in International Investment Disputes: Investment treaty cases from September 2010 to October 2011", *IISD Report*, October 2011.

24 Article 6(1) of the unofficial Swiss model BIT reads: "Neither of the contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest ...." See also Article 6(1) of the Switzerland-Bangladesh BIT; Article 5(1) of the Switzerland-Estonia BIT; Article 7 of the Switzerland-Senegal BIT; Article 5(1) of the Switzerland-South Africa BIT; Article 5(1) of the Switzerland-Saudi Arabia BIT; and Article 6 of the Switzerland-Liberia BIT.

Many Swiss BITs also contain a so-called 'umbrella clause'. Specifically, all Swiss BITs have included an umbrella clause since conclusion of the BIT with China in 1986.[31] Some umbrella clauses in Swiss BITs are modelled on the umbrella clause contained in the OECD Draft Convention on the Protection of Foreign Property, although the exact wording varies.[32] The most common wording found in Swiss BITs follows, however, the unofficial model BIT clause.[33] This clause is, in most cases, inserted under the title 'other commitments' and separated from the substantive provisions of the BIT by two dispute resolution clauses and a subrogation clause.[34]

Swiss BITs do not contain rules concerning the enforcement of arbitral awards based on these BITs. Some BITs, however, contain provisions stating that the

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25 A typical FET clause contained in a Swiss BIT reads as follows: "Investments and returns of investors of each Contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting party." See Article 4(1) of the unofficial Swiss Model BIT; Article 4 of the Switzerland-Azerbaijan BIT; Article 4 of the Switzerland-Kenya BIT; Article 4(1) of the Switzerland-Armenia BIT; Article 4(1) of the Switzerland-Botswana BIT; Article 4(1) of the Switzerland-Cambodia BIT; Article 4(1) of the Switzerland-Guatemala BIT; Article IV of the Switzerland-Philippines BIT; and Article 4 of the Switzerland-Bosnia & Herzegovina BIT.

26 In Swiss BITs, the rule against arbitrariness is often combined with the prohibition of discrimination. A typical provision states: "Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of such investment." See Article 4(1) of the unofficial Swiss Model BIT.

27 See, for example, Article 4(1) of the Switzerland-Armenia BIT; Article 4(1) of the Switzerland-Mauritius BIT; and Article 4(1) of the Switzerland-Tanzania BIT. An independent obligation may arise under customary international law, whereby host states are required to protect investors against illegal interference.

28 Swiss BITs specifically provide that free transfer of funds related to an investment must be guaranteed and give a non-exhaustive list of the types of funds covered by this provision. See, for example, Article 5 of the unofficial Swiss model BIT; Article 6 of the Switzerland-Saudi Arabia BIT; and Article 5 of the Switzerland-Kenya BIT.

29 Many Swiss BITs contain a combined national treatment/most favoured nation clause, the typical wording of which is set out in Article 4 of the Switzerland-Kenya BIT:

(2) Each Contracting Party shall in its territory accord investments or returns of the other Contracting Party treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of any third State, whichever is more favourable to the investor concerned.

(3) Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards the management, use, enjoyment or disposal of their investments, treatment no less favourable than that which it accords to its own investors or investors of any third State, whichever is more favourable to the investor concerned.

See also Article 3(2) of the Switzerland-Uruguay BIT; Article 4(2) of the Switzerland-China BIT; and Article 3(2) of the Switzerland-Argentina BIT.

30 In some Swiss BITs, the MFN clause is linked to the FET clause, which may be argued to limit the scope of the MFN clause. Other Swiss BITs limit the application of the MFN clause to investors "as regards the management, maintenance, use, enjoyment or disposal of their investment." See, for example, Article 4 of the Switzerland-Kuwait BIT and Article 4 of the unofficial Swiss model BIT.

31 Schmid, "Swiss Investment Treaties and Their Umbrella Clauses", in *Protection of Foreign Investments through Modern Treaty Arbitration*, ASA Special Series No 34 (2010), p 17; A N Koffman, "Bilateral Investment Treaty Overview – Switzerland", in *Investment Claims* (2008). For another opinion, see Burger (note 17 above), p 491.

32 Schmid (note 31 above) pp 3, 12. This draft convention was never adopted. Its umbrella clause reads: "Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party."

33 Article 10(2) of the unofficial Swiss model BIT provides: "Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party."

34 OECD *Working Paper on International Investment No 3/2006: Interpretation of the Umbrella Clause in Investment Agreements*, p 10.

35 See, for example, Article 11(8) of the Switzerland–Colombia BIT; Article 9(7) of the Switzerland – Bosnia-Herzegovina BIT; and Article 7(5) of the Switzerland-Lebanese Republic BIT.

decisions of arbitral tribunals will be final and binding on the parties to the dispute and shall be executed without any delay.[35]

Switzerland also has a practice of concluding free trade agreements (FTAs) as a member state of the European Free Trade Association (EFTA) (Iceland, Liechtenstein, Norway and Switzerland). Switzerland currently has 29 FTAs in force.[36]

2.3 Dispute resolution clauses in investment-related conventional instruments and practice

Swiss BITs have, since 1981, systematically contained investor-state dispute settlement clauses (or so-called 'diagonal clauses'), allowing the investor to bring a claim directly against the host state.[37] Before 1981, all BITs concluded by Switzerland contained only so-called 'horizontal clauses', which obliged investors to seek diplomatic protection in order to bring a claim against host states.[38] The first diagonal clause enabling investors to bring proceedings directly against the host state was included in the Switzerland-Sri Lanka BIT of 1981. Switzerland has since been renegotiating its BITs with a view to including diagonal arbitration clauses and thus allowing investors to initiate claims directly against the host state.[39]

With regard to the choice of forum, Swiss BITs mostly designate ICSID and UNCITRAL mechanisms for the settlement of investor-state disputes. Around 56% of them provide for both mechanisms and leave the investor with the option to choose.[40] In some BITs, the UNCITRAL Rules have been indirectly referred to by allowing the arbitral tribunal to choose the procedural rules applicable to the arbitration proceedings, "in conformity with" or by being "guided" by the UNCITRAL Rules.[41] The ICC Rules are also available under some Swiss BITs.[42]

Cooling-off periods, which prevent the investor from initiating arbitration proceedings immediately after the emergence of a dispute, may also be seen in most Swiss BITs.[43] The length of these cooling-off periods varies from three[44] to 12 months,[45] the average period being six months.[46]

Of the FTAs concluded by Switzerland, only two contain investor-state dispute

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36 See the list of free trade agreements in Switzerland available at www.seco.admin.ch/themen/00513/00515/01330/04619/?lang=en.

37 Schmid, "Swiss Investment Treaties and Their Umbrella Clauses", in *Protection of Foreign Investments through Modern Treaty Arbitration*, ASA Special Series No 34 (2010), p 17. "Schmid (note 31 above), p 17. See also Burger (note 17 above), p 485.

38 About 40% of Swiss BITs were concluded before 1981 and do not, as such, contain a diagonal clause.

39 Burger (note 17 above), p 486; J-C Liebeskind, "One-Hundred-Two Swiss Bilateral Investment Treaties: An Overview of Investor-Host State Dispute Settlement", in *Investment Treaties and Arbitration*,ASA Special Series No 19 (2002), p 83.

40 Radjai & Stirnimann (note 1 above), p 1209

41 Liebeskind (note 39 above), p 97. See also Article 11(4) of the Switzerland-Bulgaria BIT and Article 9(2)(b)(iii) of the Switzerland-Vietnam BIT.

42 See, for example, art. 10(2) of the Switzerland-South Africa BIT.

43 C Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road* (2004) 5 JWIT 232; Burger (note 17 above).

44 See, for example, Article 9(2) of the Switzerland-Kenya BIT and Article 9(2) of the Switzerland-Romania BIT.

45 See, for example, the Switzerland-Kazakhstan BIT.

46 See, for example, the Switzerland-Nicaragua BIT and the Switzerland-China BIT.

47 Both of the dispute settlement provisions allow the investor to choose between the ICSID Arbitration Rules, the ICSID Additional Facility Rules and *ad hoc* arbitration under the UNCITRAL Arbitration Rules.

settlement provisions: these are the Japan-Switzerland FTA and the Singapore-EFTA States FTA.[47] Switzerland is also a party to the Energy Charter Treaty (ECT), which contains investor-state dispute settlement mechanisms for investments falling within the scope of the charter.[48]

3. State practice in ICSID and investment treaty arbitration with regard to enforcement

3.1 Legislation

The New York Convention is the main applicable law for the enforcement of any foreign award in Switzerland. Pursuant to Article 194 of the Swiss PILA, it applies directly with respect to any arbitral awards rendered by an arbitral tribunal seated outside Switzerland, even if that country is not a contracting state to the convention.[49]

No specific Swiss legislation has been enacted to ensure or limit compliance with investment treaty awards. Procedurally, the enforcement of arbitral awards entails the availability of debt collection or other enforcement processes, which in Switzerland are governed in part by federal statutes and in part by local cantonal procedural rules.

The application of federal or cantonal enforcement processes depends on the nature of the relief awarded. Monetary awards are enforced through summary court proceedings under federal law, specifically the Federal Debt Enforcement and Bankruptcy Act 1889 (DEBS). Non-monetary awards (eg, orders for specific performance, restitution of a chattel, award or right in real property, and other injunctive relief) require the institution of local cantonal proceedings. Both types of enforcement process are necessary for enforcing mixed (ie, monetary and non-monetary) awards.

If the debtor is domiciled in Switzerland, the creditor must first request the Debt collection office (DCO), which is not a court, of the place of domicile to issue a summons to pay the amount due within 20 days. An objection must be filed before the local court by the debtor to halt the proceedings before the DCO. The debtor must first file this objection before raising any defences under the New York Convention before the local court.

3.2 Domestic legal provisions

Under the New York Convention, Swiss courts will deny enforcement only if one or more of the defences set out in Article V is established. The debtor seeking to resist enforcement bears to a large extent the burden of proof regarding the availability of any of these defences. Even where a defence is proved, enforcement of the award will not be denied where the court is satisfied that the debtor is acting or has acted in bad faith.

In the context of enforcement of investment treaty awards, the defences of arbitrability and public policy merit specific mention.

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48 See www.encharter.org/index.php?id=61.

49 Article 194 of the PILA states: "The recognition and enforcement of a foreign arbitral award is governed by the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards."

The concept of arbitrability is very broad under Swiss law, so that the defence of lack of arbitrability under Article V(2)(a) of the convention is limited in scope. The defence of breach of public policy under Article V(2)(b) is equally limited, since a very serious breach is required. 'Public policy' is defined very narrowly by Swiss court practice. The Federal Tribunal (or Federal Supreme Court) has defined 'public policy' in one of its decisions as follows:

> *The material findings regarding a litigious claim only then violate public order if they run against fundamental principles of law and are therefore totally incompatible with the legal order and the system of values. These principles include the maxim pacta sunt servanda, the prohibition of the misuse of the law, the principle of good faith, the prohibition of uncompensated expropriation, the prohibition of discrimination and the protection of the incapacitated.*[50]

Accordingly, it would be possible for a debtor to resist enforcement of an award based on the public policy defence only in very exceptional circumstances.

Finally, Swiss courts do not apply with excessive formalism Article IV of the New York Convention, namely the requirement to submit to the court the authenticated original or a certified copy of the award and of the arbitration agreement, together with a certified translation. This is particularly so where the party resisting enforcement does not dispute the existence of the arbitration agreement, or the award or the accuracy of a translation. Caution is, however, required as the approach may vary from one canton to the next.

While an incomplete request can be completed at a later stage (including on appeal), the best approach is to provide, at the outset, all relevant documents and certified translations, together with evidence that the award is enforceable and has not been suspended, by way of copies of the relevant foreign legal provisions and even an affidavit by counsel explaining the legal status.

In relation to the defences of sovereign immunity that may be raised by a debtor state to resist enforcement, since there is no general legislation on sovereign immunity in Switzerland, the legal framework is broadly defined through court practice. Swiss courts have adopted a restrictive concept of state immunity, limiting it to cases in which foreign states act as sovereigns (*acta jure imperii*), as opposed to cases where states act as merchants and execute commercial acts (*acta jure gestionis*).[51]

As such, execution is permitted against all commercial property of the state, but not against property serving official or governmental purposes. Swiss courts therefore look to the purpose of assets located in Switzerland as a decisive criterion for determining

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50 BGE 116 II 634, para 4. Translation taken from M Orelli, "Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 177 [Arbitrability]", in Arroyo (note 1 above), p 51.

51 ME Schneider & J Knoll, "Enforcement of Foreign Arbitral Awards against Sovereigns – Switzerland", in R Doak Bishop (Ed), *Enforcement of Arbitral Awards against Sovereigns* (JurisNet, 2009), p 327. Swiss courts adopt a restrictive approach with regard to immunity in general: see ATF 110 II 255 consid 3a 259 in 1P.581/2000; SJ 2001 I 201; ATF 1P.581/2000, in S Knuchel, *Convention des Nations Unies sur les immunités juridictionnelles des Etats et de leurs biens: quelles conséquences pour la Suisse*? (2006) PJA 1185, 1186; L Caflisch, *La pratique suisse en matière de droit international public* (2009) RSDIE 537-565, 3.7 para 2.2; D Favre, *"L'immunité de juridiction et d'exécution dans la jurisprudence du Tribunal fédéral"*, in P Fortmoser, H Honsell & W Wiergard (Eds), *Richterliche Rechtsfortbildung in Theorie und Praxis : Methodenlehre und Privatrecht, Zivilprozess- und Wettbewerbsrecht – Festschrift für Hans Peter Walter* (Stäampfli, 2005), pp 473-475.

their nature.[52] As a rule, assets that are not earmarked as sovereign purpose property are subject to execution; assets allocated for the performance of sovereign acts, which always include the assets of diplomatic missions, are immune from execution.

The concept of acts within the scope of public authority is interpreted broadly by the Swiss Federal Supreme Court.[53] For example, money (whether in the form of cash or bank accounts) is exempt from seizure only if it has been clearly assigned to definite public purposes, which implies a separation from other assets.[54] Bank accounts and other assets belonging to an embassy are, however, assumed to be for a public purpose and therefore immune from enforcement.[55] Bank accounts of embassies and diplomatic missions, which are subject to specific provisions in the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property,[56] are therefore treated by Swiss courts with much caution.[57] The same applies to funds specifically allocated to the purchase of arms[58] or cultural centres/buildings for foreign citizens run by a foreign consulate in Switzerland.[59]

The property of foreign central banks and similar monetary authorities is subject to special protection, in addition to general state immunity rules. Article 92(1) of the DEBS provides that enforcement is excluded with respect to "assets belonging to a foreign State or a central bank and assigned to tasks which are part of their duty as public authorities". This is in line with Article 19 of International Law Commission's Draft Articles on State Immunity, which exclude the property of the central bank of a foreign state from the scope of commercial property.

The enforcement of an award against a state's assets was considered in 2007 by the Swiss Federal Supreme Court, albeit in a commercial arbitration context, in the *Noga* case.[60] Noga had obtained an arbitral award in its favour against the Russian Federation, but was initially unable to obtain its enforcement, in spite of some

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52 *Banque Bruxelles Lambert (Suisse) SA v Republic of Paraguay* (August 20 1998), BGE 124 III 382 para 4a. See Schneider & Knoll (note 51 above), pp 327-329, with references and discussion of relevant jurisprudence. See also D Baizeau & and S Giroud, "Sovereign immunity – Switzerland", in A Sheppard (Ed.), *Comparative Smart Charts*, Kluwer Law Internbational Practice Tools (2010), available at www.kluwerarbitration.com; N Leroux, "Enforcing arbitral awards against foreign State assets in Switzerland – an effective tool?" (2009) *YIAG Newsletter*, pp 16-17.

53 BGE 134 III 122, para 5.2.3; 5A_618/2007; ATF 1P.581/2000, in Knuchel (note 51 above), p 1186.

54 BGE 134 III 122, para 5.2.3. See also B Giroud & N Leroux, IBA International Litigation News (2010), p 40; *State X c/ Tribunal de première instance de Genève*, consid 5, in D Favre (note 51 above), p 483; F Knoepfler, *"L'immunité d'exécution contre les états – Les états dans le contentieux économique international, III. Le contentieux judiciaire"* [2003] *Rev Arb* 1054-1061; C Lombardini, *Droit Bancaire Suisse* (Schulthess Juristische Medien, 2002), p 143.

55 BGE 112 Ia 148, paras 4-5.

56 The United Nations Convention on Jurisdictional Immunities of States and their Property of December 2 2004 was ratified by Switzerland on April 16 2010. This convention has not yet entered into force worldwide.

57 Giroud & Leroux (note 54 above), p 39; *Ratification Report* 2009, 25, para 7 (in free translation from the French original): "Insofar as the relations between Switzerland and the other Contracting States are concerned, they shall substitute domestic law, specifically the principles developed in the case law of the Federal Tribunal", available at www.admin.ch/ch/f/gg/pc/documents/1413/Bericht.pdf.

58 BGE 86 I 23, para 5, in which the Swiss Federal Supreme Court considered that funds specifically allocated to the purchase of arms were earmarked for a public purpose and thus protected from enforcement. Such earmarking must, however, be real and effective, otherwise subject funds will not be considered as "assigned to their original public purpose". See, more generally, BGE 124 III 382, para 4a (in free translation from the French original): "Case law places military activities under the *jure imperii*, or sovereign acts, rubric"; R Kolb, T Braz Jardim Oliveira, *Le droit des immunités juridictionnelles étatiques et l'arrêt de la Cour Internationale de Justice dans l'affaire italo-allemande*, RSDIE, Vol 23 (2013) 243.

59 BGE 112 Ia 148, paras 4-5.

widely reported attempts to seize Russian assets. In February 2003, Noga started enforcement proceedings against certain assets of the Russian Federation with the International Air Transport Association (IATA) in Geneva on the basis of a settlement agreement. Because this agreement had been concluded in Switzerland, the Swiss Federal Supreme Court considered, on the basis of the *Binnenbeziehung* doctrine, that the Russian Federation's assets with IATA could be rightfully seized.[61] This doctrine may be summarised as a requirement on a party to show a Swiss connection in order that enforcement acts against foreign states may be permitted.[62] In particular, the Swiss Federal Supreme Court held that a connection with Switzerland is established where a state conducts activities in Switzerland.[63]

With regard to this requirement of a Swiss connection, it is sometimes argued that the *Binnenbeziehung* doctrine is applicable to the enforcement only of awards issued in Switzerland and not foreign awards, which are subject to the New York Convention.[64] Some authors consider, however, that the *Binnenbeziehung* doctrine may apply to the enforcement of ICSID awards, since Article 54 states that an ICSID award of which enforcement s sought should be regarded as a final judgment rendered under the laws of place of enforcement.[65] Accordingly, it cannot be ruled out that Swiss courts would apply this requirement of a Swiss connection for the enforcement of investment arbitration awards against states.

3.3 State experience in ICSID/ investment treaty arbitrations

There are no publicly known ICSID or other investment treaty arbitration cases to which Switzerland has been a defendant.

3.4 National investors

There are no publicly known ICSID or other investment treaty arbitration cases in which an investor has attempted to enforce or resist enforcement of a final award in Switzerland.

It is, however, worth noting that Swiss Federal Tribunal has been seized once of jurisdiction to enforce a provisional measure rendered by an ICSID tribunal.[66] In that case, an award was rendered against a Guinean state entity under the American Arbitration Association (AAA) Arbitration Rules (but had not been affirmed by the US courts).[67] The claimant in the arbitral proceeding, Maritime International Nominees

60 BGE 134 III 122, para 5.3 (*Noga v Office des poursuites de Genève*). Russia's resistance to international arbitral awards in favour of Noga was also at the core of a series of court decisions in a number of other countries, including France and the United States. See N Radjai, *YIAG Newsletter* (2008) 18-20.

61 For discussion of this decision, see also Knoepfler (note 54 above), pp 1039–1046; E Gaillard, *Convention d'arbitrage et immunités de juridiction et d'exécution des Etats et des organisations internationales* (2000) 18 *ASA Bulletin* 479-481.

62 Schneider & Knoll (note 51 above), pp 338-344.

63 See also *LIAMCO v Libya*, BGE 106 Ia 142, para 4, a case which concerned an award rendered in Switzerland, and in which the Supreme Court ruled that the choice of Geneva as the place of arbitration by the arbitrator did not constitute a sufficient connection to Switzerland.

64 Schneider & Knoll (note 51 above), p 344; Knoepfler (note 54 above), pp 1041-1042.

65 Schneider & Knoll (note 51 above), pp 344-345.

66 *Maritime International Nominees Establishment (MINE) v Republic of Guinea* (Swiss Federal Supreme Court, December 4 1985)(1989) ICSID Reports 35 at 39-40.

67 US Court of Appeals, District of Columbia Circuit (November 12 1982) (1989) 4 ICSID Reports 8.

Establishment (MINE), a Liechtenstein corporation, initiated enforcement proceedings before the Swiss and Belgian courts, while an ICSID proceeding was also initiated at the same time against Guinea for failure to enforce the award. The Swiss courts granted an attachment order against Guinean bank accounts on the basis of the AAA award.[68]

Subsequently, however, Guinea obtained a provisional measure from the ICSID tribunal requesting the claimant to retract all existing attachment orders and to stop local court proceedings. The Federal Supreme Court referred the question of the ICSID tribunal's exclusive competence to the Geneva Court of First Instance.[69] The Geneva Court of First instance held that, by initiating the ICSID proceeding, the claimant had accepted the exclusive jurisdiction of the ICSID tribunal under Article 26 of the ICSID Convention and thus had waived its right to enforce the AAA award under the New York Convention. The court considered that the AAA award was therefore no longer binding, on the basis of Article V(1)(e) of the New York Convention, and rejected MINE's enforcement application.[70] The Geneva Supervisory Authority for the Enforcement of Debts and Bankruptcy came to the same conclusion and ordered the lifting of the attachment order.[71]

In conclusion, the Swiss courts have demonstrated, at least in the context of the enforcement of a provisional measure, that they are prepared to attach state assets in furtherance of decisions rendered by an ICSID tribunal. This should bode well for when the time comes for Swiss courts to enforce an investment treaty final award.

68 *Maritime International Nominees Establishment (MINE) v Republic of Guinea* (note 66 above), para 3; (1989) 4 ICSID Reports (1997) 35 at 39.

69 *Ibid*, para 3; (1989) 4 ICSID Reports 35 at 37-38.

70 *Ibid*, para 3; (1989) 4 ICSID Reports 35 at 41-44, together with the decision of the *Tribunal de première instance*, Geneva (March 13 1986) at 41 *et seq*.

71 *Ibid*, para 3; (1989) 4 ICSID Reports 35 at 49-52, together with the decision of the *Autorité de surveillance des offices de poursuite pour dettes et de faillite*, Geneva (October 7 1986) at 45 *et seq*.

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A Global Guide

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