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115

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**ICSID Arbitration in the Spotlight:** Switzerland faces being sued by two Turkish nationals before ICSID for an amount reported to be not less than USD 750 million. It would be the first time that Switzerland had to fend off a claim in an ICSID arbitration. In contrast thereto, Swiss companies quite regularly pursue claims against states before ICSID. And in recent years, they have done so successfully and obtained multi-million dollar awards. Time to make a broader audience familiar with the possibilities of an ICSID arbitration.

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# Foreign Investments of Swiss Companies Are Protected



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Swiss companies are among the world's largest foreign investors. Their foreign investments are protected by a global web of investment treaties. If the host state of the investment breaches an obligation under the treaty, Swiss companies can typically pursue their rights before ICSID, which is a neutral and effective arbitration forum. In recent years, Swiss companies were indeed very successful in pursuing their claims against host states.

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## Switzerland and ICSID

The potential claim by members of the Turkish Uzan family against Switzerland for an amount reported to be at least USD 750 million brought before the International Centre for Settlement of Investment Disputes («ICSID») has gained much attention in national and even international media and brought ICSID arbitration to the spotlight. While it would be the first time that Switzerland is sued before ICSID, Swiss companies have repeatedly sued the host states of their investments before ICSID. This does not come as a surprise. According to the World Investment Report 2014 of the United Nations Conference on Trade and Development («UNCTAD»), Switzerland has become Europe's largest foreign direct investor and is the world's sixth largest foreign direct investor.

To date, 19 ICSID arbitrations have reportedly been brought by Swiss companies against host states. And in recent years, Swiss companies have successfully pursued their claims. In the most recent award, rendered in November 2014, the Swiss claimant was awarded almost USD 10 million plus interest and compensation of costs against Venezuela. In February 2012, another Swiss company was awarded almost USD 40 million plus interest for more than 15 years in a claim against Paraguay. Paraguay's attempt to annul this award was dismissed in May 2014. In May 2011, the Swiss claimant was awarded an undisclosed amount against the Cen-

tral African Republic. And in September 2010, an ICSID claim brought by a Swiss company is reported to have been settled by Venezuela paying the Swiss company an amount of USD 650 million. Currently, six cases brought by Swiss companies are pending.

Still, ICSID arbitration is not broadly known in Switzerland. Time to make our esteemed readers familiar with the opportunities of an ICSID arbitration.

## What Is ICSID?

ICSID is an institution that administers arbitrations between investors and host states and is headquartered in Washington D.C. ICSID was established in 1966 by the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States («ICSID Convention»). To date, the ICSID Convention has 150 contracting states, Switzerland being one of them. ICSID belongs to the World Bank Group. The arbitrators of the ICSID tribunal are as a general rule appointed by the parties: Each party names one arbitrator and the two parties then agree on the third arbitrator who acts as the president.

## When Can an Investor Initiate ICSID Arbitration?

Three basic conditions must be met:

- First, the parties (i.e. the investor and the host state) must have consented to ICSID arbitration. Nowadays, the state's consent is typically found in a bilateral investment treaty («BIT») or a multi-lateral investment treaty («MIT»). More than 110 BITs (and almost 30 other

types of investment treaties) between Switzerland and other countries are currently in force, they range from treaties with Albania to Zimbabwe. According to UNCTAD, Switzerland has the world's second largest web of BITs. The vast majority of these BITs contain a provision that grants an investor the right to submit a claim against the host state before ICSID. Worldwide, more than 2,200 BITs are in force today. The investor can declare its consent by a written declaration to the host state; at the latest, the investor will be deemed to have consented to ICSID arbitration by filing its claim before ICSID.

- Second, the dispute must be between a contracting state and a national of another contracting state.
- Third, the dispute must be a legal dispute arising directly out of an investment. The term «investment» is not defined in the ICSID Convention, but is generally broadly construed by ICSID tribunals. In practice, ICSID arbitration covers a wide range of industries. According to ICSID statistics, most disputes concern the oil, gas and mining sector, followed by disputes about electric power, transportation, finance, construction and many other economic sectors.

#### **Why Is ICSID Arbitration Attractive to Investors?**

ICSID has several features which make it particularly attractive to investors. First, it provides a neutral forum. Investors will regularly prefer ICSID arbitration over litigation before the courts of the host state because investors might be concerned about the independence and impartiality of local courts.

ICSID arbitration also provides for a self-contained system with no interference by local courts, spanning from the constitution of the tribunal, the ruling on provisional measures and the annulment proceedings. ICSID awards are not subject

to appeal or review by national courts. Another distinctive characteristic of ICSID arbitration is that monetary obligations arising from ICSID awards must be recognised and enforced in all contracting states as if they were final judgments of the local courts. There are thus no grounds based on which a local court could refuse the recognition and enforcement of the arbitral award.

The transparency of ICSID arbitrations is another aspect that may often work in favour of the investor. Most ICSID awards are published and are readily available. Since states generally want to be perceived as being investor-friendly to attract further foreign investments, the host state will carefully consider during the negotiation phase whether it is not more favourable to settle the dispute.

Finally, because of the institutional link of ICSID to the World Bank, states typically have a strong incentive to comply with ICSID awards. Indeed, most states voluntarily comply with ICSID awards, Argentina however being a recent exception.

#### **Which Substantive Rights of the Investor Are Protected?**

The investor's interests are protected by BITs and MITs. BITs concluded by Switzerland commonly provide for (i) fair and equitable treatment of the investment, (ii) protection of the investment, (iii) no unjustified or discriminatory measures impeding the investment, (iv) national and «most favoured nation» treatment (i.e. the host state must treat the investment not less favourably than investments of its own nationals and of an investor from another foreign country), (v) free transfer of funds related to investments, (vi) no expropriation without prompt, adequate and effective compensation, and (vii) observance of obligations entered into with regard to the investment.

Thus, if an investor believes that one of its rights was violated by the host state, the investor can initiate ICSID arbitration against the host state.

#### **Can an Investor Resort to ICSID Arbitration if its Rights Were Violated by a State-Owned Entity?**

In some cases, the investor's rights were not directly violated by the host state but by a state-owned entity. Jurisdiction under the ICSID Convention is however limited to disputes between a contracting state and a national of another contracting state. In light of the advantages of ICSID arbitration, and in light of the possibility that the state-owned entity might not have sufficient funds to meet any future award in favour of the investor, an investor may still wish to pursue a claim directly against the host state. This is possible if certain conditions are met.

The state can be held responsible for the conduct of a state-owned entity if (i) the state-owned entity must be regarded as a state organ, if (ii) the state-owned entity is empowered to exercise elements of governmental authority and is acting in that capacity in the particular instance, if (iii) the state-owned entity is acting on the instructions of or under the direction or control of the host state, or if (iv) the state acknowledges and adopts the conduct in question.

#### **Conclusion**

Swiss companies are worldwide in the forefront of foreign direct investments. Switzerland has secured Swiss investors' rights by weaving one of the world's largest global web of BITs and MITs. If an investor believes that its rights were violated by the host state, it should be aware that one of its options to defend its interests is filing a claim against the host state before ICSID.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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