Bilateral investment protection treaties - hidden fount of taxpayer protection

Marcus Desax
Attorney-at-law, Dr. iur., M.C.L., of Counsel, Walder Wyss Ltd., Zurich

Recently, the levy of taxes has become an important issue raised in investment arbitrations. After an overview of the salient features of Bilateral Investment Treaties («BITs")[1)], some arbitral awards pertaining to taxation are examined. Finally, a few fact patterns are presented where Swiss BITs may grant foreign investors more rights than pertinent Swiss domestic or tax treaty law.

In letzter Zeit haben sich Investitionsschiedsgerichte wiederholt mit Steuern befasst. Nach einem Überblick über den wesentlichen Inhalt der Investitionsschutzabkommen werden Schiedsgerichtsurteile besprochen, die sich mit Steuern befasst haben. Schliesslich werden einige Fallsituationen dargelegt, in welchen möglicherweise ein schweizerisches Investitionsschutzabkommen einem ausländischen Investor mehr Schutz als nationales und Abkommensrecht bietet.

Content

I. Introduction

1. From the Suez Canal Crisis to Vodafone

On 26 July 1956, the Egyptian President Nasser announced the nationalization of the Suez Canal. On 31 October 1956, Britain and France launched an attack against Egypt. Egypt answered by sinking all forty ships that were then in the Suez Canal. One of the reasons to resort to military action was the early termination of the initial 99-year concession granted to operate the canal.[2)]

Change of scenario: On 20 January 2012, the Indian Supreme Court held that the indirect purchase in 2007 by Vodafone of a majority interest in an Indian company could not be taxed.[3)] In response to that verdict, the Indian
Finance Minister mooted a retrospective amendment to the 1961 Indian Income Tax Act, which sought to tax such transactions. On 17 April 2012, Vodafone served the Indian Government with a «Notice of Dispute" under the India-
Netherlands BIT.[4)]

2. Importance of Bilateral Investment Treaties

In the time between the Suez Canal crisis and of the Vodafone arbitration, more than three thousand BITs have been concluded worldwide. A feature of post-1969 BITs is that they more often than not contain provisions entitling foreign investors to enforce their rights through international arbitration. Since 1990, there has been a significant increase of arbitral awards based on BITs.[5)]

Beginning in 1961 and following on from Germany, Switzerland was the first state to enter into BITs.[6)] As of 5 January 2015, some 130 BITs are in effect.[7)] Most of the Swiss BITs are with countries that were capital-importing at the time of conclusion, among them China, India and Russia. In contrast, there are only few BITs with EU Member States (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic and Slovenia).[8)] These BITs were entered into before the respective states acceded to the European Union. In the Swiss government's view the absence of BITs with other EU Member States is due to the fact that the legal systems of the EU Member States normally do not require additional safeguards for cross-border investment on the level of international law.[9)]

After Germany and China, Switzerland has the third largest BIT network.[10)]

3. Investor-State Dispute Resolution by Arbitration

With the growing number of BITs entered into in the 1960s, one weakness became apparent: The lack of the possibility for an individual investor to protect itself against the investment's host state without having to rely on assistance of its home state. This deficiency led to the conclusion on 18 March 1965 of the Convention on the Settlement of Investment Disputes between States and
Nationals of Other States (the ICSID Convention) by the World Bank member states, and the current International Center for Settlement of Investment Disputes («ICSID") with seat in Washington D.C. was thereby established.[11)] The ICSID Convention has to date been signed by 155 countries, including Switzerland.

Since 1981, Swiss BITs systematically contain investor-state dispute settlement clauses.

4. BITs vs. Double Taxation Treaties

Double taxation treaties («DTTs") avoid double taxation by attributing the power to tax to either the source or the residence state or to both depending on the kind of income, and, as the case may be, limiting such power. The dispute resolution mechanism is the mutual agreement procedure conducted by the competent tax authorities to the exclusion of the taxpayer. If the competent authorities are unable to

reach agreement and provided that the matter has not yet been decided by a court or an administrative tribunal, the more recent DTTs grant the taxpayer the right to supplement the mutual agreement procedure by the initiation of arbitration.[12)] Litigation arising under double taxation treaties is frequent and takes place before the competent state courts. As of 1 January 2015, 104 DTTs are in effect with Switzerland as a contracting party.[13)]

In contrast, a BIT purports to create a favorable investment climate by protecting and stimulating investments. Host states usually grant the investor of the other contracting party

. protection against expropriation, except if non-discriminatory and in the public interest,

. fair and equitable treatment,

. equal treatment and prohibition of discrimination based on nationality,

. right to repatriation of income, and

. sometimes a right to fulfilment of undertakings provided by the host state in relation to an investment.

The investor can enforce these rights against the host state in the host state's courts or by means of arbitration under either the ICSID or the UNCITRAL arbitration rules or on an ad-hoc basis.

Traditionally, Switzerland focused its tax treaty policy on OECD countries and major emerging states, whereas its BIT policy aimed at protecting Swiss investments in capital-importing countries. As a consequence, while tax issues in connection with an investment in an emerging country can arise both under a BIT and a DTT, there are only a few developed countries where both a BIT and a DTT may apply at the same time (most importantly Japan[14)]).

II. BIT Standards of investor protection in general

1. Definition of «Investment"

1.1 Treaty language

Article 25(1), first sentence, of the ICSID Convention reads as follows:

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a

> Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

The ICSID Convention does not provide a definition of «investment". BITs providing for ICSID jurisdiction do not refer to Article 25 of the ICSID Convention for purposes of defining «investment" but instead typically contain their own definition, mostly at the beginning of the agreement.[15)]

The unpublished Swiss Model BIT[16)] defines «investment" in its Article 1(1) as follows:

> For the purpose of this Agreement: The term shall include every kind of asset in particular:
> a. movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges and usufructs;
> b. shares, parts or any other kind 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;
> e. concessions under public law, including concessions for search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.

Therefore, the Swiss Model BIT includes portfolio investments.[17)]

1.2 Arbitration practice

Arbitral awards have deemed loan contracts[18)] and promissory notes[19)] to constitute investments.

As described in Fedax v. Venezuela[20)], the basic features of an investment are the following:

> 43. ... involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development.

2. Definition of «Investor" and the issue of «BIT Shopping"

2.1 Treaty language

In order to benefit from a BIT, the investor must be a national of a contracting party. The Switzerland-Serbia BIT of 7 December 2005[21)] defines «investor" in its Article 1 as follows:

> For the purposes of this Agreement:
> (2) The term «investor" means with regard to either Contracting Party:
> a. natural persons who, according to the law of that Contracting Party, are considered to be its nationals;
> b. legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that

> Contracting Party and have their seat, together with real economic activities, in the territory of the same Contracting Party.

The scope of application of the Switzerland-Serbia BIT is defined in its Article 2 as follows:

> The present Agreement shall apply to investments in the territory of the Contracting Party that are owned or controlled, directly or indirectly, by investors of the other Contracting Party. It applies to such investments whether made prior to or after its entry into force, however not to disputes relating to facts which occurred before that date.

In its message of 22 September 2006 addressed to the Swiss Parliament[22)], the Swiss Federal Council[23)] explained these provisions as follows: [24)]

> Article 1 (in all five BITs) defines the most important terms used in this kind of agreement. There is a non-all-encompassing definition of investments (movable and immovable property, rights in rem, industrial property rights, participation rights, concessions etc.) as well as return of investment. Another central term is the one of investor, whether a natural person or a legal entity. In case of legal entities the qualification as investor is derived either from the legislation of the state of establishment of the company (criterion of incorporation) and where it has its seat or where control is exercised over it (criterion of control: Guyana Art. 1(1)(b) and (c); Colombia: Art. 1(2)(b) and (c) and Protocol to Art. 1(2)(a) and (c); in the three other agreements, this criterion appears in the scope of application).

It is noteworthy that the Swiss Federal Council has not pointed to the requirement of having «real economic activities" in Switzerland. According to Schmid [25)], for legal entities to qualify as nationals of Switzerland, incorporation in Switzerland suffices. In the most recent BITs entered into by Switzerland, the requirement of a real economic activity in Switzerland was added to exclude mailbox companies from BIT coverage. For Gabriel [26)], the incorporation requirement is valid and decisive as long as a Swiss company can demonstrate some activity in Switzerland which goes beyond the mere maintenance of a mailbox.

2.2 Arbitration practice

This issue of «BIT shopping" arose in the case Saluka v. Czech Republic[27)] under the Netherlands-Czech Republic BIT, the latter which includes «legal persons constituted under the laws of [The Netherlands]" in its definition of investor. The Czech Republic argued that the Saluka was a mere shell company controlled by its Japanese owners. The arbitral tribunal rejected this plea of lack of jurisdiction on the following grounds:

> 239. The Respondent also argues that Saluka did not have bona fide (which term again seems to connote genuineness rather than any issue of bad faith), real and continuous links to The Netherlands, and for that reason did not satisfy the requirements which are necessary to qualify as an able to benefit from the provisions of the Treaty.

> 240. The Tribunal has some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty. Such a possibility lends itself to abuses of the arbitral procedure, and to practices of which can share many of the disadvantages of the widely criticised practice of .
> 241. However that may be, the predominant factor which must guide the Tribunal's exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal's jurisdiction. In the present context, that means the terms in which they have agreed upon who is an investor who may become a claimant entitled to invoke the Treaty's arbitration procedures. The parties had complete

> freedom of choice in this matter, and they chose to limit entitled to those satisfying the definition set out in Article 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add.

3. Full Protection and Security («FPS") and Fair and Equitable Treatment («FET")

3.1 Treaty language

Article 4(1) of the Agreement of 27 January 2009 between Switzerland and the People's Republic of China on the Promotion and Reciprocal Protection of Investments[28)] 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. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of such investments.

3.2 Arbitration practice

There are some discussions amongst scholars whether the standard of FPS exceeds the standards derived from customary international law. The Swiss BITs contain an autonomous standard of FPS which is higher than the minimum standards of customary international law.[29)] It not only provides protection against physical violence and harassment but also provides legal protection against the infringement of investor's rights.[30)]

In CME v. Czech Republic[31)], the Czech media regulatory agency Media Council took action that allowed CME's local partner to terminate the contract with CME. The arbitral tribunal held:

> 613. The Media Council's actions in 1996 and its actions and inactions in 1999 were targeted to remove the security and legal protection of the Claimant's investment in the Czech Republic.

> The Media Council's (possible) motivation to regain control of the operation of the broadcasting after the Media Law had been amended as of January 1, 1996 is irrelevant. The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued. This is not the case. The Respondent therefore is in breach of this obligation.

In Téchnicas Medioambientales Tecmed v. Mexico[32)], the claimant Tecmed, a Spanish company, operated a waste confinement facility in Mexico. The Mexican ecological authorities refused to renew the license. The arbitral tribunal interpreted Article (4)(1) of the Spain-Mexico BIT prescribing FET along these lines (footnotes omitted):

> 154. The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. In fact, failure by the host State to comply with such pattern of conduct with respect to the foreign investor or its investments affects the investor's ability to measure the treatment and protection awarded by the host State and to determine whether the actions of the host State conform to the fair and equitable treatment principle. Therefore, compliance by the host State with such pattern of conduct is closely related to the above-mentioned principle, to the actual chances of enforcing such principle, and to excluding the possibility that state action be characterized as arbitrary; i.e. as presenting insufficiencies that would be recognized <...by any reasonable and impartial man,> or, although not in violation of specific regulations, as being contrary to the law because: (it) shocks, or at least surprises, a sense of juridical propriety.

The arbitral tribunal then stated that the scope of FET in the BIT is the one resulting from an autonomous interpretation.[33)] If this were not its intended scope, the respective provision of the BIT would be deprived of any semantic content or

practical utility of its own and that would go against the intentions of the Contracting Parties.[34)] And it added:

> 157. Upon making its investment, the fair expectations of the Claimant were that the Mexican laws applicable to such investment, as well as the supervision, control, prevention and punitive powers granted to the authorities in charge of managing such system, would be used for the purpose of assuring compliance with environmental protection, human health and ecological balance goals underlying such laws.

The arbitral tribunal found that Mexico had violated the FET requirement. The revocation of the license was not based on serious public health concerns but came about through the political and social pressure from the local population not wanting a toxic waste plant located in their city. Although Tecmed had agreed, in principle, to relocate the plant as long as it could continue to operate it until a location was finally chosen, the authorities did not consider this proposal. Not only did they deny the renewal of the permit although the relocation had not yet taken place, but they also did so in the understanding that this would lead Tecmed to relocate.[35)] The tribunal concluded that the Mexican authorities' behavior conflicts with what a reasonable and unbiased observer would consider fair and equitable, and that this amounts to a violation of Article 4(1) of the BIT.[36)]

4. National Treatment («NT") and Most-Favored-Nation («MFN") Treatment

4.1 Treaty language

The Swiss Model BIT[37)] provides as follows in its Article 4:

> (2) Each Contracting Party shall in its territory accord investments of the other Contracting Party treatment no less favourable than that which it accords to investments or return of its own investors or to investments or returns of investors of any third State, whichever is more favorable to the investor concerned.
>
> (3) Each Contracting Party shall in its territory accord investors of the other Contracting Party as regards the management, maintenance, use, enjoyment or disposal of their investment, treatment not less favourable than that which it accords to its own investors or investors of any third State, whichever is more favorable.

In other BITs the MFN and NT principles are set out in separate clauses.

The purpose of the NT clause is to oblige a host state to make no negative differentiation between foreign and national investors when enacting and applying its rules and regulations and thus to promote the position of the foreign investor to the level accorded to nationals.[38)]

4.2 Arbitration practice

In Feldman v. Mexico[39)], the NAFTA requirement of being «in like circumstances" was found to have been met as the foreign-owned and domestic-owned firm respectively were in the same business, i.e., exporting of cigarettes.[40)] In Occidental v. Ecuador [41)], the arbitral tribunal held that «in like circumstances"

cannot be interpreted narrowly as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken.[42)]

Legislation targeting foreign nationals as opposed to nationals was emphasized in the Corn Products v. Mexico arbitral awards.[43)] The claimant was a major manufacturer of high fructose corn syrup HFCS, a sweetener from yellow corn and used, inter alia, as a sweetener in soft drinks. Mexico imposed a 20% tax on all sweeteners for soft drinks not made from cane sugar. The tax caused Corn Products' customers to switch from HFCS to cane sugar sweeteners. To that, the arbitral tribunal stated:

> 138. ... While the existence of an intention to discriminate in not a requirement for a breach of Article 1102 (and both parties seemed to accept that it was not a requirement), where such an intention is shown, that is sufficient to satisfy the third requirement. But the Tribunal would add that, even if an intention to discriminate had not been shown, the fact that the adverse effects of the tax were felt exclusively by the HFCS producers and suppliers, all of them foreign-owned, to the benefit of the sugar producers, the majority of which were Mexican-owned, would be sufficient to establish that the third requirement of was satisfied.

The arbitral tribunal found that there could be no justification for the discrimination on policy grounds:

> 142. ... The Tribunal does not doubt either that there was a crisis in the Mexican sugar industry, or that the motive for imposing the HFCS tax was to address that crisis. That does not alter the fact that the nature of the measure which Mexico took was one which treated producers of HFCS in a markedly less favourable way than Mexican producers of sugar. Discrimination does not cease to be discrimination, nor to attract the international liability stemming therefrom, because it is undertaken to achieve a laudable goal or because the achievement of that goal can be described as necessary.

5. Protection against direct or indirect expropriation

5.1 Treaty language

Article 6(1) of the Switzerland-China BIT[44)] reads as follows:

> Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other 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, on a non-discriminatory basis and provided that provisions be made for compensation. Such compensation shall amount to the market value of the investment

> expropriated immediately before the expropriatory action was taken or became public knowledge.

5.2 Arbitration practice

Protection against direct expropriation is the most salient feature of BITs which has given rise to famous awards. However, no less important is the protection against indirect or «creeping" expropriation.

In Generation Ukraine v. Ukraine[45)], the arbitral tribunal defined creeping expropriation as

> 20.22 ... a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property.

And it continued:

> 20.26 ... A plea of creeping expropriation must proceed on the basis that the investment existed at a particular point in time and that subsequent acts attributable to the State have eroded the investor's rights to its investment to an extent that it is violative of the relevant international standard of protection against expropriation.

6. «Umbrella" Clause

6.1 Treaty language

The Switzerland-China BIT contains the so-called «umbrella" clause in its Article 8 which reads as follows:

> Each Contracting Party shall observe any obligation it may specifically have entered into with regard to investments by investors of the other Contracting Party.

An exception to the separation of the state's obligations under national and international law is introduced with the «umbrella" clause. The purpose of this clause is to add extra protection for the investor. Its practical value is that the often difficult proof that there has been an expropriation or a violation of any other substantive standard of treatment of the BIT in order to access treaty-based arbitration can be dispensed with.[46)]

6.2 Arbitration practice

Three different SGS[47)] cases show that the arbitration practice is not uniform:

One line of reasoning gives full effect to the umbrella clauses. In SGS v. Philippines[48)], the arbitral tribunal held that, given the umbrella clause in the BIT, a violation of the investment agreement will lead to the violation of the investment treaty.

> 128. .... Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with

> regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law. That issue (in the present case, the issue of how much is payable for services provided under the CISS Agreement) is still governed by the investment agreement.

By contrast, in SGS v. Pakistan[49)], the tribunal took a more restrictive view:

> 171. We believe, for the foregoing considerations, that Article 11 of the BIT would have to be considerably more specifically worded before it can reasonably be read in the extraordinarily expansive manner submitted by the Claimant. The appropriate interpretive approach is the prudential one summed up in the literature as in dubio pars mitior est sequenda, or more tersely, in dubio mitius.

This decision prompted the Swiss government to take the unusual step of expressing its disagreement with the Deputy Secretary General of ICSID in a letter of 1 October 2003.[50)]

In SGS v. Paraguay[51)] the scope of the umbrella clause was widely expanded. SGS had entered into a contract with Paraguay providing for certification services based on pre-shipment inspection of goods. Paraguay failed to pay. The Switzerland-Paraguay BIT[52)] contains an umbrella clause in its Article 11. Paraguay resisted jurisdiction on the basis that the contract vests exclusive jurisdiction in the domestic courts of Paraguay. In the award, the tribunal restated its findings of the Decision on Jurisdiction:

> 72. First, the Tribunal rejected Respondent's argument that a mere breach of contract cannot rise to the level of a breach of Article 11, unless it is coupled with additional action. The Tribunal concluded (at para. 167) that . The Tribunal explains as follows (at para. 168):
> Given the unqualified text of Article 11 of the Treaty, and its ordinary meaning, we see no basis to import into Article 11 the non-textual limitation that Respondent proposed in its Reply. Article 11 does not exclude commercial contracts of the State from its scope. Likewise, Article 11 does not state that its constant guarantee of observance of such commitments may be breached only through actions that a commercial counterparty cannot take, through abuses of state power, or through exertion of undue government influence. ... In effect, we see no basis on the face of the clause to believe that it should mean anything other than what it says - that the State is obliged to guarantee the observance of its commitments with respect to the investments of the other State party's investors. (Citations omitted).
> 73. The Tribunal also concluded that, even if it were necessary to show an abuse of sovereign authority in order to prove an Article 11 claim, a breach of contract by Paraguay could very well constitute a sovereign act. As stated in the Decision on Jurisdic

tion (at para. 135),

75. Second, the Tribunal (at paras. 173-185) rejected Respondent's argument that the forum selection clause in the Contract deprived the Tribunal of jurisdiction to hear Claimant's Article 11 claim or rendered such claim inadmissible to the extent such claims were premised on a theory that Respondent breached the Contract. The Tribunal found that, having already decided that it had jurisdiction over the claims, it was compelled to decide them. The Tribunal concluded (at para. 172) that

III. BIT Arbitration Practice in Tax Matters

1. The «Tax Carve-Out" in some trade agreements

Many international investment agreements contain a carve-out for taxation.

Article XIV of the General Agreement on Trade in Services (GATS)[53)] prohibits tax measures that constitute arbitrary or unjustifiable discrimination, or disguised restrictions on trade in services. According to Article XIV(d), tax measures that violate national treatment are acceptable if they are «aimed at ensuring the equitable or effective imposition of direct taxes". As provided in footnote 6 to this latter Article, this includes the right to impose withholding taxes.

The provision in Article 2(2) of the Switzerland-Egypt BIT of 7 June 2010[54)] addresses the BIT's «scope of application":

> Regarding taxation, the Agreement for the avoidance of double taxation between the Contracting Parties shall prevail over this Agreement to the extent of inconsistency.

The Free Trade and Economic Partnership Agreement between Switzerland and Japan[55)], which also contains a chapter on investments, in its Article 100(2) refers to the GATS exception for taxation.

The North American Free Trade Agreement (NAFTA) also contains an extensive provision on taxation measures. Article 2103 of the NAFTA reads as follows:

> 1. Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.

> 2. Nothing in this Agreement shall affect the rights and obligations of any Party under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency.
> 3. Notwithstanding paragraph 2:
> (a) Article 301 (Market Access - National Treatment) and such other provisions of this Agreement as are necessary to give effect to that Article shall apply to taxation measures to the same extent as does Article III of the GATT; and
> (b) Article 314 (Market Access - Export Taxes) and Article 604 (Energy Export Taxes) shall apply to taxation measures.
> 4. Subject to paragraph 2:

(a) Article 1202 (Cross-Border Trade in Services - National Treatment) and Article 1405 (Financial Services - National Treatment) shall apply to taxation measures on income, capital gains or on the taxable capital of corporations, and to those taxes listed in paragraph 1 of Annex 2103.4, that relate to the purchase or consumption of particular services, and
(b) Articles 1102 and 1103 (Investment - National Treatment and Most-Favored Nation Treatment), Articles 1202 and 1203 (Cross-Border Trade in Services - National Treatment and Most-Favored Nation Treatment) and Articles 1405 and 1406 (Financial Services - National Treatment and Most-Favored Nation Treatment) shall apply to all taxation measures, other than those on income, capital gains or on the taxable capital of corporations, taxes on estates, inheritances, gifts and generation-skipping transfers and those taxes listed in paragraph 1 of Annex 2103.4, except that nothing in those Articles shall apply
(c) any most-favored-nation obligation with respect to an advantage accorded by a Party pursuant to a tax convention,
(d) to a non-conforming provision of any existing taxation measure,
(e) to the continuation or prompt renewal of a non-conforming provision of any existing taxation measure,
(f) to an amendment to a non-conforming provision of any existing taxation measure to the extent that the amendment does not decrease its conformity, at the time of the amendment, with any of those Articles,
(g) to any new taxation measure aimed at ensuring the equitable and effective imposition or collection of taxes and that does not arbitrarily discriminate between persons, goods or services of the Parties or arbitrarily nullify or impair benefits accorded under those Articles, in the sense of Annex 2004, or
(h) to the measures listed in paragraph 2 of Annex 2103.4.
5. Subject to paragraph 2 and without prejudice to the rights and obligations of the Parties under paragraph 3, Article 1106(3), (4) and (5) (Investment - Performance Requirements) shall apply to taxation measures.
6. Article 1110 (Expropriation and Compensation) shall apply to taxation measures except that no investor may invoke that Article as the basis for a claim under Article 1116 (Claim by an Investor of a Party on its Own Behalf) or 1117 (Claim by an Investor of a Party on Behalf of an Enterprise), where it has been determined pursuant to this paragraph that the measure is not an expropriation. ...

2. Taxation and expropriation

Even if taxation is outside the scope of the international investment agreement, if the host state's action is tantamount to expropriation, an arbitration claim may be filed.

In El Paso v. Argentina[56)], the arbitral tribunal described the relationship of taxes of a state to the obligations it has undertaken in the BIT in this way:

290. The tax policy of a country is a matter relating to the sovereign power of the State and its power to impose taxes on its territory. The Tribunal agrees that the State has a sovereign right to enact the tax measures it deems appropriate at any particular time. Every year, governments around the world propose the adoption of tax measures which constitute either new initiatives

> or amendments to the existing fiscal legislation. There is a presumption of validity in favour of legislative measures adopted by a State, and it is up to those who challenge such measures to demonstrate their invalidity. This idea has been embodied in Article XII of the BIT, the effect of which is to only limit slightly the State's power to levy taxes.
> 291. As Article XII grants an important margin of freedom to the host State in relation to its fiscal policy towards foreign investors, the States Parties indicate in paragraph 2 of Article XII that this policy should not be unfair or inequitable. Considering both the language used - - and the fact that Article XII (2) excludes, except in specific and limited cases, any review of a possible violation of the fair and equitable treatment standard, the Tribunal concludes that Article XII (1) creates only a best-effort obligation.

In EnCana vs. Ecuador [57)], Ecuador refused to issue VAT refunds to the investor. In addition, VAT law was amended putting a substantially higher burden on foreign oil companies such as EnCana. As the Canada-Ecuador BIT excludes taxation from its scope, EnCada's claims for violation of FET, FPS and NT could not be heard.[58)] As to the expropriation claim, the arbitral tribunal found the following:

> 173. This way of putting the claim faces a double difficulty. In the first place, foreign investments like other activities are subject to the taxes and charges imposed by the host State. In the absence of a specific commitment from the host State, the foreign investor has neither the right nor any legitimate expectation that the tax regime will not change, perhaps to its disadvantage, during the period of the investment. Of its nature all taxation reduces the economic benefits an enterprise would otherwise derive from the investment; it will only be in an extreme case that a tax which is general in its incidence could be judged as equivalent in its effect to an expropriation of the enterprise which is taxed.
> 174. In the second place, although the EnCana subsidiaries suffered financially from the denial of VAT and the recovery of VAT refunds wrongly made, they were nonetheless able to continue to function profitably and to engage in the normal range of activ

> ities, extracting and exporting oil (the price of which increased during the period under consideration). There is nothing in the record which suggests that the change in VAT laws or their interpretation brought the companies to a standstill or rendered the value to be derived from their activities so marginal or unprofitable as effectively to deprive them of their character as investments.
> 177. From the perspective of expropriation, taxation is in a special category. In principle a tax law creates a new legal liability on a class of persons to pay money to the State in respect of some defined class of transactions, the money to be used for public purposes. In itself such a law is not a taking of property; if it were, a universal State prerogative would be denied by a guarantee against expropriation, which cannot be the case. Only if a tax law is extraordinary, punitive in amount or arbitrary in its incidence would issues of indirect expropriation be raised. In the present case, in any event, the denial of VAT refunds in the amount of 10% of transactions associated with oil production and export did not deny EnCana the benefits of its investment.

The demise of Yukos gave rise to three arbitral proceedings. In all of them, Russia was charged with expropriation.

In Yukos v. Russia[59)], the arbitral tribunal concluded that the combined effect of the measures taken against Yukos had an effect equivalent to nationalization or expropriation:

> 1579. The Tribunal has earlier concluded that . For the reasons that emerge in Part VIII, if the true objective were no more than tax collection, Yukos, its officers and employees, and its properties and facilities, would not have been treated, and mistreated, as in fact they were. Among the many incidents in this train of mistreatment that are within the remit of this Tribunal, two stand out: finding Yukos liable for the payment of more than 13 billion dollars in VAT in respect of oil that had been exported by the trading companies and should have been free of VAT and free of fines in respect of VAT; and the auction of YNG at a price that was far less than its value. But for these actions, for which the Russian Federation for reasons set out above and in preceding chapters was responsible, Yukos would have been able to pay the tax claims of the Russian Federation justified or not; it would not have been bankrupted and liquidated. ...

In RosInvestCo v. Russia[60)], the arbitral tribunal's finding also was that the levy of taxes could be reviewed by it.

> 628. It is undisputed, and in the present case confirmed by Article 11(3) of the Denmark-Russia BIT, that the normal application of domestic tax law in the host state cannot be seen as an expropriatory act. On the other hand, it is generally accepted that the mere fact that measures by a host state are taken in the form of application and enforcement of its tax law, does not prevent a tribunal from examining whether this conduct of the host state must be considered, under the applicable BIT or other international treaties on investment protection, as an abuse of tax law to in fact enact an expropriation.

The arbitral tribunal found that the extremely formalistic interpretation of VAT legislation with the effect that VAT was levied on exports could not be justified[61)] and these were structured in such a way to remove Yukos' assets from the control of the company and the individuals associated with it.[62)]

> 452. The extremely formalistic interpretation of the VAT tax law regarding Yukos and its trading companies to the effect that, though exports were undisputedly not subject to VAT, the documentation also undisputedly submitted by the trading companies could not be used in relation to Yukos and thus Yukos was liable for more than US$ 13.5 billion in VAT related taxes is difficult to accept as a justification for a tax liability the size of which was sufficient to lead Yukos into bankruptcy.

In Renta v. Russia[63)], the tribunal decided that Yukos' tax delinquency was a pretext for seizing Yukos' assets, and therefore constituted expropriation and not legitimate tax collection.[64)]

3. Reasonable expectations and transparency

3.1 Treaty language

The 2012 U.S. Model BIT reads as follows:

Article 10: Publication of Laws and Decisions Respecting Investment
(1) Each Party shall ensure that its:
(a) laws, regulations, procedures, and administrative rulings of general application; and
(b) adjudicatory decisions
respecting any matter covered by this Treaty are promptly published or otherwise made publicly available.
(2) For purposes of this Article, means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include:
(a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular covered investment or investor of the other Party in a specific case; or
(b) a ruling that adjudicates with respect to a particular act or practice.

3.2 Arbitration practice

Ecuador reversed an earlier provision in the VAT regulation and inserted a new article with the effect that larger sums of VAT were due by Occidental. On 1 July 2004, a first arbitral tribunal awarded $75 million to Occidental, finding

Ecuador's conduct unfair and discriminatory.[65)] Thereupon, Ecuador adopted the following VAT interpretive law: «Article (...) is hereby interpreted in the sense that reimbursement of Value Added Taxes, VAT, is not applicable to petroleum activities when referring to extraction, transportation and commercialization of oil, since petroleum is not produced, but is extracted from the respective reservoirs.". Occidental initiated the second arbitration proceedings.[66)]

In the first proceedings, the arbitral tribunal found the following:

184. The Tribunal must note in this context that the framework under which the investment was made and operates has been changed in an important manner by the actions adopted by the SRI. ... The tax law was changed without providing any clarity about its meaning and extent and the practice and regulations were also inconsistent with such changes.
187. The Tribunal accordingly holds that the Respondent has breached its obligations to accord fair and equitable treatment under Article II (3) (a) of the Treaty. In the context of this finding the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment.

In the second proceedings, the arbitral tribunal went even further and held the below:

560. In the view of the Tribunal, the VAT Interpretative Law, unfairly and arbitrarily, frustrated the legitimate expectations of the Claimants in precisely the same way as the SRI's Decrees and is thus also in breach of the Treaty. As such, as between the Claimants and the Respondent, the VAT Interpretative Law is without legal effect and should not be taken into account as a factor which impacts the fair market value of the Claimants' investment.
564. As the Tribunal emphasized earlier, nullus commodum capere de sua injuria propria: a State cannot be allowed to take advantage of its own wrongful act. The result of the

implementation of that well-known principle of international law is that must be disregarded in the determination of that value. The Tribunal, applying that principle to the facts of the present case, concludes that it must disregard the VAT Interpretative Law in determining the fair market value of the Claimants' investment.
568. The Tribunal recalls that the VAT Award held that OEPC has and that . The right of the Claimants to be reimbursed the Value Added Tax has now been legislated out of existence. There is no doubt, in the view of the Tribunal, that the VAT Interpretative Law has thereby increased the economic burden of the Claimants and thus impacted the economy of the Participation Contract.

IV. Potential Assertion of BIT protection by foreign investors in Switzerland

1. Investment arbitration has eventually reached Switzerland

On 21 January 2015, the Swiss Government launched a call for bids of legal service providers to represent Switzerland in an ICSID investment arbitration.[67)] The call was aimed at law firms specializing in arbitration, in particular investment arbitration, having knowledge of international judicial assistance in criminal matters and which are prepared to undergo a security clearance process by the Swiss Ministry of Defense. According to information in the Swiss media[68)], in April 2014 Switzerland received a «Notification de l'existence d'un différend" under the ICSID Convention by the Turkish Uzan family, whose assets in the amount of some EUR 200 million were seized in Switzerland and remitted to Turkey, allegedly in violation of the FPS provision of the Switzerland-Turkey BIT.

While BITs entered into by Switzerland have been the objects of several arbitration proceedings[69)], this is the first case of an arbitration being brought against Switzerland. Accustomed to being an investor state, Switzerland will be the subject of a role reversal and learn the «downsides" of arbitration as a host state.[70)] Will this trend extend to taxation?

2. Potential taxpayer protection arguments based on BIT investors' rights

The following considerations provide some ideas of how BITs could be applied in Swiss tax matters and where their standards of investor protection may exceed the protection available under Swiss domestic and/or and double taxation treaty law. Space constraints, however, do not allow a more thorough discussion.

2.1 National treatment without the «Residence Exception" of Article 24(1) of the OECD Model Convention

2.1.1 DTTs providing little protection against discrimination of non-resident legal entities

Article 24(1) of the OECD Model Convention prohibits discrimination between foreign nationals and own nationals provided they are «in the same circumstances, in particular with respect to residence". This allows the discrimination of foreign legal entities as the provision provides that the prohibition is based not on their nationality but on their non-residence.[71)]

2.1.2 Larger scope of non-discrimination under a BIT

Protection against discrimination may be available under the national treatment provision of an applicable BIT. It is most likely that an investment arbitral tribunal examining the alleged lack of national treatment of a foreign investor would disallow the discrimination on the ground that the foreign-based investor's less favourable treatment is based on its non-residence for tax purposes.

2.1.3 Possible cases of application

The following points of practical application could be envisaged:

a. Higher Withholding tax on dividends for non-resident corporates

Switzerland levies a withholding tax at the rate of 35% inter alia on dividends distributed by Swiss companies. Swiss residents obtain a full credit when they declare this item of income. Under DTTs, as a rule, the tax that can be levied by Switzerland on portfolio dividends is reduced to 15% and the rest is refunded upon request. Recipients in a non-treaty country do not obtain a refund.

The total corporate tax burden in Switzerland varies among the cantons and currently ranges between 12.32 % and 24.17%.[72)] This means that Switzerland levies a corporate profits tax on its resident corporate taxpayers at a maximum rate of 24% whereas it taxes the dividend received by a foreign non-treaty-country corporate taxpayer at the rate of 35%. If a BIT applies, this is hardly reconcilable with the principle of national treatment.

b. Other cases of discrimination of non-residents

There are several instances of discrimination of non-residents. A case is presently pending before the Swiss Supreme Court:[73)]

Under Article 168(2) of the Direct Federal Tax Code («DFTC"), a Swiss taxpayer with unlimited tax liability is entitled to a refund, together with interest, if taxes were paid in error, in particular, if the payment of the tax was made following a taxing decision that is subsequently reversed by the courts. A non-resident in a treaty country whose claim for a refund of the dividend withholding tax was initially denied by the Swiss Federal Tax Administration (SFTA) but who later prevails before the Federal Administrative Tribunal or the Supreme Court, for the time being, is not entitled to interest since the day of the adverse decision of the SFTA. The decision denying the refund by the SFTA is tantamount to a decision on the limited tax liability of the non-resident recipient of the dividend.[74)] Hence, in the same way as a resident taxpayer is entitled to interest under Article 168(2) of the DFTC, so should the foreign recipient of a dividend be entitled to interest.[75)]

2.2 Tightening of administrative practice without prior announcement

On 19 January 2011, the Swiss Supreme Court decided that the failure to announce the outbound dividend within thirty days using the appropriate form results in the forfeiture of the right of notification in lieu of payment of the 35% dividend withholding tax.[76)] The SFTA then tightened its practice and required payment of the withholding tax on Swiss dividends even in cases where the EU-Swiss Savings Agreement or Swiss domestic law provide that no withholding tax is due. In addition, the SFTA collects late payment interest at the rate of 5% p.a. from the due date of the withholding tax until the date of effective payment of it (which is then refunded within one month).

As a consequence, the late payment interest collected by the SFTA in 2013 reached CHF 323 million, which is higher than the total of the ten preceding years.[77)] In 2014, this amount was CHF 162 million.

Arguably, the SFTA retroactively changed its practice to the detriment of the taxpayers and without proper announcement.[78)] In addition, this change of practice may also be found to violate the Swiss Code of Conduct for Taxpayers and Tax Authorities that, in order to ensure full transparency of administration practices, requires «[t]imely announcements and publication of changes affecting administrative practices".[79)]

2.3 Failure by the SFTA to apply own administrative ordinance

A case presently pending before the Swiss Federal Administrative Tribunal[80)] could be listed as a further example: In a securities lending and borrowing situation, the

SFTA, contrary to Paragraph 3.2 of its Circular No. 13 of 1 September 2006 on Securities Lending, refused to attribute beneficial ownership to the borrower.

V. Question in Lieu of Conclusion: Investment arbitration in tax - a bridge too far?

Highly renowned tax practitioners and academics have been critical of investment arbitration extending to tax matters:

John F. Avery Jones was critical of tax provisions in trade agreements for the following reasons:[81)]

> The problem is that international trade negotiators do not understand direct tax. Either they put their heads in the sand as in the EC Treaty, or more normally these days they opt out of tax, as in NAFTA and GATS ... The thinking is presumably that trade negotiators regard tax as an arcane mystery. They know that there are lots of tax treaties around that apparently work, so why not leave tax alone and get on with things that they understand.

Asking the question «What Can Trade Teach Tax?", Arthur J. Cockfield and Brian J. Arnold conclude as follows:[82)]

> Trade and tax policies have traditionally been separate and different. A number of factors suggest this approach remains sensible, including the fact that governments

> continue to treat residents and non-residents differently for income tax purposes and the lack of evidence that income tax discrimination is unduly harming national or international welfare. For this reason, trade agreements should continue to carve out income tax matters, which should remain the near-exclusive prerogative of tax treaties, subject perhaps to a few very narrow exceptions. If the protection against discrimination afforded by the provisions of tax treaties is considered not to be sufficiently broad to allow cross-border activities to flourish, the appropriate action is not to extend the provisions of trade agreements to income tax measures or to import broad NT or MFN treatment provisions into tax treaties, but rather to identify the offensive tax provisions precisely and then amend Art. 24 or perhaps some other article of the treaty to deal with that problem.

Finally, a highly regarded scholar and practicing arbitrator, Alan Redfern, asked the question «Investor State Arbitrations, A Bridge too Far?"[83)] and responded as follows:

> In summary - and admittedly with the benefit of hindsight - it would have been preferable to establish a specialized foreign investment tribunal of competent (and pragmatic) arbitrators, on the lines of the later Iran-United States Claims Tribunal, but without the partisan element that complicated the latter's work. Instead, the conventional model of party-appointed arbitrators and a neutrally-appointed chair was adopted with a new and different tribunal being appointed for each particular dispute. This attempt to resolve investor-State disputes by ad hoc arbitration in the conventional manner appears to have failed. For the traditional process of international commercial arbitration, it has proved to be a bridge too far.

Are these not strong arguments to expand the taxpayer protection in the OECD MC and within the framework of tax treaty arbitration?

Fussnoten · Notes de bas de page

[1)] The BITs and the arbitral awards cited in this article can be retrieved as follows: The Swiss BITs are cited with reference to the Systematic Register of Swiss Law («Systematische Sammlung des Bundesrechts"; «Receuil systématique du droit fédéral"). Example: Switzerland-Serbia BIT: *SR* 0.975.268.2.

The Swiss BITs are available in German at:
http://www.admin.ch/bundesrecht/00567/index.html?lang=de and in French at:
http://www.admin.ch/bundesrecht/00567/index.html?lang=fr.The Swiss State Secretariat for Economic Affairs SECO provides English translations to the extent such are available:
http://www.seco.admin.ch/themen/00513/00594/04638/index.html?lang=en .
All BITs worldwide and investment arbitral awards rendered thereunder are available on the website of investment treaty arbitration (ita): http://italaw.com .
The internet references in this article were last visited on March 2, 2015.

[2)] Gabrielle Kaufmann-Kohler/Blaise Stucki, Foreword, Investment Treaties and Arbitration, Swiss Arbitration Association, Special Series No. 19, Basel, 2002, p. 1.

[3)] 1 Vodafone International Holdings B.V. v. Union of India & Anr., Civil Appeal No. 733 of 2012 (arising out of SLP (C)) No. 26529 of 2010.

[4)] 1 See the unpublished paper by Raag Yadava, Siva Santosh Yelamanchili, Divyanshu Agraval, Vodafone and India - A Review of Claims in Investment Arbitration, National Law School of India University, Bangalore, 15 August 2012.

[5)] 1 Paul H.M. Simonis, BITs and Taxes, INTERTAX, 2014, p. 234.

[6)] 1 Jean-Christophe Liebeskind, One-Hundred-Two Swiss Bilateral Investment Treaties: An Overview of Investor-Host State Dispute Settlement Clauses, Swiss Arbitration Association, Special Series No 19, Basel, 2002, p. 82.

[7)] 1 See the list of the Swiss BITs cited in footnote 1.

[8)] 1 Regarding the issue of intra-EU and Extra-EU BIT, see Simon Gabrie*l*, Investment Planning via Switzerland, ASA (= Association suisse de l'arbitrage/Swiss Arbitration Association) Bulletin, 2013, p. 11 (hereinafter cited as Gabriel).

[9)] 1 Michael Schmid, Swiss Investment Protection Agreements: Most-Favoured-Nation Treatment and Umbrella Clauses, Zurich, 2007, p. 3 (hereinafter cited as Schmid). Mr. Schmid is the deputy head of the International Investments and Multinational Enterprises division at the Swiss State Secretariat for Economic Affairs SECO.

[10)] http://www.seco.admin.ch/themen/00513/00594/04450/index.html?lang=en (accessed 2 March 2015)..

[11)] Schmid (footnote 9), p. 4 et seq.

[12)] See Article 25(5) of the OECD MC.

[13)] https://www.sif.admin.ch/sif/en/home/themen/internationale-steuerpolitik/doppelbesteuerung-und-amtshilfe.html (accessed 2 March 2015).

[14)] Agreement on Free Trade and Economic Partnership between Switzerland and Japan of 19 February 2009. *SR* 0.946.294.632. Its Chapter 9 deals with investments.

[15)] Rudolf Dolzer/Christoph Schreuer, Principles of International Investment Law, 2nd ed., Oxford University Press, 2012 (hereinafter cited as Dolzer/Schreuer), p. 62.

16) Cited by Schmid (footnote 9), p. 12.
17) Schmid (footnote 9), p. 12.
18) CSOB v. Slovak Republic, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, at paragraphs 60-91.
19) Fedax v.Venezuela, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997, at paragraphs 21-44.
20) Cited in footnote 19.
21) *SR* 0.975.268.2.
22) «Botschaft betreffend die Abkommen über die Förderung und den gegenseitigen Schutz von Investitionen mit Serbien und Montenegro, Guyana, Aserbaidschan, Saudi-Arabien und Kolumbien" of 22 September 2006, *BBl 2006 p. 8455* et seq.
23) The Swiss federal government.
24) *BBl 2006 p. 8467*. Unofficial translation by the author.
25) Schmid (footnote 9), p. 16.
26) Gabriel (footnote 8), p. 20 et seq.
27) Saluka v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006.
28) *SR* 0.975.224.9.
29) Schmid (footnote 9), p. 27.
30) Dolzer/Schreuer (footnote 15), p. 163.
31) UNCITRAL, Partial Award, 13 September 2001.
32) ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003.
33) At paragraph 155.
34) At paragraph 156.
35) At paragraph 173.
36) At paragraph 166. See also paragraph 174.
37) Cited by Schmid (footnote 9), p. 29.
38) Dolzer/Schreuer (footnote 15), p. 198.
39) ICSID Case No ARB(AF)/99/1, Award, 16 December 2002.
40) At paragraph 172.
41) UNCITRAL, London Court of International Arbitration LCIA Case No. UN3467, Final Award, 1 July 2004.
42) At paragraph 173.
43) ICSID Case No. ARB (AF)/04/01, Decision on Responsibility, 15 January 2008.
44) Of 27 January 2009; *SR* 0.975.224.9.
45) ICSID Case No. ARB/00/9, Award, 16 September 2003.
46) Schmid (footnote 9), p. 31 with further reference.
47) Société Génerale de Surveillance of Geneva, Switzerland, providing certification services.
48) ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004.
49) ICSID case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003.
50) Extensively cited by Schmid (footnote 9), p. 50-52.
51) ICSID Case No. ARB/07/29, Decision on Jurisdiction of 12 February 2012 and Award of 10 February 2012.
52) Of 31 January 1992, *SR* 0.975.263.2.
53) http://www.seco.admin.ch/themen/00513/00586/00587/index.html?lang=en (accessed 2 March 2015).
54) *SR* 0.975.232.1.
55) Of 19 February 2009, *SR* 0.946.294.632.
56) ICSID Case No. ARB/03/15, Award, 31 October 2011.

57) London Court of International Arbitration LCIA Case No. UN3481, Award of 3 February 2006.
58) At paragraphs 141-149.
59) UNCITRAL PCA Case No AA 227, Award, 18 July 2014.
60) Stockholm Chamber of Commerce Case No. V079/2005, Award, 12 September 2010.
61) At paragraph 177.
62) At paragraph 621.
63) Stockholm Chamber of Commerce Case No 24/2007, Award, 20 July 2012.
64) At paragraph 177.
65) Occidental Exploration and Production Company v. Ecuador, London Court of International Arbitration LCIA Case No UN3467, Award, 1 July 2004.
66) Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador, ICSID Case No ARB/06/11, Award, 5 October 2012.
67) Call for bids Nr. 851981 of 21 January 2015. Available at: https://www.simap.ch .
68) NZZ am Sonntag of 15 March 2015. Available at: http://www.nzz.ch/nzzas/nzz-am-sonntag/tuerkischer-geschaeftsmann-verklagt-schweiz-1.18502510 (accessed 28 March 2015).
69) Philip Morris v. Uruguay, ICSID Case No. ARB/10/7; Romak v. Uzbekistan, UNCITRAL Case No. AA280; Flughafen Zürich v. Venezuela, ICSID Case No. ARB/10/19; Border Timbers v. Zimbabwe, ICSID Case No. ARB/10/25; Bernhard von Pezold v. Zimbabwe, ICSID Case No. ARB/10/15; SGS v. Pakistan, ICSID Case No. ARB/01/13; SGS v. Paraguay, ICSID Case No. ARB/07/29; SGS v. Philippines, ICSID case No. ARB/02/6, Emmis v. Hungary, ICSID Case No ARB/12/2.
70) See the developments in NAFTA arbitration: William W. Park, NAFTA Chapter 11: Capital Exporters as Host States, Investment Treaties and Arbitration, Swiss Arbitration Association, Special Series No. 19, Basel 2002, p. 9 et seq., 41.
71) Luc Hinnekens/Philippe Hinnekens, Non-Discrimination at the Crossroads of International Taxation, General Report, CDFI vol. 93a, Rotterdam, 2008 (hereinafter cited as Hinnekens/Hinnekens), p. 23 et seq.; Alexander Rust, in: Klaus Vogel on Double Taxation, vol. II, 2015 , Art. 24 *N 35/36*; Stefan Oesterhelt, in: Zweifel/Beusch/Matteotti (eds), Kommentar zum Internationalen Steuerrecht, Basel, 2015, Art. 24 N 18; Kees van Raad/Carolina Landim, in: Danon/Gutman/Oberson/Pistone (eds), Modèle de Convention fiscale OCDE concernant le revenu et la fortune, Basel, 2014, Art. 24 N 46 et seq.; Alexander Rust, in: Vogel/Lehner (eds), DBA, München, 2015, Art. 24 N 49.
72) See the listing of the tax burden in the capitals of the Swiss cantons in: Pascal Hinny, Steuerrecht 2015, Zurich, 2015, p. 2024.
73) 2_C 377/2012, Complaint by the taxpayer against the judgment of the Swiss Federal Administrative Tribunal A-6537/2010 of 7 March 2012.
74) See the judgment of the German Federal Finance Court I *R 142/78* of 29 October 1981. Available at: https://www.jurion.de/Urteile/BFH/1981-10-29/I-R-142_78 (accessed 2 March 2015).
75) See The Queen v. Inland Revenue Commissioners, ex parte Commerzbank AG Case C-330-91, [1993] ECR I-017, where the ECJ held that to refuse to pay interest to non-residents in connection with refunds of overpaid tax when interest was paid on refunds to resident taxpayers was discriminatory.
76) Judgment *2C_756/2010*. See also the judgment of the Swiss Federal Administrative Tribunal A-1878/2014 of 28 January 2015.
77) http://www.estv.admin.ch/dokumentation/00075/00076/00698/01650/index.html?lang=de (accessed 2 March 2015) at p. 16/17.
78) See the report by the Swiss Treuhand-Kammer of 25 February 2015:

http://www.treuhand-kammer.ch/mm/2015-02-25_Treuhand-Kammer_Stellungnahme_Anpassungen_Meldeverfahren_Verrechnungssteuer.pdf (accessed 31 March 2015).

79) The Swiss Federal Tax Administration has undertaken to abide by the Swiss Code of Conduct and has published it on its website:
http://www.estv.admin.ch/dokumentation/00078/00733/index.html?lang=en (accessed 31 March 2015).

80) A-1426/2011.

81) J.F. Avery Jones, Are Tax Treaties Necessary?, cited by Hinnekens/Hinnekens (footnote 70), p. 53.

82) Arthur J. Cockfield/Brian J. Arnold, What Can Trade Teach Tax? Examining Reform Options for Art. 24 (Non-Discrimination) of the OECD Model, World Tax Journal vol. 2, 2010, p. 139 et seq. 153.

83) Alan Redfern, Investor-State Arbitrations - A Bridge Too Far?, in: Aksen/Böckstiegel/Mustill/Patocchi/Whitesell (eds), Global Reflections on International Law, Commerce and Dispute Resolution, Liber amicorum in honour of Robert Briner, Paris, 2005, p. 665 et seq., 674.