Exam Date	26.06.2018		
Examination No.			
Student ID			
Question 1	**Comments**	**Points**	**Pts. achieved**
A)		10	
1. notion of "investment" not defined in ICSID – why? … because it would be implicit in the consent of the parties (thus expecting state consent to manage ICSID jurisdiction).		2	
2. Is a natural person with dual citizenship, pursuant to the ICSID Convention's nationality requirement able to access ICSID arbitration? Yes, if the Respondent is a Contracting Party and the Claimant has the nationality of another Contracting Party, but not the one of the respondent State.		2	
3. broad asset based definition of investment – 2 Examples? e.g. o movable and immovable property (incl mortgages) o intellectual property rights (i.e. patents, copyrights, trade-marks) o shares/stocks		2	
4. In a "*narrow*" dispute settlement clause a foreign investor can only request an arbitral tribunal to assess … … the amount of compensation in case of expropriation; see China – Peru BIT e.g. *Austrian Airlines v Slovakia*		2	
5. What have arbitral tribunals regularly held, if a BIT clause protects only investments "*made in accordance with host State law*"? Arbitral tribunals have regularly held that they have no jurisdiction to decide over a dispute. (see *Fraport* ICSID case)		2	
B)		10	
To what extent has the specific wording of MFN clauses influenced their interpretation by investment tribunals? o also encompass procedural and jurisdictional issues vs. limited to substantive treatment? o *Maffezini v. Spain* case: - tribunal held that a BIT's MFN-clause extended to procedural issues and permitted an investor to rely on more favourable (i.e. shorter) waiting periods which were contained in another BIT of the host State before instituting arbitration. o This reasoning was followed among others in cases like *Siemens v. Argentina*, *Gas Natural v. Argentina*, etc. o Other tribunals like those in *Plama v. Bulgaria* and *Telenor v. Hungary*, however, rejected the *Maffezini*-approach for broader jurisdictional purposes. o In spite of these apparent divergences of different ICSID		1 1 1 1 2	

tribunals, it seemed relatively safe to assume that mere procedural difficulties, such as waiting periods, like in *Maffezini*, could be avoided by relying on dispute settlement clauses in other BITs through the invocation of an MFN clause.		1	
o Subsequently, however, tribunals have even allowed the invocation of an MFN clause in order to import a jurisdiction that would otherwise not have been available and other tribunals have even denied the possibility to avoid mere waiting periods like in *Maffezini* (*Wintershall*).		1	
o Since then negotiating parties have increasingly resorted to specific language in BITs aimed at clarifying whether or not procedural issues should be covered or not.		1	
o Most explicit are formulations like the one found in the draft CETA which expressly prevent importation of standards from third party treaties.		1	
Total Question 1		**20**	

Question 2	Comments	Points	Pts. achieved
2a)		17	
Applicable Legal Framework		2	
*Applicable legal framework: Domestic/international *When does Chapter 12 apply? Art 176 (1) PILA - seat of tribunal - domicile of at least one party not in CH - no Art 176 (2) PILA exclusion		0.5 0.5 0.5 0.5	
Jurisdictional Analysis		5	
*Competence-competence - tribunal itself shall decide on jurisdictional matters (Art. 186 (1) PILA) *applicability of Art. 186 (1bis) PILA: o not only in relation between state courts and arbitration tribunal, but also in relation between 2 arbitral tribunals (point of controversy, but in light of the clear wording BSK-IPRG/*Schott/Courvoisier* Art. 186 N. 28; critical *Arroyo/Berger* Art. 186 N. 32) o here (+)		0.5 0.5 0.5	
*same matter in dispute: o (prev. op.) two-tier matter in dispute: request & life circumstances: here identical (+) o identical parties (+) o legal action pending before another arbitral tribunal? (can be left open, if there are no noteworthy grounds to suspend the proceedings) o recognize *lis pendens* only when there are noteworthy grounds, i.e. - proceeding before the first seized court/arbitral tribunal is already well advanced and court/arbitral tribunal is about to issue its decision - the second proceeding was initiated mala fide - first seized court is a LugÜ court ➢ in the case at hand – no "noteworthy grounds".		 0.5 0.5 0.5 0.5 0.5 0.5 0.5	
Validity of der Arbitration Agreement		8	
*Art. 178 (2) PILA o applicable law: either law chosen by the parties, law applicable to the merits or Swiss law (*favorem validitatis*). o a mutual expression of intent is required with regard to all the essential terms of such an agreement (*essentialia negotii*) (Arts. 1-2 CO).		0.5 0.5 0.5	

o The necessary minimal content of an arbitration agreement includes: i. an agreement by the parties to submit their dispute to arbitration; ii. a specification of the object of the dispute or the legal relationship which shall be the subject-matter of the dispute. (+) other advisable elements: e.g. type/place of arbitration, no. of arbitrators/composition of AT *CRD true arbitral tribunal? o mandate, adjudicatory powers in lieu of state courts, sufficient structural independence, based on agreement by the parties: qualifies as AT (+) o arbitral tribunal or association tribunal? *CAS is a true arbitral institution that decides in lieu of state courts. *object of the matter in dispute is sufficiently specified ("*any disputes arising out of the employment contact*") *problem: alternative arbitral tribunals provided for in the arbitration agreement. o In principle: admissible. Claimant chooses the competent forum by filing a claim. o Here in addition – jurisdiction is not challenged (only *lis pendens*-plea).		0.5 0.5 (+0.5) 0.5 0.5 0.5 0.5 0.5 0.5 0.5	
*formal requirements: Art. 178 (1) PILA - written form: does not require the signature of a party (as long as the written declarations of will can clearly be attributed to the parties – here (+)		0.5 0.5	
*arbitrability: Art. 177 (1) PILA - any pecuniary claim (+)		0.5 0.5	
Options of the CAS re jurisdiction		2	
*Art 186 (3) PILA - preliminary decision by the tribunal (purpose: to clarify jurisdiction as soon as possible) Or: in final award		1 1	
Total Question 2a)		17	

2b)		13	
Is the CAS barred from deciding the dispute because of CRD award?			
Recognition of the CRD award in CH		5.5	
*applicable legal framework for recognition: Art. 194 PILA + NYC?		0.5	
*_foreign_ arbitral award? o issued in a country other where recognition and enforcement is sought (+)		0.5	
*decision of an arbitral tribunal? (award?) o starting point: autonomous interpretation of the NYC: ➢ judicial proceedings, third person that issues the decision, private mandate, must be regarded as an arbitral tribunal by the state of origin and must be comparable to a Swiss arbitral award o here: decision qualifies as award (+)		0.5 0.5 0.5	
*term *recognition*: recognition is the act that accords to the foreign arbitral award the same legal effects as a domestic decision. o Recognition will never grant more (or different) legal effects to the arbitral award than accorded to it by the country of origin. o Art. III NYC: recognition procedure for recognition must not be discriminatory with regard to domestic decisions. *In CH: no procedure for recognition (is accorded automatically) o other party must raise objection according to Art. V (1) NYC against the recognition. o grounds contained in Art. V (2) NYC must be observed *sua sponte*.		0.5 0.5 0.5 0.5 0.5 0.5	
Effects of the foreign decision (res iudicata)		4.5	
In principle, CAS must observe the res judicata effect of another award *ex officio* o violation of res iudicata: Art. 190 (2) lit. e PILA o Prerequisites: - The court/arbitral tribunal must be made aware of the foreign decision (here +). - the award must have res judicata effects *Decision on the merits? The question is, whether the award disposes – beyond its procedural effects – also of B's claim. o CH law: certain unilateral acts by a party may also have res judicata effects. This is particularly true for a withdrawal of the claim (*Klagerückzug*) - before an appeal brief/statement of claim has been filed. o However, once the Respondent has submitted its Statement of Defense/Answer, a simple withdrawal of the claim without res judicata effect is only possible if approved by the respondent. o Here: the CRD has issued a decision following an		0.5 0.5 0.5 0.5 0.5 0.5 0.5 0.5	

alleged withdrawal of the claim after the parties both have filed their submissions. o In addition, there is no consent by A to B's alleged tacit withdrawal of the claim before the CRD. o Result: award issued by the CRD is an award with res judicata effects that disposes finally of B's claim		0.5 0.5	
Grounds to refuse recognition under the NYC		3	
*violation of the right to be heard (NYC Art. V (1) lit. b)? o CRD award was issued without prior notice: clear violation of the right to be heard. *Did B waive this violation of his procedural right? o no indication on file & fact that B did not challenge the award in Mexico for an alleged procedural mistake does not constitute a waiver of such ground under the NYC. * Art. V (1) NYC discretion to refuse recognition? ("may"). o Correct view holds that there is no discretion if one of the objections under the Convention has been established.		0.5 0.5 0.5 0.5 0.5	
Conclusion: The CRD award is no obstacle for the CAS to proceed with its proceedings and to issue an award on the merits.		0.5	
Total Question 2b)		13	
Total Question 1 + 2		**50**	