Aims & Scope

Switzerland is generally regarded as one of the World’s leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

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- Arbitral awards and orders under various auspices including ICC, ICSID and the Swiss Chambers of Commerce (“Swiss Rules”)
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Each case and article is usually published in its original language with a comprehensive head note in English, French and German.

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Domestic Review of Investment Treaty Arbitrations: the Swiss Experience Revisited

MATTHIAS SCHERER*, ANGELA CASEY**


Ten years have passed since the first survey of judgments by the Swiss Federal Supreme Court dealing with investment treaty arbitrations. An update of the survey is warranted as the Supreme Court has issued several new decisions in the past decade. These decisions will be summarised in detail below.¹

A few introductory comments need to be made. All decisions reported were made in context of annulment requests filed by States or investors against awards rendered under bilateral or multilateral investment protection treaties. Indeed, only through these annulment requests the existence of these awards become public. The number of Supreme Court decisions in this survey is not a reliable indication of the number of investor-state arbitrations seated in Switzerland. Many proceedings between States and investors remain confidential, since neither party seeks to set aside the award or the dispute is settled. Arbitration proceedings that were publicly reported include Clorox España v. the Bolivarian Republic of Venezuela,² and ECT arbitration cases against the Czech Republic involving solar panels.³ The Supreme Court decisions dealing with awards made under treaties other than investment protection treaties are not included in this survey either.⁴

⁴ For instance, the decision of the Supreme Court 4A_394/2017 of 19 December 2018, ASA Bull 2/2019, p. 421 was based on a treaty between France and Spain regarding the construction and operation of a high-speed rail link.

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The grounds and framework for setting aside international arbitral awards rendered in Switzerland are set by the Swiss Private International Law Act (“PILA”). The Supreme Court’s scope of review in annulment matters is limited; in this regard there is no distinction between commercial or investment cases. The Supreme Court has a broader (but still narrow) power to review whether the arbitral tribunal has jurisdiction. In most of the decisions, the applicant had alleged the lack of jurisdiction of the arbitral tribunal (according to Article 190(2) lit. b PILA) or the violation of public policy (according to Article 190(2) lit. e PILA). The most recent cases involved increasingly complex issues of international law such as the interpretation of bilateral investment treaties (“BIT”) and the definition of the terms “investment” and “investor”. The complexity of these questions is also borne out by the fact that the Supreme Court chose to hold public deliberations twice in 2018. Public deliberations of the Supreme Court are extremely rare; the Supreme Court only schedules a public deliberation if the presiding judge orders it, a judge demands it or if the court is split. 5 

The success rate of annulment requests is slim irrespective of whether the award is based on a treaty or a commercial contract. Most awards stand. Only very few annulment requests are successful. 6 The same is true for the cases summarized in the present survey: all seven annulment requests were dismissed by the Supreme Court.  

While the Supreme Court went to great lengths to consider the concrete circumstances of the cases, it was invariably very strict in applying its rules pertaining to the grounds for challenge (Rügeprinzip). The plaintiff has to carefully pick the ground(s) for annulment in the exhaustive list in Article 190 PILA. If the Supreme Court considers that the ground was not chosen correctly, the request will be dismissed.  

Currently, chapter 12 of the PILA is being revised to reflect the jurisprudence of the past 30 years. An interesting novel feature under discussion is the possibility for parties to submit their briefs in English. 7 To date, the Supreme Court does not require translation of the award or any other part of the arbitration record. The annulment request, however, has to be filed

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5 Art. 58(1) Swiss Federal Supreme Court Act.
6 Dasser/Wójtowicz find a success rate of 7.53% (Felix Dasser/Piotr Wójtowicz, Challenges of Swiss Arbitral Awards. Updated Statistical Data as of 2017, in: ASA Bull. 2/2018, p. 276 et seq.)
in one of the three official languages (French, German, Italian). If this proposed revision passes, it will ease the burden on counsel in cases where English is the working language within the counsel-client arbitration team. However, the decision rendered by the Supreme Court would not be in English.

**Republic of Hungary v. EDF**

In this decision between Électricité de France International SA (“EDF”) and the Republic of Hungary (“Hungary”), the Supreme Court had to decide whether the claims invoked by EDF were to be treated as contractual claims under a power purchase agreement (the “PPA”) or if they fell under the umbrella clause of the Energy Charter Treaty (“ECT”).

EDF held a stake of 95% in its subsidiary, the local company Budapesti Eromu ZRt, an electricity company that operated several plants under a long-term PPA with Hungary’s state electricity company. After Hungary became a member of the European Union in 2004, the European Commission held that PPAs were tantamount to state aid and incompatible with EU Competition law. Hungary had to terminate the PPA as of 31 December 2008 and to recoup the state aid. The Commission authorized however, the compensation of stranded costs. A dispute arose as to the amount of these costs.

In May 2009, EDF started arbitration proceedings relying on Article 26 ECT to claim its damages in connection with the loss due to the early termination of the PPA. The arbitration was seated in Zurich and governed by the UNCITRAL Rules. In its final award of 3 December 2014, the arbitral tribunal held that the claims were admissible, and that Hungary had breached its obligation under Article 10(1) ECT to ensure fair and equitable treatment (“FET”) of the investor. It ordered the State to pay EUR 107 million.

Hungary filed a motion to set aside the award pursuant to Article 190(2) lit. b, d and e PILA.

First, the Supreme Court dealt with alleged lack of jurisdiction of the arbitral tribunal. The Supreme Court held that there is a fundamental difference between contractual claims between the two legal entities that are...

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8 Decision of the Supreme Court 4A_34/2015 (141 III 495) dated 6 October 2015, ASA Bull. 4/2019, p. 941. The parties’ names are not published in the decisions of the Supreme Court but have been made public here: http://investmentpolicyhub.unctad.org/ISDS/Details/364.
10 Decision 141 III 495 (supra FN 8, para. B.)
involved (one being the state or the state-owned company) and treaty claims which arise out of the treaty that foresees the protection of investors. However, the Supreme Court remarked, there is an inherent risk that contractual claims are not going to be answered by a host state, which is the reason why some treaties contain so-called umbrella clauses.\footnote{Decision 141 III 495 (supra FN 8), para. 3.2.2.}

The Supreme Court found that Article 10(1) ECT unquestionably constitutes an umbrella clause. It also found that Hungary reserved its right to not give unconditional consent to the submission of any dispute according to Article 26(3) lit. c ECT. Consequently, the Supreme Court had to determine the interrelation between the umbrella clause and Hungary’s reservation of rights. The arbitral tribunal had found that the investor had specifically not brought its claim under the umbrella clause but relied on a violation of FET. Hungary complained that the arbitral tribunal had failed to analyse the true nature of the claim, which was contractual and thus exempt by Hungary’s reservation to the arbitral tribunal’s jurisdiction.

However, the Supreme Court confirmed the arbitral tribunal’s jurisdiction. It was not up to the State to requalify the investor’s claim to remove it from the arbitral tribunal’s jurisdiction.\footnote{Decision 141 III 495 (supra FN 8), para. 3.5.5.}

Second, Hungary alleged that the assessment of the quantum of damages violated due process. Hungary submitted that EDF’s experts relied on a forecasting model developed by a third party, and that the underlying data for the forecast was not accessible.\footnote{Decision 141 III 495 (supra FN 8), para. 4.3.1.} The investor argued that it did not have the underlying data either. The Supreme Court pointed out that it had doubts as to whether Hungary really did everything in its power to challenge the reliability of the data, as it did not even suggest an alternative model or exhaust the procedural means to receive access to the underlying data. As a last resort, a party could seek the assistance of the courts at the place of arbitration to obtain the production of records from a third party (Art. 184(2) PILA).\footnote{Decision 141 III 495 (supra FN 8), para. 4.3.2.}

Third, and a part of the alleged violation of the right to be heard, Hungary claimed a formal denial of justice because the arbitral tribunal allegedly failed to consider an important argument pertaining to the calculation method of the quantum (present value of cash flow). The Court held that this allegation was unfounded, as the arbitral tribunal had addressed

\footnote{Decision 141 III 495 (supra FN 8), para. 3.2.2.}
this issue. That this happened merely in a footnote of the award – which Hungary characterised as sibylline – was irrelevant.\textsuperscript{15}

Fourth, Hungary also submitted that the award violated substantive public policy pursuant to Article 190(2) lit. e PILA\textsuperscript{16}. According to the State, the order to pay was incompatible with European law. In its award, the arbitral tribunal held that it would not infringe upon European law (or for that matter substantive public policy) when it awarded the compensation to the investor, as it remained below the maximum amount of stranded costs determined by the European Commission. The Supreme Court found that it was not certain that EU law was violated at all or that the argument had been properly brought to the arbitral tribunal’s attention. Ultimately, the Supreme Court rejected the argument on a procedural ground. The State’s objection went to due process rather than a public policy violation. The proper basis for the State’s argument that the arbitral tribunal had failed to duly consider its position was Art. 190(2) lit. d PILA (due process), rather than lit. e (public policy). As the State had not relied on that ground in its annulment request this argument was not admissible.\textsuperscript{17}

**Recofi SA v. Socialist Republic of Vietnam**

In a decision of 20 September 2016, the Swiss Supreme Court upheld an award rendered on 28 September 2015, where the arbitral tribunal declined its jurisdiction in a dispute between Recofi SA (“Recofi”), a French company, and the Socialist Republic of Vietnam (“Vietnam”) under the France-Vietnam BIT.\textsuperscript{18}

Between 1986 and 1998, Vietnam underwent an economic and supply crisis in connection with the embargo imposed by the United States. During that time, Recofi started to import goods and food into Vietnam; in 1991 it opened a representative office branch in Ho Chi Minh City. In 2013, the French company initiated arbitration proceedings to recoup outstanding payments in the amount of roughly USD 66 million. These claims were made under the France-Vietnam BIT which explicitly recognized “claims to money

\textsuperscript{15} Decision 141 III 495 (supra FN 8) para. 4.4.2.

\textsuperscript{16} Decision 141 III 495 (supra FN 8), para. 5.

\textsuperscript{17} Decision 141 III 495 (supra FN 8), para. 5.3.2.2.

\textsuperscript{18} Decision of the Supreme Court 4A_616/2015 dated 20 September 2016, ASA Bull. 4/2019, p. 959, para. A-C. The parties’ names are not published in the decisions of the Supreme Court but have been made public here: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/554/recofi-v-viet-nam.
or to any other performance of an economic value” to be investments. The arbitration was seated in Geneva and the UNCITRAL Rules applied.

In September 2015, the arbitral tribunal declined its jurisdiction because the monetary claims did not qualify as an investment under the France-Vietnam BIT. The arbitral tribunal held that for the purpose of the BIT, an investment had to meet three cumulative conditions: i) fall into one of the categories mentioned in the BIT, ii) be in conformity with the host state laws, and iii) made in its territory. The arbitral tribunal found that the French company had failed to demonstrate a contribution to Vietnam’s overall economic development, a transfer of capital, technology or know how. Nor was there a significant local establishment. The fact that the company had a local branch did not establish a sufficient presence, as it only provided administrative support.19

Recofi filed a motion to set aside the interim award invoking Article 190(2) lit. b PILA (wrong decision on jurisdiction).

First, the Supreme Court addressed the question whether Recofi’s trade was to be considered an investment according to Article 1(1) of the France-Vietnam BIT. The Supreme Court noted that the definition of the term “investment” has been one of the most controversial questions in investment arbitration. The term had to be interpreted according to the France-Vietnam BIT. It rejected Recofi’s reliance on ICSID precedents and legal writings which had recognised monetary claims as investments.20

In line with the arbitral tribunal’s award, the Supreme Court held that Recofi’s activities did not qualify as an investment in the sense of the France-Vietnam BIT.21

Recofi further alleged a violation of due process by the wrongful inversion of the burden of proof. Recofi argued that the arbitral tribunal had held against Recofi the fact that it filed the French parliament’s travaux préparatoires but not those of Vietnam. This was an impossible task because under French law it could not obtain the Vietnamese travaux préparatoires from the French government. The Supreme Court rejected the alleged violation of due process and held that the rules on the burden of proof were not part of the substantive public policy according to Article 190(2) lit. e PILA. Moreover, Recofi had not established that it had relied on Vietnam’s travaux préparatoires or asked the arbitral tribunal to order the State to produce them.22

19 Ibid.
20 Decision 4A_616/2015 (supra, FN 18), para. 3.2.2 and 3.4.
21 Decision 4A_616/2015 (supra, FN 18), para. 3.4.4.
22 Decision 4A_616/2015 (supra, FN 18), para. 4.3.2.
The Russian Federation v. Yukos Capital Sàrl

The bankruptcy of Yukos Oil Company led to many arbitration proceedings in the last decade. On 15 February 2013, Yukos Capital Sàrl, a company incorporated in Luxembourg, also initiated arbitration proceedings against Russia, arguing that under the Energy Charter Treaty, Russia had expropriated its investments consisting of loans to Yukos Oil Company by illegally causing Yukos Oil Company’s bankruptcy. The arbitral proceedings were seated in Geneva; conducted under the UNCITRAL Rules of 1976. Russia invoked five independent objections to the arbitral tribunal’s jurisdiction. The arbitration was bifurcated. The arbitral tribunal decided to examine three out of the five objections separately in a jurisdictional award. The remaining two objections were left to be decided together with the merits of the dispute, as they were closely intertwined with its facts.

On 18 January 2017, the arbitral tribunal rendered an interim award, accepting its jurisdiction and rejecting all three objections invoked by Russia.

Against this (partial) interim award, Russia filed a request to set aside the award before the Swiss Supreme Court.

In its decision, the Supreme Court held that the request was premature and therefore inadmissible.

According to Article 186(3) PILA, an arbitral tribunal sitting in Switzerland usually decides on its jurisdiction in an interim award if jurisdiction is controversial. Where jurisdictional objections are intertwined with the merits of the case, the arbitral tribunal can defer the decision on jurisdiction to the merits. If the arbitral tribunal renders an interim award, a challenge has to be filed immediately. The party that takes issue with the arbitral tribunal’s findings on jurisdiction cannot wait until the final award is rendered. The type of award at hand, that decided on some, but not all jurisdictional objections, had not previously been brought before the Supreme Court. In its request to set aside the award, Russia itself queried whether its request was premature. The Supreme Court agreed and considered the motion to set aside the interim award to be premature.

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23 Decision of the Supreme Court, ATF 143 III 462 (4A_98/2017) dated 20 July 2017, ASA Bull. 4/2019, p. 931, para. A. The parties’ names are not published in the decisions of the Supreme Court but have been made public here: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/609/yukos-capital-v-russia.
24 Ibid.
25 Decision 143 III 462 (supra, FN 23).
26 Decision 143 III 462 (supra, FN 23), para. 2.2.
Republic of Poland v. Hortel Systems BV, Poland Gaming Holding BV & Tesa Beheer BV

In this decision of the Supreme Court, 4A_157/2017 dated 14 December 2017, the Supreme Court had to decide whether an award in a PCA case seated in Geneva based on the BIT between the Republic of Poland (“Poland”) and the Netherlands violated substantive public policy according to Article 190(2) lit. e PILA.27

When Poland opened its economy in the eighties, it started to introduce measures against gambling. The new regulation prohibited “high stakes” gambling but also imposed tax measures on “low stakes” gambling, allowing a maximum win of EUR 15 on slot machines. Over the next ten years, the tax measures were steadily increased. In 2003, the tax for each machine was EUR 50 a month, paid in advance. In 2009, the tax was raised to an amount between EUR 125 and 180 per machine. Following a scandal about the involvement of members of the Polish government in the gambling industry, the use of slot machines outside of casinos was completely prohibited. The slot machines that were in use at the time could only be used until their respective permits expired, but the tax was further increased to an amount between EUR 180 and 487.

Hortel Systems BV, Poland Gaming Holding BV and Tesa Beheer BV (the “Claimants”) were active in Poland’s gambling business. In view of the extreme tax increases pertaining to the slot machines, they had to completely withdraw from the gambling market in Poland. In 2014, the Claimants initiated arbitration proceedings against Poland under the BIT between the Netherlands and Poland. The arbitral tribunal’s award rendered on 16 February 2017 held that the imposed tax measures did not constitute an expropriation according to the BIT. However, Poland had violated the BIT’s fair and equitable treatment clause and ordered the state to pay Zlotys 37 million and interest.28

Poland filed a motion to set aside the final award before the Supreme Court invoking the ground that the arbitral award violated substantive public policy. The Court held that a violation of substantive public policy is only assumed if a decision failed to consider fundamental legal principles which rendered the award incompatible with essential and general values of the

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27 Decision of the Supreme Court, 4A_157/2017 dated 14 December 2017, ASA Bull. 4/2019, p. 972, para. A.b. The parties’ names are not published in the decisions of the Supreme Court but have been made public here: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/784/horthel-and-others-v-poland.
28 Decision 4A_157/2017 (supra, FN 27), para. B.
legal system in Switzerland and any other legal system. By way of illustration, the Court usually mentions the principles *pacta sunt servanda*, the duty to act in good faith, the prohibition of abuse of law, expropriation without compensation and discrimination.²⁹

Poland argued that the award violated the substantial public policy in three different ways:

- First, it restricted Poland’s fiscal sovereignty which is protected by customary international public law.³⁰
- Second, the arbitral tribunal had allegedly disregarded that with its tax measures, Poland intended to strengthen its legislation to fight the harms of gambling; a concern the state shares with other European countries, such as Switzerland.³¹
- Third, and in the alternative, Poland argued that the arbitral tribunal would endorse an obviously unlawful practice.³² As another alternative, Poland finally argued that the Claimant’s claims were essentially the same as claiming compensation from the state for a loss of a tax benefit which was improperly obtained since it included the improper use of slot machines outside of the casinos.³³

The Supreme Court recalled that it reviews, without restriction, all legal questions relevant to the arbitral tribunal’s jurisdiction (pursuant to Article 190(2) lit. b PILA). The Court referred to earlier decisions where it had analysed an umbrella clause (Hungary v. EDF) or verified whether there was an investment for the purpose of a BIT (Recofi v. Vietnam). When an award is challenged on the ground of public policy, however, the Court’s review is limited. It does not allow the Court to assess whether the BIT in question was interpreted correctly.³⁴ Therefore, the Supreme Court did not review whether the award was right in considering that Poland had violated the FET standard of the BIT, and whether fiscal prerogatives or combating gambling justified the State’s actions. In any event, the Court pointed out that the annulment request failed to connect the Supreme Court’s definition of public policy and the flaws in the award.³⁵

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²⁹ Decision 4A_157/2017 (supra, FN 27), para. 3.1.
³⁰ Decision 4A_157/2017 (supra, FN 27), para. 3.2.1.
³¹ Decision 4A_157/2017 (supra, FN 27), para. 3.2.2.
³² Decision 4A_157/2017 (supra, FN 27), para. 3.2.3.1.
³³ Decision 4A_157/2017 (supra, FN 27), para. 3.2.3.2.
³⁴ Decision 4A_157/2017 (supra, FN 27), para. 3.3.4.
³⁵ Ibid.
Republic of Serbia v. Mytilineos Holdings

Mytilineos Holdings (“Mytilineos”) had prevailed in arbitration proceedings heard at the Permanent Court of Arbitration under Greece’s 1997 bilateral investment treaty with former Yugoslavia. The seat of the arbitral tribunal was in Geneva and the proceedings were conducted according to the UNCITRAL Rules. The Republic of Serbia (“Serbia”) filed a motion to set aside the award rendered by the arbitral tribunal on 22 August 2017. Ultimately, the Supreme Court did not have to decide the motion because the parties subsequently settled. The issues of the underlying case involved Mytilineos’ claims of USD 100 million in connection with multiple agreements signed in 1998 with RTB Bor, a copper mining and smelting company that at that time was owned by the Federal Republic of Yugoslavia (and Serbia). According to this agreement, the parties would cooperate in mineral extraction and metallurgy activities before RTB Bor was going to be privatised. From 2004 onwards, Serbia attempted to privatise RTB Bor. Within this process, RTB Bor was granted immunity towards its creditors, amongst others, Mytilineos. However, the privatisation was never finalized. Subsequently, Mytilineos claimed that Serbia had indirectly expropriated Mytilineos’ investment without compensation and had frustrated its legitimate expectations through a series of legislative measures between 2004 and 2012 that granted RTB Bor immunity from enforcement under the guise of a restructuring and privatisation that never occurred.

It is the second time that an arbitral tribunal had to deal with a treaty claim brought by Mytilineos over measures affecting RTB Bor. The first claim had been filed in 2004. In the earlier award, the arbitral tribunal held that the dispute had yet to reach the level of a breach under the Greece-Serbia BIT, noting that Serbia had indicated that it intended to complete RTB Bor’s privatisation and satisfy its creditors soon.

36 The parties’ names are not published in the decisions of the Supreme Court but have been made public here: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/560/mytilineos-v-serbia-ii-
The Russian Federation v. Ukrnafta & Stabil et al.

In the two decisions of the Supreme Court, 4A_396/2017 and 4A_398/2017 dated 16 October 2018, the Supreme Court had to decide whether the arbitral tribunal had correctly accepted its jurisdiction over the claims brought by the investors, two Ukrainian oil and gas companies: Ukrnafta, in one case; and Stabil (and other claimants) in the other against Russia. Both cases concern the seizure of the companies’ assets (gas stations and offices) in Crimea during Russia’s annexation of the territory in early 2014.

In the setting aside proceedings, Russia argued that the arbitral tribunal had wrongly accepted their jurisdiction since Crimea was not part of Russia when the BIT was concluded. The Supreme Court noted that under the Russia-Ukraine BIT the following requirements have to be met: i) the dispute must fall within the territorial and temporal scope of the BIT; ii) the claimant has to qualify as an investor within the meaning of the BIT and iii) must have made an investment according to the definition of the BIT.

Russia did not challenge that the BIT could also apply to territory that was de facto controlled by a contracting State. It took the view, however, that the relevant territory was the one existing when the treaty was entered into. In 1998, Crimea was part of Ukraine, and the investments were made in Ukraine and not in Russia. The Supreme Court did not follow Russia’s static interpretation of the term “territory”. The Supreme Court also rejected Russia’s argument that subsequent border shifts would require a further agreement between the contracting states.

Likewise, the Supreme Court held that the term “investor” – similar to the definition of “investment” – does not contain a temporal notion either. Again, taking into account the general aim to encourage the investor to make

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39 Decision of the Supreme Court, 4A_396/2017 dated 16 October 2018 (Russian Federation v. Ukrnafta; Decision of the Supreme Court, ASA Bull. 4/2019, p. 983). In the same matter, the Supreme Court had previously issued a procedural order rejecting the investor’s request for security for cost. The Supreme Court held that States were entitled to rely on the Hague Convention on Civil Procedure of 1 March 1954 (Decision 4A_396/2017 dated 23 November 2017 (ASA Bull. 2/2018, p. 456)). Also on 16 October 2018, the Court rendered another decision, 4A_398/2017 (Russian Federation v. Stabil et al.) with the same reasoning but with a different fact section involving different investors. The investors’ names are not published in the decisions of the Supreme Court but are in the public domain: https://investmentpolicy.unctad.org/investmentdispute-settlement/cases/654/stabil-and-others-v-russia.

40 Decision 4A_396/2017 (supra, FN 39), para. A.

41 Decision 4A_396/2017 (supra, FN 39), para. 4.2.

42 Ibid.

43 Decision of the Supreme Court, 4A_396/2017 dated 16 October 2018, para. 4.3.2.
an investment in the contracting state’s territory does not allow such a strict interpretation of the term under the treaty in question.\textsuperscript{44} After the rare public deliberations held on 16 October 2018, the Supreme Court rejected the motion to set aside the award.\textsuperscript{45}

In the course of 2019, Russia has filed another motion to set aside the final award rendered by the arbitral tribunal in 2019, arguing that the tribunal failed to determine that the Crimean Peninsula is a sovereign territory of Russia despite upholding liability under the treaty. Moreover, Russia also seems to argue that the investments were made illegally, including through corporate takeovers and illegal privatisations, which would render the award unenforceable.\textsuperscript{46} At the time of this survey, the Supreme Court had not yet rendered its decision.

**Republic of India v. Deutsche Telekom**

The most recent decision of the Supreme Court in this survey stemmed from the dispute between the Republic of India (“India”) and the German telecommunication company Deutsche Telekom. In a public deliberation, the Supreme Court rejected India’s request to set aside a jurisdictional award in a narrow three-to-two vote.\textsuperscript{47}

Deutsche Telekom holds a 20\% stake in the Indian telecommunication company Devas Multimedia (“Devas”). Devas – via a Singaporean subsidiary – entered into a contract with the Indian state-owned company Antrix to build, launch and operate two satellites and an S-band spectrum. This would have allowed Devas to offer wireless and broadband services in India.\textsuperscript{48} In 2011, the contract was cancelled by Antrix because the Indian government ultimately decided to not permit the commercial use of the satellites.\textsuperscript{49}

On 2 September 2013, Deutsche Telekom initiated arbitration proceedings against India and invoked that the decision to terminate the agreement was in violation of Articles 3 (fair and equitable treatment) and 5

\textsuperscript{44} Decision 4A_396/2017 (supra, FN 39), para. 4.4.4.
\textsuperscript{45} The decision however was not unanimous (four-to-one).
\textsuperscript{47} Decision of the Supreme Court, 4A_65/2018 dated 11 December 2018, ASA Bull. 4/2019, p. 1000; the parties’ names are not published in the decisions of the Supreme Court but have been made public here: https://globalarbitrationreview.com/article/1177921/swiss-court-upholds-treaty-award-against-india.
\textsuperscript{49} Decision 4A_65/2018 (supra, FN 47), para A.b.
India disputed the jurisdiction of the arbitral tribunal and in particular invoked that the BIT only protects investors who have made *direct* investments in India, which would not be the case for Deutsche Telekom, since the German company intentionally structured its investment in the form of a contribution of funds through its Singapore subsidiary. Moreover, India argued that Deutsche Telekom’s activities (carried out through the Singaporean subsidiary) had remained at the preparatory stage, and that these pre-investments were not protected by the BIT. Finally, India invoked that the termination of the contract was justified under Article 12 of the BIT, since the measures in question were necessary for the protection of its “essential security interests.”

After its decision to bifurcate the proceedings, the arbitral tribunal accepted jurisdiction in its interim award of 13 December 2017. The arbitral tribunal found that India had violated the standard of fair and equitable treatment within the meaning of Article 3(2) of the BIT and indicated that it would continue the proceedings and focus on calculating the damages incurred by Deutsche Telekom.

India challenged the interim award before the Supreme Court alleging the arbitral tribunal’s lack of jurisdiction. India argued that Deutsche Telekom’s mere purchase of shares did not amount to an investment. Thus, the Supreme Court had to assess whether the *indirect* investment was covered by the BIT. The Supreme Court held that most arbitral tribunals that have considered this issue have accepted that even if a bilateral investment treaty does not expressly include indirect investments they are nevertheless covered. According to the Supreme Court, this was also the case in the Germany-India BIT.

In this context, the Supreme Court mentioned that the interpretation of the BIT itself is sufficient, and a comparison with other treaties signed by the two countries in question is unnecessary, or even “random”, and ultimately depends on the often specific circumstances that have governed the conclusion of other bilateral treaties by the contracting parties with third

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50 Decision 4A_65/2018 (supra, FN 47), para B.b.
51 Ibid.
52 Ibid.
53 Article 12 of the India-Germany BIT: “Nothing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions to be extent necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals or plants.”; ibid.
54 Decision 4A_65/2018 (supra, FN 47), para. 3.2.1.2.4.
States. Against this background, the Supreme Court also rejected India’s argument of an alleged violation of its right to be heard, as India was not allowed to introduce the preparatory works pertaining to a BIT with a third country late in the arbitral proceedings. The Supreme Court considered India’s argument that it could not have discovered this preparatory work earlier as not credible, since India – as the contracting party – certainly must have been aware of the preparatory works.

As to the argument that Deutsche Telekom’s activity was only a preparatory investment, the Supreme Court held that the holding of shares is expressly included in the wording of in Article 1(b)ii of the BIT. The Court added that Deutsche Telekom made much more than just a “portfolio investment” but instead invested fully in a company within its core competence.

The argument that essential security interests were a bar to the arbitral tribunal’s jurisdiction was also rejected. India had never before argued that Article 12 BIT could affect the arbitral tribunal’s jurisdiction. The Supreme Court recalled that in accordance with the principle of good faith, a party is not allowed to keep objections concerning procedural defects in reserve, and raise them only in the event of an unfavourable outcome of the arbitral proceedings. The PILA even contains a specific provision (Art. 186(2) PILA) stating that “[a] plea of lack of jurisdiction must be raised prior to any defence on the merits.” Thus, India was precluded from invoking this argument.

Finally, India challenged the arbitral tribunal’s jurisdiction on the basis that the investment itself was unlawful. The Supreme Court in principle accepted India’s argument that the question whether an investment was legal (in the sense of a “compliance clause”) pertains to the definition of an investment and thus potentially affects the jurisdiction of the arbitral tribunal. The Supreme Court raised the question whether the arbitral tribunal had jurisdiction to determine the legality of an investment. However, India was estopped from challenging the award based on the alleged illegality. Although India knew since 2009 of corruption allegations it had not brought them to the arbitral tribunal’s attention until 2016.

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55 Decision 4A_65/2018 (supra, FN 47), para. 3.2.1.2.5.
56 Ibid.
57 Decision 4A_65/2018 (supra, FN 47), para. 3.2.2.2.2.
58 Ibid.
59 Decision 4A_65/2018 (supra, FN 47), para. 3.2.3.3.1.
60 Ibid.
61 Decision 4A_65/2018 (supra, FN 47), para. 4.4.
Matthias SCHERER, Angela CASEY, Domestic Review of Investment Treaty Arbitrations: the Swiss Experience Revisited

Summary

Ten years have passed since the first survey of judgments by the Swiss Federal Supreme Court dealing with investment treaty arbitrations. SCHERER/CASEY provide an update of the most recent decisions of the Supreme Court in the past decade involving treaty claims or claims under the Energy Charter Treaty: Russia v. Yukos – Hungary v. EDF – Recofi v. Vietnam – Poland v. Hortel – Serbia v. Mytilineos – Russia v. Ukrnafta & Stabil – India v. Deutsche Telekom.
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<sup>62</sup> ASA Bull. 3/2001, p. 487 et seq.
<sup>63</sup> ASA Bull. 2/2009, p. 325 et seq.
<sup>64</sup> ASA Bull. 1/2006, p. 92 et seq.
<sup>65</sup> ASA Bull. 1/2006, p. 106 et seq.
<sup>66</sup> ASA Bull. 1/2007, p. 123 et seq.
<sup>67</sup> ASA Bull. 4/2007, p. 941 et seq.
<sup>68</sup> ASA Bull. 4/2019, p. 959 et seq.
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\(^69\) ASA Bull. 4/2019, p. 931 et seq.
\(^70\) ASA Bull. 4/2019, p. 97 et seq.
\(^71\) ASA Bull. 2/2018, p. 454 et seq.
\(^72\) ASA Bull. 4/2019, p. 98 et seq.
\(^73\) ASA Bull. 4/2019, p. 1000 et seq.
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Aims & Scope
Switzerland is generally regarded as one of the World’s leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world’s best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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