New Developments in International Commercial Arbitration 2020

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Stämpfli Editions
Mission Impossible? – Challenging Investment Treaty Awards before the Swiss Federal Tribunal

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I. Introduction

Switzerland has been a hub for international commercial arbitrations for more than a century. Its role as host of investment treaty arbitrations is less well known. Yet it is important. Recent developments in the European Union are likely to increase the number of investment treaty arbitrations in Switzerland (and/or under Swiss treaties). The European Union has recently banned investment protection treaties among the EU member states.¹

The Swiss Supreme Court (“Federal Tribunal”) has issued a number of rulings on investment treaty awards (see table at the end of this paper). It has become apparent that it is exceedingly difficult for plaintiffs to have a treaty award set aside. This paper tries to explore the reasons for this low rate of success by exploring the salient features of investment treaty arbitration and of annulment proceedings before the Federal Tribunal.

II. Investment treaties and investment treaty awards

Investment treaties are treaties between two states (bilateral) or multiple states (multilateral). Typically, each contracting state undertakes to protect investments by investors from the other contracting state, to not expropriate without compensation, to not discriminate or treat unfairly. Switzerland for instance has entered into over one hundred bilateral investment protection treaties with other States ("BITs"). Switzerland has also acceded to a number of multilateral investment protection treaties, such as the Energy Charter Treaty ("ECT"). In the event that a state breaches these undertakings, many bi- and multilateral investment protection treaties afford the investor a right to bring arbitration against the host state. The type of arbitration contemplated in these treaties varies. Most BITs refer to arbitration under the 1966 Convention on the settlement of investment disputes between States and nationals of other States ("ICSID Convention"). The ICSID Convention establishes a framework for the settlement of disputes between investors and States by way of arbitration under the ICSID arbitration rules. These rules are self-contained. Awards rendered by arbitral tribunal under the aegis of ICSID cannot be challenged before any national courts. Annulment requests are referred exclusively to annulment committees established on an ad hoc basis. For this reason, none of the annulment decisions by the Federal Tribunal will be based on an ICSID award.

Some BITs and the ECT do not provide or do not exclusively provide for ICSID arbitration. They contemplate ad hoc arbitration, often under the UNCITRAL Rules, arbitration administrated by the PCA, ICC, SCC and other institutions.

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3 RS 0.730.0.
Switzerland is the place of arbitration of many of these non-ICSID arbitrations. Awards rendered in proceedings with their seat in Switzerland can be challenged before the Federal Tribunal under article 190(2) PIL Act. This survey analyses the reported cases where the Federal Tribunal dealt with arbitral awards rendered under investment protection treaties.4

It would go beyond the scope of this paper to review the large body of jurisprudence applying Article 190(2) PIL Act. Rather, we will recall what these grounds are and how they were applied in the Federal Tribunal’s treaty cases. As we will see, there are notable differences between investment treaty awards and awards rendered in commercial arbitration. While the remedies and annulment grounds available remain the same whatever the type of award involved, it is important to comprehend the characteristics of investment disputes in order to understand fully the Federal Tribunal’s approach and the reasons for the low success rates of challenges to treaty awards.

Indeed, in its very first iteration the title of this paper was not a question, but rather a statement. Mission impossible. Full stop. None of the annulment requests against arbitral awards rendered under an investment protection treaty had been successful. A question mark was added out of precaution. A fortunate change as it turned out. On 25 March 2020 the Federal Tribunal set aside a treaty award for the first time (Clorox v Venezuela).

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III. Salient features of investment treaty arbitration

Put simply, a claimant faces three hurdles in any arbitration: Jurisdiction-liability-quantum. In commercial arbitration, a claimant’s main hurdle in this triptic is typically liability. While jurisdictional objections are not rare, they are rarely successful. Invariably there will be a contract with an arbitration agreement reflecting the parties’ consent to arbitration. Usually such agreement will be construed broadly by the arbitral tribunal.

In treaty disputes, the arbitration agreement is in the treaty itself. The claiming investor is not a party to the treaty. This means that the investors’ intentions are not a relevant parameter for determining the scope of the arbitration agreement. The investors accept the states’ offer to arbitrate only later, by filing for arbitration under the treaty. This is a fundamental difference to commercial arbitration where the claimant is usually an original party to the contract and its arbitration agreement. If the scope of the treaty is unclear, the investor will have to establish intentions of the Contracting States, not his own.

If parties copy-paste an arbitration agreement in a BIT into a commercial contract this may not necessarily be accepted as a valid arbitration agreement.⁵

⁵ SFSCD 4A_418/2019 of 18 May 2020, ASA Bull. 3/2020, p. 690: A Turkish construction group had entered into a trilateral agreement (“TLA”) with an Iranian state bank and an Iranian company controlled by the Iranian Ministry of Roads and Urban Development. The Turkish side undertook to build 20’000 housing units. The TLA contained an arbitration agreement that was copied from the Iran-Turkey investment protection treaty. The arbitral tribunal found that the arbitration clause was not applicable, despite the fact that its terms appeared to be clear. In fact, the evidence before the arbitral tribunal showed that the Iranian side had never agreed to arbitrate under the arbitration clause. This dissent was known to the Turkish negotiators. Therefore there was no meeting of minds, and no agreement to arbitrate.
In treaty arbitration, the jurisdictional hurdles are high and omnipresent, making jurisdiction a very complex matter. Bifurcation of jurisdictional issues is the rule. The arbitral tribunal’s jurisdiction on all levels (ratione temporis, ratione materiae and ratione personae) is subject to restrictions. There is no pro-arbitration bias. Either the claimant’s claim ticks all the right boxes or it will fail at the jurisdictional stage.

Sophisticated parties will select arbitrators in treaty disputes specifically and often primarily with regard to their approaches to jurisdiction. Due diligence on potential arbitrators is easier than in commercial arbitration with its dearth of information about arbitrators’ past cases. As many treaties contain similar language, similar issues come up in many arbitrations. Arbitrators are easily challenged or may refuse to sit when they have dealt with an issue in a certain manner before as counsel or arbitrator (issue conflicts). While arbitrators with a counsel practice remain in high demand in commercial arbitration, double hatting has become the exception in investment arbitration.

Treaty disputes are often fought very publicly. Confidentiality is the exception, not the rule. Switzerland has even acceded to the Mauritius Transparency Convention which is an instrument by which Parties to investment treaties expressly consent to applying the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. The Rules on Transparency, effective as of 1 April 2014, are a set of procedural rules for making information on investor-State arbitrations arising under investment treaties publicly available. In relation to investment treaties concluded prior to 1 April 2014, the Rules apply, inter alia, when Parties to the relevant investment treaty agree to their application.

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There is a large body of precedents which no arbitrator in a treaty dispute can afford to ignore\(^7\) without immediate repercussions on the arbitrator’s future career in this field. The seat of the arbitration is of no import in that regard.

IV. Salient features of proceedings before the Federal Tribunal in treaty award annulment cases

A. Deference to specialized arbitrators

In *Recovi v Vietnam* the Federal Tribunal had to assess whether the alleged investment met the criteria set in the France-Vietnam BIT. The Federal Tribunal recalled that there was no single and universally accepted definition of the term investment. In an unusual fit of modesty the Federal Tribunal expressed reluctance to second-guess findings made by specialized arbitrators: « D’autre part, comme la définition de l’investissement au sens de l’art. 1 (1) du TBI a été le fait de trois arbitres dont l’expérience en la matière et la renommée internationale sont reconnues par les deux parties, le Tribunal fédéral, bien qu’il jouisse à cet égard d’une pleine cognition, ne s’écartera pas sans nécessité de l’opinion unanime émise par des spécialistes de la question au sujet de la notion juridique indéterminée de l’investissement. »\(^8\)

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\(^7\) The Federal Tribunal takes a more relaxed approach to precedents. See section IV. E. below

\(^8\) SFSCD 4A_616/2015 of 20 September 2016 (Recovi v Vietnam), ASA Bull. 4/2019, p. 959, para. 3.4.1.
B. No deference to precedents

On the other hand, the Federal Tribunal rejects the notion of precedents and does not consider to be bound by them when interpreting treaty provisions (see section IV. E. below).

C. No new case law admissible

Since most treaty arbitrations are public, new awards circulate quickly and are often unredacted. It is tempting for a party involved in an ongoing arbitration or annulment proceedings to rely on new cases perceived to be favourable. However, new evidence and new factual allegations are not admissible in annulment proceedings. New pleadings on legal aspects, new legal materials and legal opinions are in principle allowed. But if a party carries the burden of proof for establishing the content of a foreign law, such material can constitute (inadmissible) new evidence. The same goes for decisions produced in support of a factual rather than a legal point.9 In *Poland v Horte*10 the Federal Tribunal struck from the record exhibits containing laws enacted and jurisprudence rendered after the date of the award. Even a few days are fatal. A decision of the *Cour d’appel de Paris* of 21 February 2017 rendered in another matter, five days after the date of the award was not accepted.11

In the Czech Solar Tax case, the State tried to introduce the *Achmea* decision of 6 March 2018,12 where the CJEU found that the arbitration agreement in the Dutch-Slovak BIT was not compatible with EU law. The Czech Republic argued that this decision destroyed whatever jurisdiction the arbitral tribunal may have had. But because the *Achmea* decision was

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9 SFSCD 4A_80/2018 of 7 February 2020, para. 2.4.1.
11 Ibid.
12 CJEU C-284/16, Slovak Republic v Achmea BV.
issued after the Czech Solar award in December 2017, the Federal Tribunal did not consider Achmea. Neither did it consider an arbitral award in another Czech solar arbitration because it also post-dated the challenged award and because the Czech Republic relied on it as a source of facts.\(^\text{13}\)

**D. Security for costs**

According to article 62 of the Law on the Federal Tribunal, plaintiffs who are not domiciled in Switzerland or who are demonstrably impecunious can be asked to provide security for the defendant’s legal fees (\textit{cautio judicatum solvi}). International treaties such as the 1954 Hague Convention on Civil Procedure exempt certain plaintiffs from this duty. In \textit{Russia v Ukrnafta}\(^\text{14}\), Russia objected to the investor’s application for security, arguing that it was a contracting party of the Hague Convention and that the exemption benefited also the states and not only their nationals. The Federal Tribunal confirmed that this is the case. Russia did not have to provide security for Ukrnafta’s legal fees. In contrast, India (who has not ratified the Hague Convention) was requested to pay significant security upfront (CHF 250’000.-) before the Federal Tribunal engaged with its application to annul an award in favour of an investor (Germany’s Deutsche Telekom).\(^\text{15}\)

Ukrnafta further argued that security was required because Russia had notoriously adopted a policy of non-compliance with international awards. The Federal Tribunal ruled that the circumstances listed in article 62 are exhaustive. The

\(^{13}\) SFSCD 4A_80/2018 of 7 February 2020, paras. 2.4.2 and 2.4.3.


\(^{15}\) SFSCD 4A_65/2018 of 11 December 2018, ASA Bull. 4/2019, p. 1000, para. C; the parties’ names are not published in the decisions of the Federal Tribunal but have been made public here: https://globalarbitrationreview.com/article/1177921/swiss-Federal-Tribunal-upholds-treaty-award-against-india.
purported unwillingness of a party to abide by the decision is not mentioned in that list and is not tantamount to demonstrable impecuniosity.\textsuperscript{16}

E. Interpretation of the treaty and the arbitration agreement

One of the most important differences between treaty arbitration and commercial arbitration at the Federal Tribunal’s level is the method of interpreting the arbitration agreement. The scope of the applicable arbitration agreement is at the heart of many annulment cases. In commercial arbitration, the arbitral tribunal, and in its wake the Federal Tribunal, will typically deal with a clause in a contract entered into by the parties to the arbitration. In line with Swiss law, the parties’ real and common intentions are decisive. If this subjective interpretation is not possible, objective interpretation will then be applied. However, in investor-state arbitration, one of the parties, the investor, is never a party to the instrument containing the arbitration agreement, i.e., the treaty entered into by the host state and the investor’s home state. Searching for the investor’s subjective intentions when he accepted the standing offer to arbitrate is therefore not an appropriate way to interpret the arbitration clause in the treaty.

The Federal Tribunal held repeatedly that treaties are to be interpreted in accordance with public international law, reflected in the \textit{Vienna Convention on the Law of Treaties}. As these rules reflect customary international law, they apply even if one or both Contracting States have not ratified the Convention at the time the investment protection treaty was concluded.\textsuperscript{17}

\begin{footnotesize}
\begin{enumerate}
\item SFSCD 4A.396/2017, Procedural order of 23 November 2017, para. 3.2.
\end{enumerate}
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The most relevant interpretation rules in the Vienna Convention are the following:

"Article 31, GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32, SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the
interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.”

There is no pro-arbitration bias. In Hungary v EDF, Hungary ran the contrary argument that consent to arbitration should not be admitted lightly and in case of doubt, in the manner that is the least onerous for the State (in dubio mitius).\(^{18}\) The Federal Tribunal rejected this interpretation and recalled that any treaty had to be construed in line with the rule of good faith (Article 31 Vienna Convention).\(^{19}\)

The Federal Tribunal does not defer to precedents, of ICSID or other arbitral tribunals even where they have addressed the same issue. The finding in Recovi v Vietnam on how to assess whether the alleged investment fell in the scope of application of the France-Vietnam BIT illustrates this:

« ...il s’agit, premièrement, de définir le terme “investissement” tel qu’il apparaît dans le TBI considéré, et non pas tel qu’il a été défini sur la base d’autres traités bilatéraux; deuxièmement, il n’existe aucune règle imposant à un tribunal arbitral de se soumettre à des décisions prises antérieurement par d’autres tribunaux arbitraux sur le même objet, celles-ci n’ayant pas valeur de précédents contraignants; troisièmement, comme le présent arbitrage est conduit conformément aux règles de la CNUDCI, les critères propres à l’arbitrage du CIRDI n’entrent pas en ligne de compte. »\(^{20}\)

In India v Deutsche Telekom, the Federal Tribunal paid short shrift to a selection of awards and legal writings adduced by India, pointing to the lack of uniformity of treaty

\(^{18}\) SFSCD 4A_34/2015 (141 III 495) of 6 October 2015, para 3.5.2.

\(^{19}\) SFSCD 4A_34/2015 (141 III 495) of 6 October 2015, para 3.5.3.1; also 4A_616/2015 of 20 September 2016, ASA Bull. 4/2019, p. 959, para. 3.2.2.

jurisprudence. It noted that even in the framework of ICSID disputes there was no centralized authority to scrutinize the decisions taken by ICSID tribunals, or to handle annulment requests (left to ad hoc committees). This did not further the development of a firm and uncontested jurisprudence:

« Plus généralement, force est de constater que l’adage “comparaison n’est pas raison” trouve ici un terreau des plus favorables à son épanouissement, tant il est vrai que le droit de l’arbitrage en matière de traités d’investissement se caractérise par la pluralité des avis exprimés et la diversité des sentences rendues au sujet de la plupart des problèmes juridiques qu’il soulève, l’une des explications à ce manque d’homogénéité étant sans doute à rechercher dans le fait que la juridiction étatique de recours n’exerce qu’un contrôle restreint des sentences rendues par les tribunaux arbitraux dans ce type de conflits et que lui échappent, en particulier, celles qui l’ont été sous les auspices du Centre international pour le règlement des différends relatifs aux investissements (CIRDI/ICSID), lesquelles ne peuvent faire l’objet que d’un recours interne qui sera traité définitivement par un Comité ad hoc de trois membres (cf. art. 52 et 53 de la Convention CIRDI entrée en vigueur le 14 octobre 1966), ce qui n’est pas propice à l’élaboration d’une jurisprudence ferme et incontestée. »

As of late, the Federal Tribunal at least accepts that this body of awards exists and is influential on specialized publications. This does not alter the standing case law that arbitral awards are not precedents and will be disregarded:

« Qui plus est, l’autorité de céans a déjà souligné, dans le domaine de la protection internationale des

21 SFSCD 4A_65/2018 of 11 December 2018, ASA Bull. 4/2019, p. 1000, para. 3.2.2.2.1.
investissements notamment, que les solutions dégagées dans d’autres affaires arbitrales ne lient pas un tribunal arbitral, de sorte qu’on ne saurait voir dans la jurisprudence arbitrale une source à proprement parler du droit de l’arbitrage (ref omitted). Pour ces motifs déjà, la cour de céans ne tiendra pas compte de la sentence xxx et des commentaires qu’elle a suscités auprès des parties, tous ces éléments étant irrecevables. Par ailleurs, fidèle à sa pratique, elle s’attachera à dégager elle-même le sens des traités en cause, conformément aux méthodes d’interprétation applicables, en tenant compte le cas échéant de la doctrine, mais en toute liberté par rapport aux autres sentences arbitrales rendues en la matière, même si elle n’ignore pas la place importante que celles-ci occupent dans les ouvrages spécialisés. »

The Federal Tribunal cares little about precedents, but « Travaux préparatoires » fare no better. The Federal Tribunal is most reluctant to rely on them and will not do so if primary interpretation yields a result. While this is indeed the hierarchy established by the Vienna Convention (Article 32), one is left with the impression that the Tribunal speaks out of its own conviction and refers to the former as additional support for the latter:

« La recourante objecte que les travaux parlementaires français ayant précédé la ratification du TBI démontrerait que les parties contractantes avaient à l’esprit une définition aussi large que possible de l’investissement. Ce faisant, elle fait fond [sic] sur l’art. 31 al. 4 CV d’après lequel un terme sera entendu dans un sens particulier s’il est établi que telle était l’intention des parties. Relativement à cette objection, il convient de souligner que l’intéressée n’a produit les

22 SFSCD 4A_80/2018 of 7 February 2020, para 2.4.3.
travaux préparatoires que de l’une des deux parties contractantes. Force est d’observer ensuite et en tout état de cause que les travaux parlementaires français ne suggèrent pas qu’il faille donner un sens particulier au terme “investissement”, mais confirment, au contraire, que l’investissement, aussi large que soit cette notion, doit être effectué sur le territoire ou la zone maritime de l’Etat hôte, en conformité avec la législation de cet Etat. En réalité, ces travaux parlementaires ne pourraient tout au plus être assimilés qu’à des moyens complémentaires d’interprétation. Cependant, les conditions auxquelles l’art. 32 CV autorise le recours à de tels moyens ne sont pas réalisées en l’espèce, dès lors que la seule application des principes d’interprétation posés à l’art. 31 CV a permis de donner un sens au terme “investissement” ».

Even more damning is the one sentence in 4A_398/2017 of 16 October 2018, at the very end of a long section on interpretation of treaties:

« Ausführungen zur historischen Auslegung (vgl. Art. 32 VRK) erübrigen sich, zumal die Beschwerdeführerin selber vorbringt, die in das Verfahren eingeführten vorbereitenden Arbeiten (travaux préparatoires) seien unvollständig und damit als ergänzendes Auslegungsmittel unbeachtlich. »

Other treaties entered into by the contracting states and the travaux pertaining to them are not decisive for interpretation. For the Federal Tribunal, the interpretation of the BIT is mainly self-contained and self-sufficient. The primary mechanism relies on the wording of the BIT at hand as interpreted in light of the Vienna Treaty Convention. A comparatist approach, i.e.,

the comparison with other treaties signed by the two countries in question as a secondary interpretation method is unnecessary, and the result might be random because the provisions of each treaty depend on the specific circumstances governing the relations between the States. In the arbitration with Deutsche Telekom, India had made a belated attempt at introducing the travaux préparatoires regarding the Dutch-Indian BIT. Allegedly it had been unable to locate the travaux any earlier. The arbitral tribunal did not allow it. Before the Federal Tribunal, India depicted this as a violation of its right to be heard. The Federal Tribunal dismissed this ground. First, being a contracting state, India really had no excuse of not producing the materials in due time in the arbitration. Second, the material was useful as secondary means of interpretation at most. The Federal Tribunal added that had recourse to secondary means of interpretation been necessary, India should have put on record the materials regarding the treaty at hand, not those pertaining to a treaty it had with a third State.

The single most important yardstick for treaty interpretation in the Federal Tribunal’s view is the effet utile, even though the Federal Tribunal states that it is not specifically mentioned in Article 31 of the Vienna Convention. If a treaty provision can be construed in more than one way, it has to be construed in the most efficient manner in light of the purpose of the treaty. The effet utile is ensured by the combination of an interpretation in good faith and in accordance with the purpose of the treaty (teleological interpretation).

« Die Beschwerdeführerin stellt zu Recht nicht in Frage, dass bei der Auslegung des

24 SFSCD 4A_65/2018 of 11 December 2018, ASA Bull. 4/2019, p. 1000, para. 3.2.1.2.5.
25 Ibid.
26 SFSCD 4A_34/2015 (141 III 495) of 6 October 2015, ASA Bull. 4/2019, p. 941, para 3.5.1.
F. Limited remedies against most treaty awards

Bifurcation is a distinct feature of investment treaty disputes. Most claims are relatively complex. So are the jurisdictional thresholds. As a result, arbitral tribunals will often issue non-final awards deciding issues of jurisdiction, possibly with liability. Quantum is left for a subsequent award.

According to Article 186(3) PIL Act, 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. However, there is no sanction for a violation of this guideline.28

27 SFSCD 4A_398/2017 of 16 October 2018, para. 4.4.2. See also SFSCD 4A_65/2018 of 11 December 2018, ASA Bull. 4/2019, p. 1000, para. 2.4.2.

A non-final award can only be challenged on the grounds listed in article 190(2)(a) and (b) PIL Act. In *Czech Republic v Saluka* for instance, the Federal Tribunal did not review whether a fair and equitable treatment (FET) claim had been properly adjudicated in a partial award ("Vor- oder Zwischenentscheid") on issues of jurisdiction and liability. The challenge brought against the finding did not fall under article 190(2)(a) or (b) PIL Act.  

An award that decides on some but not all jurisdictional issues cannot be challenged directly at all. The losing party has to wait until the arbitral tribunal has decided its jurisdiction entirely, be it in a final award or in a further interim award. In *Russia v Yukos* the Federal Tribunal held that the request against an award that only partially decided on jurisdictional objections was premature and therefore inadmissible. The issue had not been decided before and Russia itself considered that its request might be premature (its view was confirmed, at the price of CHF 100’000.- in court fees).  

The Federal Tribunal does not, save for exceptional circumstances, suspend the Federal Tribunal proceedings pending final resolution of the jurisdictional issues by the arbitral tribunal.  

The Federal Tribunal seems to consider that once a party has challenged an award on jurisdictional grounds, it is not necessary that it reiterates its jurisdictional objections in the further arbitration. This is important. Many annulment requests are dismissed because the plaintiff has failed to raise

30 SFSCD 4A_98/2017 (143 III 462) of 20 July 2017, ASA Bull. 4/2019, p. 931, para. A. The parties’ names are not published in the decisions of the Supreme Federal Tribunal but have been made public here: https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/609/yukos-capital-v-russia.  
31 Ibid., para. 3.3.
and maintain its jurisdictional objections throughout the arbitration.

Key issues are fact-specific, for instance whether there was an eligible investment under the applicable treaty. The Federal Tribunal does not review the arbitral tribunal’s factual findings. This was fatal to the investor’s challenge in Recovi v Vietnam:

« ...la subsomption effectuée par le Tribunal arbitral à partir de son interprétation correcte de la disposition litigieuse du TBI est intimement liée à la constatation des circonstances factuelles de la cause pertinente à cet égard. Comme cette constatation relève du domaine exclusif des faits, elle échappe entièrement à la connaissance du Tribunal fédéral. »

G. Limited scope of review (Kognition/cognition)

The Federal Tribunal’s scope of review depends on the grounds for the challenge, which, in turn, is determined by the nature of the award. A non-final award can only be challenged on the grounds listed in article 190(2)(a) and (b) PIL Act, i.e., wrongful composition of the tribunal and wrongful decision on jurisdiction. The Federal Tribunal can freely review legal issues pertaining to jurisdiction, including preliminary questions that are decisive. For example, whether the treaty encompasses contract claims by operation of an umbrella clause, or whether the activities deployed by the investor qualify as investment under the applicable BIT.

If a (final) award is challenged on the ground of public policy, the Federal Tribunal does not review whether the arbitrators

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32 SFSCD 4A_616/2015 of 20 September 2016, ASA Bull. 4/2019, p. 1000, para. 3.4.3.
33 SFSCD 4A_157/2017 of 14 December 2017, ASA Bull. 4/2019, p. 972, para. 3.3.4.
applied the treaty or established the facts correctly. *Poland v Hortel* involved a finding by the arbitral tribunal that certain tax measures while falling short of a confiscation/expropriation were tantamount to a violation of FET. Poland asserted that the award disregarded its sovereignty in tax matters and was incompatible with public policy. The Federal Tribunal refused to verify whether the arbitrator’s application of FET and confiscation provisions were correct, what the state’s motives for the tax measures were, or verify the facts that were relevant according to the arbitral tribunal. The Federal Tribunal will review, however, whether the (final) award, in its result, is compatible with public policy. Poland had failed to explain why the award in its result was incompatible with the Federal Tribunal’s very narrow definition of public policy in international arbitration:

« En tout état de cause, la recourante ne fait pas le lien entre la définition de la violation de l’ordre public matériel à l’aune de laquelle le grief correspondant, fondé sur l’art. 190 al. 2 let. e LDIP, doit être examiné et les reproches qu’elle adresse au Tribunal arbitral à ce titre, si bien que l’on ne discerne pas en quoi ces derniers, fussent-ils fondés, impliqueraient nécessairement que la sentence affectée des vices dénoncés violerait des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l’ordre juridique et le système de valeurs déterminants. Sa compréhension de la nature très restrictive de cette notion d’ordre public, propre à l’arbitrage international, est du reste sujette à caution si l’on en juge par le fait qu’elle reprend à son compte la définition des plus larges de l’ordre public, telle qu’elle apparaît dans le passage suivant d’un ouvrage de doctrine de droit privé (PIERRE ENGEL, Traité des obligations en droit suisse, 2e éd. 1997, p. 113) : "l’ordre public est la somme des
prescriptions légales édictées dans l’intérêt de la communauté” (réplique, n° 22).

Il suit de là que le présent recours, qui ne satisfait pas à l’exigence de motivation découlant de l’art. 77 al. 3 LTF en liaison avec l’art. 42 al. 2 LTF, ne peut qu’être déclaré irrecevable. »³⁴

H. Waiver Agreement (Article 192 PIL Act)

Waiver agreements have been fatal to several annulment requests. In Republic of Lebanon v. France Télécom (10 November 2005).³⁵ The Federal Tribunal found that the waiver agreement contained in the following clause of the parties’ arbitration agreement was a valid partial waiver of the ground contained in article 190(2)(b), i.e., wrong jurisdictional decision:

"The Parties undertake that they will not challenge the jurisdiction of the UNCITRAL Tribunal whether before the UNCITRAL Tribunal itself or before any national courts. For the avoidance of doubt, the Parties and Y. do not hereby waive their right to challenge any award in the UNCITRAL Arbitration in the place where the award is made or to resist enforcement thereof in the country or countries where enforcement is sought on the grounds contained in the applicable arbitration laws of those countries, save that the Parties will not do so on the ground that the UNCITRAL Tribunal lacked

³⁴ Ibid., para 3.3.5.
³⁵ Two decisions were rendered by the Federal Tribunal in this case, both on 10 November 2005. The first was a judgment on Lebanon’s challenge of the main award: SFSCD 4P.98/2005 of 10 November 2005, ASA Bull. 1/2006, p. 92. The second was a judgment on Lebanon’s challenge of the tribunal’s dismissal of a request for correction of the main award: SFSCD 4P.154/2005 of 10 November 2005, ASA Bull. 1/2006, p. 106.
jurisdiction to consider one or more of the issues before it.”

The excluded ground of jurisdiction was clearly identified. This was necessary in the Federal Tribunal’s view unless the waiver referred specifically to the ground(s) in Art. 190(2) PIL Act that were not open to challenge.36

Since the arbitration agreement in a treaty dispute is most often to be found in the treaty itself, so will the waiver. In Czech Republic v Saluka37, the Federal Tribunal rejected Saluka’s argument that article 8(7) of the BIT (which provided that the arbitral tribunal’s decision “shall be final and binding upon the parties to the dispute”) was an advance waiver. Saluka argued that the contracting States had inserted the same language in the state-to-state dispute resolution clause in article 10. The rationale of both exclusions was to prevent any interference by foreign courts at the seat of the arbitration. This was the rule in the framework of ICSID arbitration, which could not have been adopted by the Czech Republic because it was not yet party to the ICSID Convention. Although the language at hand does not suffice as a waiver agreement in commercial arbitration, it should be applied strictly in the particular context of a BIT dispute. The investor who relies on the arbitration option in the BIT could not have more rights than the contracting States. Hence, the waiver should also bind the investor.

Saluka’s arguments were rejected by the Federal Tribunal.38 The Federal Tribunal found that while the contracting States might have excluded any interference by local tribunals in article 10, the identical language in article 8(7) did not necessarily have the same meaning. The Federal Tribunal considered that, when choosing Switzerland as the venue of

38 Ibid., para. 5.
arbitration, the parties were free to take advantage of the possibility afforded by article 192 PIL Act to exclude challenges to the award, but they did not do so. Moreover, the Federal Tribunal was not persuaded that the contracting States to the BIT had really intended to exclude any challenge to the award rendered in an investor-state dispute. The Federal Tribunal noted that such exclusion would not be possible in most countries and was not contemplated in the ICSID Convention either. The Convention provides for its own review mechanism with grounds for annulment similar to those in article 190(2) PIL Act.\(^{39}\)

As a take away, plaintiffs should note that even if it means treading on dangerous grounds, any possible waiver must be addressed in their annulment request. While the Federal Tribunal now admits and sometimes even orders, a second exchange, this is strictly limited for rebutting the defendant’s answer, not to raise new legal or factual arguments.\(^{40}\)

As a general rule, any second exchange is a mere rebuttal. *India v Deutsche Telekom* provides a good illustration of the Federal Tribunal’s view: In support of its position that indirect investments were not covered by the German-Indian BIT, India relied on a certain legal author. In its reply India added several other doctrinal writings, purportedly to rebut Deutsche Telekom’s defence that this author’s view was not shared by others. The Federal Tribunal observed that this was not an accurate characterization of Deutsche Telekom’s defence. The defendant had merely stated that the annulment request relied on a single author, which was not the same as saying that the author was alone to hold this view. In other words, India’s new authorities were not rebutting an argument raised

\(^{39}\) This is not an entirely apposite analogy. Even though the available grounds are similar, the ICSID system is self-contained and excludes interference of national tribunals.

by defendant, but merely trying to complete and add weight to the annulment request which was not permissible.\textsuperscript{41}

V. Grounds for annulment used in the Federal Tribunal’s treaty award decisions

Arbitral awards rendered in Switzerland can be challenged on five grounds. In addition, the extraordinary remedy of a revision is available\textsuperscript{42}, but will not be further discussed in this paper.\textsuperscript{43}

A. Composition of the arbitral tribunal (Art. 190(2) lit. a PIL Act)

Challenging an award on lack of independence or impartiality is a difficult undertaking. By way of illustration there is only one ICSID precedent where a plaintiff was successful in setting aside an award. The \textit{Eiser v. Spain} case.\textsuperscript{44}

\textsuperscript{41} Ibid., para. 3.2.1.2.4.
\textsuperscript{42} In SFSCD 4A_65/2018, para 4.4.3, the Federal Tribunal rejected the argument of purported illegality of the investment (alleged corruption between the local company (in which the investor held an indirect investment) and a state-controlled company). The Federal Tribunal added that if by any chance (“d’aventure”) a judgement in criminal proceedings were to find a case of illegality, the State could try to file a request for revision of the arbitral award (if all other pre-requisites for a revision were met). It expressed doubts whether wrong-doings by the Indian company in which the investor/claimant indirectly held shares were automatically attributable to the investor.
\textsuperscript{43} For further references see the comprehensive survey by Catherine ANNE KUNZ, Revision of Arbitral Awards in Switzerland, ASA Bulletin 2/2020.
In its challenge of a corrected award, Lebanon pointed out that the presiding arbitrator had not signed the award. For Lebanon, the arbitral tribunal was therefore irregularly constituted pursuant to article 190(2)(a) PIL Act. The Federal Tribunal dismissed the argument. A formal defect is not necessarily a testimony to an irregular constitution of the arbitral tribunal.\(^\text{45}\) The Federal Tribunal found that the signature was required to show that the arbitrator had participated in the deliberation. The absence of the signature of the presiding arbitrator was a simple oversight. The president had in fact taken part in the tribunal’s decision-making. The original produced by the defendants was signed by the president and the president had pointed out in his comments to the Federal Tribunal that he would hardly have notified the award\(^\text{46}\) had he not participated in the deliberations.\(^\text{47}\)

**B. Jurisdiction (Art. 190(2) lit. b PIL Act)**

The vast majority of annulments requests against treaty awards is based on Article 190(2)(b) PIL Act: wrong decision on jurisdiction. Jurisdiction is a broader and more complex concept in treaty disputes than in commercial arbitration. The numerous and varying prerequisites in BITs operate as a narrow entry gate to arbitral jurisdiction. Thresholds apply at all jurisdictional levels: ratione personae (what investors are covered), materiae (what investment and breach) and temporis (time of the breach). They all tie back to the question of the State’s consent to arbitration.


\(^{46}\) The arbitration was subject to the UNCITRAL Rules.

1. Investor’s consent to arbitrate

Contracting states consent to arbitrate with investors by entering into the BIT. The investor is not a party to the BIT. Only the contracting states are. The question arises whether there is an agreement to arbitrate at all on which the investor can rely. In its decision in *Saar Papier v Poland*\(^{48}\), the Federal Tribunal found that Poland had proceeded on the merits and accepted to arbitrate the dispute. The question was moot. However, the Federal Tribunal added that conceptually the arbitration agreement in the BIT could be characterized as a contract in favour of a third party (the investor) which the third party subsequently accepted by initiating arbitration. The nascent arbitration agreement falls within the scope of Chapter 12 PIL Act. Referring to Article 177(2) PIL Act, the Federal Tribunal added that arbitrability of an investment treaty dispute is not affected by the fact that one of the parties is a state.

In *Czech Republic v Saluka*\(^{49}\) the Federal Tribunal still grappled with the question of the conclusion of the arbitration agreement and the parties to it. The identity of the parties to the arbitration agreement is a threshold issue to determine whether the PIL Act applies at all. It does if at least one party is domiciled outside Switzerland at the time the arbitration agreement was concluded. The Federal Tribunal again left open the question of which acts at what given time constituted the arbitration agreement applicable to Saluka. It mentioned again the hypothesis of the treaty being a contract in favour of a third party, with a standing offer to arbitrate, accepted by the investor (Saluka). The question was not decisive because the State did not challenge jurisdiction on this ground, and regardless of the decisive act of the acceptance and when it

\(^{48}\) SFSCD 1P.113/2000 of 20 September 2000, para. 1c.

occurred, at least one party (the Czech Republic) was not “domiciled in Switzerland”.

In *Hungary v EDF*, the Federal Tribunal noted that under the ECT the investor had to give its consent in writing.\(^{50}\) Since Hungary did not allege that EDF had disregarded the form requirement or that consent was vitiated, the arbitration agreement was formed.

### 2. *Jurisdiction ratione temporis*

The *Czech Republic v. Saluka* case arose from the privatisation of a Czech bank (IPB) and its acquisition by a foreign investor, the investment bank Nomura. In October 1998 and February 2000, Nomura transferred its stake in the bank to an affiliate, Saluka Investments BV, a Dutch company. In July 2001, Saluka initiated arbitration proceedings against the Czech Republic under the Czech-Dutch BIT. Saluka asserted that it had not received fair and equitable treatment and had been discriminated by the State who had lent financial support to three large Czech banks, but not to IPB. The arbitral tribunal found that the Czech Republic was in breach of its obligations under Article 3.1 of the BIT (“fair and equitable treatment”).

Before the Federal Tribunal the Czech Republic argued that the arbitral tribunal lacked jurisdiction. The treaty violation, a government decree announcing financial aid for the three banks published in May 1998, had occurred prior to the investment (October 1998). Thus it was not covered by the BIT.

The Federal Tribunal noted that this view did not reflect the case as it had been pleaded before the arbitral tribunal. Saluka’s claim did not rest on the decree itself, but on its implementation, which occurred after Saluka had made its

\(^{50}\) SFSCD 4A_34/2015 (141 III 495) of 6 October 2015, ASA Bull. 4/2019, p. 941, para. 3.4.2.
investment. The arbitral tribunal had not violated the principle of non-retroactive effect of treaty protection. Indeed, the Republic’s treaty violation had not been completed before IPB’s transfer from Nomura to Saluka. The Federal Tribunal considered that although the Government policy had been established before Saluka made its investment, its subsequent implementation constituted a continuing breach of the Czech-Dutch BIT.

3. No treaty breach – No jurisdiction?

In *Poland v Saar Papier*, the plaintiff (Poland) asserted that the arbitral tribunal lacked jurisdiction because there was no treaty breach. Arbitration under the Poland-Germany treaty was only available in the event of expropriation or nationalization. Since, in Poland’s view, the measures the investors criticized (import ban) did not breach FET standards or prohibition of discrimination, the arbitral tribunal had no jurisdiction. Poland argued that import of waste paper had been prohibited for everyone, and import licenses wrongfully granted to five competitors of Saar Papier’s Polish affiliate had been illegal. The obvious answer to this argument would have been that it is a matter of merits rather than jurisdiction whether there is a breach or not. The Federal Tribunal took another route\(^{51}\): the Federal Tribunal cannot review the facts underlying the arbitral tribunal’s determination on its own jurisdiction. The award had found a violation of FET and non-discrimination and that was the end of the matter. Moreover, the allegation of purported illegality of licenses had not been raised in the arbitration. The challenge was inadmissible on these formal requirements alone.

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\(^{51}\) SFSCD 1P.113/2000 of 20 September 2000, para. 4.
4. **Contract claim v. treaty claim**

Normally an investor who enters into a contract with a state or a state-controlled entity cannot bring a claim for breach of contract under a BIT. BITs deal with treaty breaches, not contract breaches. Contract breaches have to be brought before the national court or arbitral tribunal that has jurisdiction pursuant to the applicable forum selection or arbitration agreement (if any). However, some treaties contain clauses, commonly called “umbrella clauses”, that elevate mere contract breaches to the rank of treaty breaches. Thus, the Energy Charter Treaty provides in article 10 that “Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party”. Some contracting States have made reservations regarding this clause.

In the decision between Électricité de France International SA (“EDF”) and the Republic of Hungary,\(^{52}\) the Federal Tribunal addressed the distinction between contractual claims and treaty claims. An arbitral tribunal seated in Zurich had ordered Hungary to pay EUR 107 million to EDF following the early termination of a power purchase agreement. Hungary argued that this was a contract claim, not a treaty claim. And as a result of a reservation, the umbrella clause in article 10(1) ECT did not operate to transform the contract claim in a treaty claim. The arbitral tribunal had therefore no jurisdiction according to Hungary.

The Federal Tribunal found that Hungary’s argument was misguided. The investor had specifically not brought its claim under the umbrella clause but relied on a violation of FET. It was not up to the defendant to recharacterize the “true

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\(^{52}\) SFSCD 4A_34/2015 (141 III 495) of 6 October 2015, ASA Bull. 4/2019, p. 941. The parties’ names are not published in the decisions of the Federal Tribunal but have been made public here: http://investmentpolicyhub.unctad.org/ISDS/Details/364.
nature” of the claimant’s claim to remove it from the arbitral tribunal’s jurisdiction.\footnote{Ibid., para. 3.5.5.}

\section*{5. Investor nationality and treaty shopping}

The investor’s nationality is crucial for jurisdiction. The investment must be effectuated in the host state by a national of the other contracting state. This rule can be problematic if the investor is a company but controlled by nationals of the host state. It happens indeed that states face claims brought by foreign companies ultimately owned by their own nationals. In the Solar Tax case, the Czech Republic had argued that investors were controlled by Czech nationals, not by a foreign investor. For this reason they could not rely on the ECT or BIT to bring a claim against their home State. The Federal Tribunal did not accept this view after a thorough analysis of the terms of the treaty which bears out the contracting states’ intentions. BITs can limit treaty shopping in a number of ways, for instance by requiring that the investor has a real activity (as opposed to being a shell or mailbox company), must not be controlled or have used funds provided by nationals of the host state, and through similar limitation or denial of benefit clauses. If the treaty provides for no such limitations and relies exclusively on the nationality of the (mostly corporate) investor (as determined by its place of incorporation), claims brought by investors of a contracting state are in principle admissible whoever the controlling individuals are.\footnote{SFSCD 4A_80/2018 of 7 February 2020, para. 4.} The Tribunal found that in essence the Dutch-Czech/Cyprus-Czech BITs and the ECT operated with the incorporation principle. Any investor incorporated in a contracting state could bring a claim against the host state.\footnote{Ibid., paras. 4.4 - 4.7. Regarding the ECT, the Federal Tribunal noted the award’s failure to engage with the question whether the alleged treaty shopping or abuse of process barred the investors’ claims. The Federal Tribunal undertook this}
Even if the terms of the BIT do not put limits for creative investors, there is a bar to engineered claims: Abuse of law and abuse of process.

Savvy parties involved in cross-border business will in the course of their due diligence also vet a host states investment treaty network before making an investment. It is legitimate to structure an investment in a manner that provides maximum protection. This means that from an investment protection perspective, the investor will want to make the investment out of the state that has the most investor-friendly BIT with the host state. This treaty shopping can be achieved by using an affiliate based in said jurisdiction. It might be an existing or a newly established company. The Federal Tribunal admits that investment optimization in itself is not abusive. It can become problematic if this is done after the alleged treaty breach occurred or was foreseeable. In the Natland case the Czech Republic contended that two of the investors had been established soon after it had become predictable that new tax would be levied, with the sole purpose to bring a claim against the Czech Republic under the BITs with these countries. The Federal Tribunal disagreed and found evidence to the contrary: the levying of the tax had not been foreseeable and the hidden purpose of the creation had not been established.

Barring an investor’s claim for abuse of process requires, in the Federal Tribunal’s words, “exceptional circumstances.” Or put differently: it would not be open to an arbitral tribunal to stifle an investor’s claim on the ground of abusive treaty analysis itself. Remarkably, it did not rely on article 17 of the ECT. This provision, which contains potentially relevant restrictions, was not put forward by the Czech Republic.

56 Ibid., para. 4.3: « A l’instar de ce qui prévaut en matière fiscale, le Treaty Shopping implique de tracer une limite entre la planification légitime et le procédé abusif. »
57 Ibid., para. 4.
58 Ibid., para. 4.8.
shopping in the absence of demonstrated exceptional circumstances or of applicable terms in the BIT limiting treaty shopping.

This leads us to the only case where the Federal Tribunal annulled an investment treaty award, *Clorox v Venezuela*. The arbitral tribunal in that case had found that the Spanish investor had made no eligible investment. The arbitrators denied jurisdiction; wrongfully in the Federal Tribunal’s view. By the time the Federal Tribunal issued its ruling in this case (25 March 2020) it was familiar with the problematic of treaty shopping and had a clear test in mind. The same five judges had rendered in the previous month the *Czech Republic v Natland* judgement.

The Spanish investor was an affiliate of the large US household cleaning products company Clorox. Clorox (Spain) had been founded in 2011 by Clorox US who contributed all shares in Clorox Venezuela to the newly constituted company’s capital. Clorox (Spain) did not have to pay a consideration for the shares. The arbitral tribunal found that all know how and actual investment in Venezuela had been made by two US companies. Clorox (Spain) had made no such investment and had not paid anything for the acquisition of the investment (Clorox Venezuela). In the circumstances the arbitral tribunal denied that Clorox Spain was an investor under and could invoke the Spain-Venezuela BIT. The Federal Tribunal analysed the terms of the BIT. It concluded that the Spain-Venezuela BIT was of the most open and classic kind. It had no other requirement apart from the nationality of the investor. Likewise, the eligible investments were defined very broadly. The problem of treaty shopping was well known and many States had introduced restrictive language in their BITs, or signed multilateral treaties with restrictions (such as the ECT), including Spain. Thus, absent such language in the

Spain-Venezuela BIT, it was reasonably construed to stipulate no other threshold requirement save for the nationality of the investor. Introducing additional requirements not envisaged in the BIT in order to block a Spanish party’s claim was therefore improper. The matter was remanded to the arbitral tribunal.

Where the Federal Tribunal remands a case it typically also finds in the operative part of its judgement (with binding effect for the arbitral tribunal) that the arbitral tribunal has jurisdiction. It could not do so in the Clorox case. The arbitral tribunal had not engaged with Venezuela’s fall back argument that the claim was barred not only by the terms of the BIT but also by the prohibition of abuse of process. Before the Federal Tribunal, Venezuela demanded that in the event of an annulment of the award the dispute be remanded to the arbitral tribunal to deal with the State’s abuse of process/of law and other objections to jurisdiction. Clorox had not addressed this in its reply. Therefore the Federal Tribunal remanded the case to the arbitral tribunal without stating that it had jurisdiction, in order for the arbitral tribunal to determine the abuse of process.

6. Investor’s existence as a legal entity

In Saar Papier v Poland, the appellant (Poland) asserted that the investor did not exist as a legal entity. The Supreme Federal Tribunal noted that the investor’s purported lack of standing had not been raised in the arbitration. It was not open to the appellant to criticize the arbitral tribunal for not having verified the claimant’s standing.60

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60 In SFSCD 4P.146/2005 of 10 October 2005, ASA Bull. 2/2006, p. 330, para. 5.2.1, not a treaty case, the Federal Tribunal held, however, that certain procedural defects, such as the lack of standing (existence) of a party can be raised at any stage of the proceedings.
7. Eligible investment under the treaty

All BITs define what investments they consider to be worthy of protection. Not all BITs are generous. This requirement is well illustrated by the decision in *Recovi v Vietnam* based on an arbitral award rendered under the France-Vietnam BIT.61

a) Monetary claims

Recofi had imported goods and food into Vietnam. In 2013, the French company initiated arbitration proceedings to recoup outstanding payments. 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 not demonstrated a contribution to Vietnam’s overall economic development, a transfer of capital, technology or know how. Neither 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.62

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

First, the Federal Tribunal addressed the question whether Recoﬁ’s trade was to be considered an investment according to Article 1(1) of the France-Vietnam BIT. The Federal Tribunal 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 recognised monetary claims as investments.

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

b) Indirect investment

Some treaties limit their protection to direct investments in the host state by an investor from the other contracting state, or even exclude “indirect” investments specifically. Many treaties simply cover “investments” generically. The question arises whether this goes to include or exclude indirect investment. In India v Deutsche Telekom the state argued that Deutsche Telekom was not an eligible investor. It had not invested directly in India but through an affiliate in Singapore that bought (with funds provided by Deutsche Telekom) shares in an Indian company.

The Federal Tribunal pointed out that most arbitral tribunals who had to deal with this issue have accepted that the absence of exclusion means inclusion. Where a treaty did not expressly include indirect investments they were nevertheless

63 Ibid., para 3.2.2 : « Le sens ordinaire du terme en question demeure l’un des plus controversés à ce jour dans le contentieux des investissements internationaux, et l’on ne compte plus les tentatives qui ont été faites par les tribunaux arbitraux appliquant les règles du CIRDI, de la CNUDCI ou d’autres institutions d’arbitrage pour en délimiter les contours. »
64 Ibid., paras. 3.2.2 and 3.4.
65 Ibid., para. 3.4.4.
66 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. In 2011, the contract was cancelled by Antrix because the Indian government ultimately decided to not permit the commercial use of the satellites.
considered covered. According to the Federal Tribunal, this was also the case in the Germany-India BIT.\footnote{SFSCD 4A_65/2018 of 11 December 2018, ASA Bull. 4/2019, p. 1000, para. 3.2.1.2.4.}

c) Pre-investment

Certain treaties demand that protected investments must reach a certain duration and intensity. Mere pre-investments or portfolio investments are excluded. India argued this point in its dispute with Deutsche Telekom. The Federal Tribunal flatly denied it, noting that Deutsche Telekom had invested specifically in a company within its core competence (telecom). Moreover the company had already a contract with the Indian Government.\footnote{Ibid., para. 3.2.2.2.2.} This was neither a pre-investment nor a portfolio investment.

8. Essential security interests as a bar to jurisdiction

India invoked a security interest exemption in its treaty with Germany before the Federal Tribunal and argued that the exemption operated as a bar to the arbitral tribunal’s jurisdiction. The argument was rejected because in the underlying arbitration, India had never argued that Article 12 BIT could affect the arbitral tribunal’s jurisdiction. In accordance with the principle of good faith, India was estopped from doing so retrospectively before the Federal Tribunal.\footnote{Ibid., para. 3.2.3.3.1.}

9. Legality of investment/Investment compliant with law

India challenged the arbitral tribunal’s jurisdiction on the basis that the investment itself was unlawful. The Federal Tribunal
in principle accepted India’s argument that the question of whether an investment was legal (in the sense of a “compliance clause”) pertained to the definition of an investment and thus potentially impacted the jurisdiction of the arbitral tribunal. Yet again, India was precluded from challenging the award based on the alleged illegality. It was aware corruption allegations since 2009 and only brought them to the arbitral tribunal’s attention in 2016.70

10. Tax exemption

Under many BITs and the ECT (Art. 21) the State reserves its fiscal prerogatives. Thus, article 21 ECT provides that “...nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties”. The Czech Republic relied on article 21 to argue that the arbitral tribunal had no power to review a controversial solar tax which the investor considered to be tantamount to a treaty breach. The Federal Tribunal sided with the arbitral tribunal in considering that the tax was not a Taxation Measure, and that the arbitral tribunal had jurisdiction.

11. Territorial application

Two Ukrainian oil and gas companies Ukrnafta and Stabil (and other claimants) brought arbitrations against Russia under the Russia-Ukraine BIT after the seizure of the companies’ assets (gas stations and offices) in Crimea during Russia’s annexation of the territory in early 2014. In the two decisions of the Federal Tribunal, 4A_396/2017 and 4A_398/2017 dated 16 October 2018,71 the Federal Tribunal had to decide whether

70 Ibid., para. 4.4.
71 SFSCD 4A_396/2017 (144 III 559) of 16 October 2018 (Russian Federation v. Ukrnafta), ASA Bull. 4/2019, p. 983. Also on 16 October 2018, the Federal Tribunal rendered another decision, 4A_398/2017 of 16 October 2018 (Russian Federation v. Stabil et al.) with the same reasoning but with a different fact
the arbitral tribunal had correctly accepted its jurisdiction over the claims brought by the investors. Russia argued that 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 arbitral tribunal was wrong to have accepted jurisdiction since Crimea was not part of Russia when the BIT was concluded.

The Federal Tribunal rejected this view. The relevant point in time for establishing the territory on which the investment was made, was the one at the time of the breach. Similarly, the investor’s nationality was the one he had at the time of the alleged breach.\textsuperscript{72}

\textbf{C. Ultra petita (Art. 190(2) lit. c PIL Act)}

In Saar Papier \textit{v} Poland the investor relied on article 190(2)(c) PILA to contend that the award was \textit{infra petita}. It alleged that the operative part of the award, by dismissing Saar Papier’s claim in the amount of DM 31’118’876, omitted to rule on the additional 0.94 DM Saar Papier had originally claimed (Saar Papier had claimed a total of DM 31’118’876.94 DM). As the Federal Tribunal noted, this was quite obviously a mistake, as was also evident from the reference in the award to an interim award where the precise amount of the claim had been mentioned.\textsuperscript{73}

\footnotesize
\textsuperscript{72} Russia also challenged the final awards in the disputes against Stabil and Ukrnafta, inter alia on the ground that the disputes about borders were not economic and hence not arbitrable (Article 177 PIL Act). The Federal Tribunal found that the investors’ claims for damages were monetary and arbitrable, and the arbitral tribunal had not decided the public international law status of the Crimea SFSCD 4A_244/2019 and 4A_246/2019 of 12 December 2019.


Saar Papier also took issue with the ruling in the operative part that “any other or further claims of the Parties are denied”. It was noted that the arbitral award did not identify the claims and that they were only identified in a previous award. The Federal Tribunal conceded that the ruling was not easily intelligible (shorthand for perfectly sloppy) but on its terms it only concerned prayers that were actually made and therefore did not go beyond these prayers. “Ultra” and “extra petita” were excluded.74

Where an arbitral tribunal is asked to correct or rectify an award, it can also go beyond the prayer and commit ultra petita. In Lebanon v France Télécom, Lebanon had asked for a correction of an amount in the operative part of the award to match the reasons section in the body of the award. The arbitral tribunal rejected the request since the error was made in relation to the reasons, whereas the operative part was correct. Changing the reasons rather than the operative part when dealing with a correction is not ultra petita.75

D. Right to be heard (Art. 190(2) lit. d PIL Act)

In Saar Papier v Poland the investor raised a due process argument. The arbitral tribunal had not acceded to a request to hold a hearing. The Federal Tribunal observed that the arbitral tribunal had closed the proceedings and informed the parties that no new allegations or evidence was admissible without prior leave. This reflected generally accepted principles of an orderly conduct of proceedings and could not be criticized as violation of the right to be heard.

Similarly, India, who had belatedly queried the legality of Deutsche Telekom’s investment in the arbitration, could no

74 Ibid., para. C and 3c.
longer raise a corruption defense in before the Federal Tribunal.\textsuperscript{76}

In \textit{Recofi v Vietnam}, Recofi saw a violation of due process in an alleged inversion of the burden of proof. Recofi argued that the arbitral tribunal had found against Recofi for filing the French parliament’s \textit{travaux préparatoires} but not those of Vietnam. This was an impossible task because under French law it could not obtain the Vietnamese \textit{travaux} from the French government. The Federal Tribunal found that Recofi was not barred from raising a due process violation because it only learnt of the alleged inversion of the burden of proof when it read the award. It could not have reacted earlier. The Federal Tribunal then rejected the alleged violation of due process because the rules on the burden of proof were not part of the substantive public policy according to Article 190(2) lit. e PIL Act. This is a strange finding in the sense that the Federal Tribunal referred to a ground (i.e. public policy) which was not raised by the plaintiff. The Federal Tribunal then examined whether the argument met the test for a due process violation under article 190(2)(d) and decided to the contrary. Recoﬁ had not been prevented from adducing evidence and had not established that it had relied on Vietnam’s \textit{travaux préparatoires} or asked the arbitral tribunal to order the State to produce them.\textsuperscript{77}

\textbf{E. Public policy (Article 190(2) lit. e PIL Act)}

\textbf{1. EU law}

In \textit{Hungary v Hortel} Hungary submitted that the award violated substantive public policy pursuant to Article 190(2)

\textsuperscript{76} SFSCD 4A_65/2018 of 11 December 2018, ASA Bull. 4/2019, p. 1000, para 4.5.

\textsuperscript{77} SFSCD 4A_616/2015 of 20 September 2016, ASA Bull. 4/2019, para. 4.3.2.
lit. e PIL Act.\textsuperscript{78} According to the State, the arbitral tribunal’s payment order was incompatible with European law. The Federal Tribunal 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 Federal Tribunal 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 PIL Act (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{79}

2. Illegality

Russia belatedly raised the illegality argument against the final award in the Stabil case.\textsuperscript{80} The state tried to demonstrate in the Federal Tribunal proceedings that an important shareholder of the claimant owed his wealth to criminal enterprises and that the investment was marred by corruption. The Federal Tribunal rejected the new documents. New evidence is not admissible in annulment proceedings. Moreover, the argument itself was belated. The state did not argue in the arbitration that the investment had involved corrupt practices, and was thus estopped from raising a public policy defense in the annulment proceedings: “\textit{Mit dem erst vor Bundesgericht erhobenen Einwand, die fraglichen Investitionen seien unter betrügerischen Umständen zustande gekommen, ist sie nicht zu hören, weshalb die darauf gestützte Rüge der Verletzung des Ordre public nach Art. 190 Abs. 2 lit. e IPRG von vornherein ins Leere stösst.}”

\textsuperscript{78} SFSCD 4A_34/2015 (141 III 495) of 6 October 2015, ASA Bull. 4/2019, p. 941, para. 5.
\textsuperscript{79} Ibid., para. 5.3.2.2.
\textsuperscript{80} SFSCD 4A_244/2019 and 4A_246/2019 of 12 December 2019. Reported in GAR, Russia fails to overturn Crimea awards, GAR 18 December 2019.
India also raised an illegality defense. As a bar against jurisdiction, not as a public policy ground (see section V. B. 9. above).

3. **Res judicata**

In *Saar Papier v Poland*, the Federal Tribunal found that the principle of *res judicata* to be a universal doctrine. Its violation could be tantamount to a violation of (procedural) public policy and result in the annulment of the award.\(^{81}\) However, only final awards can be challenged based on a *res judicata* violation.

In *Lebanon v France Télécom*, Lebanon argued that the arbitral tribunal should have deferred to a decision (“ordre de recouvrement”) of a Lebanese administrative body (“conseil des ministers”) which ordered the telecom operators to pay US$ 300 million as a preliminary assessment of damages incurred by the State due to the poor performance of the mobile telephone network agreements. The award thus violated *res judicata* and public policy pursuant to article 190(2)(e) PILA. The Federal Tribunal found that it was questionable whether administrative decisions benefited from *res judicata* effect.\(^ {82}\) It also queried whether a tentative damage assessment issued by the State itself could have that effect and bar any subsequent determination. Lastly, the State’s *res judicata* argument was doomed to fail because it had agreed to suspend the “ordre de recouvrement” pending the arbitration and to adjust the amount or withdraw the order based on the findings of the arbitral award.

4. **Pacta sunt servanda**

In *Lebanon v France Télécom*, Lebanon claimed that the award was contrary to public policy in that it violated the

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\(^{81}\) SFSCD 1P.113/2000 of 20 September 2000, para. 3.

principle of *pacta sunt servanda* by admitting the operators' claim to exploit the GPRS network yet rejecting the Lebanese counterclaim for compensation. The Federal Tribunal confirmed that the legal principle of *pacta sunt servanda* was a fundamental one whose violation would be incompatible with the Swiss juridical order. However, it stressed that in order for there to be a violation of the principle, the tribunal must have refused to give effect to a clause while simultaneously admitting that it bound the parties; or conversely, must have given effect to a clause which it recognized did not bind the parties. In the award in question, there was no such contradiction.

5. **Expropriation without compensation**

In the second *Saar Papier v Poland* case, the arbitral tribunal dismissed the German investor’s claim for damages based on lost profits. The Federal Tribunal decision does not elaborate on the particulars of the investor’s claim or the BIT provision on which it relied (presumably Article 4(2)). Apparently, the investor had calculated its claim as a function of its own lost profits. The arbitral tribunal did not accept this valuation method and instead relied on the direct damage which it found to be the value of the investment, i.e., the local affiliate which had been since liquidated ("wirtschaftlicher Wert der Investition – derjenem der inzwischen untergegangenen Tochtergesellschaft entspricht", Article 4(2) of the BIT refers to "Wert der enteigneten Kapitalanlage"). Saar Papier argued that this was a violation of the prohibition of expropriation without compensation.

83 *Ibid.*, para. 5.2.1.
The Federal Tribunal confirmed that this is a principle firmly rooted in public policy. Yet the investor had been compensated, and there is no absolute right in public international law to full compensation. In essence, the investor took issue with the arbitral tribunal’s interpretation of the BIT. According to the investor, the BIT required compensation for lost profits. A wrong interpretation of a rule of law is not tantamount to a public policy violation (“reicht jedoch die falsche Auslegung einer Rechtsregel nicht für einen Verstoss gegen den Ordre public aus”).87

6. Interference with the State’s fiscal prerogatives and sovereignty in tax matters

Three Dutch companies active in the gambling industry in Poland (Hortel Systems BV, Poland Gaming Holding BV and Tesa Beheer BV) sued Poland following steep tax increases on slot machines which ousted them from Poland. The arbitral tribunal ruled 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.88

Poland filed a motion to set aside the final award before the Federal Tribunal where it argued that the award violated substantive public policy:

- First, it restricted Poland’s fiscal sovereignty which is protected by customary public international law.89
- Second, the arbitral tribunal had allegedly disregarded the goal of the tax measures, to protect the population from the dangers of

87 Ibid., para. 2.
89 Ibid., para. 3.2.1.
The Federal Tribunal recalled that it reviews, without restriction, all legal questions relevant to the arbitral tribunal’s jurisdiction (pursuant to Article 190(2) lit. b PIL Act). The Federal Tribunal 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 Federal Tribunal’s review is limited. The Federal Tribunal is not allowed to assess whether the BIT in question was interpreted correctly. Thus, the Federal Tribunal 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 combatting gambling justified the State’s actions. In any event, the Federal Tribunal pointed out that the annulment request failed to connect the Federal Tribunal’s definition of public policy and the alleged flaws in the award.

VI. Conclusion

What conclusions can counsel draw from the Federal Tribunal’s decisions? They are different in many ways from decisions in commercial arbitration matters. First of all, they are often longer, paragraph numbering running into five digits. The Federal Tribunal has not always been at ease in this area, but appears to be more comfortable with it now. It annulled, in a relatively short decision, a treaty award for the first time, in line with the treaty interpretation rules it had developed over the last couple of years.

90 Ibid., para. 3.2.2.
91 Ibid., para. 3.3.4.
92 Ibid.
Second, the decisions deal primarily with jurisdiction under the treaty at hand. On the one hand, many awards that end up before the Federal Tribunal are awards on jurisdiction. On the other hand, jurisdiction is a very complex and controversial matter in treaty disputes.

Frequently, parties to treaty disputes in Switzerland are represented by foreign counsel. Swiss counsel who were not involved in the underlying arbitration would be engaged for the annulment proceedings before the Federal Tribunal. When the matter reaches the Federal Tribunal, it will often be too late for Swiss counsel to provide guidance on the arbitration itself. Such guidance would typically include raising and maintaining objections to jurisdiction and due process violation throughout the arbitration.

When asked to assist for annulment proceedings Swiss counsel should have a number of reactions specifically based on the Federal Tribunal’s decisions in treaty matters:

- Identify the nature of the award (which determines the grounds available for a challenge).
- Verify whether a waiver agreement pursuant to art. 192 PIL Act exists.
- Put all arguments, legal and factual in the annulment request, including a discussion on waiver language (Art. 192 PIL Act). The second round is limited to rebuttal. The Federal Tribunal will not allow the parties to improve on their first round briefs.
- Request security for costs and a stay of the arbitration or the Federal Tribunal proceedings, if applicable and opportune.
- If jurisdiction is an issue, analyse whether the arbitral tribunal strained from the treaty
interpretation rules applied by the Federal Tribunal.

While the success ratio of annulment requests against treaty based awards is very low, lower even than that of challenges to commercial arbitration awards, hope is not lost for plaintiffs. The Federal Tribunal will, however, not allow plaintiffs to introduce arguments they could have used in the underlying arbitration.
# ANNEX: LIST OF THE REPORTED FEDERAL TRIBUNAL DECISIONS IN TREATY-ARBITRATION MATTERS

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\(^93\) ASA Bull. 2/2009, p. 325.  
\(^96\) ASA Bull. 1/2007, p. 123.  
\(^97\) ASA Bull. 4/2019, p. 941.
## Mission Impossible? – Challenging Treaty Awards

<table>
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100 ASA Bull. 4/2019, p. 972.
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<td>4A_80/2018</td>
<td>7 February 2020</td>
<td>ECT</td>
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103 ASA Bull. 4/2019, p. 1000.
This book contains the written contributions to the 12th conference on “New Developments in International Commercial Arbitration”, organized by the CEMAJ (French acronym for Research Center on Alternative and Judicial Dispute Resolution Methods) of the University of Neuchâtel Faculty of Law.

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