



JURISPRUDENCE OF THE SWISS FEDERAL SUPREME COURT IN SETTING ASIDE AND REVISION PROCEEDINGS INVOLVING INVESTMENT ARBITRATION AWARDS (2020 TO 2022): STRENGTHENING SWITZERLAND AS A PRO-ARBITRATION JURISDICTION

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Jurisprudence of the Swiss Federal Supreme Court in Setting Aside and Revision Proceedings Involving Investment Arbitration Awards (2020 to 2022): Strengthening Switzerland as a Pro-Arbitration Jurisdiction

- [1]. As a pro-arbitration jurisdiction, Switzerland is one of the leading seats for non-ICSID investment arbitration. In the period from 2020 to 2022, the Swiss Federal Supreme Court (“SFSC”) had the opportunity to examine several requests to set aside and/or revise such investment awards. The SFSC’s decisions over the last two years confirm that the rate of setting aside and revision of investment arbitration awards in Switzerland is very low. This is in line with the trend observed in previous years: to date, the SFSC has heard fewer than 30 annulment and revision applications in connection with investment arbitration awards, of which only one resulted in a successful annulment.
- [2]. This contribution provides an overview of the SFSC’s decisions in setting aside and revision proceedings of non-ICSID investment awards from 2020 to 2022. These decisions have not only developed the SFSC’s jurisprudence on investment law, but also reinforce Switzerland as a safe and preferable seat for investment arbitration.

I. Introduction

- [3]. A Swiss seat is often selected for investment arbitration proceedings which fall outside of the institutional arbitration proceedings administered by the International Centre for Settlement of Investment Disputes (“ICSID”). Such investment awards are increasingly subject to setting aside and revision applications before Switzerland’s highest court, the Swiss Federal Supreme Court (“SFSC”). However, the threshold in Switzerland for setting aside or revising international arbitral awards, including investment arbitration awards, is extremely high. The SFSC has heard fewer than 30 setting aside and revision applications in investment arbitration proceedings. Of these applications, only one has been successful.
- [4]. This contribution begins by examining the limited grounds to set aside and revise international arbitral awards in Switzerland (Section II). The authors then analyse a selection of the SFSC’s key decisions on setting aside and revision applications between 2020 and 2022 to explore the complex legal and procedural issues that arise in such proceedings (Section III). The authors conclude that these decisions reinforce the deference that the SFSC accords to arbitral tribunals in their arbitral awards, and further develops the SFSC’s jurisprudence on investment law, all of which are likely to strengthen Switzerland as a preferred seat for non-ICSID investment arbitration (Section IV).

II. Contextualising Switzerland's Approach to Setting Aside and Revision Proceedings

- [5]. The principle that arbitral awards are final is enshrined in Swiss law.¹ Unlike in other jurisdictions which provide for appellate review of the decision on the challenge of an award (such as Germany, France or England), Article 191 of the Swiss Private International Law Act (“PILA”) ascribes to the SFSC the sole authority to set aside international arbitral awards. As a result, Switzerland is one of the few jurisdictions with only one level of judicial review of such awards.
- [6]. Parties may agree, in an arbitration agreement or by subsequent agreement, to waive, in whole or in part, the right to challenge any international arbitral awards rendered thereunder if none of them has their domicile, habitual residence, or seat in Switzerland.² The SFSC has clarified that this waiver must be explicit,³ and is not applicable in sports arbitration.⁴
- [7]. A decision of the SFSC can only be challenged before the European Court of Human Rights in an action against Switzerland for a violation of the European Convention on Human Rights.⁵
- [8]. Accordingly, Switzerland has become one of the leading seats for non-ICSID investment arbitration due to its arbitration-friendly legislation and the pro-arbitration approach adopted by the SFSC.⁶
- [9]. In this section, the authors examine the limited scope of the SFSC's powers to set aside (A) and review (B) arbitral awards.

A. Limited Grounds to Set Aside International Arbitral Awards

- [10]. A party with standing to set aside an international arbitral award must do so within 30 days of its issuance,⁷ and may only do so on limited, exhaustive grounds set out in Article 190(2) of the PILA, namely, that:
- the arbitral tribunal was irregularly constituted, or a sole arbitrator was improperly appointed;⁸
 - the arbitral tribunal wrongly accepted or declined jurisdiction;⁹
 - the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims;¹⁰
 - there is a violation of the right to be heard or the principle of equal treatment of the parties;¹¹ or
 - the award is incompatible with public policy.¹²

- [11]. “Preliminary” (or interim) awards can only be challenged on the first two grounds.¹³ An application to set aside an arbitral award based on grounds outside of Article 190(2) will be inadmissible.¹⁴
- [12]. The SFSC typically issues between 30 and 50 setting aside decisions annually on challenges to international arbitration awards rendered in relation to international commercial, investment and sports disputes.¹⁵ According to a statistical analysis carried out by Dasser and Wójtowicz between 1989 and 2021, only 7.65% of applications to set aside awards that the SFSC heard on the merits led to the successful annulment of the awards in question.¹⁶
- [13]. The same trend can be observed in setting aside proceedings of investment arbitration awards: the SFSC has heard fewer than 30 setting aside and/or revision applications in investment-treaty arbitration proceedings since 2000,¹⁷ of which only **one** application has been successful.¹⁸ These statistics illustrate that the SFSC's approach to challenge applications is stringent and, consequently, inherently arbitration-friendly.
- [14]. The SFSC has full power of review over legal issues; in particular, challenges to an arbitral tribunal's decision on jurisdiction (including questions of interpretation of the notions of investor and investment, umbrella clauses, illegality, *etc.*).¹⁹ When interpreting investment protection treaties, the SFSC relies on customary international law rules on treaty interpretation as reflected in the Vienna Convention on the Law of Treaties (1969).²⁰
- [15]. However, the SFSC's power to review an arbitral tribunal's factual findings is limited. The SFSC considers itself bound by an arbitral tribunal's findings of fact, even if such findings are manifestly wrong or are raised in the context of a party's challenge of an award on grounds of jurisdiction. The SFSC will only review factual findings where (i) an applicant has raised grounds for a challenge under Article 190(2) of the PILA and that challenge refers to the way the arbitral tribunal established a specific fact, *e.g.*, through a violation of fundamental procedural guarantees (Article 190(2)(d)) or procedural public policy (Article 190(2)(e)); or (ii) there are new facts that the SFSC is exceptionally required to consider (*e.g.* in the case of revision proceedings analysed below).²¹

B. Limited Grounds to Revise International Arbitral Awards

- [16]. In certain, exceptional circumstances, parties may request revision of an international arbitral award on three limited grounds set out in newly adopted Article 190a of the PILA, effective from 1 January 2021; namely, where:
- a party subsequently discovers material facts or conclusive evidence that existed before the award was issued and which, despite the exercise of due diligence, a party was unable to produce in the arbitration proceedings;²²

- the outcome of an arbitral award has been influenced by criminal conduct;²³ and/or
- circumstances give rise to a legitimate doubt as to a member of the arbitral tribunal's independence or impartiality which came to light only after the conclusion of the arbitration proceedings, despite the exercise of due diligence.²⁴

[17]. The above grounds apply to requests for revision filed after 1 January 2021, even if the challenged award was issued before that date.²⁵ The second ground above is not waivable under Swiss law.

[18]. A request for revision under Article 190a of the PILA must be filed within 90 days of discovering the ground for revision, and, in any case, no later than ten years from the date on which the award was communicated.²⁶ If the SFSC upholds a request for revision, it will set aside the award and remand the matter to the arbitral tribunal for it to render a new award.²⁷

[19]. Between 2020 and early 2023 (*i.e.*, slightly beyond the reporting period), the SFSC considered requests for revision of investment arbitration awards based on Article 190a PILA in two cases: *Croatia v. MOL Hungarian Oil and Gas Company Plc*²⁸ and *India v. Deutsche Telekom*.²⁹ These cases, which are further considered in Section III.A below, illustrate the limited circumstances in which revision can be invoked. Therefore, it is unlikely that this remedy will have a negative impact on Switzerland as a preferred seat of international arbitration, including in relation to investment disputes.

III. Complex Procedural and Substantive Issues Arising out of Setting Aside and Revision Proceedings in Switzerland between 2020 and 2022

[20]. Between 2020 and 2022, the SFSC rendered several important decisions in setting aside and revision proceedings of investment arbitration awards. Among the most notable decisions is the SFSC's decision in *Russian Federation v. Yukos Capital Limited* (the longest decision published in the context of setting aside proceedings in Switzerland to date),³⁰ in which the SFSC clarified several issues of Swiss procedural law and public international law that will be relevant to future setting aside proceedings before the SFSC. Another landmark decision is the SFSC's annulment of the *Clorox Spain S.L. v. Venezuela* award,³¹ which is the first – and only – annulment of an international investment arbitral award in Switzerland to date.

[21]. In this section, the authors analyse a number of procedural (A) and substantive (B) issues that have arisen in setting aside and revision proceedings between 2020 and early 2023 (*i.e.*, slightly beyond the reporting period).

A. Procedural Issues

[22]. The SFSC has recently considered a number of procedural issues arising in the context of setting aside and revision proceedings; namely, whether revision can be invoked in the presence of an express waiver of an “appeal” against arbitral awards (1), or on the basis of new material evidence or evidence that the final award had been influenced by criminal conduct (2). The SFSC has also considered whether a preliminary award on jurisdiction in the form of a procedural order can be set aside (3), and whether new evidence is admissible in setting aside and revision proceedings (4).

1. Waiver of a Challenge or Revision of an Arbitral Award

[23]. As explained above,³² parties with their domicile, place of habitual residence, or seat outside of Switzerland may explicitly waive the right to challenge, or request revision of, an arbitral award.

[24]. In *Croatia v. MOL Hungarian Oil and Gas Company Plc*,³³ considered in further detail below, the SFSC considered whether a waiver of appeal against a final international arbitral award also precluded revision of that award under Article 190a of the PILA, which is a question of interpretation.³⁴ The waiver clause in that case read as follows:

*“Awards rendered in any arbitration hereunder shall be final and conclusive and judgment thereon may be entered into any court having jurisdiction for enforcement thereof. There shall be no appeal to any court from awards rendered hereunder.”*³⁵

[25]. The SFSC declared the request for revision inadmissible,³⁶ ruling that the parties' broad and explicit waiver of appeal constituted a corresponding waiver of revision.³⁷ In so holding, the SFSC reaffirmed its earlier case law that the term “appeal”, on a broad interpretation, is a generic term that encompasses most diverse legal grounds, and on a more prescriptive interpretation, is synonymous with the term “revision”.³⁸

[26]. Accordingly, the SFSC will interpret a broad waiver clause as excluding all forms of recourse against an arbitral award unless the parties specify, with reference to the relevant sub-paragraphs of the PILA, which recourse is intended to be excluded.³⁹

2. Revision of an Award Based on New Material Evidence or Evidence that the Final Award Had Been Influenced by Criminal Conduct

- [27]. The SFSC has issued two decisions in respect of applications to revise international investment awards in the reporting period. In both cases, the applications for revision were denied. However, the SFSC provided observations on the admissibility and merits of the applications.
- [28]. In *Croatia v. MOL Hungarian Oil and Gas Company Plc* (discussed above in the context of the waiver), Croatia sought revision of a 2016 final award pursuant to Articles 190a(1)(a) and 190a(1)(b) of the PILA on the basis that new evidence – namely, a 2021 decision of the Croatian Supreme Court which found that the former Croatian Prime Minister had accepted a bribe from the respondent's CEO in connection with the conclusion of the investment agreements in dispute in the arbitration – had come to light, and that this new evidence evinced that the award had been influenced by criminal conduct.⁴⁰
- [29]. The SFSC held that revision under Article 190a(1)(a), *i.e.*, where a party subsequently discovers material facts or conclusive evidence that existed before the award was issued and which, despite the exercise of due diligence,⁴¹ was inadmissible in light of the broad and explicit waiver of revision discussed above.⁴² In any event, the SFSC held, the 2021 Croatian Supreme Court decision was based on evidence which had been heard by the lower instance court in Croatia, which proceedings had concluded in 2019.⁴³ Therefore, Croatia was aware of the “new” evidence long before the publication of the decision in 2021.⁴⁴ Accordingly, the request for revision had not been filed within 90 days of the alleged evidence coming to light, as required in Article 190a(2) of the PILA.⁴⁵ Thus, the SFSC observed, Croatia would not have succeeded in grounding a request for revision under Article 190a(1)(a) in any event, as the evidence came into existence after the award was issued.⁴⁶
- [30]. As regards the second ground for revision under Article 190a(1)(b), *i.e.*, where the outcome of an arbitral award has been influenced by a criminal offence,⁴⁷ the SFSC considered that arbitral tribunals are not bound by decisions of State criminal courts on the same set of facts, and that inconsistent findings between the former and the latter are not enough to trigger Article 190a(1)(b) unless the State criminal court's decision is material to the arbitral tribunal's findings in its final award.⁴⁸
- [31]. In *India v. Deutsche Telekom*,⁴⁹ India sought revision of a 2017 interim award (establishing the arbitral tribunal's jurisdiction and finding that the respondent breached the standard of the fair and equitable treatment under the BIT in question) and a 2020 final award on the basis that it had discovered new facts and evidence; namely, a 2022 decision of the Supreme Court of India that suggested that the investment in question was made unlawfully (India invoked Article 190a(1)(a) of the PILA).⁵⁰ The SFSC held that India's request for revision was inadmissible in respect of each award.⁵¹
- [32]. As to India's request for revision of the interim award, the SFSC confirmed that applications for revision can be filed against final, partial or interim awards, provided that the challenged decision is binding on the arbitral tribunal (*i.e.*, the decision cannot be subsequently amended by the arbitral

tribunal, unlike, for instance, procedural orders or decisions on provisional measures).⁵² However, in this case, the SFSC had previously dismissed India's application to set aside the interim award.⁵³ In these circumstances, a request for revision lay not against the interim award, but rather, the SFSC's decision dismissing India's challenge of this award,⁵⁴ as only the latter decision is final and binding in the Swiss legal order.⁵⁵

[33]. As regards India's request for revision of the final award, the SFSC did not consider the 2022 decision of the Supreme Court of India to constitute “new” facts or evidence going to the legality of the investment, as the facts and evidence had already been established by quasi-judicial tribunals of lower instances, of which India had knowledge.⁵⁶ For the SFSC, it was immaterial whether the decisions of quasi-judicial bodies on the facts and evidence were final or not, as the decisive factor was India's knowledge of subsequently discovered material facts and not the authoritative determination by a judicial authority.⁵⁷ In any case, the evidence came into existence after the award was issued.⁵⁸

[34]. Therefore, India's request for revision under Article 190a(1)(a) of the PILA failed.

[35]. To sum up, *Croatia v. MOL Hungarian Oil and Gas Company Plc* and *India v. Deutsche Telekom* are useful additions to the growing body of cases on the application of Article 190a of the PILA, as they confirm that: (i) where arbitral awards have been challenged in the past, any request for revision thereof should be brought against the SFSC's decision and not against the award itself; (ii) the 90-day deadline to request revision starts running once an applicant is aware of the new facts or evidence, which need not have been definitively adjudicated by a State court or other judicial body; and (iii) arbitral tribunals examining allegations of criminal conduct are not automatically bound by the decisions of State criminal courts concerning the same allegations.

[36]. It remains to be seen whether parties will be able to avail themselves of revision in the future, given the extremely narrow ambit of application of this extraordinary remedy.

3. Setting Aside a Preliminary Award on Jurisdiction in the Form of a “Procedural Order”

[37]. As explained above,⁵⁹ “final” awards may be set aside on the five grounds in Article 190(2) of the PILA, and “preliminary” (or interim) awards may only be set aside on two of the five grounds, namely Articles 190(2)(a) and 190(2)(b).⁶⁰ Article 190 of the PILA does not otherwise define what is meant by an “award”.

[38]. Final awards, final partial awards which definitively end a part of the dispute, and preliminary

awards which settle preliminary questions of substance (e.g., jurisdiction) or procedure (e.g., the appointment or constitution of an arbitral tribunal) are eligible for immediate challenge.⁶¹

- [39]. In *Spain v. AES Solar and others (PV Investors)*,⁶² the SFSC considered whether an arbitral tribunal's procedural order refusing to revisit its preliminary award on jurisdiction constituted a preliminary award for the purposes of Article 190(3) of the PILA.
- [40]. In that case, the arbitral tribunal had issued a preliminary award on jurisdiction in 2014 in which it declared itself competent to hear the dispute under the Energy Charter Treaty ("ECT"). The preliminary award addressed all of Spain's jurisdictional objections, including its intra-EU objection. The preliminary award was not challenged.⁶³
- [41]. After *Achmea*,⁶⁴ Spain requested that the arbitral tribunal consider a new jurisdictional objection based on *Achmea*. The arbitral tribunal rejected Spain's request in the form of a procedural order, confirming that it would not revisit its preliminary award on jurisdiction, as the arbitral tribunal had already finally settled the issue of jurisdiction (and, in particular, Spain's intra-EU objection), irrespective of *Achmea*. This procedural order was neither challenged, nor did Spain raise any objections to it during the remainder of the arbitration.⁶⁵
- [42]. Following another exchange of submissions on publicly available documentation related to *Achmea*, Spain requested the arbitral tribunal to reconsider its jurisdiction *ex officio*.⁶⁶ After a further round of written submissions, the arbitral tribunal denied Spain's request and set out its reasons in its final award. The arbitral tribunal observed that its preliminary award on jurisdiction had not been challenged and thus had *res judicata* effect.⁶⁷ The arbitral tribunal also made reference to its procedural order.
- [43]. Spain sought to set aside the final award on the basis that the arbitral tribunal, in its procedural order, had (i) violated its right to be heard by refusing to examine Spain's new jurisdictional objection (Article 190(2)(d) of the PILA); and (ii) misapplied the principle of *res judicata* by wrongly considering itself bound by the preliminary award on jurisdiction, in violation of procedural public policy (Article 190(2)(e) of the PILA).⁶⁸
- [44]. The SFSC upheld the arbitral tribunal's final award. In so doing, the SFSC characterised the arbitral tribunal's procedural order as a preliminary decision on jurisdiction within the meaning of Article 186(3) of the PILA,⁶⁹ the purpose of which was to confirm the arbitral tribunal's preliminary award on jurisdiction.⁷⁰ Accordingly, as Spain had not challenged this procedural order within the 30-day time limit (Article 190(4) of the PILA), it was precluded from challenging it.⁷¹
- [45]. The SFSC observed the awkwardness in Spain's complaint, which effectively criticised the reasons underlying the arbitral tribunal's decision not to reconsider its jurisdiction, but which did not

complain of a lack of jurisdiction *per se* (i.e., the ground for challenge in Article 190(2)(b) of the PILA).⁷² On that basis, the SFSC saw no need to consider whether procedural public policy had been violated.⁷³ The SFSC also rejected Spain's complaint that its right to be heard was violated.⁷⁴

- [46]. The SFSC took the opportunity to reconfirm that preliminary awards do not enjoy the effects of *res judicata*, although such awards remain binding on the arbitral tribunals from which they emanate.⁷⁵
- [47]. *Spain v. AES Solar and others (PV Investors)* is a helpful reminder that the content of an arbitral award, as opposed to its title or form, must be examined in order to determine whether the award has definitively disposed of the substantive or procedural issues in dispute. Where an arbitral tribunal addresses jurisdictional issues in the form of a procedural order, that decision may qualify as a preliminary award on jurisdiction under Swiss law and could thus be open to challenge within 30 days of its notification.
- [48]. It should also be borne in mind that an award (or procedural order) that decides some but not all jurisdictional issues cannot be challenged until the arbitral tribunal has decided, in a partial or final award, the question of its jurisdiction in its entirety.⁷⁶ For example, in *Russian Federation v. Yukos Capital Limited*, the SFSC considered that the Russian Federation's request to set aside an award which only decided three out of five jurisdictional objections was premature and therefore inadmissible.⁷⁷

4. Admissibility of New Facts and Evidence in Setting Aside Proceedings in Limited Circumstances

- [49]. In *Russian Federation v. Yukos Capital Limited*, the SFSC clarified the admissibility of new facts and evidence in setting aside proceedings.⁷⁸
- [50]. The SFSC recalled that the prohibition against presenting new facts and evidence in challenge proceedings before the SFSC (Article 99(1) of the SSCA) pertains to evidence concerning the state of *facts*, but not to evidence which supports *new legal arguments* advanced by a party to those proceedings, provided that it is produced within the time limit for lodging the challenge.⁷⁹
- [51]. As the SFSC's review is limited to an arbitral tribunal's legal findings based on the state of the law prevailing up to the date of issuance of the challenged award, new legal evidence (e.g., legal opinions, legal commentaries, or case law) which reflects or describes the state of the law before the issuance of the award will be admissible, whereas new legal evidence which reflects or describes developments in the law post-award will not be admissible.⁸⁰

- [52]. The SFSC left open the question as to whether new legal evidence would qualify as a new legal or factual exhibit, depending upon the argument for which the evidence is supporting.⁸¹
- [53]. Therefore, the SFSC's ruling is a useful reminder that while new factual evidence is generally inadmissible in challenge proceedings, new legal evidence can be accepted if it supports new legal arguments and reflects the state of the law up to the issuance of the challenged award. However, the admissibility of new legal evidence as a factual or legal exhibit depends on the specific argument it supports.

B. Substantive Issues

- [54]. The SFSC's recent jurisprudence has considered a number of substantive issues, including whether arbitral tribunals wrongly accepted or declined jurisdiction on the basis of its interpretation of “investor” and “investment” (Article 190(2)(b) PILA) (1) or ruled beyond the claims submitted to it (*extra/ultra petita*) (Article 190(2)(c) PILA) (2). The SFSC also considered whether challenged awards were incompatible with public policy (Article 190(2)(e) PILA) (3).

1. Jurisdiction (Article 190(2)(b) of the PILA)

- [55]. Under Article 190(2)(b) of the PILA, an award may be set aside “where the arbitral tribunal wrongly accepted or declined jurisdiction”.⁸² If the SFSC upholds a challenge to an arbitral tribunal's jurisdiction, the SFSC may itself declare the jurisdiction or lack of jurisdiction of the arbitral tribunal.⁸³
- [56]. In considering applications to set aside investment arbitration awards based on this ground during the reporting period, the SFSC has been faced with various jurisdictional issues, such as whether: the illegality of an investment is a jurisdictional issue (a); the term “protected investment” requires an investment to have been made actively (b) and with an economic contribution and risk on the part of the investor (c); the term “protected investor” prohibits abusive restructuring (d); and the ECT may be provisionally applied to establish jurisdiction (e).
- [57]. This section considers two important decisions of the SFSC, *Russian Federation v. Yukos Capital Limited*⁸⁴ and *Clorox Spain S.L. v. Venezuela*,⁸⁵ which provide useful guidance on these jurisdictional issues.

a) Is the Illegality of an Investment a Jurisdictional Issue?

- [58]. Whether illegality of an investment pertains to jurisdiction, admissibility, or to the merits of the dispute is not settled in international investment law.⁸⁶ Many investment tribunals have considered illegality of an investment as a jurisdictional question,⁸⁷ even where the applicable treaty did not contain an explicit legality requirement.⁸⁸
- [59]. This question has significant implications in setting aside proceedings before the SFSC, as the SFSC has unlimited powers to review jurisdictional questions, whereas its merits review is limited by law to the question of whether there has been a violation of public policy.⁸⁹ The SFSC recently considered this question in *Russian Federation v. Yukos Capital Limited*. This decision is one of the most recent developments in the wave of international arbitrations initiated by the Yukos group of companies, seeking compensation from the Russian Federation for the alleged expropriation of its assets.
- [60]. In that case, the SFSC held that the arbitral tribunal had validly assumed jurisdiction on the basis of the provisional application of the Energy Charter Treaty,⁹⁰ and that Yukos Capital Limited's investment in the Russian Federation was not illegal. The investment in this case comprised loans granted by the investor (Yukos Capital Limited, incorporated in Luxembourg) to Yukos Oil (the investor's Russian-based parent company). These loans were never repaid to the investor, because a court of the Russian Federation subsequently declared Yukos Oil bankrupt, and Yukos Oil was liquidated before it repaid the loans to the investor.
- [61]. Before the SFSC, the Russian Federation asserted that the arbitral tribunal had unduly restricted its examination of the legality of the investment to the question of whether a criminal intent of the investor could be established, which was not found in this case. In its view, the arbitral tribunal had failed to address certain of its arguments that the intra-group loans were part of a complex system of tax evasion in violation of Russian taxation laws and the double taxation treaty between the Russian Federation and Luxembourg.⁹¹ The SFSC found this grievance inadmissible for two reasons.
- [62]. First, in the absence of an express legality requirement in the ECT (or any other evidence that the parties intended to condition their consent to arbitration on the legality of investment, e.g., in *travaux préparatoires*),⁹² the legality of the investment is a question which pertains to the merits of the dispute, rather than to the arbitral tribunal's jurisdiction thereover.⁹³
- [63]. Second, the Russian Federation's complaint goes to an alleged violation of the right to be heard (Article 190(2)(d) of the PILA) and not to an erroneous decision on jurisdiction.⁹⁴
- [64]. Therefore, there was no basis for the SFSC to set aside the award pursuant to Article 190(2)(b) of the PILA. Accordingly, the SFSC upheld Yukos Capital's multi-billion-dollar award against the Russian Federation.
- [65].

It remains to be seen whether the SFSC will have cause to revisit its opinions on this question in future setting aside proceedings. For now, the SFSC's position that illegality of an investment pertains to jurisdiction is consistent with its previous case law,⁹⁵ as well as the approach adopted by a number of prominent investment tribunals. However, the SFSC left the door open for a case-by-case interpretation of investment treaties in the absence of an express compliance clause. In order to ascertain whether a host State intended to restrict its consent to arbitration (in which case the issue pertains to jurisdiction) to investments complying with its own legislation, it is necessary to ascertain what the host State's intentions were taking into account all the circumstances of the specific case; in particular, the text of the said clause, its place in the treaty, and, where appropriate, the conditions under which the clause was adopted based on the *travaux préparatoires*.

b) “Protected Investment”: Is There a Requirement for an “Active” Investment?

- [66]. In the first and (so far) only SFSC decision setting aside an investment arbitral award, *Clorox Spain S.L. v. Venezuela*,⁹⁶ the SFSC found that the arbitral tribunal had wrongly declined jurisdiction over the dispute based on an erroneous application of the Spain-Venezuela BIT.⁹⁷
- [67]. In its ruling on jurisdiction, the arbitral tribunal considered that the BIT in question, which protects “assets invested by investors”, required an active act of investment by the investor. The arbitral tribunal concluded that the investment in question (shareholding in a Venezuelan company) – which was initially made by a company located in a third State (the USA) and then transferred to the investor (a newly created Spanish company) without consideration – was not an active act of investment carried out by the investor itself and, therefore, the investment did not qualify for protection under the BIT. Upon that basis, the arbitral tribunal held that it lacked jurisdiction *ratione materiae*,⁹⁸ and thus, considered that it was not compelled to determine Venezuela's other jurisdictional objections, including its objection of an alleged abuse of rights by the investor.⁹⁹
- [68]. Before the SFSC, the investor argued *inter alia* that the arbitral tribunal had wrongly introduced conditions for the existence of an investment which were not contained in the BIT and had applied those conditions in a manner contrary to the BIT's object and purpose of encouraging and protecting existing and future investments. According to the investor, the holding of assets in the host State, and not the act of investment itself, was decisive to obtain the BIT's protection.¹⁰⁰
- [69]. The SFSC agreed with the investor that there was no textual basis in the BIT for interpreting the phrase “invested by investors” as imposing a requirement that an investment must have been made by an investor itself and in exchange for consideration. The SFSC observed *inter alia* that the asset-based definition of “investment” in the BIT was very broad, and there were no limitation clauses in the BIT (e.g., a denial of benefits clause or origin of capital clause) restricting the scope of investment protection. Thus, the SFSC concluded, the arbitral tribunal had imposed additional requirements for

investment protection which were not provided for in the BIT, and in ruling that these requirements had not been fulfilled, had erroneously determined that it did not have jurisdiction.¹⁰¹

[70]. As the arbitral tribunal had not yet determined Venezuela's jurisdictional objection concerning an alleged abuse of rights, the SFSC declined to decide on the arbitral tribunal's jurisdiction and remanded the matter back to the arbitral tribunal for a new decision on jurisdiction, including on the question of an abuse of rights and Venezuela's other jurisdictional objections.¹⁰²

[71]. Some investment tribunals have held, prior to the SFSC's decision in *Clorox Spain S.L. v. Venezuela*, that an investment must be made in an active way in order to trigger treaty protection and thus, an investment tribunal's jurisdiction.¹⁰³ Therefore, whether an investment must be made actively or can be passively held in order to qualify for treaty protection is a question which remains unsettled in international investment law.

[72]. However, and more importantly for the development of Switzerland's jurisprudence on setting aside proceedings, *Clorox Spain S.L. v. Venezuela* represents a more assertive approach on the part of the SFSC to reviewing the definition of "investment" in investment treaties, as historically, the SFSC has indicated a degree of deference to "specialist" arbitrators on this question.¹⁰⁴ The SFSC's willingness to interpret international investment treaties independently, and to correct erroneous decisions on interpretation by arbitral tribunals where necessary, is likely to further strengthen Switzerland as a preferred seat in non-ICSID investment treaty arbitrations.¹⁰⁵

c) "Protected Investment": Must There be an Economic Contribution and Risk?

[73]. In *Russian Federation v. Yukos Capital Limited*,¹⁰⁶ the SFSC was required to consider, as part of the Russian Federation's assertion that the arbitral tribunal erred in its determination that there was a protected investment under the ECT, whether economic contribution and risk are criteria inherent in the concept of investment.¹⁰⁷

[74]. The investment in this case comprised loans granted by Yukos Capital Limited to its Russian-based parent company, Yukos Oil, using funds which the investor had borrowed from subsidiaries of Yukos Oil. The latter had no right of recourse against the investor in the event of Yukos Oil's default under the loans. A court of the Russian Federation subsequently declared Yukos Oil bankrupt, and Yukos Oil was liquidated before it repaid the loans to the investor.¹⁰⁸

[75]. The arbitral tribunal held that the loans constituted assets in the form "other debt of a company" associated with an economic activity in the energy sector and thus, a protected investment within

the meaning of Article 1(6) of the ECT.¹⁰⁹

- [76]. Before the SFSC, the Russian Federation argued that the arbitral tribunal had *inter alia* “ignored the economic and legal reality” that the investor was not the true economic owner of the loans, but rather, a vehicle through which the loans transited for tax avoidance purposes. As such, there was no genuine economic contribution or risk on the part of the investor associated with the loans. According to the Russian Federation, these criteria are inherent in the concept of investment and thus, form part of the test as to whether there has been an investment within the meaning of Article 1(6) of the ECT. In the absence of these criteria, the loans did not constitute a protected investment under the ECT.¹¹⁰
- [77]. The SFSC rejected the Russian Federation's arguments and noted that there was no unanimously accepted definition of an investment.¹¹¹ The SFSC observed that investment tribunals are divided on whether contribution and risk are criteria inherent in the notion of investment within the meaning of Article 1(6) of the ECT, as well as in the definition of investment more generally.¹¹² The SFSC ultimately concluded that it is “questionable” whether these criteria have textual support in the definition of investment in Article 1(6), and on that basis, there was no need to examine the question further (although, in the SFSC's view, the arbitral tribunal was correct to hold that the investor would have satisfied these criteria in any event).¹¹³
- [78]. It remains to be seen whether the SFSC will adopt the “subjective” approach, which focuses on how the term “investment” is defined in the applicable investment treaty and which has been adopted by a number of investment tribunals, or the broader “objective” approach, which seeks to define the general characteristics or inherent criteria that are used to determine whether a particular asset qualifies as an investment.¹¹⁴ Given that many investment treaties contain broad asset-based definitions of an investment (e.g., “any asset... including, but not limited to...”), the question has practical implications: the “objective” approach tends to lead more easily to a dismissal of the case than the “subjective” approach, which often is more favourable to claimants (depending on the terms of the investment treaty in question).¹¹⁵ Although the SFSC has left the question open for now, its latest pronouncement on this issue suggests a preference for the “subjective” approach.

d) “Protected Investor”: Prohibition of Abusive Restructuring

- [79]. The prohibition against an abuse of rights, which is a remedy intended to limit manoeuvres that do not objectively deserve treaty protection, is a general principle recognised internationally and under Swiss public policy.¹¹⁶
- [80]. In *Venezuela v. Clorox Spain S.L.*,¹¹⁷ the SFSC clarified that the temporal factor is decisive in drawing the line between legitimate nationality planning, on the one hand, and an investor's abusive changes of nationality for the purposes of gaining treaty protection (i.e., treaty abuse), on the other.

Investment treaty protection should thus be denied where an investor restructures at a time when the dispute giving rise to the arbitration proceedings in question would have been reasonably foreseeable to an investor in same situation at the time of the restructuring in light of all the surrounding circumstances. The SFSC clarified that an abuse of rights must be interpreted in a restrictive manner.¹¹⁸

[81]. In *Russian Federation v. Yukos Capital Limited*, the Russian Federation asked the SFSC to set aside the award under Article 190(2)(b) of the PILA on the basis that the investor's conduct constituted an abuse of the protection under the ECT. According to the Russian Federation, the investor's conduct was abusive for two reasons.

- First, the investor's loans to Yukos Oil constituted circular flows of capital designed to avoid taxes which is incompatible with the ECT's purpose of promoting genuine investments in the energy sector.¹¹⁹

- Second, at time the investor granted the second of the two loans to Yukos Oil, it was foreseeable that the loan would not be repaid, given the tax and criminal investigations pending against Yukos Oil and its directors in the Russian Federation.¹²⁰

[82]. The SFSC held that there was no textual support in the ECT for the Russian Federation's first argument: there was no basis in the ECT to suggest that an investment motivated solely by tax reasons is incompatible with the purpose of the ECT, which seeks to promote all investments (broadly defined) associated with an economic activity in the energy sector.¹²¹

[83]. The SFSC dismissed the Russian Federation's second argument that granting a loan in circumstances where it is foreseeable that this loan would not be repaid amounted to an abuse of rights. It held that the arbitral tribunal had correctly considered that the question of whether the risk of default was foreseeable was one which goes not to jurisdiction or admissibility, but rather, to causation and the claimant's contribution to its own damage, which are legal findings beyond the SFSC's powers of review. In any event, the SFSC held, the risk of the investor not obtaining repayment of the amounts loaned to Yukos Oil was not objectively foreseeable at the time the second loan was concluded.¹²²

[84]. These decisions reinforce that the SFSC will only determine an abuse of rights in very limited circumstances, and that an investment which is structured to avoid tax is not such a circumstance. The party claiming an abuse of rights (*i.e.*, the host State) must prove that the dispute was foreseeable at the time of the restructuring. If it succeeds in doing so, it is presumed that the restructuring was abusive. The investor may, however, rebut this presumption by proving that the restructuring has in fact been carried out predominantly for reasons other than claiming the protection of the BIT.

e) Provisional Application of the ECT to Establish Jurisdiction

- [85]. In *Russian Federation v. Yukos Capital Limited*, the SFSC considered whether the provisional application of the ECT based on Article 45(1) of the ECT shielded the Russian Federation from investor-State arbitration under that treaty.
- [86]. In that case, the arbitral tribunal assumed jurisdiction under Article 26 of the ECT on the basis of a provisional application of the ECT (Article 45(1)). Article 45(1) of the ECT is a “domestic exception” clause which provides that provisional application of the ECT must not be inconsistent with the signatory State's constitution, laws or regulations.¹²³ This wording appears to give priority to national law over the treaty during the period of provisional application.
- [87]. Before the SFSC, the Russian Federation asserted that the arbitral tribunal had erroneously assumed jurisdiction as Russian domestic law is incompatible with, and thus precludes, the provisional application of the ECT based on Article 45(1) of the ECT.¹²⁴ Accordingly, the question before the SFSC was: does Article 45(1) preclude an investor from invoking the ECT's dispute resolution mechanism (Article 26 of the ECT) in order to commence an investor-State arbitration against the Russian Federation?
- [88]. The SFSC answered this question in the negative and rejected the Russian Federation's arguments. According to SFSC, Russia bore the burden of demonstrating that the provisional application of the treaty generally and the arbitration agreement specifically are inconsistent with its legal order – which the Russian Federation failed to do.¹²⁵ In fact, Russian law expressly contemplates arbitration as a mechanism for the resolution of disputes with a foreign investor.¹²⁶
- [89]. The SFSC also noted *en passant* that Article 45(1) allowed for two possible interpretations:
- First, that the wording “such provisional application” refers to the provisional application of the ECT in its entirety, in which case, a State could refuse to provisionally apply the ECT only if the principle of the provisional application is incompatible with its domestic law (*i.e.*, the “all or nothing” approach: either the entire treaty applies, or it does not apply at all).¹²⁷
 - Alternatively, that a State should provisionally apply certain provisions of the ECT except those which are incompatible with its domestic law (*i.e.*, the “piecemeal” approach, based on the wording “to the extent”, which implies that the scope of the provisional application may vary).¹²⁸
- [90]. The Russian Federation submitted that the clause requires a “piecemeal” approach, which involves analysing whether each provision of the ECT is consistent with the constitution, laws and regulations of the Russian Federation. In contrast, the former Yukos shareholders argued that the inquiry is an “all-or-nothing” exercise which requires an analysis and determination of whether the principle of provisional application *per se* is inconsistent with the constitution, laws or regulations of the Russian Federation.
- [91].

As the SFSC found that Russian law did not prohibit the provisional application of the ECT,¹²⁹ the SFSC was not compelled to make (nor did it volunteer) a final pronouncement on the correct interpretation of Article 45(1).¹³⁰ Accordingly, it remains to be seen whether the SFSC will adopt an “all or nothing” or “piecemeal” approach to the interpretation of Article 45(1) in the future. There are important practical implications of endorsing either approach: if a host State's legislation does not contain a prohibition on the provisional application of treaties (as was the case of the Russian Federation), the “all or nothing” approach typically favours investors, as all treaty provisions would apply as if the entire treaty were already in force; by contrast, the “piecemeal” approach is more favourable to States, as it may allow host States to raise arguments on possible inconsistencies between its domestic law and procedural and substantive provisions of the treaty in question.

- [92]. However, the SFSC made several important clarifications in respect of provisional application of the ECT *en passant*. First, provisional application is the rule under the ECT, whereas the domestic exception clause is, indeed, the exception: there is no requirement that national legislation specifically authorize the provisional application of treaties.¹³¹ Second, the party alleging incompatibility between the provisional application of an ECT provision and its domestic law bears the onus of proving such incompatibility.¹³² Third, the relevant date for assessing any such incompatibility is the date on which the arbitration was initiated.¹³³

2. Ultra/extra petita (Article 190(2)(c) of the PILA)

- [93]. Under Article 190(2)(c) of the PILA, a party may challenge an award “where the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims”.¹³⁴ This includes decisions awarding more (*ultra petita*) or something different (*extra petita*) than what was requested.¹³⁵

- [94]. In *Güriş İnşaat ve Mühendislik A.Ş. and others v. Syria*,¹³⁶ the investors sought to set aside a 2020 award on the basis that the arbitral tribunal ruled *extra petita* when it awarded compensation in a different currency (US dollars, or “USD”) than the currency requested by the investors (Syrian pounds, or “SYP”).¹³⁷ The SFSC rejected the investors' argument based on unusual reasoning.

- [95]. The SFSC began by conceding that, “technically speaking”, the arbitral tribunal's award of compensation in SYP (instead of USD) is something different to what the claimants had requested (in the words of the SFSC, an “*aliud*”).¹³⁸ The SFSC also recalled that, in Swiss domestic litigation, a decision that orders payment in Swiss francs as opposed to the parties' agreed currency (*e.g.*, the currency of the contract in dispute) is vulnerable to being annulled.¹³⁹

- [96]. Notwithstanding these observations, the SFSC did not analyse whether, *in casu*, the award violated Article 190(2)(c) of the PILA. Rather, the SFSC rejected the investors' arguments on the basis that the

investors lacked a legitimate “interest worthy of protection” in the annulment of the award (Article 76(1)(b) of the SSCA). The decision to set aside must provide the claimants with some practical utility. However, in this case, both parties had already spent significant amounts of arbitration fees and costs, and the precarious situation of the host State, bogged down in armed conflicts for a decade, should be taken into account. The investors had not satisfied the SFSC that they would have obtained a more favourable decision if the award were to be set aside and the case remanded to the arbitral tribunal: in this scenario, the SFSC assumed that the arbitral tribunal would maintain its award of compensation in SYP, as doing so would not violate public policy (this was the finding of the SFSC on the investors' second ground for the challenge under Article 190(2)(e) of the PILA). Moreover, the SFSC held, even if the investors were to initiate another arbitration with new claims in a currency other than USD, there is no indication that the outcome would be more favourable to them, however unsatisfactory the outcome may be for the parties concerned.¹⁴⁰

- [97]. In so holding, the SFSC avoided determining – at least for now – whether an arbitral tribunal may deviate from issuing a monetary award in the currency requested by a claimant,¹⁴¹ which is unfortunate.¹⁴² Such a determination will be helpful in the future, particularly in light of the SFSC's observations *en passant* that the principle of disposal (*i.e.*, the parties' right to choose the currency) need not be applied with the same rigour in international commercial law as in a case governed by Swiss law; that precise rules on the currency of compensation are lacking when the applicable treaty is silent on the matter; and that arbitrators enjoy wide discretion in awarding “adequate” compensation.¹⁴³
- [98]. The SFSC's reasoning has been criticised as unconvincing, as it cannot be excluded that a new set of arbitration proceedings may well have led to a more favourable outcome for the investors.¹⁴⁴
- [99]. Accordingly, *Güriş İnşaat ve Mühendislik A.Ş. and others v. Syria* has limited precedential value for future investment arbitration awards challenged under Article 190(2)(e) of the PILA.¹⁴⁵

3. Public Policy (Article 190(2)(e) of the PILA)

- [100]. Under Article 190(2)(e) of the PILA, an award may be set aside where it is “incompatible with public policy”.¹⁴⁶ An award is considered incompatible with public policy if its result (as opposed to the arbitral tribunal's reasoning) disregards the essential and widely recognised values which, according to the prevailing view in Switzerland, should form the basis of any legal order.¹⁴⁷ This occurs if fundamental principles of substantive law are violated to such an extent that the violation can no longer be reconciled with the relevant legal order and system of values.¹⁴⁸ *Pacta sunt servanda*, the duty to act in good faith, the prohibition of abuse of rights, expropriation without compensation, and discrimination are illustrations of such values.¹⁴⁹ Reaching the threshold for setting aside an international arbitral award on this ground is a rare occurrence.¹⁵⁰

[101]. In *Gürüş İnşaat ve Mühendislik A.Ş. and others v. Syria*,¹⁵¹ the SFSC acknowledged that the awarded compensation was very low and that investors should normally not bear the risk of depreciation of a host State's currency, but nonetheless refused to set aside the award after taking into account the circumstances of the case.¹⁵²

[102]. In *Russian Federation v. Yukos Capital Limited*, the Russian Federation asserted that the arbitral tribunal had wrongly awarded Yukos Capital Limited compensation corresponding to the loss of capital and interest due under a loan granted to Yukos Oil, whereas Yukos Oil's damage was much lower as it corresponded solely to the spread that the Yukos Capital Limited was supposed to derive from the transaction.¹⁵³ As such, Yukos Capital Limited was awarded compensation to which it was not entitled, which infringed the prohibition of unjust enrichment of the injured party.¹⁵⁴ On this basis, the final award was incompatible with public policy and due to be set aside pursuant to Article 190(2)(e) of the PILA.¹⁵⁵

[103]. The SFSC rejected the Russian Federation's plea for two reasons. First, the Russian Federation's arguments in support of this ground for challenge were based on references to certain arguments from the arbitration, made by one of the arbitrators in partial dissent,¹⁵⁶ which did not demonstrate how the result of the award would be incompatible public policy. Second, the arbitral tribunal had correctly found that Yukos Capital Limited was the sole creditor and only entity entitled to claim repayment of the loan, such that it would have received the full amount of the capital loaned and interest thereon, and not only the spread, if Yukos Oil had repaid the loan. Therefore, the Russian Federation failed to show that the award was contrary to substantive public policy.¹⁵⁷

[104]. Having dismissed the Russian Federation's challenge for the above reasons, the SFSC was able to refrain from taking a stance on whether the prohibition against unjust enrichment of the injured party is part of *international* public policy. The SFSC restated that the prohibition against unjust enrichment of an injured party is a fundamental principle of Swiss law and thus, part of *Swiss* public policy, but continued to leave open the question of whether this principle is also part of public policy within the meaning of Article 190(2)(e) of the PILA.¹⁵⁸

[105]. These cases continue to reinforce the SFSC's pro-arbitration stance: even if certain principles of law form part of Swiss domestic public policy, they do not automatically form part of the *international* public policy. This is in stark contrast to those jurisdictions in which domestic public policy is applied in recognition and enforcement cases (e.g., India and Hong Kong).¹⁵⁹

[106]. Finally, it would be remiss to not comment on the potential impact of the recent decision of the European Court of Human Rights ("ECtHR") in *Semenya v. Switzerland*.¹⁶⁰ In that case, which concerned a challenge against a sports arbitration award rendered under the auspices of the Court of Arbitration for Sport (the "CAS"), a majority of the ECtHR held *inter alia* that the CAS arbitral tribunal, and the SFSC as the setting aside court, failed to provide sufficient procedural safeguards to South African runner Caster Semanya as required by Article 14 of the European Convention on Human Rights. As to the SFSC's failures, the ECtHR held that the SFSC erred when it conducted a

limited review of whether the CAS arbitral tribunal's reasoning was consistent with public policy, as it failed to address Ms. Semenya's "substantiated and credible claims of discrimination".¹⁶¹ It also held that public policy under Swiss law should encompass, without exception, all obligations arising from the European Convention on Human Rights and jurisprudence. According to the ECtHR, the SFSC should exercise a higher degree of control over CAS awards, as sports arbitration, unlike commercial (and, by extension, investment) arbitration, is not habitually consensual.¹⁶² It remains to be seen whether the concept of public policy under Article 190(2)(e) of the PILA will be extended in light of the ECtHR's decision. For now, the ECtHR's decision has immediate implications for sports arbitration, though the ruling may become relevant where human rights issues arise in Swiss-seated investment arbitrations.

IV. Conclusion

[107]. Between 2020 and 2022, the SFSC issued a number of significant decisions in proceedings to set aside and revise investment arbitration awards. These decisions have clarified the SFSC's narrow powers to set aside and revise international arbitral awards, and further developed the SFSC's jurisprudence on international investment law.

[108]. The fact that only one investment arbitration award – *Clorox Spain S.L. v. Venezuela* – has been set aside by the SFSC confirms that Switzerland is a jurisdiction which accords significant deference to the determinations of arbitral tribunals in international arbitral awards.

[109]. The SFSC's approach is markedly different to the emerging approach in France, where the Paris Court of Appeal has recently demonstrated an appetite for conducting a substantive review of international arbitral awards on the merits, including by ordering the production of new evidence, at least where questions of corruption arise.¹⁶³ Given the significant judicial restraint exercised by the SFSC, even in the face of manifestly wrong factual findings, it is unlikely that the SFSC will orientate towards the French approach in the future.

[110]. For now, the recently reported cases illustrate that the SFSC is increasingly willing to independently interpret legal questions arising in international investment treaties. The SFSC's readiness to correct erroneous legal determinations in exceptional circumstances, and at the same time shield arbitral tribunals' factual findings, reinforces the SFSC's pro-arbitration outlook, thereby preserving Switzerland's reputation as a preferred seat for non-ICSID investment treaty arbitration.