Challenging Investment Treaty Awards in Switzerland: Mission (Almost) Impossible? A review of the Swiss Supreme Court decisions rendered over the period 2019-2024

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Switzerland – Investment treaty arbitration – Bilateral investment treaty – Energy Charty Treaty – Annulment of treaty awards – Russia v. Ukrnafta/Stabil II – Czech Republic v. Natland I and II – Clorox v. Venezuela II and III – Binani v. Macedonia – Libya v. Etrak – Fischer v. Czech Republic – Spain v. AES Solar – Yamantürk v. Syria – Russia v. Yukos II — India v. Deutsche Telekom II – AsiaPhos v. China – Spain v. EDF

Summary

In the last five years, the Swiss Supreme Court has handled an increasing number of investment treaty cases. SCHERER / KUNZ / AZARIA report on the recent decisions by the Swiss Supreme Court involving bilateral treaty claims or claims under the Energy Charter Treaty issued between December 2019 and December 2024: *Russia v. Ukrnafta/Stabil II – Czech Republic v. Natland I and II – Clorox v. Venezuela I, II and III — Binani v. Macedonia — Libya v. Etrak – Fischer v. Czech Republic – Spain v. AES Solar – Yamantürk v. Syria – Russia v. Yukos II – India v. Deutsche Telekom II –AsiaPhos v. China – Spain v. EDF*.

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Introduction

In the past five years, the Swiss Supreme Court has issued an increasing number of decisions in investment treaty awards. We report on the decisions rendered during this five-year period (December 2019-December 2024); these decisions are listed in the table at the end of this article.[1]

Until 2020, none of the annulment requests against arbitral awards rendered under an investment protection treaty had been successful. This changed in March 2020, when the Swiss Supreme Court set aside a treaty award for the first (and to this day only) time (*Clorox v. Venezuela I*). The success ratio of annulment requests against treaty-based awards thus remains very low, even lower than that of challenges to commercial arbitration awards. While it remains difficult to succeed in challenging a treaty award, all hope is not lost for applicants. This is especially true for questions relating to the arbitral tribunal's jurisdiction, which are at the heart of a vast majority of the Swiss Supreme Court's decisions in treaty cases.

Beyond the statistics, the decisions reviewed show that the Swiss Supreme Court has, over the years, developed significant expertise in dealing with treaty awards as well as a consistent body of case law, on a number of highly controversial issues in the field of investment arbitration. To name but a few, these include whether an active investment is required, the applicable test to determine whether treaty shopping amounts to a treaty abuse, whether a State's consent to the provisional application of a treaty includes its consent to the arbitration clause it contains and, last but not least, whether arbitral tribunals have jurisdiction over intra-EU disputes.

On this last issue, the Swiss Supreme Court ruled, in a recent decision (*Spain v. EDF*), that intra-EU investment disputes can be resolved through

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1 For earlier decisions rendered by the Swiss Supreme Court in investment treaty cases, see Matthias Scherer/Angela Casey, *Domestic Review of Investment Treaty Arbitrations: the Swiss Experience Revisited*, in ASA Bull. 4/2019, pp. 805-821 and Matthias Scherer/Veijo Heiskanen/Sam Moss, *Domestic Review of Investment Treaty Arbitrations: The Swiss Experience*, in ASA Bull. 2/2009, pp. 256-279. See also Bernhard Berger, *Die Schweiz als Schiedsort für Investitionsstreitigkeiten – Erkenntnisse aus der neueren Rechtsprechung des Bundesgerichts*, ASA Bull. 1 and 2/2020 (Two parts); Matthias Scherer, *Mission Impossible? Challenging Investment Treaty Award before the Swiss Federal Tribunal*, in Christoph Müller / Sébastien Besson / Antonio Rigozzi (Eds), *New Developments in International Commercial Arbitration 2020*, pp. 28-76; Hanno Wehland, *Setting-Aside Proceedings Against Treaty- Based Arbitral Awards in Switzerland and Their Contribution to the Debate Regarding the Fundamental Requirements for Protection under Investment Treaties*, in Journal of International Arbitration Volume 41, Issue 5 (2024) pp. 559-576.

Decisions rendered by the Swiss Supreme Court relating to the enforcement of arbitral awards are not addressed in this article.

arbitration. The Swiss Supreme Court's decision is remarkable, as it stands in direct opposition to the stance adopted by EU courts. As a result, arbitration in Switzerland remains a safe option for investors contemplating intra-EU investments. This decision only further confirms Switzerland's place as one of the most arbitration-friendly jurisdictions worldwide for both commercial and investor-state arbitrations.

1. Grounds for annulment invoked in the Swiss Supreme Court's recent treaty award decisions

The ordinary means of recourse available against an arbitral award rendered in a Swiss-seated arbitral tribunal is the filing of a setting aside application before the Swiss Supreme Court, Switzerland's highest judicial authority, within 30 days of receipt of the award. An award can only be set aside on the five grounds listed in Article 190(2) of the Swiss Private International Law Act ("**PILA**"), each of which is addressed in turn below.[2]

After the expiry of the 30-day time limit, the only remedy available against the award is its revision, which is an extraordinary remedy and only admitted in exceptional circumstances to correct fundamental issues of due process (Art. 190a PILA). One such circumstance is where decisive facts or evidence come to light that could have changed the outcome of the award. This ground was relied on by India, albeit unsuccessfully, in support of its revision request in the *India v. Deutsche Telekom II* case.[3]

1.1 Improper constitution of the arbitral tribunal (Art. 190(2)(a) PILA)

To date, only two decisions have addressed challenges of treaty awards on the grounds of an improper constitution of the arbitral tribunal, and in both instances, the challenges were unsuccessful. One of these falls in the period under review: the decision in *Spain v. EDF*.[4] In that case, Spain complained of

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2 A more detailed summary of the decisions referred to in this section is provided in Section 2 below.

3 Decision of the Swiss Supreme Court ("**DSC**") 4A_184/2022 (*India v. Deutsche Telekom II*) of 8 March 2023 (see Section 2.10 below).

4 DSC 4A_244/2023 (150 III 280, *Spain v. EDF*) of 3 April 2024, paras. 5 and 6 (see Section 2.12 below). The other (prior) decision is 4P.154/2005 of 10 November 2005 (*Lebanon v. France Télécom II*), ASA Bull. 1/2006, p. 106 *et seq.*, commented in Matthias Scherer/Veijo Heiskanen/Sam Moss, *Domestic Review of Investment Treaty Arbitrations: The Swiss*

the arbitral tribunal's failure to deliberate (*vice de délibéré*) on a specific issue as well as the presiding arbitrator's lack of independence and impartiality because parts of the award were identical to an award rendered by another arbitral tribunal presided by that same arbitrator, on the same issue. Both complaints were rejected by the Swiss Supreme Court.

1.2 Jurisdiction (Art. 190(2)(b) PILA)

A vast majority of challenges of treaty awards are brought on the ground that the arbitral tribunal wrongly accepted or declined its jurisdiction (Art. 190(2)(b) PILA). This is hardly surprising: jurisdiction is a fundamental prerequisite for an arbitral tribunal to resolve an investment dispute between an investor and a host State and hinges on the specific requirements of the relevant bilateral investment treaty ("**BIT**") or multilateral treaty such as the Energy Charter Treaty ("**ECT**"). These requirements cover all jurisdictional aspects: *ratione personae* (which "investors" are covered), *materiae* (which "investments" and breaches) and *temporis* (time of the dispute). They all tie back to the question of the State's consent to arbitration.

The Swiss Supreme Court's review under Article 190(2)(b) PILA is, in principle, limited to jurisdiction as opposed to admissibility. However, the Court assesses freely whether an objection qualifies as a jurisdictional or an admissibility issue; it is bound neither by the arbitral tribunal's nor the parties' characterisations and does not always clearly distinguish between the two.[5]

1.2.1 Arbitrability

A Swiss-seated arbitral award may be challenged for lack of arbitrability of the dispute, but such allegations must be brought as a jurisdictional challenge under Article 190(2)(b) PILA.[6] This has the following procedural consequences: the applicant cannot wait until it has received the final award to invoke the lack of arbitrability, it has to do so immediately by challenging any interim award (Art. 190(3) PILA).

The question of the dispute's arbitrability was, for example, one of the issues in *Russia v. Ukrnafta / Stabil II*. Russia argued that the arbitral tribunal had ruled on the status of Crimea, an issue which was not arbitrable. The Court

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Experience, ASA Bull. 2/2009, p. 256, p. 272. This ground has also been invoked in a case still pending before the Swiss Supreme Court (4A_78/2024) at the time of writing.

5 See *e.g.*, DSC 4A_398/2021 (148 III 330, *Clorox v. Venezuela II*) of 20 May 2022, paras. 5.4.2 and 5.5 (see Section 2.3 below).

6 As the Swiss Supreme Court recalled in DSC 4A_244/2023 (150 III 280, *Spain v. EDF)* of 3 April 2024, para. 8 (Spain had invoked the lack of arbitrability of an intra-EU dispute due to the CJEU's exclusive jurisdiction over EU Member States; see Section 2.12 below).

disagreed: the dispute was not about Crimea's status, but about damages claims under the BIT, which were arbitrable.[7]

1.2.2 Consent to arbitrate

An arbitral tribunal's jurisdiction derives from the parties' consent to arbitrate. With respect to consent in the specific field of investment arbitration, the Swiss Supreme Court ruled, already in 2015,[8] that an arbitration clause contained in a multilateral treaty such as the ECT (Art. 26) constitutes an offer to arbitrate by each of the contracting States, which offer the investor accepts by initiating arbitration. The Court considers that such a mechanism constitutes a valid arbitration agreement, as it reaffirmed in recent cases.[9]

The question of the State's consent to arbitrate arose in two instances: In *Russia v. Yukos II*, the Swiss Supreme Court examined whether Russia's consent to the provisional application of the ECT (Art. 45) included its consent to international arbitration under Article 26 ECT. The provisional application of a treaty aims at allowing the treaty to have legal effect already from the date of its signature, and not only from its ratification. The Court found that Russia, even though it had not ratified the ECT, had consented to the treaty's provisional application and found that the application of the arbitration clause in Article 26 ECT was not excluded by the limitation clause in Article 45 ECT.[10]

In the *AsiaPhos v. China* case, the Court examined the scope of the arbitration clause in the China-Singapore BIT, which also provided for a general forum selection in favour of the contracting States' national courts.[11]

1.2.3 Tax exemption

Under many bilateral or multilateral treaties, States reserve their sovereign prerogative to tax foreign investments by exempting taxation issues from the scope of treaty protection through tax carve-out clauses. In *Czech Republic v. Natland I*, the Swiss Supreme Court had to analyse whether a solar

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7 DSC 4A_244/2019 (*Russia v. Ukrnafta II*) of 12 December 2019 and 4A_246/2019 (*Russia v. Ukrnafta/Stabil II*) of 12 December 2019, para. 4 (see Section 2.1 below).

8 DSC 4A_34/2015 (141 III 495*; Hungary v. EDF*) of 6 October 2015, para. 3.4.2; reported on in Matthias Scherer/Angela Casey, *Domestic Review of Investment Treaty Arbitrations: the Swiss Experience Revisited*, ASA Bull. 4/2019, p. 805, p. 807.

9 See *e.g.*, DSC 4A_492/2021 (149 III 131, *Russia v. Yukos II*) of 24 August 2022, para. 6.4.3 (see Section 2.9 below); DSC 4A_244/2023 (150 III 280, *Spain v. EDF*) of 3 April 2024, para. 7.6.3 (see Section 2.12 below).

10 DSC 4A_492/2021 (149 III 131, *Russia v. Yukos II*) of 24 August 2022, para. 6.4 (see Section 2.9 below).

11 DSC 4A_172/2023 (150 III 89, *AsiaPhos v. China*) of 11 January 2024 (see Section 2.11 below).

levy was covered by the tax exemption provided under Article 21 ECT. The decisive criterion for a tax exemption was found to be the absence of consideration (non-equivalence). This was not one of the characteristics of the solar levy at issue.[12]

1.2.4 Investments made prior to a treaty's entry into force

In *Libya v. Etrak*, the Supreme Court had to examine whether the dispute fell within the temporal scope of the applicable BIT. While the investor's original claims had arisen prior to the BIT's entry into force, the Court found the claims to be based on a subsequent settlement agreement; this was a new dispute which fell within the arbitral tribunal's jurisdiction *ratione temporis*. This conclusion was found to be further supported by the language used in the BIT's preamble and its broad asset-based definition of "investment".[13]

1.2.5 Eligible investment

Each treaty defines the "investments" that fall within its scope of protection and, hence, the arbitral tribunal's jurisdiction *ratione materiae*. The Swiss Supreme Court carries out its own interpretation of the meaning of the term "investment" used in the specific treaty under review, in accordance with the Vienna Convention on the Law of Treaties ("**Vienna Convention**"). It does not consider itself bound by the meaning given to the term "investment" in arbitral awards rendered in respect of other treaties.[14]

The question of whether there was an eligible investment arose in the following cases during the period under review: *Czech Republic v. Natland I, Clorox v. Venezuela I and II, Russia v. Yukos II, Libya v. Etrak.*[15] In each of these cases, the Court upheld the arbitral tribunal's finding that there was a protected investment.

In the *Clorox v. Venezuela I* case, the key legal issue was whether an active investment by the investor was required to benefit from the protection offered by the relevant BIT and led to the first (and so far, only) annulment of

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12 DSC 4A_80/2018 (*Czech Republic v. Natland I*) of 7 February 2020, para. 3 (see Section 2.2 below).

13 DSC 4A_461/2020 (*Libya v. Etrak*) of 2 November 2020 (see Section 2.5 below).

14 See *e.g.*, DSC 4A_492/2021 (149 III 131, *Russia v. Yukos II*) of 24 August 2022, para. 7.4.1 (see Section 2.9 below).

15 DSC 4A_80/2018 (*Czech Republic v. Natland I*) of 7 February 2020, para. 4.6 (see Section 2.2 below); DSC 4A_306/2019 (146 III 142, *Clorox v. Venezuela I*) of 25 March 2020, para. 3.4.1; DSC 4A_398/2021 (148 III 330, *Clorox v. Venezuela II*) of 20 May 2022, para. 5.2.4 (see Section 2.3 below); DSC 4A_492/2021 (149 III 131, *Russia v. Yukos II*) of 24 August 2022, para. 7 (see Section 2.9 below); DSC 4A_461/2019 (*Libya v. Etrak*) of 2 November 2020, para. 5 (see Section 2.5 below).

an investment treaty award by the Swiss Supreme Court. The Supreme Court ruled that, in the absence of express language in an investment treaty, what is decisive when determining the existence of a protected "investment" is the investor's nationality, not the origin of a possible consideration provided in exchange for the investment nor an active investment. The Court found that in the absence of express language in the relevant BIT, the arbitral tribunal was wrong to decline its jurisdiction for lack of an active investment.[16]

1.2.6 Abuse of rights

The Swiss Supreme Court has held that, even if the treaty does not contain language expressly preventing abusive conduct, an investor can be denied treaty protection if its reliance on the relevant treaty constitutes an abuse of rights. Abuse of rights remains, however, an exceptional remedy, and is admitted only restrictively. During the period under review, States raised abuse of rights arguments against (a) treaty shopping through corporate restructuring and (b) investments made to avoid taxation.

a. Corporate restructuring – Treaty shopping

The investor's nationality is crucial for jurisdiction: the investment must have been made in the host State by a national of the other contracting State. Investors typically seek to structure their investment to ensure maximum protection by making their investment out of the State that has the most investor-friendly investment treaty with the host State ("**treaty shopping**"). This can be achieved by using an affiliate incorporated in that jurisdiction. The question then is whether a company that is controlled by nationals of the host State can still benefit from protection under the relevant treaty.

Treaty shopping was one of the issues in the *Czech Republic v. Natland I* and *Clorox v. Venezuela I* and *II* cases, in which the Swiss Supreme Court had to distinguish between legitimate nationality planning and the abusive change of nationality with the aim of beneficiating from treaty protection (treaty abuse). The test developed by the Court in *Clorox v. Venezuela I* is as follows: there is treaty abuse if the investor acquired the relevant nationality at a time when the specific future dispute was foreseeable, and that acquisition was made in anticipation of that possible dispute.[17] In both cases, the Court rejected

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16 DSC 4A_306/2019 (146 III 142, *Clorox v. Venezuela I*) of 25 March 2020, paras. 3.4.2.6. *in fine* and 3.4.2.7 (see Section 2.3 below).

17 DSC 4A_306/2019 (146 III 142, *Clorox v. Venezuela I*) of 25 March 2020, para. 3.4.2.8 (see Section 2.3 below).

the alleged treaty abuse as it found that the dispute was not foreseeable at the time of the restructuring.[18]

b. Investment made to avoid taxation

In the *Russia v. Yukos II* case, the Court found that there had been no abuse of rights by the investor choosing to repatriate certain assets to Russia in a legal form (*i.e.*, loans as opposed to dividends) that avoided the re-taxation of funds. Nothing in the ECT prevents investments driven by fiscal considerations as long as they are associated with an economic activity in the energy sector.[19]

1.2.7 Intra-EU disputes

In its landmark *Slovak Republic v. Achmea BV* decision of 6 March 2018, the Court of Justice of the European Union ("**CJEU**") ruled that arbitration clauses in intra-EU BITs were incompatible with EU law.[20] On 2 September 2021, the CJEU further ruled in the *Republic of Moldova v. Komstroy LLC* case that, for the same reason, an arbitration clause in a multilateral treaty, such as the ECT, did not apply to intra-EU disputes.[21]

Unsurprisingly, several States then sought to avail themselves of the *Achmea* decision, and then later the *Komstroy* decision, to dispute arbitral jurisdiction in challenge proceedings before the Swiss Supreme Court, but unsuccessfully. In the first three cases, the Court dismissed jurisdictional objections based on *Achmea* on procedural grounds (*Czech Republic v. Natland I* and *II, Spain v. AES Solar*).[22] Then, in a landmark decision rendered earlier this year in the *Spain v. EDF* case, the Swiss Supreme Court rejected the CJEU's findings in *Achmea* and *Komstroy*, and upheld the jurisdiction of the arbitral tribunal over an intra-EU dispute on the basis of the arbitration clause contained in the ECT (Art. 26).[23]

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18 DSC 4A_80/2018 (*Czech Republic v. Natland I*) of 7 February 2020, para. 4.8 (see Section 2.2 below); DSC 4A_398/2021 (148 III 330, *Clorox v. Venezuela II*) of 20 May 2022, para. 5 (see Section 2.3 below).

19 DSC 4A_492/2021 (149 III 131, *Russia v. Yukos II)* of 24 August 2022, para. 8.2 (see Section 2.9 below).

20 CJEU Case C-284/16, 6 March 2018, *Slovak Republic v. Achmea BV*.

21 CJEU Case C-741/19, 2 September 2021, *Republic of Moldova v. Komstroy LLC*.

22 DSC 4A_80/2018 (*Czech Republic v. Natland I*) of 7 February 2020, para. 2.4.2; DSC 4A_66/2024 (*Czech Republic v. Natland II*) of 13 June 2024, para. 4.2 (see Section 2.2 below); DSC 4A_187/2020 (*Spain vs. AES Solar*) of 23 February 2021, para. 5 (see Section 2.7 below).

23 DSC 4A_244/2023 (150 III 280, *Spain v. EDF*) of 3 April 2024, para. 7 (see Section 2.12 below).

Few decisions so far have addressed the impact of the Intra-EU BIT Termination Agreement enacted by EU Member States following the *Achmea* decision on arbitration proceedings initiated under intra-EU BITs. One of these is the Swiss Supreme Court's decision in *Fischer v. Czech Republic*.[24]

1.3 *Ultra petita* (Art. 190(2)(c) PILA)

An award can also be set aside if it is *infra*, *ultra* or *extra petita*. This ground was invoked only once, and unsuccessfully, during the period under review, in the *Yamantürk v. Syria* case. In that case, the arbitral tribunal had awarded compensation in Syrian pounds, although the investors had claimed compensation in USD. Although the Swiss Supreme Court conceded that an arbitral tribunal (unlike Swiss courts) could potentially award payment in a different currency than that of the prayers, the challenge failed on formal grounds.[25]

1.4 Right to be heard and equal treatment (Art. 190(2)(d) PILA)

During the period under review, a violation of the right to be heard was invoked as a ground for challenge in three decided cases (*Czech Republic v. Natland II, Binani v. Macedonia*, *Spain v. AES Solar*),[26] and was rejected each time. The threshold for establishing a violation of the right to be heard is quite high. The applicant must not only establish a violation of its right to be heard but also that the violation pertained to an issue that would have been material to the outcome of the arbitration.[27] Procedural good faith is particularly relevant in the context of this ground: the alleged procedural violations must have been raised, to the extent possible, in the arbitration itself, not only for the first time in the challenge proceedings.[28]

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24 DSC 4A_563/2020 (*Fischer v. Czech Republic*) of 25 November 2020 (see Section 2.6 below).

25 DSC 4A_516/2020 (*Yamantürk v. Syria*) of 8 April 2021, para. 5 (see Section 2.8 below).

26 DSC 4A_66/2024 (*Czech Republic v. Natland II*) of 13 June 2024, para. 5 (see Section 2.2 below); DSC 4A_156/2020 (*Binani v. Macedonia*) of 1 October 2020, para. 5 (see Section 2.4 below); DSC 4A_187/2020 (*Spain v. AES Solar*) of 23 February 2021, para. 6.2 (see Section 2.7 below).

27 See *e.g.*, DSC 4A_156/2020 (*Binani v. Macedonia*) of 1 October 2020, para. 5.1 (see Section 2.4 below).

28 See *e.g.*, DSC 4A_156/2020 (*Binani v. Macedonia*) of 1 October 2020, paras. 5.1 and 5.4 (see Section 2.4 below).

1.5 Public policy (Art. 190(2)(e) PILA)

A public policy violation is frequently invoked in setting aside proceedings targeting final awards, but has only been admitted twice so far, and never yet in relation to a treaty award. The threshold for succeeding with a public policy argument is extremely high. The Court will only accept to review an arbitral award on the merits in exceptional circumstances and provided the result of the decision itself is also incompatible with public policy, as the Court recalled in *Clorox v. Venezuela III*.[29]

1.5.1 Expropriation without compensation

According to the Swiss Supreme Court's established case law, an expropriation without compensation is contrary to public policy. In *Yamantürk v. Syria*, the investors argued that the award violated public policy because the compensation amount awarded to them in Syrian Pounds was only a fraction of the investment's value in USD at the time of its expropriation due to the significant devaluation of the Syrian Pound. The Supreme Court pointed out that there was no right to full compensation and all circumstances had to be considered. It found that the award did not offend public policy.[30]

1.5.2 Legality of investments

Russia belatedly raised the illegality argument against the final awards in *Russia v. Ukrnafta/Stabil II*, alleging that the investments were tainted by corruption and the awards must therefore be annulled on public policy grounds. The argument was rejected for procedural reasons: both the argument and the supporting evidence were submitted too late. They should have been brought in the arbitration, not for the first time in the challenge proceedings.[31]

Russia also invoked the illegality of the investments in the *Russia v. Yukos II* case, but this time as a bar to the arbitral tribunal's jurisdiction. The Supreme Court recalled that the legality of a given investment goes to the merits of the dispute.[32] As such, it is an issue that can only be reviewed by the Swiss Supreme Court under the restrictive angle of public policy.

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29 DSC 4A_486/2023 (*Clorox v. Venezuela III*) of 26 April 2024, para. 5 (see Section 2.3 below).

30 DSC 4A_516/2020 (*Yamantürk v. Syria*) of 8 April 2021, para. 4 (see Section 2.8 below).

31 DSC 4A_244/2019 (*Russia v. Ukrnafta II*) of 12 December 2019 and 4A_246/2019 (*Russia v. Stabil II*) of 12 December 2019, para. 3.5 (see Section 2.1 below).

32 DSC 4A_492/2021 (149 III 131, *Russia v. Yukos II*) of 24 August 2022, para. 9.1.2, referring to DSC 4A_65/2018 (*Deutsche Telekom v. India I*) of 11 December 2018, para. 4.3.2.

1.5.3 *Res judicata*

The violation of the *res judicata* doctrine can be tantamount to a violation of (procedural) public policy. The test is whether, in its final award, the arbitral tribunal failed to take into account a prior decision or moved away from a prior interim decision. In *Spain v. AES Solar*, the Court upheld the arbitral tribunal's decision to refuse to consider a new jurisdictional objection that was found to be substantively identical to one that it had already rejected in an earlier interim decision.[33]

1.5.4 Unjust enrichment

In *Russia v. Yukos II*, the Swiss Supreme Court left open the question of whether the principle that compensation can never result in the injured party's unjust enrichment formed part of substantive public policy. It found that Russia had in any event failed to establish that the result of the award was contrary to public policy.[34]

1.5.5 Cost awards

The threshold for successfully challenging an arbitral tribunal's award on costs on the ground that it violates public policy is even higher. In the *Binani v. Macedonia* case, the Court recalled that it exercises the utmost restraint in such cases and only intervenes if the costs awarded are wholly unreasonable.[35]

2. Summary of Swiss Supreme Court treaty award decisions

2.1 Russian Federation v. Ukrnafta & Stabil *et al.*

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 first two decisions rendered in this matter in 2017 ("***Russia v. Ukrnafta/Stabil I***"),[36] the Swiss Supreme Court upheld the arbitral tribunal's

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33 DSC 4A_187/2020 (*Spain v. AES Solar*) of 23 February 2021, para. 6.3 (see Section 2.7 below).

34 DSC 4A_492/2021 (149 III 131, *Russia v. Yukos II*) of 24 August 2022, para. 10 (see Section 2.9 below).

35 DSC 4A_156/2020 (*Binani v. Macedonia*) of 1 October 2020 (see Section 2.4 below).

36 DSC 4A_396/2017 (144 III 559, *Russia v. Ukrnafta I*) of 23 November 2017, ASA Bull. 4/2019, p. 983 and DSC 4A_398/2017 (*Russia v. Stabil I*) of 16 October 2018. See also

jurisdiction over Ukrnafta/Stabil's claims. While the investments were made in 1998, when Crimea was part of Ukraine and not Russia, the Court considered that the relevant point in time for establishing the territory on which the investment was made was the time of the breach.

Subsequently, the arbitral tribunal issued two final awards, in which it found that Russia (which had not participated in the arbitration proceedings) had expropriated Ukrnafta and Stabil. Russia challenged these awards, arguing that they were contrary to **public policy** as they ordered the payment of compensation for investments tainted by illegality and corruption. These allegations were rejected by the Court in decisions **4A_244/2019** and **4A_246/2019** ("***Russia v. Ukrnafta/Stabil II***"),[37] for procedural reasons, as they were not reflected in the arbitral tribunal's factual findings in the awards. The arbitral tribunal's factual findings are, as a rule, binding on the Court and can be neither corrected nor completed in the challenge proceedings. Had Russia wished to rely on said allegations, it should have raised them in the arbitration.[38]

Russia also argued that the awards should be annulled because the arbitral tribunal had ruled on the status of Crimea and the question of whether the obligations of the sovereign States under the BIT had changed following Russia's annexation of Crimea. According to Russia, these issues were not arbitrable pursuant to Article 177(1) PILA. This argument was equally rejected. The Court found that the subject-matter of the dispute was not the status of Crimea but a claim for damages arising from Russia's unlawful expropriation of Ukrnafta's and Stabil's investments, which was **arbitrable** under Swiss law. The Court observed that, with this argument, Russia was in reality criticising the arbitral tribunal's decision on jurisdiction, which had already been upheld by the Court and could thus no longer be challenged.[39]

2.2 Czech Republic v. Natland Investment Group N.V. *et al.*

Starting in the early 1990s, the Czech Republic introduced various incentives to promote renewable energy sources. However, with the arrival of

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Matthias Scherer, Angela Casey, *Domestic Review of Investment Treaty Arbitrations: the Swiss Experience Revisited*, in: ASA Bull. 4/2019, pp. 805-821, p. 815.

37 DSC 4A_244/2019 (*Russia v. Ukrnafta II*) and 4A_246/2019 (*Russia v. Stabil II*) of 12 December 2019, ASA Bull. 4/2024, p. 910.

38 DSC 4A_244/2019 (*Russia v. Ukrnafta II*) and 4A_246/2019 (*Russia v. Stabil II*) of 12 December 2019, paras. 3.4-3.6.

39 DSC 4A_244/2019 (*Russia v. Ukrnafta II*) and 4A_246/2019 (*Russia v. Stabil II*) of 12 December 2019, para. 4.

cheaper solar panels imported from Asia, investments in the photovoltaic sector soared, entirely disrupting the economic model on which the incentive scheme relied. This led the Czech Republic to engage in a series of reforms of the solar power sector, including the introduction of a three-year levy of 26% on electricity from solar plants commissioned in 2009 and 2010 ("**solar levy**"), and the removal of a tax exemption.

In 2013, Dutch-registered Natland Investment Group and three other related companies ("**Natland**") initiated a UNCITRAL arbitration against the Czech Republic, claiming damages under the ECT and various intra-EU BITs. In a partial award rendered in late 2017, the arbitral tribunal upheld its jurisdiction over part of Natland's claims and found that the solar levy violated the fair and equitable treatment standard in the relevant treaties.

The Czech Republic challenged the award before the Swiss Supreme Court on the ground that the arbitral tribunal had wrongly accepted its jurisdiction. The Supreme Court rejected the challenge in decision **4A_80/2018** ("***Czech Republic v. Natland I***").[40]

The Czech Republic argued that the solar levy qualified as a "taxation measure" under **Article 21 ECT**[41] and, as such, fell outside the scope of protection the treaty afforded to investors and hence, the arbitral tribunal's jurisdiction. The Supreme Court noted that, while Article 21(1) ECT provides for a **general tax carve-out**, the definition of "taxation measure" in Article 21(7) ECT was rather vague. The Court sided with the arbitral tribunal in considering that, in this case, the solar levy was not a taxation measure, and the related claims therefore fell within the arbitral tribunal's jurisdiction. The Court's reasoning was that the defining characteristics of a tax are the absence of consideration (non-equivalence) and generation of state revenue; the solar levy did not present such features but was used instead to reduce the State's financial support to solar energy producers.[42]

The Czech Republic also argued that two of the investors did not have a qualifying "*investment*" because they were controlled by Czech nationals and had engaged in impermissible **treaty shopping** by restructuring their investments to obtain treaty protection at a time when the dispute was already foreseeable. The Supreme Court held that one must first interpret the treaty to ascertain the intentions of the contracting States. The Court further held that,

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40 DSC 4A_80/2018 (*Czech Republic v. Natland I*) of 7 February 2020, in ASA Bull. 4/2024 p. 856, para. 4.2.

41 Pursuant to Art. 21(1) ECT "*nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties*."

42 DSC 4A_80/2018 (*Czech Republic v. Natland I*) of 7 February 2020, para. 3.

even in the absence of specific provisions in an investment treaty preventing such conduct, treaty shopping based on corporate restructuring could amount to an abuse of right, such that treaty protection could be denied on that basis.[43]

The Court rejected any abuse of rights in *Czech Republic v. Natland I*, as it found that the relevant dispute was not foreseeable at the time of restructuring of the investment. Even though the State initially had unequivocally announced its intention to adapt the Feed-in Tariff, it had then backtracked under pressure from banks and foreign investors and indicated that the temporal scope of the measure would be limited to future installations. Against that background, the Court found that existing investors, including the investors in that case, could not foresee at the relevant time that the State would subsequently enact another measure (the solar levy) designed to reach the same outcome as the one that had been abandoned.[44]

Finally, the Czech Republic, in its rejoinder, also sought to rely on the ***Achmea* decision** of 6 March 2018, arguing that this decision established that the Natland arbitral tribunal lacked jurisdiction.[45] The Court rejected this argument on procedural grounds: as the *Achmea* decision had been issued only after the expiry of the time limit to challenge the partial award, it could not be considered in the challenge proceedings.[46]

When the Natland tribunal rendered its final award a few years later, the Czech Republic again sought to challenge the partial award for lack of jurisdiction based on the *Achmea* decision. The Swiss Supreme Court rejected the challenge in decision **4A_66/2024** ("***Czech Republic v. Natland II***").[47] The Court observed that this ground for challenge had to be raised against the partial award on jurisdiction directly – which the State had done at the time, albeit unsuccessfully. However, in a **subsequent decision, the Natland tribunal had confirmed the inadmissibility of the Czech Republic's jurisdictional objection based on *Achmea***. According to the Court, this decision was not a mere procedural order. Rather, with this inadmissibility finding, the arbitral tribunal had reaffirmed its prior (positive) finding on jurisdiction. As a result, **this qualified as an interim decision that should have been challenged immediately**; the State having failed to do so, it could not raise these same objections in its challenge against the final award.[48]

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43 DSC 4A_80/2018 (*Czech Republic v. Natland I*) of 7 February 2020, para. 4.3.

44 DSC 4A_80/2018 (*Czech Republic v. Natland I*) of 7 February 2020, para. 4.8.

45 CJEU Case C-284/16, 6 March 2018, *Slovak Republic v. Achmea BV*.

46 DSC 4A_80/2018 (*Czech Republic v. Natland I*) of 7 February 2020, para. 2.4.2.

47 DSC 4A_66/2024 (*Czech Republic v. Natland II*) of 13 June 2024, in ASA Bull. 4/2024 p. 884.

48 DSC 4A_66/2024 (*Czech Republic v. Natland II*) of 13 June 2024, para. 4.2.

The Czech Republic also complained of an **alleged violation of the right to be heard in relation to submissions on the priority of EU law**. The Court rejected the argument, observing that the mere fact that the Natland tribunal had not explicitly addressed, in detail, the State's rather general arguments on the priority of EU law in the final award did not constitute a violation of its right to be heard.[49]

2.3 Clorox España S.L v. Bolivarian Republic of Venezuela

Similar questions as in *Czech Republic v. Natland I* arose in the *Clorox v. Venezuela I* matter, which gave rise to the **only decision to date in which the Swiss Supreme Court set aside an investment treaty award**.[50]

Spanish investor, Clorox España S.L. ("**Clorox Spain**"), was an affiliate of the large U.S. household cleaning products company, Clorox. Clorox Spain had been founded in 2011 by Clorox U.S., which contributed all of its shares in its Venezuelan subsidiary ("**Clorox Venezuela**") to the newly constituted company's capital. Clorox Spain did not have to pay any consideration for the shares. A few years later, Clorox Spain initiated an arbitration against Venezuela under the Spain-Venezuela BIT. The arbitral tribunal found that the know-how and the actual investment in Venezuela came from two U.S. companies. Clorox Spain had neither made such an investment nor paid anything for the acquisition of the investment, *i.e*., Clorox Venezuela. In those circumstances, the arbitral tribunal considered that Clorox Spain did not qualify as an "investor" under the BIT, and declined its jurisdiction. Clorox Spain challenged this decision before the Swiss Supreme Court.

In its decision **4A_306/2019 (146 III 142)** ("***Clorox v. Venezuela I***"),[51] the Swiss Supreme Court thus had to examine, for the first time, whether a requirement of an "active investment" can be inferred from the terms "investment" and/or "investor". The Swiss Supreme Court started by recalling that it interprets the terms **"investment" and "investor"** in each case based on the text of the relevant treaty in accordance with the Vienna Convention, not based on the meaning given to those terms in arbitral awards rendered in respect of other treaties. The Court then held that, in the absence of express language in the treaty preventing treaty shopping (*e.g*., through a "denial of benefits" or "original of capital" clause), what is decisive is the investor's

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49 DSC 4A_66/2024 (*Czech Republic v. Natland II*) of 13 June 2024, para. 5.3.

50 DSC 4A_306/2019 (146 III 142, *Clorox v. Venezuela I*) of 25 March 2020, ASA Bull. 4/2020, p. 998. See also Andreea Nica, *Case Note on the Decision of the Swiss Federal Tribunal in Clorox v. Venezuela,* ASA Bull. 4/2020, p. 884.

51 DSC 4A_306/2019 (146 III 142, *Clorox v. Venezuela I*) of 25 March 2020.

nationality, not the existence of an active investment nor the origin of any consideration provided in exchange for the investment.[52]

Turning to the interpretation of the terms "investor" and "investment" in the Spain-Venezuela BIT, the Supreme Court found that this BIT provided for the investor's nationality only as a threshold requirement. Likewise, the eligible investments were defined very broadly. Importantly, the Spain-Venezuela BIT was not found to contain any clause designed to limit the scope of its protection in the event of treaty shopping. The Court observed that the problem of treaty shopping was well known, and Spain could have included adequate language in the BIT (as it had done in other instances). Absent such language, the Court found **that a requirement for an active investment could not be inferred from the Spain-Venezuela BIT. Introducing additional requirements than the investor's nationality was not envisaged in the BIT and was therefore improper**. Accordingly, Clorox Spain, which had acquired shares in Clorox Venezuela through a corporate restructuring without providing any consideration for such shares, was found to have "invested" in Venezuela. On that basis, the Court found that the arbitral tribunal had wrongly declined its jurisdiction and partially set aside the award.[53]

In line with the *Czech Republic v. Natland I* decision rendered only a month before,[54] the Court, however, added that, even if the relevant treaty did not expressly prevent such conduct, treaty shopping based on corporate restructuring could amount to an abuse of rights. As the arbitrators had not dealt with Venezuela's fall-back objection based on the general principles of prohibition of abuse of rights, the matter was remanded to the arbitral tribunal.

In a second award, the arbitral tribunal rejected the existence of an **abuse of rights** and found it had jurisdiction. Venezuela challenged the award. The Swiss Supreme Court upheld the arbitral tribunal's jurisdiction in its decision **4A_398/2021 (148 III 330)** ("***Clorox v. Venezuela II***").[55] The Court held that treaty shopping could amount to an abuse of rights if the **specific dispute was foreseeable at the time of the corporate restructuring**. In the case at hand, the Court found that the foreseeability of the dispute at issue could not be inferred from a speech delivered by Venezuela's then President, Hugo Chávez, referring to the future adoption of a law to regulate prices and the creation of a

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52 DSC 4A_306/2019 (146 III 142, *Clorox v. Venezuela I*) of 25 March 2020, paras. 3.4.1, 3.4.2.2, 3.4.2.6.

53 DSC 4A_306/2019 (146 III 142, *Clorox v. Venezuela I*) of 25 March 2020, paras. 3.4.2.5-3.4.2.7.

54 See Section 2.2 above.

55 DSC 4A_398/2021 (148 III 330, *Clorox v. Venezuela II*) of 20 May 2022, para. 5.2.4, ASA Bull. 4/2024, p. 890.

governmental authority to fix those prices. For the Court, this speech could well have been a mere announcement aimed at galvanising supporters; it was short and vague as to the measures envisaged. On that basis, it was not possible to foresee whether and to what extent these measures would affect the investors' products or be of a scale such as to give rise to a dispute.[56]

In its final award, the arbitral tribunal found that the price control measures enacted by Venezuela amounted to an indirect expropriation of Clorox Venezuela without compensation. Upholding the final award in its decision **4A_486/2023** ("***Clorox v. Venezuela III***"),[57] the Swiss Supreme Court rejected Venezuela's allegations that the award breached public policy. The Court found that Venezuela was merely seeking an inadmissible review of the merits but had failed to establish that the result reached by the arbitral tribunal was, as such, incompatible with substantive public policy.[58]

2.4 Mr Gokul Das Binani and Mrs Madhu Binani v. Republic of North Macedonia

Two Indian investors brought arbitration proceedings against North Macedonia under the India-Macedonia BIT, alleging expropriation of mining concessions. The investors failed to pay their share of the advance on costs for over a year. Therefore, the arbitral tribunal terminated the proceedings and ordered the investors to reimburse North Macedonia's legal fees.

The investors challenged the cost award before the Swiss Supreme Court, claiming a violation of their right to be heard. They argued they had been denied the opportunity to reply to North Macedonia's unsolicited comments on their cost submission. The Court rejected the challenge in decision **4A_156/2020** ("***Binani v. Macedonia***").[59] The Court recalled that there is **no absolute right to two rounds of written submissions** in international arbitration. Consequently, the arbitral tribunal was under no obligation to order further written submissions after North Macedonia's unsolicited submission. The investors could and should have filed an unsolicited rejoinder. The fact that the investors were at the time no longer represented by legal counsel was irrelevant for the Court. It also observed that more than two months had elapsed between the submission of the reply and the issuance of the award, during which the investors remained silent. The Court concluded that the investors'

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56 DSC 4A_398/2021 (148 III 330, *Clorox v. Venezuela II*) of 20 May 2022, para. 5.6.

57 DSC 4A_486/2023 (*Clorox v. Venezuela III*) of 26 April 2024, ASA Bull. 3/2024, p. 906.

58 DSC 4A_486/2023 (*Clorox v. Venezuela III*) of 26 April 2024, para. 5.

59 DSC 4A_156/2020 (*Binani v. Macedonia*) of 1 October 2020, ASA Bull. 4/2021, p. 926.

behaviour was contrary to good faith since they had failed to raise the alleged procedural violation in the arbitration.

The investors' argument that the award was contrary to public policy because the legal fees awarded were purportedly "*unreasonable and disproportionate*" was likewise unsuccessful. The Court held that a **cost award would only be contrary to public policy if it is wholly disproportionate** to the necessary costs incurred. The Court concluded that the legal fees awarded (EUR 653'089) were neither "*unreasonable*" nor "*disproportionate*" given the investors' repeated procedural motions and delays.

2.5 State of Libya v. Etrak İnşaat Taahhüt ve Ticaret Anonim Şirketi

Turkish company Etrak İnşaat Taahhüt ve Ticaret Anonim Şirketi ("**Etrak**") was engaged on more than 35 public construction projects in Libya before suspending its works in the early 1990s following Libya's failure to honour its invoices. Following Etrak's various attempts to obtain payment of those invoices, the parties entered into a settlement agreement in late 2013, signed on the State's side by the Libyan deputy finance minister. In 2016, Etrak initiated an ICC arbitration under the Turkey-Libya BIT. The arbitral tribunal, in an award issued in 2019, upheld its jurisdiction and found the settlement agreement to be valid under Libyan law and a protected investment under the BIT. It also found that Libya had breached the BIT's fair and equitable standard by failing to honour the settlement agreement. However, a year before, Libya had initiated **parallel proceedings before the Tripoli courts**, in which it sought – and obtained – a declaration that the settlement agreement (which did not contain an arbitration clause) was null and void.

The Swiss Supreme Court upheld the arbitral tribunal's award in decision **4A_461/2019** ("***Libya v. Etrak***").[60] The Court rejected Libya's argument that the arbitral tribunal had wrongly applied the ***Kompetenz-Kompetenz*** principle by failing to consider the Tripoli proceedings. The Court recalled that, in application of the rules of ***lis pendens***, since the arbitral tribunal was seized first there was no need for it to consider the subsequent Tripoli court proceedings or its decision, or to coordinate with that court as a matter of international comity.[61]

The Supreme Court also rejected Libya's argument that, the settlement agreement being invalid, there was no **"investment"** within the meaning of the

[60] DSC 4A_461/2020 (*Libya v. Etrak*) of 2 November 2020, in ASA Bulletin 4/2024, p. 943.
[61] DSC 4A_461/2020 (*Libya v. Etrak*) of 2 November 2020, para. 4.

BIT such that the arbitral tribunal lacked **jurisdiction *ratione materiae***. Libya challenged the validity of the settlement agreement on two grounds: the deputy finance minister who signed it acted without authority, and it had not gone through the prescribed approval process. The Court found that the arbitral tribunal was entitled to assume an "apparent authority" of the deputy minister, rending any further discussion on the alleged formal requirements moot.[62]

The Supreme Court equally rejected Libya's argument that the arbitral tribunal lacked **jurisdiction *ratione temporis*** because the dispute between the parties arose prior to the BIT's entry into force in 2009. The Court agreed with the arbitral tribunal that the dispute at issue arose because of Libya's failure to honour the settlement agreement, which had extinguished any prior claims. It created a break in the timeline of the parties' disagreement. The claims asserted by Etrak in the arbitration based on the settlement agreement thus fell within the temporal scope of the BIT. This was further supported by the plain wording of the BIT: the preamble expressly referred to investments made before or after its entry into force and the definition of "investment" followed a broad asset-based approach, which was not based on any specific transaction.[63]

2.6 Václav Fischer v. Czech Republic

Czech-German businessman and former member of the Czech Senate, Václav Fischer, brought a claim against the Czech Republic based on the **German-Czechoslovak BIT**. The case concerned his displacement from his former travel agency as a result of allegedly incorrect official decisions and actions. A few months after the beginning of the arbitration, the proceedings were suspended. Upon the expiry of the initial suspension period, the Czech Republic requested a further suspension of the arbitration in order to engage in a "structured dialogue" between the parties, as provided under Article 9 of the **Intra-EU BIT Termination Agreement of 5 May 2020**, which was enacted following the CJEU's *Achmea* decision. This request was denied. However, **as none of the parties paid the cost advance requested by the arbitral tribunal, the arbitrators terminated the proceedings without prejudice**.

Václav Fischer sought to annul this decision before the Swiss Supreme Court on the ground that the arbitrators lacked jurisdiction as the BIT was no longer applicable following the entry into force of the Termination Agreement. According to him, the arbitrators should instead have directed the parties to hold a structured dialogue as required under the Termination Agreement. The

62 DSC 4A_461/2020 (*Libya v. Etrak*) of 2 November 2020, para. 5.
63 DSC 4A_461/2020 (*Libya v. Etrak*) of 2 November 2020, para. 6.

Court rejected the challenge in its decision **4A_563/2020** ("***Fischer v. Czech Republic***").[64] The Court found that the arbitral tribunal had neither upheld nor declined its jurisdiction; it had merely dismissed the claims without prejudice due to the parties' failure to pay the cost advance. The arbitral tribunal had even noted in its decision that it could not decide the question of its jurisdiction if the cost advances were not paid.

2.7 Kingdom of Spain v. AES Solar Energy Cooperatief U.A. and others (PV Investors)

In 2007, Spain implemented several regulatory measures to incentivize investment in renewable energy. However, from 2010 onward, Spain retracted some features of the original regulations. In 2011, a group of 26 EU investors who had invested in photovoltaic production in Spain initiated *ad hoc* arbitration proceedings under the UNCITRAL Rules against Spain, seeking, among other remedies, damages for breach of Article 10(1) ECT.

At the outset of the arbitration proceedings, Spain raised several jurisdictional objections, arguing *inter alia* that intra-EU investment arbitration under the ECT was incompatible with EU law. In an interim award on jurisdiction issued in 2014, the arbitral tribunal dismissed Spain's intra-EU objection. Spain did not challenge this award.

In August 2018, after the CJEU issued the ***Achmea*** decision, Spain requested that the arbitral tribunal consider a "*new jurisdictional objection*" based on "*new facts*". The arbitral tribunal denied Spain's request in a Procedural order no 19, considering that the same intra-EU objection had already been dismissed in the interim award. The arbitral tribunal considered itself bound by its prior ruling. Spain did not challenge Procedural order no 19.

In 2019, Spain reiterated its request that the arbitral tribunal reconsider its jurisdiction in light of the Declaration issued by 22 Member States, including Spain, on the legal consequences of the *Achmea* decision and on investment protection dated 15 January 2019 ("**Declaration of the 22**"). The arbitral tribunal dismissed the request in its final award, reiterating that the interim award on jurisdiction had "res judicata *effect, or conclusive and preclusive effects comparable to* res judicata". It considered that the Declaration of the 22, like the *Achmea* decision, did not alter the intra-EU objection raised by Spain at the outset of the proceedings, but simply added "*possible legal arguments in support thereof*". The arbitral tribunal concluded

64 DSC 4A_563/2020 (*Fischer v. Czech Republic*) of 25 November 2020, ASA Bull. 4/2021, p. 920.

that it remained bound by its ruling in the interim award, which was consistent with the principle that the date of initiation of the proceedings is the relevant point in time for determining jurisdiction. On the merits, the arbitral tribunal found that Spain had breached Article 10(1) ECT and ordered it to pay an amount of over EUR 91 million in total.

The Swiss Supreme Court dismissed the challenge brought by Spain against the award in decision **4A_187/2020** ("***Spain v. AES Solar***").[65] Spain argued that by refusing to examine its "*new arbitration objection*" and by rejecting its request for production of the *Achmea* decision and other related documents in support of such request, the arbitral tribunal had violated its right to be heard in Procedural order no 19 and the final award. Spain also claimed that the arbitral tribunal had incorrectly applied the *res judicata* principle, thereby violating Swiss procedural public policy.

The Supreme Court noted that, in the 2014 interim award, the arbitral tribunal had already rejected Spain's jurisdictional objections, including the intra-EU objection. The arbitral tribunal had then confirmed this decision in Procedural order no 19, which therefore also qualified as a (separate) interim award on jurisdiction within the meaning of Article 186(3) PILA. To the extent that **Spain's complaints**, based on an alleged violation of Article 190(2)(d) and (e) PILA, were **intrinsically linked to the arbitral tribunal's jurisdiction**, **Spain could and should have raised them immediately by directly challenging Procedural order no 19**. Since it did not, Spain was precluded from invoking them in its challenge against the final award. It is also for formal reasons that the Court rejected Spain's complaint that the arbitral tribunal had denied its request to re-examine the question of its jurisdiction after publication of the Declaration of the 22. Spain had failed to invoke this ground in its setting aside request, and its attempts to do so with its rebuttal submission were doomed to fail. As a result, the Supreme Court did not address the legal consequences of *Achmea* on the jurisdiction of arbitral tribunals in intra-EU ECT disputes, although this issue was discussed at length in the underlying arbitration proceedings.

Spain also argued that the arbitral tribunal had violated its **right to be heard** and perpetrated a denial of justice by refusing to examine its new objection to arbitration based on its misguided application of the *res judicata* principle. This argument equally failed. The Supreme Court observed that the arbitral tribunal refused to reconsider its jurisdictional decision after having

[65] DSC 4A_187/2020 (*Spain v. AES Solar*) of 23 February 2021, ASA Bull. 4/2024, p. 916. See also DSC 4A_191/2020 of 23 August 2021 where the Supreme Court issued a termination order acknowledging the withdrawal of AES's application to set aside the award.

ordered an exchange of submissions on this issue and explained the reasons for its refusal in the award. In those circumstances, the arbitral tribunal could not be accused of having violated Spain's right to be heard or of a denial of justice.

The same fate was reserved to Spain's argument that the arbitral tribunal had violated procedural **public policy** by misapplying the *res judicata* principle. The Supreme Court held that procedural public policy can be violated if an arbitral tribunal disregards the *res judicata* effect of a previous decision, or if it deviates in its final award from a prior interim award. Preliminary or interim awards determining a preliminary procedural or substantive issue without disposing of any claims do not have *res judicata* effect as such, but are nevertheless binding on the arbitral tribunal that rendered them. The Court found that Spain had failed to demonstrate that the arbitral tribunal had ruled without considering the *res judicata* effect of a previous decision, or that it deviated in its final award from a prior interim award. On the contrary, the arbitral tribunal had rightly considered itself bound by the 2014 interim award.

2.8 Mr Idris Yamantürk, Mr Tevfik Yamantürk, Mr Müsfik Hamdi Yamantürk, Güriş İnşaat ve Mühendislik Anonim Şirketi (Güris Construction and Engineering Inc) v. Syrian Arab Republic

Several Turkish investors initiated an ICC arbitration against Syria under the **Turkey-Syria BIT**. The investors claimed they had lost control over their cement factories, which were taken over by Kurdish forces during the war. They sought "*adequate compensation*" relying on the **most-favored nation (MFN) clause** in the Turkey-Syria BIT and the Syria-Italy BIT. Although **they claimed compensation in USD, the arbitral tribunal awarded compensation in Syrian Pounds**. Due to the significant depreciation of the Syrian Pound, the compensation amount was **only a fraction of what the investment had been worth** in USD at the time of its expropriation.

The investors challenged the award on two grounds: (i) they claimed that the award was contrary to public policy because the compensation awarded in Syrian Pounds was worth only a fraction of the loss incurred; and (ii) the arbitral tribunal had awarded something other than what had been

claimed (*extra petita*). The Swiss Supreme Court dismissed the setting aside application in decision **4A_516/2020** ("***Yamantürk v. Syria***").[66]

Regarding **public policy**, the Court first recalled that the principles underlying the European Convention on Human Rights (ECHR), such as the guarantee of property rights, can be taken into account to give concrete form to the concept of public policy. However, an ECHR violation is not, as such, a ground for challenge. The Court then found that public policy was not necessarily violated because the Turkish investors did not obtain full compensation for their loss. What is relevant is whether, considering all relevant circumstances of the case, the **amount awarded** is so out of proportion to the loss incurred that it **"*shockingly*" offends the most fundamental principles of the legal order**. While recognizing that the compensation awarded was "*very low*" compared to the estimated loss incurred at the time, the Court concluded that it did not "*shockingly*" contravene public policy. The Court relied, among others, on the fact that:

- Syria was not held responsible for wrongdoing. It bore a purely economic responsibility for damage it had not necessarily caused and which occurred in extraordinary circumstances;
- the investors invested in a high-risk country, thereby accepting the inherent risk that came with their investment;
- there was no established international rule determining the currency for compensation under a BIT, and the investors' reasoning for denominating a claim in USD was unsubstantiated;
- a very high monetary award would have a significant impact on Syria's public finances, and Syria was already greatly weakened by a decade of conflict and in an extremely challenging situation.

Examining the ground of ***extra petita***, the Court recalled that, in Swiss domestic litigation, a judge is prevented from ordering payment in a currency other than that stated in the claimant's prayers for relief. If an action is brought in the wrong currency, the Court has no other option than to reject it. It would otherwise be tantamount to granting an "*aliud*", *i.e.*, something different than what had been claimed. The Court conceded that "*technically speaking*" the arbitral tribunal's award of compensation in Syrian Pounds, rather than in USD, was an "*aliud*". That being said, the Court observed that the principle of disposal did not necessarily have to be applied in international commercial law

[66] DSC 4A_516/2020 (*Yamantürk v. Syria)* of 8 April 2021, para. 4.6, ASA Bull. 1/2022, p. 107. See also Caroline Dos Santos, *Rewriting Investors' Claim Labelled in USD in Near Worthless Syrian Lira not Extra Petita or Violation of Public Policy. Swiss Supreme Court Decision 4A_516/2020 of 8 April 2021*, ASA Bull. 1/2022, p. 92.

with "*the same rigor*" as in a case governed by Swiss law. The Court however left this question open as it dismissed the request on a formal ground: the applicant's **absence of legitimate interest in the annulment of the award**.

The setting aside of an award must have some practical benefit for the applicants. The Court found that this condition was not met. If the case were remanded to the arbitral tribunal, the latter would necessarily dismiss the dollar-based request. Even if the investors were to submit a new claim in a different currency, the Court saw no indication that they would receive a more favourable award. The Court assumed that the important costs generated by the procedure would be borne by the investors should their request be dismissed, and they might also be made to bear the currency risk. Nevertheless, the basis for such assumptions is not crystal clear in the Court's decision.

2.9 Russian Federation v. Yukos Capital Limited

Yukos Capital, a finance company of the Yukos group, granted two loans to its parent company Yukos Oil in 2003 and 2004, funded by non-recourse, back-to-back loans from other Yukos Oil subsidiaries. In 2013, Yukos Capital initiated arbitration against Russia under the ECT – which Russia had signed but never ratified – claiming that the loans were illegally expropriated during Yukos Oil's bankruptcy.

In a 2017 interim award on jurisdiction, the arbitral tribunal rejected some of Russia's jurisdictional objections, ruling that Russia was bound by the provisional application of the ECT, and that the loans were protected investments under the ECT. Russia sought to set aside the interim award, but the Swiss Supreme Court deemed the challenge inadmissible (or premature) because the arbitral tribunal had decided only some, but not all, of the jurisdictional objections (see decision 4A_98/2017 ("***Russia v. Yukos I***").[67]

In its final award, the arbitral tribunal rejected the remaining jurisdictional objections and granted Yukos Capital compensation of more than USD 5 billion, which is the largest arbitral award examined by the Swiss Supreme Court. In the challenge proceedings, Russia claimed that the arbitral tribunal had wrongly upheld its jurisdiction in both the interim and final awards and that the latter violated public policy. Russia also requested a stay of enforcement of the final award's order to pay more than USD 2.6 billion pending the outcome on the challenge proceedings.

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[67] For a summary of this decision, see Matthias Scherer, Angela Casey, *Domestic Review of Investment Treaty Arbitrations: the Swiss Experience Revisited*, in ASA Bull. 4/2019, pp. 805-821.

In a separate order, the Supreme Court dismissed Russia's request for stay of enforcement, recalling that a stay is in principle granted only when a *prima facie* examination of the case shows that the setting aside application is "*very likely to be well-founded*", a condition which was not met here.[68] The Court then dismissed Russia's challenge in decision **4A_492/2021 (*"Russia v. Yukos II"*)**.[69]

Examining the **admissibility of new evidence filed by Russia**, the Court recalled that the prohibition against new evidence in setting aside proceedings applies only to factual exhibits, not legal exhibits supporting the applicant's legal arguments. The Court clarified that new case law, legal opinions, commentaries are admissible to the extent that they reflect the state of the law as of the award's date. Conversely, new legal developments are inadmissible, as the Court reviews the arbitral tribunal's legal findings based on the state of the law prevailing at the award's date. The Supreme Court also found that when setting aside proceedings are brought against both an interim and a final award the decisive moment for assessing the admissibility of new evidence is the date of the award in support of which said evidence has been filed. As a result, the Court held inadmissible a large number of new legal exhibits submitted by Russia, including court decisions, arbitral awards and reports post-dating the interim award. Russia's related allegations were also deemed inadmissible.

Russia's **first jurisdictional ground** was that the arbitration clause in **Article 26 ECT** could not be applied **provisionally** due to the limitation clause in Article 45(1) ECT. The Supreme Court emphasized that under the ECT, provisional application is the rule, while the limitation clause the exception. Therefore, the party alleging an incompatibility between the provisional application of an ECT provision and its domestic law must prove such incompatibility. The relevant date for such assessment is when the arbitration was initiated. The Court found that Russia had failed to demonstrate that the provisional application of the ECT was incompatible with Russian domestic law, and upheld the arbitral tribunal's jurisdiction under a provisional application of the ECT.

Russia's **second jurisdictional ground** was that the arbitral tribunal erred in concluding that the loans granted by Yukos Capital to its parent company qualified as **protected investments under the ECT**. Russia contended that Yukos Capital was not the true economic owner of the loans,

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68 Swiss Federal Supreme Court, procedural order 4A_492/2021 of 1 November 2021, ASA Bull. 4/2024, p. 978.

69 DSC 4A_492/2021 (149 III 131, *Russia v. Yukos II)* of 24 August 2022, ASA Bull. 4/2024, p. 980.

considering that the loans between Yukos Capital and Yukos Oil, and the back-to-back loans between Yukos Capital and its lenders, should be viewed as a single transaction where funds flowed within the group. Russia further argued that the loans lacked the inherent characteristics of an investment, as Yukos Capital had neither made a genuine contribution nor incurred any risk. The Supreme Court concluded that the arbitral tribunal had rightly qualified the loans as protected investments under Article 1(6) ECT, holding in particular that:

(i) The loans met the requirements of Article 1(6) ECT and constituted protected investments. The Court emphasized that the definition of "investment" in Article 1(6) ECT is very broad and does not contain any requirement as to the origin of the invested assets;

(ii) It is sufficient for a loan to be granted to a company active in the energy sector to qualify as a protected investment under the ECT, without requiring that the loan be used for such an activity. It was thus sufficient that the loans were made to Yukos Oil;

(iii) Since the ECT provides that an investor may "own" or "control" an investment, the Court found no reason to disregard the legal owner (Yukos Capital) in favour of the beneficial owner (Yukos Oil). The arbitral tribunal therefore rightly concluded that the loans granted by Yukos Capital constituted assets owned by an investor;

(iv) The Court noted that Article 1(6) ECT does not expressly require a "contribution" or "risk" by the investor, and questioned whether these are necessary elements of the notion of "investment". The Court left the question open, finding Russia's objection meritless in any event.

Russia's **third jurisdictional ground** was that, even if the loans qualified as protected investments, Yukos Capital was not entitled to ECT protection because it had committed an **abuse of rights**. The Supreme Court dismissed Russia's arguments:

(i) Russia argued that the investment was a circular operation aimed exclusively at avoiding Russian taxes. The Court found no basis in the ECT to suggest that an investment motivated by tax reasons is incompatible with the ECT's purpose;

(ii) Russia also claimed that Yukos Capital made the investment when it was reasonably foreseeable that the loans would not be repaid. The Court doubted this could amount to an abuse of

> rights. It found that the arbitral tribunal correctly considered that the issue of whether the risk of default was foreseeable related to causation and Yukos Capital's contribution to its own damage, which were beyond the Court's review. The Court further held that the risk of Yukos Oil's default was not objectively foreseeable in 2003.

Russia's **fourth jurisdictional ground** was that the arbitral tribunal incorrectly assumed jurisdiction by limiting its analysis of the **investment's legality** to the existence of Yukos Capital's criminal intent. The Court found Russia's argument inadmissible. The alleged illegality of an investment cannot impact the arbitral tribunal's jurisdiction without an express compliance clause or any indication that the investment's legality impacts its qualification as a protected investment. Moreover, Russia's complaint amounted to a violation of the right to be heard, ground which had not been raised. The Court nonetheless analysed Russia's complaint and concluded that it was unfounded.

In a **last ground**, Russia argued that the award contravened substantive **public policy** because it led to the unjust enrichment of Yukos Capital. The award granted Yukos Capital several billion USD in principal and interest under the 2003 loan, whereas Yukos Capital would have been entitled only to a fraction of this amount under the overall contractual scheme. The Supreme Court confirmed that the prohibition of enrichment of the injured party is a fundamental principle of Swiss law and part of domestic public policy. It recalled that the question of whether this principle also constitutes international public policy under Article 190(2)(e) PILA has not yet been decided. The Court ultimately left this question open, finding no violation of public policy. The Court concluded that awarding damages equivalent to the principal and interest due under the loan, rather than the profit that Yukos Capital was supposed to make, did not violate public policy.

2.10 Republic of India v. Deutsche Telekom A.G.

Deutsche Telekom held an indirect interest in Indian company, Devas, which entered into a contract with the Indian State-owned company Antrix to build, launch and operate two satellites and an S-band spectrum. The Indian government subsequently decided not to allow that use, and Antrix terminated the agreement. Deutsche Telekom initiated arbitration proceedings before the PCA against India, claiming a violation of the **Germany-India BIT** and USD 270 million in damages. In an interim award rendered in 2017, the arbitral tribunal affirmed its jurisdiction and found that India had violated the standard of fair and equitable treatment under the BIT. India unsuccessfully challenged

the interim award.[70] In 2020, the arbitral tribunal issued its final award, ordering India to pay USD 93.3 million in damages to Devas. The final award was not challenged at the time.

Almost two years later, in May 2022, India filed a request for revision of both the interim and final awards on the grounds that it had discovered decisive facts and evidence that would have changed the outcome of the arbitration (Art. 190a(1)(a) PILA). Specifically, India claimed to have learnt new decisive facts from a decision rendered by the Supreme Court of India on 17 January 2022 on the liquidation of Devas, allegedly confirming the illegality of Deutsche Telekom's investment in India in the form of its shareholding in Devas.

In decision **4A_184/2022** ("***India v. Deutsche Telekom II***"), the Swiss Supreme Court declared India's request for **revision** inadmissible.[71] These are the three main take-aways of the Supreme Court's decision:

(i) **An award on jurisdiction that has already been challenged before the Supreme Court**, such as the interim award, **cannot be subject to subsequent revision**. This is because the issue of jurisdiction was conclusively decided by the Supreme Court, even though the challenge was rejected. India's revision request should thus have been directed against the Court's decision, which replaced the interim award.

(ii) The 90-day deadline to request the revision of an award (Art. 190a(2)(1) PILA) is triggered by the applicant's knowledge of the subsequently discovered facts, not by their authoritative determination by a judicial authority. India must have been aware of the facts leading to the dissolution of Devas before the Indian Supreme Court's decision. Its revision request was thus belated.

(iii) Finally, the Court ruled that the Indian Supreme Court's decision did not qualify as "new" evidence permitting revision. A revision request based on the discovery of new evidence will only be successful if the evidence already existed at the time of issuance

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70 DSC 4A_65/2018 (*Deutsche Telekom v. India I*) of 11 December 2018, in ASA Bull. 4/2019, p. 1000. See also Alexandre SCHWAB, *Deutsche Telekom v. India: The Enforcement of a Swiss Investment Arbitration Award in Singapore and the United States*, ASA Bull. 4/2024, p. 828, Singapore Court of Appeal, [2023] SGCA(I) 10 of 15 December 2023, ASA Bull. 4/2024, p. 834 and United States, District Court of Columbia, Memorandum Opinion of 27 March 2024, Civil Case No. 21-1070, ASA Bull. 4/2024, p. 849.

71 DSC 4A_184/2022 (*India v. Deutsche Telekom II*) of 8 March 2023, ASA Bull. 2/2023, p. 367.

of the award, and if it is used to prove facts that were argued in the arbitration but that could not be established at the time.

2.11 AsiaPhos Limited and Norwest Chemicals Pte Ltd v. People's Republic of China

Two Singaporean companies had been operating phosphate mines in China's Sichuan province since 1996. The Jiudingshan Nature Reserve and the Giant Pandal National Park were later established in the same area. Starting in 2017, the Sichuan provincial government banned mining in and around that area, leading to the three mines' sealing off and the non-renewal of the investors' mining licences.

The investors initiated an ICSID arbitration, claiming that China had violated the **China-Singapore BIT** through their alleged expropriation, resulting in damages to their mining operations. The arbitral tribunal concluded that it did not have jurisdiction over the dispute. It held that the scope of the arbitration clause (Art. 13 of the BIT)[72] was limited to disputes involving the amount of compensation, whereas disputes on the occurrence and legality of an expropriation was subject to the jurisdiction of domestic courts. The investors challenged the award before the Swiss Supreme Court on the ground that the arbitral tribunal had wrongly declined its jurisdiction. The Court dismissed the challenge in decision **4A_172/2023** ("***AsiaPhos v. China***").[73]

The investors argued that, if there was a valid arbitration agreement, it must be assumed that the parties' intent was for the arbitral tribunal to have exclusive jurisdiction. The Court held that this principle, developed in commercial arbitration, did not apply here as the BIT did not provide for the exclusive jurisdiction of an arbitral tribunal. The Court also emphasized that the jurisdiction of an arbitral tribunal must be based on a clear and unambiguous consent of the contracting parties.

The Court then interpreted the arbitration clause in Article 13 of the BIT according to the Vienna Convention and upheld the arbitral tribunal's

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[72] This provision reads as follows: "*1.* […] *2. If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment. 3. If a dispute involving the amount of compensation resulting from expropriation, nationalization, or other measures having effect equivalent to nationalization or expropriation mentioned in Article 6 cannot be settled within six months after resort to negotiation as specified in paragraph (1) of this Article by the national or company concerned, it may be submitted to an international arbitral tribunal established by both parties.* […]."

[73] DSC 4A_172/2023 (150 III 89, *AsiaPhos v. China*) of 11 January 2024, ASA Bull. 4/2024, p. 926.

interpretation. In particular, the Court considered that the relevant dispute resolution clause could not be interpreted in the investor's favour by invoking the "*effet utile*". The Court held that the contracting States could have opted for a comprehensive arbitration clause but deliberately did not.

2.12 Kingdom of Spain v. EDF Energies Nouvelles S.A.

In 2007, Spain implemented regulatory measures to incentivize foreign investment in the renewable energy sector. As of 2010, Spain started retracting some of these regulations. In 2016, French investor EDF, which had invested in a Spanish renewable energy project, initiated arbitration against Spain under the ECT. Spain challenged the arbitral tribunal's jurisdiction, claiming *inter alia* that the arbitration clause in Article 26 ECT was incompatible with EU law due to the intra-EU nature of the dispute. In its final award, the *ad hoc* arbitral tribunal dismissed Spain's jurisdictional objections and found that Spain had violated the fair and equitable treatment standard under the BIT. Spain challenged the award before the Swiss Supreme Court. In decision **4A_244/2023** ("***Spain v. EDF***"),[74] the Court issued a landmark ruling on the controversial question of the jurisdiction of arbitral tribunals over intra-EU investment disputes and upheld the award.

The Supreme Court began its analysis of the intra-EU objection by noting that EU bodies had been conducting a "*crusade*" against intra-EU investment arbitrations for several years, particularly through the *Achmea* and *Komstroy* decisions. The Court found that, unlike national courts of EU Member States, it was not bound by the CJEU's decisions, including *Komstroy.* The Court added that it was "*not convinced*" by the CJEU's reasoning in *Komstroy* since it was based essentially, if not exclusively, on the requirement to preserve autonomy and the specific nature of EU law, without taking into account international law or the rules of treaty interpretation.

The Court further stated that if the interpretation of foreign law was controversial, it generally defers to the highest court of the country that enacted that law. However, the Court considered that this rule was not relevant here, where the issue was not to assess the scope of a foreign legal norm but to determine whether EU law prevailed over a multilateral international treaty. According to the Court, in the event of a conflict between the rules enshrined in various international instruments, EU institutions may be tempted, as in *Komstroy*, to affirm the primacy of their own law over that of the multilateral treaty, rendering a decision more akin to a "*pleading pro domo*" (pleading its

[74] DSC 4A_244/2023 (150 III 280, *Spain v. EDF*) of 3 April 2024, ASA Bull. 4/2024 p. 955.

own case). Consequently, the **Court gave no specific weight to the *Komstroy* decision**, and instead conducted its own in-depth analysis of Article 26 ECT according to the Vienna Convention.

The Supreme Court concluded that nothing in the provision's wording suggested that Spain's "*unconditional*" consent to arbitrate excluded intra-EU disputes. Had this been the EU's and its Member States' intention, it should have been clearly expressed in the ECT. Before concluding the ECT, the EU had included disconnection clauses in other multilateral treaties, allowing Member States not to apply such a treaty in their mutual relations. However, no such clause was included in the ECT, further confirming that intra-EU disputes were within the scope of Article 26 ECT.

Examining the ECT's object and purpose under Article 31(1) Vienna Convention, the Court found that the ECT aimed to promote international cooperation and investments in the energy sector, without geographical distinction regarding the investor's origin. Allowing EU-based investors to initiate arbitration against another member state supported this goal.

The Court rejected Spain's further arguments and found that:

(i) The fact that ECT Member States transferred certain areas of power to the EU (Art. 1(3), 10 and 25 ECT) does not mean that they are no longer bound by the ECT provisions;

(ii) The European Communities' Declaration of 17 November 1997, stating that they "*have not given their unconditional consent to the submission of a dispute to international arbitration*", is limited to the ECT's fork-in-the-road clause (Art. 26(3) (bXi) ECT) and applies only to the EU Communities, not its Member States;

(iii) The Declaration of the 22 EU cannot qualify as a subsequent agreement or practice under Article 31(3) Vienna Convention since it was not formulated by all ECT contracting parties. This Declaration was not relevant as it aimed to clarify the legal consequences of the *Achmea* decision, not to interpret the ECT. Furthermore, it could not retroactively deprive an investor of the right to pursue arbitration, as jurisdiction must be assessed based on the legal situation at the time the proceedings were initiated;

(iv) Spain's argument that EU treaties conflict with Article 26 ECT was inadmissible, as it was raised only in the rebuttal submission. In any event, the Court examined the Lisbon Treaty and Articles 267 and 344 of the Treaty of the Functioning of the European Union and found no conflict between Article 26 ECT and EU law. Even if Article 26 ECT were incompatible with EU law, there are

no grounds under public international law to conclude that EU law should prevail over the ECT.

The Supreme Court concluded that Article 26(3)(a) ECT, interpreted in good faith according to the ordinary meaning of the treaty's terms in their context and in the light of its object and purpose, precluded the argument that Spain's unconditional consent to arbitrate excluded intra-EU disputes. Therefore, there was no need to examine the supplementary means of interpretation under Article 32 Vienna Convention.

Spain also claimed that the **arbitral tribunal had allegedly failed to deliberate** on a "*relevant fact*" – the ***Green Power*** *v. Spain* award, arguing that the award should be annulled under Article 190(2)(a), (b) or (e) PILA.

The Court noted that errors in deliberations typically relate to the arbitral tribunal's improper constitution but could also involve violations of the equal treatment of the parties, their right to be heard, or procedural public policy. It however left the question open in this case, as Spain's argument in any event failed for other reasons.

The Court noted that the PILA does not require a specific form for deliberations; it suffices that the arbitrators had the opportunity to express their views. As the arbitral tribunal expressly stated in the award that it was not convinced by the reasoning in *Green Power*, the Court concluded that the Green Power award was addressed during the deliberations. Furthermore, the award was signed by all three arbitrators, showing that the deliberations had been completed. Contrary to Spain's position, the mention in the dissenting opinion that the arbitral tribunal had not deliberated on *Green Power* was irrelevant. The Court recalled that a dissenting opinion is an independent opinion and does not affect the award's considerations or operative part.

In any event, the Court held that the alleged failure to deliberate on *Green Power* had no bearing on the outcome of the case, as Spain's intra-EU objection was unanimously dismissed.

The same fate was reserved to Spain's argument that **the president of the arbitral tribunal lacked impartiality**. Spain argued that the award repeated verbatim the reasoning on the intra-EU objection of the tribunal – chaired by the same arbitrator – in *Triodos SlCAV II against the Kingdom of Spain*. Spain claimed this proved that the presiding arbitrator had already formed his opinion. The Court held that Spain was precluded from raising this objection for the first time in the challenge proceedings. Spain knew that the same person chaired both tribunals and that an identical legal problem arose in both cases, as it had raised the same objection in that case. Therefore, Spain could and should have raised this objection during the arbitration, immediately after the *Triodos* award.

Finally, the Supreme Court deemed Spain's argument that **intra-EU disputes are inarbitrable** inadmissible. Spain's argument was based exclusively on public policy grounds. However, the lack of arbitrability is a condition for the validity of the arbitration agreement and, therefore, must be brought as a jurisdictional challenge under Article 190(2)(b) PILA.

3. Table of Swiss Supreme Court treaty award decisions (December 2019-December 2024)[75]

Parties	Decision	Date	Treaty
Russian Federation v. PJSC Ukrnafta (*Russia v. Ukrnafta II*)	4A_244/2019[76]	12.12.2019	Russia-Ukraine BIT
Russian Federation v. PJSC Stabil LLC *et al.* (*Russia v. Stabil II*)	4A_246/2019[77]	12.12.2019	Russia-Ukraine BIT
Czech Republic v. Natland Investment Group N.V. et al. (*Czech Republic v. Natland I*)	4A_80/2018[78]	07.02.2020	ECT; Netherlands-Czech Republic BIT; Cyprus-Czech Republic BIT; Luxembourg-Czech Republic BIT

[75] For decisions rendered by the Swiss Supreme Court in investment treaty cases over the period 2000-2018, see Matthias SCHERER, Angela CASEY, *Domestic Review of Investment Treaty Arbitrations: the Swiss Experience Revisited*, in: ASA Bull. 4/2019, p. 819.

[76] ASA Bull. 4/2024, p. 910.

[77] Similar factual background and identical findings as in DSC 4A_244/2019 (*Russia v. Ukrnafta II*) rendered on the same day.

[78] ASA Bull. 4/2024, p. 856.

Clorox España S.L. v. Bolivarian Republic of Venezuela (*Clorox v. Venezuela I*)	4A_306/2019[79] (146 III 142)	25.03.2020	Spain-Venezuela BIT
Mr Gokul Das Binani and Mrs Madhu Binani v. Republic of North Macedonia (*Binani v. Macedonia*)	4A_156/2020[80]	01.10.2020	India-Macedonia BIT
State of Libya v. Etrak İnşaat Taahhüt ve Ticaret Anonim Şirketi (*Libya v. Etrak*)	4A_461/2019[81]	02.11.2020	Turkey-Libya BIT
Václav Fischer v. Czech Republic (*Fischer v. Czech Republic*)	4A_563/2020[82]	25.11.2020	Czech Republic-Germany BIT
Kingdom of Spain v. AES Solar Energy Cooperatief U.A. et. al (PV Investors) (*Spain v. AES Solar*)	4A_187/2020[83]	23.02.2021	ECT
Mr Idris Yamantürk, Mr Tevfik Yamantürk, Mr Müsfik Hamdi Yamantürk, Güriş İnşaat ve Mühendislik Anonim Şirketi (Güris Construction and Engineering Inc) v. Syrian Arab Republic (*Yamantürk v. Syria*)	4A_516/2020[84]	08.04.2021	Syria-Turkey BIT

[79] ASA Bull. 4/2020, p. 998.
[80] ASA Bull. 4/2021, p. 926.
[81] ASA Bull. 4/2024, p. 943.
[82] ASA Bull. 4/2021, p. 920.
[83] ASA Bull. 4/2024, p. 916.
[84] ASA Bull. 1/2022, p. 107.

Bolivarian Republic of Venezuela v. Clorox España (*Clorox v. Venezuela II*)	4A_398/2021[85] (148 III 330)	20.05.2022	Spain-Venezuela BIT
Russian Federation v. Yukos Capital Limited (*Russia v. Yukos II*)	4A_492/2021[86] (149 III 131)	24.08.2022	ECT
Republic of India v. Deutsche Telekom A.G. (*India v. Deutsche Telekom II*)	4A_184/2022[87]	08.03.2023	Germany-India BIT
AsiaPhos Limited and Norwest Chemicals Pte Ltd v. People's Republic of China (*AsiaPhos v. China*)	4A_172/2023[88] (150 III 89)	11.01.2024	China-Singapore BIT
Kingdom of Spain v. EDF Energies Nouvelles S.A. (*Spain v. EDF*)	4A_244/2023[89] (150 III 280)	03.04.2024	ECT
Bolivarian Republic of Venezuela v. Clorox España S.L. (*Clorox v. Venezuela III*)	4A_486/2023[90]	26.04.2024	Spain-Venezuela BIT
Czech Republic v. Natland Investment	4A_66/2024[91]	13.06.2024	ECT; Netherlands-Czech Republic BIT; Cyprus-

85 ASA Bull. 4/2024, p. 890.
86 ASA Bull. 4/2024, p. 980.
87 ASA Bull. 2/2023, p. 367.
88 ASA Bull. 4/2024, p. 926.
89 ASA Bull. 4/2024, p. 955.
90 ASA Bull. 4/2024, p. 906.
91 ASA Bull. 4/2024, p. 884.

Group N.V. et al. (*Czech Republic v. Natland II*)			Czech Republic BIT; Luxembourg-Czech Republic BIT