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Peeking Behind the Curtains: Insights from the Swiss Supreme Court's Recent Public Hearings in Appeals against Investor-State Dispute Settlement Awards

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In a marked departure from its usual closed-doors policy, the Swiss Federal Supreme Court (the "Supreme Court") recently held public deliberations in two separate appeal proceedings concerning foreign investment arbitrations. In both cases, a public deliberation by all five judges of the first civil chamber was necessitated due to the lack of unanimity among the regular panel of three (Articles 20 and 58 of the Swiss Federal Tribunal Act). In both cases, the majority decided to uphold the decisions in the relevant UNCITRAL arbitrations that favored investment protection, with a dissenting minority advocating for a more restrained interpretation of the scope of application of the relevant bilateral investment treaties ("BITs").

The first hearing, held on 16 October 2018, concerned two cases in which the Russian Federation sought to set aside the interim awards in two PCA-administered UNCITRAL arbitrations with seat in Switzerland for lack of jurisdiction (4A_396/2017 and 4A_398/2017, published on 16 November 2018). The disputes centered on the territorial scope of the Russia-Ukraine BIT of 27 November 1998 (the "R-U BIT"), namely on whether the Crimea was part of the host state territory from the perspective of a Ukrainian investor.

The Supreme Court confirmed the arbitral tribunal's finding that the BIT extended to the Crimea, over which Russia exercised de facto control. As for the scope of investments covered by the BIT, the Supreme Court backed the arbitral tribunal's finding that the term "investment" included investments initially located in the investor's home state that ended up in the host state only subsequent to a change in territorial borders.

Judge Kathrin Klett, the lone dissenting judge, criticized the majority's finding, arguing that the arbitral tribunal's jurisdiction should have been declined for two reasons. For one, the investment notion under Article 1 (1) of the R-U BIT was in Klett's view transaction-based, i.e. it only covered investments that were made by investors of one state in the territory of another state. Judge Klett argued that, by contrast, the majority wrongly based their assessment on an asset-based definition of investment, which she considered to be a definition more commonly used in recent BITs. Judge Klett found that her view was also in line with a systematic interpretation of the R-U BIT, which specifically mentions the need for a cross-border investment *ab initio* (based on the wording in Article 12 of the R-U BIT: "*… investments carried out by the investors of one Contracting Party on the territory of the other Contracting Party …*"), thereby excluding investments that only become international later on. She further opined that her stance was

supported by the BIT's goal of attracting foreign investment. Secondly, Judge Klett criticized the majority's approach as an impermissible supplementation of a lacuna in the BIT. In her view, Russia and Ukraine in 1998 did not consider the possibility that investments would change 'nationality' as a result of shifting borders and this gap in their agreement could not be filled by a judicial or arbitral body.

In the second hearing, held on 11 December 2018 and for which the reasoned judgement is still outstanding, the Supreme Court rejected India's set-aside appeal to an interim arbitral award in a satellite telecommunications dispute with Deutsche Telekom. In the UNCITRAL arbitration with seat in Switzerland, the tribunal had rejected India's jurisdictional objections and found the *force-majeure* repudiation of the contract by the Indian state-owned entity to be a violation of the fair and equitable treatment standard. The Supreme Court confirmed the arbitral tribunal's finding that the subjective scope of the 1995 Germany India BIT (the "G-I BIT") extended to both direct and indirect foreign investments and thus covered Deutsche Telekom's Indian investment made through a Singaporean subsidiary.

The majority considered that the G-I BIT covered indirect investments despite not being mentioned explicitly in the text. It based its interpretation on the BIT's purpose of promoting foreign investment. Christina Kiss, the presiding judge, explained that a state should not be allowed to restrictively interpret such a treaty to exclude the type of investment it intended to attract when entering into the BIT. The majority also found support for its position in the fact that the use of special purpose investment vehicles was common in foreign investment and should not be disallowed by way of a restrictive interpretation. By contrast, the two dissenting judges adhered to a more literal interpretation, with Judge Klett emphasizing that Deutsche Telekom's investment was in Singapore and not in India. Judge Martha Niquille expressed the view that the treaty's silence on indirect investments should be interpreted as a conscious omission by the treaty partners since some contemporary BITs explicitly included such investments.

While no assessment on the basis of a sample size of two can be conclusive, the two decisions nevertheless invite a joint assessment in light of the fact that their contested and, in the case of the Crimean decision, politically sensitive subject matter led both to be publicly deliberated in the space of only two months. Seen together, the two decisions betray the possibility of an ideological divide among the judges of the first civil chamber. In common terms, this divide would distinguish Judges Klett and Niquille as the more 'conservative' faction favoring a more restrictive interpretation of BITs' scopes of application, which ultimately favors states' sovereignty. By contrast, the majority seems to show a willingness to interpret the BITs brought before it based on their objective purpose, thereby maintaining their broad scope (as reflected e.g. in Article 2 of the G-I BIT by the phrase *"all investments made"*) and refusing to exclude investments that a more restrictive historical or literal interpretation of the BIT would not cover.

It remains to be seen whether this divide follows the described lines or even truly exists. In any case, the Supreme Court's recent jurisprudence in investor-state dispute settlement disputes can still be said to reflect its customary and long-standing practice as a gate-keeper: it assiduously uses its broad power of review when assessing an arbitral tribunal's legal reasoning on jurisdiction yet exercises the judicial restraint mandated by Article 190 (2) of the Swiss Private International Law Act on all other grounds of appeal. The result is a body of established precedents that is very consistently *in favor arbitri*, which is good for investor-state arbitrations with seat in Switzerland and good for business.

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