4A_65/2018[1]

Judgment of December 11, 2018

First Civil Law Court

Federal Judge Kiss, Presiding,
Federal Judge Klett,
Federal Judge Hohl,
Federal Judge Niquille
Federal Judge May Canellas
Clerk of the Court: Mr. Carruzzo

The Republic of India,
Represented by Mr. Thomas Legler, Mr. Michael Kramer, and Mr. Nicolas Pellaton,
Appellant,

v.

X._____, AG,
Represented by Mr. Daniel Hochstrasser and Mrs. Simone Burlet-Fuchs,
Respondent,

Facts:

A.
A.a. In accordance with the regulations of the International Telecommunication Union (ITU), the Republic of India (hereinafter: India) has been allocated several electromagnetic frequency bands, including 190 MHz of the spectrum of the S band in the frequency range between 2500 and 2690 MHz. In the late 1990s and early 2000s, the Indian government approved a new policy framework aimed, among other things, at encouraging private sector investment in its space industry and attracting foreign investors. To this end, it issued guidelines which allowed the Department of Space (hereinafter: DOS), at whose disposal the entire spectrum of the S-band had been placed since 1983, to transfer a part of it to the Department of Telecommunications (hereinafter: DOT), for use in commercial services.

In mid-2003, an American consulting firm began negotiations with the Indian space authorities to collaborate on the commercialization of part of the DOS S-band spectrum. It proposed the creation of a hybrid (satellite-terrestrial) communications platform for the delivery of multimedia services in India via satellites to be built and launched by the Indian Space Research Organisation (hereinafter: ISRO), and

[1] Translator's Note: Quote as The Republic of India *v.* X._____ 4A_65/20186.
The decision was issued in French. The original text is available on the website of the Federal Tribunal, www.bger.ch.

a terrestrial network. At the end of the successful negotiations, a private company under Indian law, known as A._____ Limited (hereinafter: A._____) was established on December 17, 2004, for the implementation of the project in question.

On January 28, 2005, A._____ and B._____ Limited (hereinafter B._____), an Indian state-owned company, entered into a contract (hereinafter referred to as Contract A._____) for the leasing, by A._____, of 70 MHz of the spectrum of the S-band, the use of which would be made possible by the proposed orbiting of a first satellite (PS-1 or GSAT-6) and then a second one (PS-2 or GSAT-6A). A._____ agreed to pay B._____, in addition to the acquisition costs of essential components, a reservation fee of USD 20 million per satellite and rents of USD 9 million per year. The initial rental period was 12 years; an additional period of the same duration was inserted in Contract A._____ by an addendum of July 27, 2006. On February 2, 2006, B._____ sent A._____ a letter informing A._____ that it had received the necessary approval for the construction and launch of the first satellite as well as for the rental of the S band transponder capacity, which made the Contract A._____ enter into force.

A.b. In October 2007, the representative of A._____ contacted the CEO of C._____ AG, a subsidiary of the German company X._____ AG (hereinafter: X._____), to discuss a possible joint-venture. At that time, A._____ had already obtained funds from two venture capital companies that had paid them through their Mauritian subsidiaries. As this project was in line with its strategy to bring new expertise in the planning and design of terrestrial networks to emerging markets, X._____, after a closer look at the situation and meeting with the Indian authorities' representatives, approved an initial investment of USD 75 million, which it entered into under a share subscription agreement of March 19, 2008, which X._____ Asia Pty Ltd (hereinafter: X._____ Asia), a Singapore-based, wholly-owned subsidiary, concluded with A._____, apparently for fiscal reasons. The purchase of A._____'s shares, completed on August 18, 2008, was followed by a new contribution of USD 22.2 million on September 29, 2009, so that the total equity interest of X._____ Asia with capital of A._____ reached 19.62%.

The project forming the subject of the Contract A._____ never materialized for various reasons which will be indicated below in the relevant measure. Finally, on February 25, 2011, B._____ notified its co-contracting party of the termination of Contract A._____ by taking advantage of the case of *force majeure* which, in its opinion, constituted the decision, taken on the 17th of the same month by the Indian Cabinet Committee on Security (hereinafter, CSS), not to provide an orbital position in the S-band for commercial activities.

A.c. On June 19, 2011, A._____ submitted a request for arbitration against B._____ at the International Chamber of Commerce (ICC) Court of Arbitration for the purpose of obtaining the performance of the contract A._____ in kind or, in the alternative, some USD 1.6 billion in damages.

By final award of September 14, 2015, (hereinafter: the ICC award), a three-member arbitral tribunal, based in New Delhi, India, unanimously sentenced B._____ to pay to USD 562.5 million, plus interest,

for improperly terminating Contract A._____. B._____ brought an action for annulment of that award before the Indian courts. A decision on the said appeal has apparently not yet been issued.

B.

B.a. On July 10, 1995, Germany and India signed an agreement on the mutual encouragement and protection of investments, a Bilateral Investment Treaty (hereinafter, the BIT). In so far as it concerns the present appeal proceedings, the said Agreement, which entered into force on July 13, 1998, contains in particular the following provisions:

> The Federal Republic of Germany and the Republic of India (hereinafter referred to the Contracting Parties) desirous of creating conditions favourable for fostering greater investment by nationals and companies of either State in the territory of the other State,
>
> Recognising that reciprocal protection of such investments under an agreement will subserve the aforesaid objective and will be conducive to the stimulation of individual business initiative and will increase prosperity in both States,
>
> Have agreed as follows,
>
> Article 1. Definitions
> For the purpose of this Agreement:
> (a) "Companies" means:
> (i) in respect of the Republic of India: corporations, firms and associations incorporated or constituted under the law in force in any part of India;
> (ii) in respect of the Federal Republic of Germany juridical persons as well as commercial or other companies or associations with or without legal personality having their seat in the territory of the Federal Republic of Germany, irrespective of whether or not their activities are directed at profit;
>
> (b) "Investment" means every kind of asset invested in accordance with the national laws of the Contracting Party where the investment is made and, in particular, though not exclusively, includes:
> (i) movable and immovable property as well as other rights such as mortgages, liens, or pledges;
> (ii) shares in, and stock and debentures of, a company, and any other forms of such interests in a company;
> (iii) right to money or to any performance under contract having a financial value;
> (iv) intellectual property rights, including patents, copyrights, registered designs, trademarks, trade names, technical processes, know-how and goodwill in accordance with the relevant laws of the respective Contracting Party;
> (v) business concessions conferred by law or under contract, including concessions for mining and oil exploration;
>
> (c) "Investor" means nationals or companies of a Contracting Party who have effected or are effecting investment in the territory of the other Contracting Party;.
>
> Article 2. Scope of the Agreement
> This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, whether made before or after the coming in force of this Agreement.
>
> Article 3. Promotion and Protection of Investment

(1) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party and also admit investments in its territory in accordance with its law and policy.
(2) Each Contracting Party shall accord to investments as well as to investors in respect of such investments at all times fair and equitable treatment and full protection and security in its territory.
(3) Neither Contracting Party shall place any constraints on the international movement of goods or persons directly connected with an investment being transported subject to bilateral or international agreements governing such transports, which are in force between the Contracting Parties.

Article 5. Expropriation or Nationalisation
(1) Investments of investors of either Contracting Party shall not be expropriated, nationalised or subjected to measures having effect equivalent to nationalisation or expropriation in the territory of the other Contracting Party except in public interest, authorised by the laws of that Party, on a non-discriminatory basis and against compensation which shall be equivalent to the value of the expropriated or nationalised investment immediately before the date on which such expropriation or nationalisation became publicly known. Such compensation shall be effectively realisable without undue delay and shall be freely convertible and transferable. Interest shall be paid in a fair and equitable manner for the period between the date of expropriation or nationalisation and the date of actual payment of compensation.
(2) An investor whose investment is expropriated or nationalised may, under laws of the Contracting Party making the expropriation or nationalisation, seek review of expropriation or nationalisation measures by a judicial or other independent authority of that Contracting Party.
(3) Where a Contracting Party expropriates the assets of a company in its own territory, in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraphs 1 and 2 of this Article are applied in the same manner to provide compensation in respect of the investment of such investors of the other Contracting Party who are owners of those shares.

Article 9. Investment Disputes
(1) Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall..."

Article 12. Prohibitions and Restrictions
Nothing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions to the extent necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals or plants.[2]

B.b. On September 2, 2013, X._____, relying on the arbitration clause included in the BIT, initiated an arbitration proceeding against India for the purpose of obtaining damages for breach of Articles 3 and 5 of the BIT. A three-member Arbitral Tribunal was constituted under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) under the auspices of the Permanent Court of Arbitration (PCA) with its seat in Geneva. English was designated as the language of arbitration.

India raised three preliminary objections which, it was suggested, precluded the plaintiff from initiating this arbitration: *first*, it argued that the BIT protects only investors who have made direct investments in India, which would not be the case of X._____ since the German company had intentionally structured

[2] Translator's Note: In English in the original text.

its investment in the form of a contribution of funds to its Singapore subsidiary, which then invested these funds in A._____; *second*, that all the activities deployed by X._____, via its subsidiary, had remained at the preparatory stage, so that they constituted only pre-investments not protected by the BIT; and *third*, it denied X._____ the right to avail itself of the substantive rules of the treaty, since the measures complained of were necessary for the protection of its "essential security interests,"[3] reserved by Art. 12 of the BIT.

The Arbitral Tribunal agreed initially to bifurcate the proceedings and to address the issues of jurisdiction and the principle of the defendant's liability, and to address later, if necessary, the quantum of damages claimed by the plaintiff. By partial award of December 13, 2017, it accepted jurisdiction to hear the dispute between the parties, found that India had violated the standard of Fair and Equitable Treatment in the sense of Art. 3(2) of the BIT and indicated that it would take the necessary steps to continue the procedure now centered on the calculation of damages. The arguments of fact and law that supported the Award will be referred to below, as necessary, in the context of the analysis of the criticisms of which they are the subject before this Court.

C.
On January 29, 2018, India (hereinafter, India or the Appellant) filed an appeal in civil law for violation of Art. 190(2)(b) and (d) of the Federal Law on Private International Law of 18 December 1987 (PILA[4], RS 291), for the annulment of the partial award of December 13, 2017, and the finding of the lack of jurisdiction of the Arbitral Tribunal to decide the dispute that divides the parties. It also requested, as both super-provisional and provisional measures, the granting of suspensive effect to the appeal and the suspension of the arbitral proceedings until the right was known in the appeal.

By order of the Presiding Judge of February 23, 2018, the Appellant was invited to pay, until March 15, 2018, the amount of CHF 250'000 to the registry of the Federal Tribunal as security for the costs of its adverse party. This was done in a timely manner.

By letter of April 9, 2018, the Arbitral Tribunal, which produced the case file in the form of a USB key, waived its right to comment on the appeal. With regard to the request for the stay of the arbitral proceedings, it indicated that it did not consent but that it would of course comply with the decision that would be taken on this point.

At the very beginning of its answer of May 15, 2018, X._____ (hereinafter: X._____, or the Respondent) submitted that the appeal should be rejected insofar as the matter was capable of appeal. It also opposed the admission of pre-provisional and provisional requests.

The Appellant, in its reply dated May 31, 2018, and the Respondent, in its rejoinder dated June 18, 2018, maintained their initial submissions.

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[3] Translator's Note: In English in the original text.
[4] Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987.

Reasons:

1.
According to Art. 54(1) of the Law on the Federal Tribunal of June 17, 2005, (LTF[5]; RS 173.110), the Federal Tribunal issues its judgment in an official language,[6] as a rule, in the language of the award under appeal.

When the decision has been issued in another language (here, English), the Federal Tribunal uses the official language chosen by the parties. Before the Arbitral Tribunal, they used English, while, in the appeal briefs sent to the Federal Tribunal, they used either French (the Appellant) or German (the Respondent). According to its practice, the Federal Tribunal shall consequently issue its judgment in French.

2.
In the field of international arbitration, a civil law appeal is admitted pursuant to the requirements of Art.190-192 PILA (RS 291) pursuant to Art. 77(1) LTF.

2.1. The seat of arbitration was fixed in Geneva. The award under appeal constitutes an interlocutory decision by which the Arbitral Tribunal ruled on its own jurisdiction (Art. 186(3) PILA), and on one of the material conditions of the request (*i.e*. the basis of the host State's liability). In accordance with Art. 190(3) PILA, it can therefore be appealed for the reasons provided for in Art. 190(2)(b) PILA (ATF 143 III 462 at 2.2; 130 III 66 at 4.3 page 75). In addition, the First Civil Court indicated in two judgments issued in 2014 that the grievances referred to in Art. 190(2)(c)-(e) PILA can also be raised against interlocutory decisions within the meaning of Art. 190(3) PILA, but only to the extent that they are strictly limited to matters directly related to the jurisdiction or composition of the arbitral tribunal (ATF 140 III 477 at. (1) 520 at 2.2.3, judgments to which reference is made in ATF 143 III 462, cited above, at 2.2 page 465).

The civil law remedy provided for in Art. 77(1) LTF is generally only of an annulling nature (see Art. 77(2) LTF, ruling out the applicability of Art. 107(2) LTF insofar as the latter provision allows the Federal Tribunal to rule on the merits of the case). However, this exception is made when the dispute concerns, as in this case, the jurisdiction of the Arbitral Tribunal. In such a case, the Federal Court, if it allows the appeal, may itself determine the jurisdiction or lack of jurisdiction of the arbitral tribunal (ATF 136 III 605[7] at 3.3.4, page 616). The Appellant's submission that the Court of First Instance itself should find that the Court of Arbitration lacked jurisdiction is therefore admissible.

2.2. In order for an eligible and duly-invoked grievance in the civil law appeal to be admissible, it must be reasoned, as prescribed by Art. 77(3) LTF. This provision corresponds to the stipulations of Art. 106(2) LTF for the grievance alleging the breach of fundamental rights or provisions of cantonal and inter-

[5] Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173.110.
[6] Translator's Note: The official languages of Switzerland are German, French and Italian
[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

cantonal law. Like this article, it establishes the grounds of challenge (*Rügeprinzip*[8]) and thus excludes the admissibility of appellate criticism. In addition, the Appellant may not rely on arguments of fact or of law that were not submitted in a timely manner, that is, before the expiry of the non-extendible time-limit for bringing an appeal (Art. 100(1) LTF, in conjunction with Art. 47(1) LTF) or to supplement, beyond the deadline, insufficiently reasoned submission The same applies to the content of a possible rejoinder (judgment 4A_34/2015[9] of October 6, 2015, at 2.2, not published in ATF 141 III 495).

2.3. The Federal Tribunal adjudicates on the basis of the facts found in the award under appeal (see Art. 105(1) LTF). It may not rectify or supplement of its own motion the findings of the arbitrators, even if the facts have been established in a manifestly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF. As well, when seized of a Civil law appeal against an international arbitral award, does its mission not consist of deciding with full power of review, like an appellate jurisdiction—but only to consider whether the admissible grievances raised against the award are justified or not? Allowing the parties to state facts other than those found by the arbitral tribunal, apart from the exceptional cases reserved by case law, would no longer be compatible with such a mission, even though these facts may be established by evidence contained in the arbitration file. However, the Federal Tribunal retains the ability to review the facts underlying the award under appeal if one of the grievances mentioned in Art. 190(2) PILA is raised against this fact or new facts or evidence are exceptionally taken into account in the Civil appeal procedure (ATF 138 III 29[10] at 2.2.1 and the judgments cited).

2.4.

2.4.1. When called upon to deal with a jurisdictional defense (Article 190(2)(b) PILA), the First Civil Law Court freely examines the matters of law, including the preliminary matters, which determine the jurisdiction or lack of jurisdiction of the arbitral tribunal. Thus it has been led to define the concepts of contract claims, treaty claims and umbrella clauses under certain provisions of the Treaty of December 17, 1994 on the Energy Charter (TCE, RS 0.730.0; ATF 141 III 495 at 3.2) or to determine the meaning of the term "investment" used in a bilateral investment treaty concluded by the Governments of the French Republic and the Socialist Republic of Vietnam, and to determine whether the activity of the so-called investor was included in the definition of this concept (Judgment 4A_616/2015[11] of September 20, 2016, at 3 to which Judgment 4A_157/2017[12] of 14 December 2017 at. 3.3.4).

It will do the same for the concepts of 'direct/indirect investments'/'investors' (see at 3.2.1), 'pre-investment' (see at 3.2.2) and 'essential security interests' (see at 3.2.3) upon which the Appellant is relying. This interpretation shall comply with the rules of the Vienna Convention on the Law of Treaties

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[8] Translator's Note: In German in the original text.

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/swiss-supreme-court-addresses-difference-between-treaty-claims-and-contract-claims

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-616-2015

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-157-2017

of May 23, 1969, (RS 0.111; hereinafter, VCLT; ATF 141 III 495 at 3.5.1, page 503). Admittedly, unlike Germany and Switzerland, the countries in which it entered into force on August 20, 1987, and June 6, 1990, respectively, the VCLT has not been ratified by India. Nevertheless, it has codified customary international law with regard to the interpretation of treaties (ATF 138 II 524 at. 3.1) and that there is therefore no obstacle to the reference being made in this case. The Arbitral Tribunal also pointed out that this way of proceeding was not disputed (Judgement, No. 109). Moreover, the Appellant itself cites the text of Art. 31(1) VCLT in one of its submissions to the arbitration file (Respondent's Rejoinder on Jurisdiction and Liability of October 9, 2015, page 151, footnote 482).

2.4.2. Art. 31(1) VCLT provides that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In addition to the context (see Art. 31(2) VCLT), the following must be taken into account, according to Art. 31(3) VCLT, of any subsequent agreement between the parties concerning the interpretation of the treaty or the application of its provisions (a); any subsequent practice in the application of the treaty establishing the agreement of the parties with respect to the interpretation of the treaty (b) and any relevant rules of international law applicable in the relations between the parties (c). The preparatory work and the circumstances in which the treaty was concluded constitute supplementary means of interpretation when the interpretation given in accordance with Art. 31 VCLT leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable (see Article 32 VCLT)

Art. 31(1) VCLT sets an order of taking into account the elements of the interpretation – without, however, establishing a compulsory legal hierarchy between them. The ordinary meaning of the text of the treaty is the starting point of the interpretation. This ordinary meaning of terms must be understood in good faith, taking into account their context and in the light of the object and purpose of the treaty. The object and purpose of the treaty correspond to what the parties wanted to achieve by the treaty. The purposive interpretation guarantees, in connection with the interpretation in good faith, the “effectiveness” of the treaty. When several meanings are possible, it is necessary to choose the one which allows the effective application of the clause whose meaning is sought, avoiding an interpretation in contradiction with the letter or the spirit of the commitments made. A contracting State must therefore prohibit any conduct or interpretation that would result in its evading of its international commitments or in diverting the treaty from its meaning and purpose (ATF 144 II 130 at. 8.2.1 and the judgments cited).

2.4.3. The following should also be taken into account: the Appellant's argument, which does not directly involve the process of interpretation, that consists of deducing the lack of jurisdiction of the Arbitral Tribunal from the alleged illegality of Contract A._____ (see n. 4).

2.4.4. It goes without saying that the forthcoming review will be done within the strict limits that the aforementioned case-law has long laid down for the Federal Tribunal's scope of review when ruling on a civil law appeal against an award made in the context of international arbitration.

3.
Before entering into the merits – subject to these reservations – of the grievance relating to the jurisdiction of the Arbitral Tribunal, it is necessary to summarize the grounds on which the Arbitrators dismissed the

three preliminary objections raised by the Appellant. For the sake of simplification, the relationship of the arguments developed in the partial award will take the form of direct speech as much as possible.

3.1.

3.1.1. The Appellant's objection to the indirect nature of the investment claimed by the Respondent raises two questions: *first*, do the definitions of the terms *investment*[13] and *investor*[14] in the BIT imply that this bilateral treaty imposes on nationals of the State of origin to directly hold, *i.e*. without interposed companies, the assets concerned? *Second*, can nationals of the state of origin who do not directly hold the assets affected by the measures complained of protest against the material breaches of the BIT resulting from these measures?

3.1.1.1. Art. 1(b) of the BIT gives a broad definition of investment, which covers any type of asset invested in accordance with the host State's national legislation; it also provides a non-exhaustive list of examples including the shares of a company and any other form of participation in a company. Admittedly, the Appellant rightly points out that the illustrative list of assets that may constitute an investment within the meaning of the contractual standard examined relates to the type of rights to be taken into account in this respect, and not to the condition that each of them must fulfil to meet this definition of investment. In fact, that condition resides in the process of investing the relevant asset in accordance with the national law of the Contracting Party hosting the investment ("*... invested in accordance with the national laws of the Contracting Party where the investment is made...*"), in this case, India.

That being the case, if Art. 1(b) of the BIT requires that the asset concerned be "invested", it does not specify that it must be done so directly, that is, without the intermediary of one or more intervening companies. In the absence of any reservation in the BIT regarding the direct or indirect nature of the investor's required act, the Arbitral Tribunal will interpret the terms *investment* and *invested* according to the criteria set out in Art. 31(1) VCLT, taking into account the ordinary meaning that must be given to them in good faith in their context and in light of the object and purpose of the BIT. Investments are often made indirectly for various legal and regulatory reasons, in particular in order to benefit from a favorable regime for double taxation. Thus, the ordinary meaning of the above terms is not restricted to assets of which an investor is the direct owner. The object and purpose of the BIT, which is to stimulate individual business initiative and to increase the number of investments in order to increase the prosperity of both States, also does not justify a narrow interpretation of these terms. The continuing decisions of a number of investment tribunals confirm that, in the absence of express reservations, the term *investment* embraces both direct and indirect investment. The award in *Berschader v. Russia*, relied upon by the Appellant, does not change this because it deals with a different situation. The same is true of the comparison made by the plaintiff between the BIT and the bilateral investment treaties concluded by Germany and India with other States; as primary methods of interpretation provide a conclusive result, there is no need to resort to a complementary method of interpretation, which is the practice of comparative contracts. The latter method is in any case not decisive: some bilateral treaties, more detailed than others, provide particulars on the direct or indirect nature of the investments, without this meaning, for those which are less so and do not include similar particulars, that the two signatory states

[13] Translator's Note: In English in the original text.
[14] Translator's Note: In English in the original text.

have tacitly demonstrated their common desire to exclude indirect investments. The Appellant has not provided the preparatory work for the BIT, which could be inferred from the existence of such qualified silence. The Arbitral Tribunal therefore concludes that the definition of investment within the meaning of Art. 1(b) of the BIT does not require that the assets be held directly by the national of the state of origin in order to be considered as protected investments.

Should a different conclusion be drawn from the definition of the term *investor*? Art. 1(c) of the BIT applies this term to nationals or companies of one Contracting Party who have made or make an investment in the territory of the other Contracting Party. India has not argued that the ordinary meaning of the word would preclude an investment made by intervening companies, which would be contrary to the practice mentioned above. With regard to the second part of the definition, it is not in dispute that A._____ is a company that was incorporated and exists in India. In addition, the requirement that the investment be made in the territory of the host State does not limit the manner of so doing; it is therefore sufficient for the assets concerned, that is, the result of the investment process, to be in the territory of the host State. Moreover, the arbitral tribunals that have examined the issue systematically refused to deduce a requirement of direct ownership of the assets constituting the investment from the reference to such a territory. It is therefore sufficient that the invested assets are located in India.

In other words, that the Respondent does not hold them directly does not prevent it from being regarded as an investor.

3.1.1.2. The difference is whether a protected investor, such as X._____, can act against measures affecting the investment it holds only indirectly. Art. 5(3) of the BIT contains a specific rule in this regard. It provides that where a Contracting Party expropriates the assets of a company in its own territory, in which investors of the other Contracting Party hold shares, it shall ensure that the provisions of paragraphs 1 and 2 of this Article shall be applied in the same way in order to provide compensation in connection with the investment of those investors of the other Contracting Party who own such shares.

The Appellant believes that it can deduce from this rule the lack of standing of the indirect shareholders. However, this rule does not concern standing or the question of whether a shareholder may submit applications for breach of the substantive provisions of the treaty relating to its indirect investment. In particular, Art. 5(3) of the BIT does not stipulate who has *locus standi* in relation to breaches other than expropriation, but simply establishes that a shareholder may avail itself of the prohibition of expropriation because of the company in which it holds a part of the shares. In the present case, the Respondent is not acting instead of that company nor does it purport to substitute for it to assert its rights deriving from the primary rule of the BIT. Rather, it claims compensation for the derivative loss it personally suffered as a result of India's alleged breaches of treaty obligations that protect investors' investments from the other contracting party. India does not dispute that international investment law allows shareholders to be compensated for the derivative loss they suffer as a result of the breach of the contractual standards governing their investments. Art. 5(3) of the BIT envisages a different situation, in that it allows a shareholder to benefit from the protection afforded by this treaty to the company from which it acquired part of the shares. Accordingly, this provision cannot be construed as limiting the shareholder's distinct right to submit a claim for the derivative loss suffered on its own behalf.

3.1.1.3. The answers thus provided to the two questions above lead the Arbitral Tribunal to dismiss the Appellant's preliminary objection based on the indirect nature of the Respondent's investment.

3.1.2. In support of its second preliminary objection and relying on the above-mentioned text of Art. 3(1) of the BIT, according to which only investments made in accordance with the law and policy of the host State will be protected, the Appellant argues that the treaty at issue is the standard model of a treaty with an admission clause, by which is meant a treaty that protects only those investments approved by the host State, excluding the pre-investment activities to which the Respondent's actions in the present case would have been limited, via A._____. Also, for lack of an investment worthy of the name, the arbitration clause inserted in the BIT would be inapplicable in the present case.

This is not the case. The disputed clause does not make the protection granted by the BIT to the investments of a contracting party dependent on the good will of the host State, whether or not it is party to endorsing the investment made in its territory, but requires that State to admit investments that comply with its legislation and policy. In this case, there is no indication that this condition has not been fulfilled. In this respect, it is significant that B._____ did not rely on this argument when it argued for the invalidity of Contract A._____ in the ICC arbitration.

For the rest, supposing, *arguendo*, that Art. 3(1) of the BIT bears the character of an admission clause, it must be held that the relevant Indian authorities admitted X._____'s indirect participation in A._____'s capital and thus approved that investment. To obtain its indirect participation in A._____, X._____ also provided substantial financial resources, namely more than USD 97 million, capital contributions that constitute investments protected under Art. 1(b)(ii) of the BIT.

The Appellant insists that A._____ did not obtain the license for the Wireless Planning and Coordination Wing of the DOT (hereinafter: the WPC license), which was essential for the terrestrial reuse of the leased spectrum and without which system A._____ could not be deployed. The importance of such a license cannot be underestimated. However, the definition of investment given by the BIT does not apply only to incumbent companies which hold all the approvals necessary for the exercise of their activities, otherwise it would be necessary to exclude, for example, a valid concession contract as long as the concessionaire had not obtained the last approval needed to start its activity. Such a narrow interpretation would not be justified in light of the text, object, and purpose of the BIT. Therefore, the absence of the WPC license, even if it may have diminished the value of X. _____'s investment and is likely to affect the extent of the compensation claimed by X._____, does not affect the jurisdiction of the Arbitral Tribunal.

It must also be emphasized that, unlike the situation prevailing in the arbitral cases relied on by the Appellant, which concerned non-compulsory or even merely preparatory agreements, the agreement concluded on 28 January 2005 by A._____ and B._____ (Contract A._____), which provided for the lease of valuable satellite spectra, was legally binding since it entered into force after A._____ had been informed that it had obtained full approval from the Indian government to proceed with the implementation of the lease.

3.1.3. Art. 12 of the BIT reserves the right for each of the contracting parties to apply prohibitions or restrictions to the extent necessary to protect its essential security interests. Relying on this provision, the Appellant submits that it took the action complained of, namely the termination of the Contract, for the safeguarding of such interests, for which reason it denies the Respondent the right to avail itself of the substantive rules of the BIT. This third and final preliminary objection must be examined.

3.1.3.1. The cited provision, whose purpose is broader than that of the defense of necessity that international custom relies on, is not a discretionary clause that is beyond all control. Its application assumes the following three conditions: first, the implementation of a prohibition or restriction; second, the existence of essential state security interests that may justify that prohibition or restriction; third, the maintenance of the measure taken within the limits of what is necessary.

As nothing in the text of the provision cited requires a prohibition or restriction of a general nature, the Arbitral Tribunal has no difficulty in holding that the measure in question – namely, the CSS's decision not to provide an orbital position to B._____ in the S-band for commercial activities, the decision giving rise to the subsequent cancellation of the Contract A._____ – fulfils the first condition. The analysis of the other two conditions is more complex.

With regard to the existence of essential security interests, the Arbitral Tribunal accepts the idea that it is necessary to examine the manner in which the host State has applied this condition with a certain degree of deference. However, the margin of appreciation granted to the host State cannot be unlimited, at the risk of having to endorse a decision that would give an overly broad meaning to the notion of essential security interests, as the interpretation of Art. 12 of the BIT. It is therefore necessary that the alleged interests are related to the security of the State and that they are, moreover, essential. In particular, Art. 12 of the BIT, if properly relied on, precludes the application of the obligations imposed by the treaty, including the obligation to indemnify an investor who has been lawfully expropriated; it must therefore protect something of a higher value than the public interest to which Art. 5(1) of the BIT subordinates the validity of the expropriation or nationalization of an investment.

The same remarks apply, *mutatis mutandis*, to the third condition, that of the necessity of the measure complained of. Here again, the host State must be given latitude in its judgment because of the proximity of the host State to the situation, its expertise and its jurisdiction; it cannot, however, be unlimited, except to encourage the excessive use of Art. 12 of the BIT which would render the substantial protections guaranteed by this treaty completely futile.

3.1.3.2. Having thus set the limits of its powers of review, the Arbitral Tribunal then examines at length the factual evidence in its file to determine whether the decision of the CSS was necessary for the protection of the essential security interests of India. It does so by taking into account not only the context in which that decision was made, but also the subsequent circumstances that would clarify the meaning of the decision. It further explains that its analysis will focus on documentary evidence, since it has not been able to benefit from the testimony of senior Indian officials directly involved in the process that led to the decision of the CSS.

At the end of its thorough analysis of the records and documents in its possession, the Arbitral Tribunal reaches the conclusion that the said award is based on a multitude of reasons, some of which are only likely, according to an objective analysis, to be related to the essential interests of security referred to in Art. 12 of the BIT. There was therefore the question of whether the decision complained of was necessary for the protection of such interests. On this point, the Arbitral Tribunal considered that the Appellant has not shown that this was the case, mainly given the scope of the decision, the purpose assigned to it and subsequent events. The substantive rules of the BIT therefore apply, according to it, to X. _____'s investment.

3.2.
The reasons supporting the rejection by the Arbitral Tribunal of these three preliminary objections having been summarized above, it is appropriate to examine now, with respect to each of them, the arguments put forward by the Appellant to prove the alleged lack of relevance of these reasons and the counter-arguments against the Respondent, and then draw the necessary consequences as to the fate of the present appeal.

3.2.1.
3.2.1.1. First, the Appellant argues that the Arbitral Tribunal had neither jurisdiction *ratione materiae*, as the BIT did not protect indirect investments, nor *ratione personae*, as indirect investors were not covered by that treaty. Without contesting the relevant facts contained in the Award, it submits that X. _____'s sole investment consisted of the acquisition of the shares of X._____ Asia, its Singapore subsidiary, which itself subscribed to a number of shares of A._____, a private company under Indian law that entered into the disputed contract with B._____, a state-owned Indian company. According to the Appellant, such an investment would not enter into the BIT's forecasts, given its indirect nature.

This view, the Appellant bases, first, on the comparison made by it between the BIT and a number of bilateral treaties concluded by India and Germany with other States, which treaties, unlike the treaty in question, all include the adjective 'indirect' following the noun 'investment' or the adverb 'indirectly' used to determine the act of investing. For the Appellant, in the present BIT, the absence of a clause providing for the protection of investments and/or indirect investors, on the one hand, and the reference, made to Art. 1(c) and 2 of the BIT to investments made "*in the territory of the other Contracting Party*"[15], on the other, clearly reveals the will of the parties to the BIT to limit the application to direct investments only. It does not matter, continues the Appellant, that Art. 1(b) of the BIT provides a broad definition of investment, since this definition, as recognized by the Arbitral Tribunal, relates to the types of assets or rights that may be protected by the treaty, and not the manner in which they must be held for such protection, a point on which the BIT is apparently silent.

With regard to the textual interpretation of the BIT, the Appellant relies, in support of its case, on the authority of Professor Zachary Douglas (*The International Law of Investment Claims*, 2009, pp. 310 et seq.) for whom the principle of interpretation given by the Latin adage *verba aliquid operari debent*[16] directs that effect must be given to adverbs directly or indirectly and, therefore, that the treaties in which

[15] Translator's Note: In English in the original text.
[16] Translator's Note: In Latin in the original text. The word means "words should have some effect".

these terms appear are distinguished – an instance involving the extension of the jurisdiction of the arbitral tribunal *ratione personae* to claimants holding their investment only through intermediary companies – from those where they do not appear, from the absence of which it must be inferred that the plaintiff must exercise direct effective control over the investment to claim the protection of the relevant treaty. In support of this argument, it criticizes the Arbitral Tribunal for having equated the direct nature of the investments with a reservation which should have been formulated *expressis verbis* in the BIT so that indirect investments could be excluded from the scope of the treaty, when it should have instead found, in its view, that only the introduction of terms 'indirect' or 'indirectly' in the text of the treaty would have extended the coverage of this legal instrument to cover indirect investments and investors. Instead, the Arbitral Tribunal apparently proceeded to give an interpretation that amounted to inserting the expression 'directly or indirectly' in the text of the treaty, without good reason, in order to fill a gap that it most likely confused with a qualified silence. Moreover, it appears that it failed to draw the appropriate conclusion from the reading of Art. 2 of the BIT, the effect of which is to limit the scope *ratione loci* of the treaty to investments made on the territory of the host State, in this case, India.

Moreover, according to the Appellant, while the usefulness of this means of interpretation is incontestable and moreover demonstrated by the extracts of awards and doctrinal opinions reproduced in the appeal brief, in particular the award issued on April 21, 2006, under the aegis of the Arbitration Institute of the Stockholm Chamber of Commerce [hereinafter SCC] in SCC Case No. 080/2004, *Vladimir and Moses Berschader v. The Russian Federation* (hereinafter: the *Berschader* case), the Arbitral Tribunal apparently did not use the practice of comparative contracts of the two States that were parties to the BIT, which would only have confirmed the findings already reached from the ordinary meaning of the terms used in the treaty.

As to the lack of preparatory work relating to the BIT, the Appellant considers that it does not alter the ordinary meaning of the terms used in this treaty.

In the same vein, the Appellant argues that the Arbitral Tribunal wrongly refused to accept its request to produce the preparatory work for the BIT signed on November 6, 1995, by India and the Netherlands, a treaty that would have been negotiated at the same time as the BIT in the 1990s. In fact, it makes a fully-fledged grievance of the breach of its right to be heard (Art. 190(2)(d) PILA). According to it, this preparatory work clearly indicates that the position taken by India since the first series of investment treaties negotiated by it [India] is not, on the face of it, to protect indirect investment, unless expressly stated otherwise.

3.2.1.2.

3.2.1.2.1 Art. 9 of the BIT subjects any dispute between an investor of a contracting party and the other contracting party in connection with an investment made in the territory of the other contracting party to arbitration under the UNCITRAL rules. Called "investor-state arbitration", this type of arbitration has undergone a spectacular development since the beginning of the 1990s thanks to the proliferation of bilateral investment promotion and protection treaties containing arbitration clauses. However, in recent years, dispute over this form of dispute settlement has grown, which has led a large number of states in their most recent treaties to regulate much more strictly the conditions under which a foreign investor will be able to resort to international arbitration to settle its disputes with the host State (on this question, see

Julien Cazala, *La défiance étatique à l'égard de l'arbitrage investisseur-État exprimée dans quelques projets et instruments conventionnels récents*, in Journal du Droit International [JDI] 2017 pp. 81 et seq.).

This is the case for India, which in 2015 adopted a new model for a bilateral treaty for the promotion and protection of investment, setting more stringent requirements for the implementation of the investor-state arbitration mechanism (Cazala, *op. cit.*, p 94 et seq; on this new model treaty, see, among others: Ranjan/Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, in Northwestern Journal of International Law & Business, vol. 38, 2017, p. 1 et seq, 19 to 22 and 45 to 51).

However, it should be borne in mind that the BIT in question was adopted in 1995, at a time when the objective of investor-state arbitration was primarily to promote, among other things, investing, by protecting investors, and by de-politicizing the settlement of investment disputes (Cazala, op.cit., pp. 84-5).

The application in the present case of the aforementioned contract rule supposes that there is a German investor in conflict with the Indian State in respect of an investment made in the territory of that State. The Arbitral Tribunal conceded that these conditions were fulfilled in this case. It is a question of examining whether the considerations it has made in this respect (see at 3.1.1 above) or notwithstanding the arguments against the Appellant (see at 3.2.1.1).

3.2.1.2.2 As a legal entity subject to German law, the Respondent can be described as an investor within the meaning of Art. 1(c) of the BIT. According to that provision, it is still necessary for it to have made an investment in the territory of India to fully merit that description, a condition whose fulfilment will be examined below (see at 3.2.1.2.5). It is also accepted that the dispute giving rise to the issuing of the Award divides this German company, the plaintiff, from India, the defendant, a State which is one of the two contracting parties governed by the BIT, the other party being Germany.

3.2.1.2.3 To be admitted to the arbitration jurisdiction provided for by the BIT, the investor must – obviously – have made an 'investment'.

To date, there is no abstract, definitive and unanimously accepted definition of the notion of investment in international treaties of a bilateral or multilateral nature relating to the protection and promotion of investments. Investment does not necessarily have the same meaning from a legal standpoint as from an economic one. Moreover, its legal definition varies from one arbitral tribunal to another, to say nothing of the multiple legal opinions regarding it (judgment 4A_616/2015, cited above, at 3.4.1 and references). A pragmatic approach to the issue should therefore be preferred and, from the text of the BIT examined, interpret this concept of good faith in the ordinary sense of the relevant terms considered in their context and in the light of the object and purpose of the treaty (see at 2.4.2 above).

According to Art. 1(b) of the BIT, the term investment refers to assets of any type invested in accordance with the national law of the contracting party in which the investment is made, which includes a series of assets of various kinds, of which this provision provides an illustrative list. The acquisition by a German investor, of shares in an Indian company undoubtedly falls under this provision. Even assuming that the Respondent subscribed for the shares of A._____ which were purchased by its Singapore subsidiary

(X._____ Asia), such an undertaking would undoubtedly constitute an investment under Art. 1(b) of the BIT. Moreover, the Appellant admits implicitly that this is the case in arguing that the present case does not raise complex questions of interpretation as to the scope of the assets covered by the term investment, unlike the case dealt with in the judgment 4A_616 / 2015, but brings into play the distinction between direct and indirect investment (Appeal, p 28, footnote 82).

3.2.1.2.4. The crux of the problem is therefore to determine whether the BIT covers not only the immediate investment made by a German investor in the territory of the host State (the acquisition of a stake in Company A._____ with which the Respondent itself could have proceeded), which is not at issue, but the mediate investment made by a German investor (the Respondent) who holds shares in a company that has its registered offices in a third State (X._____ Asia, Singapore) and which requires this subsidiary to acquire a certain number of shares of the company located on the territory of the host State (A._____) by providing the necessary funds for this purpose, which is disputed. It is undisputed that the BIT does not contain a formal provision which expressly excludes the taking into account of indirect investments or, conversely, which would clearly authorize it. Each of the parties derives its argument from this silence: the Appellant sees in it the proof that indirect investments do not enter into the expectations of the treaty, whereas the Respondent infers from them, on the contrary, that they are indeed covered by this legal instrument.

On a general level, the idea that a third-party (or even several) could come between the investor and the investment, in other words, as in this case, between the legal entity having its registered office in one of the two States which are signatory to a bilateral treaty for the protection and promotion of investments, and the legal person, located in the receiving State, whose shares constitute the object of the investment, is nothing extraordinary. As well, the eligibility of this form of investment, referred to as indirect investment, if not all the terms and effects of such investment, seems to be well-established, with various reservations and nuances here and there (see, among others: McLachlan/Shore/Weiniger [hereinafter: McLachlan, *op. cit.], International Investment Arbitration, Substantive Principles*, 2nd ed. 2017, no. 6.175; Hanno Wehland, *Investment Treaty Arbitration*, in *International Commercial Arbitration*, Stephan Balthasar [ed.], 2016, no. 28 et seq; Bischoff/Happ, *The Notion of Investment*, in *International Investment Law*, Bungenberg/ Griebel/ Hobe/ Reinisch [ed.], 2015, p. 495 et seq., no. 84; Martín Molinuevo, *International Disputes in Investment in Services*, 2012, p. 48; Schreuer/ Malintoppi/ Reinisch/ SINCLAIR [hereinafter: Schreuer, *op. cit.*], *The ICSID Convention, A Commentary*, 2nd ed. 2009, no. 150 to Art. 25; Beatrice Grubenmann, *Der Begriff der Investition in Schiedsgerichtsverfahren in der ICSID-Schiedsgerichtsbarkeit*, 2009, p. 227 et seq.; Mariel Dimsey, *The Resolution of International Investment Disputes: Challenges and Solutions*, 2008, p. 69 and et seq). Similarly, that the legal person acting as the intermediary between the investor and the investment is based in a State that is not party to the bilateral treaty is, in principle, not considered to be an obstacle to the application of the treaty to indirect investment through the third-party company (Wehland, *op.cit*., no. 29, *Grubenmann*, op.cit., pp. 242 et seq.).

As regards the point at issue, most of the arbitral tribunals that have examined the issue have accepted that a bilateral investment treaty that does not *expressly* cover indirect investments does, in fact, cover them (Decision on Jurisdiction of August 3, 2004, in ICSID no. ARB/02/8, *Siemens AG v The Argentine Republic*, no. 137; Award on Jurisdiction of July 6, 2007, in the ICSID Case No. ARB/05/18, *Ioannis*

Kardassopoulos v. Georgia, no. 123/124; Award on Jurisdiction of June 10 2010, in ICSID Case No. ARB/07/27, *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, no. 165; Award on Jurisdiction and Merits of 3 September 2013 in ICSID case no. ARB / 07/30*, ConocoPhillips Petrozuata B.V. and others v. Bolivarian Republic of Venezuela*, no. 282-286; Award of January 31, 2014, in PCA Case No. 2011-17, *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, no. 352-357; Award on Jurisdiction of March 8, 2017, in the ICSID Case No. ARB/13/6, *Vladislav Kim and others v. Republic of Uzbekistan*, n. 317). The Appellant objects to the award issued on April 21, 2006, in the *Berschader* case, cited above. It explained that the Bilateral Investment Treaty contained a clause protecting indirect investment through a third State and added that the Arbitral Tribunal found it unlikely that the contracting parties would have had the intention to protect indirect investments other than those covered by this clause, from which it infers confirmation that, in the absence of an *ad hoc* clause, the treaty does not protect indirect investments (Appeal, No.103). However, as the Arbitral Tribunal clearly saw, if indirect investments made through a company located in the State of origin were outside the bilateral treaty concluded by Belgium and Russia, it was because of the fact that a specific clause of the treaty clearly limited the type of indirect investments that could be taken into consideration, retaining as such only those which would be made through a company located in a third State (Judgment, no. 145).

The Appellant's objection thus falls wide of the mark.

The argument developed by the Appellant on the basis of the opinion expressed by Zachary Douglas (see at 3.2.1.1, 3rd para., above) cannot be shared. The Latin adage *verba aliquid operari debent*,[17] which supports it, apart from being apparently alien to the jurisprudence of the Federal Tribunal, in this form at least, is part of formal logic and can be used to justify both arguments involved. Additionally, the word 'investment', used without any other modifier, in Art. 1(b) of the BIT, can be viewed also, as the above-mentioned arbitral tribunals have done, as a generic term which states a concept without excluding the constituent elements, namely direct investment and indirect investment. Considered from this standpoint, the term 'investment', taken in isolation, certainly has a meaning and does not therefore affect the aforesaid principle that the words produce an effect. On the other hand, all other things being equal, this would not be the case for an interpretation which excludes indirect investments even though the topical clause expressly states this alongside direct investment, since that would deprive the adjective 'indirect' of effect when it describes the noun 'investments'. Under nos. 24 to 28 of its reply, the Appellant quotes other authors (Surya Subedi, Jeswald Salacuse, Paul Peters, Panayotis M. Protopsaltis, and Marc Bungenberg) who are of the same opinion as Zachary Douglas. It purports to do so to counter the Respondent's assertion that this professor was ostensibly the only specialist in international law to have held the aforementioned view (Appeal, no. 24). In reality, the Respondent never argued that, but merely noted, under no. 74 of its reply, that the Appellant had cited only one author in support of its argument ("*Zur Unterstützung ihrer Position, ..., beruft sich die Beschwerdeführerin auf einen einzigen Autor*"[18]), which is correct but which is not the same thing. Therefore, under the guise of replying to the Respondent, the Appellant merely adds, here as well, to its appeal, which is not admissible (see at 2.2 above). Moreover, it lends to the authors that it mentions in its reply much more peremptory opinions than what emerges from reading the passages quoted from their writings.

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[17] Translator's Note: In Latin in the original text. The phrase means "words should have some effect".
[18] Translator's Note: In German in the original text.

In addition, the arbitral tribunals systematically refused to infer from a reference (made in a clause of a bilateral investment treaty) to the territory of the host State the requirement that the investor who brings proceedings before the arbitral tribunal provided for by the treaty is the direct owner of the assets constituting the investment. It is sufficient that the invested assets are located on the territory of the host state (see, among others, the award on jurisdiction of December 30, 2010, in the ICSID case No. ARB/08/15, CEMEX *Caracas Investments BV and other v. Bolivarian Republic of Venezuela*, no. 157; the *Guaracachi America, Inc*. case, supra, nos. 356-358).

3.2.1.2.5. Considered in the light of the principles established by the case-law and applied by the arbitral tribunals, the Arbitral Tribunal's interpretation of the notion of investment within the meaning of Art. 1(b) of the BIT, as summarized above (at 3.1.1.1), is resistant to criticism by the Appellant.

The text of this provision and the preamble of the Treaty, both of which constitute elements of the context (see Art. 31(2) VCLT), contain nothing restrictive but rather illustrate the common will of the contracting parties to promote and stimulate, as far as possible, reciprocal investments. The illustrative list of investments to be taken into account is broad and nothing in the text of the BIT gives the impression that the contracting parties sought to restrict in any way the scope of the notion of investment, except from the incorrect assumption, suggested by the Appellant, that this notion does not embrace indirect investments in the absence of a clause that would expressly include them. In this respect, this Court agrees with the Arbitral Tribunal that the conclusive result achieved by this method of primary interpretation renders superfluous the use of secondary interpretative methods and, in particular, the practice of comparative contracts, which appears quite random, depending on the often specific circumstances that led to the conclusion of other bilateral treaties by the contracting parties with third States. Also, the reference made under no. 92 of the appeal brief, without further explanation, to clauses excerpted from bilateral treaties signed by India and Germany with other States, is not capable of invalidating the above-mentioned conclusion, notwithstanding the fact that certain courts and legal opinion cited by the Appellant (Appeal, No. 100) would prefer the application of the comparative method. For the rest, the developments appearing under nos. 32 to 34 of the reply, as well as the accompanying documents, are new and therefore inadmissible at this stage of the proceedings (see at 2.2 above). All in all, and in the event that the use of additional means of interpretation would have proved indispensable, the Appellant would undoubtedly have gained by trying to find in the preparatory work of the BIT something to support its argument rather than relying on other investment treaties (*see* Art. 32 VCLT).

In this context, the Appellant argues that there was a breach of its right to be heard on the grounds that it did not obtain permission to file the preparatory work for the bilateral investment treaty concluded on November 6, 1995, by the Kingdom of the Netherlands and the Republic of India. It is, indeed, also a separate grievance (Appeal, nos. 109-127). As regards the right to adduce evidence, which is one of the constituent elements of the guarantee of the right to be heard provided for in Art. 182(3) and 190(2)(d) PILA, it should be noted that it must be exercised in good time and in accordance with the applicable rules as to form. Moreover, even if this has been the case, the arbitral tribunal may refuse to allow evidence, without breaching the right to be heard, if the evidence is inadequate to satisfy the tribunal of the existence of a given fact, if the fact to be proven has already been established, if it is irrelevant or if the court, by proceeding with an advance assessment of the evidence, reaches the conclusion that it is

already satisfied and that further evidence based on the advance assessment sought by a party can no longer modify its view. The Federal Tribunal cannot review an advance assessment of evidence, except from the extremely narrow angle of public policy (ATF 142 III 360,[19] at 4.1.1, page 361). In this case, the Arbitral Tribunal, by letter of March 20, 2017, from its President, informed the Appellant that it had not established the existence of exceptional circumstances justifying its authorization to file the document in question, not to mention that the latter related to a treaty different from the BIT at issue; in its opinion, the party concerned, as a contracting party to that treaty, should have known of the preparatory work from the beginning of the arbitration proceedings and should have filed it with its appeal brief in accordance with the applicable rules of procedure and the procedural calendar. Notwithstanding the length of its explanations and the inadmissibility of the attempt to complete them under No. 37 to 46 of its rejoinder (see at 2.2 above), the Appellant has failed to demonstrate how its right to be heard would have been disregarded in the present case.

In particular, it is not credible, to say the least, when it claims that it could not have discovered this preparatory work earlier. Formulated by a signatory party to the treaty to which they are a party, such an excuse is not persuasive. In any event, the evidence requested by the Appellant was intended for the implementation of the comparative method. It was thus to be used in applying this supplementary means of interpretation, which was not necessary in this case, as has just been stated. For the delay in relying on evidence which was not decisive in the case in issue, the Appellant argues without good reason that there was a breach of its right to be heard.

The Arbitral Tribunal did not breach the applicable rules by refusing to exclude indirect investments from the scope of the BIT. It therefore rightly admitted that the Respondent could be considered an investor even though the shares of A._____ forming the object of the investment at issue were not held directly by it.

For the rest, it must be noted that the Appellant does not challenge the Arbitral Tribunal's explanation regarding the standing of an investor who is protected against measures by the host State that affect the investment it holds only indirectly, explanations appearing under nos. 154 -157 of the Award and which have been summarized above (see at 3.1.1.2).

3.2.2.

3.2.2.1. The Appellant then challenges the arguments that led the Arbitral Tribunal to reject its objection to the issue of 'pre-investment' (see at. 3.1.2 above). Its criticism on this count, which is summarized here, is based on the distinction it allegedly made between two categories of investment treaties: on the one hand, the treaties of the 'right-of-establishment' type, which grant protection to the persons concerned with respect to the establishment of an enterprise in the territory of the host State; on the other hand, treaties of the 'admission-clause' type, which grant their protection only after the establishment of an enterprise has become effective, thereby enabling that State to subject that institution to all the conditions it finds useful and therefore do not include pre-investment activities within their scope. The Appellant then quotes a number of excerpts of legal commentaries and a passage from a United Nations

[19] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties

Conference on Trade and Development (UNCTAD) publication to demonstrate that the distinctive features of an 'admission-clause' type treaty would be widely recognized (Appeal, No. 130).

From there, the Appellant seeks to establish that the Arbitral Tribunal wrongly denied such a quality to the BIT in question. According to it, the BIT, on the basis of its Art. 3(1), like the rest of the bilateral investment treaties to which India is a party, constitutes a legal instrument reserving to the host State itself the power to determine the conditions for the admission of the investment that the legal person of the other Contracting Party is planning to carry out, a state of affairs that would emerge from various awards made by arbitral tribunals and confirmed by several authors.

This premise raised, the Appellant, going on to the legal reasoning, explains why, in its opinion, the activities that were carried out by A._____ and its shareholders with a view to implementing the proposed project should be considered 'pre-investment' and should not, accordingly, be covered by the BIT. As a preliminary point, it argues that the Arbitral Tribunal wrongly focused, in order to highlight the nature of that treaty, on the investment made by X._____ Asia in A._____, namely the acquisition by the Respondent's subsidiary of a certain number of shares in the Indian company, rather than on the project – *i.e.* the creation of a hybrid (satellite-terrestrial) communication platform intended for the provision of multimedia services in India – which the Respondent intended to bring to a successful conclusion, via its indirect investment in A._____, which formed the basis of the German company's claim for compensation for the breach of the BIT. For the Appellant, the fact that none of A._____'s shares were confiscated by India, nor the funds invested by X._____ Asia in that company, implies that the participation acquired by the Respondent in A._____ and the financing of this company to focus on the project in question should be ignored. However, according to the Appellant, if we examine, as we should, the steps taken by the Indian company in the context of this project, then it is clear that they have not gone beyond the preparatory stage. The reason for this is apparently that Project A._____ could not be executed without obtaining the WPC license, which was essential for the terrestrial reuse of the leased spectrum and was therefore a sine qua non for the execution of the project, crucial approval of which had not yet been granted and whose granting remained uncertain. In this case, as in the case of the awards cited in the appeal brief, there was no guarantee that the ultimate purpose of the Respondent could be achieved. Thus, in the Appellant's opinion, we are dealing with preparatory steps, consisting only of a simple 'pre-investment', which were incompatible with the BIT and could in no way establish the jurisdiction *ratione materiae* of the Arbitral Tribunal.

3.2.2.2. The arguments thus summarized, purporting to demonstrate the lack of jurisdiction *ratione materiae* of the Arbitral Tribunal, are unfounded for various reasons.

3.2.2.2.1. First, the distinction made in the appeal brief between investment treaties of the 'right-of-establishment' type and the 'admission-clause' type is a categorization that the Appellant uses on its own initiative and that does not find support in either the short, selected, and sometimes truncated passages extracted from the case-law on the subject, or the phrase taken from a United Nations publication. Most of the authors cited, like UNCTAD, simply explain the meaning of an admission clause but do not make any fundamental distinction, as proposed by the Appellant, between the two types of treaties mentioned above. On the contrary, it is possible to conceive, through the idea that the authors mentioned of the concept of an admission-clause, that a number of investment treaties are of a different nature and the

investor has a right that is enforceable against the host State, unlike those that confer on the State a right of scrutiny or even veto over the planned investments. Still, the distinction to be made between the two types of treaty is not as clear as the Appellant asserts. Therefore, it is unlikely that it can be used solely on the basis of a certain number of case-law opinions. It is more likely that it depends, in the first place, on an analysis of the terms and expressions used in the ad hoc clause of the relevant treaty.

Art. 3(1) of the BIT, as translated by the Appellant into French, provides that "[e]ach [c]ontracting [p]arty shall encourage and create favorable conditions for investors of the other contracting party and also admit investments on its territory in accordance with its law and policies (*sic*, *for policy*)"[20]. Like the Arbitral Tribunal, this Court finds it hard to see in the text of this clause the expression, even implicit, of an option granted to the host State, if not to refuse *ad libitum* the protection of the BIT to an investor of the State of origin, at least to agree to the proposed investment on a condition unilaterally determined by it and to exclude any protection with respect to activities that have not gone beyond the pre-investment stage. At the very most, the last part of this sentence can be interpreted as a requirement of legality, in the broadest sense, of the proposed investment, which is not extraordinary since it would not cross anyone's mind to impose on the host State the obligation to admit an investment that breaches its legislation, except to deny any scope for the expression "in accordance with its law and policies". This, however, is a problem foreign to that of the admission clause. Indeed, the requirement of legality thus formulated, better known as the compliance clause, refers to the legality of the investment (not to the *definition* of the investment), in other words to the question of whether a given investment, even if it does not fall under a possible admission clause, complies or not with the legislation of the host State; the purpose of such a requirement is to exclude illegal investments from the scope of the BIT (see Diel-Gligor/ Hennecke, *Investment in Accordance with the Law, in International Investment Law*, Bungenberg/ Griebel/ Hobe/ Reinisch [ed.], 2015, pp. 566 et seq. no.1). Moreover, the clause at issue says nothing about the consequences of a failure to admit the planned investment.

The Appellant objects that the very numerous and unanimous sources on this point cited in its appeal brief (nos.134-138), in particular those referring to clauses almost identical to Art. 3(1) of the BIT seem to show that the treaty at issue is an admission-clause type, which would mean that it does not protect pre-investment activities. In support of this view, it invokes the opinion of various authors (Dolzer/ Schreuer, *Principles of International Investment Law*, 2nd ed. 2012, p. 89; Newcombe/Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, 2009, p. 127 et seq.; McLachlan/ Shore/ Weiniger*, International Investment Arbitration, Substantive Principles*, ed. from 2007, p. 29/30; Devashish Krishan, *India and International Investment Laws, India and International Law*, Bimal N. Patel [ed.], 2008, p. 301) and the considerations of two arbitral tribunals (Final Judgment of September 9, 2003, in SCC Case No. 049/2002, *William Nagel v. The Czech Republic, Ministry of Transportation and Telecommunications*, passim; Final Award of November 30, 2003, in *White Industries Australia Limited v. The Republic of India*, no. 9.2.12), pointing out that the second award quoted is apparently the only one to have been issued on the basis of a treaty to which India is a party and that the last referenced author has, for his part, published the only commentary specifically on investment treaties concluded by India. In fact, of numerous and allegedly unanimous sources, the Appellant is proposing, here again, brief extracts of legal commentary, at least one of which is truncated, where general principles are stated that

[20] Translator's Note: In French in the original text.

do not necessarily apply to the present case, which is also true of the Indian author named above. The same reflection can be made with regard to the two awards mentioned above. More generally, it is clear that the adage '*there is no truth that one learns by comparing*' here finds a breeding ground most favorable to its development, as it is true that the law of arbitration in terms of investment treaties is characterized by the plurality of opinions expressed and the diversity of the awards handed down on most of the legal problems it raises, one of the explanations for this lack of homogeneity being undoubtedly to be found in the fact that the state court of appeal exercises only limited control of the awards made by the arbitral tribunals in such conflicts and, in particular, those which have been exempted under the aegis of the International Center for the Settlement of Investment Disputes (ICSID), which can only be the subject of an internal appeal which will be definitively dealt with by an *ad hoc* Committee of three members (see Articles 52 and 53 of the IHRC Convention in force since October 14,1966), which is not conducive to the development of firm and uncontested jurisprudence.

3.2.2.2.2. The foregoing considerations are sufficient to reject the challenges made by the Appellant in relation to the existence, in this case, of an alleged 'admission clause'.

The Arbitral Tribunal nevertheless considered, in the alternative, the situation which would have prevailed in the event, properly excluded by it, where Art. 3(1) of the BIT had the character of an admission clause and would have authorized the Appellant not to admit the investments proposed by the Respondent. Such an examination led it to state that India, by approving X._____'s indirect participation in the capital of A._____, had admitted the Respondent's investment. Based on a finding of fact binding on the Federal Tribunal, this subsidiary argument reinforces the above-mentioned main argument.

However, the Appellant argues that the Arbitral Tribunal wrongly reasoned from an investment that was apparently not relevant. It undoubtably does not dispute that the acquisition of part of the shares of A._____ by X._____ Asia did indeed constitute an investment. It argues, however, that this investment was not "good", as it was not affected in any way by the measures taken by the host State, since the Singaporean company was still the owner of the shares acquired in the Indian company, by order of its German parent company, and that the funds invested by it in A._____ had not been seized by the Indian Government. For it, the investment worthy of the name thus resided in the "Proposed Project", namely the implementation, on Indian territory, of the planned telecommunications system, and it required the obtaining of a WPC license that the host State was not obliged to issue to the foreign investor. The activities carried out thus far had remained at the pre-investment stage, as had been the case in other disputes submitted to arbitration tribunals (ICSID Award of March 15, 2002, no. ARB/00/2, *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, nos. 41, 60, and 61; Award of January 24, 2003, in ICSID Case No. ARB/00/1, *Zhinvali Development Limited v. Republic of Georgia,* no. 388 and 417; Award of September 9, 2003, in the *Nagel* case, cited above, nos. 291, 320, 326, and 328; Award of March 29, 2005, in the SCC Case No. 126/2003, *Petrobart Limited v. Kyrgyz Republic*, p. 69). As a result, they did not fall within the scope of the BIT and thus escaped the substantive jurisdiction of the Arbitral Tribunal.

In many ways, such criticism does not appear to be well-founded.

First, the Appellant ignores the very definition of investment given by the treaty in question and, in particular, that Art. 1(b)(ii) of the BIT expressly includes the "shares in ... a company..." in the assets it enumerates in a non-exhaustive manner. However, if one puts aside the question, already resolved, of the direct or indirect nature of the investment that may be taken into consideration under this treaty, it is undeniable that the shares of an Indian company , such A._____, must be equated with an investment made in the territory of the other contracting party within the meaning of Art. 9(1) of the BIT. In this light, and contrary to what is argued by the Appellant, whether an investment in the treaty's protection was hindered by expropriation or other measures taken by the host State is not a criterion to assess the jurisdiction of the arbitral tribunal seized, but a determining factor for the application of the substantive provisions of the investment treaty examined.

Secondly, even if the activity underlying the investment is taken into account, in other words the work done by the Indian company (A._____) in which the Respondent indirectly acquired part of the shares, the circumstances which characterize the present case are not comparable to those in the arbitrations cited and relied on by the Appellant. Incidentally, they are even less applicable to the example cited under no. 49 of the reply where a legal person located in the State of origin, having entered into a simple contract of sale of goods with the host State – a legal act which is recognized as constituting an investment – creates in that State a legal person, whose shares it would own – an approach equivalent to an investment – and then resume the sales contract for the sole purpose of availing itself of the investment protection treaty between the two States in the context of an arbitral proceeding initiated by it against the defending State in relation to that contract.

Having made this point, it is fitting to return to the awards relied on by the Appellant. In the *Mihaly* case, the claimant intended to obtain reimbursement of the expenses it had incurred for the construction of a power plant in Sri Lanka. The arbitral tribunal excluded the existence of an investment, within the meaning of Art. 25 of the ICSID Convention, as the defending State had clearly indicated in the documents relied upon by the claimant that, so long as the performance of a contract did not had not begun, it was not prepared to admit that the parties had entered into contractual relations and that an investment had been made (see the above-mentioned judgment, no. 51; see also McLachlan, *op. cit.,* no. 6.80; Schreuer, *op. cit.*, No. 176 to Art. 25; Grubenmann, *op. cit.*, p. 255 et seq.). The arbitral tribunal in the *Zhinvali* case declined jurisdiction on the grounds that the 1996 Georgian Investment Law did not include the development costs claimed for an investment (see McLachlan, *op. cit.*, No. 6.82; Schreuer, *op. cit.*, no. 178 to Art. 25, Grubenmann, *op. cit.*, at 260 et seq.). Similarly, in the *Petrobart* case, the arbitral tribunal, while admitting that a firm undertaking by the contracting parties for the delivery of 200'000 tonnes of concentrated gas constituted an investment, considered that this was not the case for the basis of the second part of the request, which relies only on the parties' discussions of future commercial relations (Award, cited above, p.69; see also: McLachlan, *op. cit.,* no. 6.83). In the *Nagel* case, which the Appellant tries in vain to liken to the present case (Appeal, no. 145 et seq.), the arbitral tribunal, as the Respondent convincingly demonstrates (Answer, no. 123), dismissed the plaintiff's claim for pre-investment expenses by stating that, while the parties had certainly concluded a cooperation agreement, this one was only of a preparatory nature, intended as it was to fix the conditions of execution of a future consortium, and that, moreover, the rights deriving from it had no financial value (aforesaid Award, no. 328). On the other hand, the award on jurisdiction issued on June 4, 2004, in ICSID Case No. ARB/02/5*, PSEG Global Inc. and others v. Republic of Turkey*, nos. 79-105, is closer to a concrete case. In that case, the Turkish

Government, which had canceled a concession contract prior to the commencement of the works, argued that the parties had not agreed on essential elements of the contract, which was why it was not an investment. The arbitral tribunal nevertheless accepted jurisdiction because the concession contract appeared to it to be valid and binding, in spite of the outstanding issues, otherwise the parties would not have signed it. In its final award of January 19, 2007, it also issued, in these terms, an opinion that is of significant interest to the case in dispute:

> [a]n investment can take many forms before actually reaching the construction stage, including most notably the cost of negotiations and other preparatory work leading to the materialization of the Project, even in connection with pre- investment expenditures, particularly when, like in this case, there is a valid and binding Contract duly executed between the parties.

(n. 304; see also: McLachlan, *op. cit.,* no. 6.81; Schreuer, *op. cit.*, No. 179 to Art. 25; Grubenmann, *op. cit*., p. 261 et seq.).

In light of these precedents, the Appellant's attempt to confine the role played by the Respondent in this case to that of an investor having made only preparatory acts not going beyond 'pre-investment' in the mere hope that the planned project would be executed, is doomed to failure. Far from being comparable to a pension fund whose sole purpose would have been to diversify its investments by acquiring shares in an Indian company at the market price through a subsidiary, the Respondent did not just settle for making a portfolio investment (on this notion, see, among others: McLachlan, *op. cit.,* no. 6.155 et seq.), but rather was fully invested in an undertaking within its sphere of competence, whose success was not immediately ensured. It must be borne in mind that, when the German company entered the picture, indirectly acquiring the shares of A._____ in 2008, the latter and another Indian company owned by the State (B._____) had already concluded, on January 28, 2005, the Contract A._____, which had entered into force in early February 2006 after B._____ had received the necessary Indian Government approval for the construction and launch of the first satellite as well as for the rental of the S-band transponder capacity (see A.(a), last paragraph, above). In the present case, the Respondent's expenses in carrying out this project were therefore incurred while the Indian company whose shares formed the subject of the investment at issue was already benefiting from a contract in force – as in the aforementioned *PSEG* case – and was to remain so until terminated by B._____ on February 25, 2011, six years after its conclusion. That the Respondent has made a substantial sacrifice to secure its participation in A._____ is also not questionable, as it cost it USD 97 million. Moreover, the contribution of the German company to the implementation of the project provided for in the Contract did not stop there, but took on other forms such as the provision to A._____ by that company of its know-how and its expertise as well as about twenty engineers and other specialists in the development of the terrestrial telecommunications network, to name but a few examples (see ICC Award, No. 81). It goes without saying that this contribution, in all its forms, had an undeniable financial value and that it went well beyond the stage of a simple pre-investment made with a view to the future conclusion of a contract. In this respect, the present case is certainly distinguishable from those which gave rise to the awards In the *Mihaly, Zhinvali, Petrobart*, and *Nagel* cases, cited above.

The Appellant makes much of the WPC license. According to it, when one is in the situation where an investment project cannot be implemented without obtaining a crucial license, the granting of which remains uncertain, such as the aforementioned license, that the investor recognizes this uncertainty and fully understands the consequences of a refusal of the license, then the activities carried out and the

costs incurred by it for the execution of the project and in the hope of issuing the required license constitute a pre-investment which is not covered by the treaty (Appeal, No. 154). And the interested party adds, under no. 53 of the reply, that the file shows that the license in question was the first of its kind to be granted by India; that such a license could not have been granted without a complete prior public consultation process; that India's practice with respect to the terrestrial use of a spectrum is to impose the payment of fees corresponding to the values obtained in Indian spectrum auctions; that, therefore, even in the unlikely event that this license was granted, the payment of such fees would have made the proposed project economically unsustainable. The latter allegations, which appear for the first time in the reply, as well as the documents which are supposed to support them, cannot be accepted (see at. 2.2 above), as well as the referrals made by the Appellant to a brief submitted in the arbitration file (judgment 4A_491/2017 of 24 May 2018, at 3.1). In any event, the Appellant's argument concerning the WPC license is unfounded, at least from the point of view of jurisdiction, as the Arbitral Tribunal quite rightly pointed out (Award, no. 180), not to mention that the good faith of its author is questionable. In fact, while it is a company owned by it that terminated Contract A._____, thus preventing the Respondent from ever obtaining a WPC license, it is still it who intends to take advantage of this unilateral act to dismiss the possibility of granting such a license to the Respondent. This question of good faith aside, it is clear from the foregoing explanations that the Respondent did indeed engage in various investment acts that have intrinsic economic value regardless of the issue of granting the WPC license. In this respect, the Appellant's argument that all activities carried out by an investor for years would not go beyond the pre-investment stage if the host State ultimately refused to grant a license essential for the proposed exploitation, is untenable. With the Arbitral Tribunal, it must be admitted rather that the latter circumstance does not affect jurisdiction but may have an impact on the quantum of reparation required (*ibid*.).

Therefore, if the BIT had been classified as an admission-clause type treaty, contrary to what case was, the Appellant's objection to the question of pre-investment would nevertheless have been rejected, too.

3.2.3.
3.2.3.1. The next jurisdictional argument relates to the 'essential security interests' reserved by Art. 12 of the BIT, which the Arbitral Tribunal excluded from its considerations in the present case for the reasons summarized above (see at 3.1.3).

In the chapter devoted to this question (Appeal, No. 160-190), the Appellant seeks to demonstrate, *first*, that Art. 12 of the BIT imposes a condition relating to the jurisdiction of the arbitral tribunal; *second*, that the Arbitral Tribunal improperly applied that treaty provision; *third*, that the measures taken by it were intended to protect its 'essential security interests'; *fourth*, that the Arbitral Tribunal erred in considering that the disputed measure was not "necessary" within the meaning of the same provision.

The Respondent is mainly challenging the first of these four arguments in its answer (127-172). Its objections must be further examined. Indeed, if these were to prove to be founded, the Tribunal could avoid analyzing the other three arguments.

3.2.3.2. It is appropriate to set out, in the first instance, the grounds that the Appellant and the Respondent put forward, who to challenge the jurisdiction of the Arbitral Tribunal, who to justify it. After

which, it will be necessary to indicate which of these two conflicting arguments must be retained as well as the reasons for this choice.

3.2.3.2.1. In its brief, the Appellant argues that Art. 12 of the BIT "imposes a condition on the jurisdiction of the Arbitral Tribunal". In its view, where a court finds that the host State is entitled to invoke the essential security-interests clause, that means that it does not have jurisdiction *ratione materiae*. Moreover, this point was not really disputed by the Arbitral Tribunal, which recognized this in its partial award. Similarly, in its award on the jurisdiction and merits of July 25, 2016, in PCA Case No. 2013-09, *Cc/Devas (Mauritius) Ltd and others v. The Republic of India* [hereinafter: the *Mauritian* case], another arbitral tribunal, applying the treaty of protection and promotion of investments linking the Republic of Mauritius and the Republic of India, admitted that the clause analogous to Art. 12 of the BIT contained in the Indo-Mauritian treaty raised a question of jurisdiction. And the Appellant cites to two similar decisions (Decision of the Ad Hoc Committee of 25 September 2007 on the request for cancellation of the Republic of Argentina in the case ICSID No. ARB/01/8, *CMS Gas Transmission Company v. Argentina Republic* [hereinafter: the *CMS* case], no. 129; Award of September 5, 2008 in ICSID Case No. ARB / 03/9, *Continental Casualty Company v. The Argentine Republic* [hereinafter: the *Continental* case], footnote 236).

3.2.3.2.2. Against this argument, the Respondent asserts that Art. 12 of the BIT does not in any way affect the jurisdiction of the arbitral tribunal but rather offers the party who avails itself of it a defense on the merits. For Respondent, Arts. 1, 2, and 9 of the BIT set out the conditions of the arbitral tribunal's jurisdiction exhaustively; Art. 12 of the BIT, on the other hand, functions to exclude the liability of the State in certain circumstances. The arbitral tribunal must therefore have jurisdiction under the first three provisions cited to be able to apply and interpret the fourth. And the Respondent cites various precedents, drawn from the case-law of the International Court of Justice (ICJ) and the UNCITRAL courts, which would confirm its view.

Examining further the conduct adopted by the Appellant throughout the arbitral proceedings, the Respondent asserts, citing passages taken from various submissions of its opponent, that it never argued once that Art. 12 of the BIT concerned the jurisdiction of the Arbitral Tribunal. It is, in fact, in contradiction to the conclusions drawn by the Appellant from the two passages of the Award quoted in its appeal brief as well as the award issued in the *Mauritian* case.

3.2.3.2.3. In its rejoinder, the Appellant maintains that both the Arbitral Tribunal and the tribunal that heard the *Mauritian* case considered the question of essential security-interests as a matter of jurisdiction. It then takes up an argument of its appeal, based on a passage from the first edition of Berger/Kellerhals entitled *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz* (2006, No. 1535), where the authors state that, under Art. 190(3) PILA, interlocutory and preliminary awards not expressly dealing with jurisdiction, but from which it can be inferred that the arbitral tribunal implicitly admitted it by issuing them, are challengeable.

The Appellant then underlines the difference between commercial arbitrations, in which the arbitral tribunal derives its jurisdiction from the arbitration clause stipulated in the contract concluded by the parties, and investment arbitrations, where the jurisdiction of the tribunal results from a treaty without

ever having a separate and explicit arbitration clause binding the foreign investor and the host State. In this last type of international arbitration, the arbitral tribunal would therefore have jurisdiction, *first*, only if the investment treaty is applicable on the facts of the case in dispute and, *second*, only if the investor accepts the offer of host State arbitration included in the bilateral treaty (on this mechanism, see ATF 141 III 495 at 3.4.2 and references). According to the Appellant, the Respondent, although its answer is not very clear on this point, seems to accept that the essential security-interests clause can be attached to the first of the two conditions mentioned above, that is to say to the very applicability of the investment treaty. The Appellant goes on to point out that the exception drawn from this clause constitutes a fact of double relevance since it involves both the question of the jurisdiction of the arbitral tribunal and the question of the substantive merits of the action, which are also apparently admitted by the Respondent. For this reason, as the case-law excludes the application of the doubly-relevant (or "doubly-pertinent") facts theory (*doppelrelevante Tatsachen*[21]) in the field of arbitration (ATF 141 III 495 at. 3.5.5.2), the Arbitral Tribunal was bound to consider the question of essential safety interests as fully as the other preliminary objections to its jurisdiction, as it did, just like the arbitral tribunal that heard the Mauritian case and which partly refused to accept jurisdiction on this count.

The Appellant contests, moreover, the conclusions that the Respondent drew from the awards extracted from the arbitral case-law.

Finally, it maintains that the essential security-interests clause "effectively excludes substantive examination" and that, as a result, the exception thereto, in the same way as other similar exceptions, may be challenged directly before the Federal Court, under Art. 190(3) PILA, even though it does not expressly relate to the jurisdiction of the arbitral tribunal.

3.2.3.2.4. In its surrejoinder, the Respondent firmly refutes that the essential security-interests clause was treated as an objection to lack of jurisdiction, contrary to the contention of the Appellant. It maintains that it has considered it, like the Arbitral Tribunal, as a possible defense on the merits.

According to the Respondent, the clause in question relates to the responsibility of the host State and the Arbitral Tribunal can apply it only if it has jurisdiction. It would therefore be wrong to claim that it is of a dual nature, not to mention that the Appellant relies for the first time on such a theory in its Reply, which is not permissible. If that clause was described by it as *Grenzbestimmung*[22] in the reply to the appeal, it is rather because it restricts the substantive scope of the BIT when it is successfully relied upon, which is why the Arbitral Tribunal examined it in the context of the preliminary objections.

Finally, the Respondent explains why, in its opinion, the case-law concerning interlocutory decisions relied on by the Appellant would not be applicable in this case.

3.2.3.3. For the reasons set out below, this Court – without hesitation – relies on the Respondent's arguments as to the nature of the objection based on essential security interests and, therefore, rejects the converse argument advanced by the Appellant.

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[21] Translator's Note: In German in the original text.
[22] Translator's Note: In German in the original text. The word means "demarcation" or "boundary determination".

3.2.3.3.1. It must first be noted with the Respondent that the Appellant never argued once before the Arbitral Tribunal that Art. 12 of the BIT concerned the jurisdiction of the Tribunal. Indeed, under no. 147 of its response to the appeal, the Respondent, without being contradicted by its opponent, cites five examples, four taken from passages of the Appellant's briefs in the arbitration file and, the fifth from the opening arguments of the latter, in order to show that the Appellant has supported, from the beginning to the end of the arbitration proceedings conducted so far, that the objection inferred from the BIT clause relating to the question of the essential security interests of the host State constituted a defense on the merits which, if admitted, would preclude the application of the substantive provisions of the treaty in question.

Anyone involved in the proceedings must comply with the rules of good faith (see Art. 52 CPC; RS 272). The principle of good faith, laid down for ordinary civil proceedings, is of general application, so that it also governs arbitral proceedings, both in the field of domestic arbitration and in international arbitration. By virtue of this principle, it is not permissible to reserve procedural grievances which could have been corrected immediately in order to raise them only in the event of an adverse outcome of the arbitral proceedings (judgment 4A_247/2017 of April 18, 2018, at 5.1.2 and the case-law cited). With regard to jurisdiction, the PILA contains, in addition, a specific provision – Art. 186(2) – based on the same principle, according to which "the objection to lack of jurisdiction must be raised prior to any defense on the merits". From this angle also, it seems difficult to admit that a party having several objections of lack of jurisdiction up its sleeve, as is the case of the Appellant, should not raise them all in the arbitral proceedings but keep one aside, only to raise it in case of an appeal against the award that has rejected the objections that *were* relied upon. Moreover, as early as 2002, the Federal Tribunal pointed out that, when the objection of lack of jurisdiction is raised, it must be fully reasoned, as a party may not keep arguments in reserve, for it is not for the arbitrators to seek *ex officio* whether circumstances exist unrelated to those relied on in support of an argument of lack of jurisdiction might require them to decline jurisdiction (ATF 128 III 50 at 2c/ bb/ ccc p. 61; in the same sense, see, among others: Schott/ Courvoisier, in *Commentaire bâlois, Internationales Privatrecht*, 3rd ed. 2015, no 96 to Art. 186 PILA, p. 1929).

It follows from these considerations that the Appellant is precluded from raising, before the Federal Tribunal, the arguments of lack of jurisdiction of the Arbitral Tribunal in connection with Art. 12 of the BIT. The explanations which follow, therefore, are superfluous.

3.2.3.3.2. It is appropriate therefore to make three procedural remarks.

The first relates to the theory of doubly-relevant facts (on this notion, see ATF 143 III 462 at 2.2, last paragraph, and the judgement cited). This theory appeared for the first time, penned by the Appellant, only in the reply. It is therefore appropriate to simply ignore it altogether (see 2.2, above). In any event, the Appellant, if it correctly states what the theory consists of and why it is inapplicable in arbitration, errs, on the other hand, when it tries to demonstrate the double relevance of the facts alleged by it in this context. It starts, wrongly (as will be demonstrated later, *see* 3.2.3.3.3 and 3.2.3.3.4), with the assumption that the 'essential security interests' clause in Art. 12 of the BIT falls not only to the substantive defense available to the host state sought by an investor of another contracting state, but also to the jurisdiction *ratione materiae* of the arbitral tribunal hearing an objection from that clause.

The second remark concerns the jurisprudential and legal commentary principle, relied upon by the Appellant, according to which it is necessary to assimilate to the pronouncement, made during the proceedings, by which the court expressly accepts jurisdiction, the interlocutory or preliminary awards in which the arbitral tribunal, without pronouncing directly on its jurisdiction, nevertheless upholding it implicitly and in a recognizable manner by the very fact of settling one or more preliminary questions of procedure or substance (ATF 143 III 462 at 3.1; Berger/ Kellerhals, *op.cit.* at 3.2.3.2.3 above). It is difficult to see where the Appellant is going with this. The hypothesis it raised could be relevant if the Arbitral Tribunal, without having previously ruled on its jurisdiction, had ruled on the objection relating to essential security interests by making an interlocutory decision on the subject. It is clear that, in that event, the Arbitral Tribunal would have implicitly accepted its jurisdiction to decide on that point, so that its decision could have been appealed by the party denying it any jurisdiction in this regard. However, this case has nothing to do with that situation. In fact, the situation is that of an arbitral tribunal which, having made a decision on a series of objections the admission of which would have led it to refuse jurisdiction to settle the dispute which had been submitted to it, rejected them all, and then, having accepted jurisdiction, considered the merits of a substantive objection which the Appellant had raised before it on the basis of Art. 12 of the BIT.

Under no. 166 of its appeal brief, the Appellant quotes, in French, the following two passages of the Award, which will be reproduced in the original language used by the Arbitral Tribunal: "…if [the essential security interests clause] applies, the substantive obligations under the Treaty do not apply" (no. 227, p. 72; in fact it refers to the quotation by the Arbitral Tribunal of a passage under no. 129 of the aforementioned award in the CMS case); "... the far-reaching consequences that a successful invocation of Article 12 entails, that of entirely dis-applying the Treaty... " (no. 281, p 95). From this double quotation, the Appellant believes that it can draw the recognition, by the Arbitral Tribunal, that Art. 12 of the BIT "imposes a condition on the jurisdiction" (*ibid.*). A third remark will therefore be formulated here to challenge such an interpretation. It appears, in effect, from the English term substantive appearing in the first quotation and taking into account the context in which the second quotation, truncated in fact, was made, that, in one and the other, the Arbitral Tribunal had in mind the material obligations deriving from the treaty, excluding its own jurisdiction.

3.2.3.3.3. Art. 12 of the BIT, as reproduced above (see B(a) in fine), states the following (the French translation was proposed by the Appellant: Appeal, No. 163):

> Nothing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions to the extent necessary for the protection of its essential security interests…

The cited clause, referred to as the essential interests of security, is similar to the act of necessity – even if the two notions do not overlap (see Award, No. 228) – which has its origin in customary international law of State responsibility, codified in the *Draft Articles on State Responsibility for Internationally Wrongful Acts,* adopted by the United Nations International Law Commission (ILC) in 2001 and published with comments on the draft of articles (see, among others, Christina Binder, *Circumstances Precluding Wrongfulness, in International Investment Law*, Bungenberg/ Griebel/ Hobe /Reinisch [ed.], 2015, p. 442 et seq., no. 1; Sabahi/Duggal/Birch, *Limits on Compensation for Internationally Wrongful Acts,* in last *op. cit.*, p. 1115 et seq., no. 10). The act of necessity, which features in Art. 25 of the ILC draft, in Chapter V

entitled: "*circumstances precluding wrongfulness*," constitutes, with force majeure and self-defense in particular, one of the six circumstances excluding the unlawfulness of conduct which, moreover, would not be in conformity with the international obligations of the State considered. In this, it offers to this State, to use an image used by the International Law Commission, a shield against a charge of breach of a proven international obligation. However, it acts "more as a shield than as a sword", in that it does not have the effect of canceling or extinguishing the obligation, but only of excusing a temporary non-performance (*Commentary of the project*, nos.1 and 2 to Chapter V, see also: Sabahi/Duggal/Birch, *ibid*.). According to the International Law Commission, circumstances precluding wrongfulness "have nothing to do with matters within the jurisdiction of a court or tribunal in respect of a dispute or the admissibility of an application." (*Project Commentary*, No. 7).

This last remark is consistent with the decisions that have been issued in this respect by international judicial authorities, such as the ICJ (Judgment of June 27, 1986, in the case of military and paramilitary activities in Nicaragua and against it, *Nicaragua v. the United States of America*, No. 222, Judgment of December 12, 1996, in the *Oil Platforms Case, Islamic Republic of Iran v. United States of America*, No. 20, Judgment of September 25, 1997, in the *Case Concerning the Gabcikovo-Nagymaros Project*, Hungary/Slovakia, No. 51), or by arbitral tribunals (award of November 1, 2006, in ICSID Case No. ARB/99/7, *Patrick Mitchell v. The Democratic Republic of Congo*, n. 55; award of the *ad hoc* Committee of September 25, 2007, on the Request for Annulment of the Republic of Argentina in the *CMS* case, nos. 129 and 146; Award of September 5, 2008, in the *Continental* case, no. 164). To this firmly established case-law, to which it seeks in vain to assign a different meaning than that which emerges from its own text, the Appellant would like to oppose the following passage, drawn from the operative part of the Award on Jurisdiction and the Merits of July 25, 2016, in the *Mauritian* case of (No. 501):

> ...the Tribunal decides and adwards [*sic*] as follows:... c) By majority, that the Tribunal lacks jurisdiction over the Claimants' claims insofar as the Respondent's decision to annul the A. Agreement was in part directed to the protection of the Respondent's essential security interests.[23]

Such an attempt is doomed to failure. Admittedly, the expression highlighted, which was used to qualify the majority decision taken by the arbitral tribunal in this case, is not the happiest. However, it is clear from the text of the recitals of that award that the Arbitral Tribunal did not focus on the question of its jurisdiction *ratione materiae*, but rather examined to what extent the defending State could rely on the essential security interests clause, having regard to the circumstances of the case at issue, and then setting the proportion at 60%, which is why it restricted to 40% the claimant's claim for compensation for expropriation of their investment.

3.2.3.3.4. On the other hand, another question, which the Appellant does not appear to have raised and which could be linked to the *lato sensu* jurisdiction of the arbitral, is whether or not the provisions of the investment treaties relating to essential security interests are automatic. In practice, if a grievance on this ground had been relied on and duly substantiated by the party concerned (see Art. 77(3) LTF), it would have been necessary to consider who is responsible for judging whether the essential interests of the state are at stake.

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[23] Translator's Note: Emphasis added by the Federal Tribunal.

In chapter 5 of an article published by the Organisation for Economic Co-operation and Development (OECD) in 2007 under the title: "*Perspectives d'investissement international - Liberté d'investissement dans un monde en changement*", the OECD addressed this issue. The conclusion reached was that, while a number of bilateral or multilateral investment agreements expressly attribute this role to the state itself, the same may not be true of some bilateral investment promotion and protection treaties that do not expressly indicate that the exception is automatic ('*self-judging*'[24]). In its view, the analysis of the awards issued on this point shows that the courts that have considered the issue in investor-State disputes have refused to recognize that essential security interests clauses may have an inherent self-judging character even when it is not specified that they have such a character (pp. 124 *et seq*. and the awards cited). The General Agreement on Tariffs and Trade (GATT 1947) provides an example of a self-judging exception to its Art. XXI(a), that "*[n]o provision of this Agreement shall be construed as imposing on a contracting party an obligation to provide information the disclosure of which would, in its opinion, be contrary to the essential interests of its security*". The new model of a bilateral treaty for the promotion and protection of investment, adopted in 2015 by India, offers another example, which is much more explicit. With regard to the Security Exceptions, regulated by Art. 33, number 4 of that provision refers to Schedule 1, which states, in part:

> Where the Party asserts as a defense that conduct alleged to be a breach of its obligations under this Treaty is for the protection of its essential security interests protected by Article 33, any decision of such Party taken on such security considerations and its decision to invoque [*sic*] Article 33 at any time, whether before or after the commencement of arbitral proceedings shall be non-justiciable. It shall not be open to any arbitral tribunal constituted under Chapter IV or Chapter V of this Treaty to review any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the Tribunal.[25]

It goes without saying that Art. 12 of the BIT, even though it emanates in part from the same state, is at the opposite end of the quoted provision. Indeed, nothing in its text would make it possible to argue, as in the two examples cited above, that India intended to completely exclude from the Arbitral Tribunal the question of whether it could validly rely on the essential security-interests clause in this case to oppose the admission of the Respondent's claim.

3.2.3.4. As the issue of essential security interests did not fall within the question of the jurisdiction of the Arbitral Tribunal in this case, the argument of a breach of Art. 190(2)(b) PILA, even if the Appellant had not been barred from raising it (see 3.2.3.3.1), would nonetheless have been declared inadmissible on that basis. Moreover, the interested party does not rely on other grounds in relation to Art. 12 of the BIT.

4.

Lastly, the Appellant seeks to prove that the Award in which the Arbitral Tribunal rejected the argument Appellant presented concerning the alleged wrongfulness of Contract A._____ while at the same time rejecting the evidence it wanted to adduce in this respect, constitutes an additional grounds not only for

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[24] Translator's Note: In English in the original text.
[25] Translator's Note: In English in the original text.

denying lack of jurisdiction (Art. 190(2)(b) PILA), but also the argument alleging breach of its right to be heard (Art. 190(2)(d) PILA).

In the first place, it will be a question of placing this double grievance in its factual context (at 4.1). Then, in summary form, the arguments put forward on both sides on the contentious issue (at 4.2). Some theoretical considerations will still need to be raised as to the legal relevance of the relevant circumstance - *i.e.* the alleged wrongfulness of Contract A._____; on the possibility of relating it to the jurisdiction of the Arbitral Tribunal (at 4.3). Finally, it will be necessary to examine the impact, in the present case, of the possible wrongfulness of Contract A._____ (at 4.4) and to say whether or not the Appellant's right to be heard has been breached in this case (at 4.5).

4.1. In a letter dated October 24, 2016, the Appellant drew the attention of the Arbitral Tribunal to a number of developments in A._____, in particular criminal proceedings brought by India's Central Bureau of Investigation (CBI) against senior government officials, against A._____, and against certain officers and directors of that corporation. According to the Appellant, if the charges made by the CBI were to be substantiated, it would be necessary to consider "additional grounds for dismissal" because, in that event, the alleged investment would not have been carried out in accordance with Indian law. It was therefore justified, in its opinion, to suspend the arbitration procedure until the law was known on the fate of these accusations. Attached to this letter were various exhibits, including an indictment published in August 2016 ("the CBI Charge Sheet"). Responding on November 14, 2016, in a long letter, the Respondent put forward various reasons which, in its view, required it not to grant its opponent's request.

The Arbitral Tribunal rejected the request for suspension by letter of February 20, 2017. For the rest, it dismissed it in the interim award of December 13, 2017 (nos. 115-119).

Leaving open the question of whether the Appellant intended to raise a new objection to jurisdiction or inadmissibility based on the purported illegality of the contract A._____, it held that, if that was the case, such an exception had been made outside of the prescribed period and in disregard of the procedural timetable established in this arbitration, as the Appellant did not raise it until well after the filing of the parties' written submissions and the hearing on jurisdiction and the principle of liability. Similarly, the evidence proposed could not be admitted, as it had not been produced in a timely manner and had been in breach of the applicable procedural rules, which required prior approval.

In an alternative argument, the Arbitral Tribunal held that even if it had been formulated within the prescribed time period and with regard to the relevant procedural rules, the objection of illegality should be rejected on the merits for three reasons: *first*, because it was not sufficiently substantiated; *second*, because the CBI charge sheet had been issued as part of an investigation initiated by that body in March 2015 and contained simple allegations that had not yet been adjudicated; and *finally*, because none of these allegations related to the Respondent's actions or conduct, as the Appellant did not demonstrate how, as a result of the CBI's Charge Sheet, X._____'s investment consisting of the indirect acquisition of A._____'s shares was contrary to Indian law.

4.2.

4.2.1. Contrary to this argument, the Appellant argues, first of all, that it acted "in time and in a perfectly appropriate manner by raising its objection after the issuance of the indictment" (Appeal, no. 193). As to the allegedly incomplete statement of reasons for this objection, the complainant asserts that it clearly demonstrated the principle that there can be no investment that could be protected if the investment claimed is unlawful according to the law of the host State. That alone, in its view, would matter to the exclusion of the number of sentences it devoted to that question.

While conceding that the charges at issue had not yet been brought to the attention of the relevant Indian criminal court at the time it raised its objection of wrongfulness, the Appellant denies any relevance to this circumstance on the ground that the temporary absence of confirmation of the veracity of its statements by an Indian criminal authority did not mean that there was no illegal investment. Therefore, in its opinion, the Arbitral Tribunal had breached its right to be heard by refusing to suspend the arbitral proceedings – which amounted to prejudging the outcome of the criminal proceedings – and later, by rejecting, in its interim award, the evidence that it had submitted to it with a view to establishing the unlawful nature of the investment in question.

Moreover, according to the Appellant, the criminal trial had started since then, a first hearing having taken place on December 23, 2017, after the approval to prosecute the last four officials involved in this case was issued in August 2017.

Finally, the Appellant, unlike the Arbitral Tribunal, does not attach importance to the fact that the charges do not relate to acts performed by the organs or employees of X._____ itself, but those of A._____. In fact, it would be obvious that if Contract A._____ were unlawful, the German company could not have availed itself of a lawful investment, even if it had not been involved in the wrongdoings referred to in the charge sheet.

Therefore, for the Appellant, the rejection by the Arbitral Tribunal of the jurisdictional defense on the basis of the unlawfulness of Contract A and its unjustified refusal to admit the evidence relating to that argument fall foul, respectively, of (b) and (d) of Art. 190(2) PILA.

4.2.2. The Respondent disagrees with the argument advanced by its opponent. According to it, assuming that one is dealing here with an exception concerning the jurisdiction of the Arbitral Tribunal or the admissibility of the claim, which it seems is far from clear, this exception was on the face of it raised late. In fact, it was formulated in a letter sent to the Arbitral Tribunal on October 24, 2016, more than six months after the hearing that took place from April 6 to 11, 2016, while Art. 21(3) of the UNCITRAL Arbitration Rules (1976 version) provides that "*[a] plea of lack of jurisdiction must be raised at the latest at the time of filing of the reply or, in the case of a counterclaim, of the reply.*" However, if the Respondent is to be believed, the Appellant would have been able to do it much earlier for the following reasons: it had known for several years the arguments formulated in the charge sheet; these arguments were also the subject of several reports within the Indian government, which went back to the year 2009; in addition, Mr. U_____, a witness of the Appellant, indicated at the time of his hearing that he had received, that year, an anonymous report in connection with the conclusion of contract A._____, a report which had given rise to the opening of various investigations and the drafting of a series of reports and memoranda

within the Indian administration; these documents, moreover, had apparently been produced as evidence in the arbitral proceedings and the accusations contained therein discussed in the parties' briefs and witness statements filed during the period October 2014 to October 2015; despite this, the Appellant had specified, in an appeal brief of October 9, 2015, entitled "Respondent's Rejoinder on Jurisdiction and Liability", that the legality of the (indirect) acquisition of A._____'s shares by the Respondent was not in question; furthermore, there was no mention of the charges at issue during the April 2016 hearing, nor in the Appellant's subsequent Post-Hearing Brief of June 10, 2016.

With the exception of this *ratione temporis* forfeiture, the Respondent seeks to demonstrate, in an alternative argument, that the Arbitral Tribunal would have rightly rejected the objection of unlawfulness, had it been submitted to it within the prescribed time period. It maintains, in this respect, that the objection was not sufficiently reasoned ("*nicht hinreichend substanziiert*"[26], Answer, no. 189, first bullet point); secondly and most importantly, that the CBI's Charge Sheet contains only simple allegations and charges that have not yet been submitted to an Indian criminal court, much less confirmed by such a tribunal; and finally, that the grievances in the charge sheet do not relate to the actions or conduct of the Respondent itself. The latter then devoted lengthy sections to the limited scope of the CBI Charge Sheet and the subsequent acts of the criminal investigation authorities (Reply, nos. 191-191.7).

Moreover, for the Respondent, even if an Indian court were to decide – which has not yet been the case so far – that Contract A. breaches Indian law, it would not mean that the Arbitral Tribunal would have wrongly accepted jurisdiction, as it concerns a problem – the conformity of the investment with Indian law, as required by Art. 3(1) of the BIT – that it is for the Arbitral Tribunal alone to resolve, without the latter being bound by decisions of local courts finding that Indian law has been breached.

The Respondent further challenges the relevance of the case-law on which the Appellant relies and which, in its view, relates to circumstances of fact unrelated to the present case, this case-law referring to cases in which the investor was accused of having committed itself criminally offenses, whereas in this case the situation is quite different since it is about an investor having acquired shares of a company of the host State years after criminal offenses had allegedly been committed in relation to a specific asset of that company (Contract A._____). Moreover, for both the Respondent and the Arbitral Tribunal, it is revealing that B._____ never relied on the wrongfulness of Contract A._____ in the ICC arbitration between the two Indian companies which was concluded by the Final Award of September 14, 2015.

In the further alternative, the Respondent denies the Appellant the opportunity to rely on the objection of wrongfulness for being too late in raising it.

Finally, Respondent explains, essentially reiterating some of the arguments summarized above, why, in its view, the Arbitral Tribunal did not breach the Appellant's right to be heard by rejecting the evidence that the Appellant had submitted to it.

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[26] Translator's Note: In German in the original text.

4.3.

4.3.1. A large number of modern bilateral investment treaties contain a clause stipulating that foreign investment must be made "in accordance with the laws and regulations of the host State". Similar clauses, called a "compliance clause" in English language legal commentary (in French: "*clause de conformité*") is generally, but not necessarily, included in the treaty provision defining the investment (Diel-Gligor/ Hennecke, *op.cit*., nos. 1-3). As a result, several host States have attempted to argue that the purpose of the compliance clause would be to limit the concept of investment by subjecting it to the domestic law of the receiving State. However, the arbitral tribunals did not follow them; on the contrary finding that such a clause refers to the legality of the investment and not to the definition of it (see, among others, the award on jurisdiction of July 23, 2001, in the ICSID Case No. ARB/00/4, *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco*, n. 46). In other words, if the examination of the legality or illegality of a particular investment can be made under host State law, the very definition of investment is supposed to have its roots in international public law, except to allow the defending State to restrict the object of the protection afforded by the investment treaty as it sees fit (Diel-Gligor/Hennecke, cited above, no. 1-3; see also: Schreuer, *op.cit*., n. 200 ad art. 25; Grubenmann, *op. cit*., p. 207 et seq.; apparently with another view: McLachlan, *op. cit*., no. 6.110).

4.3.2. The compliance clause raises another, more delicate, problem that can be presented in the following interrogative form: does the question of whether a given investment complies with the host State's legislation fall within the jurisdiction of the State? The arbitral tribunal or the merit of the claim?

The answer to this question is not of a purely academic nature, because it affects the rights of the investor and the fate of the arbitral dispute in two ways: first, at the level of the arbitral tribunal, only two solutions appear possible if the point of contention is one of jurisdiction, namely the acceptance or complete refusal of the jurisdiction of the arbitral tribunal, the second of which has the effect of denying the investor any protection under the bilateral investment treaty before a neutral international forum; on the other hand, if it is considered a question of substance, the arbitral tribunal, no longer being placed before this alternative, will be able to assess, in a differentiated manner, the circumstances of the specific case and, in particular, the consequences of non-compliance, per investor, of the host State's regulations (Diel-Gligor/Hennecke, *op.cit*., no. 12-13). Then, at the level of the Federal Tribunal, the First Civil Law Court, seized of an appeal in civil law within the meaning of Art. 77(1)(a) LTF, can only review the decision taken by the arbitral tribunal from the narrow angle of the incompatibility of the award with public policy (Article 190(2)(e) PILA), should the compliance clause fall within the merits of the action, while it will review it freely in law if it falls within its jurisdiction.

Some arbitral tribunals have made the link between the compliance clause and the jurisdiction of the arbitral tribunal on the ground that the clause would constitute a limit set by the host State to the consent given by it to the dispute arising from the application of the bilateral investment treaty is submitted to the arbitral tribunal provided for by that treaty (jurisdiction *ratione voluntatis*, Diel-Gligor/Hennecke, *op.cit*., No. 11, in this sense, see the award of August 2, 2006, in the ICSID Case No. ARB/03/26, *Inceysa Vallisoletana, SL v. Republic of Salvador*, n. 257; award of May 19, 2010, in the ICSID Case No. ARB (AF)/07/3, *Alasdair Ross Anderson and others v. Republic of Costa Rica*, n. 58/59; Award of July 14, 2010 in ICSID Case No. ARB/07/20, *Mr. Saba Fakes v. Republic of Turkey*, no. 115; award of October 4, 2013, in ICSID Case No. ARB/10/3, *Metal-Tech Ltd. v. Republic of Uzbekistan*, no. 372/373; award of

December 10, 2014, in the ICSID Case No. ARB/11/12, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, n. 468). Other arbitration tribunals have attached the compliance clause to the merits of the action (award of April 21, 2006, in the *Berschader* case, No. 111, award of August 27, 2008, in the ICSID Case No. ARB/03/24, Plama Consortium Limited v. Republic of Bulgaria, nos. 143-146; award of February 7, 2011, in ICSID Case No. ARB/08/18, Malicorp Limited v. The Arab Republic of Egypt, no. 119).

Express compliance clauses are most of the time considered as a restriction on the jurisdiction of the arbitral tribunal, whereas a condition implicitly imposed in this respect is rather related to the merits of the action (Diel-Gligor/Hennecke, *op.cit*., No. 14), or even the admissibility of the request (August Reinisch, *Jurisdiction and Admissibility in International Investment Law*, in *General Principles of Law and International Investment Arbitration*, Gattini/Tanzi/Fontanelli [ed.], 2018, p. 130 et seq., p 146). It is nevertheless difficult to make the distinction between the investments whose defect (*Mangelhaftigkeit*) must lead to the lack of jurisdiction of the arbitral tribunal and those, tainted by a less serious defect (*Fehlerhaftigkeit*), which cannot produce such an effect (Grubenmann*, op. cit.,* p. 216). Ultimately, in order to know whether a host State wished to restrict its consent to investment-friendly arbitration by inserting a compliance clause into the relevant bilateral investment treaty, it will be necessary to determine what its intentions were in this regard by taking into account all the circumstances of the particular case, in particular the text of that clause, its place in the treaty and, where appropriate, the conditions under which it was adopted, such as would be shown in the preparatory work (Diel-Gligor/Hennecke, *op.cit*., No. 15).

4.3.3. The methods to be applied and the criteria to be used to verify whether a given investment is or is not in conformity with the host State's legislation have not yet been fixed once and for all, if that is at all possible, but is still the subject of discussions in arbitral awards and legal commentaries (Diel-Gligor/Hennecke, *op.cit*., no.16 et seq. with numerous references).

Similarly, special attention was paid to the particular case of non-compliance of the investment with the host State's law of corruption generally and the payment of bribes in particular (see among others: Lorz/ Busch, *Investment in Accordance with the Law - Specifically Corruption, in International Investment Law*, Bungenberg/ Griebel/ Hobe/ Reinisch [ed.], 2015, p. 577 et seq). In this area, there are two major differences compared to ordinary situations of non-compliance of the investment with the host State's legislation: the first is that corruption is universally condemned by the international community, where the BIT envisages only the breach of the host State's domestic law; the second is the finding that corruption is not the sole act of the investor, unlike the unilateral breach of the host state's law, but also presupposes conduct contrary to the law attributable to one or several persons, often highly placed, acting on behalf of that state (Lorz/Busch, *op.cit.,* no.1). This double difference is not without posing specific problems (see Lorz/Busch, *op.cit.,* no. 4 et seq.).

This being the case, there is no need to delve more deeply into the questions just mentioned, as the fate of the grievance under consideration does not depend on the solution that might be offered to them.

4.4.

4.4.1 Art. 1(b) of the BIT includes the compliance clause ("... *in accordance with the national laws of the Contracting Party where the investment is made*..."[27]) in the definition of investment. Art. 3(1) of the BIT adopts said clause in slightly different terms, which invites each contracting party to encourage investors of the other contracting party and to admit investments made in its territory "in accordance with its law and policy". From this express double formulation, in the BIT, of the requirement of conformity of the investment with the law of the host State, it can be inferred from the above-mentioned legal opinion and case-law and in the absence of contrary indications, that this is a condition relating to the jurisdiction of the Arbitral Tribunal, in the sense that each of the contracting parties has consented in advance to give up its state judicial system and to be brought before a private jurisdiction only insofar as the forthcoming lawsuit relates to an investment that was made in accordance with its legislation, *i.e*. an investment that was not illegal.

Moreover, it is also on the grounds of jurisdiction that the parties and the Arbitral Tribunal placed themselves in relation to the compliance clause. The Appellant, it is true, did not make clear its position on this subject. However, the Respondent and the Arbitral Tribunal did not, at the very least, rule out that it had intended to raise a jurisdictional defense or, more specifically, that it wished to add an additional reason to those it was already relying on as such.

It follows that the Federal Tribunal may, in principle, freely review the relevance of the reasons given on this point by the arbitrators.

4.4.2. It has been stated above that, when the jurisdictional defense is reasoned, it must be fully justified under pain of forfeiture (see 3.2.3.3.1, 2nd para.). The Appellant has therefore forfeited the right to argue the lack of jurisdiction of the Arbitral Tribunal in connection with the compliance clause, unless it could reasonably have raised such an objection before the time when it did so, as it asserts before the Federal Tribunal.

This Court is not persuaded by this assertion. It should be noted that, according to the findings of the Arbitral Tribunal, on November 8, 2009, U._____, one of the secretaries of the DOS, apparently received an anonymous report that the spectrum of the S-band had been leased to A._____ on the basis of corruption, a complaint which was followed by discussions among the representatives of the Indian space authorities, then the constitution of the so-called Committee V._____, named after its sole member, the director of the Indian Institute of Space and Technology, which published its report on June 6, 2010. The Indian media had also been interested in Contract A._____, claiming that the lease was too advantageous for this company, and they called on the government to cancel the contract. This was followed by a series of reports and memoranda in the Indian administration.

Some senior officials of this administration had been arrested in early February 2011, before A._____ saw its contract with B._____ terminated, on the 25th of the same month, for an alleged case of *force majeure*. Therefore, it is difficult to understand why the Appellant did not mention these circumstances – which were revealing, at least, of suspicions of commission of criminal offenses – in its submissions in

[27] Translator's Note: In English in the original text.

the arbitration, or during the hearing of April 2016, or in its post-hearing brief of June 10, 2016, preferring instead to wait until October 24, 2016, to inform the Arbitral Tribunal. This is all the less understandable that the CBI had already sent its Charge Sheet to whom it may have concerned on August 11, 2016.

As the aforesaid reservation is no longer subject to the conclusion of this examination, it follows that the jurisdictional defense based on Arts.1(b) and 3(1) of the BIT is forfeited.

4.4.3. Would it not then be that the argument in the alternative developed by the Arbitral Tribunal on the merits should then be ratified?

First, the reading of the letter that the Appellant sent on October 24, 2016, to the Arbitral Tribunal confirms that the content of this document was so excessively ethical that the recipient was unable to draw clear conclusions as to the desire expressed in general and imprecise terms by the author of the missive.

Second, the charge sheet, following the CBI's initiation of an investigation in March 2015, contained only allegations and charges that were not yet decided. Admittedly, as the Appellant rightly pointed out, that did not exclude that the accusations made in this document could prove to be well-founded in the end. However, in the face of vague accusations, it was also necessary to take into account the interests of the investor in ensuring that the settlement of the dispute with the host State took place within an acceptable period of time and was not postponed for several years because of a suspension of arbitral proceedings until the criminal law was decided. On the basis of the legal opinion extract reproduced below, one may wonder whether the existence of a pending criminal investigation was such as to affect the Arbitral Tribunal's jurisdiction over Arts. 1(b) and 3(1) of the BIT: "Nevertheless and despite this focus on the host State's domestic law, the arbitral tribunal, as an international forum, is not bound by any prior assessments made by national courts under such relevant national law; rather it is required to make its own legal determination"[28] (Gligor/Hennecke, *op.cit*., no. 18). The question may remain open, in any event, such as that of the right of the host State to invoke the criminal behavior of some of its officials in an attempt to evade its responsibility under the BIT (on this point, see Lorz/Busch, *op.cit.*, nos. 24-28, see also the judgment of October 4, 2006, in ICSID Case No. ARB/00/7, *World Duty Free Company Limited v. Republic of Kenya*, no. 180/18, in favor of the host State, in which the investor was forced to bear alone the consequences of corruption resulting from a bribe solicited by the President of the defending State, on the grounds that the law does not protect the disputing parties but the public, *i.e*. the citizens and taxpayers of the host State). This is the place to recall, moreover, that grievances articulated in relation to promises of bribes are admitted by the Federal Tribunal only if corruption is established, but that the Arbitral Tribunal refused to take this into account in its Award (judgment 4A_50/2017[29] of July 11, 2017, at 4.3.2 on the grievance of incompatibility with substantive public policy).

In any event, if by chance a final, criminal decision, likely to affect the final award not yet issued as of this date, was to be taken after the pronouncement of the award, the Appellant may attempt to obtain, if

[28] Translator's Note: In English in the original text.
[29] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-50-2017

necessary and all other conditions being met, the review of that award (see Judgment 4A_596/2008[30] of October 6, 2009 at 4).

Finally, it is not self-evident, *a priori*, that by indirectly acquiring part of the shares in an Indian company, without its opponent finding anything to challenge, the Respondent, as an investor, must allow itself to be blamed for the fact that, by alleged misconduct by its organs, this company located in the territory of the host State obtained from a company controlled by the same State advantages qualified as unlawful by the latter. This, however, is another debate that there is no need to have here.

4.5. In a final argument, the Appellant, arguing that there was a breach of its right to be heard within the meaning of Art. 190(d) PILA states that the Arbitral Tribunal failed to admit the evidence it had produced in support of its objection to jurisdictional defense based on the alleged wrongfulness of Contract A. _____.

The grievance in question has no further purpose if one admits, as is the case here, that the jurisdictional defense is paralyzed by forfeiture. It goes without saying that the Appellant cannot assert any interest worthy of protection for the taking of evidence intended to establish a factual circumstance which is no longer of any importance from the moment that the party who alleges it could no longer benefit from it, had it been proved.

In any event, this is the place to recall that the right to take evidence, which is one of the constituent elements of the guarantee relied upon, must be exercised in good time and in accordance with the applicable formal rules (see 3.2.1.2.5(3) and the judgement cited). However, the Arbitral Tribunal has convincingly held that the evidence in dispute was not submitted in a timely manner and that it was not submitted to it in accordance with the applicable procedural rules. This last argument, supposing it to be admissible, would also be doomed to failure.

5.
In conclusion, the present appeal can only be rejected, insofar as the matter is capable of appeal, for the reasons indicated above. Accordingly, the Appellant's requests for granting a stay of enforcement to the appeal and the suspension of the arbitral proceedings until the law on the latter is decided, which are still formally pending, thereby become irrelevant.

6.
The Appellant, who is unsuccessful, will have to pay the costs of the federal proceedings (Art. 66(1) LTF) and pay costs to the Respondent (Art. 68(1) and (2) LTF). The compensation granted to the latter will be taken from the security for costs provided by the Appellant.

[30] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/revision-of-award-accepted-arbitral-tribunal-misled-by-evidence-

For these reasons, the Federal Tribunal pronounces:

1.
The appeal is rejected insofar as the matter is capable of appeal.

2.
The judicial costs, set at CHF 200'000, shall be borne by the Appellant.

3.
The Appellant shall pay Respondent an amount of CHF 250'000 for costs; this amount shall be taken from the security for costs deposited with the Office of the Federal Tribunal.

4.
This judgment shall be communicated to the parties' representatives and to the President of the Arbitral Tribunal.

Lausanne, December 11, 2018

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:	The Clerk of the Court:
Kiss	Mr. Carruzzo