

PERMANENT COURT OF ARBITRATION

PCA Case No. 2014-26

LOUIS DREYFUS ARMATEURS SAS V. THE REPUBLIC OF INDIA

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DECISION ON JURISDICTION

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22 December 2015

Tribunal:

[Jean E. Kalicki](#) (President)

[Julian D. M. Lew](#) (Appointed by the investor)

[J. Christopher Thomas](#) (Appointed by the State)

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## Decision on Jurisdiction

### GLOSSARY OF DEFINED TERMS / LIST OF ABBREVIATIONS

<b>ALBA</b>	ALBA Asia Private limited
<b>Berths</b>	Berths Nos. 2 and 8 at the Kolkata Port Haldia Dock Complex
<b>BIT (Treaty)</b>	Agreement between the Government of the Republic of India and the Government of the Republic of France on the Reciprocal Promotion and Protection of Investments, dated 2 September 1997
<b>Claimant</b>	Louis Dreyfus Armateurs SAS or LDA
<b>Consent Order</b>	Consent Order, dated 12 September 2012
<b>Consortium</b>	Consortium Consisting of ABG Infralogistics and its subsidian ABG Kolkata Container Terminals Private Limited
<b>Contract (Project)</b>	Agreement between the Board of Trustees for the Port of Kolkata and ABG Haldia Bulk Terminals Private Limited in Respect of Supply Operation and Maintenance of Different Cargo Handling Equipment at Berth No. 2 and 8 of Haldia Dock Complex, Kolkata Port Trust, dated 16 October 2009
<b>Contracting Parties</b>	The Government of the Republic of India and the Government of the Republic of France as contracting parties to the BIT
<b>Counter-Memorial</b>	Respondent's Counter-Memorial on Jurisdiction and Admissibility, dated 7 July 2015
<b>ECT</b>	Energy Charter Treaty, dated 17 December 1994
<b>First Objection</b>	The first Objection (Tribunal lacks jurisdiction <i>Ratione Voluntary</i> because the Claimant failed to comply with jurisdictional preconditions to arbitration)
<b>HBT</b>	Haldia Bulk Terminals Private Limited
<b>HDC</b>	Haldia Dock Complex
<b>KoPT (Kolkata Port Trust)</b>	Board of Trustees for the Port of Kolkata
<b>LDA</b>	Louis Dreyfus Armateurs SAS or the Claimant
<b>MFN</b>	Most Favored Nation clause
<b>Notice of Arbitration</b>	Notice of Arbitration, dated 31 March 2014
<b>Notice of Suspension</b>	Notice of Suspension of Operations, dated 23 August 2012

<b>Notice of Termination</b>	Notice of Termination, dated 31 October 2012
<b>Notification of Claim</b>	Notification of Claim, dated 11 November 2013
<b>Objections</b>	Respondent's Objections to Jurisdiction. Nos. 1-11. set out in Respondent's Request
<b>Parties</b>	The Claimant and the Respondent
<b>PO1</b>	Procedural Order No 1, dated 13 April 2015
<b>PO2</b>	Procedural Order No 2, dated 13 August 2015
<b>PO3</b>	Procedural Order No 3, dated 11 September 2015
<b>Port</b>	Port of Kolkata (Calcutta). India
<b>Rejoinder on Jurisdiction</b>	Respondent's Rejoinder on Jurisdiction, dated 23 October 2015
<b>Reply on Jurisdiction</b>	Claimant's Reply on Jurisdiction dated, 18 September 2015
<b>Respondent</b>	The Republic of India
<b>Respondent's Request</b>	Request for Bifurcation, dated 7 July 2015
<b>Response to Request</b>	Claimant's Response to Request for Bifurcation, dated 28 July 2015
<b>Second Objection</b>	The second Objection (the Tribunal lacks jurisdiction because the Investments were made through a company of which the Claimant owns less than 51 percent)
<b>Statement of Claim</b>	Statement of Claim, dated 3 March 2015
<b>Statement of Defense</b>	Statement of Defense, dated 7 July 2015
<b>ender</b>	Tender for Supply. Operation and Maintenance of Different Cargo Handling Equipment at Berth 2 & 8 of Haldia Dock Complex. Kolkata Port Trust. No. Ad Equipping/2007-08
<b>Treaty (BIT)</b>	Agreement between the Government of the Republic of India and the Government of the Republic of France on the Reciprocal Promotion and Protection of Investments, dated 2 September 1997
<b>UNCTRAL Rules</b>	<a href="#">Arbitration Rules of the United Nations Commission on International Trade Law 1976</a>
<b>VCLT</b>	Vienna Convention on the Law of Treaties, dated 23 May 1969

## I. THE PARTIES AND THEIR REPRESENTATIVES

1. The Claimant is Louis Dreyfus Armateurs SAS, a company incorporated and existing under the laws of France (registered under No. 652-012-311 in the Companies and trade Registry of Nanterre, France), having its registered office at Immeuble "Les écluses." 28. Quai Gallieni. 92158 Suresnes Codex, France ("LDA" or Claimant"). The Claimant is represented in these proceedings by: Dr. Tariq Baloch, whose address is 3 Verulam Buildings. Gray's Inn. London. WC1R 5NT, United Kingdom; Mr. Farhad Sorabjee, Mr. Varghese Thomas. Ms. Arti Raghavan. Ms. Shanaya Irani, and Ms. Neeraja Balakrishnan of J. Sagar Associates. Vakil's House. 18 Sprott Road. Ballard Estate, Mumbai 400 001. India; and Professor Vaughan Lowe QC of Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2 A 3EG, United Kingdom.
2. The Respondent is the Government of the Republic of India, a sovereign state ("India" or "Respondent." together with the Claimant, the "Parties") The Respondent is represented by Mr. Mark A. Clodfelter, Dr. Constantinos Salonidis. Ms. Oonagh Sands. Mr. Otilio J. Mayorga. Mr. Joseph Klingler, and Ms. Drana Tsutieva of Foley Hoag LLP. 1717 K Street NW, Washington. DC 20006-5342, United States. The Respondent is further represented by Messrs. Thomas Bevilacqua and Antoine Lerosier of Holey Hoag AAR.PL 153 rue du Faubourg Saint-Honoré, 75008 Paris, France.

## II. PROCEDURAL HISTORY

### A. COMMENCEMENT OF THE ARBITRATION

3. On 31 March 2014, the Claimant submitted a Notice of Arbitration ("**Notice of Arbitration**"), invoking the Agreement between the Government of the Republic of India and the Government of the Republic of France on the Reciprocal Promotion and Protection of Investments dated 2 September 1997 (the "**Treaty**" or "**BIT**") and [the Arbitration Rules of the United Nations Commission on International Trade Law 1976 \(the "UNCITRAL Rules"\)](#).

### B. CONSTITUTION OF THE TRIBUNAL

4. On 17 April 2014, the Claimant appointed Professor Julian D.M. Lew, QC as first arbitrator. On 8 July 2014, Claimant requested that the Secretary-General of the PCA, pursuant to Article 7(2) of the UNICTRAL Rules and Article 9(3) of the Treaty, appoint the second arbitrator. On 10 July 2014, the PCA wrote to the Respondent inviting its comments on the Claimant's request by 28 July 2015. By letter dated 31 July 2014, the PCA granted the Respondent an extension until 11 August 2014 to respond to the Claimant's application to the PCA. The Respondent replied by letter dated 8 August 2014, in which it appointed Mr. John Christopher Thomas, QC as second arbitrator.
5. On 8 September 2014, in accordance with Article 9(3) (b) of the BIT, the co-arbitrators appointed Ms. Jean E. Kalicki as Presiding Arbitrator.
6. On 3 November 2014, the Parties and members of the Tribunal signed the forms of Appointment.

## C. INITIAL PROCEDURAL STEPS

7. On 9 March 2015. Claimant submitted its Statement of Claim ("**Statement of Claim**"), which included, (i) Exhibits C-1 to C-0492; (ii) Legal Authorities CLA-1 to CLA-1211; (iii) Appendices I and II, (iv) Witness Statements of Messrs, Manpreet Jolly, Saket Agarwal, Pradip Ghosh, Olivier Morel-Jean, Jean-Michel Pap, Hans Starrenburg, Gurpeet Malhi, Gildas Maire, and Babu Rajeev, dated 9 March 2015, and of Mr Yogesh Agarwalla, dated 6 March 2009; and (v) the Expert Report of Mr. James Gilbey, dated 6 March 2015, with appendices.
8. The Tribunal held a preliminary procedural meeting with the Parties on 25 March 2015 in The Hague. During that meeting, the Respondent indicated that it intended to request bifurcation of the proceedings so that jurisdictional objections might be considered as a preliminary question.
9. On 13 April 2015, the Tribunal issued Procedural Order No. 1 ("**PO1**"), which set forth two alternative procedural timetables, one envisaging the potential future bifurcation of the proceedings, with the other envisaging no such bifurcation.
10. On 7 July 2015, Respondent filed its Statement of Defense ("**Statement of Defense**"), CounterMemorial on Jurisdiction and Liability ("**Counter-Memorial**"), and Request for Bifurcation ("**Respondent's Request**") in accordance with PO1. These were accompanied by (i) Exhibits R-1 to R-65, and (ii) Legal Authorities RLA-1 to RLA-245. The Respondent's Request set forth eleven separate objections to jurisdiction ("**Objections**")<sup>1</sup> and requested bifurcation of the proceedings to allow each issue to be addressed as a preliminary question prior to any examination of the merits.
11. On 28 July 2015, the Claimant filed its response to the Respondent's Request, including Exhibits C-1 to C-499 and Legal Authorities CLA-1 to CLA-159 ("**Response to Request**").

## D. BIFURCATION OF PROCEEDINGS

12. On 13 August 2015, the Tribunal issued Procedural Order No. 2 ("**PO2**"), in which it granted the Respondent's request for bifurcation in respect of the first and second of the Respondent's Objections ("**First and Second Objections**"), and denied the Respondent's request for bifurcation in

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<sup>1</sup> As described and numbered in the Respondent's Request, these were that (1) "The Tribunal Lacks Jurisdiction *Ratione Voluntatis* Because The Claimant Failed To Comply With The Jurisdictional Requirements In Article 9 Of The BIT". (2) "The Tribunal Lacks Jurisdiction Over All Of The Claimant's Claims, because The Investments Were Made Through A Company Of Which The Claimant Does Not Own At Least 51 Percent And The Claimant Therefore Cannot Benefit From The Treat' s Protections Under Articles 1(1) And 2(1)". (3) "The Tribunal Lacks Jurisdiction Over All of The Claimant's Claims Because The Claimant's Alleged Investment Was Not Made In Accordance With Indian Law" (4) "The Claimant s Allegedly Indirectly Held Rights Under The Contract Do Not Qualify As A Protected Investment Under The BIT". (5) "*Prima Facie* Jurisdiction Is Lacking Over Claims Relating To The Claimant's Indirect Shareholding In HBT, which The Claimant Claims To Be Its Investment, because It Alleges No Treatment By India Of That Shareholding Interest". (6) "Jurisdiction Is Lacking Over The Entirety Of The Claimant's Claims, because They Are Based On Contract Rights That Belong To An Affiliated Entity And Because The Claimant Suffered No Distinct. Individual Loss" (7)"The Tribunal Has No Jurisdiction Over Conduct That Is Not Attributable To The State Under International Law". (8) "Parallel Proceedings". (9) "The Tribunal Lacks Jurisdiction Over The Claimant's Claims Based Upon Facts And Disputes Settled By Virtue Of The Consent Order Of The Calcutta High Court". (10) "The Tribunal Lacks Jurisdiction Over The Claimant's Claims To The Extent That They Are Based Upon Actions Or Omissions That Occurred Before The Claimant Made Its Alleged Investment In HBT" and (11) "The Tribunal Lacks *Prima Facie* Jurisdiction Over The Claimant's Claims To The Extent That They Are Based Upon Actions Or Omissions That Occurred Before India Acquired Knowledge Of Claimant's Shareholding In HBT" Response to Request pp. 6-17.

respect of the remaining Objections.

13. On 11 September 2015, the Tribunal issued Procedural Order No. 3 ("PO3"), in which it fixed the procedural timetable in accordance with the Parties' agreement.
14. Pursuant to the agreed timetable, on 18 September 2015, the Claimant submitted its Reply on Jurisdiction related to the First and Second Objections, including Exhibits C-1 to C-499 and Legal Authorities CLA-1 to CLA-169 ("Reply on Jurisdiction").
15. On 23 October 2015, the Respondent submitted its Rejoinder on Jurisdiction related to the First and Second Objections ("Rejoinder on Jurisdiction").
16. On 5 November 2015, a bifurcated jurisdictional hearing was held at the International Dispute Resolution Centre in London. The Claimant was represented at the hearing by Professor Vaughan Lowe QC, Dr. Tariq Baloch, Mr. Farhad Sorabjee, and Ms. Aru Raghavan. The Respondent was represented by Messrs Clodfelter, Bevilacqua, Klinger, and Irosier, Dr Salonidis, and Ms. Sands, assisted by Mmes, Kalinowski and Schmidt.

### III. NATURE OF THE DISPUTE

17. The Claimant seeks declaratory and compensatory relief<sup>2</sup> from the Respondent for "jeopardising and ultimately dispossessing"<sup>3</sup> the Claimant of its investment, defined in the Notice of Arbitration as "comprising of its interest in the contract dated 16th October 2009 for the 'supply, operation and maintenance of cargo handling equipment at Berth Nos. 2 and 8 of Haldia Dock Complex'"<sup>4</sup>("Berths") at the Port of Kolkata ("Port"), between Haldia Bulk Terminals Private Limited (formerly ABG Haldia Bulk Terminals Private Limited) ("HBT") and the Board of Trustees for the Port of Kolkata ("KoPT") ("Contract" or "Project")<sup>5</sup>.
18. As discussed further herein, the Claimant's claimed connection to the Contract lies through its equity stake in ALBA Asia Private Limited (formerly ABG-LDA Bulk Handling Private Limited) ("ALBA"), a joint venture company incorporated under the laws of India between the Claimant and ABG Ports Limited (also a company incorporated under the laws of India) ("ABG Ports") The Claimant held 49% of ALBA's shares, and ABG Ports held the remaining 51% of ALBA's shares. ALBA in turn held a 63% equity stake in HBT, and as a result of certain arrangements, including preferential shares, was entitled to a 98.78% share of HBT's profit.<sup>6</sup>

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<sup>2</sup> Statement of Claim, ¶ 520

<sup>3</sup> Notice of Arbitration, ¶ 1, 4.

<sup>4</sup> Notice of Arbitration, ¶ 1, 4.

<sup>5</sup> Agreement between KoPT and HBT for Supply, Operation and Maintenance of different cargo handling equipment at the Berths, the Port, dated 16 October 2009 (C-2)

19. The Claimant alleges that the Respondent's acts and omissions resulted in the premature termination of the Contract on 31 October 2012.<sup>7</sup> The Claimant divides those acts and omissions into "three chapters"<sup>8</sup> According to the Claimant:

a) the first chapter entails the Respondent's "inexplicable resistance and obstruction"<sup>9</sup> of the Claimant's investment, including through: (i) KoPT's delay in issuing documentary pre-requisites to the Contract, such as a letter of intent, delayed for almost 250 days;<sup>10</sup> (ii) KoPT's refusal to commence allocation of cargo to HBT.<sup>11</sup> contrary to the terms of the Contract. (iii) the Indian police's failure to ensure the safe passage of the Claimant's equipment.<sup>12</sup> purchased pursuant to the terms of the Contract: and (iv) KoPT's obliging HBT to recruit "*double* the number of workers HBT had planned for and required"<sup>13</sup> following "threats, protests and acts of vandalism perpetrated by local labour unions:"<sup>14</sup>

b) the second chapter demonstrates "the way in which KoPT choked HBT's finances"<sup>15</sup> through KoPT's "'conscious decision to not utilize HBT's Berths optimally"<sup>16</sup> and failure "to make timely payments to HBT;"<sup>17</sup> and

c) the third chapter begins with IIBT's issuing a Notice of Suspension of Operations on 23 August 2012, the High Court of Calcutta's issuing a Consent Order on 12 September 2012 ("**Consent Order**"), which settled the dispute between HBT and KoPT and "reiterated the terms of the Contract:"<sup>18</sup> and HBT's dismissing "excess workers and sub-contractors."<sup>19</sup> The chapter continues with "a violent backlash,"<sup>20</sup> which saw HBT's staff "subjected to multiple acts of aggression in the form of mobs preventing operations, assaulting HBT personnel and threatening their personal security (and that of their families),"<sup>21</sup> to which KoPT, the police, the District Magistrate and the Ministry of Shipping responded with denials, silence, or apathy. It concludes with the alleged kidnapping at gunpoint of three HBT employees and their families and KoPT subjecting "HBT to a manifestly unfair blacklisting procedure."<sup>22</sup>

20. The Claimant asserts that such conduct renders the Respondent in breach of, *inter alia*, the following provisions of the Treaty:

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<sup>6</sup> Response to Request, ¶ 27(d); Statement of ¶ Claim ¶ 128

<sup>7</sup> Notice of Arbitration, ¶ 1.7.

<sup>8</sup> Statement of Claim, ¶ 11.

<sup>9</sup> Statement of Claim, ¶ 12.

<sup>10</sup> Statement of Claim, ¶ 14.

<sup>11</sup> Statement of Claim, ¶ 12.

<sup>12</sup> Statement of Claim, ¶ 13.

<sup>13</sup> Statement of Claim, ¶ 16.

<sup>14</sup> Statement of Claim, ¶ 16.

<sup>15</sup> Statement of Claim, ¶ 17.

<sup>16</sup> Statement of Claim, ¶ 17.

<sup>17</sup> Statement of Claim, ¶ 19.

<sup>18</sup> Statement of Claim, ¶ 20.

<sup>19</sup> Statement of Claim, ¶ 20.

<sup>20</sup> Statement of Claim, ¶ 22.

<sup>21</sup> Statement of Claim, ¶ 22.

<sup>22</sup> Statement of Claim, ¶ 28.

- a) Article 6 of the BII, which prevents the Respondent from taking "any measure of expropriation or nationalisation or any other measures having the effect of dispossession, direct or indirect"<sup>23</sup> unless it satisfies the conditions laid out in that article:
  - b) Article 4(2) of the BIT, which obliges the Respondent to "extend fair and equitable treatment in accordance with internationally established principles" to the investments of French investors in India;
  - c) Article 4(1) of the BIT, which provides that investments made by French investors "shall enjoy full and complete protection and safety" in India; and
  - d) the most-favored nation ("MFN") clauses in Article 5 of the BIT, which require India to accord French investors and their investments "treatment which shall not be less favourable than that accorded to" third-State investors and their investments.
21. The Respondent disputes that: (i) the Tribunal has jurisdiction over these claims;<sup>24</sup> (ii) the claims are admissible;<sup>25</sup> (iii) India has violated any of the standards of protection set forth in the Treaty;<sup>26</sup> and (iv) India is responsible for any loss incurred by UTA as a result of the violations alleged.<sup>27</sup>

## IV. RELEVANT LEGAL PROVISIONS

### A. THE BIT

22. For the purposes of the two bifurcated jurisdictional objections, the following provisions of the BIT are immediately relevant.
23. Article 1(1) of the BIT slates:  
The term "investment" means every kind of asset, such as goods, intellectual property rights and other rights and interest of whatever nature, invested in the area of the Contracting Party in accordance with the laws of that Contracting Party and in particular though not exclusively includes:
- a) Moveable and immovable property as well as any other rights in rem such as mortgages, liens, usufructs and pledges, and similar rights;
  - b) Shares and other kinds of interest including minority or indirect forms, in companies constituted in the territory of one Contracting Party ;

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<sup>23</sup> Article 6(1) of the BIT.

<sup>24</sup> Counter-Memorial, ¶ 3.

<sup>25</sup> Counter-Memorial, ¶ 3.

<sup>26</sup> Counter-Memorial, ¶ 2.

<sup>27</sup> Counter-Memorial, ¶ 2.

- e) Debentures or rights to money, or in any legitimate performance having a financial value;
- d) Business concessions conferred by law or under contract, including concessions to search for, extract or exploit natural resources, which are located in the maritime area of the Contracting parties [sic].
24. Article 2(1) of the BIT provides:  
[The Treaty] shall apply to any investment made by investors of either Contracting Party in the area of the other Contracting Party, including an indirect investment made through another company, wherever located, which is owned to an extent of at least 51 per cent by such investors, whether made before or after the coming into force of this Agreement.
25. Articles 5(1) and 5(2) of the BIT state:  
(1) Each Contracting Party shall accord to investments of investors of the other Contracting Party, including their operation, management, maintenance, use, enjoyment or disposal by such investors, treatment which shall not be less favourable than that accorded to investments of its investors, or than the most favourable treatment accorded to investors of any third country, whichever is more favourable.  
  
(2) In addition each Contracting Party shall accord to investors of the other Contracting Party, including in respect of returns on their investments, treatment which shall not be less favourable than that accorded to investors of any third State.
26. Article 9 of the BIT reads:  
(1) Any dispute concerning the investment occurring between one Contracting Party and an investor of the other Contracting Party shall, if possible, [sic] be settled amicably between the two parties concerned.  
  
(2) Any such dispute which has not been amicably settled within a period of six months from written notification of a claim may be submitted [sic] to international conciliation under the Conciliation Rules of the United Nations Commission on International Trade Law, if the parties so agree.  
  
(3) Notwithstanding paragraph 2, [sic] the dispute may be referred to arbitration at any time as follows: [...] (b) if the investor so decides, the dispute shall be referred to an ad hoc arbitral tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, as adopted by the General Assembly on December 15, 1976 [...]

## B. THE VCLT

27. [Article 31 of the Vienna Convention on the Law of Treaties, dated 23 May 1969](#) ("VCLT"), sets forth the Convention's general rule of treaty interpretation:

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

(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

a. any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

b. any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

(3) There shall be taken into account, together with the context:

a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

c. any relevant rules of international law applicable in the relations between the parties

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

28. [Article 32 of the VCLT](#) states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31. or to determine the meaning when the interpretation according to article 31 :

(a) Leaves the meaning ambiguous or obscure: or

(b) Leads to a result which is manifestly absurd or unreasonable

## **V.THE RESPONDENT'S FIRST OBJECTION: THE TRIBUNAL LACKS JURISDICTION *RATIONE VOLUNTATIS* BECAUSE THE CLAIMANT FAILED TO COMPLY WITH JURISDICTIONAL PRECONDITIONS TO ARBITRATION**

29. The Respondent's First Objection is that the Claimant failed to comply with certain alleged preconditions to arbitration in Article 9 of the BIT, including an obligation to attempt amicable settlement in good faith and, in any event, to wait at least six months before commencing arbitration. The Respondent contends that the Claimant rushed to arbitration without meaningfully

attempting amicable settlement discussions and did not wait for six months between its notification of a Treaty dispute on 11 November 2013 and its filing of the Notice of Arbitration on 31 March 2014. The Respondent contends that these are mandatory jurisdictional requirements that cannot be excused by the subsequent running of time following the Notice of Arbitration, nor can they be excused on ground of "futility," as a matter of law or under the facts of this case.

30. By contrast, the Claimant contends that no such requirements exist in the BIT, that in any event such amicable settlement and waiting period provisions would be procedural rather than jurisdictional in nature, that waiting (or "cooling off") periods can be satisfied by the subsequent running of time prior to a decision on jurisdiction, and finally, that any such requirements could and should in this case be excused on grounds of futility.
31. The Tribunal sets forth below the core facts relevant to this Objection, followed by a more detailed summary of the Parties' respective positions. These positions are summarized with respect to the four embedded issues in the Objection, namely whether: (i) Article 9 of the BIT requires a six-month period of amicable settlement before the commencement of arbitration; (ii) any such amicable settlement period is a requirement for the Tribunal's jurisdiction; (iii) any such amicable settlement period may be fulfilled subsequent to the filing of a Notice of Arbitration, and (iv) whether non-compliance with any required amicable settlement period may be excused on grounds of futility, as a matter of law or under the facts of this case. The Tribunal's analysis to follows.

## A. RELEVANT FACTS

32. On 10 March 2010, HBT - then still known as AUG Haldia Bulk Terminals Private Limited<sup>28</sup> wrote to the Ministry of Shipping in New Delhi outlining its grievances and requesting that the Ministry (i) "give all necessary directions to KoPT to ensure that cargo handling operations at Berths Nos. 2 & 8 using the equipment already deployed by ABG is commenced immediately," and (ii) "give all necessary instructions to KoPT to withdraw its show cause notice and refund us the liquidated damages paid to us and ensure that all Force Majeure events are removed and Berths Nos. 2 & 8 are made available for cargo handling operations by ABG in an environment free of threats and labour unrest."<sup>29</sup>
33. By letter dated 30 May 2011 to the Chairman of KoPT and the Manager of Haldia Dock Complex ("HDC"). HBT requested that KoPT fix a meeting immediately to "resolve outstanding disputes, settlements, claims" under the Contract.<sup>30</sup>
34. On 8 June 2011, HBT wrote to the Ministry of Shipping, seeking its "immediate intervention and issuance of appropriate direction's to KoPT" claiming that "KoPT's actions are now seriously threatening the continuation and operation of the said Project," and averring that "KoPT may not reciprocate" HBT's commitment to amicable settlement.<sup>31</sup>

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<sup>28</sup> See Incorporation Documents of HBT (C-25).

<sup>29</sup> Letter dated 10 March 2010 from Director of HBT. Saket Agarwal, to Thiru G.K. Vasan (Ministry of Shipping) (C-139).

<sup>30</sup> Letter dated 30 May 2011 from Director of HBT. C Babu Rajeev, to the Chairman of koPT and the Manager of Haldia Dock Complex (C- 209).

<sup>31</sup> Letter dated 8 June 2011 from Gurpeet Malhi (HBT) to the Ministry of Shipping (C-210)

35. On 18 June 2011, HBT sought the Ministry's "immediate intervention" to ensure that KoPT reverse its "arbitrary and unreasonable deduction of substantial amounts by KoPT" from HBTN running bills for the month of May 2011 and claiming that KoPT had ignored a request by HBT on 30 May 2011 to remedy the situation.<sup>32</sup>
36. On 6 September 2012, HBI wrote to the Ministry of Shipping seeking an appointment to discuss "various matters issues" related to the Berths.<sup>33</sup>
37. HBT apparently received no response to any of these letters.
38. On 29 October 2013, the Ambassador of France, François Richter, wrote to the Chief Minister of West Bengal,<sup>34</sup> the Minister of Commerce and Industry,<sup>35</sup> the Minister of External Affairs<sup>36</sup> the Minister of Shipping,<sup>37</sup> the Principal Secretary to the Prime Minister.<sup>38</sup> and the Secretary to the President.<sup>39</sup> "draw [...] attention to the difficulties being faced by" HBT. Those letters expressly retened to LDA as a French investor and noted that LDA "has decided to institute legal proceedings against the Government of India in an international arbitration tribunal on the basis of Article 9 of the BIT. The Ambassador received no response to any of these letters.
39. On 11 November 2013, the Claimant, through counsel, issued to the Republic of India what it described as a "formal notification of claim under Article 9"of the BIT ("**Notification of Claim**").<sup>40</sup> The letter indicated that the Claimant intended to initiate arbitration "in the absence of an immediate and urgent resolution of all disputes."<sup>41</sup> or otherwise stated, "in the absence of a formal written commitment by India within a period of two weeks from the date of receipt hereof to fully satisfy and settle all claims of LDA."<sup>42</sup> LDA received no response to this letter.
40. Thereafter, on 20 November 2013, the Chief Executive Officer of LDA wrote to the Chief Minister of West Bengal, cautioning that LDA's equipment "will soon have lost its entire value" and claiming that "LDA is still ready and eager to discuss to settle its dispute with KoPT amicably."<sup>43</sup>
41. On 7 January 2014, the Additional Secretary to the Government of West Bengal forwarded LDA's letter to the Chairman of KoPT, explaining that LDA had contacted the State government and

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<sup>32</sup> Letter dated 18 June 2011 from Gurpreet Malhi (HBT) to the Ministry of Shipping (C-211)

<sup>33</sup> Letter dated 6 September 2012 from Gurpreet Malhi (HBT) to the Ministry of Shipping (C-246)

<sup>34</sup> Letter dated 29 October 2013 from the Ambassador of France, François Richter, to the Chief Minister of West Bengal, Kum Mamta Banerjee (C-407).

<sup>35</sup> Letter dated 29 October 2013 from the Ambassador of France, François Richier to the Honourable Minister of Commerce and Industry, Shri Anand Sharma (C-408).

<sup>36</sup> Letter dated 29 October 2013 from the Ambassador of France, François Richier, to the Honourable Minister of External Affairs, Shri Salman Khurshid (C-409).

<sup>37</sup> Letter dated 29 October 2013 from the Ambassador of France, François Richier, to the Honourable Minister of Shipping, Shri G.K Vasan (C-410).

<sup>38</sup> Letter dated 29 October 2013 from the Ambassador of France, François Richier, to the Principal Secretary to the Prime Minister, Shri Pulok Chatterjee (C-411).

<sup>39</sup> Letter dated 29 October 2013 from the Ambassador of France François Richier, to the Secretary to the President, Smt Omida Paul (C-412).

<sup>40</sup> Letter dated 11 November 2013 from J. Sagar Associates to the Republic of India, p.1 (C-414).

<sup>41</sup> Letter dated 11 November 2013 from J. Sagar Associates to the Republic of India, p. 1 (C-414).

<sup>42</sup> Letter dated 11 November 2013 from J Sagar Associates in the Republic of India, p. 12 (C-414)

<sup>43</sup> Letter dated 20 November 2013 from the Chief Executive Officer of LDA, Gildas Maire, to the Honourable Chief Minister of West Bengal Num Mamata Banerjee (C-415)

"expressed their intention to settle its dispute with KoPT amicably." The Additional Secretary solicited the views of the Chairman of KoPT.<sup>44</sup> No evidence was presented to the Tribunal showing any response from the Additional Secretary or KoPT on this matter.

42. On 30 January 2014, the Chief Executive Office of LDA wrote to the Additional Secretary to the Government of West Bengal, thanking him for his intervention, explaining that LDA had "been unsuccessfully trying to settle this matter for a considerable time and have therefore been compelled to issue a Notification of Claim," and requesting a meeting with an appropriate person "to further discuss our difficulties and see if the situation can somehow be resolved."<sup>45</sup> LDA received no response to this letter.
43. On 31 March 2014, as noted above, the Claimant initialed these proceedings with the submission of a Notice of Arbitration.

## B. THE POSITIONS OF THE PARTIES

### 1. Necessity of Amicable Settlement Efforts for Six Months under Article 9 of the BIT

#### *The Claimant's Position*

44. The Claimant contends that Article 9(1) of the BIT is a declaration that parties to a dispute "should amicably settle the dispute if possible "<sup>46</sup> Relying on the interpretation of an amicable settlement provision in *Abaclat v. Argentina*.<sup>47</sup> the Claimant submits that Article 9 (1) is merely an expression of goodwill, but does not impose any particular consultation requirement on parties in dispute, much less a "best efforts" obligation.<sup>48</sup>
45. The Claimant asserts that Article 9, read as a whole, does not impose any waiting period prior to commencement of arbitration, during which amicable settlement efforts may be expected to be attempted. It notes that the only temporal reference in Article 9 appears in paragraph 2, which addresses conciliation, and argues that the ordinary meaning of the words "notwithstanding paragraph 2" and "at any time" in Article 9(3) "clearly indicate that any course of action mandated by Article 9 paragraph (2) can be disregarded insofar as the referral of a dispute to arbitration is concerned."<sup>49</sup>

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<sup>44</sup> Letter dated 7 January 2014 from the Additional Secretary to the Government of West Bengal. Mr. M. Jha to the Chairman of KoPT (C-490),

<sup>45</sup> Letter dated 30 January 2014 from the Chief Executive Officer of LDA, Gildas Maire, to the Additional Secretary to the Government of West Bengal. Mr. M. Jha (C-417)

<sup>46</sup> Hearing Transcript dated 5 November 2015, at p. 10'2, lines 9-10.

<sup>47</sup> *Abaclat et al. v. The Argentine Republic*, ICSID Case No. ARB/07/05, Decision on Jurisdiction and Admissibility dated 4 August 2011. (CLA-124).

<sup>48</sup> Hearing Transcript dated November 2015, at p. 103, lines 10-25 and p.104, lines 1-10.

46. To support its view of the ordinary meaning of "notwithstanding" in Article 9(3), the Claimant cites the interpretation of that term by the tribunal in *Yukos v. The Russian Federation*, which was construing [Article 45 of the Energy Charter Treaty \("ECT"\)](#). The pertinent part of Article 45 of the ECT reads:

(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

(2) (a) **Notwithstanding paragraph (1)** any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.<sup>50</sup>

The Claimant cites the *Yukos* tribunal's construction of the term "notwithstanding:"<sup>51</sup>

Furthermore, the use of the word "[n]otwithstanding" to introduce Article 45(2) plainly suggests that the declaration in Article 45(2)(a) can be made whether or not there in fact exists any inconsistency between "such provisional application" of the ECT and a signatory's constitution, laws or regulation.<sup>52</sup>

47. By analogy to that provision, the Claimant concludes that the ordinary meaning of "the word 'notwithstanding' in paragraph (3) of Article 9 of the treaty plainly indicates that arbitration can be commenced 'whether or not' a cooling-off period has been observed."<sup>53</sup>

48. The Claimant considers that the ordinary meaning of the words "at any time" in Article 9(3) of the BIT bolsters its interpretation of the term "notwithstanding," and "makes it clear that any thought that the cooling off period might apply not only to the referral of a dispute to conciliation but also to a referral to arbitration would be incorrect."<sup>54</sup> In the Claimant's view, the Respondent's interpretation is "illogical." since it would deprive Article 9(3) of any independent meaning.<sup>55</sup>

49. The Claimant considers the ordinary meaning of Article 9(3) as a "complete answer to the Respondent's first objection."<sup>56</sup> The Claimant rejects the Respondent's arguments that its interpretation stands contrary to the context, object, and purpose of the Treaty, by imposing more onerous preconditions to conciliation than to arbitration. The Claimant finds "nothing illogical"<sup>57</sup> in a provision that distinguishes between amicable settlement followed by conciliation, on the one hand, and recourse to arbitration "at any time," on the other. The Claimant argues, for example, that additional time to "lay the foundations for a conciliation effort by first having six months of direct

<sup>49</sup> Reply on Jurisdiction, ¶ 5. *see also* Reply on Jurisdiction, ¶ 9

<sup>50</sup> Claimant's emphasis added.

<sup>51</sup> Reply on Jurisdiction, ¶¶ 6-8 (citing *Yukos Universal Limited v. The Russian Federation*. PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility dated 30 November 2009, ¶ 262 (CLA-162))

<sup>52</sup> Claimant's emphasis added

<sup>53</sup> Reply on Jurisdiction, ¶ 8.

<sup>54</sup> Reply on Jurisdiction, ¶ 9.

<sup>55</sup> Response to Request, ¶ 20.

<sup>56</sup> Response to Request, ¶ 16.

<sup>57</sup> Response to Request, ¶ 19.

talks"<sup>58</sup> might be necessary to maximize the chance of a successful outcome, in a system of dispute resolution that requires voluntary participation:

If the parties do not agree to conciliation, or have never directly discussed the dispute, it is unlikely that conciliation would be successful. Arbitration, in contrast, does not depend upon a commonality of purpose and does not need to build upon a period of direct negotiation between the parties. Hence, arbitration can be initiated at any time by a party acting alone.<sup>59</sup>

50. The Claimant rejects the Respondent's reference to the treaty practice of France and India in their dealings with other States, because the treaty practice is inconsistent and the Contracting Parties were free to depart from such practice even if it were to exist.<sup>60</sup> In the Claimant's view, Indian bilateral investment treaties embody a diversity of approach, with some providing six-month cooling-off periods, others three months, and others none at all.<sup>61</sup> The Claimant argues that even consistent treaty practice by either India or France with respect to mandatory-cooling-off periods would fail to strengthen the Respondent's interpretation.<sup>62</sup> In the Claimant's view, the textual deviation in the France-India BIT from the Respondent's postulated otherwise consistent approach to waiting periods suggests a desire to depart from precedent, rather than to emulate it.<sup>63</sup> The Claimant notes that Article 14.3 of the Respondent's own "Model Text for the Indian Bilateral Investment Treat"<sup>64</sup> has long included a cooling-off period specifically applicable in the context of the referral of disputes to arbitration. India's choice not to adopt the language from its Model BIT, in the Claimant's view, reflects a willingness to depart from a mandatory cooling-off period rather than to impose it in the manner urged by the Respondent.<sup>65</sup>
51. The Claimant also submits that the VCLT "gives no warrant for" recourse to supplementary materials to determine France and India's own views on the Treaty<sup>66</sup> Even if it did, the Claimant considers the Respondent's reliance on French legislative materials as unavailing. For example, it characterizes the references to Article 9 in the two French legislative materials the Respondent cites as "simply summary descriptions of provisions and not actual analyses of provisions."<sup>67</sup> and invokes two other French documents that it describes "as patently more detailed analyses [...] than the descriptions" invoked by the Respondent.<sup>68</sup> It emphasizes that one of these documents, Report 314 to the French Senate states, "at any time, an appeal to arbitration is possible."<sup>69</sup> At best, the Claimant asserts, the French documents are "equivocal and you can find passages which support either view in the French documents."<sup>70</sup> The Claimant also queries the apparent lack of "Indian records

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<sup>58</sup> Response to Request, ¶ 19.

<sup>59</sup> Response to Request, ¶ 19.

<sup>60</sup> Hearing Transcript dated 5 November 2015, at p. 107, lines 13-15.

<sup>61</sup> Reply on Jurisdiction, ¶ 13 (citing Finland-India, Netherlands-India, and Austria-India BITs).

<sup>62</sup> Hearing Transcript dated 5 November 2015, at p 107 lines 24-25 and p.108, line 1

<sup>63</sup> Response to Request, ¶ 21; Reply on Jurisdiction, ¶ 14.

<sup>64</sup> Reply on Jurisdiction, ¶ 10 (citing Article 14.3 of the Model Text for the Indian Bilateral Investment Treaty (CLA-161)).

<sup>65</sup> Reply on Jurisdiction, ¶ 14.

<sup>66</sup> Hearing Transcript dated 5 November 2015, at p. 10, lines 11-12.

<sup>67</sup> Hearing Transcript dated 5 November 2015, at p. 98, lines 5-6.

<sup>68</sup> Hearing Transcript dated 5 November 2015. at p. 97, lines 22-25.

<sup>69</sup> An English translation of excerpts from Report No 314 dated 25 February 1998. p 5 (CLA-172); Hearing Transcript dated 5 November 2015, at p 108 lines 18-25 and p 109, line 1

<sup>70</sup> Hearing Transcript dated 5 November 2015, at p. 98, lines 7-10

corresponding to these French reports."<sup>71</sup>

## *The Respondent's Position*

52. The Respondent contends that "[t]he terms of Article 9 require an interpretation heavily reliant on context to make sense of the provision and to establish consistency with their context."<sup>72</sup> Applying [Articles 31-32 of the VCLT](#), the Respondent contends that a good faith interpretation of Article 9 of the BIT, having regard to its ordinary meaning, context, and object and purpose, and confirmed by supplementary means of interpretation, renders the Contracting Parties' consent to arbitration under Article 9(3) subject to three preconditions: "(i) written notification has been provided of Treaty claims, (ii) a good faith effort has been made to settle the dispute amicably, and (iii) a period of six months has passed before arbitration is commenced."<sup>73</sup> The Respondent argues that the Claimant has not fulfilled the second and third of those preconditions and therefore the Tribunal's jurisdiction over its claims must be denied.<sup>74</sup>
53. The Respondent emphasizes that the ordinary meaning of "shall" in Article 9(1) indicates that it is "obligatory, not optional"<sup>75</sup> that an amicable dispute settlement process precede the commencement of arbitration proceedings. The Respondent asserts that the mandatory language in Article 9(1), contrasted with the permissive language ("may") in Articles 9(2)-(3), reveals that the context and purpose of Article 9(3) mandate a six-month waiting period before the commencement of arbitration.<sup>76</sup>
54. For the Respondent, the context and object and purpose of Article 9 of the BIT is amicable dispute resolution,<sup>77</sup> of which a mandatory waiting period is an integral part. The Respondent argues that a mandatory waiting period allows the Parties "an opportunity to explore possible settlement with a sufficient understanding of the dispute and in an atmosphere that is not complicated by pending litigation."<sup>78</sup> That the waiting period applies under Article 9(2) to conciliation.....itself a mode of amicable dispute settlement evidences that the waiting period should be read also as applying to arbitration, according to the Respondent
55. To confirm its view, the Respondent points to what it considers supplementary sources of treaty interpretation, pursuant to [Article 32 of the VCLT](#). The Respondent asserts that Indian BIT practice "has uniformly and universally applied the warning period as a condition to India's offer to consent to arbitrate:"<sup>79</sup> "of a total of 77 other BFTs entered into by India. 76 include a waiting period requirement. And in every instance, the requirement was expressed as a condition to arbitration."<sup>80</sup> The Respondent finds parallels in the treaty-making practice of France: "out of a total of 93 other

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<sup>71</sup> Hearing Transcript dated 5 November 2015, at p. 109, lines 5-6. *See also* Hearing transcript dated 5 November 2015, at p. 98, lines 12-14.

<sup>72</sup> Hearing Transcript dated 5 November 2015, at p. 4, lines 23-25.

<sup>73</sup> Rejoinder on Jurisdiction, ¶ 67; *see also* Counter-Memorial ¶ 16

<sup>74</sup> Rejoinder on Jurisdiction, ¶ 67; Counter-Memorial, ¶ 40

<sup>75</sup> Counter-Memorial, ¶ 14

<sup>76</sup> Counter-Memorial, ¶ 14

<sup>77</sup> Counter-Memorial, ¶ 14

<sup>78</sup> Counter Memorial, ¶ 15; *see also* Counter-Memorial, ¶ 7.

<sup>79</sup> Counter-Memorial, ¶ 20.

<sup>80</sup> Rejoinder on Jurisdiction, ¶ 82; *see also* Counter-Memorial, ¶ 21-24

- BITs entered into by France. 87 imposed a waiting period requirement. And in every instance, that requirement was expressed as *a condition to the commencement of investor-State arbitration*.<sup>81</sup> As such, the Respondent characterizes Article 9 of the BIT as the latest iteration of a line of such provisions adopted by both Indian and French treaty negotiators that required a discrete waiting period before the commencement of arbitration.<sup>82</sup>
56. The Respondent also cites Legislative Bill No. 231 transmitting the BIT to the French Senate for ratification.<sup>83</sup> The salient section of the statement reads: "Article 9 makes it possible for an investor, in the case of a dispute with the host State of its investment, to call upon an arbitral tribunal set up in compliance with recognized international standards if an amicable settlement has not been reached after a period of six months."<sup>84</sup>
57. The Respondent challenges the Claimant's interpretation of Article 9 as dissonant with the ordinary meaning of the provision in light of its context and object and purpose.<sup>85</sup> First, the Respondent rejects the Claimant's reading of Article 9(3) as "overly literal."<sup>86</sup> Rather than exempting arbitration from the six-month waiting period, the Respondent argues the words "notwithstanding paragraph 2"<sup>87</sup> in Article 9(3) merely "confirm the optional nature" of conciliation, the mode of dispute resolution identified in "paragraph 2." It distinguishes the interpretation of the word "notwithstanding" by the *Yukos* tribunal as pertaining to "a very different treaty provision."<sup>88</sup> namely [Article 45\(2\)\(a\) of the ECT](#). The Respondent also denies that the words "at any time" in Article 9(3) of the BIT are a "cross-reference to, and dispensation from, the obligation to allow six months to pass" between a notice of claim and the initiation of proceedings.<sup>89</sup>
58. Second, the Respondent contends that the Claimant's literalist interpretation "completely defeats"<sup>90</sup> the object and purpose of Article 9(1), which Respondent notes is the creation of favorable conditions under which parties are more likely to settle their disputes before committing to lengthy and expensive litigation.<sup>91</sup>
59. Third, the Respondent challenges the Claimant's request to treat as dispositive the fact that the six-month waiting period and the treaty's discussion of arbitration are separated within different subsections of Article 9. Rather, the Respondent urges the Tribunal consult the context in which Article 9 of the BIT was drafted.
60. Fourth, the Respondent contends the Claimant's interpretation of Article 9 imposes more onerous preconditions on conciliation than on arbitration and as such, does not comport with the context of Article 9. It regards the waiting period as "a key piece of the overall dispute resolution framework"<sup>92</sup>

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<sup>81</sup> *Rejoinder on Jurisdiction*, ¶ 81.

<sup>82</sup> Counter-Memorial, ¶ 25.

<sup>83</sup> *Rejoinder on Jurisdiction*, ¶ 85 (citing Legislative Bill No. 231 transmitting the treaty to the Senate by Foreign Ministry dated 21 January 1998 (R-67)).

<sup>84</sup> *Rejoinder on Jurisdiction*, ¶ 85 (citmg R-67).

<sup>85</sup> Counter-Memorial, ¶ 28.

<sup>86</sup> Counter-Memorial, ¶ 17.

<sup>87</sup> *Rejoinder on Jurisdiction*, ¶ 73.

<sup>88</sup> *Rejoinder on Jurisdiction*, ¶ 79.

<sup>89</sup> *Rejoinder on Jurisdiction*, ¶ 74

<sup>90</sup> Counter-Memorial, ¶ 19.

<sup>91</sup> Counter-Memorial, ¶ 18.

of the BIT, geared toward amicable settlement. Since conciliation is even less adversarial than arbitration, it "defies logic"<sup>93</sup> to apply the waiting period to conciliation alone.<sup>94</sup>

61. Finally, the Respondent submits that the Claimant's interpretation would allow for abuses of the arbitral process. The Respondent argues that the Claimant's interpretation of Article 9 would allow claimants to immediately follow a dispute letter with a request for arbitration—conduct of which, the Respondent notes, the *Murphy v. Ecuador* tribunal was critical.<sup>95</sup>

## 2. Amicable Settlement Periods as Jurisdictional Requirements under International Law

### *The Claimant's Position*

62. The Claimant considers that international investment tribunals have deemed it "otiose to force parties to engage in a consultative exercise 'that is doomed to fail from the outset.'"<sup>96</sup> On that basis, the Claimant contends that amicable settlement is not a mandatory jurisdictional requirement and that non-compliance even with express cooling-off periods can be excused in appropriate circumstances.<sup>97</sup>

### *The Respondent's Position*

63. The Respondent argues that international law and investment treaty jurisprudence regard the failure to fulfill preconditions to dispute resolution as grounds for denying a Tribunal's jurisdiction *ratione voluntatis*. Citing PCIJ<sup>98</sup> and ICJ<sup>99</sup> jurisprudence, the Respondent submits that it is a "fundamental principle of international law"<sup>100</sup> that "tribunals can exercise jurisdiction over a State only with its consent"<sup>101</sup> and such consent is limited to the extent of any conditions to that consent expressed in a compromissory clause of an international agreement.<sup>102</sup> The Respondent cites, *inter*

<sup>92</sup> Rejoinder on Jurisdiction, ¶ 76.

<sup>93</sup> Counter-Memorial, ¶ 18.

<sup>94</sup> Counter-Memorial, ¶ 18. Rejoinder on Jurisdiction, ¶ 76.

<sup>95</sup> Counter-Memorial, ¶ 19 (citing *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction dated 15 Dec. 2010, ¶ 135 (RLA-185)).

<sup>96</sup> Reply on Jurisdiction, ¶ 16 (quoting *Abaclat et al.*, ¶¶ 564 (CLA-124), and *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award dated 24 July 2008, ¶ 343 (C LA-I6)).

<sup>97</sup> Reply on Jurisdiction, ¶ 16 (citing *Biwater Gauff*, ¶¶ 345-347 (CLA-16); *Societe Generale de Surveillance S A v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision dated 6 August 2003, ¶ 184 (C LA- 167); and *Abaclat et al.*, ¶¶ 583-585 (CLA-124)).

<sup>98</sup> *Status of Eastern Carelia*. Advisors Opinion dated 21 April 1923. PCTJ Series B. No. 5 p. 87. at p. 27 (RLA-4).

<sup>99</sup> *Ambatielos Case (Greece v. United Kingdom)*, Judgment dated 19 May 1953, ICJ Reports 1953. p. 10. at p. 19 (RLA-17)

<sup>100</sup> Counter-Memorial, ¶ 27.

<sup>101</sup> Counter-Memorial, ¶ 27.

<sup>102</sup> Counter-Memorial, ¶ 27 (citing *Armed Activities on the Territory of the Congo Democratic Republic of the Congo v. Rwanda*), Jurisdiction of the Court and Admissibility of the Application dated 3 February 2006, ICJ Reports 2006, p. 6, ¶ 88 (RLA-118))

*alia. Kihc Insaat v. Turkmenistan*<sup>103</sup> and *ST- AD v. Bulgaria*<sup>104</sup> for the proposition that compliance with conditions set out in the dispute settlement provisions of the BIT "constitutes a *Jurisdictional requirement*"<sup>105</sup> the investment treaty context. The Respondent further contends that a sovereign's general immunity from arbitral jurisdiction requires that conditions to its consent to arbitration not be lightly discarded.<sup>106</sup> It notes that the tribunals in, *inter alia* *Murphy v. Ecuador* and *Enron v. Argentina* deemed non-compliance with an amicable settlement period requirement as grounds to deny jurisdiction.<sup>107</sup>

### 3. Retroactive Satisfaction of any Amicable Settlement Period

#### *The Claimant's Position*

64. The Claimant argues that tribunals have held that mandatory cooling-off periods may be considered satisfied if they are "met subsequently," so long as the period in question has been exhausted by the time a tribunal reaches a decision on jurisdiction.<sup>108</sup> Since more than six months have now elapsed since the date of its Notification of Claim (i.e., 11 November 2013), the Claimant urges the Tribunal to regard any requirement of an amicable settlement period as met.<sup>109</sup> Citing *Teinver v. Argentina*, the Claimant urges that a contrary result that would "now require the Claimant to withdraw the claim and re-file afresh would be a 'waste of time and resources.'"<sup>110</sup>

#### *The Respondent's Position*

65. The Respondent rejects the Claimant's suggestion that "after the fact" satisfaction of the waiting requirement might be sufficient to meet the "pre-condition" to the Tribunal's jurisdiction found in Article 9 of the BIT.<sup>111</sup> To allow a matter at the heart of the Tribunal's jurisdiction to be retroactively satisfied would, in the Respondent's view, stand in tension with a well-developed line of jurisprudence by the International Court of Justice<sup>112</sup> and contribute to a "parallel yet unwritten

<sup>103</sup> *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan ICSID Case No. ARB/10/1, Award dated 2 July 2013, ¶ 6.2.9 (RLA-220)*

<sup>104</sup> *DAD GmbH v. The Republic of Bulgaria, PCA Case No 2011-06 Award on Jurisdiction dated 18 July 2013, ¶ 336 (RLA-222).*

<sup>105</sup> *Rejoinder on Jurisdiction, ¶ 29 (citing Kilic, ¶ 6.2.9 (RLA-220)).*

<sup>106</sup> Counter-Memorial, ¶ 31 (citing *Tulip Real Estate Investment and Development Netherlands BV v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue dated 5 March 2013, ¶ 72 (RLA-217); *Omer Dede and Serdar Ethuseyni v. Romania*, ICSID Case No. ARB/10/22, Award dated 5 September 2013, ¶ 173 (RLA-223)).

<sup>107</sup> Counter-Memorial, ¶ 32 (citing *Murphy Exploration*, at ¶ 157 (RLA-185); *Enron Corporation & Ponderosa Assets, L.P v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction dated 14 January 2004, ¶ 88 (RLA-100)); see also *Rejoinder on Jurisdiction, ¶ 95.*

<sup>108</sup> Reply on Jurisdiction, ¶ 25 (citing *Philip Morris v. Uruguay*, Decision on Jurisdiction dated 2 July 2013, ¶ 144 (CLA-168), and *Teinver SA Transportes de Cercanías SA & Autobuses Urbanos del Sur S.A v. The Argentine Republic*, Decision on Jurisdiction dated 21 December 2012, ¶ 135 (CLA-169)).

<sup>109</sup> Reply on Jurisdiction, ¶ 25.

<sup>110</sup> Reply on Jurisdiction, ¶ 25 (citing *Teinver et al. ¶ 135 (CLA-169)*)

<sup>111</sup> *Rejoinder on Jurisdiction, ¶ 96.*

and unconditional entitlement to arbitrate."<sup>113</sup>

## 4. Relevance of the Alleged Futility of Amicable Settlement Efforts

### *The Claimant's Position*

66. Without prejudice to its submission that there exists no mandatory cooling-off period requirement, the Claimant submits that non-compliance with any amicable settlement period would be excused by "the evident futility of any attempt to amicably settle the dispute."<sup>114</sup>
67. Citing *Biwater Gauff v. Tanzania. Société Générale v. Pakistan*, and *Abacalat v. Argentina*,<sup>115</sup> the Claimant argues that non-compliance with cooling-off periods may be excused "if it is evident that any attempt at amicable settlement would be futile."<sup>116</sup> Relying on *Biwater*, the Claimant considers that "the purpose of a cooling-off period requirement is to facilitate amicable settlement, not to impede or obstruct arbitration when amicable settlement is not possible".<sup>117</sup>
68. The Claimant asserts that "futility is writ large in the facts of the present case,"<sup>118</sup> rendering compliance with any cooling-off period unnecessary and irrelevant to the Tribunal's jurisdiction".<sup>119</sup> The Claimant claims it "repeatedly and sincerely tried over the course of many months to engage the Respondent in amicable discussions, but without any success."<sup>120</sup> The Claimant recalls six letters issued through the French embassy in October 2013 to "various instrumentalities of the Respondent state, seeking an amicable resolution of the dispute".<sup>121</sup>
69. The Claimant also recounts that the Respondent gave no substantive response to the submission of Notification of Claim on 11 November 2013<sup>122</sup> or the Claimant's attempts after the Notification of Claim to engage the Respondent in amicable settlement discussions.<sup>123</sup> In this regard, the Claimant cites the letter dated 20 November 2013 addressed to the Chief Minister of West Bengal, which was "merely forwarded" to KoPT, and the letter to the Respondent dated 30 January 2014.<sup>124</sup> Accordingly,

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<sup>112</sup> Rejoinder on Jurisdiction, ¶¶ 97-99.

<sup>113</sup> Rejoinder on Jurisdiction, ¶ 96 (citing *Omer Dede*, at ¶ 220 (RLA-223)).

<sup>114</sup> Reply on Jurisdiction, ¶ 16 (citing *Biwater Gauff*, ¶¶ 345-347 (CLA-16); *Societe Generale*, ¶ 184 (CLA-167); and *Abacalat et al.* ¶¶ 583-585 (CLA-124))

<sup>115</sup> Response to Request, ¶ 23 (citing *Biwater Gauff* ¶¶ 343-344 (CLA-16); *Ronald S Lauder v. The Czech Republic*, Award dated 3 September 2001, ¶¶ 188-190 (CL A-125))

<sup>116</sup> Response to Request, ¶ 16.

<sup>117</sup> Response to Request, ¶ 16.

<sup>118</sup> Reply on Jurisdiction, ¶ 17.

<sup>119</sup> Reply on Jurisdiction, ¶ 23.

<sup>120</sup> Reply on Jurisdiction, ¶ 21.

<sup>121</sup> Response to Request, ¶ 22 (citing correspondence in c- 407 to c- 412)

<sup>122</sup> Reply on Jurisdiction, ¶ 18.

<sup>123</sup> Response to Request, ¶ 22. Reply on Jurisdiction, ¶¶ 17-20: Statement of Claim, ¶ 366(b).

<sup>124</sup> Reply on Jurisdiction, ¶ 19 (citing Letter dated 20 November 2013 from Gildas Maire of the Claimant to the Chief Minister of West Bengal and to the Minister in Charge, Finance and Excise) (C-417)).

the Claimant characterizes its Notice of Arbitration on 31 March 2014 as an option of last resort.<sup>125</sup>

70. The Claimant also refers to India's attempt to obtain an anti-arbitration injunction in its domestic courts after the Notice of Arbitration. In the Claimant's view, this action is strongly suggestive of the Respondent's unwillingness to engage in amicable settlement discussions.<sup>126</sup>
71. The Claimant also contends that the Respondent's failure to raise non-compliance with the cooling-off period at the start of proceedings<sup>127</sup> suggests that the Respondent had no interest in engaging in amicable settlement discussions and evidences the futility of compliance with any amicable settlement period.<sup>128</sup>

## *The Respondent's Position*

72. The Respondent rejects the possibility of a futility exception to Article 9 of the BIT First. it notes the absence of any such express exception in the text of Article 9 of the BIT.<sup>129</sup> Second, relying on *Rurelec v. Bolivia*, the Respondent considers an investor's anticipation that attempts at negotiation will not bear fruit "irrelevant" to the "obligation of means" embodied by mandatory cooling-off periods.<sup>130</sup> Citing *Guaracachi America v. Bolivia*,<sup>131</sup> the Respondent argues that the waiting period is not "an obligation that a specific level of progress or settlement be achieved."<sup>132</sup> Third, the Respondent distinguishes *Biwater Gauff v. Tanzania* - and other arbitral jurisprudence that apparently recognizes a futility exception as the product of circumstances that are inapplicable to the present dispute.<sup>133</sup>
73. If futility exception to an amicable settlement period does apply to Article 9 of the BIT, the Respondent argues that evidence of futility must be "compelling," not presumed, and the Claimant in this case has failed to discharge its evidentiary burden.<sup>134</sup>
74. The Respondent claims it stood ready to negotiate an amicable settlement. It points to correspondence from the Additional Secretary of State Government for West Bengal dated 7 January 2014 responding to a letter from the Claimant and requesting that KoPT substantively

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<sup>125</sup> Reply on Jurisdiction, ¶ 20

<sup>126</sup> Reply on Jurisdiction, ¶ 22 (referring to KoPT's application for Interim Relief in the form of an anti-arbitration injunction dated 17 June 2014 (C-481)).

<sup>127</sup> Reply on Jurisdiction, ¶ 24 (citing Letter dated 13 May 2014 from the Respondent to the Claimant (C-479); KoPT's application for Interim Relief in the form of an anti-arbitration injunction dated 17 June 2014 (C-481); PCA's letter dated 13 August 2014, forwarding a copy of the Respondent's letter dated 8 August 2014 (C-486); Letter dated 24 July 2014 from the PC A, forwarding an ex-parte letter sent by the Respondent (C-482)).

<sup>128</sup> Reply on Jurisdiction, ¶ 24,

<sup>129</sup> Counter-Memorial, ¶ 36; Rejoinder on Jurisdiction, ¶¶ 10, 95.

<sup>130</sup> Counter-Memorial, ¶ 39 (citing *Guaracachi America Inc & Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award dated 31 January 2014, ¶ 392 (RLA-227)); Rejoinder on Jurisdiction, ¶ 92

<sup>131</sup> *Guaracachi* ¶ 392 (RLA-227).

<sup>132</sup> Rejoinder on Jurisdiction, ¶ 92.

<sup>133</sup> Rejoinder on Jurisdiction, ¶ 93 (citing *Biwater Gauff*, ¶¶ 201-228 (CL A-16); *Société Générale*, ¶ 119 (CLA-1 67); *Abaclat et al.*, ¶ 588 (CLA -124)).

<sup>134</sup> Counter-Memorial, ¶ 36.

engage with the Claimant's concerns and provide a written note to that effect.<sup>135</sup>

75. According to the Respondent, the letters cited by the Claimant and sent by the French Ambassador prior to the Notification of Claim neither sought negotiations to resolve the dispute, nor can they be construed as an attempt at amicable resolution by the Claimant.<sup>136</sup>
76. The Respondent characterizes the Claimant's Notification of Claim as an "ultimatum."<sup>137</sup> threatening arbitration in the absence of an immediate written commitment by the Respondent to address the Claimant's concerns.<sup>138</sup>

## C. THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

77. The Tribunal begins with the proposition that Article 9, like all other treaty provisions, is to be interpreted and applied in accordance with the "natural and ordinary meaning" of its terms, "in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context," no further inquiry is required.<sup>139</sup> As the Parties agree, the relevant context for construing any given passage in a treaty includes the words and sentences found in close proximity to that passage, as well as other provisions of the same treaty which help illuminate its object and purpose<sup>140</sup> In accordance with [Article 32 of the VCLT](#), only if the textual approach required by Article 31 leaves a meaning "ambiguous or obscure," or leads to a result that is "manifestly absurd or unreasonable," may recourse be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.<sup>141</sup> Even in these circumstances, "a decisive reason" (such as unmistakable evidence of the State Parties' intentions from such supplementary materials) would be required "[t]o warrant an interpretation other than that which ensues from the natural meanings of the words" of a provision."<sup>142</sup>
78. Applying this approach, the Tribunal first observes that the plain text of Article 9(1) does not support the Respondent's contention that the Treaty requires from the Claimant a particular qualitative level of effort to negotiate, which could support dismissal of an action for its failure to make such efforts. The Respondent contends that the word "shall" in Article 9(1) imposes such a requirement, independent of any alleged waiting period, so that even if a hypothetical claimant had waited six months after a notification of dispute before initiating arbitration, a tribunal still could dismiss the case on grounds that the claimant had made insufficient use of the intervening period

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<sup>135</sup> Counter-Memorial, ¶ 37 (citing Letter dated 7 January 2014 from M. Jha (State of West Bengal) to KoPT (C- 490)).

<sup>136</sup> Rejoinder on Jurisdiction, ¶ 90.

<sup>137</sup> Counter-Memorial, ¶ 35.

<sup>138</sup> Counter-Memorial, ¶ 35; Rejoinder on Jurisdiction, ¶ 87,

<sup>139</sup> *The Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)* Judgment dated 12 November 1991. ICJ Reports 1991, p 53, ¶ 48 (RLA-39) (citing *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950. p. 8).

<sup>140</sup> Hearing Transcript dated 5 November 2015, at p. 14, lines 14-17 See also *Kilic*, ¶ 5.2.6 (RLA-220) ("Treaty terms are obviously not drafted in isolation, and their meaning can only be determined by considering the entire treaty text. The context will include the remaining terms of the sentence and of the paragraph: the entire article at issue; and the remainder of the treaty [...].")

<sup>141</sup> [Article 32 of the VCLT](#) (emphasis added).

<sup>142</sup> *Conditions of Admission of a State to Membership in the United Nations*, Advisory Opinion dated 28 May 1948, ICJ Reports 1948, p. 63 (RLA-13).

to try to resolve the dispute.<sup>143</sup> But the word "shall" is not used in Article 9(1) to describe a specific *action or process* that is required (as in "shall *consult*" "shall *negotiate*." or "shall *attempt* to reach agreement"), much less specific conduct that is required by a claimant in particular. Rather, the term, expressed in the passive tense, refers to a desired *outcome* ("shall [...] *be settled* amicably"), and to the equal positions of both parties with respect to that outcome ("shall be settled amicably *between the two parties concerned*").<sup>144</sup> Moreover, completing the concept, the word "shall" is immediately qualified by the phrase "if possible" ("shall, *if possible*, be settled amicably between the two parties concerned")<sup>145</sup> The word "if" is a conditional clause that introduces an element of uncertainty regarding the prospects for settlement, and therefore of evaluation by the parties of those prospects.

79. In these circumstances, the Tribunal interprets the provision as indicating that both parties to a dispute are expected to seek amicable settlement *if and to the extent that* they consider such an outcome to be reasonably possible, while some good faith effort is implicit in evaluating this possibility.....a party might not have acted reasonably in concluding there is no possibility of amicable settlement without any attempt whatsoever to explore that possibility through dialogue—the clause cannot be read as imposing a "best efforts" obligation, such that a tribunal would be justified later in dismissing claims on the basis that the effort by one party was qualitatively not its "best."<sup>146</sup> This conclusion is reinforced by the bilateral framing of the clause (that, a dispute "shall, if possible, be settled amicably *between the two parties concerned*").<sup>147</sup> rather than a unilateral framing that might impose a particular objective obligation of effort on the claimant but not on the respondent State. In amicable settlement, as in classic dance, it takes two to tango.
80. Here, the facts demonstrate a considerable degree of effort by HBT, the French Ambassador, and ultimately the Claimant to raise their concerns successively with KoPT, the Government of West Bengal, the Ministry of Shipping, and various other government ministries and senior officials, while the Respondent correctly notes that the Notification of Claim contained peremptory language purporting to impose a two-week deadline on reply and suggesting that suit otherwise was imminent.<sup>148</sup> the fact remains that the Claimant did not file for arbitration for four-and-a-half months, and that the correspondence both before and after this Notification set out the details of Claimant's concerns, the need for meaningful relief, requests for dialogue or action, and the intention to pursue legal remedies if the actions complained of were not rectified, The recipients of

<sup>143</sup> Hearing Transcript dated 5 November 2015. at p. 5, lines 1-12 (contending that consent to arbitrate exists only when "three cumulative conditions have been met," one of which is "a meaningful effort to settle the disputes amiably." which is a distinct and independent precondition from compliance with any waiting period) *see also* Hearing Transcript dated 5 November 2015.. at p. 59, lines 11-24.

<sup>144</sup> *Article 9(1) of the BIT (emphasis added).*

<sup>145</sup> *Article 9(1) of the BIT (emphasis added).*

<sup>146</sup> Although the decisions of prior arbitration tribunals have no binding or precedential effect, it is instructive on occasion to refer to reasoning that is either analogous or distinct, particularly where the Parties have invoked prior decisions in an effort to persuade this Tribunal to follow their approach. For the proposition above, for example, the Tribunal's conclusion is similar to that of the tribunals in *Ambiente Ufficio S.P.A and others v. The Argentine Republic* ICSID Case No. ARB/08/9, *Decision on Jurisdiction and Admissibility* dated 8 February 2013, ¶¶ 582-583 (concluding that "a direct and independent consequence" of the phrase "insofar as possible" is that claimants will not breach their duties if a "sufficient minimum amount of consultations was actually conducted, or at least offered"), and *Abaclat et al.* ¶¶ 554, 564 (RLA-194) (interpreting the phrase "if possible" as not "referring not only to the technical possibility of settlement talks, but also the possibility, i.e. the likelihood [sic], of a positive result") By contrast, the Tribunal is not persuaded by the dissent in *Abaclat* that the clause carries with it a stronger obligation, akin to one requiring a demonstration of "best efforts" *Abaclat et al.* Dissenting Opinion dated 28 October 2011, ¶ 26 (RLA-382)).

<sup>147</sup> *Article 9(1) of the BIT (emphasis added).*

<sup>148</sup> Letter dated 11 November 2013 from J.Sagar Associates to the Republic of India, pp. 1, 11-12 (C -414).

this correspondence for the most part did not respond at all, and certainly did not respond with any offers of dialogue. In these circumstances, even if Article 9(1) were to be construed as imposing an independent requirement that a claimant reasonably explore the possibility of amicable settlement, the Tribunal has no difficulty concluding that the Claimant, on its own and through its various agents, satisfied such an obligation of reasonable engagement.

81. The question then turns to whether Article 9, read as a whole, imposes a *temporal* precondition to arbitration, in the form of a "waiting" or "cooling off period, even if not all of that period need be engaged in active pursuit of amicable settlement. Certainly, waiting periods can perform important functions independent of settlement overtures, including (as Respondent contends) allowing the parties "an opportunity to carefully consider the dispute, including investigating the facts and the options available to each of them."<sup>149</sup> For these reasons. States often expressly provide that arbitration may not be initiated until a specified number of months after notification of a dispute. The question remains, however, whether France and India did so in this case.
82. For this proposition, the Respondent concedes that its interpretation is heavily reliant on the "context" of Article 9 as a whole, rather than the ordinary meaning of any particular passage.<sup>150</sup> This concession is necessary because neither Article 9(1) (which addresses amicable settlement) nor Article 9(3) (which addresses access to arbitration) refer to any particular period of time. to be spent in amicable settlement discussions or in any other activity; prior to the commencement of arbitration. Rather, the only reference to a period of time appears in Article 9(2), which provides that any dispute "which has not been amicably settled within a period of six months from written notification of a claim may be submitted [sic] to international conciliation" pursuant to the UNCITRAL Conciliation Rules. As noted above, however, the Respondent contends that the broader context and object and purpose of Article 9 mandate a conclusion that a similar six-month waiting period also is required prior to submission of a claim to arbitration.
83. The Tribunal disagrees that such a conclusion can be drawn either from the text of Article 9 or from its object and purpose as deduced from any language elsewhere in the BIT. Focusing first on Article 9, the Tribunal finds it relevant that the provision contains two different temporal references, in the context of two different types of proceedings. First, Article 9(2) provides that "any dispute which has not been amicably settled within a period of six months from written notification of a claim" may be submitted to conciliation if the parties so agree. Second, Article 9(3) states that "the dispute may be referred to arbitration *at any time* [...]" (emphasis added) The ordinary meaning of "at any time" is exactly what it says, namely that there is no temporal restriction on the commencement of arbitration proceedings, such as that expressed in the context of conciliation.
84. The conclusion is also supported by the transition language between Articles 9(2) and 9(3). The Contracting Parties could have chosen no transition language to signal the relationship between those provisions, or they could have chosen transition language to connote that the requirements of those provisions were sequential or cumulative. Instead, they chose language that clearly connotes the independence of Article 9(3) from the contents of Article 9(2), namely the introductory words, "[n]otwithstanding paragraph 2 [...]" (emphasis added). Taken in conjunction with "at any time," the

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<sup>149</sup> Counter-Memorial, ¶ 15.

<sup>150</sup> Hearing Transcript dated 5 November 2015, at p. 4, lines 2.4-25 ("[t]he terms of Article 9 require an interpretation heavily reliant on context to make sense of the provision and to establish consistency with their context"); and p 48, lines 19-23 (explaining that Respondent's interpretation rests on "a combination of textual references and supplementary materials." because "[i]t is probably generous to say it [Article 9] is not a model of drafting clarity").

clear import of the "notwithstanding" language is that any temporal precondition on invoking the mechanism offered in Article 9(2) does not apply to invoking the different mechanism offered in Article 9(3).

85. The ordinary meaning of Article 9 is further buttressed by context drawn from the immediately following provision of the BIT, namely Article 10 on settlement of disputes between the Contracting Parties. Structurally, Articles 9 and 10 of the BIT perform the same function, namely delineating available mechanisms for resolution of Treaty disputes. They follow Articles 1 and 2, which respectively define the Treaty's terms and scope, and Articles 3 through 8, which articulate the substantive standards of treatment that the Contracting Parties commit to providing to each other's covered investors. The structure of the BIT suggests that Articles 9 and 10 should be read in the context of each other in particular. In this case, Article 10(2) provides that if a dispute between the two Contracting Parties "has not been settled within a period of six months from the date on which the matter was raised by either Contracting Party, it may be submitted at the request of either Contracting Party to an Arbitral Tribunal,"<sup>151</sup> This is a classic expression of a waiting or cooling off period, with a defined temporal precondition to arbitration. It demonstrates that France and India not only knew how to impose such a precondition to arbitration, but affirmatively chose to do so in the context of State-to-State disputes in this very Treaty. The absence of any equivalent language in Article 9(3), and instead the presence of the categorical language "at any time," compels a conclusion that Article 9 does *not* require any defined cooling-off period before commencement of investor-State arbitration proceedings.
86. For these reasons, the Tribunal does not consider the ordinary meaning of Article 9 to be either "ambiguous or obscure" within the meaning of [Article 32\(a\) of the VCLT](#). Nor is the Tribunal able to accept the Respondent's contention that the ordinary meaning of Article 9 "leads to a result which is manifestly absurd or unreasonable." within the meaning of [Article 32\(b\) of the VCLT](#).<sup>152</sup> While it is certainly unusual for States to require a waiting period before a further agreed resort to conciliation but not before a unilateral commencement of arbitration, a decision to do so is not "manifestly" absurd or unreasonable. States conceivably might conclude that there is a "need to lay the foundations for a conciliation effort by first having six months of direct talks between the parties," whereas, as the Claimant posits, arbitration "does not need to build upon a period of direct negotiation between the parties."<sup>153</sup> Or they may have other reasons for distinguishing between the two mechanisms. It is not manifestly absurd for States to dispense with a waiting period for arbitration, if they so wish; indeed. France and India apparently each have done so, although rarely.<sup>154</sup> The fact that they each have done so in treaties with other States suggests that in certain instances, they consider direct resort to arbitration, without any required waiting period, to be acceptable. This conclusion is not rendered manifestly unreasonable simply because in a particular treaty, they may choose to specify a different modality for an alternative dispute resolution procedure, namely resort to formal conciliation pursuant to the UNCITRAL Conciliation Rules.
87. In any event, the Tribunal is not required to speculate on the motivations underlying a particular treaty passage, so long as its meaning and effect is clear on its face. The Tribunal has found that to

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<sup>151</sup> Article 10(2) of the BIT.

<sup>152</sup> Counter-Memorial, ¶ 18 (contending that "it defies logic to contend that the drafters intended the prerequisites for conciliation to be more onerous than those for arbitration").

<sup>153</sup> Response to Request, ¶ 19.

<sup>154</sup> According to the Respondent, India has one BIT (out of a total 77 BITs) that does not include a waiting period, while France has six (out of a total 93), Rejoinder on Jurisdiction, ¶¶ 81-82.

be the case with respect to Article 9.

88. Nor does the Tribunal accept the Respondent's argument that reading Article 9(3) as allowing an immediate launch of arbitration proceedings would strip Article 9(1) of *effet utile*.<sup>155</sup> Even a non-binding exhortation to explore amicable settlement serves potentially useful purposes, encouraging the disputing parties to consider engaging in dialogue in circumstances where otherwise they might not. Moreover, as the Tribunal already has noted, the Article 9(1) phrase "shall, if possible, be settled amicably" does imply some degree of effort by the parties to evaluate the "possib[ility]" of such amicable settlement, in the particular circumstances of their dispute, while the Tribunal expresses some doubt that this possibility reasonably could be evaluated without making any attempt at all to engage in dialogue, that is not the situation before us. Unlike the facts of *Murphy v. Ecuador*, for example where a claimant initiated arbitration the day after sending its notice of dispute, notwithstanding a treaty requirement that "six months have elapsed from the date on which the dispute arose"<sup>156</sup>—here the evidence suggests a far more extensive effort by the Claimant to engage responsible Indian officials in dialogue, prior to the commencement of arbitration proceedings. Given these facts, the Tribunal has no difficulty concluding that the Claimant's efforts complied with the spirit of Article 9(1). Indeed, those efforts suggest that Article 9(1) does, retain *effet utile*, as an exhortation to explore the reasonable possibility of settlement prior to commencing arbitration, even in the absence of a mandatory waiting period prior to arbitration pursuant to Article 9(3).
89. For these reasons, the Tribunal sees no need to resort to supplementary means of interpretation, either to verify or to attempt to confirm the ordinary meaning of Article 9. However, since the Parties have expended some effort in briefing potential inferences to be drawn both from the French legislative materials and from other Indian and French BIT practice, the Tribunal briefly addresses those arguments here. It does so with the understanding that State Parties to a treaty are "presumed to have that intention that appears from the ordinary meaning of the terms used by them" in the treaty text, and therefore that tribunal would require "decisive" evidence from supplementary material to adopt "an interpretation other than that which ensues from the natural meaning" of the treaty terms.<sup>157</sup>
90. Here, neither Party has submitted any excerpts from the *travaux préparatoires*, the official record of the negotiations between France and India, which might shed some light on the evolution of these particular terms and the communications between the State Parties regarding their respective or shared interpretation and intent. The Respondent instead relies on certain documents that were generated in the course of the subsequent ratification process in France. The Tribunal notes as a threshold matter that "[t]he view of one State does not make international law, even less so when such a view is ascertained only by indirect means of interpretation [...] What is relevant is the intention which both parties had in signing the Treaty [...]"<sup>158</sup>
91. In any event, the French legislative materials are ambiguous and do not lead to an inescapable conclusion. The Respondent relies on two documents submitted to the French legislature that refer to the possibility of arbitration if amicable settlement has not been achieved after six months.<sup>159</sup> For

<sup>155</sup> Counter-Memorial, ¶ 19; Hearing Transcript dated 5 November 2015. at p. 49, lines 22-25, and p. 50, lines 1-

<sup>156</sup> *Murphy*, ¶ 96, see also *Murphy*, ¶ 135 (RLA-185).

<sup>157</sup> *Conditions of Admission of a State to Membership in the UN*. p. 6.3 (RLA- 13).

<sup>158</sup> *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award dated 28 September 2007, ¶ 385 (CLA-145).

its part, the Claimant refers to another (purportedly "more detailed")<sup>160</sup> analysis of the Treaty that states that "at any time, an appeal to arbitration is possible "<sup>161</sup> In these circumstances, where the interpretation of Article 9 by those briefing the French Senate appear to have been inconsistent, no clear inference can be drawn about the intent of the French treaty negotiators. It goes without saying that these documents in any event tell us nothing about the contemporaneous interpretations of India, the Respondent in this case. No materials have been submitted with respect to India's analysis or ratification of the BIT

92. In addition to the French legislative material, the Respondent invokes BIT practice in both France and India, which (as noted above) almost always includes waiting periods prior to arbitration, and in no other cases imposes waiting periods for conciliation and not for arbitration<sup>162</sup> According to the Respondent, this practice is so consistent in both countries that if they had truly intended to depart from it for the BIT between India and France, one would expect them to have signaled this unambiguously. Absent clear evidence of a deliberate deviation from longstanding common practice, the Respondent contends, one must assume that the State Parties intended Article 9 to be interpreted consistently with other French and Indian BITs. but simply employed infelicitous drafting in this case.<sup>163</sup> The Claimant draws the opposite conclusion from the Respondent's survey of BIT practice, namely that "recourse to other treaties is not helpful because the parties are free to agree to different terms in different treaties."<sup>164</sup> which the Claimant suggests they did here. The Claimant contends that this only can have been deliberate, since the State Parties plainly knew how to draft an express precondition to arbitration when they wished to do so.<sup>165</sup>

93. The positions of the Parties perfectly illustrate the limitations of relying too greatly on inferences drawn from the comparison of a subject BIT with the text of other BITs. As the Parties' arguments reveal, a departure from past practice generally can be spun by able advocates to diametrically opposite effect, from one perspective that the incongruity must have been inadvertent, and from the other that it must have been deliberate. The Tribunal is grateful to Professor Lowe QC for his candor in describing this conundrum, as follows:

It is a classic confrontation on the question of treaty law and almost all pleading comes down to this. One side will say you have 100 treaties out there, they all say the same thing and this one is different, therefore, this one must have meant to say the same as all these say. Then their opponents conic on and say you have 100 treaties out here all saving the same thing and this one is different and, therefore, the parties must have deliberately departed from the terms of it.

The fact is that neither of us has any evidence of what the parties intended or thought when they were doing that. We have the treaty, we work with the treaty and that is it.<sup>166</sup>

In the absence of any evidence about *why* particular Treaty language departs from that used in

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<sup>159</sup> Legislative Bill No. 231 transmitting the Treaty to the Senate by Foreign Ministry dated 21 January 1998 (R- 67). Report No. 1475 to the National Assembly dated 17 March 1999. p. 3 (CLA-173)

<sup>160</sup> Hearing Transcript dated 5 November 2015. at p. 108, lines 8-25, and p. 109, line 1.

<sup>161</sup> Report No. 314 on the Proposal to Consent to the Agreement between the Government of the French Republic and the Government of India on the mutual promotion and protection of investments. p. 5 (CLA-172).

<sup>162</sup> Rejoinder on Jurisdiction, ¶¶ 81-83; Hearing Transcript dated 5 November 2015. at p 53, lines 15-25 and p 54, line 1.

<sup>163</sup> Hearing Transcript dated 5 November 2015. at p 54, lines 2-5, p. 143, lines 21-25. and p. 144, lines 1-8.

<sup>164</sup> Response to Request, ¶ 21.

<sup>165</sup> Reply on Jurisdiction, ¶ 14.

<sup>166</sup> Hearing Transcript dated 5 November 2015. at p. 147, lines 3-14.

other BITs, the Tribunal does not consider inferences to be particularly compelling either way. Certainly they are not sufficiently compelling to question the ordinary meaning otherwise apparent from Article 9's text, which is further supported by contrast with the immediately adjacent terms of Article 10.

94. The Tribunal thus concludes that, unlike the provisions of many other treaties, Article 9 does not impose a waiting period, for purposes of amicable settlement or otherwise, before an investor may resort to arbitration. Had it done so, the Tribunal would have considered this to be of jurisdictional and not merely procedural import.<sup>167</sup> States are free to condition their consent to arbitration in any way they wish, and when they unmistakably have done so it is not for tribunals to deem such requirements as merely precatory, or to permit them to be sidestepped on policy grounds that essentially substitute the tribunal's judgment for that of the Contracting Parties.<sup>168</sup> As explained in *ST-AD v. Bulgaria*.

In order for a claimant to benefit from the jurisdictional protection granted by an arbitration mechanism, there is a condition *ratione voluntatis*: the State must have given its consent to such procedure, which allows a foreign investor to sue the State directly at the international level. This consent is expressed broadly or restrictively; with or without conditions of exhaustion of local remedies or waiting periods, as allowing all claims or only certain claims. In other words, the State's consent is given under certain conditions. Just as, for example, the conditions of nationality must be fulfilled before an investor can have access to rights under a BIT, the conditions subject to which the State gives its consent must be fulfilled before a right to arbitration can arise. Such conditions are an inherent part of the State's given consent. In other words, if these conditions are not fulfilled, there is indeed no consent.<sup>169</sup>

95. The Tribunal also rejects the Claimant's suggestion that a mandatory waiting period can be satisfied *post-hoc* by the running of the clock following a notice of arbitration and prior to a tribunal's decision on jurisdiction.<sup>170</sup> While the ICJ's jurisprudence on this issue is somewhat inconsistent,<sup>171</sup> the Tribunal agrees with the analysis in *Tulip v. Turkey* that "[i]t would be to rewrite the BIT and to confound its plain meaning to accept that a party may file its Request without notice and then perfect the breach after the arbitration commenced"<sup>172</sup> While the Tribunal accepts that in any

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<sup>167</sup> The Tribunal thus rejects the Claimant's suggestion that amicable settlement periods are "not even a jurisdictional requirement" Response to Request, ¶ 16. As other tribunals have observed the cases that have dismissed such requirements as merely procedural and therefore apparently capable of being disregarded without consequence, do not source that distinction in any way from the treaty text. See, e.g. *Giovanni Alemanni and others v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility dated 17 November 2014, ¶ 304 (agreeing in turn with the analysis in *Ambiente Ufficio* ¶ 572).

<sup>168</sup> *Giovanni Alemanni*, ¶¶ 304-306; *Kilic*, ¶¶ 6.2.3, 6.2.9 (RLA-220); *Murphy* ¶¶ 141-142, 147-154 (R LA-185); *Enron*, ¶ 88 (RLA-100); *Tulip*, ¶¶ 71-72 (RLA-217).

<sup>169</sup> *ST-AD*, ¶ 336 (RLA-222).

<sup>170</sup> Reply on Jurisdiction. • 25.

<sup>171</sup> *ontrast* for example, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment dated 14 February 2002. ICJ Reports 2002, ¶ 26 (RLA-351) (referring to "settled jurisprudence" under which the ICJ's jurisdiction must be determined at the time that the act instituting proceedings was filed"), with *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. Preliminary Objections, Judgment dated 18 November 2008. ICJ Reports 2008, ¶¶ 85, 87 (citing with approval the PCIJ's decision in *Mavrommatis* that certain jurisdictional requirements that were not satisfied at the time of instituting legal proceedings could be met subsequently, and suggesting that "it is preferable except in special circumstances, to conclude that the condition has, from that point on, been fulfilled [...] [i]t would not be in the interest of justice to oblige the Applicant if it wishes to pursue its claims, to initiate fresh proceedings.")

particular case this work-around may be tempting as an alternative to dismissing claims in the knowledge that they simply can be refilled.<sup>173</sup> Imposing such extra efforts on a party that did *not* observe treaty requirements is preferable to the practical effect of endorsing, as a matter of doctrine, a sweeping end-run around express precondition to arbitration. A pronouncement that mandatory waiting periods could be satisfied by the passage of time after rather than before instituting proceedings would create an exception that would swallow the rule, given that in virtually every case the required period will subsequently elapse before the tribunal is constituted and the jurisdictional objections briefed for its consideration.

96. In the Tribunal's view, the only basis for excusing noncompliance with a mandatory precondition to arbitration could be the doctrine of futility. The Tribunal does not accept the Respondent's suggestion that the doctrine can never apply to excuse non-compliance with preconditions, unless the Treaty text itself allows for this possibility.<sup>174</sup> The doctrine of futility derives from jurisprudence addressing the international law requirement to exhaust local remedies, and in that context, the ICJ has carved out a general exception in circumstances where in reality no remedy is available or any attempt at invoking it would be futile, while the preconditions to arbitration are different in the investment treaty context where generally no exhaustion of remedies requirement applies there is no reason to assume that Contracting Parties intended to exclude any possible recourse to the doctrine of futility, simply by not referring to that doctrine in the Treaty text. Indeed, numerous investment treaty tribunals have considered the futility doctrine as potentially applicable to treaty-based preconditions to arbitrate.<sup>175</sup>
97. Nonetheless, the doctrine imposes a considerable burden of proof on a claimant wishing to invoke it to excuse non-compliance with preconditions to arbitrate. A mere showing that the steps a treaty requires to be taken prior to arbitration are *unlikely* to result in a satisfactory outcome for the investor would not satisfy a requirement of demonstrating that it was *futile* for the investor even to try. Futility connotes a manifest waste of effort towards a self-evident, even pre-ordained, lack of success, not simply that the effort faces significant hurdles or that the odds are against success, where to draw the line inevitably will be an issue of fact and will differ from case to case, the Tribunal, however, agrees with the Respondent that the existence of futility cannot be presumed, but rather it must be proven, based on substantial and credible evidence.
98. In the context of an express waiting period during which the parties are required to undertake amicable settlement efforts, the doctrine of futility faces a particularly high threshold of proof. The issue in this context is not the unavailability of an alternate process or remedy as a matter of law.<sup>176</sup> but rather the purported patent unwillingness of the counterparty to negotiate in any meaningful way. Such unwillingness may not be simply presumed, and a claimant that proceeds immediately to arbitration without even attempting negotiations may find its later futility defense rejected, on the ground that "[t]o determine whether negotiations would succeed or not, the parties must first initiate them."<sup>177</sup> Similarly, a moderate delay in a respondent State's acknowledgment of a request

<sup>172</sup> *Tulip*, at ¶ 91 (RLA-217).

<sup>173</sup> See, e.g., *Société Générale*, ¶ 184 (CLA-167).

<sup>174</sup> Counter-Memorial, ¶ 36; Rejoinder, ¶ 95; Hearing Transcript dated 5 November 2015, at p. 66 lines 11-13.

<sup>175</sup> See, e.g., *Giovanni Alemanni*, ¶ 310, 315-316; *Ambiente Ufficio*, ¶¶ 582-583; *Kilic*, ¶¶ 7.9.1, 8.1.4 (RLA-220); *Teinver* ¶¶ 126-129 (CLA-169).

<sup>176</sup> Cf. *Kilic*, ¶ 8.1.4 (RLA-220) (discussing treaty requirements of prior recourse to local courts, where the doctrine of futility might excuse compliance if it is demonstrated that "recourse is not available to the state's court or, if available, the investor would not have been treated fairly before those courts")

for discussions may not satisfy the requirement of showing futility, because such a delay may reflect realities other than unwillingness to engage in dialogue, such as a respondent's effort to organize a response or to investigate the relevant facts sufficiently for discussions to be meaningfully productive. In the Tribunal's view futility should not be seen as a "get out of jail free card" that excuses, *post hoc*, any and all rush to arbitration in defiance of treaty language expressly requiring a defined time period for discussions. An investor ignores such temporal requirements at its peril.

99. On the facts before us, the issue of futility would be a close call, if the Respondent's interpretation of Article 9 as requiring a six-month waiting period had been adopted. The Claimant did not rush to arbitrate, but rather sent repeated communications to Indian officials, both before and after its formal invocation of the BIT, none of which such officials effectively even acknowledged. Although the Claimant's Notification of Claim on 11 November 2013 warned of an intent to commence arbitration in just two weeks, the Claimant nonetheless waited roughly four-and-a-half months to commence these proceedings, during which the Respondent continued to be conspicuously silent. It is not clear why the Claimant in these circumstances could not have simply waited an additional six weeks before filing, to remove any doubt from these proceedings.<sup>178</sup> That said, the Respondent has presented no evidence suggesting that after four-and-a-half months of effective silence in the wake of Claimant's invocation of the BIT. It was organizing any imminent and meaningful response. In these circumstances, the Tribunal likely would have been inclined to find the futility doctrine satisfied, because the ordinary terms of Article 9 do not impose a temporal requirement with respect to amicable settlement efforts, however, such a finding is not necessary to the result.
100. For the reasons stated above, the Tribunal hereby denies the Respondent's First Objection to jurisdiction.

## VI. THE RESPONDENT'S SECOND OBJECTION: THE TRIBUNAL LACKS JURISDICTION BECAUSE THE INVESTMENTS WERE MADE THROUGH A COMPANY OF WHICH THE CLAIMANT OWNS LESS THAN 51 PERCENT

101. The Respondent's Second Objection is that the Tribunal lacks jurisdiction *ratione materiae* because Article 2(1) of the BIT excludes from the Treaty's protection all indirect investments in India that are made through another company "wherever located" that is not owned at least 51% by a French company. In this case, the Claimant's investment in HBT was made indirectly through ALBA, an Indian company in which the Claimant owns less than 51% of the shares. The Respondent asserts that this is a fundamental impediment to jurisdiction, and it cannot be cured by resort to the MFN clause in Article 5(1) of the BIT, because that clause does not apply to broaden the scope of Article 2(1). Nor in the Respondent's view, can a claim proceed on the basis of the Claimant's direct investment in ALBA (rather than its indirect investment in HBT), because this would constitute an end-run around the exclusion in Article 2(1), and in any event is not the way the Claimant thus far

<sup>177</sup> *Murphy*, ¶ 135 (R LA-185).

<sup>178</sup> See Reply on Jurisdiction, ¶ 20 (contending that "[i]n light of the Respondent's failure to engage with the Claimant, the Claimant *had no choice but* to issue the Notice of Arbitration on 31 March 2014," but not alleging any particularly exigent circumstances that left it no choice, or that could have rendered waiting an additional six weeks irreparably prejudicial) (emphasis added).

has pleaded its case.

102. By contrast, the Claimant contends that Article 2(1) is not an impediment to the Tribunal's jurisdiction because it applies to indirect investments only when such indirect investments are held through companies "outside of India," and not through Indian companies such as ALBA.<sup>179</sup> In the alternative, the Claimant contends, the MFN clause in Article 5(1) of the BIT would render LDA's claims within the scope of the Treaty and the Tribunal's jurisdiction, because other Indian BITs do not contain a comparable exclusion on indirect investments made through companies in which the investor owns less than 51% of the shares. Finally, the Claimant contends, jurisdiction exists in any event because it made direct investments in India (through ALBA and otherwise) that do not fall within the scope of any exclusion in Article 2(1), and the Claimant's claim can be viewed as one for harm to its direct investments.
103. As with the First Objection, the Tribunal begins by setting forth the core facts relevant to this Objection, followed by a more detailed summary of the Parties' respective positions. These positions are summarized with respect to the three issues embedded in the Objection, namely whether: (i) Article 2(1) bars jurisdiction over claims by a French investor in India, if it structures its relevant investment through an intermediate Indian company in which it owns less than 51% of the shares; (ii) the Claimant can invoke the MFN clause in Article 5(1) to import more favorable provisions from other Indian BITs that do not contain similar minimum ownership requirements for indirect investments; and (iii) whether the case can proceed in the alternative on the basis of the Claimant's direct investment in ALBA, as a matter of treaty interpretation and in light of the way the Claimant heretofore has characterized its claim. The Tribunal's analysis follows the summary of the Parties' positions.

## A. RELEVANT FACTS

104. On 13 November 2007, India organized and floated a global tender (the "Tender") for the operation and maintenance of mechanized dry bulk cargo handling equipment at the Berths<sup>180</sup> A consortium consisting of the Claimant's Indian collaborator, ABG Infralogistics ("ABG infra"), and its subsidiary, ABG Kolkata Container Terminals Private Limited ("ABG Kolkata"), (the "Consortium") was recognized as the preferred bidder on 16 April 2008.<sup>181</sup>
105. Under clause 3.9 of the Tender, the Tender was valid for a period of six months from 28 February 2008<sup>182</sup> After several extensions,<sup>183</sup> the Consortium and KoPT signed a Letter of Intent on 29 April 2009.<sup>184</sup>
106. That Letter of Intent required the Consortium to form a joint venture that would enter into the

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<sup>179</sup> Statement of Claim, ¶ 364.

<sup>180</sup> Tender No. Ad/Equipping/2007-08 for Supply, Operation and Maintenance of Different Cargo Handling Equipment at Berth No. 2 and 8 of Haldia Dock Complex, Kolkata Port Trust dated 16 October 2009 (C- 1)

<sup>181</sup> Contract, pp. 789-792 (C-2).

<sup>182</sup> Tender, p. 35 (C-1).

<sup>183</sup> See e.g., Statement of Claim, ¶ 159, n. 157 (citing C-65 to C-81).

<sup>184</sup> Contract, pp. 935-938 (C-2).

contract with KoPT.<sup>185</sup> ALBA had been incorporated on 18 November 2008 as "ABG Bulk Handling Private Limited."<sup>186</sup> a subsidiary of ABG Ports, itself a subsidiary of ABG Infra. In May 2009, HBT was incorporated as a special purpose vehicle, with ABG Infra and ABG Kolkata holding 89% and 11% equity respectively.<sup>187</sup> On 21 July 2009, LDA and ABG Ports executed a shareholders' agreement under which (a) LDA was allotted 96,078 newly issued equity shares in ALBA, and ABG Ports was issued a further 90,000 equity shares in ALBA; and (b) HBT issued additional equity shares to ALBA, bringing ALBA's shareholding in HBT to 63%<sup>188</sup> Following the issue by HBT of preference shares to ALBA. ALBA is entitled to 98.78% of HBT's profits.<sup>189</sup> The Claimant illustrates the resulting ownership structure of these companies as follows:<sup>190</sup>

107. On 16 October 2019, HBT and KoPT entered into the Contract.<sup>191</sup>

## B. THE POSITIONS OF THE PARTIES

### 1. Interpretation of the Minimum Ownership Requirement in Article 2(1) of the BIT

#### *The Claimant's Position*

108. For the Claimant, the minimum ownership requirement in Article 2(I) of the BIT only extends to indirect investments in India made through third States.<sup>192</sup> The Claimant's interpretation of Article 2(1) of the BIT proceeds in two steps.<sup>193</sup> First, the phrase, "This Agreement shall apply to any investment made by investors of either Contracting Party in the area of the other Contracting Party," requires investments to have originated outside of India, not from within India; the focus is on external and inbound, rather than domestic, investments.<sup>194</sup> Second, the subsequent clause, "including an indirect investment made through another company, wherever located," continues to refer to the process of the investment's reaching India, and signals that before that point, it may be routed through an intermediary company located anywhere ("wherever").<sup>195</sup> subject to the specified minimum ownership requirements. For the Claimant, the second clause does not address the issue

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<sup>185</sup> Contract, p. 937.

<sup>186</sup> It was later renamed ABG-LDA Bulk Handling Private Limited, and finally assumed its current name. See ALBA's documents of incorporation (C-24).

<sup>187</sup> See HBT's documents of incorporation (C-25).

<sup>188</sup> ALBA's documents of incorporation (C-24). Statement of Claim, ¶ 127.

<sup>189</sup> Preference Share Certificate (C-94).

<sup>190</sup> Statement of Claim, ¶ 131.

<sup>191</sup> Contract (C-2)

<sup>192</sup> Hearing Transcript dated 5 November 2015. at p. 97, lines 16-17.

<sup>193</sup> Response to Request, ¶¶ 37-40

<sup>194</sup> Response to Request, ¶ 38.

<sup>195</sup> Response to Request, ¶ 39.

of how the investment may be further routed *within* India, after becoming an investment in India; its reach is grammatically limited to the preceding clause that it modifies, namely the first part of Article 2(1) of the BIT, which is discussing the process of investing into India in the first place. Therefore, according to the Claimant, FDA's investment in HBT through ALBA, an Indian company, does not fall foul of the restriction in Article 2(1) of the BIT.

109. The Claimant argues that its interpretation of Article 2(1) of the BIT accords with the definition of investment in Article 1(1)(b), which refers to "minority or indirect forms" of shareholding in companies constituted within India. The Claimant observes that since Article 2(1) does not purport to impose a minimum shareholding requirement for *direct* investments in India, it would be illogical to read it as applying to *indirect* investments in India routed through direct investments in India.<sup>196</sup> By contrast, the Claimant reasons, the provisions make more sense as interpreted to apply to the routing of French investments through a third country before reaching India: in respect of those third countries, the question otherwise might arise whether a claim should be brought through the third country's BIT, which might contain different protections than the BIT between France and India.<sup>197</sup> According to the Claimant, Article 2(1) regulates this situation by providing that if the French company owns 51% or more of the shares in the third-country company through which the investment is routed, a claim can proceed under the France-India BIT, but otherwise not.<sup>198</sup> The logic of this view of Article 2(1) (as regulating which of several potential BITs should apply to a claim against India) does not extend to a situation like the present one, where LDA did not route its investment through third countries, but rather invested directly into a separate holding company in India (ALBA), which in turn invested in HBT as well as in other Indian ventures.

110. The Claimant submits that at the time of the Treaty's drafting and signature, the Contracting Parties understood Article 2(1) of the BIT only to apply in this way, namely to impose minimum ownership requirements on indirect investments routed through third States.<sup>199</sup> The Claimant invokes Report No. 314 of the Foreign Relations Committee of the French Senate, which was submitted to the French Senate as part of the BIT'S ratification process. That Report states:

As far as investments made through a company established in a third State are concerned, these are covered by the Agreement [India- France BIT] only if that company is controlled to an extent of at least 51% by a French or Indian investor (Article 2.1). Such a restriction does not feature in the other investment treaties concluded by France.<sup>200</sup>

111. The Claimant rebuts the Respondent's construction of Article 2(1) of the BIT as creating "an absurdity"<sup>201</sup> and making "no commercial sense."<sup>202</sup> The former is because an investment in an intermediate Indian company would fall within the scope of the Treaty in any event, as a direct investment in India;<sup>203</sup> the latter is because the effect of the Respondent's interpretation would be

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<sup>196</sup> Response to Request, ¶ 41.

<sup>197</sup> Response to Request, ¶ 42.

<sup>198</sup> Response to Request, ¶ 42.

<sup>199</sup> Response to Request, ¶ 43 (citing Report No. 314 on the Proposal to Consent to the Agreement between the Government of the French Republic and the Government of India on the mutual promotion and protection of investments dated 25 February 1998 (CLA-126; *see also* CLA-172)).

<sup>200</sup> Response to Request, ¶ 43 (citing French Senate Report No. 314 (CLA-126; *see also* CLA-172)).

<sup>201</sup> Response to Request, ¶ 41-42.

<sup>202</sup> Response to Request, ¶ 44.

to punish corporate structures "commensurate with the scale and complexity of the investments [LDA] sought to make."<sup>204</sup>

## *The Respondent's Position*

112. In the Respondent's view, the ordinary meaning of the language of Article 2(1) of the BIT in light of its context, object, and purpose indicates that, of investments made through indirect ownership, only those in which the corporate form is owned "to an extent of at least 51 percent" are eligible for protection under the BIT. It argues that since the Claimant's interest in HBT is indirect.<sup>205</sup> It is subject to, but fails to satisfy, the majority ownership requirement in Article 2(1), because the Claimant's holdings in ALBA are limited to 49% of outstanding shares.
113. The Respondent emphasizes that the "ordinary meaning" of the phrase "wherever located" does not place any limits on the geographical scope of the majority ownership condition on indirect investments.<sup>206</sup> It notes that the equivalent phrase found in the French version of Article 2(1) of the BIT, "*où q u'elle soil situee*" also translates to "wherever it may be located."<sup>207</sup> The Respondent also submits that under the plain and ordinary meaning of the clause, "investments 'in the area of the other Contracting Party' clearly include investments made from within India [..]. [A] qualifying investment in shares under the Treaty can be made in India and from India..... at the same time."<sup>208</sup> The Respondent submits that the "ordinary meaning of the phrase 'company, wherever located' is clear and this has not really been contested by the Claimant."<sup>209</sup>
114. The Respondent argues that the context of Article 2(1) of the BIT supports its interpretation of the provision.<sup>210</sup> Firstly, the Respondent submits that Article 1(1) of the BIT reveals the Treaty drafters' choice to eschew geographical limitations (beyond nationality requirements) in defining the scope of the Treaty India notes that Article 1(1) of the BIT, which confirms that "indirect forms [of ownership] in companies constituted in the territory of one Contracting Party" are a qualifying investment,<sup>211</sup> imposes no limitations on either the geographical origin of intermediary companies held by French investors, nor on the ownership of such companies. Although Article 2(1) of the BIT imposes a new "express restraint" concerning the ownership of an intermediary company.....the Respondent emphasizes that Article 2(1) of the BIT does not introduce the sort of geographical qualifier, distinguishing between routing of investments within versus outside the Contracting States, that the Claimant seeks to establish. Had they intended to add a geographical carve-out, "they would have done so expressly."<sup>212</sup>
115. Second, the Respondent notes that the first clause of Article 2(1) of the BIT extends the applicability

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<sup>203</sup> Response to Request, ¶ 41.

<sup>204</sup> Response to Request, ¶ 44.

<sup>205</sup> Respondent's Request, ¶ 17.

<sup>206</sup> Counter-Memorial, ¶¶ 48-52, citing various dictionary definitions of "wherever" (RLA-65, RLA-243, RLA-244, RLA-122 and RLA-178).

<sup>207</sup> Counter-Memorial, ¶ 51.

<sup>208</sup> Rejoinder on Jurisdiction, ¶ 23 (Respondent's emphasis added).

<sup>209</sup> Hearing Transcript dated 5 November 2015. at p. 11 lines 16-18.

<sup>210</sup> Counter-Memorial, ¶ 53.

<sup>211</sup> Rejoinder on Jurisdiction, ¶ 23

<sup>212</sup> Counter-Memorial, ¶ 56.

of the BIT to any investment made "in the area of the other Contracting Party."<sup>213</sup> It contrasts that clause and the geographical restrictions found in other bilateral investment treaties concluded by India<sup>214</sup> with the minimum ownership requirement found in the second half of Article 2(1) ("including an indirect investment made through another company, wherever located.")<sup>215</sup> It asserts that the juxtaposition between the territorial terms used in the first ("in the area of a Contracting Party") and second section ("wherever located") of Article 2(1) of the BIT "suggests strongly"<sup>216</sup> that the minimum ownership requirement applies to Indian intermediary companies as well as to intermediate companies in third jurisdictions.

116. Third, the Respondent considers the use of the word "Company" in Article 2(1) of the BIT to be significant since it is the only time the defined term is used in an operational provision of the Treaty.<sup>217</sup> Noting its definition in Article 1(3) of the BIT as "any legal person constituted on the territory of one Contract Party in accordance with the laws of that Party," the Respondent submits that it would be "absurd" to interpret Article 2(1), which incorporates the same term, as excluding companies incorporated in a Contracting Party from its reach.<sup>218</sup> Rather, the Respondent contends, the majority ownership requirement extends to *all* companies through which investments in India are indirectly held.<sup>219</sup>
117. The Respondent argues that the "object and purpose" of the Treaty support its interpretation of Article 2(1) of the BIT, Referring to the Treaty's preambular reference to the "promotion and protection" of investments, the Respondent claims that "even under India's interpretation, the treaty extends treaty protection to majority French owned indirect investments, thereby creating a more favourable situation than existed without the treaty, thereby promoting investment."<sup>220</sup> Citing *Berschader v. Russia*<sup>221</sup> and *Daimler v. Argentina*,<sup>222</sup> the Respondent submits that the Treaty's object and purpose does not go further, to necessitate the protection of all forms of investment under the Treaty.<sup>223</sup> It also considers that the "commercial sense" of the Treaty is irrelevant to its interpretation.<sup>224</sup>
118. The Respondent rejects the Claimant's argument that the majority ownership requirement of Article 2(1) of the BIT, when "properly construed,"<sup>225</sup> applies only to indirect investments held through companies "outside of India. In the Respondent's view, the Claimant's "absurdly narrow"<sup>226</sup> interpretation would require the Tribunal to interpret the terms "wherever located" to mean

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<sup>213</sup> Article 2(1) of the BIT.

<sup>214</sup> Article 1 of the Kuwait-India BIT (CLA-118) ("This Agreement shall not apply to any indirect investments in a Contracting State made through a company incorporated in a third state unless such company is owned to an extent of at least 51% or is controlled by investors of the other Contracting Suite.") See Counter-Memorial, ¶ 57 n. 114.

<sup>215</sup> Article 2(1) of the BIT.

<sup>216</sup> Counter - Memorial, ¶ 57.

<sup>217</sup> Hearing Transcript dated 5 November 2015. at p. 16, lines 20-25 and p. 17, lines 1-5.

<sup>218</sup> Hearing Transcript dated 5 November 2015, at p. 17, lines 10-13.

<sup>219</sup> Statement of Defense, ¶ 139.

<sup>220</sup> Hearing Transcript dated 5 November 2015, at p. 17, lines 24-25 and p 18, lines 1-3

<sup>221</sup> *Vladimir Berschader and Moïse Berschader v. The Russian Federation SCC Case No. 080/2004, Award dated 21 April 2006 (RLA-122).*

<sup>222</sup> *Daimler Financial Services AG v. The Argentine Republic, ICSID Case No. ARB/05/1 Award dated 22 August 2012 (RLA-209).*

<sup>223</sup> Hearing Transcript dated 5 November 2015, at p. 18, lines 4-19.

<sup>224</sup> Hearing Transcript dated 5 November 2015. at p.19, lines 6-9.

<sup>225</sup> See Statement of Claim, ¶ 364 (emphasis in original)

<sup>226</sup> Counter-Memorial, ¶ 45.

"wherever located outside of India" or "in only some places where located."<sup>227</sup> The Respondent asserts that such an interpretation is not compatible with the VCLT.

119. The Respondent rejects the Claimants reliance upon Report No 314 of the French Senate Foreign Relations Committee as evidence that Article 2(1) of the BIT was understood to apply only to "indirect investments made through companies in a third state."<sup>228</sup> The Respondent instead cites two oilier French documents, Legislative Bill No. 231 transmitting the Treats to the French Senate<sup>229</sup> and Report No 23 on Approval of the Treaty of the National Assembly Foreign Relations Committee.<sup>230</sup> for the proposition that Article 2(1) of the BIT does not refer only to third-country routing, but rather restricts the Treaty's protection regardless of jurisdiction, to "indirect investments made by a company that is owned to an extent of at least 51% by investors of one of the Contracting Parties."<sup>231</sup>

## 2. The Applicability of the MFN Clause

### *The Claimant's Position*

120. The Claimant submits that even if Article 2(1) were interpreted as barring claims based on indirect ownership of investments such as its investment in HBT, it would be entitled to invoke the MFN clause in Article 5(1) of the BIT to avoid this outcome, because otherwise the Claimant would be deprived of its recourse to arbitration in circumstances under which arbitration would remain open to qualified investors from other Contracting States.<sup>232</sup>
121. In the Claimant's view,<sup>233</sup> Article 5(1) permits it to benefit from other bilateral investment treaties concluded by India that contain no minimum shareholding or control requirements for indirect investments (as in the Germany-India BIT).<sup>234</sup> The MFN clause also would permit the Claimant to claim the benefit of other BITs in which a minimum shareholding requirement applies to indirect shareholding, but is limited expressly to intermediate companies incorporated in third states (such as the Kuwait-India BIT).<sup>235</sup> In either case, the Claimant submits that it should be accorded treatment no less favorable than these other investors, and therefore should be permitted to proceed with its claim, notwithstanding any interpretation adopted with respect to the minimum ownership requirement in Article 2(1).

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<sup>227</sup> Counter-Memorial, ¶ 45.

<sup>228</sup> Response to Request, ¶ 43 (quoting French Senate Repon No. 314. (C LA-126; *see also* C LA-172)); Reioinder on Jurisdiction, ¶ 29.

<sup>229</sup> Legislative Bill No. 231 transmitting the Treaty to the Senate (R-67)

<sup>230</sup> Report No. 23 on Approval of the Treaty of the National Assembly Foreign Relations Committee (R-68).

<sup>231</sup> Respondent's Rejoinder (quoting R-67).

<sup>232</sup> Response to Request, ¶ 45.

<sup>233</sup> Statement of Claim, ¶ 364.

<sup>234</sup> Agreement between the Republic of India and the federal Republic of Germany for the Promotion and Protection of Investments dated 10 July 1995 (CLA-117).

<sup>235</sup> Article 1 of the Agreement between the state of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investment dated 27 November 2001 ("Kuwait-India BIT") (CLA- 118).

122. The Claimant dismisses the Respondent's suggestion that its interpretation of Article 5(1) would allow the MFN clause to displace the BIT's definition of a protected investment. The Claimant contends that it is not attempting to expand or change the definition of investment" in Article I of the Treaty, but rather is invoking the MFN clause in the context of its rights "regarding the 'operation, management, maintenance, use, enjoyment or disposal'" of investments that already fall within the Treaty definition.<sup>236</sup>

## *The Respondent's Position*

123. The Respondent cites, *inter alia Société Generale v. The Dominican Republic*<sup>237</sup> in support of the proposition that MFN clauses apply "only to the treatment accorded to [a] defined investment." not to "the definition of investment' itself."<sup>238</sup> For the Respondent, MFN clauses cannot apply to jurisdictional requirements:

Such a condition cannot be adulterated or attenuated through the invocation of the Treaty right to receive MFN treatment, *because that condition qualifies the very access to the Treaty*. In other words, satisfaction of Article 2(1)'s requirements is a precondition to the enjoyment of the very right to receive MFN treatment.<sup>239</sup>

124. While the Treaty's definition of an investment is not found in Article 2(1) of the BIT, the Respondent contends that the requirements of Article 2(1) of the BIT are jurisdictional in nature. It cites the tribunal's treatment of a nearly identical clause featured in *Rafat Alt Rizvi v. Indonesia*<sup>240</sup> to argue that Article 2(1) of the BIT'S minimum ownership requirement directly relates to the scope of the Tribunal's jurisdiction *ratione materiae*.
125. Accordingly, the Respondent submits that the Treaty's MFN clause cannot circumvent Article 2(1) of the BIT, whose minimum ownership requirement excludes the Claimant's indirect shareholding in HBT from coverage under the Treaty.

## 3. The Possibility of Proceeding on the Basis of LDA's Direct Investment in India

### *The Claimant's Position*

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<sup>236</sup> Response to Request, ¶ 46.

<sup>237</sup> Counter-Memorial, ¶¶ 64-68 (citing *Venessa Vemures v. The Bolivarian Republic of Venezuela*, ICSID CASE No. ARB(AF)04/6, Award dated January 2003, ¶ 133 (RLA-214) *Societe Generale*, ¶ 41(CLA-86); *HICEE B.V v. The Slovak Republic*, PCA Case No, 2009-11, Partial Award dated 23 May 2011, ¶ 149 (RLA-192); *Metal-Tech Ltd v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award dated 4 October 2013, ¶ 145 (RLA-224)).

<sup>238</sup> Statement of Defense, ¶ 140 (citing *Société Générale*, ¶ 41 (CLA-86)).

<sup>239</sup> Counter-Memorial, ¶ 63 (emphasis in original).

<sup>240</sup> Rejoinder on Jurisdiction, ¶¶ 44-46 (citing *Rafat Ali Rizvi v. The Republic of Indonesia*, ICSID Case No. ARB 11/13, Award on Jurisdiction, dated 16 July 2013 (RLA-221)).

126. The Claimant notes that regardless of how Article 2(1) is interpreted with respect to its indirect investment in HBT, it indisputably also has made and continues to hold a direct investment in India within the meaning of Article 1(1) of the BIT. The Claimant urges the Tribunal to consider that: (i) LDA, together with its partner ABG Ports, owned 100% of shares outstanding in ALBA, an Indian company, and LDA's shares alone represent an INK 90,00,00,000 (approximately USD 20.65 million) equity stake;<sup>241</sup> (ii) ALBA was specifically approved by the Indian Finance Ministry's Foreign Investment Promotion Board ("FIPB") as an "operating cum holding company" permitting LDA as "foreign collaborator" to invest in India;<sup>242</sup> (iii) ALBA owned a 63% stake in HBT, the special purpose vehicle established to perform the Contract;<sup>243</sup> (iv) LDA was "actively involved" in the management of both ALBA and HBT, nominating half of ALBA's directors and exercising joint control over the HBI Board<sup>244</sup> and (v) LDA has significant technical financial investments in, and liabilities arising from, the Project.<sup>245</sup> In total, LDA claims to have invested USD "42 million with an exposure to a further 7 million or so on ALBA's debts."<sup>246</sup> Citing *Bavandir v. Pakistan*,<sup>247</sup> it argues that such an investment falls within Article 1 (1)'s definition of investment as "every kind of asset," including "moveable property shares, debentures, rights"<sup>248</sup> and employees.<sup>249</sup> and satisfies even the "most demanding definition of an investment in the *Salini test*".<sup>250</sup>

127. The Claimant characterizes its investment as both direct and indirect and regards the distinction between a direct and indirect investment as immaterial. It states:  
The [only relevant] question is whether there was an "asset [...] invested in the area of the Contracting Party [...] in accordance with the laws of that Contracting Party," and of that there is no doubt.

The fact that an investment may be viewed simultaneously as both a direct Investment in ALBA and as an indirect Investment in HBT is not material to the claim [...]. The Claimant is not a portfolio investor in India ALBA and HBT were the legal entities through which the Claimant participated in the Project at HDC.<sup>251</sup>

It also notes that a shareholder may pursue claims for its reflective loss when its subsidiary is subjected to harm.<sup>252</sup> and points to Article 1 (1)(b) as expressly covering "minority or indirect" forms of interest.<sup>253</sup>

<sup>241</sup> Response to Request, ¶ 27(b), Statement of Claim, ¶ 127.

<sup>242</sup> FIPB Approval dated 16 March 2009 (C-497)

<sup>243</sup> Response to Request, ¶ 27(d) Statement of Claim. ¶¶ 123-124, 128.

<sup>244</sup> Response to Request, ¶ 27(e); Gildas Maire, ¶ 14.

<sup>245</sup> Response to Request, ¶¶ 27(f)-27(g).

<sup>246</sup> Hearing Transcript, dated 5 November 2015, at p 78, lines 12-13.

<sup>247</sup> *Hearing Transcript, dated 5 November 2015, at p 91 lines 15-19 (citing Bayindir Insaat Turizm Ticaret Ve Sanayi A.S v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction dated 14 November 2005, ¶ 115 (CLA-13)).*

<sup>248</sup> Hearing Transcript dated 5 November 2015, at p. 79, lines 13-14

<sup>249</sup> Hearing Transcript dated 5 November 2015, at p. 91 lines 1-5.

<sup>250</sup> Hearing Transcript dated 5 November 2015, at p. 79, lines 18-23 (citing *Salini Costruttori S. p. A & Italstrade S.p.A v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction date 16 July 2001 (RLA- 77)*).

<sup>251</sup> Response to Request, ¶¶ 30-31.

<sup>252</sup> See, e.g., Hearing Transcript dated 5 November 2015, at p. 83, lines 1-18.

<sup>253</sup> Hearing Transcript dated 5 November 2015, at p. 94, lines 24-25 and p. 95, line 1.

128. The Claimant criticizes the Respondent's reliance on *HICEE v. Slovakia*.<sup>254</sup> for the proposition that restrictions on jurisdiction over indirect investment claims would be circumvented by invocation of a direct investment to claim for the same injury, as "circular,"<sup>255</sup> and also argues that the treaty in *HICEE* is distinguishable from the present BIT. The Claimant notes that the tribunal in *HICEE* found "clear evidence of a concordance of views of an agreement between the states and parties to that treaty"<sup>256</sup> to exclude indirect investment made through locally incorporated subsidiaries, supported by an explanatory note to the treaty, and also found evidence of a "deliberate attempt to circumvent"<sup>257</sup> such a restriction. The Claimant submits that there is no comparable evidence in this case either of an express agreement by the Contracting Parties to exclude jurisdiction in these circumstances, or of an attempted circumvention of such agreement by the Claimant in this case.<sup>258</sup>

## *The Respondent's Position*

129. Relying on the decision of the tribunal in *HICEE*.<sup>259</sup> the Respondent insists that the Claimant's losses from a "direct investment in the intermediary company" cannot confer standing to circumvent a minimum ownership requirement imposed on all indirect shareholdings by clear Treaty language.<sup>260</sup> Allowing such an ownership interest to create jurisdiction for intermediary companies by virtue of a claimant's shareholding in a separate parent company would, in the Respondent's view, impermissibly deprive Article 2 (1) of the BIT of effect.<sup>261</sup>

130. The Respondent rebuts the Claimant's attempt to distinguish *HICEE* on the grounds that the treaty in that case was accompanied by an express explanatory note agreed by the relevant State Parties. It contends that the *HICEE* tribunal's decision to foreclose a direct investment reflective loss claim proceeded instead from reliance on the language of the relevant treaty.<sup>262</sup>

131. The Respondent rejects the Claimant's effort to reframe as claim as involving harm to its direct ownership interest in ALBA as too late in these proceedings.<sup>263</sup> The Respondent notes that the Claimant, in its various submissions to the Tribunal, itself repeatedly characterized its investment in indirect investment terms. For example, the Claimant referred to its investment as deriving from its "rights in relation to HBI"<sup>264</sup> and its "interest in" the Contract.<sup>265</sup> The Respondent contends that the Claimant has not presented any evidence of the diminution of the value of LDA shares in ALBA.<sup>266</sup> "which would be required to proceed with a reflective loss claim based on its direct investment, and invokes *Postova Bankav Greece*<sup>267</sup> to suggest that a claim may be rejected on that

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<sup>254</sup> *HICEE (RLA-192)*.

<sup>255</sup> Hearing Transcript dated 5 November 2015. at p. 85, line 24

<sup>256</sup> Hearing Transcript dated 5 November 2015, at p.84, lines 18-20 (quoting *HICEE* ¶¶ 137, 138 (RLA-192)).

<sup>257</sup> Hearing Transcript dated 5 November 2015. at p. 89, line 6.

<sup>258</sup> Hearing Transcript, dated 5 November 2015, at p. 89, lines 5-15.

<sup>259</sup> *HICEE*, ¶¶ 146-147 (RLA-192).

<sup>260</sup> Rejoinder on Jurisdiction, ¶ 63.

<sup>261</sup> Rejoinder on Jurisdiction. ¶¶ 26, 58.

<sup>262</sup> Hearing Transcript dated 5 November 2015. at p. 128, lines 11-15.

<sup>263</sup> Rejoinder on Jurisdiction, ¶¶ 25-26.

<sup>264</sup> Reminder on Jurisdiction, ¶ 49 (citing Response to Request, ¶ 31).

<sup>265</sup> Rejoinder on Jurisdiction, ¶ 52 (citing Notice of Arbitration, ¶ 1.4 (C-420)).

<sup>266</sup> Hearing Transcript dated 5 November 2015, at p. 130, lines 22-25; at p. 131, lines 1 -25: and at p. 132, lines 1 - 25.

basis.

## C, the TRIBUNAL'S ANALYSIS AND CONCLUSIONS

132. As with the First Objection, the Tribunal begins with the ordinary meaning of the Treaty text, Article 1(1) sets forth a very broad definition of investment, as comprising "every kind of asset [...] invested in the area of the Contracting Party" in accordance with its laws. The provision then states that this definition "in particular but not exclusively includes" a list of specified types of assets. The ordinary meaning of the term "includes." in this context, is that the items on the list are a subset of the broader definition, and the phrase "not exclusively" confirms that the identification of a subset is not intended to suggest that *other* types of assets, not so identified, are intended to be excluded. Among the assets specifically identified are shares and other interests in companies incorporated in the host State, and Article 1(1)(f) makes clear that both minority shareholdings and indirect shareholdings qualify as investments within the Treaty definition.
133. The fact that a particular asset falls within the definition of the term "investment" does not necessarily mean that it is a *protected* investment. States are free, if they wish, to extend treaty protection to a subset, rather than to the full universe of potential investments. If they so choose, such carve-outs can be reflected in treaty provisions other than the one defining the basic term "investment." Indeed, the very function of Article 2 of the BIT, as its title indicates, is to delineate the "Scope of the Agreement" a title which, in the Tribunal's view, connotes the Treaty's jurisdictional reach. This reality reflects a threshold flaw in the Claimant's criticism of the First Objection as impermissibly using Article 2(1) to restrict the class of investments purportedly intended to be protected through Article 1(1).<sup>268</sup> Arguably, there would be no need for "scope" provisions at all in investment treaties, if they were presumed to cover the full range of investments and investors covered in the initial definition sections. Accordingly, the Tribunal considers that to determine the intended scope of the BIT, it should start with the language of the provision that purports to delineate its reach, and interpret the terms of that provision in line with the specified definitions, rather than the reverse.
134. Turning, then, to the specific text of Article 2(1), the Tribunal first observes that its initial clause, if read in isolation, *would* seem to confirm the broadest possible scope of protection, since it states that the Treaty "shall apply to *an* investment made by investors of either Contracting Party in the area of the other Contracting Party [...]" (emphasis added), what follows is the word "including" which is curious in this context. Ordinarily and as "includes" is used in Article 1(1) the word "including" would seem to connote that what follows will simply be a *subset* of the broader category of "any investment." confirmed by the first clause to fall within the Treaty's scope of application. A truly literal reading of Article 2(1), focused on the word "including." could thus suggest that it does not function as an exclusion clause at all. The outcome of that approach would be a conclusion that the provision's specific reference to the protection of one form of investment ("including an indirect investment made through another company, wherever located, which is owned to an extent of at

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<sup>267</sup> *Postová Banka, A.S. and Istrokapital v. The Hellenic Republic, ICSID Case No. ARB/13/8, Award dated 9 April 2015 (RLA-242)*

<sup>268</sup> See e.g., Hearing Transcript dated 5 November 2015. at p. 80, lines 16-25 and p 81, lines 1-2 (contending that the object and purpose of the treaty is to promote and protect "investments" as defined in Article, which "Covers every kind of investment"). *see also* Hearing Transcript dated 5 November 2015. at p. 94, lines 24-25 and p. 95, lines 1-8 (objecting that "it makes no sense to interpret Article 2(1) as implying into Article 1 a condition [...] That would be a major limitation on the scope of Article 1. by means of an inference drawn from Article 2.")

least 51 per cent by such investors") is simply informational and confirmatory, rather than operating to exclude from Treaty coverage the corresponding category of indirect investments through companies owned to a lesser extent.

135. While the Claimant noted the possibility of this literal reading, it ultimately accepted as common ground with the Respondent that Article 2(1) does function as a carve-out.<sup>269</sup> While it may seem counter intuitive to infer an exclusionary intent from the use of an inclusionary word, that interpretative tool is well established, as suggested by the Latin maxim *expressio unius exclusio alterius* (*i.e.* that the express mention of one or more things of a particular class may be regarded as impliedly excluding others in that class). If Article 2(1) were not read in this fashion, then little purpose would be served by the second part of the provision specifically confirming the Treaty's extension to the 51% owned entities, the first clause of the provision already would confirm their coverage, since it applies to "any investment" and Article 1(1) already includes indirect shareholdings within the definition of investment. In other words, the only reason to specify that these *particular* forms of indirect shareholdings fall within the scope of the BIT is to indicate that *other* forms of indirect shareholdings do not. The Claimant acknowledges as much, in stating that Article 2(1) "seeks to exclude from the protection of the Treaty a particular class of indirect investment (that would otherwise qualify for protection under Article I(1))".<sup>270</sup>
136. The question of course, is how that class of indirect investment is defined. According to the Claimant, Article 2(1) as "properly construed" applies only to exclude a subset of indirect shareholdings in India "held through companies outside of India"<sup>271</sup> The challenge the Claimant faces is that Article 2(1) does not contain any such geographic limitation; to the contrary, it employs the phrase "wherever located" to describe the intermediate companies, which would seem to negate the overlay of any geographic restriction. The only textual analysis that the Claimant offers to overcome the plain meaning of this term is an argument drawn from the use of the word "in" in the first clause of Article 2(1), providing that the Treaty applies to "any investment made by investors of either Contracting Party in the area of the other Contracting Party" (emphasis added). As noted above, the Claimant construes "in" as meaning "into" or "incoming from abroad," and therefore suggests that the rest of the provision, dealing with intermediate companies, is only addressing potential routing of investments through third countries "before the investment was made *in* India," or otherwise stated, "where the investment has yet to enter into India."<sup>272</sup> According to the Claimant, this reading renders "wherever located" to mean routed through any "location *outside* India," and "[o]nly if the first part [of Article 2(1)] had contemplated an investment *from* India could it be said that 'wherever located' must also encompass a company *in* India."<sup>273</sup> Based on this construction, the Claimant suggests, the Tribunal could maintain literal adherence to the wording of the BIT (without reaching further into object and purpose or supplementary materials), and still reject the Respondent's Second Objection.<sup>274</sup>
137. In the Tribunal's view, however, this interpretation reads far more into the single word "in" than

<sup>269</sup> Hearing Transcript, dated 5 November 2015. at p 95, lines: 9-17 and p.96, lines 2-3. see also Hearing Transcript, dated 5 November 2015 at p 97, lines 15-16.

<sup>270</sup> Response to Request, ¶ 35.

<sup>271</sup> Statement of Claim, ¶ 364 (emphasis in original). see also Response to Request, ¶ 35 (contending that Article 2(1) "applies only to indirect investments held through non -*Indian* intermediate companies) (emphasis added)

<sup>272</sup> Response to Request, ¶ 39 (emphasis in original).

<sup>273</sup> Response to Request, ¶ 39 (emphasis in original).

<sup>274</sup> Hearing Transcript dated 5 November 2015 at p 70, lines 20-22.

that small word reasonably can bear. Moreover, the Claimant's construction of that word potentially proves too much, since it would render the first part of Article 2(1) as essentially limiting the scope of the Treaty's protections "to any investment made by investors of either Contracting Party [*from outside the other Contracting Party coming into*] the area of the other Contracting Party [...]"- but not (as the Claimant says), to investments from within the host State into other companies in the host State. This could mean that once the outside investment enters the host State, any further routing of it through local intermediate entities (even entities that were wholly owned by the foreign investor, and therefore clearly exceed the 51% ownership threshold) might no longer be qualified for Treaty protection, since the subsequent investment flows do not qualify as an investment coming *into* the host State from outside.

138. By contrast, a more natural reading of the word "in" focuses on the ultimate destination of the investment, *i.e.* that protections extend to any investment by the foreign investor that ends up *within* the host State. This reading would make the first clause of Article 2(1) neutral as between investments directly into the vehicle and those routed indirectly into that vehicle through intermediate entities, so long as at the end of that routing, the destination of the investment is within the host State. The function of the second clause of Article 2(1) is to carve out a subset of the latter category, namely for routings through intermediate entities over which the foreign investor does not exercise majority (51% or more) control. The focus is squarely on the extent of the foreign investor's stake in the intermediate vehicle, not on whether that vehicle is located within or outside the host State. This construction restores to the phrase "wherever located" its ordinary meaning ("wherever" denoting anywhere in the world), rather than imposing on it a strained reading of "wherever located except within the host State".
139. For these reasons, the Tribunal considers the ordinary meaning of Article 2(1) to be as the Respondent posits, namely that it restricts the scope of Treaty protections to indirect investments in which an investor from the other Contracting Party owns at least 51% of the intermediate investment vehicle, wherever that vehicle may be located. The Tribunal does not consider the phrase "wherever located" to be ambiguous, on its own or in the context of the rest of Article 2 (I), so as to require resort to supplementary materials as the next step of a VCLT analysis.
140. Nor does the Tribunal consider the ordinary meaning of Article 2(1) to be "manifestly absurd or unreasonable," within the meaning of [VCLT Article 32\(b\)](#). The Claimant argues that there is no logical object or purpose in using Article 2(1) to penalize French investors for channeling minority investments through Indian holding companies, when the Treaty does not carve out any equivalent majority ownership requirement for direct investments in India by the same investors. The Claimant notes that a holding company structure allows a foreign direct investor to establish separate entities for multiple projects in India, a "common corporate arrangement [that] is desirable from an organisational and financial perspective."<sup>275</sup> According to the Claimant, Article 2 "only makes practical sense if it operates not a prohibition on investments in the form of joint ventures with Indian partners," but rather as a mechanism to prevent the BIT from being used to protect investments that in reality are majority owned by *third country* nationals, which instead should be protected only through the treaty framework applicable to those third countries.<sup>276</sup> The Claimant accepts, however, that this asserted "logic of the treaty" requires "a readme in of something which is not in Article 2(1) on its face."<sup>277</sup> since that provision contains no reference to third countries in

<sup>275</sup> Response to Request, ¶ 44.

<sup>276</sup> Hearing Transcript, dated 5 November 2015, at p. 94 lines 17-21; see also p. 96, lines 3-18; and Response to Request, ¶¶ 41-42.

connection with its discussion of indirect investments.<sup>278</sup>

141. The Respondent counters that there is nothing manifestly absurd about its reading of Article 2(1). In fact, the Respondent contends, that reading is consistent with what it claims to be India's "long-standing foreign investment policy" of considering an indirect investment to be "foreign" only when it is made through an Indian company that is owned or controlled by non-Indian residents, but not when ownership and control remains in the hands of Indian residents.<sup>279</sup> The Respondent refers to press notes from India's Ministry of Commerce and Industry regarding the method of calculating foreign investment in Indian companies.<sup>280</sup> For the Claimant, these documents only "internal Indian regulatory reporting requirements designed for another purpose," and do not purport to bear on the understanding of the relevant BIT provisions.<sup>281</sup>
142. The Tribunal does not consider a resort to the internal Indian regulatory documents to be either necessary under a VCLT analysis, given the lack of ambiguity in the Treaty text, nor in any event particularly probative of the intent of the BIT negotiators. The same is true for the Parties' respective citations to French legislative material. The Claimant relies on two reports, one stating that "[a]s far as investments made through a company established in a third State are concerned, these are covered by the Agreement only if that company is in control of at least 51% by a French or Indian investor."<sup>282</sup> and the other indicating that "indirect investments, made by a company established in a third State are covered by the agreement if the latter is controlled of at least 51% by a French or Indian investor."<sup>283</sup> The Respondent contends that these descriptions of the BIT'S application to third-country routing of indirect investments do not purport to limit Article 2(1)'s effects to that scenario, and instead are silent about any implications for indirect investments routed through *host State* companies in which French investors hold minority interests.<sup>284</sup> At the same time, the Respondent cites two *different* French legislative documents which it contends are not limited to the third-country scenario.

One states that "Article 2 specifies that the agreement applies to all investments.[...], including to indirect investments made by a company that is owned to an extent of at least 51% by investors of one of the Contracting Parties."<sup>285</sup> The other provides that "a restriction has been added related to indirect investments (Article 2). Indeed, indirect investments are covered by the agreement only if it is controlled to an extent of at least 51% by a French or Indian investor."<sup>286</sup>

<sup>277</sup> Hearing Transcript dated 5 November 2015, at p. 97, lines 17-19.

<sup>278</sup> In that sense, the BIT may be contrasted with India's later treaty with Kuwait, which expressly provides that it "shall not apply to any indirect investments in a Contracting State *made through a company incorporated in a third state* unless such company is owned to an extent of at least 51% or is controlled by investors of the other Contracting State" (Article 1 of the Kuwait-India BIT (CLA-118) (emphasis added)). The Claimant contends that this essentially is what India must have intended to capture by the earlier less precise drafting in the France-India BIT, while the Respondent argues that the different language in the France-India BIT must be taken as connoting different intent. The Tribunal ultimately does not put significant weight on inferences drawn from comparison of the subject BIT with the later Kuwait-India BIT, for the reasons set forth above generally with respect to such comparisons.

<sup>279</sup> Rejoinder on Jurisdiction, ¶ 38; Hearing Transcript dated 5 November 2015, at page 20, lines 13-24.

<sup>280</sup> Rejoinder on Jurisdiction ¶ 8 & n.44 (citing R-72, R-66, R-69, R-70, R-71, R-73, R-74, R-75, R-76, R-77, R-78, R-79, and R-80); Hearing Transcript dated 5 November 2015, at page 21, lines 1-3.

<sup>281</sup> Hearing Transcript dated 5 November 2015, at p.99, lines 2-7,

<sup>282</sup> French Senate Report No. 314, p.4 (CLA-126; *see also* CLA-172); Response to Request, ¶ 43.

<sup>283</sup> Report No. 1475, p.4 (CLA-173).

<sup>284</sup> Rejoinder on Jurisdiction, ¶ 29.

<sup>285</sup> Legislative Bill No. 231 dated 21 January 1998 p.2 (R-67); Rejoinder on Jurisdiction, ¶¶ 31-32.

<sup>286</sup> National Assembly Commission on Foreign Affairs. Report No. 23 dated 17 March 1999, pp, 9-10 (R-68); Rejoinder on Jurisdiction, ¶¶ 33-34.

143. The coexistence of these four different French reports, generated within a short period of time but containing different descriptions of Article 2(1), does not provide consistent or compelling evidence of France's intent with respect to that provision. The Tribunal thus agrees with professor Lowe QC's observation that:

There is a wonderful symmetry in our submissions because our friends say that two of the documents support their case and two are neutral. We of course, can say precisely the same thing about the documents: two of them support our case and two are neutral. Ultimately. [...] [t]hey do not carry the tribunal very far at all, particularly as they come from one side.<sup>287</sup>

144. Whatever the French documents suggest about France's contemporaneous understanding of Article 2(1), there is no evidence in the record that this understanding was shared either with or by India. As noted above, neither Party has submitted any excerpts from the *travaux préparatoires* nor does the record reflect any documentation from India's own ratification process.

145. In the end, the Tribunal is left where it started, with the unambiguous phrase "wherever located" in Article 2(1). In the absence of any language in the Treaty to suggest a contrary reading of this phrase—and with no compelling evidence from supplementary material that the Contracting Parties mutually intended it to mean something other than what it says.....the Tribunal must treat the language they used in the provision as the "definitive guide" to their contemporaneous intent.<sup>288</sup> In consequence, the Tribunal finds that by virtue of Article 2(1), the Claimant may not proceed under the BIT with a claim for harm to its indirect investment in HBT.

146. This conclusion requires the Tribunal next to examine the Claimant's attempt to invoke Article 5(1) of the BIT (the Most Favored Nation or "MFN" provision) effectively to eliminate the relevant restrictions on consent incorporated within Article 2(1), by positing an entitlement to the "more favourable" treatment of indirect investments under the Germany-India or Kuwait-India BITs.<sup>289</sup> The Tribunal starts by observing that the scope and permissible use of MFN clauses is one of the areas in investment treaty jurisprudence in which a consensus on approach has not yet developed.<sup>290</sup> While this debate takes various different forms and has various different nuances, the issue presented in this case involves certain first principles: whether the BIT's MFN clause may be used to overcome express limits to the threshold scope of the BIT itself and thus to expand its jurisdiction *ratione materiae*. As to that question, the Tribunal has no difficulty concluding that the answer is no. A provision delineating the "*Scope of the Agreement*," as Article 2 by its own title does, functions as a gateway. Only investors and investments that are entitled to pass through that gateway may then invoke the protections of the Treaty's other provisions, including both its provisions on substantive protection and its provisions on dispute resolution.<sup>291</sup> It would turn the whole notion of "scope" on its head to first look to one of the BIT's substantive protections—the

<sup>287</sup> Hearing Transcript dated 5 November 2015, at page 146, lines 20-25, and page 147, lines 1-2.

<sup>288</sup> *Daimler*, ¶ 164 (RLA-209)

<sup>289</sup> Statement of Claim, ¶ 364 (invoking the Germany-India BIT (CLA-117), which contains no minimum shareholding requirement and the Kuwait-India BIT (CLA-118), which excludes only indirect shareholdings through minority interests in intermediate companies incorporated in a "third country"); see also Response to Request, ¶¶ 45-47; Reply on Jurisdiction, ¶ 36

<sup>290</sup> See generally *European American Investment Bank AG (Austria) (EURAM) v. The Slovak Republic*, PCA Case No, 2010-17, Award on Jurisdiction dated 22 October 2012, ¶¶ 437-438.

<sup>291</sup> Cf. *EURAM*, ¶ 446 (noting that dispute resolution clauses in BITs likewise function as "the gateway through which the investor must pass in order to create an arbitration agreement and confer jurisdiction upon a tribunal to hear its claims regarding breach of the standards of treatment to which it is entitled under the BIT. Applying an MFN clause so as to alter the scope of that arbitration provision is therefore a very different matter from applying an MFN clause to the other provisions of the BIT's legal regime which do not have the same dual character:").

entitlement by *covered* investors and investments to treatment no less favorable than that accorded to investors and investments from third States to reason back to determine *which* investors or investments are entitled to coverage in the first place.<sup>292</sup> Stated otherwise, "one must fall within the scope of the treaty [...] to be entitled to invoke the treaty protections, of which MFN treatment forms part. [...] [O]ne must be under the treaty to claim through the treaty."<sup>293</sup>

147. Here, the Claimant's indirect investment in HBT does not fall within the scope of covered investments, because the Claimant chose to make that, investment through an intermediate entity (ALBA) in which it held less than 51% of the shares. Had they Claimant negotiated a different arrangement with its joint venture partner, so the Claimant maintained 51% rather than 49% of the ALBA shares, then the investment structure would not have fallen afoul of the restriction in Article 2(1). That did not happen, however, and the consequence is that this particular indirect investment falls outside Article 2(1)'s express delineation of the "Scope of the Agreement." In these circumstances, it cannot be placed back *within* the scope of the Agreement by observing that *other* investments by the Claimant might be entitled to the benefits of Article 5(1), because that provision extends protections generally to "investments".
148. While it is true (as the Claimant notes) that Article 5(2) also extends MFN protection to "investors."<sup>294</sup> this general language falls far short of signaling an intention to allow such investors the benefit of MFN treatment even with respect to their particular investments that are *excluded* from the Treaty's scope under Article 2(1). In the Tribunal's view, far clearer language would be required in an MFN clause for it to function as a "wild card" that trumps express exclusions from the "Scope of the Agreement." In other words, where the Contracting Parties have seen fit to exclude a particular investment from the scope of the BIT, it is not for a tribunal to rewrite the operative BIT clause, by reference to a different BIT protection (MFN treatment) that is extended to other investments that *do* fall within the treaty's defined scope.
149. With this point established, the only remaining question is whether the Second Objection disposes in its entirety of the Claimant's case, or whether a portion of that case may proceed on a basis *other* than with respect to the Claimant's indirect investment in HBT. There is no dispute, factually, that the Claimant made a direct investment in India in connection with its acquisition of shares in ALBA.<sup>295</sup> and the Claimant asserts that it also invested directly into HBT, including through the commitment of finance, personnel and know-how.<sup>296</sup> While the Respondent contends that the latter

<sup>292</sup> See *Rafat*, ¶¶ 221-222, 224, 228 (RLA-221) (rejecting use of an MFN clause to reach investments beyond those covered by the defined "Scope of the Agreement," because like treaty clauses defining the meaning of "investment," scope provisions "a condition that determines the scope, *ratione materiae*, of the treaty"; as such, it was "clearly a provision which stipulates a condition which must be fulfilled for the treaty beneficiary to have access to treaty protection." including to the MFN clause itself).

<sup>293</sup> *Metal-Tech v. The Republic of Uzbekistan*, ¶ 145 (RLA-224) (emphasis in original). See also *Vannessa Ventures Ltd v. The Bolivarian Republic of Venezuela*, ¶ 133 (RLA-214) (rejecting use of MFN clause to "expand the category of investments" to which the Canada-Venezuela BIT applies, because the benefit of MFN treatment could be asserted only "in respect of investments that are within the scope of [that BIT's definition of covered investments] to begin with"); *Société Générale*, ¶ 41 (CLA-86) (rejecting similar arguments on the basis that "[e]ach treaty defines what it considers a protected investment and who is entitled to dial protection," and the treaty's MFN clause "applies only to the treatment accorded to such defined investment," but not to the threshold categorization of a protected investment itself); *HICEE* ¶ 149 (RLA-192) (rejecting use of MFN to circumvent BIT's applicability only to investments made "either directly or through an investor of a third State." because while an MFN clause may "broaden the scope of the substantive protection granted to the eligible investments of eligible investors." it could not "legitimately be used to broaden" the categories of such investors or investments themselves).

<sup>294</sup> Hearing Transcript dated 5 November 2015, at p. 100, lines 5-8.

<sup>295</sup> Hearing Transcript dated 5 November 2015, at p. 124, lines 21-25 (the Respondent stating, "[w]e concede that they have a direct investment in ALBA [...]. So, there is no question about the existence of a direct investment [.....]").

<sup>296</sup> Response to Request, ¶¶ 27-28; Hearing Transcript dated 5 November 2015, at p. 90, lines 6-25, and p. 91, lines 1-19.

categories do not qualify as assets for purposes of Treaty protection.<sup>297</sup> It does not dispute that the Claimant's direct ownership of shares in ALBA constitutes a qualifying investment in India, entitled to BIT protection.<sup>298</sup> It also accepts that the BIT imposes no majority ownership restriction on the BIT's coverage of direct investments. In other words, it is common ground that the Claimant has standing to pursue a properly framed claim for improper treatment of and injury to its direct investment in ALBA.

150. Where the Parties part ways, however, is whether such a direct investment claim may proceed on the facts and pleadings in this case. According to the Respondent, it may not do so, because the Claimant has not alleged any wrongdoing by India aimed at the Claimant's shareholding in ALBA itself, so any claim pursued on the basis of harm to a direct investment still essentially would be predicated on State action in relation to HBT the indirect investment. This is said to be an impermissible end-run around Article 2(1)'s bar on asserting a claim squarely on the basis of the indirect investment in HBT. In addition, the Respondent argues it is too late in these proceedings for the Claimant to reformulate its claims on the basis of its direct investment, because that was not the formulation presented in its initial pleadings.
151. The Tribunal accepts these objections only in part. It agrees with the Respondent that no jurisdiction would lie for a direct investment claim that is simply a restatement of the indirect investment claim that is excluded from BIT protection under Article 2(1). In other words, in general the Claimant cannot collapse the distinction between the two types of claims by simply positing, with no economic analysis, that its 49% stake in ALBA entitles it automatically to claim for 49% of whatever injury may have been sustained by HBT. On the other hand, if the Claimant properly can frame an analytically claim, focused on alleged wrongdoing by the Respondent that demonstrably injured the Claimant's interest in assets that it directly owns, such a claim in principle would not be barred under Article 2(1).<sup>299</sup> Otherwise, the exclusion (in the second part of that article) for minority stakes in indirect investments would completely swallow the acceptance (in the first part of that article) that any other investments within the definition of Article 1(1) are entitled to treaty protection, including "minority" interests in direct investments under Article 1(1)(f). The Tribunal finds no evidence in the BIT that the Contracting Parties intended to impose limits in this fashion on direct investment claims.
152. The Tribunal does not accept the Respondent's argument that the reverse is true, namely that allowing a properly framed direct investment claim to proceed "renders Article 2(1) meaningless."<sup>300</sup> It goes without saying that Article 2(1) still has significant effect for investors routing indirect investments through third countries, as those cannot possibly be reframed as direct investment claims. Moreover, even for indirect investments routed through intermediate entities in India, such as in this case, there are significant differences (and arguably greater hurdles) in the way such a "double reflective loss" claim would have to be proven, including *inter alia* with respect to issues of causation and loss.<sup>301</sup>

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<sup>297</sup> Rejoinder on Jurisdiction, n.66

<sup>298</sup> Hearing Transcript dated 5 November 2015, at p. 124, lines 21-25 and p. 125, line 1 ("We concede that [...] that direct investment [in ALBA] is itself protected against action by the State directed toward that shareholding investment. So there is no question about [...] the extension of the treaty to protect that investment. The question is how far it protects such direct investments.")

<sup>299</sup> The Tribunal offers no comment on whether there may be other jurisdictional issues to be addressed, including with respect to the additional Objections pleaded by the Respondent and joined to the merits by the Tribunal in its PO2.

<sup>300</sup> Rejoinder on Jurisdiction, ¶ 58.

<sup>301</sup> See, e.g., *ST-AD*, ¶ 282 (explaining that "an investor whose investment consists of shares cannot claim, for example, that the assets of the

153. Nor is the Tribunal persuaded at this point to follow the approach in *HICEE v. Slovakia*, where the tribunal denied a request to re-plead claims in order to focus on alleged injury to a direct investment, following a finding that the Contracting Parties had unmistakably intended to exclude a particular form of indirect investment from BIT protection<sup>302</sup> "The *HICEE* tribunal acknowledged that "[a]s the Tribunal has interpreted the Agreement, it plainly admits a company like [the direct investment] as an investment in its own right." with "[t]he consequence [...] that a claim under the Agreement would lie (in appropriate circumstances) in respect of losses sustained by" the direct investment<sup>303</sup> The tribunal nonetheless concluded that for jurisdiction to exist in that case, any such losses would have to have resulted from wrongful "treatment of" the direct investment, not from mistreatment of the downstream indirect investment causing injury upstream to the direct investment.<sup>304</sup>
154. The Respondent made a similar objection in this case,<sup>305</sup> which the Claimant opposed *inter alia* on the grounds that the objection was "about the merits of the case, the equivalent of a 'motion to dismiss' or an application to 'strike out the case at the preliminary stage, before a full hearing'"<sup>306</sup> In PO2, the Tribunal joined this objection to the merits, along with other objections for which (unlike the Article 2(1) and Article 9 objections) the alleged jurisdictional flaws were closely intertwined with issues of fact. In these circumstances, the Tribunal considers that it would be premature to preclude a direct investment claim at the outset, without further briefing on the facts (including as to which entity or entities the State action or "treatment" in this case was directed), as well as on the proper boundaries between issues of loss causation and jurisdiction For present purposes, the Tribunal confines its observations to the consequences of Articles 1(1) and 2(1), which is that where a treaty decidedly protects *direct* investments in its territory, claims alleging injury to such direct investments as a consequence of State conduct are not so manifestly flawed that they should be barred at the door, simply because the treaty excludes other types of claims alleging harm to certain categories of *indirect* investments.

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company are its property and ask for compensation for interference with these assets. Such an investor can, however, claim for any loss of value of its shares resulting from an interference with the assets or contracts of the company in which it owns the shares") (RLA - 222). As otherwise explained by Professor Zachary Douglas. "[a]n action for a 'direct injury' is premised upon the third party having breached an obligation owed directly to the shareholder rather than just to the company, whereas in an action for 'reflective loss' the shareholder is suing for the diminution of the value of its shares caused by acts of the third party directed to the company itself Reflective loss can be defined as "the diminution of the value of the shares [...] the loss of dividends [...] and all other payments which the shareholder may have obtained from the company if it had not been deprived of its funds. "' Zachary Douglas, *THE INTERNATIONAL LAW OF INVESTMENT Claims* (2009), p. 402 (RLA-I60) (quotations omitted). In this case, the Claimant would need to focus even more squarely on issues of causation, because its claim may be seen as one involving "double reflective loss," i.e., alleged injury to the Claimant resulting from injury to its minority (direct) shareholding in ALBA, flowing from harm to ALBA's interest in HBT. The Respondent contends that the Claimant thus far has not trained its proof as required under reflective loss jurisprudence. Hearing Transcript dated 5 November 2015, at p. 130, line 22 through p. 132, line 5.

<sup>302</sup> In *HICEE*, the relevant BIT defined as "investments" only assets invested directly or "through an investor of a third State." The claimant alleged loss to a downstream investment that was channeled through a vehicle in the respondent State, not through a third State. *HICEE*, ¶¶ 48-49 (RLA-192). The Tribunal noted the existence of express Explanatory Notes confirming that while "[n]ormally, investment protection agreements also cover investments in the host country made by a [...] company's subsidiary which is already established in the host country, in this case one State Party "wishes to exclude the sub-subsidiary from the scope of this Agreement," and the other State Party "has consented to it." *HICEE*, ¶ 126 (quoting Explanatory Note) (RLA-192).

<sup>303</sup> *HICEE*, ¶ 147 (RLA-192).

<sup>304</sup> *HICEE* ¶ 147 (RLA-192).

<sup>305</sup> See Counter-Memorial, ¶ 162 (contending, as part of the Respondent's Fifth Objection, that jurisdiction exists *prima facie* only if the qualifying investment, in this case a shareholding interest, itself was the object of allegedly unlawful treatment).

<sup>306</sup> Response to Request, ¶ 89 See also Hearing Transcript dated 5 November 2015, at p. 83, lines 1 -24 (arguing that the notion that claims cannot be brought for injury "by action that is directed at another person [...] is based on a fallacy, but more important, [...]it is essentially a question of the limits of liability and of remoteness which is a merits question." not an issue of the Tribunal's "jurisdiction to hear that question").

155. The Tribunal further does not accept the Respondent's argument that it is simply too late in these proceedings for the Claimant to seek to proceed on the basis of alleged harm to its direct investment, while it is true that the Claimant's initial pleadings did not formulate the claim in this way,<sup>307</sup> they did clearly allege the factual predicate of a direct investment in India. Moreover, the Claimant made clear immediately after the Respondent's request for bifurcation that it intended to proceed in the alternative on the basis of its direct investment, should the Tribunal find jurisdiction to be lacking over its indirect investment claim<sup>308</sup> Article 20 of the UNCITRAL. Rules permits amendment of claims absent undue prejudice<sup>309</sup> and those Rules permit a tribunal to allow reformulations, with appropriate adjustments to the procedural timetable, rather than dismissing a case outright and requiring it to be refiled with somewhat different emphasis.<sup>310</sup> Proceeding in this fashion is particularly appropriate given the Respondent's concession that Article 2(1) does not exclude jurisdiction over a properly trained claim to a direct investment in India.<sup>311</sup>
156. It is not clear to the Tribunal whether the Claimant considers its present Memorial (with supporting witness statements, expert reports and exhibits) adequate to support claims focused on harm to its direct investment, or whether it would seek the opportunity to amend or supplement such a filing in light of the Tribunal's ruling that such claim must be analytically distinct from one predicated on a right to pursue a claim for harm to its indirect interest in HPT. The Tribunal invites the Claimant to indicate, within thirty days of this Decision, whether it intends to rest on its present submission, or seeks an opportunity to amend or supplement. The Tribunal recognizes that certain adjustments may be required to the procedural schedule (including a deferral of the currently reserved hearing dates), in order to provide adequate time to the Respondent to consider the implications of the Claimant's decision and in particular any amended or supplemented Memorial.

## VII. DISPOSITIF

157. For the reasons set out above the Tribunal unanimously  
A DISMISSES the Respondent's First Objection.

B. FINDS, with respect to the Respondent's Second Objection that,

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<sup>307</sup> Notification of Claim, ¶ 6 (C-414) (alleging that India "has jeopardized and deprived LDA of its Investment comprising of its interest in the [Contract]"); Notice of Arbitration, ¶ 1.4 (C-420). (describing the dispute as arising out of "India's conduct in jeopardising and ultimately dispossessing LDA of its Investment, comprising of its interest in the [Contract]"); Statement of Claim, ¶¶ 359-360 (alleging that "the Claimant holds an investment in India, in the form of an indirect shareholding in HBT" and "through its shareholding, the Claimant holds partial rights (in the ratio 49.51 as set out above) to money and claims for performance under the Contract. Consequently, the Claimant's indirect shareholding of and rights in the Contract held by HBT qualify as a protected investment in India").

<sup>308</sup> Response to Request, ¶¶ 32-33, 47. See also Hearing Transcript dated 5 November 2015. at p. 92, lines 13-17 ("We are making no pretence that the claimant went through and considered at the beginning every conceivable formulation of its case that it could have put forward in legal terms so that they could be there. It put the facts out and puts its claim out [...]").

<sup>309</sup> Article 20 of the UNCITRAL Rules reads "During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances [...]"

<sup>310</sup> See, e.g., *Methanex v. United States*. UNCITRAL Case, Partial Award dated 7 August 2002, ¶ 79 (deciding that the claimant's amended statement of claim, "as a whole, cannot withstand the USA's jurisdictional challenge [...] but that it is possible that a fresh pleading from Methanex re-stating part of its existing case could survive that challenge," and therefore granting the claimant an opportunity to further amend its statement of claim, based on Article 20 of the UNCITRAL., Arbitration Rules)

<sup>311</sup> Hearing Transcript dated 5 November 2015, at p. 124, lines 21-25 and p. 125, line 1.

1. the Claimant may not proceed under Article 2(1) of the Treaty with a claim with respect to its indirect investment in HBT:

2. the Claimant may proceed under Article 2(1) of the Treaty with a claim with respect to its direct investments in India.

C. INVITES the Claimant to notify the Tribunal, the Respondent, and the PCA within thirty days of this Decision, whether it intends to amend or supplement its present submissions. in light of this Decision, and

D. DEFERS consideration of costs until a Later phase of these proceedings.