

4A\_616/2015<sup>1</sup>

Judgment of September 20, 2016

First Civil Law Court

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

X. \_\_\_\_\_ SA,  
Represented by Mr. Giorgio Campá,  
Appellant

v.

The Socialist Republic of Vietnam,  
Represented by Mr. Thomas Sprecher,  
Respondent

Facts:

A.

A.a. On May 26, 1992, the Government of the French Republic and the Government of the Socialist Republic of Vietnam signed an agreement in Paris for the Reciprocal Encouragement and Protection of Investments (hereafter: the BIT, for Bilateral Investment Treaty). The aforesaid agreement entered into force on August 10, 1994, and contains the following provisions pertinent to this dispute:

**Preamble**

The Government of the French Republic and the Government of the Republic of Vietnam, hereafter "The Contracting Parties".

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<sup>1</sup> Translator's Note:

Quote as X. \_\_\_\_\_ SA v. Vietnam, 4A\_616/2015.

The decision was issued in French. The full text is available on the website of the Federal Tribunal, [www.bger.ch](http://www.bger.ch).

Desiring to expand economic cooperation between the two states and to create favorable conditions for French investments in Vietnam and Vietnamese investments in France,

Convinced that encouragement and protection of such investments are apt to stimulate the transfer of capital and technology between the two countries in the interest of their economic development, have agreed as follows:

#### **Article 1**

For the purposes of this Agreement:

1. "Investment" means assets such as goods, rights and interest of any nature and more specifically but not exclusively:

- a) Moveable and immoveable property and any other property rights such as mortgages, liens, usufructs, sureties, and similar rights;
- b) Shares, share issue premiums and other forms of shares, even minority or indirect, in companies constituted on the territory on one of the Contracting Parties;
- c) Debentures, debt obligations and any rights to any performance having economic value;
- d) Copyrights, industrial property rights (such as patents, licenses, registered trademarks, industrial design and models), technical processes, deposited names and clientele;
- e) Concession confirmed by law or under contract, in particular concessions to search for, cultivate, extract or exploit natural resources, including those in the maritime zone of the contracting parties, provided the aforesaid assets are or have been invested in accordance with the laws of the contracting party on the territory or in the maritime zones in which the investment was made before or after the entry into force of this Agreement.

A subsequent change of the form in which the investments have been made shall not affect their qualification as investments, provided such a change does not contradict the laws of the Contracting Party on the territory or in the maritime zones of which the investment has been made.

[...]

#### **Article 4**

Each Contracting Party shall apply on its territory and in its maritime zones to the nationals or companies of the other Parties as to their investments and activities connected to these investments a treatment comparable to that granted to its nationals or companies and not less favorable than the treatment accorded to the nationals or companies of the most favored nation. In this capacity, the nationals authorized to work on the territory and in the maritime zones of one of the contracting parties shall benefit from appropriate material facilities to carry out their professional activities.

However, such treatment shall not extend to the privileges a Contracting Party grants to the nationals or companies of a Third State, based on its participation or acquisition in a free trade area, a custom union, a common market, a mutual economic assistance organization or any other regional economic institution.

[...]

## Article 8

1. Any dispute with respect to investments between one of the contracting Parties and a national or a company of the other Contracting Party shall be resolved amicably between the two parties involved as far as possible.

2. If such a dispute cannot be solved within six months from the date it was raised by one of the parties to the dispute, it may be submitted in writing to arbitration by one or the other parties to the dispute. The dispute shall then be finally decided in accordance with the arbitration rules of the United Nations Commission on International Trade Law as adopted by the General Assembly of the United Nations in its Resolution 31-98 of December 15, 1976.

When both Contracting Parties become parties to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States concluded in Washington on March 18, 1965, the International Center for the Settlement of Investment Disputes (ICSID) shall substitute the procedure defined at the proceeding paragraph for the settlement through arbitration of the disputes between one of the contracting parties and a national or a company of the other contracting party.

A.b. From 1986 to 1998, whilst Vietnam went through a period of economic and food crisis as it was subject to a trade embargo and other sanctions by the United States of America, the French company X. \_\_\_\_\_ SA (hereafter: X. \_\_\_\_\_), active in trading commodities and goods, entered into numerous contracts to supply and exchange products with Vietnamese companies and other entities controlled by the State. First, it supplied Vietnam with large quantities of food (flour, powdered milk, butter, oil, etc.), basic necessities (fertilizers, cement, steel frames, jute bags, etc.), and farming equipment in exchange for Vietnamese products (rice, coffee, soya, cassava, shrimp, fish, etc.), which it imported into France or against payment.

Pursuant to a permit issued by the Vietnamese Ministry of Trade of July 10, 1991, X. \_\_\_\_\_ also opened a permanent representative office in Ho Chi Minh City.

B.

Convinced that it was not receiving a fair return on its investment made in Vietnam, X. \_\_\_\_\_ initiated arbitration proceedings against the Socialist Republic of Vietnam on July 19, 2013, on the basis of Art. 8(2) of the BIT, with a view to obtaining payment of USD 66'018'172.84.

In its answer to the request for arbitration of August 7, 2013, the Defendant argued that the Claimant made no investments protected by the BIT.

A three-member Arbitral Tribunal was constituted pursuant to the Arbitration Rules of the United Nations Commission on International Trade (UNCITRAL), with its seat set in Geneva. English was the language of the arbitration.

Upon request from the Defendant, which asked it to decide a number of preliminary procedural issues, the Arbitral Tribunal decided on April 3, 2015, to bifurcate the proceedings (hereafter: "Decision on Bifurcation")

and to examine first, among other objections, whether X.\_\_\_\_\_ made an investment qualifying for protection under the BIT.

After giving the parties the opportunity to present their arguments in this respect, both in writing and in a hearing held on June 2 and 3, 2015, in Singapore, the Arbitral Tribunal issued a final award on September 28, 2015, the operative part of which declined jurisdiction to address the claim raised by X.\_\_\_\_\_. The reasons leading it to this result will be explained later on insofar as they are necessary.

C.

On November 5, 2015, X.\_\_\_\_\_ (hereafter: the Appellant) filed a civil law appeal for breach of Art. 190(2)(b) and (d) PILA,<sup>2</sup> requesting the Federal Tribunal annul the aforesaid Award.

On December 14, 2015, the Permanent Court of Arbitration, with the agreement of the chairman of the Arbitral Tribunal, sent the file of the case to the Federal Tribunal on a USB key.

In a brief of December 17, 2015, the Socialist Republic of Vietnam (hereafter: the Respondent) asked that the Appellant be required to provide security for costs. The request was rejected by an order of the Presiding Judge of February 15, 2016, along with the Appellant's motion seeking an order for the Respondent to file its briefs in French.

In a letter of February 26, 2016, the Chairman of the Arbitral Tribunal advised the Federal Tribunal that the grievances raised by the Appellant appeared to him to be groundless.

In its answer of March 14, 2016, the Respondent submitted that the Appeal should be entirely rejected.

In its reply of April 5, 2016, and in its rejoinder of April 21, 2016, the Appellant and the Respondent confirmed their submissions.

On May 4, 2016, the Appellant filed a spontaneous additional brief, which the Respondent answered on June 2, 2016.

In a final letter of June 8, 2016, the Appellant made reference to its previous writings, claiming to have already rebutted its opponent's arguments.

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<sup>2</sup> Translator's Note:

PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

Reasons:

1.

According to Art. 54(1) of the Law on the Federal Tribunal of June 17, 2005, (LTF,<sup>3</sup> RS 173.110), which came into force on January 1, 2007, the Federal Tribunal issues its judgment in an official language,<sup>4</sup> as a rule, in the language of the decision under appeal. When the decision is in another language (here, English) the Federal Tribunal resorts to the official language chosen by the parties. Before the Arbitral Tribunal, they used English, whilst in the briefs filed with the Federal Tribunal, they used French (the Appellant) or German (the Respondent), thus complying with Art. 42(1) LTF in connection with Art. 70(1) CST<sup>5</sup> (Judgment 4A\_386/2015<sup>6</sup> of September 7, 2016, destined to be published at 1). In accordance with its practice, the Federal Tribunal shall consequently issue its judgment in French.

2.

A civil law appeal is admissible against awards concerning international arbitration pursuant to the requirements of Art. 190-192 PILA (Art. 77(1)(a) LTF). Whether as to the object of the appeal, the standing to appeal, the time limit to appeal to appeal, the Appellant's submissions, or the grievance raised in the appeal briefs, none of these admissibility requirements raises any problem in the case at hand. The matter is therefore capable of appeal.

3.

In a first and main argument based on Art. 190(2)(b) PILA, the Appellant argues that the Arbitral Tribunal wrongly declined jurisdiction to address the claim submitted to it.

3.1.

3.1.1. Seized of a jurisdictional defense, the Federal Tribunal freely reviews the legal issues, including preliminary issues, which determine the jurisdiction of the arbitral tribunal or the lack thereof. Yet, this does not turn it into a court of appeal. Thus, it is not for this Court to go looking for the legal arguments in the award under appeal that may justify upholding the grievance based on Art. 190(2)(b) PILA. Rather, it behooves the Appellant instead to draw the Court's attention to them, in order to comply with the requirements of Art. 77(3) LTF (ATF 141 III 495<sup>7</sup> at 3.1 and the cases quoted).

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<sup>3</sup> Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

<sup>4</sup> Translator's Note: The official languages of Switzerland are German, French, and Italian.

<sup>5</sup> Translator's Note: CST is the French abbreviation for the Swiss Federal Constitution.

<sup>6</sup> Translator's Note: The English translation of this decision is available here:  
<http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network>

<sup>7</sup> Translator's Note: The English translation of this decision is available here:  
<http://www.swissarbitrationdecisions.com/swiss-supreme-court-addresses-difference-between-treaty-claims-and-contract-claims>

3.1.2. The Federal Tribunal reviews the findings of facts only within prescribed limits, even when it examines an argument based on the lack of jurisdiction of the arbitral tribunal (case quoted, *ibid.*). The Court must make its decision on the basis of the facts found in the award under appeal (see Art. 105(1) LTF), it may not rectify or supplement *ex officio* the factual findings of the arbitrators, even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). However, there is the possibility that may review the factual findings on which the award under appeal is based if one of the grievances mentioned in Art. 190(2) PILA is raised against such factual findings or if some new facts or evidence are exceptionally taken into account in the framework of the civil law appeal procedure (Judgment 4A\_342/2015<sup>8</sup> of April 26, 2016, at 3).

It must be pointed out that the findings of the arbitral tribunal as to the procedural aspects of the arbitration bind the Federal Tribunal as well, subject to the same reservations, whether they concern the submissions of the parties, the facts claimed or their legal arguments, the statements made during the case, the submissions of evidence, or the content of a witness statement or an expert report, or even the information gathered during an on-site visit (judgment quoted, *ibid.*).

3.2. Before addressing the argument concerning the jurisdiction of the Arbitral Tribunal – subject to these reservations – it is appropriate to summarize the reasons for which it refused to accept the Appellant’s claim. To keep it simple, the summary of the reasons contained in the award shall take the form of a direct quote.

3.2.1. As a preliminary matter concerning the burden of proof as to the decisive facts to decide the issue of the jurisdiction of the Arbitral Tribunal, it must be pointed out that the burden is not solely upon the Appellant’s shoulders, no matter what the Respondent says. Indeed, if the Appellant, which had the burden of proof, succeeded in establishing *prima facie* that the Arbitral Tribunal has jurisdiction to address the claim, it would then behoove the Respondent to demonstrate that it does not upon closer inspection.

3.2.2. This being so, the scrutiny of the case will begin with an inquiry as to the meaning of the word “investment” as defined at Art. 1(1) of the BIT. It must be recalled in this regard that pursuant to Art. 31(1) of the May 23, 1969, Vienna Convention on the Law of Treaties (hereafter: VC; RS 0.111), a treaty shall be interpreted in good faith in accordance with the ordinary meaning given to its terms in their context and in light of the object and the purpose of the treaty.

The ordinary meaning of the expression at issue remains one of the most disputed to this day in international investment litigation and countless attempts have been made by arbitral tribunals applying ICSID or UNCITRAL rules or those of other arbitral institutions to outline its contours. However, there is no need to enter into this debate here; indeed the issue is *first* to define the expression “investment” as it appears in the BIT at issue and not as defined pursuant to other bilateral treaties. *Second*, there is no rule requiring an arbitral tribunal to heed decisions previously taken by other arbitral tribunals on the same issue, as they are

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<sup>8</sup> Translator’s Note:

The English translation of this decision is available here:  
<http://www.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties>

not binding precedents. *Third*, as this arbitration is under the UNCITRAL rules, the criteria germane to ICSID arbitrations are not to be taken into consideration. The Appellant concentrates on Art. 1(1)(c) of the BIT to bring into the category of protected investments, “the divestitures of companies, debt obligations, claims and rights to any performance having economic value”. For its part, the Arbitral Tribunal considers that Art. 1(1) of the BIT, which contains an illustrative list of such investments, must be read in its entirety. It shows that once the existence of assets, such as the goods, rights, and interests of any nature is indeed a necessary condition to be able to talk of investment, it is not a sufficient condition for this purpose because the aforesaid assets must also have been invested in the territory or in the maritime zones of the host State. This additional requirement rises from paragraph (e) of Art. 1(1) of the BIT. Moreover, it would make no sense to limit its scope to this paragraph, which deals with concessions because, by definition, a concession may be granted only on the territory of the maritime zone where the State exercises its sovereignty. In other words, if the requirement were not extended to all assets considered by the caption of Art. 1(1) BIT, the assets could qualify as investment whether or not they were invested within the boundaries of the host State, which would be completely unreasonable and moreover inconsistent with the text, object and purpose of the BIT. Therefore, the Arbitral Tribunal considers that the wording of the BIT, interpreted in good faith and according to its ordinary meaning, subjects the recognition of an investment to the fulfillment of the following three cumulative conditions: first, the existence of assets according to the list at Art. 1(1)(a) to (e) of the BIT or of similar assets; then, the investment of these assets in the territory or in the maritime zone of the contracting party; finally, the conformity of the investment with the laws of the host State.

The aforesaid interpretation is confirmed by the context, the object and the purpose of the treaty, and according to Art. 31(2) VC, the context shall, in particular, comprise the text of the treaty as well as its preamble and annexes. From this point of view, the Arbitral Tribunal notes that all of the provisions of the BIT granting material protection to the investments see their scope limited to the territory and to the maritime zone of the host State. The same applies to the preamble, which seeks to create favorable conditions to for “French investment in Vietnam and Vietnamese investments in France”. Thus, the territorial element was crucial to the contracting parties at the time the BIT was concluded and constituted therefore, in their view, an essential feature of the notion of investment. The text of the preamble also shows that the contracting parties concluded the BIT in order to stimulate the transfer of capital and technology between the two countries.

The Appellant objected that the French *travaux parlementaires* that preceded the ratification of the BIT showed that the contracting parties had as broad as possible a definition of investment in mind. To do so, it relies on Art. 31(4) VC, according to which, a special meaning shall be given to a term if it is established that the parties so intended. As to this objection, it must be emphasized that the Appellant produced the *travaux préparatoires* of only one of the contracting parties. Furthermore, it must be pointed out that in any event, the French *travaux parlementaires* do not suggest that the expression “investment” should be given a specific meaning, on the contrary, they confirmed that the investment, however broad as a notion, must be made in the territory or the maritime zone of the host state in conformity with the laws of that state. In reality, the *travaux parlementaires* could at best be likened to a supplementary means of interpretation. However, the requirements under which Art. 32 VC permits the use of such means are not met in the case at hand, as the

very recourse to the principles of interpretation set out at Art. 31 VC make it possible to give a meaning to the expression “investment”.

3.2.3. It remains to be seen whether the Appellant made an investment within this meaning. The Appellant argues that the contracts it entered into with various Vietnamese companies were part of a program of food assistance organized by the Vietnamese state with a view to distributing large quantities of food and basic necessities as well as hardware and equipment in the provinces of the country. With the Respondent, the Arbitral Tribunal finds that it did not produce the slightest evidence of the existence of such a program in which it participated. Similarly, the documents in the file do not reveal any transfer of know-how, capital, or technology by the Appellant between France and Vietnam.

According to the Appellant, the activities of its permanent office in Hô-Chi-Minh-City were undeniable proof of its presence on the territory of Vietnam and consequently of the investment it made “in” this country. It is not so. Indeed, the Appellant’s presence on Vietnamese territory, evidenced by the permanent office, remained very limited and merely consisted of tasks belonging to administrative assistants – tasks impossible to label “investments” – such as signing contracts through the aforesaid office on the Appellant’s behalf and a mere intermediary or contact-point role paid by this office between the Appellant and the Vietnamese company parties to the distribution contract. Moreover, none of the 29 exhibits invoked by the Appellant is sufficient to substantiate its claim that the representative office organized the redistribution of products in Vietnamese territory, made an important contribution to training the staff of this country, or transferred the Appellant’s know-how to the Respondent. In short, most activities of the Appellant – and in any event, those through which it claims to have contributed to the development of the Vietnamese economy – were undertaken outside the territory of Vietnam. As to the other projects alleged by the Appellant, namely the construction of a slaughterhouse and a high-technology freezing unit, none of them saw the light of day, according to the arbitration file. In any event, the claims in the arbitration do not arise from such projects but from the failure to pay for the goods, pursuant to the sales contracts.

3.2.4. On the basis of this review, the Arbitral Tribunal considers that the Appellant did not participate in any food-aid program in Vietnam and actually failed in its attempt to demonstrate that such a program ever existed. Moreover, it is of the opinion that the Appellant carried out no transfer of know-how, capital, or technology to Vietnam. Furthermore, the Appellant’s presence in the country was very limited and essentially consisted of providing administrative aid for activities deployed outside Vietnamese territory. Thus and as, according to the definition the Arbitral Tribunal gave, an investment within the meaning of Art. 1(1) of the BIT requires assets to have been invested into the territory or the maritime zone of the host state that is a party to the treaty, one must declare that the Appellant did not make an investment in Vietnam.

Consequently, the Arbitral Tribunal has no jurisdiction to address the Appellant’s claim.

3.3. In its appeal brief and subsequent writings, the Appellant essentially argues that the Arbitral Tribunal wrongly declined jurisdiction. According to the Appellant, the arbitrators disregarded the broad concept of investment which arises from the interpretation of Art. 1(1) of the BIT in the light of the resolutions generally



adopted in bilateral investment treaties, of the practice followed by the parties in their relationships with other states, and arbitral case law in this field, by including conditions that were not in this provision, such as the necessity of the transfer of technology, capital, or know-how to Vietnam or also an effective presence of the investor on the territory of the host state. Still according to the Appellant, the Arbitral Tribunal gave too much importance to the preamble of the treaty and neglected the lessons to be drawn from consulting the *travaux parlementaires* prior to the ratification of the BIT by France and did not see that the common intent of the parties to the treaty was to adopt a broad definition of investment, which would also cover import-export activities, which are the object of this dispute at hand.

### 3.4.

3.4.1. To this day, there is no definition set and unanimously accepted of the concept of “investment” in bilateral or multilateral international treaties concerning the protection and the promotion of investments (Manjolia Manoku, *La notion d’investissement dans l’arbitrage basé sur les traités de protection et de promotion des investissements*, in *Notions-cadre, concepts indéterminés et standards juridiques en droit interne, international et comparé*, Cashin Ritaine / Maître Arnaud (ed.), 2008, p. 381 ff, 402 i.f.). Arbitral tribunals also do not have the same approach to the aforesaid notion (Grisberger and Voser, *International Arbitration* 3<sup>rd</sup> ed. 2016, n. 1821); moreover, the solutions developed by case law are not legally binding upon the arbitral tribunals in subsequent investment arbitrations (Eleanor McGregor, *L’arbitrage en droit public Suisse*, 2015, p. 233, n. 725), so it appears difficult to take into account the arbitral case law issued in this field as a source of arbitration law (see *mutatis mutandis*, judgment 4A\_110/2012<sup>9</sup> of October 9, 2012, at 3.2.2 concerning the awards of the Court of Arbitration for Sport; however, see Emmanuel Gaillard, *L’arbitrage sur le fondement des traités de protection des investissements*, *Revue de l’arbitrage* 2003, p. 835 ff, 858, n. 7 and more generally Fouchard, Gaillard, and Goldman, *Traité de l’arbitrage commercial international*, 1996, n. 371 ff). Thus, the notion of investment is not necessarily the same from a legal point of view as, say, the economic definition and moreover its legal definition varies from one arbitral tribunal to the other, let alone the multiple doctrinal opinions advanced in this respect (see among others Beatrice Grubenmann, *Der Begriff der Investition in Schiedsgerichtsverfahren in der ICSD-Schiedsgerichtsbarkeit*, 2010, p. 36 ff and the references; Dieudonné Edouard Onguene Onana, *La qualification d’investissement étranger*, 2011, p. 225 ff).

The foregoing observation shows that the Arbitral Tribunal was right to focus its attention on the very text of the BIT rather than trying to establish a meaning to be given to the word “investment” used by the signatories of the treaty in some arbitral awards issued with regard to different international agreements. The consequence is also that the numerous references made by the Appellant to the definition that arbitral tribunals gave to this expression in another legal framework unfortunately do not help it at all.

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<sup>9</sup> Translator’s Note:

The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/grounds-challenge-arbitrator-must-be-raised-immediately-after-one-becomes-aware-them>

On the other hand, as the definition of investment within the meaning of Art. 1(1) BIT came from three arbitrators whose experience in this field and international reputation are acknowledged by both parties, the Federal Tribunal, whilst having full power of review in this respect, will not depart without necessity from the unanimous opinion expressed by specialists in this issue as to the legally undetermined notion of investment.

3.4.2. Like any treaty, the BIT must be interpreted in good faith, in accordance with the ordinary meaning of the terms contained in the treaty in their context and in the light of its object and purpose (Art. 31(1) CV; 141 III 495<sup>10</sup> at 3.5.1, p. 503). Pursuant to Art. 31(2) VC, the preamble is a constitutive element of the context.

On the basis of the reasons developed in its award, as summarized above and no matter what the Appellant says, the Arbitral Tribunal did not disregard these principles at all by interpreting Art. 1(1) of the BIT as it did, mainly by emphasizing the principle of territoriality or the “foreignness” of the investment and consequently excluding from this notion mere contracts of sale or barter such as those on which the Appellant based its claim, even though such contracts, concluded in numbers and during a relatively long period, necessarily implied the transfer of merchandise from France to Vietnam (sale), and *vice-versa* (barter) and, as to some of them, led to the Vietnamese companies taking delivery of the merchandise, issuing acknowledgements of debt. In this respect, it is wrong to argue, as the Appellant does, that the arbitrators added some conditions or criteria to the definition of investment that did not belong there by emphasizing the absence of proof of a food program in Vietnam in which the Appellant would have participated, a transfer of know-how, capital, or technology to that country that the latter made or simply a presence of some importance of the alleged investor in the host state. On the one hand, as to the aid program in favor of Vietnam and the activity carried out by the representative office in Hô-Chi-Minh-City, they merely examined whether the Appellant’s allegations corresponded to reality. On the other hand, and more generally, far from adding new conditions to the definition of investment within the meaning of Art. 1(1) BIT, they use these allegedly “additional” criteria only to verify if the requirement of territoriality was met *in casu*. Moreover, despite what the Appellant says, they rightly refused to give importance to the result of the *travaux parlementaires* conducted by one of the two parties to the treaty only, namely France.

3.4.3. Moreover, the subsumption made by the Arbitral Tribunal from its correct interpretation of the provision of the BIT in dispute is intimately connected to the finding of the factual circumstances of the case pertinent in this respect. As such a finding falls within the exclusive domain of the facts, it is entirely beyond the review of the Federal Tribunal (see 3.1.2, above).

3.4.4. Consequently, the Arbitral Tribunal rightly declined jurisdiction to address a claim not falling within the scope of the BIT.

Consequently, the argument based on the violation of Art. 190(2)(b) has no merit.

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<sup>10</sup> Translator’s Note:

The English translation of this decision is available here:

<http://www.swissarbitrationdecisions.com/swiss-supreme-court-addresses-difference-between-treaty-claims-and-contract-claims>

4.

4.1. Second, the Appellant invokes Art. 190(2)(d) PILA and argues that the Arbitral Tribunal violated its right to be heard by reversing the burden of proof. According to the Appellant, the Arbitrators blatantly disregarded that guarantee by blaming it for failing to produce the Vietnamese *travaux parlementaires* concerning the ratification of the BIT even though it had demonstrated *prima facie* the jurisdiction of the Arbitral Tribunal by submitting the French *travaux parlementaires* and because, in the opinion of the same Tribunal, in such a case it behooved the Respondent to produce evidence to the contrary while submitting, if necessary, the *travaux* of its parliament, which the Appellant could not do due to a ban on the dissemination of such documents arising from French law on foreign policy. Disputing any reversal of the burden of proof by the Arbitral Tribunal, the Respondent also submits that the grievance raised by the Appellant had been forfeited because, at the end of the June 3, 2015, hearing, the Appellant indicated to the chairman of the Arbitral Tribunal that it had no objection to raise as to the manner in which the proceedings had been conducted so far.

4.2. According to case law, the party that considers itself to be a victim of a violation of its right to be heard or another procedural deficiency must invoke it immediately in the arbitral proceedings under penalty of forfeiture. It is indeed contrary to good faith to invoke a procedural deficiency only in the framework of an appeal against the arbitral award when the deficiency could have been mentioned during the proceedings (Judgment 4A\_392/2015<sup>11</sup> of December 10, 2015, at 4.2).

This case law is obviously not applicable in the case at hand as the Appellant complains about a reversal of the burden of proof which, if it existed, it discovered only by reading the Award under appeal, thus this party cannot be hampered by statements made previously.

The second argument is therefore capable of appeal.

4.3.

4.3.1. The manner in which the rules of the burden of proof were applied evades a review by the Federal Tribunal when seized of a civil law appeal against an international arbitral award (unpublished 4.3.2 in the aforesaid 141 III 495<sup>12</sup>) because such rules are not part of substantive public policy within the meaning of Art 190(2) PILA (Judgment 4A\_606/2013<sup>13</sup> of September 2, 2014, at 5.3 and the precedent quoted).

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<sup>11</sup> Translator's Note: The English translation of this decision is available here:  
<http://www.swissarbitrationdecisions.com/atf-4a-392-2015>

<sup>12</sup> Translator's Note: The English translation of this decision is available here:  
<http://www.swissarbitrationdecisions.com/swiss-supreme-court-addresses-difference-between-treaty-claims-and-contract-claims>

<sup>13</sup> Translator's Note: The English translation of this decision is available here:  
<http://www.swissarbitrationdecisions.com/challenge-expert-forfeited-if-not-filed-immediately>

The Appellant disregards this case law by inviting this Court to take note of a reversal of the burden of proof that the Arbitrators made to its detriment. Be this as it may, the argument is devoid of any basis. Indeed, contrary to what the Appellant argues, the Arbitral Tribunal did not find that it established its jurisdiction *prima facie* by submitting the exhibits concerning the French *travaux parlementaires* before the ratification of the BIT. Instead, it drew from these documents the confirmation of its interpretation that a qualifying investment under the treaty was subject to having been made in the territory or the maritime zone of the host state.

4.3.2. The right to be heard, as guaranteed by Art. 182(3) and 190(2)(d) PILA includes the right to adduce evidence under certain conditions (142 III 360<sup>14</sup> at 4.1.1 and the cases quoted).

In the case at hand, it does not appear from the explanations of the Appellant that it was deprived of exercising this right or that, in this respect, it was treated in a manner less favorable than the Respondent. Moreover, one does not understand how it could blame the Arbitral Tribunal or its opponent for the alleged inability to produce the *travaux préparatoires* concerning the negotiation of the BIT, which neither of them could access as their root was in a law concerning the conduct of foreign policy of its own country. Moreover, the Appellant does not argue that it asked the Arbitral Tribunal to request the Vietnamese government produce the documents that the French government was not willing to provide.

4.3.3. That being so, the submission based on a violation of the right to be heard is doomed too, which leads to the appeal being rejected.

5.

The Appellant loses and shall pay the costs of the federal proceedings (Art. 66(1) LTF) and must compensate the Respondent (Art. 68(1) and (2) LTF).

Therefore, the Federal Tribunal pronounces:

1.

The appeal is rejected.

2.

The judicial costs set at CHF 100'000 shall be borne by the Appellant.

3.

The Appellant shall pay to the Respondent an amount of CHF 150'000 for the federal judicial proceedings.

4.

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<sup>14</sup> Translator's Note:

The English translation of this decision is available here:  
<http://www.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties>

This judgment shall be notified in writing to the parties and to the Chairman of the Arbitral Tribunal.

Lausanne, September 20, 2016

In the name of the First Civil Law Court of the Swiss Federal Tribunal

Presiding Judge:

Clerk:

Kiss (Mrs.)

Carruzzo