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**AD HOC ARBITRATION UNDER THE 1976  
UNCITRAL ARBITRATION RULES**

**PCA CASE 2016-20**

**DAWOOD RAWAT**

**Claimant**

**v**

**THE REPUBLIC OF MAURITIUS**

**Respondent**

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**AWARD ON JURISDICTION**

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**Before:**

**The Arbitral Tribunal**

Professor Lucy Reed (Presiding Arbitrator)

Mr Jean-Christophe Honlet

Professor Vaughan Lowe QC

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## I. INTRODUCTION

1. The Claimant, Mr Dawood Ajum Rawat (**Rawat**), is pursuing this arbitration against the Respondent, the Republic of Mauritius (**Mauritius**), to claim for alleged breaches of the Investment Promotion Treaty entered into on 22 March 1973 between the Republic of France and Mauritius (**France-Mauritius BIT**).<sup>1</sup> Rawat brings this arbitration under the 1976 UNCITRAL Arbitration Rules through the Most Favored Nation (**MFN**) clause in the France-Mauritius BIT and the arbitration clause in the 2007 Agreement between the Government of the Republic of Finland and the Government of the Republic of Mauritius on the Promotion and Protection of Investments (**Finland-Mauritius BIT**).<sup>2</sup>
2. In brief, Rawat alleges that Mauritius violated the France-Mauritius BIT by freezing and misappropriating his protected investment in the group of companies known as British American Investment Co. (Mauritius) (**BAICM**), which includes the Bramer Banking Corporation Ltd (**Bramer Bank**). He seeks compensation for these alleged treaty breaches in an amount exceeding US\$ 1 billion. Mauritius does not dispute that certain of the actions alleged by Rawat have occurred, but denies any violation of its obligations under the France-Mauritius BIT. According to Mauritius, the freeze of Rawat's personal and business assets and related actions are part of an ongoing, and legal, investigation of alleged Ponzi-like schemes orchestrated by him and/or his family members, involving money laundering and fraud at the level of MUR 1 billion.
3. Mauritius has raised preliminary objections based on the alleged lack of jurisdiction *ratione voluntatis and ratione personae*, and requests the Tribunal to dismiss Rawat's claims. In response, Rawat requests the Tribunal to dismiss the jurisdictional objections and proceed to decide the merits of his claims.
4. For the reasons set out below, the Tribunal determines that it lacks jurisdiction *ratione personae* to hear the claims made.

## II. PROCEDURAL HISTORY

5. On 8 June 2015, the Claimant sent a Notice of Dispute to the Respondent, through his legal representatives Dr Andrea Pinna and Professor Xavier Boucobza. By letter

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<sup>1</sup> *Convention entre le Gouvernement de la République française et le Gouvernement de l'île Maurice sur la protection des investissements, signée à Port-Louis le 22 mars 1973 (France-Mauritius BIT)* (Exh C-1). The authentic language of the France-Mauritius BIT is French.

<sup>2</sup> Agreement between the Government of the Republic of Finland and the Government of the Republic of Mauritius on the Promotion and Protection of Investments dated 12 September 2007 (Exh C-2).

dated 11 September 2015, through its appointed legal representatives Lalive SA, Mauritius informed Rawat that it found no basis in the France-Mauritius BIT for his claims.

6. On 9 November 2015, Rawat sent and Mauritius received the Notice of Arbitration and Statement of Claim. Pursuant to Article 3(2) of the UNCITRAL Rules, and as confirmed in paragraph 2.6 of the Tribunal's Terms of Appointment executed on 2 September 2016, these proceedings are deemed to have commenced on 9 November 2015.
7. In the Notice of Arbitration, Rawat notified Mauritius of his appointment of Mr Jean-Christophe Honlet as the first arbitrator. By letter dated 9 December 2015, Mauritius notified Rawat of its appointment of Professor Vaughan Lowe QC as the second arbitrator. By Rawat's letter dated 6 May 2016 and Mauritius' letter dated 15 May 2016, the Parties appointed Professor Lucy Reed as Presiding Arbitrator. In paragraph 4(4) of the Terms of Appointment, the Parties confirmed that the members of the Tribunal have been validly appointed in accordance with the France-Mauritius BIT, the Finland-Mauritius BIT and the UNCITRAL Arbitration Rules.
8. By email dated 31 May 2016, counsel for Mauritius sent to the Tribunal drafts of the Terms of Appointment and Procedural Order No. 1, prepared jointly by the Parties. The drafts highlighted remaining differences between the Parties, notably the place of arbitration, the language of arbitration, and the responsibility to pay the advance on costs for the arbitration.
9. By email also dated 31 May 2016, Rawat indicated his intention to request that Mauritius bear the entire advance on costs. In turn, by letter dated 31 May 2016, Mauritius indicated its intention to seek termination of the case should Rawat refuse to contribute his equal share of the advance on costs, as envisioned in Article 41(1) of the UNCITRAL Rules.
10. After a further exchange of correspondence, the Tribunal conducted a conference call with counsel for the Parties on 9 June 2016 to address procedures for the opening phase of the arbitration. In Procedural Order No. 1 issued on 15 June 2016, the Tribunal ordered the Parties jointly to request the Permanent Court of Arbitration (*PCA*), or such other institution as they might agree, to administer this arbitration, and to deposit the initial advance on costs of € 100,000 in equal shares with the PCA or substitute institution by 13 July 2016.
11. By email dated 17 June 2016, in response to inquiries from the Parties, the Tribunal clarified that the role for the PCA or other administering institution was most

importantly to collect and manage the deposits toward the advance on costs, as the Tribunal members were not in a position to open and manage an escrow account.

12. The Parties proceeded to arrange depository services with the PCA. By email dated 14 July 2016, the PCA acknowledged receipt of Mauritius' and Rawat's initial deposits of € 50,000 each on 30 June and 12 July 2016, respectively.
13. The Tribunal issued Procedural Order No. 2 on 12 August 2016. This Order established Brussels as the place of arbitration and English as the language of arbitration, and annexed the procedural calendar for the Initial Phase of the arbitration. The Initial Phase was described to include Rawat's anticipated "*request for interim measures to shift responsibility for the full advances on costs to Mauritius*" and Mauritius' anticipated "*application for security for costs in relation*" to Rawat's interim measures request.
14. On 1 August 2016, Rawat submitted his Request for Interim Measures. He asked the Tribunal to order Mauritius to fund the entire advance on costs, either directly or by unfreezing certain of his bank accounts and real property and/or releasing certain documents to potential third-party funders; to enjoin Mauritius from continuing alleged retaliation measures against his family; and to enjoin Mauritius from taking action aggravating the dispute, such as media campaigns and retaliatory measures. The Request included 10 witness declarations, including the Witness Statement of Rawat dated 29 July 2016, 65 documentary exhibits, and six legal authorities. On 5 and 7 September 2016, Rawat submitted six additional documentary exhibits.
15. On 5 September 2016, Mauritius submitted its Application for Security for Costs in the amount of € 3 million. The Application included four documentary exhibits and 20 legal authorities.
16. On 26 September 2016, Mauritius submitted its Answer to Rawat's Request for Interim Measures, with 22 legal authorities. On the same date, Rawat submitted his Answer to Mauritius' Application for Security for Costs, with five documentary exhibits and one legal authority.
17. On 10 October 2016, Mauritius submitted its Reply to Claimant's Answer to the Application for Security for Costs, with three witness statements, three additional documentary exhibits, and four additional legal authorities. On the same date, Rawat submitted his Reply to Respondent's Answer to the Request for Interim Measures, with three additional documentary exhibits and one additional legal authority.

18. By letter dated 14 October 2016, Rawat asked the Tribunal to direct Mauritius to indicate whether two of his properties, described as his “*former residence in Mauritius and the villa at La Preneuse*” were subject to freezing orders in Mauritius.
19. On 16 October 2016, with leave of the Tribunal, Mauritius submitted six new exhibits related to Mauritian court proceedings involving, among others, one of Rawat’s daughters, Ms Laina Rawat. By letter dated 17 October 2016, Rawat asked to submit a short declaration of Ms Rawat explaining her motivation in discontinuing her request for appointment of a new receiver to represent Bramer Bank in the Mauritian court proceedings.
20. As envisioned in Procedural Order No. 2, the Tribunal conducted a procedural conference call on 17 October 2016 “*to consider hearing requests and next steps for the Initial Phase*”. As neither Party had requested a hearing, the Tribunal confirmed that it would decide Rawat’s Request for Interim Measures and Mauritius’ Application for Security for Costs on the written submissions. During the conference call, counsel addressed Rawat’s requests in his letters of 14 and 17 October 2016 and, at the request of the Tribunal, the question of *prima facie* jurisdiction for the Initial Phase in relation to the MFN clause in the France-Mauritius BIT.
21. The Tribunal issued Procedural Order No. 3 on 18 October 2016. The Tribunal authorized Rawat to submit a short declaration by Ms Rawat regarding the relevant Mauritian court proceedings by 19 October 2016, and ordered the Parties to consult on the status of the residence and villa referenced in Rawat’s 14 October letter, in particular whether the properties were subject to a freezing order or not, and to report on the same by 25 October 2016. The Tribunal also ordered the Parties to file any further legal submissions on the issue of *prima facie* jurisdiction in relation to the MFN Clause of the France-Mauritius BIT by 25 October 2016.
22. On 18 October 2016, Rawat submitted Ms Rawat’s Declaration dated 17 October 2016, which annexed three documents from the Mauritian Supreme Court case of *Laina Dawood Rawat v Financial Intelligence Unit* (Serial No. 914/2016). By letter dated 20 October 2016, Mauritius requested the Tribunal to exclude Ms Rawat’s Declaration from the record as being outside the scope of Procedural Order No. 3 or, in the alternative, to afford the Declaration no weight. On 21 October 2016, Rawat objected to Mauritius’ request. By Procedural Direction dated 22 October 2016, the Tribunal “*determined not to strike the Declaration, with the assurance that we will give it—like all the evidence in the record—appropriate weight in our future analysis and decisions*”, and directed Mauritius to submit any reply to Ms Rawat’s Declaration by 28 October 2016. In its reply on 28 October 2016, Mauritius challenged the

accuracy and relevance of the Declaration, and underscored that Ms Rawat has been receiving MUR 100,000 monthly pursuant to a September 2015 court order.

23. On 25 October 2016, Rawat filed its Submission on the Issue of *Prima Facie* Jurisdiction in Relation to the Most Favoured Nation Provision of the France-Mauritius BIT, with three documentary exhibits and five legal authorities. Also on 25 October 2016, Mauritius filed its Supplementary Submission on *Prima Facie* Jurisdiction, with two documentary exhibits and 16 legal authorities. By letter dated 2 November 2016, Rawat commented on Mauritius' discussion in its Supplementary Submission of the 2010 Bilateral Investment Agreement between the Government of the French Republic and the Government of the Republic of Mauritius on the Protection of Investments (*2010 France-Mauritius BIT*), which is signed but has not yet entered into force.
24. On 4 November 2016, Mauritius informed the Tribunal that the two properties Rawat had inquired about—his former residence and the villa at La Preneuse—are not on the list of his frozen properties but are subject to charges granted by him to creditors.
25. On 11 January 2017, the Tribunal issued its reasoned Order Regarding Claimant's and Respondent's Requests for Interim Measures. The Tribunal denied Rawat's Request for Interim Measures, with leave to re-apply, and denied Mauritius' Application for Security for Costs, also with leave to re-apply. The Tribunal reserved the issue of allocation of costs in relation to the Initial Phase.
26. In the 11 January 2017 Order, the Tribunal set the advance on costs for the next jurisdiction phase at € 200,000 and directed each Party to deposit its half-share of € 100,000 with the PCA within 60 days. On 22 February and 6 March 2017, the PCA informed the Tribunal and the Parties of its receipt of the Parties' deposits.
27. On 11 March 2017, the Tribunal requested the Parties to consult and attempt to agree an efficient timetable for written submissions and a hearing for the jurisdiction phase. By email dated 18 March 2017, Rawat reported to the Tribunal that the Parties were unable to agree on a timetable.
28. The Tribunal conducted a further procedural conference call on 29 March 2017. Following the conference call, the Tribunal issued Procedural Order No. 4 and a Procedural Directive dated 12 April 2017 governing the jurisdiction phase. The Tribunal ordered Mauritius to file its Memorial on Jurisdiction by 31 July 2017 and Rawat to file his Counter-Memorial on Jurisdiction by 22 November 2017, and set the cut-off date for additional documentary evidence and legal authorities at

18 December 2017. The Tribunal scheduled the jurisdiction hearing for 16 and 17 January 2018, reserving a decision on the hearing venue for a later date.

29. On 6 April 2017, Mauritius informed the Tribunal that the Parties had conferred but were unable to agree on the hearing venue. Mauritius stated its preference for Brussels, the designated place of the arbitration. The Tribunal, by email dated 19 April 2017, suggested The Hague, considering that the PCA's administrative role provided free use of hearing facilities at the Peace Palace, and requested the Parties' views. Mauritius agreed to The Hague.
30. By letter dated 25 April 2017, Rawat relayed his concern about the hearing being held in Brussels, The Hague or any other place outside France. He requested Paris as the hearing venue on grounds that he and his family members were subject to criminal proceedings in Mauritius, and attached a copy of a Mauritian "Warrant to Apprehend" dated 20 April 2015. Rawat argued that any travel outside France without a written undertaking from Mauritius to protect his attendance at the hearing would "*put his security at risk*".
31. In the same letter of 25 April 2017, Rawat requested the Tribunal to take "*all required measures to preserve all evidence regarding the sale of BAICM's assets pending the decision on the merits of the case*", in the context of the appointment by the Mauritius Council of Ministers in April 2017 of a Committee of Inquiry to review the sale of Britam Kenya shares, which were indirectly owned by BAICM at the relevant time. In particular, he requested that the Tribunal order:
- (i) that Respondent communicate to the Claimant information and documents regarding the sale of Claimant's assets obtained and issued by the Committee of Inquiry as they become available, or alternatively (ii) any other measure granting the preservation of evidence, notably by ordering Respondent to provide to the Tribunal and the Claimant's counsel a copy of all documents obtained and issued by the Committee of Inquiry.*
32. Mauritius responded by letter on 9 May 2017. Mauritius objected to the jurisdiction hearing being held in Paris, proposing that Rawat instead attend in The Hague or Brussels via video-link. With regard to Rawat's request for measures to preserve evidence, Mauritius submitted that Rawat had not shown any circumstances giving rise to a legitimate concern that Mauritius would imminently destroy, or had any intention to destroy, any documents relevant to the arbitration or documents relevant to the sale of the Britam Kenya shares or any former BAICM assets. Mauritius argued that, to the contrary, the establishment of the Committee of Inquiry to investigate the Britam Kenya share sale suggested the opposite intention.

33. By Procedural Directive on 16 May 2017, the Tribunal denied Rawat's informal request (by letter of 25 April 2017) to order measures to preserve evidence, without prejudice to his pursuing a formal application for provisional measures should the need arise.
34. In the Procedural Directive of 16 May 2017, the Tribunal also requested Mauritius to confirm or deny the validity of the 20 April 2015 Warrant to Apprehend provided by Rawat and, if valid, whether it might subject him to a risk of extradition in connection with the alleged events underpinning this arbitration if the hearing were held outside France. Subject to Mauritius' response, the Tribunal asked Rawat to explain the legal basis for the alleged risk that he could be arrested and extradited to Mauritius.
35. By letter of 22 May 2017, Mauritius confirmed that Rawat was subject to a valid Warrant to Apprehend and a related Interpol Red Notice. Mauritius further stated that it could not provide any undertaking that the Warrant would not be executed, because the matter lay within the control of Interpol and local law enforcement authorities in the relevant state.
36. On the same day, 22 May 2017, Rawat addressed the Tribunal's question regarding the risk of arrest and extradition. He submitted that Belgium and Switzerland both have extradition treaties with Mauritius, and that the domestic Dutch Extradition Act provides a possibility of extradition under the United Kingdom-Netherlands extradition treaty, which could be extended to Mauritius as a member of the Commonwealth.
37. In Procedural Order No. 5 dated 25 May 2017, the Tribunal established Paris as the venue for the jurisdiction hearing. By Procedural Directive dated 17 October 2017, following an exchange concerning the specific location in Paris for the hearing, the Tribunal selected Multiburo Opéra as the location and requested the Parties to make the necessary logistical arrangements.
38. Mauritius filed its Memorial on Jurisdiction on 31 July 2017, together with 37 documentary exhibits and 54 legal authorities. Rawat filed his Counter-Memorial on Jurisdiction on 22 November 2017, together with three documentary exhibits and 65 legal authorities.
39. On 8 December 2017, Mauritius reported to the Tribunal the Parties' agreement to a one-day hearing on 16 January 2018, with 17 January being held in reserve. Under the circumstances, and with the Parties' concurrence, the Tribunal cancelled the pre-hearing procedural conference call scheduled for 12 December 2017.

40. On 14 December 2017, the Tribunal sent to the Parties the following list of issues on which it would welcome elaboration or clarification during the jurisdiction hearing:
1. *Whether the order in which the Tribunal assesses the two jurisdictional objections regarding nationality and MFN objections has significance and, if so, why;*
  2. *The relationship between the ICSID Convention and bilateral investment treaties in general insofar as each apparently sets out limits on jurisdiction and/or admissibility; and, more particularly, the meaning of the term “ressortissants” in Article 25(2) of the ICSID Convention and in Article 1(2) of the France-Mauritius treaty, and the question of the relationship of the meaning(s) of that term in those contexts, with focus on potential development of the parties’ positions on the arguments in paragraphs 70-72 of the Respondent’s Memorial;*
  3. *Clarification, if possible, of the parties’ positions on the interpretation question posed in paragraph 81 of the Tribunal’s Order Regarding Claimant’s and Respondent’s Requests for Interim Measures -- what is the “matière” of Article 9 of the France-Mauritius treaty and the “matière” of Article 9 of the Finland-Mauritius treaty and, in both cases, why?*

For convenience, paragraph 81 reads in full:

*The central interpretation question posed to the Tribunal [in the context of the request for interim measures] is the scope of “les matières régies par la présente Convention” in the MFN clause of the France-Mauritius BIT and, in specific, whether the “matière” in Article 9 of the France-Mauritius BIT is “contractual ICSID arbitration”, “investor-state dispute settlement” or otherwise, and whether that “matière”, once defined, can be considered ejusdem generis with the “matière” in Article 9 of the Finland-Mauritius BIT, as also to be defined, it being recalled that this provision includes a direct right to investor-state arbitration.*

4. *Whether effet utile is among the principles of treaty interpretation to be applied by the Tribunal and, if so, what is the result of its application to the France-Mauritius treaty?*
41. On 18 December 2017, the cut-off date for submission of further documentary exhibits and/or legal authorities set in Procedural Order No. 4, Rawat submitted one additional exhibit and Mauritius submitted nine additional legal authorities.
42. The Tribunal conducted the hearing on jurisdiction on 16 January 2018, with the reserve date of 17 January not proving necessary. For the Claimant, the attendees were Mr Dawood Rawat himself, his wife Mrs Ayesha Motala Rawat, and the counsel team of Professor Xavier Boucobza and Dr Andrea Pinna, Ms Hortense Fouchard and

Ms Gabriela Mihaescu of De Gaulle Fleurance et Associés. For the Respondent, the attendees were Mr Rajesh Ramloll SC, Deputy Solicitor-General of the Republic of Mauritius, and the legal team of Dr Veijo Heiskanen, Ms Domitille Baizeau, Ms Laura Halonen and Ms Eléonore Caroit of Lalive SA.

43. In the course of the hearing, counsel for the Parties made submissions on the jurisdiction issues in two rounds and in response to Tribunal questions. At the close of the hearing, counsel confirmed that neither Party had any complaint or objection on the procedure or the process, or on the neutrality and independence of the Tribunal.<sup>3</sup>
44. On 5 March 2018, the Tribunal requested statements of costs from each Party by 19 March 2018, “including both their arbitration costs and their legal fees and expenses through the jurisdictional objection phase”. The Parties filed their respective statements on 19 March 2018. The PCA provided an accounting of arbitration costs on 27 March 2018.

### **III. FACTUAL BACKGROUND**

45. The Tribunal sets out below a factual summary, not in full but as necessary to place the jurisdictional objections in context. These facts are as alleged by the Claimant, except where indicated otherwise.

#### **A. Rawat’s Personal History**

46. It is not disputed that Rawat is a national of Mauritius.<sup>4</sup> Rawat was born in 1944 in Port Louis, Mauritius.<sup>5</sup> He holds a Mauritian driving license and several directorships of Mauritian companies, and is registered as a voter in Mauritius.<sup>6</sup> While he was residing in Rose Hill, Mauritius, he married a French national, Ayesha Motala, on 11 September 1969, and they have three daughters, all born in Mauritius and married to Mauritian nationals.<sup>7</sup>

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<sup>3</sup> Transcript of 16 January 2018 with consolidated corrections (*Transcript*), p 191, lines 24-25, Dr Pinna; p 192, lines 2-3, Dr Heiskanen.

<sup>4</sup> Respondent’s Memorial on Jurisdiction, para 68; copy of Rawat’s Mauritian National Identity Card dated 17 November 1989 (Exh R-25); Claimant’s Counter Memorial on Jurisdiction, para 1.

<sup>5</sup> Certified Extract of a Birth Entry of Dawood Ajum Rawat dated 23 August 1944 (Exh R-29).

<sup>6</sup> Office of the Commissioner of Police of Port Louis, Mauritius, Attestation certifying driving licence dated 2 June 2017 (Exh R-36); Mauritian Registrar of Companies, List of companies in which Rawat is involved dated 6 June 2017 (Exh R-48); letter from the Electoral Commissioner to the Solicitor General dated 23 June 2017 (Exh R-32).

<sup>7</sup> Certified Extract of a Marriage Entry between Dawood Ajum Rawat and Ayesha Hassam Motala dated 11 September 1969 (Exh R-31); certified Extract of a Birth Entry of Kerima Dawood Rawat dated 23 July 1971

47. In addition to being a prominent businessman, Rawat has been a philanthropist and political advisor in Mauritius. He served as the President of the Mauritian Employers' Federation and a member of the Commission of the Prerogative of Mercy, advising the President of Mauritius in relation to the President's extraordinary right to grant pardon, respite, remit or substitute punishments to persons convicted of offences.<sup>8</sup> Rawat also made a donation to a local college in Mauritius in 2009, naming the college after his grandfather.<sup>9</sup>
48. On 22 December 1998, Rawat submitted a Declaration of French Nationality under Article 21-2 of the French Civil Code,<sup>10</sup> which was registered by the French authorities on 4 October 1999. According to Rawat, as the French authorities did not oppose his Declaration within one year from the date of registration, he acquired French citizenship as of 22 December 1998 by operation of Article 21-4 of the French Civil Code.<sup>11</sup>
49. Rawat holds a French identity card issued on 17 June 2011, and a French passport issued on 13 February 2015.<sup>12</sup>
50. On 11 July 2014, Rawat was made a knight of the French *Légion d'Honneur* in recognition of his "*distinguished contribution to the economic and social life of Mauritius, as the president of an important group of companies and as a French and Mauritian citizen*".<sup>13</sup> The French embassy in Mauritius thanked Rawat for the contribution of his company to the organization of the French national day of 14 July in Mauritius and for his contribution to the training center of the Institut Français de Maurice.

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(Exh R-37); certified Extract of a Birth Entry of Adeela Dawood Rawat dated 16 December 1977 (Exh R-38); certified Extract of a Birth Entry of Laïna Dawood Rawat dated 6 March 1981 (Exh R-39).

<sup>8</sup> Respondent's Memorial on Jurisdiction, para 96; L'express.mu, "*L'homme derrière l'empire: B(h)ai Dawood, le self-made man*" dated 2 April 2015 (Exh R-50); L'express.mu, "*Affaire BAI: qui est Dawood Rawat?*" dated 5 April 2015 (Exh R-49).

<sup>9</sup> Ministry of education & human resources, "History of GMD Atchia State College" (Exh R-44).

<sup>10</sup> Claimant's Counter Memorial on Jurisdiction, p 5, and para 21; *Déclaration de Nationalité française de Monsieur Dawood Rawat* (Exh C-53).

<sup>11</sup> Claimant's Counter Memorial on Jurisdiction, para 25, fn 12; *Acquisition de la nationalité française à raison du mariage*, French Civil Code in force on 2 December 1998, French Civil Code, First Book, Title I bis "The French Nationality", Article 21-4 (Exh CLA-18).

<sup>12</sup> Copy of Rawat's French identity card issued on 17 June 2011 and valid until 16 June 2021 (Exh C-95); copy of Rawat's French passport issued on 13 February 2015 and valid until 12 February 2025 (Exh C-94).

<sup>13</sup> Letter from the French embassy in Mauritius to Dawood Rawat dated 22 July 2014 (Exh C-96).

## **B. BAICM and Bramer Bank History**

51. In the late 1980s, Rawat, as an employee of British American Insurance (Mauritius branch) (*BAI*), acquired a 20% share as part of his compensation package.<sup>14</sup> He went on in 1990 to acquire a 70% shareholding in British American Insurance Company (*BAIC*), the then parent company of BAI.<sup>15</sup> In 1992, he purchased a further 30% share of BAI through an Initial Public Offering. According to the Respondent, in addition to the BAICM group, Rawat owned shares in and participated in numerous other Mauritian businesses.<sup>16</sup>
52. In 1993, Rawat settled a trust called Carmina Trust, of which he is the beneficiary, and Klad Investment Corporation (*Klad*), wholly owned by Rawat's Carmina Trust, was incorporated in the Bahamas in 1994.<sup>17</sup>
53. In 2003, BAI was re-structured into BAICM, a new public holding company.<sup>18</sup> In 2006, BAIC sold its Kenya and Malta companies and BAICM became the parent company of BAIC.<sup>19</sup> BAICM acquired South East Asia Bank in 2008, which was renamed Bramer Banking Corporation Ltd. Bramer Bank provided retail, private, corporate and international banking services.<sup>20</sup> The Bank of Mauritius issued a banking license to Bramer Bank on 27 August 2008, and Bramer Bank commenced operations.<sup>21</sup>
54. Between 2008 and 2015, BAICM was composed of more than 50 companies operating in the economic sectors of financial services, transportation, construction and property development, tourism and leisure, healthcare, and information and communication technology.<sup>22</sup>
55. In 2010, BAICM was delisted and held in a corporate chain. Carmina Trust wholly owned Klad, Klad owned 85.15% of subsidiary Seaton Investment Ltd (incorporated

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<sup>14</sup> Notice of Arbitration and Statement of Claim (*Statement of Claim*), para 10.

<sup>15</sup> Statement of Claim, para 11.

<sup>16</sup> Respondent's Memorial on Jurisdiction, para 95, fn 133; Registrar of Companies, list of companies in which Rawat is involved dated 6 June 2017 (Exh R-48).

<sup>17</sup> Statement of Claim, para 14.

<sup>18</sup> Statement of Claim, para 12.

<sup>19</sup> Statement of Claim, para 13.

<sup>20</sup> Statement of Claim, para 36.

<sup>21</sup> Statement of Claim, para 36.

<sup>22</sup> Statement of Claim, para 29.

in Mauritius), and Seaton controlled the delisted and privately held BAICM.<sup>23</sup> Thereafter, with approval of the Bank of Mauritius, Bramer Bank acquired debt from and amalgamated with other related companies.<sup>24</sup>

### **C. Developments Post-November 2014**

56. According to Rawat, Mauritius took a series of actions in violation of its obligations under the France-Mauritius BIT to protect his US\$ 1 billion investments, starting from 15 December 2014 with the withdrawal by the State Insurance Company of Mauritius of MUR 30 million from Bramer Bank and continuing through 2015. The alleged violations include: a campaign of premature encashment by Government of Mauritius officials and Government-related entities of funds from their Bramer Bank accounts; revocation of Bramer Bank's Banking License; appointment of receivers for Bramer Bank and transfer of Bramer Bank assets to a company wholly-owned by Mauritius for a value far below their market value; appointment of conservators for BAICM affiliates; improper enactment of the Mauritius Insurance (Amendment) Act 2015 with retroactive effect applying to BAI; appointment of special administrators for BAI and all BAICM companies; and disposal of assets of BAICM companies to the benefit of Mauritius or third parties.
57. In May 2015, the Bank of Mauritius commissioned an investigation by nTan, an accounting firm based in Singapore, into the activities of BAICM from 2007 through 2014. According to the nTan interim report dated 27 January 2016, which is publicly available, BAICM liabilities exceeded assets by MUR 12 billion by the end of financial year 2013, which the group was able to hide by operating Ponzi-like schemes. As characterized by Mauritius, the nTan Report sets out evidence that BAICM channeled funds exceeding MUR 1 billion to Rawat and/or his family members. The nTan Report caveats that the investigation proceeded without informing all individuals and entities investigated, and such individuals and entities were not provided the opportunity to offer comments or corrections and “[t]his report should be read subject to this limitation”.<sup>25</sup>
58. According to the submissions before the Tribunal, Rawat is facing a Warrant to Apprehend in Mauritius for money laundering, conspiracy to defraud, and misuse of

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<sup>23</sup> Statement of Claim, para 14; Simplified Organogram of the Group at 31 March 2015 (Exh C-8); 2010 Takeover by Seaton Investment Ltd of the Minority Shareholdings in BAI (Exh C-97).

<sup>24</sup> Letter from Bramer Bank dated 16 March 2015, p 2 (Exh C-62); Report on the examination by nTan Corporate Advisory Pte Ltd, Consultant appointed by the Bank of Mauritius, dated 27 January 2016, paras 2, 10 and 158-168 and 168(3) (*nTan Report*) (Exh C-34).

<sup>25</sup> nTan Report, p i (Exh C-34).

company assets. Rawat, who remains outside Mauritius in France, has not been convicted of any of these crimes. According to Mauritius, as a matter of Mauritian criminal law, Rawat faces provisional charges until he can be physically presented before a judge. Receivers of Rawat's companies have also initiated civil suits in Mauritius, in which Rawat and various family members are named defendants.

59. In connection with the criminal investigation, the Mauritius Supreme Court issued an Order on 18 April 2015 listing immovable properties allegedly belonging to Rawat that "*shall not be disposed of, or otherwise dealt with, by any person, except upon a Judge's Order*".<sup>26</sup>
60. Rawat's daughters Laina and Adeela Rawat and sons-in-law Brian Burns and Claudio Feistritzer were questioned by Mauritius' Central Criminal Investigation Department, and arrested and provisionally charged for money laundering, conspiracy to defraud, misuse of company property, and giving false statements. It is undisputed that all were freed on bail. However, they were barred from leaving Mauritius by operation of an Objection to Departure issued by the Mauritius Passport and Immigration Office, and had to surrender their passports to the Mauritius courts. As of 25 April 2017, according to Mauritius, the measures affecting Rawat's daughters and their husbands objected to by Rawat in the Initial Phase "*have been abandoned following the closing of the investigations*".<sup>27</sup>
61. On 2 December 2015, administrators initiated legal proceedings before Mauritius courts against Rawat through the administrator BDO & Co., claiming the sum of MUR 24 billion.<sup>28</sup> On 29 December 2015, the appointed BAICM Special Administrator served a Summons against Rawat and 18 others, claiming MUR 3.5 billion.<sup>29</sup> In July 2016, BAICM's assets, the Apollo Bramwell Hospital and Britam Kenya's shares were sold.<sup>30</sup>

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<sup>26</sup> Order issued by Her Ladyship, Mrs Gaytree Jugessur-Manna, Judge of the Supreme Court of Mauritius sitting in Chambers dated 18 April 2015, p 2 (Exh C-29).

<sup>27</sup> Respondent's Memorial on Jurisdiction, p 5, fn 6; Mauritius News, "*BAI Case - Court strikes out charges against the Rawat sisters*" dated 25 April 2017 (Exh R-19).

<sup>28</sup> Claimant's Application for Interim Measures, para 48; letter from counsel for BDO & Co. dated 2 December 2015 (Exh C-7).

<sup>29</sup> Claim against the Investor for compensations amounting to MUR 3.5 billion (approximately USD 97 million) (Exh C-71).

<sup>30</sup> Claimant's Application for Interim Measures, para 28; Plum LLP, Circular to the shareholders of Britam Holdings Limited on the proposed acquisition of four hundred and fifty two million, five hundred and four thousand (452,504,000) ordinary shares by Plum LLP, 30 June 2016 (Exh C-18); Sixth National Assembly, Parliamentary Debates, First Session, 5 July 2016 (excerpts) pp 71-72 (Exh C-84).

62. Around 6 to 9 April 2017, Mauritius appointed a Committee of Inquiry to review the sale of BAICM assets.<sup>31</sup>

#### IV. KEY TREATY PROVISIONS

63. The Tribunal sets out the relevant treaty provisions below and, in the next section, summarizes the Parties' treaty interpretation submissions.
64. The France-Mauritius BIT does not provide for a direct right of arbitration of a treaty dispute between an investor of one Contracting State and the host Contracting State.
65. Article 9 of the France-Mauritius BIT provides that investment contracts between an investor and the host state must include a dispute resolution clause providing for International Center for Settlement of Investment Disputes (*ICSID*) arbitration if amicable resolution cannot be reached:

*Les accords relatifs aux investissements à effectuer sur le territoire d'un des Etats contractants, par les ressortissants, sociétés ou autres personnes morales de l'autre Etat contractant, comporteront obligatoirement une clause prévoyant que les différends relatifs à ces investissements devront être soumis, au cas où un accord amiable ne pourrait intervenir à bref délai, au Centre international pour le règlement des différends relatifs aux investissements, en vue de leur règlement par arbitrage conformément à la Convention sur le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats.*

In free translation:

*Agreements relating to investments to be made in the territory of one of the Contracting States by nationals, companies or other legal persons of the other Contracting State, must include a clause providing that their disputes relating to these investments shall be submitted, in the event that an amicable agreement cannot be reached within a short period of time, to the International Center for the Settlement of Investment Disputes, with a view to their settlement by arbitration, in accordance with the Convention on the Settlement of Investment Disputes between States and nationals of other States.*

66. The relevant MFN clause of the France-Mauritius BIT, Article 8 paragraph 2, provides:

*Pour les matières régies par la présente Convention autres que celles visées à l'article 7 [tax matters], les investissements des ressortissants, sociétés ou autres personnes morales de l'un des Etats contractants bénéficient également de toutes les dispositions plus favorables que celles du présent Accord qui pourraient résulter d'obligations internationales déjà souscrites ou qui viendraient à être*

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<sup>31</sup> Claimant's letter to the Tribunal dated 25 April 2017.

*souscrites par cet autre Etat avec le premier Etat contractant ou avec des Etats tiers. (Emphasis added)*

In free translation:

***For the matters governed by<sup>32</sup> the present Convention** other than those referred to in article 7 [tax matters], investments made by nationals, companies or other legal persons of one of the contracting States shall also benefit from all provisions more favourable than those of the present Agreement, which may result from international obligations already entered into or to be entered into by this other State with the first contracting State or third States.*

67. Article 9 of the Finland-Mauritius BIT of 2007, executed almost 35 years after the France-Mauritius BIT, expressly includes a right for an investor to pursue arbitration directly against the host state:

*1. Any dispute arising directly from an investment between one Contracting Party and an investor of the other Contracting Party should be settled amicably between the two parties to the dispute.*

*2. If the dispute has not been settled within three months from the date on which it was raised in writing, the dispute may, at the choice of the investor, be submitted:*

*(a) to the competent courts of the Contracting Party in whose territory the investment is made; or*

*(b) to arbitration by the International Centre for Settlement of Investment Disputes (ICSID), ...; or*

*(c) to any ad hoc arbitration tribunal which unless otherwise agreed on by the parties to the dispute, is to be established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). ...*

68. In 2010, Mauritius and France entered into the 2010 France-Mauritius BIT, which expressly includes a right for an investor to pursue ICSID arbitration directly against

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<sup>32</sup> Rawat translated the introductory clause of Article 8, paragraph 2, as “[f]or the subject matter covered by this agreement” (Notice of Arbitration, para 70). Mauritius translated the same as “[f]or the matters subject to the present Convention” (Respondent’s Answer to Rawat Request, para 37). In the Tribunal’s Order Regarding Claimant’s and Respondent’s Requests for Interim Measures of 11 January 2017 (*Interim Measures Order*), the Tribunal considered that the English verb “govern” more closely captures the French verb “régir” in the original text. The difference in translation is of little import, because the French text of the France-Mauritius BIT is the authentic text and the one relied upon by the Tribunal.

the host state.<sup>33</sup> As of the date of Rawat's Notice of Arbitration and to the present, France had not ratified the treaty, and it has not come into force.

## V. THE PARTIES' POSITIONS

69. The Tribunal sets out below the Parties' main positions on the preliminary objections on jurisdiction. Both sides provided the Tribunal with erudite and thorough submissions, both in writing and at the hearing, which we found extremely helpful. Although we recite below what we assessed to be the most significant arguments, we considered each and every point raised by both the Claimant and the Respondent.

### A. Jurisdiction *Ratione Voluntatis*

#### i. *The Respondent's Position*

70. In its Memorial on Jurisdiction, Mauritius took the position that the Tribunal should first decide the objection to jurisdiction *ratione voluntatis*, because this objection goes to foundational consent to arbitration:<sup>34</sup>

*Such a [consent] clause is a fundamental basis of jurisdiction in the sense that, in the absence of such a clause, other potential issues relating to the jurisdiction of the tribunal such as jurisdiction ratione temporis, ratione personae or ratione materiae, cannot even arise. As issues relating to the scope (rather than the existence) of the tribunal's jurisdiction under the dispute resolution clause, they can only arise if there is a dispute resolution clause in the applicable treaty in the first place. (Emphasis in original)*

71. Mauritius contends that the lack of consent is clear. There is no clause in the France-Mauritius BIT providing for direct investor-state arbitration and, absent such an arbitration clause, Rawat cannot be allowed to use the MFN clause to import the direct investor-state arbitration clause in the Finland-Mauritius BIT—in its entirety—into the France-Mauritius BIT. To do so, argues Mauritius, would be to use the MFN clause to import basic consent to arbitration, rather than simply more favorable arbitration provisions. As Mauritius has not consented to arbitrate any BIT dispute with Rawat, the Tribunal lacks jurisdiction *ratione voluntatis*.

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<sup>33</sup> *Accord entre le Gouvernement de la République française et le Gouvernement de la République de Maurice sur l'encouragement et la protection réciproque des investissements, signé à Port-Louis le 8 mars 2010* (Exh R-14).

<sup>34</sup> Respondent's Memorial on Jurisdiction, para 13.

72. It is undisputed that there is no direct investor-state arbitration clause in the France-Mauritius BIT. The Claimant acknowledges this in his Notice of Arbitration.<sup>35</sup>

*The France-Mauritius BIT does not provide for a clause of settlement of [disputes] between a contracting Party and an investor, unless an agreement has been entered into in relation to the investment.*

73. The France-Mauritius BIT does contain a clause—Article 9—providing that investment contracts between a national of one of the Contracting States and the other Contracting State are to contain ICSID arbitration clauses: Article 9 is quoted in paragraph 65 above.

74. Mauritius acknowledges Rawat’s position that Article 9 “ensure[s] that the substantial rights established by the BIT will actually be enforced”, but only inasmuch as disputes arising under investment contracts are to be resolved through ICSID contractual arbitration.<sup>36</sup> Article 9 “does not purport to say, and does not say, anything about investor-State arbitration under the Treaty”.<sup>37</sup>

75. Mauritius submits that the Contracting States have the same understanding of the meaning of Article 9. Mauritius relies primarily on the 2010 France-Mauritius BIT, which does provide for direct investor-state arbitration under the ICSID Convention. As evidenced by the impact assessment study prepared by the French National Assembly, one reason for the new treaty was to “modernise” the 1973 BIT, including to “garantir l’accès à une justice neutre et indépendante via l’arbitrage international investisseur-Etat” (in free translation: “grant ... access to neutral and independent justice via investor-State arbitration”).<sup>38</sup> This confirms, says Mauritius, the view of the Contracting States that the 1973 Treaty “did **not** contain a dispute resolution clause providing for investor-State arbitration (emphasis in original).<sup>39</sup>

76. Without a direct investor-state arbitration clause—at all—in the France-Mauritius BIT, Mauritius denies that Rawat can establish jurisdiction via the MFN clause. Mauritius relies on what it argues is the “well-established principle of international law that, to be able to rely on an MFN clause in the basic treaty, a party must first

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<sup>35</sup> Statement of Claim, para 68.

<sup>36</sup> Respondent’s Memorial on Jurisdiction, para 16.

<sup>37</sup> Respondent’s Memorial on Jurisdiction, para 16.

<sup>38</sup> Respondent’s Memorial on Jurisdiction, para 17; Impact assessment concerning the draft law authorising the approval of the agreement between the Government of the French Republic and the Government of the Republic of Mauritius on the promotion and reciprocal protection of investments, p 4 (Exh R-15).

<sup>39</sup> Respondent’s Memorial on Jurisdiction, para 18.

*establish the tribunal's jurisdiction under that treaty*”,<sup>40</sup> citing the decision of the International Court of Justice (ICJ) in the *Anglo-Iranian Oil Company* case. As found by the tribunal in *Venezuela US, S.R.L. v Venezuela*, where, as here, the issue is consent to direct investor-state arbitration:<sup>41</sup>

*the MFN clause cannot serve the purpose of importing consent to arbitration when none exists under the [basic treaty].*

77. Mauritius further contends that, absent clear language otherwise, MFN clauses do not apply to dispute resolution and cannot be used to import dispute resolution clauses from other treaties.<sup>42</sup> Here, says Mauritius, the MFN clause—Article 8 of the France-Mauritius BIT—is silent on dispute resolution and, indeed, the language used implicitly excludes dispute resolution. Interpreting Article 8 with the ordinary meaning rule in Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) and the *ejusdem generis* rule, the scope of the MFN treatment obligation is limited to “*les matières régies par la présente Convention*” (“the matters governed by the present Convention”).<sup>43</sup> As direct investor-state arbitration is not mentioned in the France-Mauritius BIT, it cannot be a “*matière*” governed by the Treaty, and it necessarily falls outside the MFN clause.
78. Further, counsel for Mauritius argued at the hearing that Article 8 limits the benefit of the MFN clause to treatment of “investments”, not “investors”, even assuming that Claimant were a protected “*ressortissant*”: “*Pour les matières régies par la présente Convention ..., les investissements des ressortissants ... bénéficient également de toutes les dispositions plus favorable que celles du présent Accord*” (emphasis added).<sup>44</sup> In any event, Mauritius rejects Rawat’s argument that Article 9 of the France-Mauritius BIT makes dispute resolution a “*matière*” governed by the treaty, triggering MFN rights. Counsel emphasized that Article 9 references ICSID arbitration only in the context of future investment *contracts*. Article 9 of the France-Mauritius BIT deals with “*the procedure for conclusion of investment contracts*”, while Article 9 of the Finland-Mauritius BIT is a “*jurisdictional clause*.”<sup>45</sup>

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<sup>40</sup> Respondent’s Memorial on Jurisdiction, paras 20-35; *Anglo-Iranian Oil Co. Case (United Kingdom v Iran)*, Preliminary objection, Judgment of 22 July 1952, (1952) I.C.J. Reports 93, p 109 (Exh RLA-51).

<sup>41</sup> Respondent’s Memorial on Jurisdiction, para 29; *Venezuela US, S.R.L. v The Bolivarian Republic of Venezuela*, Interim Award on Jurisdiction, PCA Case No. 2013-34, 26 July 2016, para 105 (Exh RLA-66).

<sup>42</sup> Respondent’s Memorial on Jurisdiction, para 37, citing *Plama Consortium Ltd v the Republic of Bulgaria*, Decision on Jurisdiction, ICSID Case No. ARB/03/24, 8 February 2005, para 212 (Exh RLA-53).

<sup>43</sup> Respondent’s Memorial on Jurisdiction, paras 38-43.

<sup>44</sup> Transcript, p 39, line 22 to p 40, line 6, Dr Heiskanen.

<sup>45</sup> Transcript, p 41, line 23 to p 42, line 4, Dr Heiskanen.

79. To illustrate the difference, Mauritius explains that the *ejusdem generis* rule could allow Rawat to import a more favorable direct investor-state arbitration provision from another BIT, if the France-Mauritius BIT contained a direct investor-state arbitration clause of the same *genus*, meaning a similar (but less favorable) clause for direct investor-state arbitration.<sup>46</sup> But there is no dispute resolution clause of that *genus* in the France-Mauritius BIT. Mauritius relies on the finding of the tribunal in the *Daimler v Argentina* case that the state: “*must have consented to the particular type of dispute settlement in question before the claimant may raise any MFN claims before the designated forum*” (emphasis in original).<sup>47</sup>
80. Mauritius emphasizes that, except for the *Menzies v Senegal* case, in every case addressing the question of whether an MFN clause can be used to import more favorable arbitral provisions from another treaty, for example, a shorter cooling-off period, the basic treaty contained a direct investor-state arbitration clause.<sup>48</sup> Even in *Menzies v Senegal*, where the claimants attempted to invoke consent to arbitration under the General Agreement on Trade in Services (*GATS*), which has no investor-state dispute resolution clause, by way of the MFN clause of the *GATS* and a third-state treaty, the tribunal declined jurisdiction because of the lack of “*express, clear and unequivocal*” consent to arbitrate of the host state.<sup>49</sup> Mauritius cites commentary in support of its position that the investor must establish the state’s consent to arbitrate in the basic treaty and only then be allowed to invoke an MFN clause to import more favorable provisions from third-state treaties.<sup>50</sup>
81. The Respondent asks the Tribunal to follow the same path in the instant arbitration. As counsel submitted in the hearing:<sup>51</sup>

*The decision on whether international jurisdiction exists cannot be driven by our individual views as to whether extending the scope of international jurisdiction is generally a good thing as a matter of legal policy or otherwise. Whether or not international jurisdiction exists is exclusively a matter of law*

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<sup>46</sup> Respondent’s Memorial on Jurisdiction, para 44.

<sup>47</sup> *Daimler Financial Services AG v Argentine Republic*, Award, ICSID Case No. ARB/05/1, 22 August 2012, para 204 (Exh RLA-69).

<sup>48</sup> Respondent’s Memorial on Jurisdiction, para 48.

<sup>49</sup> Respondent’s Memorial on Jurisdiction, para 54; *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd v Republic of Senegal*, Award, ICSID Case No. ARB/15/21, 5 August 2011, para 130 (*Menzies v Senegal*) (Exh RLA-18).

<sup>50</sup> Respondent’s Memorial on Jurisdiction, paras 25-26; Z Douglas, “The MFN Clause in Investment Arbitration-Treaty Interpretation Off the Rails” (2011) (2)1 Journal of International Dispute Settlement 97, p 107 (Exh RLA-32).

<sup>51</sup> Transcript, p 8, lines 1-9, Dr Heiskanen.

*and evidence, and what is required as a matter of international law is a strict proof of consent.*

82. At the hearing, counsel also addressed the Tribunal’s fourth written question concerning the applicability of *effet utile* as a principle of treaty interpretation. Citing the ILC’s Draft Articles on the Law of Treaties, counsel described *effet utile* as a principle embodied in the general rule in VCLT Article 31 that a treaty is to be interpreted in good faith in accordance with the ordinary meaning given to its terms in context and in light of its object and purpose.<sup>52</sup> Investment treaty tribunals have cautioned that *effet utile* cannot be used to justify an illegitimate extension of meaning. As stated by the *Cemex v Venezuela* tribunal:<sup>53</sup>

*[T]his principle does not require that a maximum effect be given to a text. It only excludes interpretations which would render the text meaningless, when a meaningful interpretation is possible.*

83. The *effet utile* principle, argued counsel, “cannot be applied to extend the scope of the treaty ... contrary to the letter and spirit of the treaty”, and in this case, “it certainly cannot be applied to give effect to the provisions of the France-Mauritius BIT so as to create jurisdiction over the Claimant’s claims, whether *ratione voluntatis* or *ratione personae* ... [and] result in creating jurisdiction out of thin air”.<sup>54</sup>

#### **ii. The Claimant’s Position**

84. In his Counter-Memorial on Jurisdiction, Rawat chose first to defend against Mauritius’ jurisdiction *ratione personae* objection, as he argues it goes to his very status as a protected investor under the France-Mauritius BIT and thus to the sheer possibility for him even to invoke the MFN clause.
85. As to the Respondent’s jurisdiction *ratione voluntatis* objection, Rawat’s main position is that the very broad language in the MFN clause, Article 8, of the France-Mauritius BIT—covering “*les matières régies par la présente convention autres que celles visées à l’article 7*” (“the matters governed by the present Convention other than those referred to in Article 7”)—allows investors to benefit from all more favorable substantive and procedural treatment granted by either France or Mauritius

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<sup>52</sup> Transcript, p 72, line 18 to p 73, line 25, Dr Heiskanen; Draft Articles on the Law of Treaties, with Commentaries, text adopted by the International Law Commission at its eighteenth session, *Yearbook of the International Law Commission*, 1966, vol. II, p 219 (Exh RLA-108).

<sup>53</sup> Transcript, p 75, lines 15-23, Dr Heiskanen; *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v Bolivarian Republic of Venezuela*, Decision on Jurisdiction, ICSID Case No. ARB/08/15, 30 December 2010, para 114 (*CEMEX*) (Exh RLA-125).

<sup>54</sup> Transcript, p 76, lines 6-16, Dr Heiskanen.

to third-state investors in other investment treaties. As investor-state dispute resolution is covered in Article 9 of the France-Mauritius BIT, albeit for contractual investor-state arbitration, “investor-state dispute resolution”<sup>55</sup> is the relevant “*matière*” for purposes of the MFN clause. Therefore, Rawat asserts, Mauritius consented to direct arbitration with French investors as soon as Mauritius entered into an investment treaty with a third state providing access to such direct arbitration, such as the 2007 Finland-Mauritius BIT.<sup>56</sup>

86. Rawat’s case is that Mauritius gave its consent to arbitrate the present dispute in two steps: first, in 1973, when it consented to the MFN clause, drafted in very broad terms, through which it undertook to grant French investors any more favorable treatment that it would grant investors of third states; and second, in 2007, when it offered arbitration in the Finland-Mauritius BIT, granting more favorable treatment to those third-party investors and thus setting the MFN clause into motion.<sup>57</sup>
87. As a preliminary issue, Rawat contends that it is necessary to interpret the specific language of an MFN clause on a case-by-case basis, applying the rules of interpretation in the VCLT. In support, Rawat cites commentary<sup>58</sup> and the International Law Commission’s Final Report of the Study Group on the Most-Favoured-Nation Clause (*ILC Report*): “*the key question of ejusdem generis—what is the scope of the treatment that can be claimed—has to be determined on a case-by-case basis*”.<sup>59</sup> The Tribunal should approach interpretation “*neither restrictively nor expansively but rather objectively and in good faith*”.<sup>60</sup>
88. Among his arguments, Rawat disagrees with Mauritius on the significance of the 2010 France-Mauritius BIT. Noting that the Contracting States intended the 2010 BIT to “*modernize*” the 1973 France-Mauritius BIT and to improve the “*legal security*” of foreign investors, he contends that these intentions were fulfilled by making express the procedural rights and substantive protections that investors

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<sup>55</sup> Transcript, p 132, lines 15-25, Dr Pinna.

<sup>56</sup> Claimant’s Counter Memorial on Jurisdiction, para 157.

<sup>57</sup> Claimant’s Counter Memorial on Jurisdiction, p 37.

<sup>58</sup> Claimant’s Counter Memorial on Jurisdiction, paras 162-164, 169; Z Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), Rule 43, p 344 (Exh CLA-9). E Gaillard, “Establishing jurisdiction through a Most-Favored-Nation Clause”, *New York Law Journal*, 2 June 2005, Volume 233, No 105 (Exh CLA-52); SW Schill, “Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses”, (2014) 27(2) *Berkeley Journal of International Law* 496, p 549 (Exh RLA-83).

<sup>59</sup> Claimant’s Counter Memorial on Jurisdiction, para 161; Final Report of the Study Group on the Most-Favoured-Nation clause, Adopted by the International Law Commission at its sixty-seventh session, in 2015, and submitted to the General Assembly, p 26, para 147 (*ILC Report*) (Exh CLA-8).

<sup>60</sup> Claimant’s Counter Memorial on Jurisdiction, para 168.

- already enjoyed under the earlier BIT.<sup>61</sup> The express right to direct investor-state dispute resolution would serve to enhance legal security.
89. Rawat's core argument is that the MFN clause, interpreted in accordance with Article 31 of the VCLT, includes investor-state dispute resolution as a covered "*matière*".
90. First, as a matter of ordinary meaning, the expression "*matières régies par la présente convention*" is widely recognized to cover dispute resolution mechanisms. Rawat relies on the ILC Report, which identifies six categories of MFN clauses according to their respective drafting features and the common interpretation attached to them by tribunals. Article 8 of the France-Mauritius BIT, which applies to all "*matières régies par la présente Convention*", falls under the second category in the ILC Report—MFN clauses that refer "*to 'all treatment' or 'all matters' governed by the treaty*"—and tend to be interpreted broadly.<sup>62</sup>
91. In addition, Rawat refers to the tribunal's decision in *Maffezini v Spain*, where the MFN clause was applicable to "*all matters subject to this Agreement*", that "[n]otwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors".<sup>63</sup> Rawat also refers to the *Suez v Argentina* case and commentary, as supporting the interpretation that the phrase "*all matters*" in an MFN clause includes matters relating to dispute settlement.<sup>64</sup>
92. Still examining ordinary meaning, Rawat emphasizes that there is, in fact, an investor-state dispute resolution provision in the France-Mauritius BIT—this is "*precisely covered by Article 9 of the France-Mauritius BIT*".<sup>65</sup> Article 9 provides that any agreement concluded between a Contracting State and an investor of the other Contracting State shall contain an arbitration agreement. Rawat argues that this

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<sup>61</sup> Claimant's Counter Memorial on Jurisdiction, paras 202-204.

<sup>62</sup> Claimant's Counter Memorial on Jurisdiction, para 176; ILC Report, supra note 59, p 34, para 197.

<sup>63</sup> Claimant's Counter Memorial on Jurisdiction, para 177; *Emilio Augustín Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on the objections to jurisdiction dated 25 January 2000, paras 54-56 (Exh CLA-10).

<sup>64</sup> Claimant's Counter Memorial on Jurisdiction, paras 178-182; Schill, supra note 58 at p 550 (Exh RLA-83); Gaillard, supra note 58 (Exh CLA-52); B Poulain, "*Clauses de la Nation la Plus Favorisée et Clauses d'Arbitrage Investisseur-Etat: est-ce la Fin de la Jurisprudence Maffezini?*", ASA Bulletin 2/2007 (June), pp 279-340 (Exh CLA-77); *Suez, Sociedad General de Aguas de Barcelona and InterAguas Servicios Integrales del Agua v Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction dated 16 May 2006, para 59 (*Suez*) (Exh CLA-54).

<sup>65</sup> Claimant's Counter Memorial on Jurisdiction, para 185.

is how the “*matière*” of “investor-state arbitration” is “*régie*” (i.e. “governed” or “treated”) in the BIT.<sup>66</sup> That this is limited to contractual investor-state arbitration, he says, is justified by the fact that, in 1973, it was not usual for states to include permanent offers to arbitrate in BITs, as compared to investment contracts. Nonetheless, argues Rawat, within this context “*it is obvious that investor-State arbitration was one of the matters envisaged by the contracting States when they entered into this BIT*”.<sup>67</sup>

93. As further confirmation that France and Mauritius intended dispute resolution to be among the “*matières régies par la présente convention*” for MFN purposes, Rawat points to the express exclusion of tax matters (Article 7) in Article 8. If the Contracting States had intended also to exclude dispute resolution matters, they would have specified that as they did for tax matters and would have excluded Article 9 from the scope of MFN treatment in addition to Article 7. In support, Rawat refers to the decisions of the tribunals in *Suez v Argentina* and *Gas Natural SDG v Argentina*, which found that where an MFN clause excludes certain matters, the absence of dispute resolution from the excluded matters indicates that dispute resolution was intended to be included for MFN treatment.<sup>68</sup>
94. Second, Rawat turns to interpretation of Article 8 in context and in light of the object and purpose of MFN clauses.
95. According to Rawat, one reason that states agree to MFN provisions in BITs is so that, at any given time, investors will benefit from the outcome of more successful negotiations with a third state. Here, Article 9 of the Finland-Mauritius BIT is more favorable than the France-Mauritius BIT because it allows investors the choice of dispute settlement with a Contracting State before the national courts or an international arbitral tribunal.<sup>69</sup>
96. Another reason for states to agree to MFN provisions is to allow a treaty to adapt to legal evolution that cannot be foreseen.<sup>70</sup> Rawat submits that, before the *AAPL v Sri Lanka* Award in 1990, France and Mauritius did not expect that a state’s consent to

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<sup>66</sup> Transcript, p 130, lines 1-5, Dr Pinna.

<sup>67</sup> Claimant’s Counter Memorial on Jurisdiction, para 185.

<sup>68</sup> Claimant’s Counter Memorial on Jurisdiction, paras 187-189; *Suez*, supra note 64, para 56 (Exh CLA-54); *Gas Natural SDG v Argentina*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction dated 17 June 2005, para 30 (Exh CLA-55).

<sup>69</sup> Claimant’s Counter Memorial on Jurisdiction, para 197.

<sup>70</sup> Claimant’s Counter Memorial on Jurisdiction, paras. 200-201.

arbitrate with an investor could be inferred directly from an investment treaty.<sup>71</sup> Hence, Article 8 “comes as an adjustment clause in order to grant the Investor the benefit of the evolution of the analysis of the State’s consent to arbitrate”.<sup>72</sup>

97. Rawat contends that a broad interpretation of Article 8 is consistent with the object and purpose of the France-Mauritius BIT, to “*protéger et stimuler les investissements*” (in free translation: “*protect and stimulate investments*”).<sup>73</sup> He cites with approval Professor Stephan Schill’s opinion that “*policies underlying investment treaties further justify the broadening of MFN treatment to include the host State’s broader consent to investor-State dispute settlement*”.<sup>74</sup>
98. Third, Rawat submits that a broad interpretation of Article 8 is confirmed by supplementary means of interpretation, as envisioned in VCLT Article 32.<sup>75</sup> He characterizes the debates before the French *Sénat* in relation to the France-Mauritius BIT, including Article 9 on ICSID arbitration, as emphasizing the importance of arbitration to investment protection.<sup>76</sup>
99. Fourth, in related vein, Rawat looks to the negotiations of the France-Mauritius BIT to argue that the Contracting States endorsed investor-state dispute resolution. As direct access to investor-state arbitration was not usual at the time of the negotiations, the language of Article 9 reflects the “*will of the Parties to submit State-investors disputes to arbitration*” by contract.<sup>77</sup> In that era, the purpose of investment treaties was merely to provide governing rules for investment contracts. It was only after 1990, and the *AAPL v Sri Lanka* developments, that Mauritius changed the drafting of its dispute resolution provisions, such as the one in the Finland-Mauritius BIT. Given the context prior to 1990, Article 9 must be interpreted as a clear expression of the Contracting States’ intent to submit any investor-state disputes to arbitration.<sup>78</sup>
100. Fifth, Rawat turns to the *ejusdem generis* rule of interpretation of MFN clauses. He submits that the *ejusdem generis* rule applies when the basic treaty, here the France-Mauritius BIT, is of the same nature and concerns the same subject matter as the

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<sup>71</sup> *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 (Exh CLA-13).

<sup>72</sup> Claimant’s Counter Memorial on Jurisdiction, para 201.

<sup>73</sup> Claimant’s Counter Memorial on Jurisdiction, para 208.

<sup>74</sup> Claimant’s Counter Memorial on Jurisdiction, para 209; Schill, *supra* note 58 at p 554 (Exh RLA-83).

<sup>75</sup> Claimant’s Counter Memorial on Jurisdiction, paras 160 and 210.

<sup>76</sup> Claimant’s Counter Memorial on Jurisdiction, paras 213-214.

<sup>77</sup> Claimant’s Counter Memorial on Jurisdiction, para 220.

<sup>78</sup> Claimant’s Counter Memorial on Jurisdiction, paras 224-226.

relevant third-state treaty, here the Finland-Mauritius BIT.<sup>79</sup> Accordingly, as both the France-Mauritius BIT and the Finland-Mauritius BIT are investment treaties and both have dispute resolution provisions, Article 8 of the France-Mauritius BIT should be interpreted to allow him to benefit from the more favorable investor-state arbitration rights in the Finland-Mauritius BIT.

101. Rawat disagrees with Mauritius' position that the *ejusdem generis* rule requires direct investor-state arbitration clauses in both the France-Mauritius and Finland-Mauritius BITs. In his view, the focus for *ejusdem generis* review must be the subject matter of the MFN clause itself rather than the specific treaty provision that is sought to be applied through MFN. In support, he cites the ILC's commentary on the 1978 Draft Articles on MFN Treatment.<sup>80</sup>

*It is also not proper to say that the treaty or agreement including the clause must be of the same category (ejusdem generis) as that of the benefits that are claimed under the clause. To hold otherwise would seriously diminish the value of a most-favoured-nation clause.*

102. In any event, Rawat submits that the Finland-Mauritius BIT is of the same nature as the France-Mauritius BIT for purposes of application of the *ejusdem generis* rule<sup>81</sup> and that Articles 9 of the two treaties, alternatively, are also of the same nature for these purposes, because they both address the resolution of disputes between investors and a host state, regardless of how consent to arbitration is established in either case (i.e. simultaneously through contract in Article 9 of the France-Mauritius BIT or consent being dissociated in time—"arbitration without privity"—in Article 9 of the Finland-Mauritius BIT).<sup>82</sup> In essence, Rawat argues that "investor-state dispute settlement" is the "*matière*" of both Articles 9 of the two treaties and that "arbitration consent to be given by contract" or "arbitration consent given under treaty" are how these "*matières*" are "governed" or "treated" in each treaty respectively.

103. As a final argument against Mauritius' position on the relationship between the MFN clause and consent to arbitration, Rawat submits that the MFN clause, Article 8, of the France-Mauritius BIT automatically went into effect when Mauritius entered into the Finland-Mauritius BIT. This is reflected by use of the verb "*bénéficient*" in

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<sup>79</sup> Claimant's Counter Memorial on Jurisdiction, paras 234-237, citing Gaillard, *supra* note 58 (Exh CLA-52) and Schill, *supra* note 58 at p 523 (Exh RLA-83).

<sup>80</sup> Claimant's Counter Memorial on Jurisdiction, para 246; ILC's Draft Articles on Most-Favoured-Nation Clauses, with Commentaries 1978, p 30 (Exh RLA-71).

<sup>81</sup> Claimant's Counter Memorial on Jurisdiction, paras 232 and 250.

<sup>82</sup> Transcript, p 131, lines 10-12, Dr Pinna; p 133, lines 17-25, Dr Pinna; and p 134, lines 1-3, Dr Pinna.

Article 8 of the France-Mauritius BIT, which is in indicative present tense, denoting an imperative in the French language, as opposed to an obligation to do something in the future.<sup>83</sup>

104. At the hearing, Rawat’s counsel addressed the Tribunal’s fourth written question concerning *effet utile* in connection with interpretation of Article 8 of the France-Mauritius BIT. Counsel agreed with Mauritius’ counsel that *effet utile* is “indeed, a principle of interpretation ... included in the good faith condition of Article 31 of the Vienna Convention [with the purpose to avoid] too restrictive [an] interpretation of clauses and of terms that would deprive the clause of any role at all”.<sup>84</sup> Counsel went on to argue that *effet utile* supports Rawat’s interpretation of the MFN clause, which reflects the drafters’ support of arbitration, and undermines Mauritius’ “very, very narrow” interpretation, which would leave the clause “useless” with respect to Article 9 of the France-Mauritius BIT.<sup>85</sup>
105. In sum, according to Rawat, with the ratification of the Finland-Mauritius BIT, the direct investor-state arbitration provisions in Article 9 of the Finland-Mauritius BIT became available to protected French investors by automatic operation of Article 8 of the France-Mauritius BIT. At that moment, Mauritius consented to arbitrate with French investors, which offer was accepted by Rawat when filing for arbitration in this case.

## **B. Jurisdiction *Ratione Personae***

### ***i. The Respondent’s Position***

106. Should Rawat prevail on the issue of jurisdiction *ratione voluntatis*, Mauritius submits that the Tribunal manifestly lacks jurisdiction *ratione personae* for three separate reasons.<sup>86</sup> First, Rawat has failed to prove his French nationality and, even if he were a French national, the France-Mauritius BIT does not apply to dual nationals. Second, even if the BIT does apply to dual nationals, Rawat’s dominant and effective nationality is Mauritian, and there is no exception in the BIT to the international law principle that a dual national cannot bring a claim against his state of dominant and effective nationality. Third, the BIT requires an investor to have the

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<sup>83</sup> Claimant’s Counter Memorial on Jurisdiction, paras 256-257. This is something that the Tribunal had noted in its Interim Measures Order, *supra* note 32, at footnote 8, p 16.

<sup>84</sup> Transcript, p 138, line 23 to p 139, line 14, Dr Pinna.

<sup>85</sup> Transcript, p 139, lines 19-25, Dr Pinna.

<sup>86</sup> Respondent’s Memorial on Jurisdiction, paras 56-60.

nationality of a Contracting Party on the date of the relevant investment, and Rawat made his investment before allegedly becoming a French national in 1998.

107. The Respondent, as well as the Claimant, devoted most attention to the dual nationality issue.

**a. The Claimant's Dual Nationality**

108. Mauritius originally challenged Rawat's status as a French national, arguing that Rawat's Declaration of Nationality based on marriage to a French national is insufficient proof.<sup>87</sup> Following Rawat's production of his 2015 French passport and 2011 French identification card, Mauritius effectively accepted that Rawat became a French national in December 1998 by reason of marriage. Mauritius' counsel stated at the hearing:<sup>88</sup>

*The Claimant has produced new evidence in the Counter-Memorial on jurisdiction to prove his French nationality. This evidence is still unsatisfactory in our view, but for the purposes of this hearing the Respondent does not challenge the Claimant's French nationality.*

109. Dual nationality does not support jurisdiction *ratione personae*, submits Mauritius, because the France-Mauritius BIT does not protect dual nationals.
110. Mauritius relies most heavily to support this argument on the text of Article 1(2) of the France-Mauritius BIT, in specific the reference therein to investments made by the "*ressortissants, sociétés ou autres personnes morales de l'un des Etats contractants*" (emphasis added).<sup>89</sup> Mauritius distinguishes use of the French term "*ressortissants*" in the 1973 BIT from use of the broader term "*nationaux*" in more recent investment treaties concluded by France.<sup>90</sup>
111. The term "*ressortissant*", contends Mauritius, has an established ordinary meaning in the French language that specifically excludes dual nationals.<sup>91</sup> In support, Mauritius cites the *Dictionnaire de l'Académie française*, described as having the status of an official administrative document, and the *Larousse* dictionary, which define

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<sup>87</sup> Respondent's Memorial on Jurisdiction, para 62.

<sup>88</sup> Transcript, p 47, line 25 to p 48, line 5; p 57, lines 2-7, Dr Heiskanen.

<sup>89</sup> France-Mauritius BIT, Article 1(2) (Exh C-1).

<sup>90</sup> Respondent's Memorial on Jurisdiction, para 64.

<sup>91</sup> Respondent's Memorial on Jurisdiction, paras 64-65.

“*ressortissant*” as a person possessing the nationality of a state and who benefits from that state’s diplomatic and consular protection outside that state.<sup>92</sup>

112. To qualify as a French “*ressortissant*” under the France-Mauritius BIT, therefore, Rawat must prove not only that he is a French national, but also that he is entitled to the benefits of consular and diplomatic protection of France in Mauritius.<sup>93</sup> He cannot do this, because the official position of the French Government is that it does not grant consular or diplomatic protection to French citizens who are also nationals of the state in which they reside or travel. To quote from the website of the French Government:<sup>94</sup>

*Un Français binational ne peut ... pas faire prévaloir sa nationalité française auprès des autorités de l'autre ou des autres État(s) dont il possède aussi la nationalité lorsqu'il réside sur son territoire. Ce binational ou plurinational est alors généralement considéré par ces États comme leur ressortissant exclusif et il s'en suit que la protection diplomatique de la France ne peut s'exercer contre l'autre État dont dépend le binational.* (Emphasis added)

In free translation:

*A French dual national cannot ... invoke his French nationality with the authorities of the other State(s) of which he is also a national when he resides in its territory. This dual national or multi-national is then generally considered by these States as their exclusive ressortissant and it follows that France cannot exercise its diplomatic protection against the dual national's other State of nationality.* (Emphasis added)

113. In sum, even as a French-Mauritian dual national, Rawat cannot qualify as a French “*ressortissant*” under the France-Mauritius BIT.<sup>95</sup>
114. In reliance on Article 31 of the VCLT, Mauritius adds that this ordinary meaning interpretation of “*ressortissant*” is supported by the context and object and purpose of the France-Mauritius BIT.
115. As for object and purpose, Mauritius looks to the Preamble of the France-Mauritius BIT, where the two states recite that they are “[a]nimated by the desire to intensify

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<sup>92</sup> *Dictionnaire de l'Académie française* (9th ed), JORF (2017) dated 26 January 2017, p 1 (Exh R-23): “*Toute personne possédant la nationalité d'un Etat et bénéficiant à l'étranger de sa protection diplomatique et consulaire*”; *Larousse online dictionary* (last visited on 4 July 2017) (Exh R-24): “*Personne protégée par les représentants diplomatiques ou consulaires d'un pays donné, lorsqu'elle réside dans un autre pays*”.

<sup>93</sup> Respondent’s Memorial on Jurisdiction, paras 66-68.

<sup>94</sup> Respondent’s Memorial on Jurisdiction, para 68; extract from the website of the French Government (last visited on 4 July 2017) <https://www.service-public.fr/particuliers/vosdroits/F334> (Exh R-26).

<sup>95</sup> Respondent’s Memorial on Jurisdiction, para 69.

*economic cooperation between the two countries [and] [i]nterested to this effect in protecting and stimulating investments”*.<sup>96</sup> This can only mean protection of foreign investment, says Mauritius, not domestic investment. In support, Mauritius cites the *Lemire v Ukraine* ICSID Award.<sup>97</sup>

***States confer rights to foreign investors, which are unavailable to their own citizens.***

...  
*The different treatment between foreign and domestic investors is a natural consequence of a BIT. However, this unequal treatment is not without justification: justice is not to grant everyone the same, but suum cuique tribuere. Foreigners, who lack political rights, are more exposed than domestic investors to arbitrary actions of the host State and may thus, as a matter of legitimate policy, be granted a wider scope of protection.* (Emphasis added)

116. Turning to context, Mauritius argues that the term “*ressortissant*” is not used synonymously with “national” in the BIT. The term “national” does not appear and the term “*ressortissant*” is expressly used in all articles of the treaty except Articles 11 and 12. Most significantly, the term “*ressortissant*” is used in connection with contractual ICSID arbitration.<sup>98</sup> Article 9 provides that investment contracts between a Contracting State and a “*ressortissant*” (or a company or other legal entity) of the other Contracting State “*must include a clause providing that their disputes relating to these investments shall be submitted, to ... [ICSID], with a view to their settlement by arbitration, in accordance with the [ICSID Convention]*”.
117. In turn, Article 25(2)(a) of the official English version of the ICSID Convention expressly excludes from arbitral jurisdiction “*any person who ... also had the nationality of the Contracting State party to the dispute*”.<sup>99</sup> The official French version of Article 25(2)(a) uses the term “*ressortissant*” in this context:<sup>100</sup>

“*Ressortissant d’un autre Etat contractant*” signifie :

(a) *toute personne physique qui possède la nationalité d’un Etat contractant autre que l’Etat partie au différend à la date à laquelle les parties ont consenti à soumettre le différend à la conciliation ou à l’arbitrage ainsi qu’à la date à*

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<sup>96</sup> Respondent’s Memorial on Jurisdiction, para 73 (in free translation).

<sup>97</sup> Respondent’s Memorial on Jurisdiction, para 74; *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, 28 March 2011, paras 56-57 (Exh RLA-89).

<sup>98</sup> Respondent’s Memorial on Jurisdiction, paras 70-72.

<sup>99</sup> ICSID Convention (English official version), p 18, Article 25(2)(a) (Exh RLA-87).

<sup>100</sup> ICSID Convention (French official version), p 18, Article 25(2)(a) (Exh RLA-88).

*laquelle la requête a été enregistrée ... à l'exclusion de toute personne qui, à l'une ou à l'autre de ces dates, possède également la nationalité de l'Etat contractant partie au différend;* (Emphasis added)

The English official version reads as follows:<sup>101</sup>

*“National of another Contracting State” means:*

*(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered ..., but does not include any person who on either date also had the nationality of the Contracting State party to the dispute;* (Emphasis added)

118. Relying on the context of Article 9 of the France-Mauritius BIT read with Article 25(2)(a) of the ICSID Convention, Mauritius argues that the BIT “*therefore makes clear that dual nationals are not covered by the Treaty*”.<sup>102</sup> The ICSID Convention and the reference to it in Article 9 of the France-Mauritius BIT support interpreting “*ressortissant*” to exclude dual nationals under VLCT Article 31(1), with Article 9 as context, and under VCLT Article 31(3)(c), with ICSID Convention Article 25(2)(a) as a relevant rule of international law applicable between Mauritius and France.

119. At the hearing, counsel specifically addressed the Tribunal’s second written question, namely the relationship between the ICSID Convention and the France-Mauritius BIT and, “*more particularly, the meaning of the term “ressortissants” in Article 25(2) of the ICSID Convention and in Article 1(2) of the France-Mauritius treaty*”. Counsel took the position that Article 9 offers no consent to jurisdiction for direct investor-state arbitration:<sup>103</sup>

*Article 9 of the France-Mauritius BIT is not a jurisdictional clause. There is no consent to arbitrate. It simply requires -- creates an obligation for the State parties to consent to arbitrate in an investment contract.*

120. Mauritius’ counsel argued further that the France-Mauritius BIT should be interpreted in accordance with the ICSID Convention:<sup>104</sup>

*[Rawat] cannot escape the effects of the ICSID Convention, since the ICSID Convention is the only treaty that is referred to in this BIT, and it therefore forms part of the context of interpretation of this treaty.*

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<sup>101</sup> ICSID Convention (English official version), p 18, Article 25(2)(a) (Exh RLA-87).

<sup>102</sup> Respondent’s Memorial on Jurisdiction, paras 72-73.

<sup>103</sup> Transcript, p 168, lines 3-7, Dr Heiskanen.

<sup>104</sup> Transcript, p 53, lines 7-10, Dr Heiskanen.

121. Mauritius' counsel submitted that if an ICSID arbitration clause were to be inserted into an investment contract with Rawat, it would not be enforceable.<sup>105</sup>

*Now, to conclude on the issue of context and Article 31.3(c), if the term, "ressortissants", is not given the same meaning in the French -- France-Mauritius BIT and the ICSID Convention, if it is not given the meaning excluding dual nationals, this would lead to the absurd result that Mauritius, if it entered into an Investment Contract with Mr Rawat, would be under an obligation to include, in that contract, an ICSID arbitration clause that would be unenforceable.*

122. In summary, whether looking to plain meaning of the term "*ressortissant*", the context or the object and purpose of the France-Mauritius BIT, Mauritius argues that the treaty does not protect the Claimant as a dual national.

**b. The Claimant's Dominant and Effective Nationality**

123. Even if the France-Mauritius BIT could be interpreted to protect dual French-Mauritian nationals, Mauritius argues that Rawat's claims would fall outside the Tribunal's jurisdiction *ratione personae*, because the international law rule of "dominant and effective nationality" is applicable under the BIT and Rawat's dominant and effective nationality is indisputably Mauritian.

124. Mauritius first explains that, while classic international law excluded claims by dual nationals against states—as reflected in the terms of the France-Mauritius BIT and the ICSID Convention—a "*further and more nuanced rule*" has developed allowing claims by dual nationals who can establish that their dominant and effective nationality is that of their espousing state (for diplomatic protection) or their home state (for direct claims).<sup>106</sup> In support, Mauritius cites the ICJ's judgment in *Nottebohm* and other diplomatic protection related authorities.<sup>107</sup> Mauritius further cites the *Case No. A/18* decision of the Iran-United States Claims Tribunal (*IUSCT*) as:<sup>108</sup>

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<sup>105</sup> Transcript, p 55, lines 11-19, Dr Heiskanen.

<sup>106</sup> Respondent's Memorial on Jurisdiction, paras 76-77.

<sup>107</sup> Respondent's Memorial on Jurisdiction, paras 78-81; *Nottebohm Case (Liechtenstein v Guatemala)*, Judgment of 6 April 1955, (1955) I.C.J. Reports 4, p 21 *et seq* (Exh RLA-92); *Mergé Case (United States v Italy)*, Italy and United States Conciliation Commission, 14 RIAA 236, 10 June 1955, p 246 (Exh RLA-93); *Flegenheimer Case (United States v Italy)*, Italy and United States Conciliation Commission, 14 RIAA 327, 20 September 1958, para 62 (Exh RLA-94).

<sup>108</sup> Respondent's Memorial on Jurisdiction, paras 81-82; *Case No. A/18*, Decision No. DEC 32-A18-FT, 5 Iran-US CTR 251, 6 April 1984, p 265 (footnote omitted) (Exh RLA-96).

*an important development in the application of the dominant and effective nationality rule ... because, as the IUSCT noted, arbitration before the IUSCT did not represent a form of diplomatic protection. Private parties had direct access to the IUSCT and accordingly the dominant and effective nationality rule came to be applied primarily as a jurisdictional rule rather than as a rule of admissibility. ...*

125. According to Mauritius, the dominant and effective nationality rule is now an established rule of international law, codified in Article 7 of the ILC Draft Articles on Diplomatic Protection:<sup>109</sup>

*A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.*

126. Mauritius acknowledges that the dominant and effective nationality rule is not a *jus cogens* norm, and accordingly state parties to a treaty—which would be *lex specialis*—may consent to allow their own nationals to assert claims against them. However, argues Mauritius, the dominant and effective nationality rule must apply in the instant case absent a clearly stated exception regarding dual nationals in the France-Mauritius BIT. As there is no such exception, the BIT reflects the classic rule of international law that excludes claims by dual nationals against either of their states of nationality, and the dominant and effective nationality rule applies.<sup>110</sup> This follows from VCLT Article 31(3)(c), which directs that account must be taken of “any relevant rules of international law applicable in the relations between the parties” in interpreting the treaty.<sup>111</sup>

127. In applying the dominant and effective nationality rule, tribunals examine the facts of the overall life of the relevant individual. As stated by the *Ballantine v Dominican Republic* tribunal, absent any express standards in the relevant treaty, the elements include:<sup>112</sup>

*the State of habitual residence, the circumstances in which the second nationality was acquired, the individual's personal attachment for a*

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<sup>109</sup> Respondent's Memorial on Jurisdiction, para 85; Draft Articles on Diplomatic Protection, with commentaries, text adopted by the International Law Commission at its fifty-eighth session, Yearbook of the International Law Commission, 2006, vol. II, Part Two, p 43 (*ILC Draft Articles on Diplomatic Protection*) (Exh RLA-91).

<sup>110</sup> Respondent's Memorial on Jurisdiction, paras 104-110.

<sup>111</sup> Respondent's Memorial on Jurisdiction, paras 105-107.

<sup>112</sup> Respondent's Memorial on Jurisdiction, para 86; *Michael Ballantine and Lisa Ballantine v The Dominican Republic*, Procedural Order No. 2, PCA Case No. 2016-17, 21 April 2017, p 6, para 25 (Exh RLA-101).

*particular country, and the center of the person's economic, social and family life.*

128. Second, Mauritius contends that the relevant elements readily demonstrate that Rawat is dominantly and effectively a Mauritian national.
129. As set out in the Factual Background above, the Claimant's links to Mauritius are long and deep.<sup>113</sup> He was born and raised in Mauritius and, with the exception of three years in the United States and his recent residency in France, has had his habitual residence in Mauritius. He was married in Mauritius, and his children were all born in Mauritius, married Mauritian nationals, and reside in Mauritius. He owns substantial property in Mauritius, including what he considers to be his principal residence. He holds a Mauritian driving license and is registered to vote in Mauritius. He has held management positions or shares in at least 65 companies incorporated in Mauritius. He has always used his Mauritian passport to enter Mauritius and, apparently except on two occasions, has always used his Mauritian passport to enter France.<sup>114</sup> To the best of Mauritius' knowledge, Rawat has not made any application under the applicable Mauritian law to acquire his properties as a foreign national.<sup>115</sup>
130. In comparison, says Mauritius, Rawat's links to France are tenuous.<sup>116</sup> He apparently spent only two years in France over 51 years, and has no significant business interests or assets there. He was awarded the French *Légion d'Honneur* as a foreigner, nominated by the Protocol Service of the French Ministry of Foreign Affairs, for his long service as president of an investment company in Mauritius.<sup>117</sup>

### **c. The Claimant's Nationality at the Time of Investment**

131. Mauritius' third and final argument against jurisdiction *ratione personae* is that, even accepting that Rawat acquired French nationality in 1998, he was not a French national when he acquired his relevant interests in Mauritius, in his own terms, from the "late eighties" to 1992.<sup>118</sup>

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<sup>113</sup> Respondent's Memorial on Jurisdiction, paras 88-97.

<sup>114</sup> Respondent's Memorial on Jurisdiction, para 97; Mauritian movement summary and passport and immigration office travel history of Mr Rawat, p 13 (Exh R-51).

<sup>115</sup> Respondent's Memorial on Jurisdiction, para 90.

<sup>116</sup> Respondent's Memorial on Jurisdiction, paras 98-99.

<sup>117</sup> Respondent's Memorial on Jurisdiction, para 99; *Code de la légion d'honneur et de la médaille militaire*, pp 15 and 37 (Exh R-52); *Présidence de la République, Ordre national de la légion d'honneur, Décret portant promotion et nomination, JORF* (2014) dated 11 July 2014, p 5 (Exh R-53); excerpt from the website of the French Ministry of Foreign Affairs (Exh R-54).

<sup>118</sup> Witness Statement of Dawood Rawat dated 29 July 2016, p 2 *et seq* (Exh C-50).

132. Mauritius relies on Article 1(2) of the France-Mauritius BIT, which provides for protection of “*les investissements que les ressortissants ... de l’un des Etats contractants ont, en conformité de la législation de l’autre Etat contractant, effectués* [made] ... *sur le territoire de ce dernier*”.<sup>119</sup> As Rawat was exclusively a Mauritian national when he made the relevant investments in BAIC and BAI from the late eighties to 1992, he is not a protected investor under the BIT.

**ii. The Claimant’s Position**

133. The Claimant disputes all of the Respondent’s arguments on jurisdiction *ratione personae*. Rawat asserts that, if the France-Mauritius BIT is interpreted properly under VLCT Article 31, the only relevant requirement of the BIT is that he be a national of one of the Contracting States—which he is. There is no need, submits Rawat, for the Tribunal to address his status as a dual national or his dominant and effective nationality.

**a. The Claimant’s Dual Nationality**

134. First, Rawat focuses substantial attention on the ordinary meaning of the term “*ressortissant*” in Article 9 of the France-Mauritius BIT. He argues that the non-legal definitions of “*ressortissant*” in French language dictionaries cited by the Respondent cannot apply in interpreting the BIT in context. As the term “*ressortissant*” is not defined in the France-Mauritius BIT, it should be used as a synonym of the term “*national*” according to French law and conventional practice in the context of investment treaties.<sup>120</sup>

135. Rawat emphasizes that French law on nationality does not distinguish between “*ressortissants*” and “*nationaux*”. Several provisions of the French Civil Code refer to these terms interchangeably in designating natural persons holding French nationality.<sup>121</sup>

136. Further, Rawat submits that the definitions given to the terms “*ressortissants*” and “*nationaux*” in other BITs are important, as states rely on prior practice in treaty negotiations. Based on BITs concluded by France between 1960 and 1990, in which both terms are defined as “*les personnes physiques possédant la nationalité de l’une*

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<sup>119</sup> Respondent’s Memorial on Jurisdiction, paras 117-119.

<sup>120</sup> Claimant’s Counter Memorial on Jurisdiction, paras 35-36.

<sup>121</sup> Claimant’s Counter Memorial on Jurisdiction, paras 37-38. Rawat cites, in particular, Article 21-13-1 of the French Civil Code, which provides that a person can be granted French nationality through a declaration if, amongst other conditions, he is a direct ascendant of a French “*ressortissant*” (Exh CLA-78).

*des Parties contractantes*”,<sup>122</sup> Rawat asks the Tribunal to infer that the drafters of the France-Mauritius BIT did not intend to distinguish between “*nationaux*” and “*ressortissants*”. In particular, Rawat cites the examples of the 1978 France-Jordan BIT, the 1977 France-Korea BIT and the 1978 France-Sudan BIT, which use the term “*nationaux*” to define protected individual investors, and the term “*ressortissant*” to describe the protection granted to these persons.<sup>123</sup> Moreover, the term “*ressortissant*” used in Article 3 of the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, adopted by Mauritius in 1969, is defined as “*national*”: “*a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses*”.<sup>124</sup>

137. Second, Rawat looks to the object and purpose in the Preamble of the France-Mauritius BIT to “*intensify the economic cooperation between the two States*” and to “*protect and encourage investments*”,<sup>125</sup> Rawat argues that dual French-Mauritian nationals who invest either in Mauritius or France self-evidently do contribute to the economic cooperation between these two States. He relies on the decision of the Paris Court of Appeal in *Venezuela v García Armas*, which noted the object and purpose of the relevant treaty in refusing to distinguish between single and dual nationals regarding their eligibility to protection *ratione personae* under the treaty.<sup>126</sup>
138. Third, emphasizing that the France-Mauritius BIT does not contain any condition on the nationality of natural person investors other than being a “*ressortissant*” of one of the Contracting States, Rawat cautions that additional conditions cannot be added to the BIT. This is what the Tribunal would be doing, argues Rawat, if it were to accede

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<sup>122</sup> Claimant’s Counter Memorial on Jurisdiction, paras 40-41.

<sup>123</sup> *Convention entre le Gouvernement de la République française et le Gouvernement du Royaume Hachémite de Jordanie sur l’encouragement et la protection des investissements*, 23 February 1978 (entered into force on 18 October 1979) (Exh CLA-25); *Accord entre le Gouvernement de la République française et le Gouvernement de la République de Corée sur l’encouragement et la protection des investissements, signé à Paris le 28 décembre 1977* (entered into force on 1 February 1979), Article 3, (Exh CLA-32); *Convention entre le Gouvernement de la République française et le Gouvernement de la République démocratique du Soudan sur l’encouragement et la protection réciproques des investissements, signée à Paris le 31 juillet 1978* (entered into force on 5 July 1980), Article 8 (Exh CLA-26).

<sup>124</sup> Claimant’s Counter Memorial on Jurisdiction, para 43; Convention on Certain Questions relating to the Conflict of Nationality Laws, signed at The Hague on 12 April 1930, Article 3, (Exh CLA-15) (Claimant’s free translation from French original: “[s]ous réserve des dispositions de la présente convention, un individu possédant deux ou plusieurs nationalités pourra être considéré, par chacun des Etats dont il a la nationalité comme son ressortissant”).

<sup>125</sup> France-Mauritius BIT (Claimant’s free translation from French original: “*intensifier la coopération économique entre les deux pays*”, “*protéger et stimuler les investissements*”).

<sup>126</sup> *Bolivarian Republic of Venezuela v Serafin García Armas and Karina García Gruber*, Court of Appeal of Paris, RG No. 15/01040, Decision of 25 April 2017 (*Venezuela v García Armas*) (Exh RLA-115). The tribunal’s award was eventually partially set aside by the Paris Court of Appeal, on a different ground.

to the Respondent's request to examine his dominant and effective nationality as an international law rule applicable between the Contracting States under Article 31(3)(c) of the VCLT. In support, he cites findings by the *Saluka v Czech Republic* and *Oostergetel v Slovak Republic* tribunals that the relevant BIT did not require the investor's nationality to be "effective" or impose further conditions such as the existence of a genuine link to the non-host state,<sup>127</sup> and that the treaty's object and purpose to promote mutual investment would not be furthered if dual nationals are excluded from protection.<sup>128</sup>

139. Rawat adds that if France and Mauritius had intended to set additional limitations on jurisdiction *ratione personae*, they would have expressly done so. Both France and Mauritius have expressly provided such restrictions in many other treaties, for example, the France-China BIT and the Mauritius-Egypt BIT.<sup>129</sup>
140. Fourth, Rawat points out that unlike Article 25(2)(a) of the ICSID Convention, the UNCITRAL Rules—under which this arbitration is filed—do not contain an express exclusion of dual national claims against a host state. Indeed, argues Rawat, the need for the express exclusion of dual national jurisdiction in the ICSID Convention demonstrates the common understanding under international law that dual nationals are not precluded from bringing claims against one of their states of nationality. The ICSID exclusion of dual nationals, therefore, cannot be generalized to investment treaty arbitration under other rules.<sup>130</sup>
141. At the hearing, addressing the Tribunal's second written question, counsel took the position that the question of nationality must be assessed separately under the France-Mauritius BIT and the ICSID Convention. Counsel argued that the term "ressortissant" in the France-Mauritius BIT has a different ordinary meaning than

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<sup>127</sup> Claimant's Counter Memorial on Jurisdiction, paras 54-56; *Saluka Investments B.V. v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras 229 and 241 (Exh CLA-33); *Oostergetel v Slovak Republic Jan Oostergetel and Theodora Laurentius v Slovak Republic*, UNCITRAL Ad Hoc Arbitration, Decision on Jurisdiction, 30 April 2010, para 130 (Exh CLA-16).

<sup>128</sup> Claimant's Counter Memorial on Jurisdiction, paras 57-59; *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No. ARB/98/2, Award I, 8 May 2008, para 415 (*Pey Casado v Chile*) (Exh CLA-34); *Serafin García Armas and Karina García Gruber v Bolivarian Republic of Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction, 15 December 2014, paras 180-181 (*García Armas v Venezuela*) (Exh CLA-35).

<sup>129</sup> *Accord entre le Gouvernement de la République française et le Gouvernement de la République populaire de Chine sur l'encouragement et la protection réciproques des investissements*, 30 May 1984 (entered into force on 19 March 1985, terminated), Article 1(3) (Exh CLA-37); Agreement between the Government of the Republic of Mauritius and the Government of the Arab Republic of Egypt on the reciprocal promotion and protection of investments, 25 June 2014 (entered into force on 17 October 2014), Article 1(3) (Exh CLA-40).

<sup>130</sup> Claimant's Counter Memorial on Jurisdiction, para 70.

“ressortissant” in the ICSID Convention. While the ordinary meaning is as “a synonym of, “National” [and] does not exclude dual national”,<sup>131</sup> the term is a “precisely and... specifically-defined term in the ICSID Convention”:<sup>132</sup>

*The reference in the ICSID Convention -- the reference to the ICSID Convention in Article 9 of the BIT cannot be interpreted as restricting the meaning of the term, “ressortissants”, and restricting the meaning of the term, “ressortissants”, to physical persons having the nationality of only one contracting State, and not to the State nationality of the host State of the investment.*

142. The very length of the definition of “ressortissant” in the ICSID Convention, argued counsel, shows that the term is not being used in its general sense because “[i]f this was the ordinary meaning of the term, it was not necessary to go into such a long definition”.<sup>133</sup>
143. Counsel cautioned against interpreting the general coverage of claims under the France-Mauritius BIT against the specific reference in Article 9 to mandatory inclusion of ICSID arbitration clauses in investment contracts:<sup>134</sup>

*[I]t would be very artificial to try to find in the language of Article 9 a specific definition, a delimitation of the general scope of application of the treaty. Article 9 and the specific condition of Article 9, Investment Contract, are very limited, the scope is much more broad.*

144. Counsel stressed that Article 9 of the France-Mauritius BIT reflects Mauritius’ general willingness to settle investment disputes by arbitration.<sup>135</sup>
145. Finally, Rawat submits that the Tribunal, in interpreting the France-Mauritius BIT under VCLT Article 31(3)(c), may refer to rules of international law only if their application to a particular issue is not disputed, which distinguishes rules from broader principles or considerations that may not be firmly established.<sup>136</sup> The dominant and effective nationality concept, says Rawat, is not such a rule of international law applicable to investor-state disputes. It was developed in the limited context of diplomatic protection. The diplomatic protection cases cited by Mauritius,

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<sup>131</sup> Transcript, p 107, lines 21-24, Dr Pinna.

<sup>132</sup> Transcript, p 109, lines 15-16; p 109, line 22 to p 110, line 4, Dr Pinna.

<sup>133</sup> Transcript, p 107, lines 19-20, Dr Pinna.

<sup>134</sup> Transcript, p 111, lines 19-24, Dr Pinna.

<sup>135</sup> Transcript, p 116, lines 1-14, Dr Pinna.

<sup>136</sup> Claimant’s Counter Memorial on Jurisdiction, paras 72-76; C McLachlan, “The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention”, (2005) 54(2) The International and Comparative Law Quarterly 279, p 290 (Exh RLA-107).

and the awards of the special-purpose Iran-United States Claims Tribunal, are not relevant to a determination of whether this rule applies in the context of investment treaty protection generally.<sup>137</sup> Investment treaty tribunals, including in the cases of *Micula v Romania* and *Pey Casado v Chile*, have repeatedly found that diplomatic protection rules, and in particular the dominant and effective nationality principle, do not apply in investor-state disputes, absent express inclusion as in the Dominican Republic-Central America Free Trade Agreement.<sup>138</sup>

146. In sum, Rawat submits that the France-Mauritius BIT constitutes *lex specialis* for the Parties and, absent the express inclusion of the dominant and effective nationality rule in the treaty, excludes application of the rule. Rawat's interpretation of the ILC's Draft Articles on Diplomatic Protection is that they cannot be applied when they are "inconsistent" with "provisions for the protection of investments", which is the case with the France-Mauritius BIT.<sup>139</sup>

**b. The Claimant's Dominant and Effective Nationality**

147. As Rawat does not accept the applicability of the dominant and effective nationality rule, he offered no submissions on his dominant and effective nationality. He did not materially dispute the facts alleged by Mauritius as to his comparative links to Mauritius and France.

**c. The Claimant's Nationality at the Time of Investment**

148. Rawat rejects Mauritius' submission that he must prove he was a French national when he made—"a *effectué*"—his original investments in Mauritius. He contends that, for the purposes of personal jurisdiction, he had to be—and was—a French national when Mauritius allegedly breached its BIT obligations in 2015 and when he submitted his Notice of Arbitration in late 2015.<sup>140</sup>
149. In support, Rawat relies on the tribunal decisions in *Pey Casado v Chile* and in *García Armas v Venezuela*.<sup>141</sup> In the latter case, the Paris Court of Appeal notably confirmed that it was enough in order to establish the *ratione personae* jurisdiction of the

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<sup>137</sup> Claimant's Counter Memorial on Jurisdiction, paras 77-79 and 80-91.

<sup>138</sup> Claimant's Counter Memorial on Jurisdiction, para 92; *Micula et al. v Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, para 99 (Exh CLA-45); *Pey Casado v Chile*, supra note 128, para 415.

<sup>139</sup> Claimant's Counter Memorial on Jurisdiction, paras 103-105; ILC Draft Articles on Diplomatic Protection, supra note 109, pp 89-90.

<sup>140</sup> Claimant's Counter Memorial on Jurisdiction, para 120.

<sup>141</sup> Claimant's Counter Memorial on Jurisdiction, paras 121-126; *Pey Casado v Chile*, supra note 128, para 414; *García Armas v Venezuela*, supra note 128.

tribunal, that one of the contracting states should recognize the investor as its own national at the time the investor brought the relevant treaty claim.<sup>142</sup> He further relies on leading commentary.<sup>143</sup>

150. Rawat argues that, in any event, his original investments continued for approximately 40 years, with reinvestment of profit and dividends. In his view:<sup>144</sup>

*It would therefore be artificial to require an investor, and in particular Mr Rawat, to hold the nationality of one of the contracting parties to a bilateral investment treaty at the time of the first purchase of the shares that constitutes only the first step of the whole investment under consideration.*

### **C. The Relief Requested**

151. The Respondent requests that the Tribunal dismiss the Claimant's claims for lack of jurisdiction, and order the Claimant to pay Respondent's costs on a full indemnity basis as defined in Article 38 of the UNCITRAL Rules.
152. The Claimant requests that the Tribunal dismiss the Respondent's jurisdictional objections, rule that it has jurisdiction to decide the merits of the claims, and order the Respondent to pay all costs of this phase of the arbitration proceedings.

## **VI. THE TRIBUNAL'S ANALYSIS AND DECISION**

### **A. The Sequence for Addressing the Jurisdictional Objections**

153. As noted in the Procedural History section above, the Tribunal posed four written questions to the Parties in advance of the jurisdiction hearing. The first was: "*Whether the order in which the Tribunal assesses the two jurisdictional objections regarding nationality and MFN objections has significance and, if so, why?*"
154. Rawat's counsel took the position at the hearing that the nationality objection should come first because it concerns the very *applicability* of the France-Mauritius BIT to

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<sup>142</sup> The Paris Court of Appeal however partially set aside the award on the basis of a mixed *ratione materiae/ratione temporis* objection, *ie* that the specific language in the relevant treaty required, in its view, the investments to have been made at a time when the investor already held the home state's nationality. *Venezuela v García Armas*, *supra* note 126, p 7.

<sup>143</sup> For example, R Dolzer and C Schreuer, *Principles of International Investment Law* (2012), p 252 (Exh CLA-47).

<sup>144</sup> Claimant's Counter Memorial on Jurisdiction, para 148.

Rawat as a protected investor, which must be determined before examining the applicability of the MFN clause:<sup>145</sup>

*[T]he question of nationality, whether Mr Rawat is a protected investor under the BIT, concerns the general scope of application, the applicability of the treaty in general as a whole. On the other hand, the question of the MFN clause to determine whether it applies to jurisdictional protection, or to the jurisdictional protection Mr Rawat is asking, is a question of applicability of only one clause of the treaty, of Article 8.2. This question arises once and only once the claim of Mr Rawat is considered to fall within the general scope of application of the treaty.*

155. Mauritius' counsel took the opposite position on grounds that the MFN objection relates to the *existence* of Mauritius' consent to arbitration, which must be determined before assessing the *scope* of that consent, including whether Rawat is a protected investor:<sup>146</sup>

*So the sequence is first you have an Arbitration Agreement, then you can make an MFN claim. An MFN clause is not a jurisdictional clause.*

156. Counsel for Mauritius, without disagreement from Rawat's counsel, acknowledged at the hearing that the Tribunal has full discretion to set the order for determining the preliminary jurisdictional objections:<sup>147</sup>

*The Tribunal certainly remains free to choose the legal basis of its decision, so if the Tribunal decides that the nationality issue is more appropriately addressed first, it is certainly free to do so, and choose the basis of its legal decision. This doesn't change the -- what we just said, but it is the exercise of discretion that the Tribunal has on this issue.*

157. The Tribunal will first address the jurisdiction *ratione personae* objection. Although we first examine that objection, as proposed by Rawat, we consider the question of Rawat's status as a dual French-Mauritian national fundamentally to raise an issue of consent to jurisdiction as well, as prioritized by Mauritius.

## **B. Analysis of Consent**

158. The Tribunal agrees with Mauritius that consent to arbitration is foundational to jurisdiction. This is in fact common ground between the Parties. All objections to jurisdiction, be they of a *ratione personae*, *ratione materiae* or *ratione temporis* nature, are for this reason sub-types of *ratione voluntatis* objections. The first

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<sup>145</sup> Transcript, p 85, lines 8-18, Dr Pinna.

<sup>146</sup> Transcript, p 27, lines 19-21, Dr Heiskanen.

<sup>147</sup> Transcript, p 4, lines 17-23, Dr Heiskanen.

question before us is whether Mauritius, as a Contracting State, consented to confer jurisdiction on the Tribunal to resolve this dispute with this Claimant.

159. The analysis of consent requires two steps.
160. First, the Tribunal must determine if the 1973 France-Mauritius BIT applies, meaning whether the disputed conditions for application are met. If the treaty *does not* apply, consent to jurisdiction is missing, and Rawat is not entitled to any of the substantive protections provided in the BIT, including access to the MFN clause in Article 8.
161. The second step is necessary if the BIT *does* apply. This step would entail examining, in the absence of an express direct investor-state arbitration provision in the BIT, whether the MFN clause in Article 8 operates to demonstrate Mauritius' consent to such direct arbitration through application of the direct investor-state arbitration clause in the 2007 Finland-Mauritius BIT.

*i. Step 1: Does the France-Mauritius BIT Apply?*

162. There is no dispute that, for purposes of the condition in Article 1(2) of the France-Mauritius BIT, Rawat made substantial "*investissements*" (investments) in Mauritius over a long period of time. This is reflected in the Factual Background section above.
163. Article 1(2) of the France-Mauritius BIT does not use the term "*investisseur*" (investor), but only the term "*ressortissant*", the precise meaning of which (in French or English) is not agreed between the Parties. It plainly is a condition of application of the BIT that a natural person claiming protection, such as Rawat, be a "*ressortissant*" of France or Mauritius. The term "*ressortissant*" is used in every article of the BIT except Articles 11 and 12, which deal with the purely state-level issues of entry into force, denunciation and implementation of the treaty in the domestic legislation of the Contracting States.
164. The question, therefore, is whether Rawat is a French "*ressortissant*", as understood under the BIT, who can invoke the protections of the BIT against Mauritius.
165. The Tribunal accepts that Rawat is a French national, and was a French national long before this dispute arose and he commenced arbitration.<sup>148</sup> Whether or not Mauritius definitively waived its objections to Rawat's proof of his French nationality at the hearing, we find the evidence sufficient to prove that he became a French national in 1998 by operation of French law, following registration of his Declaration of

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<sup>148</sup> The Tribunal need not resolve the Parties' dispute as to whether Rawat also had to be a French national before he made the relevant investments in Mauritius, in light of our dismissal of his claims on other grounds.

Nationality based on marriage to a French national. (Factual Background, paragraph 48) Further, although Mauritius explained that one need not be a French national to be made a knight of the French *Légion d'Honneur*, the fact remains that when Rawat was so honored he received it “as a French and Mauritian citizen”. (Factual Background, paragraph 50)

166. It is undisputed that Rawat is also a Mauritian national, and has been since his birth in Mauritius in 1944. The Tribunal notes that, if we had to determine Rawat’s dominant and effective nationality, the basic facts of his connections to Mauritius recited in the Factual Background readily show that he is dominantly and effectively Mauritian. As will be clear from the analysis to follow, such a determination is immaterial to resolution of the present dispute.
167. What is material, for purposes of determining the applicability of the France-Mauritius BIT to the present case, is that Rawat is a dual national of Mauritius and France.
168. The first and key legal question, then, is whether the term “*ressortissant*”, as used throughout the France-Mauritius BIT includes or excludes dual nationals. The question of whether an individual (or legal entity) is a national or “*ressortissant*” of a state is a question of municipal law. Whether that nationality, once demonstrated, has legal effects on the international plane—the plane of investment treaties—is a question of international law.<sup>149</sup>
169. This brings the Tribunal to the challenge of interpreting the relevant provisions of the France-Mauritius BIT.
170. The Tribunal accepts, as argued by Rawat, that we are not to add conditions to the BIT, as drafted and ratified by France and Mauritius. There is no express exclusion of dual nationals from protections under the BIT, unlike other investment treaties entered into by both Mauritius and France (referenced in paragraph 139 above). This would seem to point to the inclusion, rather than the exclusion, of dual nationals within the scope of the France-Mauritius BIT.
171. This is not the end of the matter, however. As both Parties emphasized, the lodestar for our finding on how dual nationals are to be treated under the BIT must be Article 31(1) of the VCLT. Under Article 31(1), we are to interpret terms in the BIT—

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<sup>149</sup> *Décrets tunisiens et marocains de nationalité*, PCIJ Reports, Series B, Advisory Opinion No. 4, 7 February 1923, p 24 (CLA-14); ILC Draft Articles on Diplomatic Protection, supra note 109, pp 31-35; *Soufraki v United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, para 55 (Exh RLA-85); *Pey Casado v Chile*, supra note 128, paras 255-257, 319.

including the term “*ressortissant*”—according to “*the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*” (emphasis added).

172. The Tribunal considers that, but for the requirement that we take the context of the ordinary meaning of the term “*ressortissant*” into account, the object and purpose of the France-Mauritius BIT would also point to the outcome of including, rather than excluding, dual nationals as protected “*ressortissants*” within the ambit of the BIT. The Preamble highlights the goal of the treaty to “*protect and stimulate*” investment, and the BIT does not distinguish between the possible sources of the investments sought. Other investment treaty tribunals have reached the same conclusion, for example in the cases of *Pey Casado v Chile* and in *García Armas v Venezuela*, as cited by Rawat.<sup>150</sup>
173. However, in addition to the object and purpose of the France-Mauritius BIT, we must interpret the term “*ressortissant*”, as applicable to dual nationals, in context. Under VCLT Article 31(2), the context includes the *text* of the treaty itself, including its preamble and annexes. Interpreting treaty text in context means, of necessity, *examining the relevant provisions of the BIT in which the term to be interpreted is used*.
174. Turning back to the France-Mauritius BIT, the term “*ressortissant*” is used beyond Article 1(2). Most important to the interpretation issue before the Tribunal, which goes to arbitral jurisdiction, Article 9 of the BIT also uses the term “*ressortissant*”. Article 9 directs all French and Mauritian “*ressortissants*” who enter into investment contracts with the other state to arbitrate disputes with the host state under the ICSID Convention. The text of Article 9 bears quoting again, in French and English:

*Les accords relatifs aux investissements à effectuer sur le territoire d'un des Etats contractants, par les ressortissants, sociétés ou autres personnes morales de l'autre Etat contractant, comporteront obligatoirement une clause prévoyant que les différends relatifs à ces investissements devront être soumis, au cas où un accord amiable ne pourrait intervenir à bref délai, au Centre international pour le règlement des différends relatifs aux investissements, en vue de leur règlement par arbitrage conformément à la Convention sur le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats.*

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<sup>150</sup> As will be clear from the following discussion, the Tribunal does not purport to disagree with the conclusions reached by the tribunals in these two cases, but deems that the context of the two treaties involved in these cases, the Spain-Chile BIT on the one hand, and the Spain-Venezuela BIT on the other hand, was different. Importantly, these treaties provided for a *menu* of jurisdictional options for investors. They did not make it an *obligation* for investors to bring disputes against the host state before an arbitral tribunal constituted under the auspices of ICSID, unlike what is set out in Article 9 of the France-Mauritius BIT in the present case.

In free translation:

*Agreements relating to investments to be made in the territory of one of the Contracting States by nationals, companies or other legal persons of the other Contracting State, must include a clause providing that their disputes relating to these investments shall be submitted, in the event that an amicable agreement cannot be reached within a short period of time, to the International Center for the Settlement of Investment Disputes, with a view to their settlement by arbitration, in accordance with the Convention on the Settlement of Investment Disputes between States and nationals of other States.*

175. Article 25(2) of the ICSID Convention, to which Article 9 of the BIT necessarily refers by referencing the ICSID Convention, also uses the term “*ressortissant*” in the authentic French version. Indeed, the ICSID Convention includes a definition of the term, which also bears quoting again:

*“Ressortissant d’un autre Etat contractant” signifie :*

*(a) toute personne physique qui possède la nationalité d’un Etat contractant autre que l’Etat partie au différend à la date à laquelle les parties ont consenti à soumettre le différend à la conciliation ou à l’arbitrage ainsi qu’à la date à laquelle la requête a été enregistrée ... à l’exclusion de toute personne qui, à l’une ou à l’autre de ces dates, possède également la nationalité de l’Etat contractant partie au différend ;* (Emphasis added)

The English official version reads as follows:

*“National of another Contracting State” means:*

*(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered ..., but does not include any person who on either date also had the nationality of the Contracting State party to the dispute;* (Emphasis added)

176. Article 25(2) expressly and definitively excludes dual nationals from the term “*ressortissant*”. The import is clear: there would be no ICSID jurisdiction of any dispute that arises under a hypothetical investment contract between a French-Mauritian dual national and either France or Mauritius.
177. To repeat, Article 9 of the BIT and—by explicit reference in Article 9 to the ICSID Convention—Article 25(2) of the ICSID Convention are also part of the *context* in which the BIT term “*ressortissant*” must be interpreted. Even accepting the Claimant’s position that the general meaning of “*ressortissant*” can be equated with

the notion of the term “national” in French,<sup>151</sup> the duty of the Tribunal is to interpret “*ressortissant*” according to the ordinary meaning of the term *in the context* of the France-Mauritius BIT.

178. The Tribunal finds it decisive, in interpreting the term “*ressortissant*” in the treaty context, that Article 9 of the BIT makes it an *obligation*, as opposed to an *option*, for the Contracting States to include an ICSID arbitration clause in investment contracts with protected “*ressortissants*”. This creates a strict and conventional alignment between the notion of “*ressortissant*” under the ICSID Convention and under the France-Mauritius BIT.
179. The Tribunal cannot but conclude that, by incorporating a *mandatory* reference to the ICSID Convention in the notion of “*ressortissant*” through Article 9 of the BIT, France and Mauritius have implicitly, but necessarily, excluded French-Mauritian dual nationals from the scope of application of the BIT.
180. The Tribunal acknowledges Rawat’s argument seeking to avoid this conclusion. At the hearing, his counsel agreed that had he sought the application of Article 9 with his French nationality in a (hypothetical) investment contract with Mauritius, the mandatory ICSID arbitration clause would have had no effect due to his dual nationality.<sup>152</sup> Counsel effectively asked the Tribunal to read Article 9, as applied to dual nationals, out of the BIT and instead focus on the possibility offered by the MFN language in Article 8 of the BIT and Article 9 of the Finland-Mauritius BIT to open the effective avenue of UNCITRAL arbitration, which poses no express jurisdictional bar to dual nationals.
181. The Tribunal carefully examined this argument, but finds that it cannot succeed. Taken to its logical conclusion, the result would be two different meanings being ascribed to the same term in the same treaty. The term “*ressortissant*” would be read to include dual nationals in all provisions of the BIT except Article 9, and to exclude dual nationals in Article 9. There is no room for such an internally conflicting interpretation of the same term in a treaty under VCLT Article 31. That a treaty term

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<sup>151</sup> The Tribunal essentially agrees with the Claimant in this respect. If anything, and putting aside the specific context in which the term must be interpreted in the BIT, the notion of “*ressortissant*” is in general synonymous with, and in certain circumstances may even be seen to be broader than, the notion of “national”, not narrower as argued by Mauritius. Consistent with this interpretation, the Respondent in fact recognized at the hearing that the notion of “*ressortissant*” “*entitled certain individuals who were not nationals of France to diplomatic protection*”. Transcript, p 50, lines 11-15, Dr Heiskanen.

<sup>152</sup> Transcript, p 115, lines 21-25, Dr Pinna.

must be ascribed the same meaning throughout the treaty is in fact undisputed between the Parties.<sup>153</sup>

182. The Tribunal's conclusion that it lacks jurisdiction *ratione personae* is confirmed by application of the principle of *effet utile*, which the Parties agreed (in response to our fourth written question), is part of the applicable interpretive principles. *Effet utile*, although not expressly set out in the VCLT, is generally accepted to flow from the principle of interpretation of treaties in good faith as envisioned in VLCT Article 31(1). The *Cemex v Venezuela* tribunal described the principle of *effet utile* as "exclud[ing] interpretations which would render the text meaningless, when a meaningful interpretation is possible".<sup>154</sup> We consider that it would indeed be meaningless here to interpret Article 9 of the BIT as obliging France and Mauritius to enter into investment agreements containing ICSID arbitration clauses with "ressortissants" of the other state who are French-Mauritian dual nationals, when such arbitration clauses would be ineffective precisely because of that dual nationality.
183. To conclude, having found that the term "ressortissant" cannot encompass dual nationals when interpreted in the context of the France-Mauritius BIT, the Tribunal holds that the BIT does not apply to Rawat as a dual national of Mauritius and France. The Claimant is neither protected under Article 1(2) of the BIT nor under the BIT as a whole, and Mauritius has not consented in the BIT to arbitrate with him.
184. The Tribunal therefore upholds Mauritius' objection to jurisdiction *ratione personae*, as formulated at paragraphs 70-72 of Mauritius' Memorial on Jurisdiction, and subsequently addressed by the Parties and the Tribunal at the hearing, with the effect that the Tribunal has no jurisdiction to hear the claims made.

**ii. Step 2: Does the MFN Clause in Article 8 of the BIT Apply?**

185. As a result of the Tribunal's decision that personal jurisdiction is lacking, we need not advance to the second step and examine whether the Claimant may benefit from the MFN avenue in Article 8 of the France-Mauritius BIT. Because dual nationals are not covered by the BIT, the Claimant cannot avail himself of the substantive protections of the BIT, including Article 8.
186. We do wish to express our appreciation for the high quality of both Parties' submissions on the jurisdiction *ratione voluntatis* objection, which to our knowledge

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<sup>153</sup> Transcript, p 89, line 23 to p 90 line 9, Dr Pinna, referring to the fact that the term "ressortissant" has "exactly the same meaning" throughout the France-Mauritius BIT.

<sup>154</sup> *CEMEX*, supra note 53, para 114.

involved an issue of first impression in investment treaty arbitration.<sup>155</sup> As the Tribunal pointed out in its Interim Measures Order (paragraph 84):

*counsel for the Parties have been unable to point the Tribunal to any decision in which an investment tribunal tasked with interpreting a BIT without any direct investor-state arbitration clause has found jurisdiction on the basis of an MFN clause in the base treaty, thereby allowing an investor effectively to accept an arbitration offer made by the host state to investors of a third state.*

187. If it had proven necessary to decide the Respondent's second jurisdictional objection, the questions to be resolved would have included defining for MFN purposes the "*matière*" in Article 9 of the France-Mauritius BIT and the "*matière*" in Article 9 of the Finland-Mauritius BIT, and deciding whether these were of the same kind. This would have been the heart of the *ejusdem generis* test to be applied and would have involved an assessment of the level of granularity<sup>156</sup> at which the "*matières*" needed to be considered, in order to distinguish "matters" from "treatment" of these matters in the respective Articles 9 of the two investment treaties. "Matters" cannot be "bettered" by virtue of MFN clauses; "treatment" of matters may, in accordance with the wording of each relevant MFN clause. It was such questions that the Tribunal highlighted in its Order on Interim Measures (paragraph 81).

### C. Costs

188. To recall, on 5 March 2018, the Tribunal requested statements of costs from each Party by 19 March 2018, "*including both their arbitration costs and their legal fees and expenses through the jurisdictional objection phase*" (emphasis added).
189. In its 19 March 2018 Statement of Costs, counsel for Rawat reported his total costs and fees, as of 31 July 2017 (the date of Mauritius' Memorial on Jurisdiction), to be € 277,523.66, including: arbitration costs of € 100,000 deposited with the PCA, legal fees of € 172,056.69 of De Gaulle Fleurance & Associés for 685 hours, and expenses of € 5,466.97. The Statement indicated that "*Claimant understands that the Statement of Costs shall be limited to the jurisdictional objection phase only*".
190. In Respondent's Cost Statement, also filed on 19 March 2018, counsel for Mauritius reported its total costs and fees, from the date of receipt of the Notice of Arbitration through the jurisdictional objection phase, to be US\$ 723,973.53. In addition to

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<sup>155</sup> The *Menzies v Senegal* case, supra note 49, though similar in some respects, is different in that the treaty, including the MFN clause, that the claimants sought to rely on—the GATS—was not an investment treaty.

<sup>156</sup> By this, the Tribunal means for instance that "dispute settlement" is less granular as a "*matière*" than "investor-state dispute settlement", which is itself less granular than "contractual investor-state dispute settlement".

Mauritius' deposits of € 100,000 and € 50,000 to the PCA for arbitration costs, counsel divided legal fees and expenses between five phases, as follows:

<b>Phase</b>	<b>Legal Fees to Lalive</b>	<b>Expenses</b>
Initial Phase	\$ 193,315.70 (464.54 hours)	\$ 5,204.30
Interim Measures	\$ 179,262.70 (524.66 hours)	\$ 6,644.98
Memorial on Jurisdiction	\$ 158,369.60 (471.30 hours)	\$ 5,223.14
Hearing on Jurisdiction	\$ 152,459.70 (419.58 hours)	\$ 12,882.41 (counsel) \$ 6,491.00 (client)
Cost Statement	\$ 4,000.00 (10 hours)	\$ 120.00

191. In its Statement of Account of 27 March 2018, the PCA Secretariat confirmed that: (1) each Party had deposited € 150,000 as advances on costs, bringing the total advance on costs to € 300,000; (2) the PCA incurred fees, expenses and other bank, printing and telecommunications costs of € 4,886.76; and (3) the total fees and expenses of the Tribunal were € 295,113.24. (This reflects reductions taken by the Tribunal members and the PCA to keep the total owing for fees and expenses to the deposited € 300,000.) The PCA's Statement of Account is annexed to this Award.
192. The Tribunal sets the arbitration costs at € 300,000.
193. On the basis that neither Party prevailed on its request for interim measures, and that both Parties presented strong arguments on complex jurisdictional objections, the Tribunal determines that each Party should bear one-half of the total arbitration costs of € 300,000. As Rawat and Mauritius each deposited € 150,000 as advances on costs with the PCA, no further action is necessary with respect to arbitration costs.
194. On the basis that neither Party prevailed on its request for interim measures, and that Mauritius prevailed on one of its two jurisdictional objections, the Tribunal (by majority) determines that Rawat shall bear one-third of Mauritius' total fees and expenses for the jurisdictional objection phase. Using the amounts set out in the Respondent's Costs Statement for the Memorial and Hearing on Jurisdiction phases, this comes to US\$ 111,697.00 (\$163,592.74 plus \$171,833.11 equals \$ 335,425.85, multiplied by 33.3%, equals \$111,696.81). Payment is to be made within 45 days of the date of this Award on Jurisdiction.

**VII. AWARD**

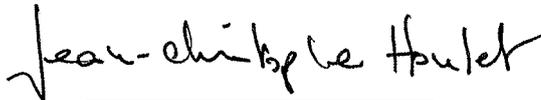
195 For the foregoing reasons, the Tribunal renders the following award:

- (1) The Respondent's preliminary objection to jurisdiction *ratione personae* is upheld;
- (2) The Tribunal therefore decides that it lacks jurisdiction to hear the claims made;
- (3) Each of the Parties is to bear one-half of the total arbitration costs of € 300,000, as confirmed by the PCA Secretariat, and its own legal fees and expenses through the interim measures phase; no reimbursement therefore needs to be made in this respect; and
- (4) The Claimant is to pay the Respondent US \$ 111,697.00 within 45 days of the date of this Award on Jurisdiction.

Place of arbitration: Brussels, Belgium

Date: 6 April 2018

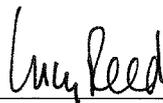
**The Tribunal:**



Mr Jean-Christophe Honlet  
Arbitrator



Professor Vaughan Lowe QC  
Arbitrator



Professor Lucy Reed  
Presiding Arbitrator

Date: 27-03-18  
Time: 17:50:07

## Statement of Account

**2016-20**

	Deposit	Expenses
<b>Parties</b>		
Claimant deposits	150,000.00	
Respondent deposits	150,000.00	
	300,000.00	
<b>Tribunal</b>		
Mr. J. C. Honlet VAT		10,364.84
Mr. J. C. Honlet arbitrator's fees		103,648.41
Mr. J. C. Honlet expenses		159.44
Prof. L. Reed arbitrator's fees		121,310.00
Prof. L. Reed expenses		5,691.11
Prof. V. Lowe QC arbitrator's fees		52,662.50
Prof. V. Lowe QC expenses		1,276.94
		295,113.24
<b>Other Tribunal Expenses</b>		
Bank costs		80.00
Printing and Supplies		38.10
Telecommunication		258.15
		376.25
<b>Registry</b>		
PCA registry fees - billed PCA		3,990.00
unbilled fees thr 27/03/18		520.51
		4,510.51
<b>Total</b>	<b>EUR</b>	
	<b>300,000.00</b>	<b>300,000.00</b>
<b>Remaining deposit</b>	<b>0.00</b>	