

**AD HOC ARBITRATION UNDER THE 1976 RULES OF  
THE UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW  
PCA CASE NO. 2018-37**

**PROFESSOR CHRISTIAN DOUTREMEPUICH &  
MR ANTOINE DOUTREMEPUICH**

Claimants

**V.**

**THE REPUBLIC OF MAURITIUS**

Respondent

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**MEMORIAL ON JURISDICTION**

23 November 2018

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**Before:**

Prof Maxi Scherer (President)

Prof Olivier Caprasse

Prof Jan Paulsson

**LALIVE**

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## 1 INTRODUCTION

- 1 Pursuant to Procedural Order No. 2 of 14 September 2018 and to the Provisional Timetable for the jurisdictional phase of this arbitration, the Republic of Mauritius hereby submits its Memorial on Jurisdiction contesting the Tribunal's jurisdiction over the Claimants' claims.
- 2 The object and purpose of bilateral investment treaties is to promote and protect foreign investment *inter alia* by establishing substantive investment protection standards that the host State is required to comply with. They may also, but do not always, allow a foreign investor to bring a claim before an international tribunal if the host State fails to comply with the investment protection standards established in the treaty.
- 3 The preamble of the agreement between the French Government and the Government of the Republic of Mauritius on the protection of investments (the "**France-Mauritius BIT**", the "**Treaty**", or the "**BIT**")<sup>1</sup> reflects the common object and purpose of bilateral investment treaties, confirming that the Treaty was concluded to intensify economic cooperation between the two countries and to protect and stimulate investment. However, while the Treaty establishes a mechanism for resolving disputes between the two Contracting States,<sup>2</sup> like many other first-generation investment treaties concluded in the 1960s and 1970s, **it does not contain a dispute resolution clause providing for arbitration of disputes arising under the Treaty between a Contracting State and an investor of the other Contracting State. In other words, the Treaty does not provide consent to investor-State arbitration.**
- 4 The Claimants' attempt to submit their dispute with Mauritius to an international tribunal therefore fails on a very elementary basis: the Claimants wrongly seek to initiate an international arbitration when it is manifestly clear that the France-Mauritius BIT does not contain consent to arbitrate investor-State disputes.

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<sup>1</sup> A list of all defined terms appears as **Annex 1** to the present Memorial.

<sup>2</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, at **Exhibit CLA-1**, p. 476 (Art. 10).

- 5 In addition, the Claimants have not proven that they have invested in Mauritius. In the absence of a protected investment, the Claimants cannot avail themselves of the benefit of the Treaty.
- 6 These two flaws in the Claimants' case are fundamental, and they both deprive this Tribunal of jurisdiction, the former of jurisdiction *ratione voluntatis* and the latter of jurisdiction *ratione materiae*.
- 7 The Claimants' attempt to invoke the dispute resolution clause in Article 9 of the bilateral investment agreement between the Government of Finland and the Government of the Republic of Mauritius on the promotion and protection of investments (the "**Finland-Mauritius BIT**"), through the most-favoured nation ("**MFN**") clause in Article 8 of the France-Mauritius BIT, is baseless. It is black letter international law that, in order to be in a position to invoke the allegedly more favourable dispute resolution clause in another treaty, *i.e.*, the Finland-Mauritius BIT, there must be a dispute resolution clause, even if less favourable, in the basic treaty, *i.e.*, the France-Mauritius BIT. Where, as here, there is no investor-State dispute resolution clause at all in the basic treaty, the MFN clause is of no assistance. In other words, to be able to invoke the dispute resolution clause in the Finland-Mauritius BIT, the Claimants must first have standing under the France-Mauritius BIT to invoke the protections available under the Treaty; however, they have none as the latter treaty does not allow investor-State claims in the first place. There is no jurisdiction *ratione voluntatis*.
- 8 The Tribunal similarly lacks jurisdiction *ratione materiae*. The object of the France-Mauritius BIT is to protect investments made by the investors of one Contracting State in the territory of the other Contracting State.<sup>3</sup> No such investment was ever made by the Claimants in Mauritius. The evidence submitted in support of the Claimants' Notice of Arbitration shows, at best, that the Claimants hoped to set up a private forensic DNA and paternity testing laboratory in Mauritius (the "**Project**"), **if and when** authorised by the relevant authorities. Such authorisation was not granted, so that the Claimants never even started implementing the Project. The

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<sup>3</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, at **Exhibit CLA-1**, p. 473 *et seq.*

Claimants may not rely on the BIT, the purpose of which is to protect **investments**, to seek compensation for having allegedly been prevented from investing in Mauritius in the first place. The Treaty does not create a right to invest, nor protects such a right; it protects investments, if and when made.

- 9 The present Memorial is structured as follows:
  - a) **Section 2** demonstrates that the Tribunal lacks jurisdiction *ratione voluntatis* over the Claimants' claims;
  - b) **Section 3** demonstrates that the Tribunal also lacks jurisdiction *ratione materiae* over those claims; and
  - c) **Section 4** sets out the Respondent's request for relief.
- 10 The Memorial is accompanied by four Factual Exhibits (**R-1** to **R-4**) and thirty-six Legal Authorities (**RLA-1** to **RLA-36**).

## **2 THE TRIBUNAL LACKS JURISDICTION *RATIONE VOLUNTATIS***

- 11 Consent is the cornerstone of investment treaty arbitration. There can be no international jurisdiction without the consent of the State. The existence of consent to arbitration is both a matter of law and a matter of evidence, and it must be proven in each individual case. International law requires **strict proof of consent**. A State's consent to arbitrate must be **clear and unequivocal**. In this case, the Claimants have failed to meet their burden of proving Mauritius' consent to arbitrate this dispute (**Section 2.1**).
- 12 It is undisputed that the France-Mauritius BIT does **not** contain an investor-State dispute resolution clause. The Respondent has therefore not consented to arbitrate this dispute. Accordingly, the Tribunal lacks jurisdiction *ratione voluntatis* (**Section 2.2**).
- 13 The Claimants cannot import such consent through the MFN provision of Article 8 of the France-Mauritius BIT from the Finland-Mauritius BIT. In the absence of consent to arbitrate in the basic treaty, that is, the France-Mauritius BIT, **the Claimants lack standing to invoke the MFN clause** in Article 8 of the Treaty (**Section 2.3**).
- 14 In any event, even assuming the Claimants were entitled to invoke the MFN clause in Article 8 of the France-Mauritius BIT, this does not assist the Claimants as **dispute resolution clauses are severable** from the main treaty and therefore **cannot be imported from another treaty** on the basis of an MFN clause. It is also clear from the language of Article 8 that it does not apply to dispute resolution (**Section 2.4**).

### **2.1 Under international law, the State's consent to arbitrate must be clear and unequivocal**

- 15 A State's consent to arbitrate cannot be implicit. Indeed, under public international law, "[n]on-consent is the default rule; consent is the exception".<sup>4</sup> The International Court of Justice (the "**ICJ**" or the "**Court**")

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<sup>4</sup> *Daimler Financial Services AG v. Argentine Republic*, Award, ICSID Case No. ARB/05/1, 22 August 2012, at **Exhibit RLA-1**, p. 70 (para. 175). See also *Menzies Middle East and Africa*

has repeatedly stressed that the consent of a State to submit a dispute to international adjudication “must be **certain**”<sup>5</sup> and expressed “in a ‘**voluntary and indisputable**’ manner”.<sup>6</sup>

- 16 A State’s consent to arbitrate cannot be assumed or inferred; it must be proven, and **the standard of proof is strict**. As explained by one the greatest international jurists of the 20<sup>th</sup> century, Sir Gerald Fitzmaurice:

“Just because consent is the basis, and the sole basis of it, the jurisdiction simply does not exist outside the scope of the consent given. Consequently, jurisdiction ought at the very least not to be assumed in cases in which there is room for any serious doubt as to whether consent was given, and whether it covers the dispute. This is putting it less high than it can be put: strictly, jurisdiction ought only to be assumed if it is quite clear that the parties have agreed to its exercise in relation to the dispute before the tribunal [...]. To sum up—**what is required**, if injustice is not to be done to the one party or the other, is neither restricted nor liberal interpretations of jurisdictional clauses, but **strict proof of consent**”.<sup>7</sup>

- 17 As noted by Sir Fitzmaurice, the consequences of an exceedingly liberal or an exceedingly restrictive interpretation of a State’s consent to arbitration are not equally serious:

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*S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, Award, ICSID Case No. ARB/15/21, 6 August 2016, at **Exhibit RLA-2**, p. 40 *et seq.* (para. 130).

<sup>5</sup> *Case Concerning mutual assistance in criminal matters (Djibouti v. France)*, Judgment, 4 June 2008, (2008) *I.C.J. Reports* 177, at **Exhibit RLA-3**, p. 204 (para. 62) (emphasis added).

<sup>6</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, 3 February 2006, (2006) *I.C.J. Reports* 6, at **Exhibit RLA-4**, p. 18 *et seq.* (para. 21) (emphasis added); *Corfu Channel (United Kingdom v. Albania)*, Preliminary Objection, Judgment, 25 March 1948, (1948) *I.C.J. Reports* 15, at **Exhibit RLA-5**, p. 27; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, 11 July 1996, (1996) *I.C.J. Reports* (II) 595, at **Exhibit RLA-6**, p. 620 *et seq.* (para. 40). See also *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Preliminary objection, Judgement of 22 July 1952, (1952) *I.C.J. Reports* 93, at **Exhibit RLA-7**, p. 114.

<sup>7</sup> G. Fitzmaurice, *The Law and Procedure of The International Court of Justice* (Cambridge, 1986) (excerpts), at **Exhibit RLA-8**, p. 18 of pdf (p. 514) (emphasis added).

“Yet it should be evident that neither a deliberately liberal nor a deliberately restrictive interpretation of such clauses can be justified. The first is unfair to one party (usually the defendant State) by imputing to it a consent which it may not really have intended to give, or realized it was giving: the second is unfair to the other party (usually the plaintiff State) by depriving it of a means of recourse the benefit of which it was entitled to expect under the clause in question. But while neither is justified, it is safe to say that the first, though it may appear superficially to promote the ideal of an enlargement of international arbitral and judicial jurisdiction, involves by far the greater long-term dangers for the standing and prestige of this jurisdiction—since **nothing undermines confidence in the process of international adjudication so quickly and completely as the feeling that international tribunals may assume jurisdiction in cases not really covered by the intended scope of the consents given by the parties**”.<sup>8</sup>

- 18 The decision of whether international jurisdiction exists cannot be driven by individual views as to whether extending the scope of international jurisdiction is generally a good thing, as a matter of public policy or otherwise. Whether or not international jurisdiction exists is, exclusively, a matter of law and evidence, and not a matter of policy. It is a matter of law insofar as consent provides the legal basis of international jurisdiction, and it is a matter of evidence insofar as consent must be proven in each and every instance.
- 19 As to the applicable standard of proof, international courts and tribunals have required “**strict proof of consent**”. In the *Case Concerning Mutual Assistance in Criminal Matters*, the ICJ summarised its jurisprudence in the following terms:

“As the Court has recently explained, whatever the basis of consent, the attitude of the respondent State must ‘be capable of being regarded as ‘**an unequivocal indication**’ of the desire of that State

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<sup>8</sup> G. Fitzmaurice, *The Law and Procedure of The International Court of Justice* (Cambridge, 1986) (excerpts), at **Exhibit RLA-8**, p. 17 *et seq.* of pdf (p. 513 *et seq.*) (emphasis added).

to accept the Court's jurisdiction in a '**voluntary and indisputable**' manner' [...]. For the Court to exercise jurisdiction on the basis of *forum prorogatum*, the element of consent must be either explicit or clearly to be deduced from the relevant conduct of a State".<sup>9</sup>

20 These considerations apply with equal force in investment treaty arbitration. Consent to arbitrate expressed in an investment treaty is not a given, or something that can be assumed or inferred. In providing its consent to arbitrate, the State agrees to an alternative form of dispute resolution, waiving the right to settle the dispute before its own courts, and it cannot be assumed or inferred that an investment treaty implies such consent. The claimant must prove it.<sup>10</sup>

21 In *ICS Inspection and Control Services Ltd v Argentina*, the tribunal stressed these fundamental principles:

**"[A] State's consent to arbitration shall not be presumed in the face of ambiguity.** Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. **The burden of proof for the issue of consent falls squarely on a given claimant** who invokes it against a given respondent. Where a claimant fails to prove consent **with sufficient certainty**, jurisdiction will be declined."<sup>11</sup>

22 The *Daimler v. Argentina* tribunal stated these principles in the following terms:

"General respect for State consent is also manifested by the fundamental principle of public international law according to

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<sup>9</sup> *Case Concerning mutual assistance in criminal matters (Djibouti v. France)*, Judgment, 4 June 2008, (2008) *I.C.J. Reports* 177, at **Exhibit RLA-3**, p. 204 (para. 62) (emphasis added – citations omitted). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, 11 July 1996, (1996) *I.C.J. Reports* (II) 595, at **Exhibit RLA-9**, p. 621 (para. 40).

<sup>10</sup> *Brandes Investment Partners LP v. Bolivarian Republic of Venezuela*, Award, ICSID Case No. ARB/08/3, 2 August 2011, at **Exhibit RLA-10**, p. 32 (paras. 112-113).

<sup>11</sup> *ICS Inspection and Control Services Ltd v. The Argentine Republic*, Award on Jurisdiction, PCA Case No. 2010-9, 10 February 2012, at **Exhibit RLA-11**, p. 93 (para. 280) (emphasis added).

which **international courts and tribunals can only exercise jurisdiction over a State on the basis of its consent**. As noted by the Permanent Court of International Justice in one of its first judgments, ‘[i]t is well established in international law that **no State can, without its consent, be compelled to submit its disputes ...** either to mediation or to arbitration, or to any other kind of pacific settlement.’

This basic rule was often recalled by the International Court of Justice, as in particular in the *Ambatielos* case as well as in the *Monetary Gold* case. Against this background, it is not possible to presume that consent has been given by a state. Rather, the existence of consent must be established. This may be accomplished either through an **express declaration of consent** to an international tribunal’s jurisdiction or **on the basis of acts ‘conclusively establishing’ such consent**. What is not permissible is to presume a state’s consent by reason of the state’s failure to proactively disavow the tribunal’s jurisdiction. **Non-consent is the default rule; consent is the exception**. Establishing consent therefore requires **affirmative evidence**. But the impossibility of basing a state’s consent on a mere presumption should not be taken as a ‘strict’ or ‘restrictive’ approach in terms of interpretation of dispute resolution clauses. It is simply the result of respect for the rule according to which state consent is the incontrovertible requisite for any kind of international settlement procedure.”<sup>12</sup>

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<sup>12</sup> *Daimler Financial Services AG v. Argentine Republic*, Award, ICSID Case No. ARB/05/1, 22 August 2012, at **Exhibit RLA-1**, p. 69, (paras. 174-175) (emphasis added). See also the *Menzies v. Senegal* case discussed *infra* at paragraphs 48 *et seq*, where the tribunal found that the claimants had failed to establish Senegal’s “express, clear and unequivocal” consent to arbitrate in the basic treaty. The tribunal confirmed that under general international law and specifically in investment arbitration, a sovereign State cannot be brought before an international tribunal without its “clearly expressed and unequivocal” consent, as, on the international plane, “consent of States to arbitration is the exception, not the rule”. The tribunal considered that the claimants’ approach consisting of attempting to “compose” consent to arbitration by pasting together disparate bits and pieces of the MFN clause in GATS and treaties concluded with third States was “a manifest example of an equivocal and doubtful ‘consent’ to arbitration”, *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, Award, ICSID Case No. ARB/15/21, 6 August 2016, at **Exhibit RLA-2**, p. 40 *et seq*.

- 23 This *jurisprudence constante* governs the determination of whether a consent to arbitrate exists in a given case, setting out the legal and evidentiary standard that this Tribunal must apply when determining whether it has jurisdiction *ratione voluntatis*.
- 24 The Claimants have the burden of proving, through affirmative evidence, that the Republic of Mauritius would have provided “clear and unequivocal” consent to this arbitration. They have failed to do so.

## **2.2 There is no investor-State arbitration clause in the France-Mauritius BIT**

- 25 It is black letter international law that the fundamental basis of jurisdiction *ratione voluntatis* of an investment treaty tribunal is the State’s consent to arbitrate disputes with a foreign investor arising under a treaty, contained in a **dispute resolution clause** included in the treaty.<sup>13</sup> Such a clause is the fundamental basis of jurisdiction in the sense that, in its absence, 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.
- 26 Although the France-Mauritius BIT contains a dispute resolution clause for State-to-State disputes,<sup>14</sup> it does **not** contain an investor-State dispute resolution clause.<sup>15</sup> The Claimants acknowledge that much in their Notice

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<sup>13</sup> *Occidental Petroleum Corporation et. al. v. the Republic of Ecuador*, Decision on Provisional Measures, ICSID Case No. ARB/06/11, 17 August 2007, at **Exhibit RLA-12**, p. 25 (para. 55); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Order on Interim Measures, UNCITRAL, 2 September 2008, at **Exhibit RLA-13**, p. 8 (para 48); *Chevron Corporation et al. v. Republic of Ecuador*, Order for Interim Measures, PCA Case No. 2009-23, 9 February 2011, at **Exhibit RLA-14**, p. 3.

<sup>14</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, at **Exhibit CLA-1**, p. 476 (Art. 10).

<sup>15</sup> See e.g. “Mapping of the IIA” by the UNCTAD Investment Policy Hub Website (visited in November 2018), at **Exhibit R-1**, p. 4 and 5 where it is stated “SSDS – yes” and “ISDS – No”.

of Arbitration: “*Le TBI franco-mauricien ne prévoit pas d’arbitrage investisseur-Etat hors contrat*”.<sup>16</sup>

- 27 Instead of expressing consent for investor-State arbitration, Article 9 of the Treaty merely provides that investment contracts between a national of a Contracting State and the other Contracting State should contain a clause referring any dispute arising thereunder to arbitration under the auspices of the International Centre for Settlement of Investment Disputes (“ICSID”):

*“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”*.<sup>17</sup>

- 28 Article 9 places an obligation on the Contracting States to include, in their **investment contracts** with investors of the other Contracting State, an arbitration clause providing for ICSID arbitration. However, Article 9 does not purport to say, and does not say, anything about investor-State arbitration **under the Treaty**. This was and remains the understanding of the governments of the two Contracting States.
- 29 In March 2010, France and Mauritius signed a new bilateral investment treaty, which does provide for investor-State arbitration.<sup>18</sup> One of the main

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<sup>16</sup> Claimants' Notice of Arbitration dated 30 March 2018, p. 17 (para. 42) (emphasis added).

<sup>17</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, at **Exhibit CLA-1**, p. 476 (Art. 9) (emphasis added).

<sup>18</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, at **Exhibit R-2**. This new treaty has not entered into force (although signed by French Republic and Republic of Mauritius), since it has not yet been

reasons for concluding a new investment treaty was to “modernise” the 1973 Treaty, in particular by way of providing for investor-State arbitration, as confirmed in the impact assessment study prepared by the French National Assembly in connection with the approval of the new treaty.<sup>19</sup> The absence of investor-State dispute resolution clause in the Treaty was also highlighted in the “*exposé des motifs*” of the *Projet de Loi* issued on 24 October 2017 by the French government to justify the need of a new investment treaty between France and Mauritius.<sup>20</sup>

- 30 Unlike the 1973 Treaty, the 2010 treaty contains a dispute resolution clause which provides for the Contracting Parties’ consent that disputes relating to investments between a Contracting Party and an investor of the other Contracting Party be submitted to ICSID arbitration.<sup>21</sup> This confirms that

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ratified by France. The new treaty has neither been incorporated nor gazetted as per the provisions of Section 46 of the Constitution of Mauritius.

<sup>19</sup> Etude d'Impact sur le Projet de Loi autorisant l'approbation de l'accord entre le Gouvernement de la République française et le Gouvernement de la République de Maurice sur l'encouragement et la protection des investissements, at **Exhibit R-3**, p. 7, which specifically explains that the purpose of the new treaty is to improve the “legal security” of foreign investors, notably by providing for access to investor-State arbitration: “*L'accord a spécifiquement pour finalité d'améliorer la sécurité juridique des investisseurs contre les mesures spoliatrices, injustes, arbitraires ou encore discriminatoires et, en cas de préjudice causé par les agissements de l'État d'accueil en violation de ses engagements conventionnels, de leur garantir l'accès à une justice neutre et indépendante via l'arbitrage international investisseur-État.*”

<sup>20</sup> *Projet de Loi autorisant l'approbation de l'accord entre le Gouvernement de la République française et le Gouvernement de la République de Maurice sur l'encouragement et la protection réciproques des investissements enregistré à la Présidence de l'Assemblée nationale le 24 octobre 2017*, at **Exhibit R-4**, p. 3 “*À Maurice, les investisseurs français bénéficient de l'accord de protection des investissements (API) signé le 22 mars 1973 et entré en vigueur le 1<sup>er</sup> avril 1974. Cependant, cet API présente des faiblesses [...]. Le champ du règlement des différends investisseur-État est limité puisque l'accord présuppose l'existence d'une clause compromissoire dans le contrat d'investissement. Or, conformément à l'évolution du droit international des investissements, la pratique conventionnelle française a évolué afin de permettre aux investisseurs connaissant un préjudice du fait des agissements de l'État d'accueil de leur investissement de recourir à l'arbitrage international sur la base du consentement exprimé par l'État dans l'API. C'est donc essentiellement pour mettre cet accord en conformité avec l'évolution de la pratique conventionnelle qu'une renégociation a été engagée avec le gouvernement de Maurice en 2005.*” (emphasis added).

<sup>21</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*, at **Exhibit R-2**, p. 3 (Article 9).

the Contracting States also agree that they had not given such consent in the 1973 Treaty.

- 31 Under the 1973 Treaty, foreign investors have two options: they can either include an ICSID arbitration clause in the relevant investment contract entered into with the host Contracting State or, if the investment contract was concluded with a private party and the host State then impermissibly interfered with the investment, request that their home State exercise diplomatic protection. What is not available is direct investor claims under the Treaty.<sup>22</sup>

### **2.3 The MFN clause in the France-Mauritius BIT does not create consent to arbitrate**

- 32 As noted above, the Claimants do not dispute that Mauritius' consent to arbitrate is required for this Tribunal to have jurisdiction, and that there is no investor-State arbitration clause in the France-Mauritius BIT.<sup>23</sup> This should be the end of the matter as, absent express consent to arbitrate under the BIT, investor-State arbitration is not available.
- 33 However, the Claimants have chosen simply to ignore this fatal flaw. Instead, the Claimants argue that there is an MFN provision in Article 8 of the BIT, that the MFN provision does not exclude investor-State arbitration and that therefore the Claimants are at liberty to pick and choose any dispute resolution provision in Mauritius' subsequent treaties with third States – here the Finland-Mauritius BIT.<sup>24</sup>
- 34 The Claimants' justification for this creative approach immediately gives away its inherent defect:

*“Le TBI finlando-mauricien permet à l’investisseur de choisir entre deux modes de règlement des litiges, un règlement du litige par les*

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<sup>22</sup> This was the case for most first-generation investment treaties. See e.g. A. Newcombe, L. Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International, 2009) (excerpts), at **Exhibit RLA-15**, p. 44 *et seq.*

<sup>23</sup> See *supra* at paragraph 26; Claimants' Notice of Arbitration dated 30 March 2018, p. 17 (para. 42).

<sup>24</sup> Claimants' Notice of Arbitration dated 30 March 2018, p. 17 *et seq.* (paras. 43-45).

*juridictions nationales ou un règlement du litige par un tribunal arbitral.*

*Cette disposition est donc manifestement plus favorable que le TBI franco-mauricien **qui ne permet pas aux investisseurs de saisir un tribunal arbitral***".<sup>25</sup>

- 35 In other words, the Claimants candidly admit that **they have no right to arbitrate** under the France-Mauritius BIT. What follows is that they cannot rely on the MFN provision contained therein – or any other provision for that matter.
- 36 It is a well-established principle of international law that, **to be able to rely on an MFN clause in the basic treaty, a party must first establish the tribunal's jurisdiction under that treaty**. This principle, which is simply a consequence of the fact that a party has standing to invoke the MFN clause in the basic treaty only if there is a dispute resolution clause in that treaty establishing such standing, was confirmed by the ICJ in the *Anglo-Iranian Oil Case*.<sup>26</sup> In that case, the United Kingdom purported to rely on the MFN provision contained in a treaty between the United Kingdom and Iran that was not covered by Iran's declaration conferring jurisdiction upon the ICJ. The ICJ considered that the United Kingdom was not entitled to import provisions through an MFN clause as it was not entitled to rely on that basic treaty:

“It is obvious that the term *traités ou conventions* used in the Iranian Declaration refers to treaties or conventions which the Party bringing the dispute before the Court has the right to invoke against Iran and does not mean any of those which Iran may have concluded with any State. But **in order that the United Kingdom may enjoy the benefit of any treaty concluded by Iran with a third party by virtue of a most-favoured-nation clause contained in a treaty concluded by the United Kingdom with Iran, the United Kingdom must be in a position to invoke the latter treaty**. The treaty containing the most-favoured-nation

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<sup>25</sup> Claimants' Notice of Arbitration dated 30 March 2018, p. 18 (para. 46) (emphasis added).

<sup>26</sup> *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Preliminary objection, Judgement of 22 July 1952, (1952) *I.C.J. Reports* 93, at **Exhibit RLA-7**.

clause is the basic treaty upon which the United Kingdom must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. **A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*.**<sup>27</sup>

- 37 In his concurring opinion, President McNair explained that a party could invoke an MFN clause only if jurisdiction had been established under the basic treaty:

“Unquestionably, **if the jurisdiction of the Court in this case had already been established** and if the Court was now dealing with the merits, the United Kingdom would be entitled to invoke against Iran the most-favoured-nation clause (Article 9) of the Anglo-Persian Treaty of 1857 [...].”<sup>28</sup>

- 38 The situation in the present case is analogous to that in the *Anglo-Iranian Oil Co. Case*. In order for the Claimants to be able to “enjoy the benefit” of the dispute resolution clause in the Finland-Mauritius BIT, they must be in a position to invoke the MFN clause of the France-Mauritius BIT – which is not the case as the Treaty does not contain any dispute resolution clause in the first place.<sup>29</sup> Consequently, to paraphrase the Court in the *Anglo-Iranian Oil Co. Case*,<sup>30</sup> the dispute resolution provision contained in the Finland-Mauritius BIT remains “independent of and isolated from the basic treaty”, here the France-Mauritius BIT, and therefore “cannot produce any legal effect as between [the Claimants and Mauritius]: it is *res inter alios acta*”.

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<sup>27</sup> *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Preliminary objection, Judgement of 22 July 1952, (1952) *I.C.J. Reports* 93, at **Exhibit RLA-7**, p. 109 (emphasis added).

<sup>28</sup> Individual (Concurring) Opinion of President McNair, 22 July 1952, at **Exhibit RLA-16**, p. 13 of pdf (emphasis added).

<sup>29</sup> *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Preliminary objection, Judgement of 22 July 1952, (1952) *I.C.J. Reports* 93, at **Exhibit RLA-7**, p. 109.

<sup>30</sup> *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Preliminary objection, Judgement of 22 July 1952, (1952) *I.C.J. Reports* 93, at **Exhibit RLA-7**, p. 109.

- 39 As explained by Professor Zachary Douglas, MFN clauses operate in **two distinct steps**: the investor must **first** accept the State's consent to arbitrate contained in the basic treaty, and **only then** can it request the tribunal to import, through the MFN clause, the more favourable provisions to which it claims to be entitled. In other words, the investor must first conclude an arbitration agreement; and only after it has concluded an arbitration agreement, does it have standing to invoke the MFN clause:

“The claimant must assert a right to more favourable treatment by claiming through the MFN clause in the basic treaty. **It can only do so by instituting arbitration proceedings and thus by accepting the terms of the standing offer of arbitration in the basic treaty.** At that point an arbitration agreement between the claimant and the host state comes into existence. And **the existence of that arbitration agreement is critical to the viability of the arbitration regime envisaged by the investment treaty**”.<sup>31</sup>

- 40 The sequence of this “two-steps” analysis is of fundamental importance. It is only once the **existence** of consent has been established that it is possible to examine the provisions of the basic treaty to determine the **scope** of the tribunal's jurisdiction. A person cannot invoke the MFN clause of the basic treaty to acquire jurisdiction under such treaty in the absence of a dispute resolution clause. As emphasised by the International Law Commission (the “**ILC**”), MFN provisions do not create *jus tertii*.<sup>32</sup>
- 41 Professor Campbell McLachlan similarly explains that the “starting point” to establish an investment treaty tribunal's jurisdiction is the dispute

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<sup>31</sup> See Z. Douglas, “The MFN Clause in Investment Arbitration - Treaty Interpretation Off the Rails”, (2011) (2)1 *Journal of International Dispute Settlement* 97, at **Exhibit RLA-17**, p. 107 (emphasis added).

<sup>32</sup> Final Report of the Study Group on the Most-Favoured-Nation clause (ILC 2015), at **Exhibit RLA-18**, p. 4 (para. 14) (“The right to MFN treatment is premised on the treaty containing the MFN clause being the basic treaty establishing the juridical link between the granting State and the beneficiary State. In other words, the right of the beneficiary State to MFN treatment arises only from the MFN clause in a treaty between the granting State and the beneficiary State and not from a treaty between the granting State and the third State. Thus, no *jus tertii* is created”).

settlement provision in the basic treaty.<sup>33</sup> The jurisdiction of the tribunal always depends “upon the consent in writing of the parties”:<sup>34</sup>

“It is also a principle of international law that the existence and application of a substantive obligation is a separate question to the conferral of jurisdiction upon an international tribunal. Whatever the source or nature of the substantive obligation, **‘jurisdiction always depends upon consent.’**”

**The consent of the parties to arbitrate is contained in the dispute resolution clause in the basic treaty.** It is by means of that arbitration agreement that the parties confer jurisdiction upon the tribunal”.<sup>35</sup>

- 42 This view is shared by commentators, criticising the claimant’s approach in the *Rawat v. Mauritius* case,<sup>36</sup> which the Claimants now attempt to mimic:

“Professor James Crawford SC has used a bridge analogy to explain the theory against ‘MFN jurisdiction’: the investor is on one side of the bridge; the substantive provisions of the treaty (including MFN)

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<sup>33</sup> C. McLachlan, L. Shore and M. Weiniger, "Most-Favoured-Nation Treatment", in *International Investment Arbitration, Substantive Principles*, Oxford International Arbitration Series 2<sup>nd</sup> Edition, 2017, at **Exhibit RLA-19**, p. 350 (para. 7.330).

<sup>34</sup> C. McLachlan, L. Shore and M. Weiniger, "Most-Favoured-Nation Treatment", in *International Investment Arbitration, Substantive Principles*, Oxford International Arbitration Series 2<sup>nd</sup> Edition, 2017, at **Exhibit RLA-19**, p. 350 (para. 7.330).

<sup>35</sup> C. McLachlan, L. Shore and M. Weiniger, "Most-Favoured-Nation Treatment", in *International Investment Arbitration, Substantive Principles*, Oxford International Arbitration Series 2<sup>nd</sup> Edition, 2017, at **Exhibit RLA-19**, p. 351 (paras. 7.331-7-332) (emphasis added – citations omitted). Professor Campbell McLachlan further opines “A person that does not meet the criteria under the BIT to be an investor cannot become an investor by invoking an MFN provision. The same is true for the scope of investments covered by the treaty *ratione materiae*. Nor can reference to the MFN provision change the application of the basic treaty *ratione temporis*, such that it would be capable of conferring rights in respect of State conduct producing effects prior to the entry into force of the treaty. In each case, **it is the basic treaty alone that establishes the scope of the parties’ consent to jurisdiction**”, C. McLachlan, L. Shore and M. Weiniger, "Most-Favoured-Nation Treatment", in *International Investment Arbitration, Substantive Principles*, Oxford International Arbitration Series 2<sup>nd</sup> Edition, 2017, at **Exhibit RLA-19**, p. 352 (para. 7.337) (emphasis added).

<sup>36</sup> *Dawood Rawat v. the Republic of Mauritius*, Award on Jurisdiction, PCA Case 2016-20, 6 April 2018, at **Exhibit RLA-20**.

are on the other; the bridge is made up of the jurisdictional provisions of the treaty – **the investor can only cross if jurisdiction is established (which requires the investor to show that the State has consented to arbitration)**".<sup>37</sup>

43 The same commentators noted that attempting to rely on an MFN clause before having established jurisdiction under the basic treaty equates to "us[ing] MFN not only before [crossing] the bridge but in fact to build it".<sup>38</sup>

44 That consent to arbitrate must be established in order for an investor to be able to rely on an MFN clause, and not the other way around, is also firmly established in arbitral practice.

45 In *Venezuela US, S.R.L. v. Venezuela*, the tribunal confirmed that an MFN clause cannot serve to create consent in the basic treaty where none exists:

"It is now for the Tribunal to determine how Article 3(2) [the MFN clause] impacts the provisions of Article 8 on settlement of disputes between an investor and a State. **The Tribunal agrees with the Respondent that the MFN clause cannot serve the purpose of importing consent to arbitration when none exists under the [basic treaty]**".<sup>39</sup>

46 In another case, *ST-AD v. Bulgaria*, the tribunal similarly found that an arbitral tribunal must first ascertain its own jurisdiction under the basic treaty in accordance with the principle of *compétence-compétence*, before it can even discuss the scope of an MFN clause.<sup>40</sup> In *Hochtief v. Argentina*,

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<sup>37</sup> S. Lutrell, C. Packer, "Case comment: *Dawood Rawat v The Republic of Mauritius*" 2017, published on the website of the Australian Dispute Centre, at **Exhibit RLA-21**, p. 3 (emphasis added).

<sup>38</sup> S. Lutrell, C. Packer, "Case comment: *Dawood Rawat v The Republic of Mauritius*" 2017, published on the website of the Australian Dispute Centre, at **Exhibit RLA-21**, p. 3.

<sup>39</sup> *Venezuela US, S.R.L. v. The Bolivarian Republic of Venezuela*, Interim Award on Jurisdiction, PCA Case No. 2013-34, 26 July 2016, at **Exhibit RLA-22**, p. 35 (para. 105) (emphasis added).

<sup>40</sup> *ST-AD GmbH v. The Republic of Bulgaria*, Award on Jurisdiction, PCA Case No. 2011-06, 18 July 2013, at **Exhibit RLA-23**, p. 99 (para. 398).

an ICSID tribunal similarly determined “that the MFN clause cannot create a right to go to arbitration where none otherwise exists under the BIT”.<sup>41</sup>

- 47 In *Daimler v. Argentina*, the tribunal specifically referred to the *Anglo-Iranian Oil Co. Case* and stressed that there must be consent in the basic treaty for the tribunal to be able to examine whether an MFN clause may serve to modify the terms of such consent by importing procedural provisions from another treaty:

“[I]n *Anglo-Iranian Oil*, Iran’s acceptance of the ICJ’s jurisdiction over disputes arising under the two ‘basic treaties’ (the UK-Persia treaties) was a condition precedent to the UK’s standing to raise its MFN claims before the Court. Because that condition precedent had not been fulfilled, the UK had no standing and the ICJ had no jurisdiction.

In the present matter, of course, Argentina’s consent to international arbitration is contained within the same instrument as the MFN guarantees giving rise to some of the Claimant’s jurisdictional arguments. But the physical location (external instrument versus within the same treaty) of a State’s consent to a particular type of dispute resolution does not eviscerate the requirement, stressed by the ICJ, 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**. According to this logic, the Claimant **may not yet have standing to raise any MFN arguments at all before the Tribunal**”.<sup>42</sup>

- 48 In the only known case deciding on an investor’s attempt to invoke consent given in a third-party treaty that was absent from the basic treaty through

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<sup>41</sup> *Hochtief AG v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/07/31, 24 October 2011, at **Exhibit RLA-24**, p. 20 (para. 79).

<sup>42</sup> *Daimler Financial Services AG v. Argentine Republic*, Award, ICSID Case No. ARB/05/1, 22 August 2012, at **Exhibit RLA-1**, p. 82 *et seq.* (paras. 203-204) (emphasis altered – citations omitted).

an MFN clause, *Menzies v. Senegal*, the tribunal flatly rejected the investor's argument and declined jurisdiction.<sup>43</sup>

- 49 In *Menzies*, the claimants purported to sue the Republic of Senegal on the basis of the General Agreement on Trade in Services (“GATS”).<sup>44</sup> As the GATS does not contain a dispute resolution provision, the claimant purported to rely on the MFN clause in Article II of the GATS to import dispute resolution provisions from either the Senegal-Netherlands BIT or the Senegal-United Kingdom BIT. The tribunal declined jurisdiction precisely on the ground that Senegal never consented to arbitrate in the basic treaty.<sup>45</sup>
- 50 To the best of the Respondent's knowledge, no investment tribunal has ever found jurisdiction on the basis of an MFN clause, in the absence of the state's consent to arbitrate in the basic treaty. The need to establish jurisdiction under the basic treaty before applying an MFN clause is therefore *jurisprudence constante*.
- 51 To conclude, in the present case, Mauritius has not consented to arbitrate investor-State disputes under the France-Mauritius BIT, and such consent cannot be “imported” from the Finland-Mauritius BIT through the MFN clause of the France-Mauritius BIT. This is because, in the absence of a dispute resolution clause in the basic treaty (the France-Mauritius BIT), the Claimants **have no standing** to invoke the MFN clause of that treaty

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<sup>43</sup> *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, Award, ICSID Case No. ARB/15/21, 6 August 2016, at **Exhibit RLA-2**, p. 40 *et seq.* Although the claimant in *Rawat v. Mauritius* made that argument, the tribunal declined jurisdiction on the separate ground that he was not a qualifying investor under the France-Mauritius BIT (see *Dawood Rawat v. the Republic of Mauritius*, Award on Jurisdiction, PCA Case 2016-20, 6 April 2018, at **Exhibit RLA-20**).

<sup>44</sup> The MFN clause in Article II of Part II of the GATS reads: “*I. En ce qui concerne toutes les mesures couvertes par le présent accord, chaque Membre accordera immédiatement et sans condition aux services et fournisseurs de services de tout autre Membre un traitement non moins favorable que celui qu'il accorde aux services similaires et fournisseurs de services similaires de tout autre pays.*” (see *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, Award, ICSID Case No. ARB/15/21, 6 August 2016, at **Exhibit RLA-2**, p. 19 (para. 72)). One of the claimants, an investor from the BVI, also attempted to base the tribunal's jurisdiction on Senegal's investment legislation. The tribunal also declined jurisdiction for reasons that are not relevant to the present case.

<sup>45</sup> *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, Award, ICSID Case No. ARB/15/21, 6 August 2016, at **Exhibit RLA-2**, p. 44 *et seq.* (paras. 141-143).

in the first place. The Claimants cannot pull themselves up by their bootstraps out of the clear terms of the France-Mauritius BIT.

#### **2.4 The MFN clause of the France-Mauritius BIT does not extend to dispute resolution**

- 52 Even assuming they had standing to invoke the MFN clause in Article 8 of the France-Mauritius BIT (which they do not), the Claimants' case fails. First, a dispute resolution clause is severable, or autonomous, from the main treaty and, accordingly, it falls outside the scope of application of an MFN clause contained in the same treaty unless the terms of the MFN clause make it clear that it is also intended to govern dispute resolution. Second, it is in any event clear from the language of the MFN clause in Article 8 of the France-Mauritius BIT that it is not intended to govern dispute resolution.
- 53 In public international law, like in private international law, dispute resolution provisions are severable, or autonomous, from the main agreement.<sup>46</sup> This has implications on the applicability of MFN clauses to such provisions, and indeed, investment treaty tribunals have held that, unless the treaty in question clearly provides otherwise, MFN clauses do not apply to dispute resolution and therefore cannot be relied upon to "import" more favourable dispute resolution provisions from other treaties.<sup>47</sup> This is indeed common sense because provisions relating to dispute resolution become applicable only after the dispute has arisen and therefore cannot be relied upon to argue that the investor should have been treated "as favourably" prior to the commencement of the arbitration proceedings – as if the arbitration itself was the subject of the claim.<sup>48</sup>

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<sup>46</sup> See e.g. *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment of 18 August 1972, (1972) *I.C.J. Reports* 46, at **Exhibit RLA-25**, p. 53 *et seq.* (para. 16), and p. 64 *et seq.* (para 32). See also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, 3 February 2006, (2006) *I.C.J. Reports* 6, at **Exhibit RLA-4**, p. 31 *et seq.* (para. 64-67), and p. 51 *et seq.* (para. 125).

<sup>47</sup> See e.g. *Plama Consortium Ltd v. the Republic of Bulgaria*, Decision on Jurisdiction, ICSID Case No. ARB/03/24, 8 February 2005, at **Exhibit RLA-26**, p. 67 *et seq.* (para. 212).

<sup>48</sup> Z. Douglas, "The MFN Clause in Investment Arbitration - Treaty Interpretation Off the Rails", (2011) (2)1 *Journal of International Dispute Settlement* 97, at **Exhibit RLA-17**, p. 105.

54 Moreover, in the present case, far from establishing that it applies to dispute resolution, the language of Article 8 of the France-Mauritius BIT makes it clear that it does **not**. This is the case whether, in determining its meaning, one applies the ordinary meaning rule in Article 31(1) of the Vienna Convention on the Law of Treaties (“VCLT”) or the *ejusdem generis* rule – another rule of treaty interpretation often applied in the context of MFN provisions.

#### **2.4.1 Interpretation of Article 8 of the France-Mauritius BIT under Article 31(1) of the Vienna Convention on the Law of Treaties**

55 That the language of the MFN clause is the starting point of its interpretation is uncontroversial under the VCLT.<sup>49</sup>

56 Article 8 of the France-Mauritius BIT provides:

*“Pour les matières régies par la présente Convention autres que celles visées à l'article 7, 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 souscrites par cet autre Etat avec le premier Etat contractant ou avec des Etats tiers.”*<sup>50</sup>

57 The language of Article 8 makes it clear that the scope of the MFN treatment obligation is limited to “*les matières régies par la présente Convention*”. This limitation is also reflected in the language of the provision insofar as it expressly provides that investments may benefit from “*toutes les dispositions plus favorables que celles du présent*

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<sup>49</sup> According to Article 31(1) VCLT, a treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

<sup>50</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, at **Exhibit CLA-1**, p. 476 *et seq.*

*Accord*".<sup>51</sup> Since investor-State arbitration is not one of the "subject-matters" ("*matières*") governed by the Treaty, nor one of the "provisions" ("*dispositions*") dealt with in the Treaty, it falls outside the scope of the MFN clause.

- 58 The Claimants seem to suggest, nonetheless, that they can rely on the MFN clause because investor-State arbitration is not specifically excluded from the scope of the France-Mauritius BIT.<sup>52</sup> It is for the Claimants, however, to establish that consent to investor-State arbitration is included within the scope of the MFN clause; it does not suffice therefore simply to argue that it is not excluded. The argument that it should be expressly excluded is both disingenuous and indeed absurd in circumstances where such clauses hardly existed at the time the BIT was entered into, back in 1973. Indeed, at the time, neither France nor Mauritius had concluded any investment treaty containing a dispute-resolution clause providing for investor-State arbitration. It is thus simply not credible to argue that they should have expressly excluded it from the scope of the MFN clause at the time.
- 59 Another argument (to the extent made) that must fail is that consent to investor-State arbitration would need to be specifically excluded in order not to be covered by the MFN clause in Article 8 because it is in fact a matter covered by Article 9 of the Treaty. Indeed, as demonstrated above,<sup>53</sup> Article 9 does **not** establish consent to investor-State arbitration; it merely provides for the inclusion of an ICSID arbitration clause in investment agreements that **may be** concluded between a Contracting State and an investor of another Contracting State. In other words, Article 9 is not a dispute resolution clause governing disputes arising under the Treaty; it rather creates a **substantive right**, granted to both the Contracting States and their investors, to demand the inclusion a dispute settlement provision in **investment contracts**. It is the arbitration clauses in those contracts that would then contain the parties' consent to arbitrate.

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<sup>51</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, at **Exhibit CLA-1**.

<sup>52</sup> Claimants' Notice of Arbitration dated 30 March 2018, p. 17 (para. 44).

<sup>53</sup> See *supra* at paragraph 26 *et seq.*

- 60 Article 9 of the Treaty therefore does not enable an investor to claim compensation for breaches of the France-Mauritius BIT before an arbitral tribunal. Accordingly, investor-State arbitration is **not** one of the “subject-matters” governed by the Treaty.
- 61 Furthermore, Article 8 of the Treaty provides MFN treatment for “*les investissements des ressortissants [...] de l’un des Etats contractants*”.<sup>54</sup> The MFN treatment therefore only extends to “investments,” but not to “investors”. However, the right to access dispute resolution is a personal right granted to investors of the other contracting State in order to vindicate claims pertaining to their investment in the territory of the other contracting State; it is not an accessory to the investment.<sup>55</sup>
- 62 In sum, even assuming that “investors” could rely on the MFN clause in the France-Mauritius BIT, which they cannot, they could not benefit from more favourable dispute resolution provisions in other investment treaties concluded by either Contracting Party.

#### **2.4.2 Interpretation of Article 8 of the France-Mauritius BIT under the *ejusdem generis* rule**

- 63 The Respondent’s interpretation of Article 8 is also supported by the *ejusdem generis* rule, which the ILC has referred to as one that is “generally recognised and affirmed by the jurisprudence of international tribunals and national courts and by diplomatic practice”.<sup>56</sup> The *ejusdem generis* rule by its very nature is of particular relevance in the context of

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<sup>54</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, at **Exhibit CLA-1**, p. 475 *et seq.* (Art. 8) (emphasis added).

<sup>55</sup> See *e.g. Hochtief AG v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/07/31, 24 October 2011, at **Exhibit RLA-24**, p. 16 (para. 60 *et seq.*) where the tribunal noted that there were two types of MFN clauses in the applicable treaty, those that applied to investments and those that applied to investors, and decided that since the claimant invoked the MFN clause for the purpose of being able to rely on a more favourable dispute resolution provision, this meant that the relevant MFN clause was the one dealing with the MFN treatment of “investors” rather than “investments”.

<sup>56</sup> Draft Articles on most-favoured-nation clauses, with commentaries, text adopted by the International Law Commission at its thirtieth session, *Yearbook of the International Law Commission, 1978*, vol. II, Part Two, at **Exhibit RLA-27**, p. 27 (para. 1).

MFN clauses (which generally operate by way of enumerating matters to which the clause is intended to apply). It is reflected in Article 9(1) of the ILC's 1978 Draft Articles on Most-Favoured-Nation Treatment:

“Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause”.<sup>57</sup>

- 64 The Commentary to Article 9(1) clarifies that the *ejusdem generis* rule is rooted in common sense insofar as it “derives from [the] very nature” of MFN clauses.<sup>58</sup> The rule is meant to eliminate the risk that, through an imprudent application of an MFN clause, parties to international treaties are considered to be bound by provisions to which they never intended to consent in the first place:

“The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the **result in a number of cases may be to impose upon the granting State obligations it never contemplated.**”<sup>59</sup>

- 65 Similar to the ordinary meaning rule, the *ejusdem generis* rule means in this case that the Claimants are not entitled to import more favourable provisions from another treaty, **except to the extent** that the subject-matter of such provisions is also regulated in the basic treaty. In other words, the Claimants would be entitled to import a more favourable investor-State dispute resolution provision from the Finland-Mauritius BIT **only if** the France-Mauritius BIT contained an investor-State dispute resolution provision belonging to the same *genus*, *i.e.*, if it contained a similar but less favourable provision dealing with investor-State dispute resolution (and also, of course, only if the MFN provision specifically provided that it also applied to dispute resolution). On the Claimants' own admission, the

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<sup>57</sup> Draft Articles on most-favoured-nation clauses, at **Exhibit RLA-27**, p. 27.

<sup>58</sup> Draft Articles on most-favoured-nation clauses, at **Exhibit RLA-27**, p. 30 (para. 10).

<sup>59</sup> Draft Articles on most-favoured-nation clauses, at **Exhibit RLA-27**, p. 30 (para.11) (emphasis added – citations omitted).

France-Mauritius BIT does not contain any such provision.<sup>60</sup> The Claimants are thus barred from relying on the MFN clause in Article 8 of the France-Mauritius BIT.

- 66 The relevance of the *ejusdem generis* rule in the determination of the scope of MFN clauses has been recognised by investment treaty tribunals.<sup>61</sup> Similarly, commentators such as Professor Schill, who has favoured a broad interpretation of MFN clauses, agree that, in the absence of consent to arbitrate in the basic treaty, dispute resolution cannot form part of the subject-matter of an MFN clause:

“[I]f the basic treaty does not provide for investor-State dispute settlement at all, the situation will be different. In such cases, the interpretation of an MFN clause in the treaty will more likely than not bar the incorporation of the consent to dispute settlement from third-party BITs, since it will be difficult to establish that the MFN clause covered issues of dispute settlement as part of the clause’s subject matter. That the subject matter of the basic treaty does not encompass matters of dispute settlement militates against the presumption that the subject matter of the MFN clause is broad enough so as to cover matters that are outside the scope of application of the basic treaty. Instead, under the *ejusdem generis* rule, the basic treaty’s MFN clause usually would be limited to importing more favourable substantive investment protection.”<sup>62</sup>

- 67 The France-Mauritius BIT, the basic treaty in this case, does not contain any investor-State dispute resolution clause.<sup>63</sup> Consequently, even assuming that an MFN clause could apply to dispute resolution in the absence of express language to that effect (which is denied), the Claimants cannot rely on the MFN clause of Article 8 of the France-Mauritius BIT to

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<sup>60</sup> See *supra* at paragraph 26. Claimants' Notice of Arbitration dated 30 March 2018, p. 17 (para. 42).

<sup>61</sup> See e.g. *Hochtief AG v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/07/31, 24 October 2011, at **Exhibit RLA-24**, p. 19 *et seq.*; and *Daimler Financial Services AG v. Argentine Republic*, Award, ICSID Case No. ARB/05/1, 22 August 2012, at **Exhibit RLA-1**, p. 85 *et seq.*

<sup>62</sup> S. W. Schill, "Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses", (2014) 27(2) *Berkeley Journal of International Law* 496, at **Exhibit RLA-28**, p. 557.

<sup>63</sup> See *supra* at paragraph 26.

import “more favourable” dispute resolution provisions from another treaty to which Mauritius is a party. There can be no “more favourable” provisions in any such other treaty, in the absence of any provision in the basic treaty dealing with investor-State arbitration.

### **3 THE TRIBUNAL LACKS JURISDICTION *RATIONE MATERIAE***

- 68 It is incumbent on the Claimants to prove that they have made a qualifying investment in Mauritius to be able to invoke the substantive investment protection provisions under the Treaty.<sup>64</sup> The Claimants have failed to do so and accordingly the Tribunal also lacks jurisdiction *ratione materiae*.<sup>65</sup>
- 69 The Claimants' alleged interests do not satisfy the definition of "investment" in Article 1(1) of the Treaty. The Claimants have failed to prove that they have made **any capital contribution** in Mauritius and thus that they have made any investment. The mere incorporation of companies, which have no economic activity whatsoever and do not appear to have been capitalised, does not constitute an investment within the **inherent meaning** of that term (**Section 3.1**).
- 70 The Claimants also cannot allege that the monies they have spent in preparation of the Project constitute an investment. Such **pre-investment expenditures**, which did not result in the planned investment – setting up a forensic DNA and paternity testing laboratory in Mauritius – do not constitute an investment. Indeed, it is undisputed that the Claimants were never granted the requested authorisations<sup>66</sup> and accordingly the contemplated investment never materialised (**Section 3.2**).

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<sup>64</sup> See e.g., Article 24 of the UNCITRAL Rules (1976); *Phoenix Action, Ltd. v. The Czech Republic*, where the tribunal observed that "if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage", *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, dated 15 April 2009, at **Exhibit RLA-29**, p. 25 (para. 61).

<sup>65</sup> The Claimants have also failed to submit any evidence to prove their French nationality so that the jurisdiction *ratione personae* of the Tribunal has not been established, see *Hussein Nuaman Soufraki v. United Arab Emirates*, Award, ICSID Case No. ARB/02/7, 7 July 2004, at **Exhibit RLA-30**, p. 23 *et seq.* (para. 63); See also *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Decision on Jurisdiction, ICSID Case No. ARB/05/15, 11 April 2007, at **Exhibit RLA-31**, p. 41 *et seq.*

<sup>66</sup> See Claimants' Notice of Arbitration dated 30 March 2018, p. 9 *et seq.* (para. 16) "[...] *les Demandeurs étant simplement dans l'attente de l'autorisation des autorités pour l'acquisition du terrain en application du Non Citizen Property Restrictions Act*".

### 3.1 The Claimants' alleged interests are not investments

- 71 In their Notice of Arbitration, the Claimants contend that they are the sole shareholders of three companies incorporated in Mauritius (International DNA Services Holding Ltd, DNA Services (Mauritius) Ltd, and International DNA Services Global Business License 1). The Claimants note that “*les droits de participation à des sociétés*” and “*toutes créances [y] afférentes*” are assets listed in the definition of “*investissements*” in Article 1(1) of the Treaty and argue that this is sufficient to establish that they have “*réalisé des investissements au sens du TBI franco-mauricien*” and therefore are “*fondés à invoquer l’application de ses dispositions*”.<sup>67</sup>
- 72 However, contrary to the Claimants’ assertions, the mere ownership of companies does not in itself constitute a protected investment when the companies in question have never started operating. Accordingly, the Claimants could not have incurred, and in fact did not incur, any loss of or damage to a protected investment.
- 73 The Claimants’ literal construction of Article 1(1) of the Treaty is contrary to the established rules of treaty interpretation.
- 74 As noted above,<sup>68</sup> the provisions of the Treaty should be interpreted in accordance with the VCLT. Pursuant to Article 31(1) of the VCLT, Article 1(1) of the BIT must be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose.<sup>69</sup>
- 75 The France-Mauritius BIT does not contain a substantive definition of the protected “investments”. Article 1(1) merely lists the forms that an investment may take, that is, the types of assets that may be invested, but does not define the term “investment” itself:

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<sup>67</sup> Claimants' Notice of Arbitration dated 30 March 2018, p. 11 (para. 21).

<sup>68</sup> See *supra* at paragraph 54.

<sup>69</sup> See, e.g., *Romak SA v Uzbekistan*, Award, PCA Case No AA280, 26 November 2009, at **Exhibit RLA-32**, p. 44 (para. 176); *Alps Finance and Trade AG v. The Slovak Republic*, Award, UNCITRAL, 5 March 2011, at **Exhibit RLA-33**, p. 75 *et seq.* (paras. 236-237).

*Au sens de la présente Convention, le terme « investissements » comprend toutes les catégories de biens **notamment, mais non exclusivement** :*

— *les biens meubles et immeubles ainsi que tous autres droits réels tels qu'hypothèques, droits de gage, etc., acquis ou constitués en conformité avec la législation du pays où se trouve l'investissement ;*

— *les droits de participation à des sociétés et autres sortes de participation ;*

— *les droits de propriété industrielle, brevets d'invention, marques de fabrique ou de commerce, ainsi que les éléments incorporels du fonds de commerce ;*

— *les concessions d'entreprises accordées par la puissance publique et notamment les concessions de recherches et d'exploitation de substances minérales ;*

— *toutes créances afférentes aux biens et droits ci-dessus visés et aux prestations qui s'y rapportent.*<sup>70</sup>

- 76 A straight-forward reading of the introductory clause of Article 1(1) “*notamment, mais non exclusivement*” confirms that it merely provides for a **non-exhaustive list of assets** that **may** qualify as investments. In order to determine whether the Claimants’ alleged interests qualify as a protected investment under the Treaty, the relevant test is therefore not whether they fall within one or more categories of assets listed in Article 1(1), but rather whether they meet the inherent definition of “investment” under the Treaty. They do not.
- 77 Such inherent definition derives from the ordinary meaning of the term “investment” and, as further demonstrated below by reference to investment treaty awards, includes elements of contribution, risk and duration.

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<sup>70</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, at **Exhibit CLA-1**, p. 474 (Art. 1.1) (emphasis added).

- 78 This is confirmed by the preamble of the Treaty which underlines that the “purpose” pursued by the Contracting States is to “intensify the economic cooperation” by “protect[ing] and stimulat[ing] investments”.<sup>71</sup> It would be absurd to assume that these goals could be achieved by granting treaty protection to shell companies that have not been capitalized and do not operate. The existence of an investment is not a matter of form but a **substantive** requirement for jurisdiction – and hence a requirement for jurisdiction *ratione materiae*.
- 79 The need to refer to the intrinsically substantive definition of “investment” rather to the non-exhaustive lists of assets contained in investment treaties (which merely list that the assets that may be “invested”), has been recognised by tribunals in ICSID and non-ICSID investment treaty arbitrations alike.<sup>72</sup>
- 80 In the words of the *ad hoc* tribunal in *Alps Finance v. Slovak Republic*, applying Article 1(1) of the Switzerland-Czech and Slovak Federal Republic BIT, which contains an asset-based investment definition similar to that of Article 1(1) of the Treaty, “the BIT definition of investment is not an entirely self-standing concept, but refers to a more general concept given by international law rules.”<sup>73</sup>

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<sup>71</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, at **Exhibit CLA-1**, Preamble : “*Le Gouvernement de la République française d’une part, et le Gouvernement de l’île Maurice d’autre part, Animés du désir d’intensifier la coopération économique entre les deux pays, Soucieux à cet effet de protéger et stimuler les investissements [...]*” (emphasis added).

<sup>72</sup> See e.g. *Salini Costruttori SpA v. Morocco*, Decision on Jurisdiction, ICSID Case No. ARB/00/4, 23 July 2001, at **Exhibit RLA-34**; *Joy Mining Machinery Ltd v. Egypt*, Award on Jurisdiction, ICSID Case No. ARB/03/11, 6 August 2004, at **Exhibit RLA-35** (for examples under ICSID); *Romak SA v Uzbekistan*, Award, PCA Case No AA280, 26 November 2009, at **Exhibit RLA-32**; *Alps Finance and Trade AG v. The Slovak Republic*, Award, UNCITRAL, 5 March 2011, at **Exhibit RLA-33** (for non ICSID examples).

<sup>73</sup> *Alps Finance and Trade AG v. The Slovak Republic*, Award, UNCITRAL, 5 March 2011, at **Exhibit RLA-33**, p. 76 (para. 240), See also *ibid.* para 239: “The Tribunal is aware that the multitude of bilateral and multilateral investment treaties – although containing different definitions (either narrow or broad) of what constitutes an ‘investment’ – explicitly or implicitly refers to an ‘objective’ definition given by international law, as applied by other treaty-based tribunals. Tribunals must therefore be cautious to enforce the true intention of the Contracting

- 81 A non-exhaustive enumeration of assets in an investment treaty does not constitute a substantive definition of the term “investment”. As rightly noted by the tribunal in the UNCITRAL case *Romak SA v. Uzbekistan*, the term “investment” has an intrinsic meaning, independent of the categories enumerated in the treaty, and this meaning cannot be ignored:

“[T]he categories of investments enumerated in Article 1(2) of the BIT are not exhaustive, and **do not constitute an all-encompassing definition of ‘investment.’** Both Parties agree that this is the case. Therefore, there may well exist categories different from those mentioned in the list which, nevertheless, could properly be considered investments protected under the BIT. Accordingly, there must be a **benchmark** against which to assess those non-listed assets or categories of assets in order to determine whether they constitute an ‘investment’ within the meaning of Article 1(2). The term ‘investment’ has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT”.<sup>74</sup>

- 82 The *Romak* tribunal further explained that assets that would not meet the **inherent characteristics** of “investments” are not automatically transformed into “investments” by the mere fact that they fall into one or more of the categories listed in a treaty definition of “investment”:

“[T]he term ‘investments’ under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk. The Arbitral Tribunal is further comforted in its analysis by the reasoning adopted by other **arbitral tribunals which consistently incorporates contribution, duration and risk as hallmarks of an ‘investment.’** By their nature, asset types enumerated in the BIT’s non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of ‘investment,’ the fact that it falls within one of the categories listed in Article 1 does

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Parties to the specific treaty forming the basis of their jurisdiction, which cannot grossly depart from the ‘objective’ case-law definition.”

<sup>74</sup> *Romak SA v Uzbekistan*, Award, PCA Case No AA280, 26 November 2009, at **Exhibit RLA-32**, p. 45 (para. 180) (emphasis added).

not transform it into an investment. In the general formulation of the tribunal in *Azinian*, ‘labelling [...] is no substitute for analysis’.<sup>75</sup>

83 As pointed out by the *Romak* tribunal, such a “mechanical application” of the categories of assets listed in a treaty’s definition would lead to “a result which is manifestly absurd or unreasonable,” within the meaning of 32(b) of the VCLT.<sup>76</sup>

84 The *Alps Finance* tribunal also stressed that an investment must fulfil the following characteristics to benefit from investment treaty protection:

“It is now common ground that the necessary conditions or characteristics to be satisfied for attributing the quality of ‘investment’ to a contractual relationship include: (a) a **capital contribution** to the host-State by the private contracting party, (b) a significant **duration** over which the project is implemented and (c) a sharing of operational **risks** inherent to the contribution together with **long-term commitments**.”<sup>77</sup>

85 In the present case, the Claimants’ participation in three inoperative companies does not constitute an investment within the inherent meaning of that term, comprised of three elements, (a) capital contribution, (b) risk; and (c) duration. In short:

- a) The Claimants have made no **capital contribution** towards their planned venture in Mauritius. The fact that the Claimants registered three companies in Mauritius in 2014 and 2015 is of no relevance, since there is no evidence that they were ever capitalised, and it is undisputed that they have had no activity in Mauritius. The fact that the Claimants may have intended to make a capital contribution in the future is irrelevant for the purposes of establishing this Tribunal’s jurisdiction.

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<sup>75</sup> *Romak SA v Uzbekistan*, Award, PCA Case No AA280, 26 November 2009, at **Exhibit RLA-32**, p. 53 *et seq.* 53 (para. 207) (emphasis altered).

<sup>76</sup> *Id.* **RLA-32**, p. 46 (para. 184)

<sup>77</sup> *Alps Finance and Trade AG v. The Slovak Republic*, Award, UNCITRAL, 5 March 2011, at **Exhibit RLA-33**, p.77 (para. 241) (emphasis added).

- b) The Claimants have failed to meet the burden of proving that they would have assumed any **risk** giving rise to an expectation of return. Where there is no capital contribution, there is, by definition, no risk of losing it.
- c) Finally, since the Claimants have failed to make a capital contribution, their alleged investment has, by definition, no **duration**. Sunk costs do not constitute an investment.

86 The Claimants' alleged interests in Mauritius therefore do **not** qualify as investments under the Treaty. As such, the dispute falls outside the scope of the Treaty and the Tribunal lacks jurisdiction *ratione materiae*.

### **3.2 The Claimants' alleged pre-investment expenditures do not amount to an investment**

87 In their Notice of Arbitration, the Claimants refer to a series of relatively minor expenses and endeavours that they have allegedly undertaken as the basis for their claim.<sup>78</sup>

88 Even assuming they were proven, such expenditures cannot, by their very nature, constitute a protected investment under the Treaty. They rather constitute pre-investment expenditures, which by definition arise out of one-off transactions, not capital contributions, and therefore have no duration – they are sunk as soon as they are incurred, without any assumption of risk or expectation of return.

89 Indeed, arbitral tribunals have expressly excluded “pre-investment expenditures” from the scope of investment treaty arbitration.

90 In *Mihaly v. Sri Lanka*, the claimant had entered into negotiations with Sri Lanka to build and operate a power plant. Following the signature of a letter of intent, a letter of agreement and subsequently a letter of extension with Sri Lanka, the claimant began devoting efforts and incurring significant expenses on the project. The tribunal considered however that it was “unable to accept as a valid denomination of ‘investment’, the

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<sup>78</sup> Claimants' Notice of Arbitration dated 30 March 2018, p. 7 *et seq.*

**unilateral or internal characterization of certain expenditures** by the Claimant in preparation for a project of investment”.<sup>79</sup>

- 91 In the tribunal's view, in the absence of valid proof of the host State's consent to the implementation of the project, such expenditures could not be treated as an investment:

“The Tribunal is of the view that *de lege ferenda* the sources of international law on the extended meaning or definition of investment will have to be found in conventional law or in customary law. The Claimant has not succeeded in furnishing any evidence of treaty interpretation or practice of States, let alone that of developing countries or Sri Lanka for that matter, to the effect that pre-investment and development expenditures in the circumstances of the present case could automatically be admitted as ‘investment’ in the absence of the consent of the host State to the implementation of the project.”<sup>80</sup>

- 92 The *Mihaly* tribunal concluded that the claims were, at best, premature, since the claimant had failed to prove ownership of an investment at the time the proceedings were initiated.<sup>81</sup> The tribunal recognised that such pre-investment actions and expenditures could potentially entitle the claimant to damages, but in no event could they constitute a protected investment giving rise to investor-State arbitration:

“It may be and the Tribunal does not have to express an opinion on this, that during periods of lengthy negotiations even absent any contractual relationships obligations may arise such as the obligation to conduct the negotiations in good faith. These obligations if breached may entitle the innocent party to damages, or some other remedy. However, **these remedies do not arise because an investment had been made, but rather because the**

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<sup>79</sup> *Mihaly International Corporation v. Sri Lanka*, Award, ICSID Case No. ARB/00/2, 15 March 2002, at **Exhibit RLA-36**, p. 18 (para. 61) (emphasis added).

<sup>80</sup> *Mihaly International Corporation v. Sri Lanka*, Award, ICSID Case No. ARB/00/2, 15 March 2002, at **Exhibit RLA-36**, p. 18 (para. 60).

<sup>81</sup> *Mihaly International Corporation v. Sri Lanka*, Award, ICSID Case No. ARB/00/2, 15 March 2002, at **Exhibit RLA-36**, p. 18 (para. 61).

**requirements of proper conduct in relation to negotiation for an investment may have been breached.** That type of claim is not one to which the Convention has anything to say. They are not arbitrable as a consequence of the Convention.”<sup>82</sup>

- 93 The reasoning of the *Mihaly* tribunal applies to the present case. It is undisputed that the forensic DNA and paternity testing laboratory contemplated by the Claimants was never established.<sup>83</sup> As acknowledged by the Claimants, the Project was contingent upon the formal approval of the Mauritius authorities, which they never obtained.<sup>84</sup> It is also clear from the evidence submitted by the Claimants that they were fully aware that their prospective investment would have required a change of legislation in Mauritius (*i.e.*, amendment to the DNA Identification Act of 2009), which did not occur.<sup>85</sup>
- 94 As the tribunal in *Mihaly* put it, other than rejecting the Project, “what else could the Respondent have said to exclude any obligations which might otherwise have attached to interpret the expenditure of the moneys as an admitted investment?”<sup>86</sup> The Claimants cannot ignore that they were never authorised to invest in the regulated sector of DNA forensics in Mauritius. Whatever pre-investment expenses they may have incurred, they incurred them exclusively at their own risk.

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<sup>82</sup> *Mihaly International Corporation v. Sri Lanka*, Award, ICSID Case No. ARB/00/2, 15 March 2002, at **Exhibit RLA-36**, p. 15 (para. 51) (emphasis added).

<sup>83</sup> Claimants' Notice of Arbitration dated 30 March 2018, p. 15 (para. 34) where the Claimants evoke the “non-concretization” of the project.

<sup>84</sup> Claimants' Notice of Arbitration dated 30 March 2018, p. 9 (para. 16). See also Annexes au Rapport d'expertise du préjudice par Mr Christian Colléter, at **Exhibit C-17-Annex**, p. 102 (Annex 8) where the Claimants acknowledge “*Nous sommes dans l'attente : - de l'autorisation d'achat d'un terrain à Rose Belle Business Park, - d'un global acceptance auprès du Ministère de la santé, - d'une modification de la DNA Identification ACT*”.

<sup>85</sup> See *e.g.* the newspaper clipping attached to the Email from Mr Rawat Ahmed dated 9 November 2015, at **Exhibit C-11**, which indicates “*le bureau du Premier ministre devra analyser les amendments à être apportés au DNA Identification Act pour permettre l'entrée en opération d'un laboratoire privé de ce genre*.” See also Annexes au Rapport d'expertise du préjudice par Mr Christian Colléter, at **Exhibit C-17-Annex**, p. 102 (Annex 8).

<sup>86</sup> *Mihaly International Corporation v. Sri Lanka*, Award, ICSID Case No. ARB/00/2, 15 March 2002, at **Exhibit RLA-36**, p. 14 (para. 48).

- 95 In conclusion, the Claimants have failed to prove that they have made any protected investment under the Treaty. Accordingly, the Tribunal lacks jurisdiction *ratione materiae*.

#### **4 REQUEST FOR RELIEF**

96 In view of the above, the Respondent respectfully requests that the Tribunal:

- a) dismiss the Claimants' claims for lack of jurisdiction *ratione voluntatis*; or

In the alternative,

- b) dismiss the Claimants' claims for lack of jurisdiction *ratione materiae*; and

In any event,

- c) order the Claimants to pay the Respondent's costs of the arbitration on a full indemnity basis, *i.e.*, the Respondent's costs as defined in Article 38 of the UNCITRAL Rules, including but not limited to the fees and expenses of the Tribunal and the Respondent's costs of legal representation and assistance, and all other fees and expenses incurred in participating in the arbitration, including internal costs, with post-award interest at a commercially reasonable rate.

Respectfully submitted,

23 November 2018

For and on behalf of the Respondent,

**The Republic of Mauritius**

Counsel for the Respondent



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## ANNEX 1: DEFINED TERMS AND ABBREVIATIONS

<b>Defined term / Abbreviation</b>	<b>Description</b>
<b>BIT</b>	Bilateral investment treaty
<b>Claimants</b>	Prof. Christian Doutremepuich and Mr Antoine Doutremepuich
<b>Contracting States</b>	The French Republic and the Republic of Mauritius, State parties to the France-Mauritius BIT
<b>Finland-Mauritius BIT</b>	2007 bilateral investment agreement between the Government of Finland and the Government of the Republic of Mauritius on the promotion and protection of investments
<b>France-Mauritius BIT or the Treaty or the BIT</b>	1973 bilateral investment agreement between the Government of the French Republic and the Government of the Republic of Mauritius on the protection of investments
<b>GATS</b>	General Agreement on Trade and Services
<b>ICJ</b>	International Court of Justice
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>ICSID Convention</b>	1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States entered into force on 14 October 1966
<b>ILC</b>	International Law Commission
<b>Mauritius or the Respondent</b>	The Republic of Mauritius
<b>MFN</b>	Most Favoured Nation
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCITRAL Rules</b>	the 1976 UNCITRAL Arbitration Rules
<b>VCLT</b>	1965 Vienna Convention on the Law of Treaties

## **ANNEX 2: LIST OF EXHIBITS AND LEGAL AUTHORITIES**

### **List of Respondent's fact exhibits**

- R-1 “Mapping of the IIA” by the UNCTAD Investment Policy Hub Website (visited in November 2018)
- R-2 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
- R-3 Etude d'Impact sur le Projet de Loi autorisant l'approbation de l'accord entre le Gouvernement de la République française et le Gouvernement de la République de Maurice sur l'encouragement et la protection des investissements
- R-4 Projet de Loi autorisant l'approbation de l'accord entre le Gouvernement de la République française et le Gouvernement de la République de Maurice sur l'encouragement et la protection réciproques des investissements enregistré à la Présidence de l'Assemblée nationale le 24 octobre 2017

### **List of Respondent's legal authorities**

- RLA-1 *Daimler Financial Services AG v. Argentine Republic*, Award, ICSID Case No. ARB/05/1, 22 August 2012
- RLA-2 *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, Award, ICSID Case No. ARB/15/21, 6 August 2016
- RLA-3 *Case Concerning mutual assistance in criminal matters (Djibouti v. France)*, Judgment, 4 June 2008, (2008) *I.C.J. Reports* 177
- RLA-4 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v.*

- Rwanda*), Jurisdiction and Admissibility, Judgment, 3 February 2006, (2006) *I.C.J. Reports* 6
- RLA-5 *Corfu Channel (United Kingdom v. Albania)*, Preliminary Objection, Judgment, 25 March 1948, (1948) *I.C.J. Reports* 15
- RLA-6 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, 11 July 1996, (1996) *I.C.J. Reports* (II) 595
- RLA-7 *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Preliminary objection, Judgement of 22 July 1952, (1952) *I.C.J. Reports* 93
- RLA-8 G. Fitzmaurice, *The Law and Procedure of The International Court of Justice* (Cambridge, 1986) (excerpts)
- RLA-9 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, 11 July 1996, (1996) *I.C.J. Reports* (II) 595
- RLA-10 *Brandes Investment Partners LP v. Bolivarian Republic of Venezuela*, Award, ICSID Case No. ARB/08/3, 2 August 2011
- RLA-11 *ICS Inspection and Control Services Ltd v. The Argentine Republic*, Award on Jurisdiction, PCA Case No. 2010-9, 10 February 2012
- RLA-12 *Occidental Petroleum Corporation et. al. v. the Republic of Ecuador*, Decision on Provisional Measures, ICSID Case No. ARB/06/11, 17 August 2007
- RLA-13 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Order on Interim Measures, UNCITRAL, 2 September 2008

- RLA-14      *Chevron Corporation et al. v. Republic of Ecuador*, Order for Interim Measures, PCA Case No. 2009-23, 9 February 2011
- RLA-15      A. Newcombe, L. Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International, 2009) (excerpts)
- RLA-16      Individual (Concurring) Opinion of President McNair, 22 July 1952
- RLA-17      Z. Douglas, "The MFN Clause in Investment Arbitration - Treaty Interpretation Off the Rails", (2011) (2)1 *Journal of International Dispute Settlement* 97
- RLA-18      Final Report of the Study Group on the Most-Favoured-Nation clause (ILC 2015)
- RLA-19      C. McLachlan, L. Shore and M. Weiniger, "Most-Favoured-Nation Treatment", in *International Investment Arbitration, Substantive Principles*, Oxford International Arbitration Series 2<sup>nd</sup> Edition, 2017
- RLA-20      *Dawood Rawat v. the Republic of Mauritius*, Award on Jurisdiction, PCA Case 2016-20, 6 April 2018
- RLA-21      S. Lutrell, C. Packer, "Case comment: *Dawood Rawat v The Republic of Mauritius*" 2017, published on the website of the Australian Dispute Centre
- RLA-22      *Venezuela US, S.R.L. v. The Bolivarian Republic of Venezuela*, Interim Award on Jurisdiction, PCA Case No. 2013-34, 26 July 2016
- RLA-23      *ST-AD GmbH v. The Republic of Bulgaria*, Award on Jurisdiction, PCA Case No. 2011-06, 18 July 2013
- RLA-24      *Hochtief AG v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/07/31, 24 October 2011
- RLA-25      *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment of 18 August 1972, (1972) *I.C.J. Reports* 46

- RLA-26      *Plama Consortium Ltd v. the Republic of Bulgaria*,  
Decision on Jurisdiction, ICSID Case No. ARB/03/24, 8  
February 2005
- RLA-27      Draft Articles on most-favoured-nation clauses, with  
commentaries, text adopted by the International Law  
Commission at its thirtieth session, *Yearbook of the  
International Law Commission, 1978*, vol. II, Part Two
- RLA-28      S. W. Schill, "Multilateralizing Investment Treaties  
Through Most-Favored-Nation Clauses", (2014) 27(2)  
*Berkeley Journal of International Law* 496
- RLA-29      *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case  
No. ARB/06/5, Award, dated 15 April 2009
- RLA-30      *Hussein Nuaman Soufraki v. United Arab Emirates*, Award,  
ICSID Case No. ARB/02/7, 7 July 2004
- RLA-31      *Waguih Elie George Siag and Clorinda Vecchi v. The Arab  
Republic of Egypt*, Decision on Jurisdiction, ICSID Case  
No. ARB/05/15, 11 April 2007
- RLA-32      *Romak SA v Uzbekistan*, Award, PCA Case No AA280, 26  
November 2009
- RLA-33      *Alps Finance and Trade AG v. The Slovak Republic*, Award,  
UNCITRAL, 5 March 2011
- RLA-34      *Salini Costruttori SpA v. Morocco*, Decision on  
Jurisdiction, ICSID Case No. ARB/00/4, 23 July 2001
- RLA-35      *Joy Mining Machinery Ltd v. Egypt*, Award on Jurisdiction,  
ICSID Case No. ARB/03/11, 6 August 2004
- RLA-36      *Mihaly International Corporation v. Sri Lanka*, Award,  
ICSID Case No. ARB/00/2, 15 March 2002