

PCA CASE No. 2018-37

IN THE ARBITRATION MATTER UNDER  
THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW 1976

-between-

1. PROFESSOR CHRISTIAN DOUTREMEPUICH (France)
2. ANTOINE DOUTREMEPUICH (France)

-and-

THE REPUBLIC OF MAURITIUS

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AWARD ON JURISDICTION

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**Arbitral Tribunal**

Professor Maxi Scherer (Presiding Arbitrator)  
Professor Olivier Caprasse  
Professor Jan Paulsson

**Registry**

Permanent Court of Arbitration

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## TABLE OF ABBREVIATIONS

<b><u>Abbreviation</u></b>	<b><u>Definition</u></b>	<b><u>Para.</u></b>
<b>2010 Treaty</b>	Treaty between the Government of the Republic of France and the Government of the Republic of Mauritius signed on 8 March 2010	158
<b>Act</b>	Mauritius Investment Promotion Act of 2000 (also referred to as the “Mauritius Investment Promotion Act”)	80
<b>Application</b>	Respondent’s Application requesting that the Tribunal strike certain documents from the record and order the Claimants to remove the portions of their Counter-Memorial on Jurisdiction relying on them	46
<b>Basic Treaty</b>	An investment treaty entered into by the investor claimant’s home country, containing an MFN clause relied upon by the claimant to import into that treaty a provision of another treaty to which its home country is not a party	159
<b>BOI</b>	Board of Investment of the Republic of Mauritius	11
<b>Business Plan</b>	Business plan laying out the Project for setting up the Mauritius Laboratory	88(a)
<b>Claimants</b>	Collective reference to Professor Christian Doutremepuich and Mr Antoine Doutremepuich	1
<b>Claimants’ Counter-Memorial</b>	Claimants’ Counter-Memorial on Jurisdiction, submitted on 1 February 2019	45
<b>Claimants’ Rebuttal Submissions on Place and Language</b>	Claimants’ comments on the Respondent’s Submissions on Place and Language, submitted on 20 July 2018	37
<b>Claimants’ Rejoinder</b>	Claimants’ Rejoinder on Jurisdiction, submitted on 24 May 2019	54
<b>Claimants’ Submissions on Costs</b>	Claimants’ submissions on costs, filed on 24 July 2019	60
<b>Claimants’ Submissions on Place and Language</b>	Claimants’ Submissions on Place and Language, filed on 12 July 2018	34
<b>Co-Arbitrator</b>	Individual reference to Professor Olivier Caprasse or Professor Jan Paulsson, appointed as arbitrators on 30 March 2018 and 16 May 2018 respectively	26

<b>Co-Arbitrators</b>	Collective reference to Professor Olivier Caprasse and Professor Jan Paulsson, appointed as arbitrators on 30 March 2018 and 16 May 2018 respectively	26
<b>Companies</b>	Three companies created by the Claimants, namely: (i) International DNA Services Holding, created on 9 January 2015; (ii) DNA Services Mauritius Ltd, created on 23 February 2015; and (iii) International DNA Services, created on 24 September 2015	13
<b>Contracting State</b>	Individual reference to the contracting parties to the Treaty between the Government of the Republic of France and the Government of the Republic of Mauritius on the Promotion and Protection of Investments, signed at Port Louis on 22 March 1973 (namely: the Republic of France or the Republic of Mauritius)	9
<b>Contracting States</b>	Collective reference to the contracting parties to the Treaty between the Government of the Republic of France and the Government of the Republic of Mauritius on the Promotion and Protection of Investments, signed at Port Louis on 22 March 1973 (namely: the Republic of France and the Republic of Mauritius)	9
<b>Crépet-Daigremont Opinion</b>	Expert Opinion of Dr Claire Crépet-Daigremont, submitted with the Claimants’ Counter-Memorial on 1 February 2019	45
<b>DNA Identification Act</b>	DNA Identification Act 2009	82
<b>Finland-Mauritius BIT</b>	Agreement between the Government of the Republic of Finland and the Government of the Republic of Mauritius on the Promotion and Protection of Investments, signed at Helsinki on 12 September 2007	15
<b>First Claimant</b>	Professor Christian Doutremepuich	1
<b>France-Mauritius BIT</b>	Treaty between the Government of the Republic of France and the Government of the Republic of Mauritius on the Promotion and Protection of Investments, signed at Port Louis on 22 March 1973 (also referred to as the “Treaty”)	9
<b>French Laboratory</b>	Laboratoire d’Hématologie Médico-Légale, situated in Bordeaux, France, of which the founder and director is Professor Christian Doutremepuich	2
<b>Hearing</b>	Hearing on jurisdiction held on 12 and 13 June 2019 at the Peace Palace, Carnegieplein 2, 2517KJ The Hague, The Netherlands	58

<b>Holding Company</b>	International DNA Services Holding, created by the Claimants on 9 January 2015, held 90% by the First Claimant and 10% by the Second Claimant	13
<b>ICSID</b>	International Centre for Settlement of Investment Disputes	75
<b>ILC</b>	International Law Commission	160
<b>ILC 1978 Draft Articles and Commentary</b>	Draft Articles on most-favoured-nation clauses, and associated commentary, text adopted by the International Law Commission at its thirtieth session	168 (fn. 230)
<b>ILC 2015 Report</b>	Final Report of the Study Group on the Most-Favoured-Nation clause, adopted by the International Law Commission at its sixty-seventh session, in 2015, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session	160
<b>Mauritius Investment Promotion Act</b>	Mauritius Investment Promotion Act of 2000 (also referred to as the “Act”)	80
<b>Mauritius Laboratory</b>	Project for a laboratory to be established in Mauritius for genetic and DNA analysis by Professor Christian Doutremepuich (also referred to as the “Project”)	10
<b>MFN</b>	most-favoured-nation	67
<b>No-Objection Letter</b>	Letter from the Prime Minister’s Office to the Director-General of the Board of Investment, dated 14 October 2014	12
<b>Notice of Arbitration</b>	Notice of Arbitration, filed by the Claimants against the Respondent on 30 March 2018	22
<b>Nouvel Opinion</b>	Expert Opinion of Professor Yves Nouvel, submitted with the Claimants’ Counter-Memorial on 1 February 2019	45
<b>Parties</b>	Collective reference to the parties to the present arbitration, namely, Professor Christian Doutremepuich, Mr Antoine Doutremepuich, and the Republic of Mauritius	5
<b>PCA</b>	Permanent Court of Arbitration	8
<b>PMO</b>	Prime Minister’s Office	12
<b>Presiding Arbitrator</b>	Professor Maxi Scherer, appointed as presiding arbitrator on 21 June 2018	27
<b>Procedural Order No. 1</b>	The Tribunal’s first procedural order, issued on 16 August 2018, regarding the place and the languages of the arbitration	39

<b>Procedural Order No. 2</b>	The Tribunal’s second procedural order, issued on 14 September 2018, regarding the procedural rules for the arbitration and the timetable for the Respondent’s jurisdictional challenge	43
<b>Procedural Order No. 3</b>	The Tribunal’s third procedural order, issued on 5 March 2019, regarding the Respondent’s application to strike certain documents from the record	52
<b>Procedural Order No. 4</b>	The Tribunal’s fourth procedural order, issued on 5 June 2019, regarding the organisation of the hearing on jurisdiction	57
<b>Project</b>	Project for a laboratory to be established in Mauritius for genetic and DNA analysis by Professor Christian Doutremepuich (also referred to as the “Mauritius Laboratory”)	10
<b>Rejection Letter</b>	Letter from the Prime Minister’s Office to the Director-General of the Board of Investment, dated 14 April 2016	14
<b>Respondent</b>	The Republic of Mauritius	5
<b>Respondent’s Memorial</b>	Respondent’s Memorial on Jurisdiction, submitted on 23 November 2018	44
<b>Respondent’s Reply</b>	Respondent’s Reply on Jurisdiction, submitted on 29 March 2019	53
<b>Respondent’s Reply on Costs</b>	Respondent’s reply submissions on costs, filed on 30 July 2019	62
<b>Respondent’s Rebuttal Submissions on Place and Language</b>	Respondent’s comments on the Claimants’ Submissions on Place and Language, submitted on 20 July 2018	38
<b>Respondent’s Submissions on Costs</b>	Respondent’s submission on costs, filed on 24 July 2019	61
<b>Respondent’s Submissions on Place and Language</b>	Respondent’s submissions on the place and language of the arbitration, filed on 12 July 2018	35
<b>Second Claimant</b>	Mr Antoine Doutremepuich	1
<b>Terms of Appointment</b>	Terms of Appointment signed by the Parties and Tribunal on 18, 19, 20, 25 and 30 July 2019	8
<b>Transcript</b>	Hearing transcript provided by the Parties to the Tribunal on 19 July 2019	59
<b>Treaty</b>	Treaty between the Government of the Republic of France and the Government of the Republic of Mauritius on the Protection	9

of Investments, signed at Port Louis on 22 March 1973 (also referred to as the “France-Mauritius BIT”)

<b>Tribunal</b>	The arbitral tribunal in the present case, being composed of Professor Olivier Caprasse, Professor Jan Paulsson, and Professor Maxi Scherer (presiding arbitrator)	7
<b>UNCITRAL</b>	United Nations Commission on International Trade Law	20
<b>UNCITRAL Rules</b>	UNCITRAL Arbitration Rules 1976	20
<b>UNCITRAL Transparency Rules</b>	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014	21
<b>VCLT</b>	Vienna Convention on the Law of Treaties	73

## **I. INTRODUCTION**

### **A. Parties**

1. The Claimants are Professor Christian Doutremepuich (France) (the “**First Claimant**”) and Mr Antoine Doutremepuich (France) (the “**Second Claimant**”) (together the “**Claimants**”).
2. The First Claimant is a citizen of France born on 13 June 1949 and residing at 290 avenue d’Ares 33 700 Merignac. He is the director and founder of the Laboratoire d’Hématologie Médico-Légale situated in Bordeaux, France (the “**French Laboratory**”).
3. The Second Claimant is a citizen of France born on 24 October 1988 and residing at 5 rue Camille Vic 33 700 Merignac. He is the Manager and Head of External Relations of the French Laboratory.
4. The Claimants are represented in this arbitration by Me Bruno Poulain and Me Roxane Regaud of Ernst & Young Société d’Avocats, Quai de Bacalan, Hangar 16 Entrée 1, 33 070 Bordeaux Cedex, France.
5. The Respondent is the Republic of Mauritius, a sovereign State (the “**Respondent**”) (together with the Claimants, the “**Parties**”). The Respondent’s address for this arbitration is at Attn: The Hon. Maneesh Gobin – Attorney General, Mr Dheerendra Kumar Dabee – Solicitor-General and Mr Rajeshsharma Ramloll – Deputy Solicitor-General, 4th Floor, R. Seeneevassen Building, Port Louis, Mauritius.
6. The Respondent is represented in this arbitration by Dr Veijo Heiskanen, Ms Domitille Baizeau, Ms Laura Halonen, Ms Eléonore Caroit and Mr Augustin Barrier of Lalive, Rue de la Mairie 35, P.O. Box 6569, 1211 Geneva 6, Switzerland.

### **B. Tribunal**

7. The arbitral tribunal in the present case (the “**Tribunal**”) is composed of:
  - (a) Professor Olivier Caprasse, nominated by the Claimants on 30 March 2018, whose address is Caprasse Arbitration, Avenue de Tervueren 412 Bte 18, 1150 Brussels, Belgium;
  - (b) Professor Jan Paulsson, nominated by the Respondent on 16 May 2018, whose address is Three

Crowns, Washington Harbour, 3000 K Street N.W., Suite 101, Washington, D.C. 20007-5109, U.S.A; and

(c) Professor Maxi Scherer, appointed as the presiding arbitrator on 21 June 2018, whose address is Wilmer Cutler Pickering Hale and Dorr LLP, 49 Park Lane, London, W1K 1PS, United Kingdom.

8. Pursuant to the terms of appointment, signed by the Parties and the Tribunal (the “**Terms of Appointment**”), at paragraphs 43 and 44, the Permanent Court of Arbitration (the “**PCA**”) provides administrative support in the present case and Ms Fedelma Claire Smith, Senior Legal Counsel, serves as the Tribunal Secretary. The address of the PCA is Peace Palace, Carnegieplein 2, 2517 KJ, The Hague, The Netherlands.

### **C. Dispute**

9. The Claimants allege that the Respondent, by its acts and omissions, breached various provisions of the Treaty between the Government of the Republic of France and the Government of the Republic of Mauritius (individually the “**Contracting State**” and together the “**Contracting States**”) on the Promotion and Protection of Investments, signed at Port Louis on 22 March 1973 (the “**France-Mauritius BIT**” or “**Treaty**”),<sup>1</sup> and request, among other things, damages provisionally quantified at EUR 11,600,000.

10. According to the Claimants, beginning in 2009, the relevant organs of the Respondent sought to secure the involvement of the French Laboratory in order to enhance the forensic capability of Mauritius. Wishing to expand the activities of the French Laboratory, and on the basis of preliminary discussions with the Mauritian authorities, the Claimants undertook to establish a laboratory in Mauritius for genetic and DNA analysis (the “**Project**” or “**Mauritius Laboratory**”).<sup>2</sup>

11. According to the Claimants, during 2013, the Project was submitted to the Board of Investment (the “**BOI**”) of the Republic of Mauritius, which is in charge of the promotion and reception of foreign investors to Mauritius Island.<sup>3</sup>

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<sup>1</sup> France-Mauritius BIT (**Exhibit C-2**).

<sup>2</sup> Notice of Arbitration, dated 30 March 2018, para. 7.

<sup>3</sup> Notice of Arbitration, dated 30 March 2018, para. 7.

12. On 14 October 2014, the Prime Minister’s Office (the “**PMO**”) of the Respondent wrote a letter to the BOI stating that there were no objections to the Project (the “**No-Objection Letter**”). The letter stated that:

“This Office has consulted different stakeholders, including the Forensic Science Laboratory and the Office of the Solicitor-General on the above proposal submitted by Prof. Doutremepuich in regard to the above project.

Following views received, I am to inform you that we have no objection to the project. You may liaise with Prof. Doutremepuich accordingly.”<sup>4</sup>

13. On the basis of the above, the Claimants, among other things, created three companies in Mauritius: (i) on 9 January 2015: International DNA Services Holding, held 90% by the First Claimant and 10% by the Second Claimant (the “**Holding Company**”); (ii) on 23 February 2015: DNA Services Mauritius Ltd, held 100% by the Holding Company; and (iii) on 24 September 2015: International DNA Services, held 100% by the Holding Company (together the “**Companies**”).<sup>5</sup>

14. The Claimants contend that on 14 April 2016, after having studied an updated business plan, the PMO rejected the Project without providing any reasons (the “**Rejection Letter**”). The letter stated:

“I am to inform you that the updated Business Plan submitted in October 2015 by the promoter in respect of the above project has been examined anew and in view of the important implications thereof, the project has not been approved.”<sup>6</sup>

#### **D. Arbitration Agreement**

15. The Claimants invoke the arbitration agreement in Article 9 of the Agreement between the Government of the Republic of Finland and the Government of the Republic of Mauritius on the Promotion and Protection of Investments, signed at Helsinki on 12 September 2007 (the “**Finland-Mauritius BIT**”),<sup>7</sup> which they say is applicable by virtue of Article 8(2) of the France-Mauritius BIT.

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<sup>4</sup> Letter from the PMO to the Managing Director of the BOI, dated 14 October 2014 (**Exhibit C-7**).

<sup>5</sup> Notice of Arbitration, dated 30 March 2018, para. 12, referring to Certificate of Incorporation of International DNA Services Holding Ltd (**Exhibit C-10**), Certificate of Incorporation of DNA Services (Mauritius) Ltd (**Exhibit C-11**), Certificate of Incorporation of International DNA Services (**Exhibit C-12**).

<sup>6</sup> Letter from the PMO to the Managing Director of the BOI, dated 14 April 2016 (**Exhibit C-18**) (emphasis in the original).

<sup>7</sup> Finland-Mauritius BIT (**Exhibit C-3**).

16. Article 8(2) of the France-Mauritius BIT provides as follows:

*“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>8</sup>*

17. Article 9 of the Finland-Mauritius BIT provides as follows:

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

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

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

(b) to arbitration by the International Centre for Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965 (hereinafter referred to as the “Centre”), if the Centre is available; or

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

3. An investor who has submitted the dispute to a national court may nevertheless have recourse to one of the arbitral tribunals mentioned in paragraphs 2(b) or 2(c) of this Article if, before a judgment has been delivered on the subject matter by a national court, the investor declares not to pursue the case any longer through national proceedings and withdraws the case.

4. Any arbitration under this Article shall, at the request of either party to the dispute, be held in a state that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), opened for signature at New York on 10 June 1958. Claims submitted to arbitration under this Article shall be considered to arise out of a commercial relationship or transaction for purposes of Article 1 of the New York Convention.”<sup>9</sup>

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<sup>8</sup> France-Mauritius BIT, Article 8(2) (**Exhibit C-2**). (“With respect to matters governed by this Treaty other than those referred to in article 7, the investments of nationals, companies or other corporate bodies of one Contracting State shall also benefit from any more favourable provisions than those in this Treaty which may result from international undertakings already entered into or hereafter entered into by the other Contracting State with the first-mentioned Contracting State or with third States.”) (Translation by the PCA).

<sup>9</sup> Finland-Mauritius BIT, Article 9 (**Exhibit C-3**).

18. The Claimants also refer to Article 9 of the France-Mauritius BIT which provides as follows:

*“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>10</sup>*

## **E. Scope of the Award and Applicable Rules**

19. The present award decides on the Respondent’s challenge to the Tribunal’s jurisdiction in this arbitration and related costs.
20. Pursuant to the Terms of Appointment, the Parties agree that the present dispute is governed by the United Nations Commission on International Trade Law (“**UNCITRAL**”) Arbitration Rules 1976 (the “**UNCITRAL Rules**”).<sup>11</sup>
21. The Parties also agree to the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014 (the “**UNCITRAL Transparency Rules**”) pursuant to Article 1(2)(a) of the said rules.<sup>12</sup>

## **II. PROCEDURAL HISTORY<sup>13</sup>**

### **A. Commencement of the Arbitration**

22. On 30 March 2018, the Claimants filed a notice of arbitration against the Respondent (the “**Notice of Arbitration**”).

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<sup>10</sup> France-Mauritius BIT, Article 9 (**Exhibit C-2**) (“Agreements concerning investments to be made in the territory of one Contracting State made by nationals, companies or other corporate bodies of the other Contracting State shall contain a clause providing that, in cases where an amicable settlement cannot be reached within a short time, disputes arising in connexion with such investments shall be brought before the International Centre for Settlement of Investment Disputes so that they may be settled by means of arbitration in accordance with the Convention on the settlement of investment disputes between States and nationals of other States.”) (Translation by the PCA).

<sup>11</sup> Terms of Appointment, dated 18 and 30 July 2018, para. 14.

<sup>12</sup> Terms of Appointment, dated 18 and 30 July 2018, para. 15.

<sup>13</sup> This section is not a full summary of the procedural history of the arbitration; rather, it merely sets out the steps most relevant to this award.

23. According to Article 3(2) of the UNCITRAL Rules, these arbitral proceedings are deemed to have commenced on 30 April 2018, the date on which the Respondent received the Notice of Arbitration.

**B. Constitution of the Tribunal**

24. The Claimants, in the Notice of Arbitration, and in accordance with Articles 4(b) and 7 of the UNCITRAL Rules, nominated Professor Olivier Caprasse as their party-appointed arbitrator.
25. The Respondent, on 16 May 2018, in accordance with Article 7 of the UNCITRAL Rules, nominated Professor Jan Paulsson as its party-appointed arbitrator.
26. Professor Olivier Caprasse and Professor Jan Paulsson are individually referred to as “**Co-Arbitrator**” and together as “**Co-Arbitrators**.”
27. On 21 June 2018, the Co-Arbitrators, in accordance with Article 7 of the UNCITRAL Rules, appointed Professor Maxi Scherer as the presiding arbitrator (the “**Presiding Arbitrator**”).

**C. Terms of Appointment**

28. On 30 June 2018, having received the file from the Parties, the Tribunal, among other things, provided the Parties with the text of draft terms of appointment in English and French and invited the Parties to comment in writing.
29. On 18 July 2018, the Tribunal circulated revised texts taking into account the Parties’ comments.
30. On 18, 19, 20, 25 and 30 July 2018, the Parties and the Tribunal signed the Terms of Appointment.

**D. Decision on Place and Language of the Arbitration**

31. In their Notice of Arbitration, the Claimants proposed Paris (France) as the place of arbitration, and French as the language of the proceedings.
32. On 30 April 2018, the Respondent replied, among other things, that it disagreed with the choice of Paris (France) as the place of arbitration, and proposed Geneva (Switzerland) instead. The Respondent also noted its disagreement with French being the language of the proceedings and suggested English instead.

33. On 30 June 2018, the Tribunal, among other things, noted the Parties' disagreement regarding the place and language of the arbitration and stated that it would decide these points pursuant to Articles 16(1) and 17(1) of the UNCITRAL Rules after having heard the Parties. Accordingly, it invited the Parties to provide their submissions as to the place and language of the arbitration by 12 July 2018.
34. On 12 July 2018, the Claimants provided their submissions on the place and language of the arbitration (the "**Claimants' Submissions on Place and Language**").
35. On the same day, the Respondent provided its submissions on the place and language of the arbitration (the "**Respondent's Submissions on Place and Language**").
36. On 13 July 2018, the Tribunal acknowledged the Claimants' and the Respondent's Submissions on Place and Language and invited the Parties to provide comments on the other side's submissions by 20 July 2018.
37. On 20 July 2018, the Claimants provided their comments on the Respondent's Submissions on Place and Language (the "**Claimants' Rebuttal Submissions on Place and Language**").
38. On the same day, the Respondent provided its comments on the Claimants' Submissions on Place and Language (the "**Respondent's Rebuttal Submissions on Place and Language**").
39. On 16 August 2018, the Tribunal issued its first procedural order (the "Procedural Order No. 1") in which it decided as follows:

“a. the place of the arbitration is London (United Kingdom); and

b. the languages of the arbitration are French and English, subject to the directions and specifications set out above (or in subsequent procedural orders after consultation with the Parties).”<sup>14</sup>

40. Procedural Order No. 1 further specified that:

“a. written correspondence by the Parties to the Tribunal (or the PCA) and correspondence by the Tribunal (or the PCA) to the Parties shall be in either French or English without any translation being required;

b. at oral hearings and procedural meetings in person or by video/telephone conference, the Party's legal representatives shall address oral submissions to the Tribunal in either English or French, and members of the Tribunal may express themselves in either French o[r] English;

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<sup>14</sup> Procedural Order No. 1, dated 16 August 2018, para. 37.

- c. the Parties' written submissions (memorials, briefs and other written pleadings) shall be in either French or English without any translation being required;
- d. exhibits and legal authorities shall be submitted in their original language without any translation being required, if the original language is English or French;
- e. witness statements shall be submitted in their original language without any translation being required, if the original language is English or French;
- f. the Tribunal's procedural orders, award(s) and other decisions shall be in English only without any translation being required; the Tribunal may there cite the Parties' written submissions, exhibits, legal authorities etc. in their original language, provided that it is English or French without any translation being required."<sup>15</sup>

### **E. Procedure Regarding Jurisdictional Challenge**

- 41. Also on 16 August 2018, the Tribunal provided the Parties with a draft procedural order no. 2 regarding the conduct of the proceedings. The Tribunal invited the Parties to confer and discuss the draft procedural order, including the procedural timetable, and to provide the Tribunal with any joint or separate comments.
- 42. On 6 and 13 September 2018, the Parties provided comments on the draft procedural order no. 2. The Parties agreed to deal with the Respondent's jurisdictional challenge on a preliminary basis and provided a procedural timetable to this effect.
- 43. On 14 September 2018, the Tribunal issued its second procedural order (the "**Procedural Order No. 2**") which included the procedural rules for this arbitration and the timetable for the Respondent's jurisdictional challenge.
- 44. On 23 November 2018, the Respondent submitted its memorial on jurisdiction (the "**Respondent's Memorial**"), including Exhibits R-1 to R-4, as well as RL-1 to RL-36.<sup>16</sup>
- 45. On 1 February 2019, the Claimants submitted their counter-memorial on jurisdiction (the "**Claimants' Counter-Memorial**") including Exhibits C-1 to C-30 and CL-1 to CL-64, as well as expert opinions of Dr Claire Crépet-Daigremont, CER-1 (the "**Crépet-Daigremont Opinion**") and

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<sup>15</sup> Procedural Order No. 1, dated 16 August 2018, para. 35.

<sup>16</sup> For consistency reasons, and in accordance with Procedural Order No. 2, para. 3.6, the Respondent's legal exhibits are listed as RL- and not as RLA- as actually submitted.

Professor Yves Nouvel, CER-2 (the “**Nouvel Opinion**”).<sup>17</sup>

46. On 15 February 2019, the Respondent filed an application, in which it requested that the Tribunal strike certain documents from the record and order the Claimants to remove the portions of their Counter-Memorial that relied on them (the “**Application**”).
47. On the same day, the Tribunal invited the Claimants to comment on the Application by 20 February 2019 and, on 18 February 2019, extended the deadline to 22 February 2019.
48. On 22 February 2019, the Claimants commented on the Application.
49. On 24 February 2019, the Respondent sought leave from the Tribunal to provide further comments on the Application following the Claimants’ letter of 22 February 2019. On the same day, the Tribunal granted the request and invited the Respondent to provide final comments by 26 February 2019, after which date the Claimants would have an opportunity to provide their final comments, if any, by 28 February 2019.
50. On 26 February 2019, the Respondent provided its final comments on the Application.
51. On 28 February 2019, the Claimants provided their final comments on the Application.
52. On 5 March 2019, the Tribunal issued its third procedural order (the “**Procedural Order No. 3**”), in which it granted the Respondent’s request to strike Exhibits C-19, C-29 and C-30 from the record; decided that it was premature or unnecessary to deal with the Respondent’s other requests; and reserved the costs relating to the Respondent’s Application.
53. On 29 March 2019, the Respondent submitted its reply on jurisdiction (the “**Respondent’s Reply**”), including Exhibits RL-37 to RL-57, as well as Exhibit TL-1.
54. On 24 May 2019, the Claimants submitted their rejoinder on jurisdiction (the “**Claimants’ Rejoinder**”), including Exhibits C-31 to C-38 and CL-65 to CL-74.
55. On 29 and 30 May 2019, as directed by the Tribunal, the Parties provided written comments on the

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<sup>17</sup> A further report, namely, the Damage Assessment Report of Mr Christian Colléter, together with Annexes 1 through 8, was submitted as “Pièce No. 17” to the Notice of Arbitration. For ease of identification, and in accordance with Procedural Order No. 2, para. 3.5, the exhibits to the Damage Assessment Report of Mr Christian Colléter are listed as CER-00- together with the original Annex numbers.

organization of the hearing on jurisdiction.

56. On 3 June 2019, the Tribunal held a telephone pre-hearing conference with the Parties.
57. On 5 June 2019, the Tribunal issued its fourth procedural order (the “**Procedural Order No. 4**”) regarding the organization of the hearing on jurisdiction.
58. On 12 and 13 June 2019, the hearing on jurisdiction took place at the Peace Palace, Carnegieplein 2, 2717KJ The Hague, The Netherlands (the “**Hearing**”). Participants on behalf of the Claimants were: Professor Christian Doutremepuich and Mr Antoine Doutremepuich as well as Me Bruno Poulain, Me Roxane Regaud, Me Anne-Caroline Juvin and Me Henri Vercasson of E&Y Société d’Avocats. Participants on behalf of the Respondent were: Mr Rajesh Ramloll, Deputy Solicitor-General Republic of Mauritius, as well as Dr Veijo Heiskanen, Ms Domitille Baizeau, Ms Laura Halonen, Ms Eléonore Caroit and Mr Augustin Barrier of Lalive.
59. The Hearing was live-recorded and broadcast simultaneously to the public via the web-site of the PCA.<sup>18</sup> A hearing transcript was provided by the court reporters to the Parties on 10 July 2019 and a final and agreed version was provided by the Parties to the Tribunal on 19 July 2019 (the “**Transcript**”).

#### **F. Cost Submissions**

60. On 24 July 2019, the Claimants filed their submissions on costs (the “**Claimants’ Submissions on Costs**”).
61. On the same day, the Respondent filed its submissions on costs (the “**Respondent’s Submissions on Costs**”), including Exhibits RL-58 to RL-65.
62. On 30 July 2019, the Claimants stated that they had no comments on the Respondent’s Submissions on Costs.
63. On the same day, the Respondent filed its reply submissions on costs (the “**Respondent’s Reply on Costs**”), including Exhibits RL-66 and RL-67.

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<sup>18</sup> See <https://pca-cpa.org/en/cases/169/>.

### III. REQUESTS FOR RELIEF

#### A. Respondent's Requests for Relief

64. The Respondent requests that the Tribunal:

- (a) dismiss the Claimants' claims for lack of jurisdiction *ratione voluntatis*;<sup>19</sup> or, in the alternative,
- (b) dismiss the Claimants' claims for lack of jurisdiction *ratione materiae*;<sup>20</sup> and
- (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.<sup>21</sup>

#### B. Claimants' Requests for Relief

65. The Claimants request that the Tribunal :

- (a) *constate que les Demandeurs ont réalisé des investissements sur le territoire mauricien au sens du Traité*;<sup>22</sup>
- (b) *constate que la clause MFN de l'article 8 du Traité permet aux Demandeurs d'invoquer le bénéfice de l'article 9 du traité conclu avec la Finlande*;<sup>23</sup>

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<sup>19</sup> Respondent's Memorial, para. 96(a); Respondent's Reply, p. 41.

<sup>20</sup> Respondent's Memorial, para. 96(b); Respondent's Reply, p. 41.

<sup>21</sup> Respondent's Memorial, para. 96(c); Respondent's Reply, p. 41.

<sup>22</sup> Claimants' Counter-Memorial, para. 115 (“[R]ecognise that the Claimants have made investments in the Mauritian territory within the meaning of the France-Mauritius BIT”) (Translation by the PCA); Claimants' Rejoinder, para. 137.

<sup>23</sup> Claimants' Counter-Memorial, para. 115 (“[R]ecognise that the MFN clause in Article 8 of the Treaty allows the Claimants to invoke Article 9 of the Finland-Mauritius BIT”) (Translation by the PCA); Claimants' Rejoinder, para. 137.

- (c) *rejette en conséquence l'exception d'incompétence soulevée par la Défenderesse.*<sup>24</sup>
- (d) *condamne en conséquence la Défenderesse, sur le fondement de l'article 38 du Règlement d'arbitrage CNUDCI, à payer aux Demandeurs l'ensemble des frais qu'ils ont exposés dans la présente procédure. Y compris :*
- i. *les frais et honoraires payés au Tribunal et au secrétariat de la Cour permanente d'arbitrage;*
  - ii. *les frais et honoraires payés au cabinet Ernst & Young pour leur assistance et représentation dans la présente procédure ;*
  - iii. *les frais et honoraires payés aux deux experts cités par les Demandeurs ;*
  - iv. *tous autres frais exposés dans le cadre de la présente procédure par les Demandeurs, y compris le temps et les coûts consacrés à la gestion de la présente procédure.*<sup>25</sup>

#### **IV. TRIBUNAL'S JURISDICTION**

##### **A. Introduction**

66. The Respondent's challenge to the Tribunal's jurisdiction turns around two main points: first, the Respondent argues that it has never consented to arbitration under the Treaty;<sup>26</sup> second, according to the Respondent, there is no qualifying investment in the sense of the Treaty.<sup>27</sup> For the avoidance of doubt, the Tribunal notes that the Respondent does not dispute the Claimants' quality as French

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<sup>24</sup> Claimants' Counter-Memorial, para. 115 (“[R]eject the jurisdictional objections raised by the Respondent”) (Translation by the PCA); Claimants' Rejoinder, para. 137.

<sup>25</sup> Claimants' Rejoinder, para. 137 (“[C]ondemn the Respondent, on the basis of Article 38 of the UNCITRAL Arbitration Rules, to pay to the Claimants all of the costs that they have incurred in these proceedings. This includes: (i) costs and fees paid to the Tribunal and the secretariat of the Permanent Court of Arbitration; (ii) costs and fees paid to Ernst & Young for their assistance and representation in these proceedings; (iii) costs and fees paid to the two experts mentioned by the Claimants; (iv) any other costs incurred by the Claimants in this proceeding, including the time and costs involved in the management of this proceeding”) (Translation by the PCA).

<sup>26</sup> Respondent's Memorial, paras. 11-67; Respondent's Reply, paras. 11-82.

<sup>27</sup> Respondent's Memorial, paras. 68-95; Respondent's Reply, paras. 83-107.

nationals and therefore potential investors under the Treaty.<sup>28</sup>

67. The Claimants, to the contrary, argue that they have made a protected investment under the Treaty;<sup>29</sup> and that the Respondent's submission to arbitration results from the combined application of the most-favoured-nation ("MFN") clause in Article 8(2) of the France-Mauritius BIT and the dispute resolution clause in Article 9 of the Finland-Mauritius BIT.<sup>30</sup>

68. The Parties also disagree on the order in which the Tribunal should look at the two questions. According to the Respondent, the question of consent is the starting point:

"Both of the issues, obviously relate to the Tribunal's jurisdiction, but the issue of jurisdiction *ratione voluntatis* is the more fundamental one. It is about whether there is a consent to arbitrate in the first place. In the Respondent's submission, it is therefore logical to address the issue of jurisdiction *ratione voluntatis* first. It is about the existence of the alleged consent, whereas the existence of investment is about the scope of the alleged consent. If there is no consent, there is no jurisdiction of any kind at the first place."<sup>31</sup>

69. According to the Claimants, the question of a protected investment is logically a preliminary step since it concerns the applicability of the Treaty.<sup>32</sup> The Claimants state that the question of the MFN clause presupposes that the Treaty containing it applies in the first place.<sup>33</sup>

70. The Tribunal is of the view that the order of the issues is not decisive. Ultimately, the Claimants will have to show that both conditions are met, i.e. that they made a protected investment and that the Respondent consented to arbitration (via the MFN clause or otherwise). This is because each condition is indispensable with respect to jurisdiction. Nevertheless, conceptually, the question of the protected investment may be looked at first because it concerns the applicability of the Treaty and the MFN clause contained therein.

71. Accordingly, the Tribunal will examine in turn whether the Claimants made a qualifying investment under the France-Mauritius BIT and, then, whether the Claimants are entitled to invoke the arbitration

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<sup>28</sup> Even though the Respondent initially noted that the Claimants had failed to submit any evidence to prove their French nationality (see Respondent's Memorial, para. 68), the Respondent confirmed at the Hearing that they do not dispute the Claimants' quality as French nationals. See Transcript, 12 June 2019, p. 139.

<sup>29</sup> Claimants' Counter-Memorial, paras. 4-27; Claimants' Rejoinder, paras. 8-49.

<sup>30</sup> Claimants' Counter-Memorial, paras. 28-114; Claimants' Rejoinder, paras. 50-136.

<sup>31</sup> Transcript, 12 June 2019, p. 8.

<sup>32</sup> Claimants' Rejoinder, paras. 3-7.

<sup>33</sup> Claimants' Rejoinder, paras. 4-5, referring to *Dawood Rawat v. The Republic of Mauritius*, PCA Case 2016-20, Award on Jurisdiction, 6 April 2018 (**Exhibit RL-20**).

agreement in Article 9 of the Finland-Mauritius BIT on the basis of the MFN clause in Article 8(2) of the France-Mauritius BIT.

## **B. Existence of a Qualifying Investment**

### **1. Respondent's Position**

72. The Respondent submits that the Tribunal lacks jurisdiction *ratione materiae* because the Claimants have failed to prove that they made a qualifying investment in Mauritius.<sup>34</sup> According to the Respondent, the mere ownership of non-operating companies and pre-investment expenditures fall outside the definition of investments pursuant to the France-Mauritius BIT.<sup>35</sup> The Respondent states that the Claimants' Mauritius Laboratory never materialised owing to their failure to obtain the necessary authorisations from Mauritian authorities.<sup>36</sup>
73. The Respondent contends that the meaning of investment as per Article 1(1) of the France-Mauritius BIT should 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, to use the familiar language of Article 31(1) of the Vienna Convention on the Law of Treaties (the "VCLT").<sup>37</sup> The Respondent states that in lieu of defining investments, Article 1(1) of the France-Mauritius BIT merely provides a list of the forms that an investment may take. In its relevant part, Article 1(1) provides that "[a]u sens de la présente Convention, le terme 'investissements' comprend toutes les catégories de biens notamment, mais non exclusivement [...]."<sup>38</sup> In other words, it sets out a non-exhaustive list of assets that may qualify as investments.<sup>39</sup>
74. According to the Respondent, the relevant test in determining whether investments fall within the ambit of the Treaty is "not whether they fall within one or more categories of assets listed in

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<sup>34</sup> Respondent's Memorial, para. 68, referring to Article 24 of the UNCITRAL Rules; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, p. 25, para. 61 ("if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage") (**Exhibit RL-29**).

<sup>35</sup> Respondent's Memorial, para. 74.

<sup>36</sup> Respondent's Memorial, paras. 69-70.

<sup>37</sup> Respondent's Memorial, para. 74, referring to *Romak S.A. v. Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, p. 44, para. 176 (**Exhibit RL-32**); *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award, 5 March 2011, pp. 75-76, paras. 236-237 (**Exhibit RL-33**).

<sup>38</sup> France-Mauritius BIT, Article 1(1) (emphasis omitted) (**Exhibit C-2**).

<sup>39</sup> Respondent's Memorial, para. 76.

Article 1(1), but rather whether they meet the inherent definition of ‘investment’ under the Treaty.”<sup>40</sup> The Respondent submits that investments listed in the Treaty are “not exhaustive, and do not constitute an all-encompassing definition of ‘investment’ [and that] 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.’”<sup>41</sup>

75. Comparing Article 1(1) of the Treaty to the Switzerland-Czech and Slovak Federal Republic BIT, which according to the Respondent contains a similar asset-based investment definition, the Respondent argue that 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>42</sup> The Respondent draws support from awards rendered by tribunals acting under the Rules of the International Centre for Settlement of Investment Disputes (the “ICSID”) as well as in non-ICSID investment treaty arbitrations.<sup>43</sup>

76. The Respondent submits that an investment must possess the following characteristics to benefit from investment treaty protection:

“[...] (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>44</sup>

77. The Respondent points to the fact that the Claimants agree to apply those “*critères de qualification de l’investissement*,” known as the “*Salini test*.”<sup>45</sup> The Respondent makes the following submissions regarding those criteria.

78. First, regarding the capital contribution criterion, the Respondent argues that the creation of the

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<sup>40</sup> Respondent’s Memorial, para. 76.

<sup>41</sup> Respondent’s Memorial, para. 80, referring to *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, p. 45, para. 180 (**Exhibit RL-32**).

<sup>42</sup> Respondent’s Memorial, para. 79, referring to *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award, 5 March 2011, p. 76, para. 240 (**Exhibit RL-33**).

<sup>43</sup> Respondent’s Memorial, paras. 80 *et seq.* (emphasis omitted), referring to *Salini Costruttori S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (**Exhibit RL-34**); *Joy Mining Machinery Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (**Exhibit RL-35**); *Romak S.A. v. Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009 (**Exhibit RL-32**); *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award, 5 March 2011 (**Exhibit RL-33**).

<sup>44</sup> Respondent’s Memorial, para. 84, referring to *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award, 5 March 2011, p. 77, para. 241 (emphasis omitted) (**Exhibit RL-33**).

<sup>45</sup> Respondent’s Reply, para. 87, referring to Claimants’ Counter-Memorial, p. 5, para. 12.

Companies is “of no relevance” since they were never capitalised and had no activity.<sup>46</sup> According to the Respondent, the Companies were “mere shells, vehicles for later investments, rather than investments in themselves.”<sup>47</sup> Moreover, the funds injected in the Companies were soon recovered by the Claimants “when the Mauritian authorities informed the Claimants that their proposed investment was not authorised.”<sup>48</sup>

79. The Respondent also argues that the Claimants have failed to prove that they would have invested know-how.<sup>49</sup> According to the Respondent, the Claimants merely refer to planned future contributions which never happened. In any event, in order to qualify as a contribution, know-how “would need to amount to something of tangible value, such as intellectual property rights.”<sup>50</sup>
80. The Respondent addresses the Claimants’ argument that a capital of EUR 100,000 per company would be sufficient to be considered as an investment under the Mauritius Investment Promotion Act of 2000 (the “**Mauritius Investment Promotion Act**” or “**Act**”).<sup>51</sup> The Respondent submits that the Claimants failed to apply the second limb of the requirements under the Act which states that companies must have an “annual turnover exceeding 4 million rupees.”<sup>52</sup> The Respondent further submits that “the amount of EUR 100,000 is not a substantial contribution, as required for it to be a constitutive element of a qualifying investment.”<sup>53</sup>
81. The Respondent further submits that pre-investment expenses do not have the attributes to constitute a protected investment under the Treaty as they are not capital contributions, present no risks or

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<sup>46</sup> Respondent’s Memorial, para. 85. See also Respondent’s Reply, paras. 92-94.

<sup>47</sup> Respondent’s Reply, para. 92.

<sup>48</sup> Respondent’s Reply, para. 95, referring to Annex No. 7 to the Damage Assessment Report of Mr Christian Colléter, p. 75 (**Exhibit CER-00-7**). See also Respondent’s Opening Statements, p. 46 (**Exhibit R-Pres 1**).

<sup>49</sup> Respondent’s Reply, para. 96, referring to Claimants’ Counter-Memorial, p. 6, para. 13.

<sup>50</sup> Respondent’s Reply, para. 96.

<sup>51</sup> Respondent’s Reply, para. 94, referring to Claimants’ Counter-Memorial, p. 6, para. 13.

<sup>52</sup> Respondent’s Reply, para. 94, referring to Mauritius Investment Promotion Act, p. 17, Schedule 1, Part I, s. 1 (**Exhibit C-20**).

<sup>53</sup> Respondent’s Reply, para. 94, referring to *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, pp. 67 *et seq.*, paras. 187-191 (**Exhibit RL-57**); *Fedax v. Venezuela*, ICSID Case No. ARB/96/7, Decision on Jurisdiction, 11 July 1997, para. 43 (**Exhibit CL-1**); B. Poulain, “L’Investissement international: définition ou définitions?”, in T.P. Kahn & T. Wälde (eds.), *Les aspects nouveaux du droit des investissements internationaux* (Brill Nijhoff Leiden, 2007), p. 124, para. 7 (**Exhibit RL-55**).

expectation of return, and offer no long-term commitments.<sup>54</sup> According to the Respondent, “the unilateral or internal characterization of certain expenditures by the Claimants in preparation for a project of investment”<sup>55</sup> cannot be accepted as a valid form of investment. The Respondent adds that any claims pertaining to unestablished investments are premature.<sup>56</sup>

82. The Respondent submits that the Project never materialised because it was subject to relevant authorisations by Mauritian authorities.<sup>57</sup> The Respondent further submits that the Claimants were aware of required the amendments to local legislation (such as the DNA Identification Act 2009 (the “**DNA Identification Act**”)) which were necessary prior to the establishment of the Project. These amendments did not take place.<sup>58</sup> According to the Respondent, the correspondence between the Parties also proves that the Claimants had not obtained the required authorisations in order to proceed with the Project.<sup>59</sup>
83. Second, regarding the risk criterion, the Respondent argues that the Claimants have made no capital contribution and borne no risks.<sup>60</sup> The Respondent states that under “the definition of investment, ‘risk’ refers to the risk of losing the capital contribution made, not the risk of not being able to make an investment.”<sup>61</sup> According to the Respondent:

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<sup>54</sup> Respondent’s Reply, para. 97.

<sup>55</sup> Respondent’s Memorial, para. 90, referring to *Mihaly International Corporation v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, p. 18, para. 61 (**Exhibit RL-36**).

<sup>56</sup> Respondent’s Memorial, paras. 91-92, referring to *Mihaly International Corporation v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, p. 18, paras. 51, 60-61 (**Exhibit RL-36**).

<sup>57</sup> Respondent’s Memorial, para. 91, referring to Claimants’ Notice of Arbitration dated 30 March 2018, p. 15, paras. 34, 51.

<sup>58</sup> Respondent’s Memorial, para. 91, referring to Claimants’ Notice of Arbitration dated 30 March 2018, p. 15, para. 16. See also Letter from Claimants to Prime Minister, dated 21 October 2015, Annex No. 8 to the Damage Assessment Report of Mr Christian Colléter, p. 102 (**Exhibit CER-00-8**).

<sup>59</sup> Respondent’s Reply, paras. 103-107. See also Respondent’s Opening Statements, p. 50 (**Exhibit R-Pres 1**), referring to Letter from Claimants to Prime Minister, dated 21 October 2015, Annex No. 8 to the Damage Assessment Report of Mr Christian Colléter, p. 102 (**Exhibit CER-00-8**); E-mail and brief on the DNA lab project from the BOI to the “Laboratoire d’Hématologie Médico-Légale”, 10 August 2015, p. 3 (**Exhibit C-37**). See also Respondent’s Closing Statements, p. 8 (**Exhibit R-Pres 2**), referring to Publication of the Fast Track Committee projects, attachment to E-mail from Mr Ahmed Rawat to the Claimants, dated 9 November 2015, pp. 1-2 (**Exhibit C-15**).

<sup>60</sup> Respondent’s Memorial, para. 85.

<sup>61</sup> Respondent’s Reply, para. 98, referring to B. Poulain, “L’Investissement international: définition ou définitions?”, in T.P. Kahn & T. Wälde (eds.), *Les aspects nouveaux du droit des investissements internationaux* (Brill Nijhoff Leiden, 2007), p. 127, para. 9 (**Exhibit RL-55**).

“The fact of the matters is that as the Claimants made no capital contribution, they risked nothing. The limited funds transferred into the [C]ompanies’ bank accounts were always under the Claimants’ control, and recovered when the [C]ompanies were dissolved. In other words, the Claimants assumed no risk, at any point in time, in relation to their alleged investment.”<sup>62</sup>

84. Third, regarding the duration criterion, the Respondent submits that in the absence of “a capital contribution, [the Claimants’] alleged investment has, by definition, no duration.”<sup>63</sup>
85. Finally, according to the Respondent, the Claimants opine that prospective investors should be protected under the Treaty. The Respondent takes issue with this view, stressing that the protection should only extend to realised investments.<sup>64</sup> With respect to the object and purpose of the Treaty, the Respondent believes that investments exclude “any form of promotion” and further submits that “general promotion obligations contained in BITs do not give any enforceable right to the admission and establishment of prospective foreign investors or require States to adopt specific measures to promote foreign investment.”<sup>65</sup> The Respondent adds that customary international law preserves the discretion of a State to admit “foreigners and foreign investors in their territories and most countries refrain from granting foreign nationals an unrestricted right to invest in their economies through BITs.”<sup>66</sup> Foreign investors from the other Contracting State are thus not afforded any positive right of admission.<sup>67</sup>
86. In sum, the Respondent submits that the Tribunal lacks jurisdiction *ratione materiae* because the Claimants have failed to prove that they have made any protected investment under the Treaty.

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<sup>62</sup> Respondent’s Reply, para. 99.

<sup>63</sup> Respondent’s Reply, para. 100.

<sup>64</sup> Respondent’s Reply, para. 88.

<sup>65</sup> Respondent’s Reply, para. 90, referring to A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International, 2009), p. 127 (**Exhibit RL-53**).

<sup>66</sup> Respondent’s Reply, para. 90, referring to United Nations Conference on Trade and Development (UNCTAD), *Bilateral Investment Treaties 1995-2006* (New York and Geneva: United Nations, 2007) (Doc. No. UNCTAD/ITE/IIT/2006/5), p. 35, para. C (**Exhibit RL-54**); B. Poulain, “L’Investissement international: définition ou définitions?”, in T.P. Kahn & T. Wälde (eds.), *Les aspects nouveaux du droit des investissements internationaux* (Brill Nijhoff Leiden, 2007), pp. 143 *et seq.*, para. 39 (**Exhibit RL-55**).

<sup>67</sup> Respondent’s Reply, para. 90, referring to United Nations Conference on Trade and Development (UNCTAD), *Admission and Establishment* (New York and Geneva: United Nations, 1999) (UNCTAD/ITE/IIT/10), p. 16 (chapter B) (**Exhibit RL-56**); A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International, 2009), p. 134, para. 3.11 (**Exhibit RL-53**).

## 2. Claimants' Position

87. According to the Claimants, the Parties first discussed the possibility of setting up the Mauritius Laboratory in 2009.<sup>68</sup> Since then, the First Claimant, via the French Laboratory, has cooperated with the judicial authorities of Mauritius in a number of cases involving forensic matters.<sup>69</sup> Following the establishment of this relationship, the Claimants sought to grow their activity internationally and, in 2014, formally initiated the steps for the setting up of the Mauritius Laboratory.
88. According to the Claimants, the events unfolded in the following manner:<sup>70</sup>
- (a) the Project was laid out as a business plan (the “**Business Plan**”) which described the investments to be made and was validated by the BOI;<sup>71</sup>
  - (b) the Project received an unconditional approval from the PMO in the form of the No-Objection Letter on 14 October 2014;<sup>72</sup>
  - (c) on this basis, the BOI liaised with the University of Mauritius on 17 December 2014<sup>73</sup> for the latter to consider a partnership with the Claimants;<sup>74</sup>
  - (d) during the course of 2015, the Claimants set up the Companies intended to operate the different branches of the Project;<sup>75</sup>
  - (e) the Companies were initially weakly capitalised but various amounts were mobilised by the

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<sup>68</sup> Claimants' Counter-Memorial, para. 4, referring to E-mail from the BOI to Mr Doutremepuich, dated 28 January 2009 (**Exhibit C-4**).

<sup>69</sup> Claimants' Counter-Memorial, para. 4, referring to List of interventions of Prof. Christian Doutremepuich in Mauritius (**Exhibit C-5**).

<sup>70</sup> See also Claimants' Opening Statements, pp. 2-9 (**Exhibit C-Pres 1**).

<sup>71</sup> Claimants' Counter-Memorial, para. 6, referring to Business Plan (**Exhibit C-6**).

<sup>72</sup> Claimants' Counter-Memorial, para. 6, quoting Letter from the PMO to the Managing Director of the BOI, dated 14 October 2014 (**Exhibit C-7**); Claimants' Rejoinder, para. 8.

<sup>73</sup> Claimants' Counter-Memorial, para. 6, quoting Letter from the BOI to the University of Mauritius, dated 17 December 2014 (**Exhibit C-8**); Claimants' Rejoinder, para. 8.

<sup>74</sup> Claimants' Counter-Memorial, para. 6, referring to Draft Memorandum with the University, February 2015 (**Exhibit C-9**); Claimants' Rejoinder, para. 8.

<sup>75</sup> Claimants' Counter-Memorial, para. 6, referring to Certificate of Incorporation of International DNA Services Holding Ltd (**Exhibit C-10**), Certificate of Incorporation of DNA Services (Mauritius) Ltd (**Exhibit C-11**), Certificate of Incorporation of International DNA Services (**Exhibit C-12**).

Claimants during 2015 and transferred to the Mauritian territory to satisfy various obligations and expenses under the Project;<sup>76</sup> and

(f) the Project was supported by the BOI,<sup>77</sup> it benefited from the Fast Track Committee,<sup>78</sup> a notarial act had been signed for the acquisition of land<sup>79</sup> and the architectural plans for the building hosting the Mauritius Laboratory were being produced.<sup>80</sup>

89. In light of the above, the Claimants submit that the Project was wrongly terminated by the PMO's Rejection Letter of 14 April 2016.<sup>81</sup> The Claimants submit that by the time the Rejection Letter was issued, they had already made protected investments under the Treaty. It is thus the Claimants' contention that they are not seeking protection for future investments and that the Respondent, in alleging so, is distorting the Claimants' submissions.<sup>82</sup>

90. The Claimants refer to Article 1(1) of the Treaty which provides that "*au sens de la présente Convention, le terme 'investissements' comprend (...) les droits de participation à des sociétés et autres sortes de participation.*"<sup>83</sup> This, according to the Claimants, is inclusive and unconditional and it follows that shares in companies are investments within the meaning of the Treaty.<sup>84</sup>

91. However, the Claimants agree that it would be contrary to the purpose of the Treaty if the protection was granted to any French citizen holding an interest in a company incorporated in Mauritius without taking into account the three criteria for qualifying the investment: contribution, risk, and duration,

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<sup>76</sup> Claimants' Counter-Memorial, para. 6, referring to Transfer of funds from Prof. Christian Doutremepuich (**Exhibit C-13**).

<sup>77</sup> Claimants' Counter-Memorial, para. 6, referring to E-mail from the BOI to Mr Doutremepuich, dated 22 October 2015 (**Exhibit C-14**).

<sup>78</sup> Claimants' Counter-Memorial, para. 6, referring to publication of the Fast Track Committee projects, attachment to E-mail from Mr Ahmed Rawat to the Claimants, dated 9 November 2015 (**Exhibit C-15**).

<sup>79</sup> Claimants' Counter-Memorial, para. 6, referring to agreement to sell lots 17 and 18 between Business Parks and DNA Services, dated August 2015 (**Exhibit C-16**).

<sup>80</sup> Claimants' Counter-Memorial, para. 6, referring to E-mail from Mr Ahmed Rawat to Mr Antoine Doutremepuich, dated 20 August 2015 (**Exhibit C-17**).

<sup>81</sup> Claimants' Counter-Memorial, para. 6, referring to Letter from the PMO to the Managing Director of the BOI, dated 14 April 2016 (**Exhibit C-18**).

<sup>82</sup> Claimants' Rejoinder, paras. 12-13.

<sup>83</sup> France-Mauritius BIT, Article 1(1) (**Exhibit C-2**) ("For the purposes of this Treaty, the term 'investments' comprises [...] rights of participation in companies and participation of other kinds.") (Translation by the PCA).

<sup>84</sup> Claimants' Counter-Memorial, para. 11. See also Claimants' Rejoinder, paras. 14 *et seq.*

often referred to as the *Salini* test.<sup>85</sup> The Claimants argue that the Treaty is meant to protect nationals of a Contracting State who intend to invest sustainably in the economy and territory of the other Contracting State.<sup>86</sup>

92. The Claimants submit that the criteria established in the *Salini* test must “be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually.”<sup>87</sup> The Claimants cite a number of additional authorities in support of this position<sup>88</sup> and analyse the distinctive characteristics required for an investment to qualify under the Treaty as follows.
93. First, with respect to the contribution criterion, the Claimants submit that in 2015, they transferred an amount of EUR 100,000 for each of the Companies, i.e. a total amount of EUR 300,000. According to the Claimants, these three transfers were ordered on 19 May 2015, 25 June 2015 and 28 July 2015<sup>89</sup> so that the Companies could claim the status of investor within the meaning of the Mauritius Investment Promotion Act.<sup>90</sup>
94. The Claimants further submit that although the amounts mobilised may seem small, transfers of funds for the benefit of the Companies were made by the Claimants only when needed to advance the Project.<sup>91</sup> In addition, the Claimants submit that there is no numerical threshold for an investment to qualify for protection and that smaller investors also have a role to play.<sup>92</sup>
95. In any event, according to the Claimants, in 2015, the investment amount of the Project represented 37% of the profits then realised by the First Claimant and they submit that this shows a considerable financial effort in terms of the Claimants’ personal resources.<sup>93</sup> The Claimants allege that they had

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<sup>85</sup> Claimants’ Counter-Memorial, para. 12.

<sup>86</sup> Claimants’ Counter-Memorial, para. 12.

<sup>87</sup> Claimants’ Rejoinder, para. 15, quoting *Salini Costruttori S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52 (**Exhibit RL-34**).

<sup>88</sup> Claimants’ Rejoinder, para. 15, quoting *Joy Mining Machinery Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, para. 54 (**Exhibit RL-35**); R. Dolzer & C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), p. 69 (**Exhibit CL-65**).

<sup>89</sup> Claimants’ Counter-Memorial, para. 13, referring to Transfer of funds from Prof. Christian Doutremepuich (**Exhibit C-13**).

<sup>90</sup> Claimants’ Counter-Memorial, para. 13, referring to Mauritius Investment Promotion Act (**Exhibit C-20**).

<sup>91</sup> Claimants’ Counter-Memorial, para. 13.

<sup>92</sup> Claimants’ Rejoinder, paras. 17-18, 22.

<sup>93</sup> Claimants’ Counter-Memorial, para. 13, footnote 25.

intended to invest further had the Project not been terminated by the PMO in 2016.<sup>94</sup>

96. The Claimants also note that the criterion of contribution should not only be assessed in financial terms, but also in terms of contribution of know-how.<sup>95</sup> According to the Claimants, such know-how goes beyond their personal expertise.<sup>96</sup> The Claimants submit that the Project would have necessitated, *inter alia*, the purchase of expensive and specialised equipment, a specific internal layout of the Mauritius Laboratory, as well as hiring qualified teams that respect precise, standardised and certified sampling, analysis and identification protocols.<sup>97</sup>
97. Refuting the Respondent's arguments, the Claimants submit that the repatriation of the funds cannot call into question the qualification of these contributions as investments, adding that the repatriation was sensible in light of the termination of the Project by the PMO.<sup>98</sup>
98. As to the Respondent's allegation regarding the lack of operational activity of the Companies, the Claimants observe that the Companies entered into negotiations with the University of Mauritius and had been issued invoices in their names, among other things.<sup>99</sup>
99. In response to the Respondent's allegation that the Claimants ignored the second limb of the Mauritius Investment Promotion Act which requires "an annual turnover exceeding 4 million rupees," the Claimants submit that the anticipated annual turn-over of the Project was significantly higher than the legal threshold.<sup>100</sup>
100. Second, with respect to the risk criterion, the Claimants submit that the envisaged activities entailed

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<sup>94</sup> Claimants' Rejoinder, para. 27, quoting *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, para. 73 (**Exhibit CL-67**).

<sup>95</sup> Claimants' Rejoinder, para. 23, quoting *Deutsche Bank AG v. Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, para. 297 (**Exhibit CL-66**).

<sup>96</sup> Claimants' Rejoinder, para. 24.

<sup>97</sup> Claimants' Rejoinder, para. 24.

<sup>98</sup> Claimants' Rejoinder, para. 21.

<sup>99</sup> Claimants' Rejoinder, para. 29, referring to Agreement to sell lots 17 and 18 between Business Parks and DNA Services, dated August 2015 (**Exhibit C-16**); E-mail and brief on the DNA lab project from the Board of Investment to the "Laboratoire d'Hématologie Médico-Légale", 10 August 2015, p. 3 (**Exhibit C-37**); Draft Memorandum with the University, February 2015 (**Exhibit C-9**); Examples of invoices paid by the Claimants or their companies for the implementation of the Project (**Exhibit C-31**); Letter from the BOI to DNA Services (Mauritius) Ltd, dated 11 August 2015 (**Exhibit C-33**).

<sup>100</sup> Claimants' Rejoinder, para. 30, referring to Business Plan (**Exhibit C-6**).

different risks. According to the Claimants, the Project's Business Plan describes a long-term commercial activity in Mauritius with results that could fluctuate in consideration of numerous economic, regulatory and political circumstances.<sup>101</sup> The Claimants also point out that they invested their own funds in the Project, which constitutes an important risk factor. In addition to the identified technical risks and the mapping of specific risks in the Business Plan, the profitability of the Project included a risk linked to the market shares of paternity tests.<sup>102</sup> The Claimants add that the termination of the Project alone characterises the political risk taken in carrying out this Project.<sup>103</sup>

101. Third, with respect to the duration criterion, the Claimants submit that their establishment in Mauritius was effected by the incorporation of the Companies once the Project was authorised by the No-Objection Letter on 14 October 2014. The Companies were dissolved soon after the Project was terminated by the Rejection Letter on 14 April 2016.<sup>104</sup>

102. The Claimants further add that the Project was intended to run in the long term. According to the Claimants, the fact that the Respondent terminated the Project cannot deprive them of the protection of the Treaty, since the purpose of the Treaty is to provide investors with protection once their Project is accepted.<sup>105</sup> The Claimants submit that they started to benefit from the protection of the Treaty from the moment the Project was authorised by the PMO's No-Objection Letter.<sup>106</sup> The Claimants submit that from the Project's approval until its termination, they have, through the Companies, undertaken many actions in accordance with the BOI's guidelines.<sup>107</sup> The termination of the Project is not attributable to the Claimants, and their technical and financial capacity to carry out the Project has never been questioned. According to the Claimants, it would be wrong to determine the duration

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<sup>101</sup> Claimants' Counter-Memorial, para. 13, referring to the Business Plan (**Exhibit C-6**); Claimants' Rejoinder, para. 36.

<sup>102</sup> Claimants' Rejoinder, para. 36.

<sup>103</sup> Claimants' Counter-Memorial, para. 13, referring to *Fedax v. Venezuela*, ICSID Case No. ARB/96/7, Decision on Jurisdiction, 11 July 1997, para. 40 (**Exhibit CL-1**).

<sup>104</sup> Claimants' Counter-Memorial, para. 15.

<sup>105</sup> Claimants' Counter-Memorial, para. 15.

<sup>106</sup> Claimants' Counter-Memorial, para. 15, referring to *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, para. 513 (**Exhibit CL-8**).

<sup>107</sup> Claimants' Rejoinder, para. 33.

of the Project solely on the basis of the unjustified termination of the Project by the Respondent.<sup>108</sup>

103. Fourth, the Claimants also make reference to a possible additional fourth criterion in the so-called *Salini* test: the requirement that the investment contributes to the development of the host State.<sup>109</sup> In this respect, the Claimants submit that the Project brought a specific expertise which the Respondent needed. The Claimants further submit that by including the Project in the Fast Track Committee, the Respondent acknowledged its importance and potential impact on the Mauritian economy.<sup>110</sup>
104. Finally, the Claimants submit that none of the awards cited by the Respondent can serve as a relevant reference to dismiss the qualification of investment in this case, arguing in particular that the cases cited by the Respondent are distinguishable from the case at hand.<sup>111</sup>
105. The Claimants also reject the Respondent's arguments that the Claimants only made pre-investment expenses which do not qualify as a protected investment under the Treaty. According to the Claimants, these arguments ignore the unconditional approval of the Project by the PMO of the Respondent in the form of the No-Objection Letter dated 14 October 2014.<sup>112</sup> The Claimants submit that their expenses incurred after the aforementioned approval.<sup>113</sup> The Claimants argue that the present case is therefore distinguishable from the cases cited by the Respondent.<sup>114</sup>
106. The Claimants refer to Article 9 of the France-Mauritius BIT which relates to "*les accords relatifs aux investissements à effectuer sur le territoire d'un des Etats contractants, par les ressortissants*

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<sup>108</sup> Claimants' Rejoinder, paras. 33-34, quoting *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 133 (**Exhibit RL-29**).

<sup>109</sup> Claimants' Counter-Memorial, para. 13, referring to *Mauritius: Experts sceptical about forensic lab*, 2017 (**Exhibit C-1**); Claimants' Rejoinder, para. 37, referring to *Salini Costruttori S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 73 (**Exhibit RL-34**).

<sup>110</sup> Claimants' Rejoinder, paras. 18, 38, referring to *Renta 4 S.V.S.A. et al v. Russian Federation*, SCC Case No. V024/2007, Award on Preliminary Objections, 20 March 2009, para. 92, p. 40 (**Exhibit CL-15**); *Fedax v. Venezuela*, ICSID Case No. ARB/96/7, Decision on Jurisdiction, 11 July 1997 (**Exhibit CL-1**).

<sup>111</sup> Claimants' Counter-Memorial, para. 16, referring to *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009 (**Exhibit RL-32**); *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award, 5 March 2011 (**Exhibit RL-33**).

<sup>112</sup> Claimants' Counter-Memorial, para. 18; Claimants' Rejoinder, paras. 41-44.

<sup>113</sup> Claimants' Counter-Memorial, para. 19.

<sup>114</sup> Claimants' Counter-Memorial, para. 20, referring to *Mihaly International Corporation v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002 (**Exhibit RL-36**).

*(...) de l'autre Etat contractant.*"<sup>115</sup> On this basis, the Claimants infer that all expenses incurred from the date of approval of the Project on 14 October 2014 and until the termination of the Project on 14 April 2016 are "arbitrable."<sup>116</sup>

107. The Claimants also reject the contention that they were required to obtain new authorisations to carry out the Project, once the Project was approved by the PMO. The Claimants submit it is normal practice that the implementation of the Project requires additional administrative authorisations and that the BOI assists the investor in obtaining the relevant permits.<sup>117</sup> In any event, in the Claimants' view, the termination of the Project was not justified by the need for an amendment of the DNA Identification Act.<sup>118</sup> The Claimants further submit that the DNA Identification Act has never prevented the Respondent's authorities from seeking the Claimants' services.<sup>119</sup>
108. In sum, the Claimants consider that their investments, expenses, and the human and financial resources incurred in the course of preparing for the Project from its approval by the PMO on 14 October 2014 must be considered globally as a protected investment within the meaning of the France-Mauritius BIT.

### 3. Tribunal's Decision

109. The first question before the Tribunal, in order to establish its jurisdiction, is whether the Claimants have made an investment within the meaning of the France-Mauritius BIT. The Tribunal will first set out the relevant legal standard for a protected investment under the Treaty, before assessing whether the Claimants' Project meets the relevant standard.

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<sup>115</sup> France-Mauritius BIT, Article 9 (**Exhibit C-2**) ("Agreements concerning investments to be made in the territory of one Contracting State made by nationals [...] of the other Contracting State [...].") (Translation by the PCA).

<sup>116</sup> Claimants' Counter-Memorial, para. 20.

<sup>117</sup> Claimants' Rejoinder, paras. 47-49, referring to Mauritius Investment Promotion Act (**Exhibit C-20**); Letter from the BOI to DNA Services (Mauritius) Ltd, dated 11 August 2015 (**Exhibit C-33**).

<sup>118</sup> Claimants' Counter-Memorial, para. 20, referring to Letter from the PMO to the Managing Director of the BOI, dated 14 April 2016 (**Exhibit C-18**).

<sup>119</sup> Claimants' Counter-Memorial, para. 23, referring to List of interventions of Prof. Christian Doutremepuich in Mauritius (**Exhibit C-5**); Letter from the Director of Public Prosecutions to Professor Doutremepuich, dated 23 July 2014 (**Exhibits C-22**); Letter (fax) from the Commissioner of Police to Professor Doutremepuich, dated 25 November 2010 (**Exhibit C-21**).

(a) *Legal Standard for a Qualifying Investment*

110. As a preliminary matter, the Tribunal notes that both sides made submissions relating to the Mauritius Investment Promotion Act.<sup>120</sup> In particular, the Parties discussed whether the Claimants meet certain threshold requirements to qualify as investors under the Act.<sup>121</sup> The Mauritius Investment Promotion Act, among other things, provides that persons qualifying as investors under the Act may benefit from support for investment activities, including by the BOI.<sup>122</sup> However, the Mauritius Investment Promotion Act contains no substantive investment protection provisions and no offer of access to arbitration. In any event, the application of the Mauritius Investment Promotion Act, and the possible qualification of the Claimants as investors under the Act, have no bearing on the question before the Tribunal, i.e. whether the Claimants have made an investment under the France-Mauritius BIT, in order to determine whether the Tribunal has jurisdiction thereunder.
111. The relevant starting point for the Tribunal’s determination on whether the Claimants have made a qualifying investment is Article 1(1) of the France-Mauritius BIT. It provides as follows:

*“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 de 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>123</sup>

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<sup>120</sup> See above, paras. 80, 93, 99.

<sup>121</sup> See above, paras. 80, 93, 99.

<sup>122</sup> Mauritius Investment Promotion Act, ss. 12, 18B (**Exhibit C-20**).

<sup>123</sup> France-Mauritius BIT, Article 1(1) (**Exhibit C-2**) (“For the purposes of this Treaty, the term ‘investments’ comprises all categories of assets, particularly but not exclusively:  
- movable and immovable property and all other real rights such as mortgages, liens, etc, which have been acquired or constituted in accordance with the legislation of the country in which the investment takes place;  
- rights of participation in companies and participation of other kinds;  
- industrial property rights, patents, factory or trademarks, and goodwill;  
- business concessions accorded by public authorities, particularly concessions for prospecting and developing mineral substances;

112. In interpreting Article 1(1), the Tribunal takes into account “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,” according to Article 31(1) of the VCLT.<sup>124</sup>
113. Article 1(1) provides that investments within the meaning of the Treaty encompass all categories of assets. It also contains a non-exhaustive list of assets. The ordinary meaning of the terms of the provision (“*notamment, mais non exclusivement*”) leaves no doubt about the non-exhaustive nature of the list in Article 1(1). The Parties indeed agree on this point.<sup>125</sup>
114. The question remains whether any assets that fall within the non-exhaustive list of Article 1(1) automatically qualify as an investment within the meaning of the Treaty or whether, to the contrary, the assets also need to meet an objective, intrinsic definition of investment.
115. As detailed above,<sup>126</sup> the Respondent submits that the France-Mauritius BIT does not contain a substantive definition of protected investments and that Article 1(1) merely lists possible forms that investments may take.<sup>127</sup> The relevant test, according to the Respondent, is therefore not whether assets fall in a category of the list in Article 1(1), but rather whether they meet an inherent definition of investment under the Treaty.<sup>128</sup>
116. As also detailed above,<sup>129</sup> the Claimants agree that assets falling within Article 1(1) also need to meet an independent test for investments.<sup>130</sup> According to the Claimants, this is so because the Treaty is only “meant to protect the nationals of a State who intend to invest sustainably in the economy and territory of the other Contracting State.”<sup>131</sup>

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- all claims relating to the above-mentioned property and rights and to payments made in connection with them.”) (Translation by the PCA).

<sup>124</sup> VCLT, Article 31(1) (**Exhibit CL-72**).

<sup>125</sup> Claimants’ Counter Memorial, paras. 10-11; Claimants’ Rejoinder, paras. 17-20; Respondent’s Memorial, para. 76.

<sup>126</sup> See above, paras. 73-75.

<sup>127</sup> Respondent’s Memorial, para. 75.

<sup>128</sup> Respondent’s Memorial, para. 76.

<sup>129</sup> See above, paras. 91-92.

<sup>130</sup> Claimants’ Counter-Memorial, para. 12; Claimants’ Rejoinder, paras. 14 *et seq.*

<sup>131</sup> Claimants’ Counter-Memorial, para. 12.

117. The Tribunal is satisfied that this interpretation of Article 1(1) of the Treaty is correct. Looking at the plain wording of Article 1(1), it does not contain a definition of investments. Indeed, the term “definition” does not even appear in Article 1(1). Rather, Article 1(1) only provides that the term “investments” – however to be defined – encompasses (“*comprend*”) all types of assets (“*toutes les catégories de biens*”). Such a provision cannot play the gatekeeping role of establishing when a situation qualifies as an investment and when it does not. Nor can the non-exhaustive list of assets contained in Article 1(1) play such a role since, by its own terms, it only provides possible examples. The question of how to define investment therefore cannot be found in Article 1(1) of the Treaty. It has to be found in the objective and ordinary meaning of the term “investments.” The Tribunal notes that other arbitral tribunals, applying similar investment treaty provisions, have reached the same result. For instance, in *Romak S.A. v. The Republic of Uzbekistan*, the tribunal concluded that:

“The term ‘investments’ has an intrinsic meaning, independent of the categories enumerated in Article 1(2). This meaning cannot be ignored.”<sup>132</sup>

118. The Tribunal therefore needs to determine the objective meaning of “investment” that will operate as a benchmark definition for the purposes of Article 1(1) of the Treaty. The Parties agree on this point to apply what they call the *Salini* test, i.e. in order to show a protected investment the Claimants need to show it meets certain criteria.<sup>133</sup> These criteria include (i) a contribution to the host State; (ii) of a certain duration; (iii) that entails participating in the risks of the operation. These criteria, in slight variations, have been developed by arbitral tribunals – operating under the ICSID convention<sup>134</sup> as

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<sup>132</sup> *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, para. 188 (**Exhibit RL-32**). See also *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award, 5 March 2011, paras. 236-238 (**Exhibit RL-33**).

<sup>133</sup> See above paras. 77, 91-92. See also Claimants’ Counter-Memorial, para. 12; Claimants’ Rejoinder, paras. 14 *et seq.*; Respondent’s Memorial, paras. 77-79; Respondent’s Reply, paras. 86-87.

<sup>134</sup> See e.g. *Fedax v. Venezuela*, ICSID Case No. ARB/96/7, Decision on Jurisdiction, 11 July 1997, p. 1387, para. 43 (**Exhibit CL-1**); *Salini Costruttori S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (**Exhibit RL-34**), *Joy Mining Machinery Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (**Exhibit RL-35**) *LESI, S.p.A. and Astaldi, S.p.A. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, para. 72(iv) (**Exhibit CL-67**); *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, p. 25, para. 61 (**Exhibit RL-29**); *Deutsche Bank AG v. Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, paras. 294-295 (**Exhibit CL-66**); *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, p. 67, para. 187 (**Exhibit RL-57**).

well as bilateral investment treaties<sup>135</sup> – and scholarly writing.<sup>136</sup>

119. The Parties have debated the application of a fourth criterion, i.e. whether the invested assets contribute to the development (or the economy) of the host State.<sup>137</sup> Arbitral tribunals seem split as to whether such a fourth criterion is necessary, its assessment having been criticised as too subjective by some.<sup>138</sup> However, the Tribunal need not decide this point, since, as will be seen below, the Claimants' Project in the case at hand does not meet the initial three criteria.
120. In any event, the Tribunal is minded to apply the above-listed criteria with some flexibility.<sup>139</sup> This should not be a box-ticking exercise, but take into account the full circumstances of each case. For instance, if the duration of a project is rather short, but entails substantial risks, the test might be satisfied.

**(b) Application of the Legal Standard to the Claimants' Project**

121. As a preliminary remark, the Tribunal notes that the Claimants had planned a number of investment activities in Mauritius with the aim of setting up the Mauritius Laboratory. These activities are set out in the Business Plan and include, among other things, the purchase of land, the construction of infrastructure, the purchase of equipment, and the hiring and training of employees.<sup>140</sup>

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<sup>135</sup> See e.g. *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award, 5 March 2011, paras. 236-238 (**Exhibit RL-33**); *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, para. 207 (**Exhibit RL-32**).

<sup>136</sup> See e.g. R. Dolzer & C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), p. 68 (**Exhibit CL-65**); B. Poulain, "L'Investissement international: définition ou définitions?", in T.P. Kahn & T. Wälde (eds.), *Les aspects nouveaux du droit des investissements internationaux* (Brill Nijhoff Leiden, 2007), p. 129, para. 13 (**Exhibit RL-55**).

<sup>137</sup> See above para. 103. See also Claimants' Rejoinder, paras. 37-38.

<sup>138</sup> For cases that include such a criterion, see e.g. *Salini Costruttori S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (**Exhibit RL-34**); *Joy Mining Machinery Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (**Exhibit RL-35**). For cases that do not to include such a criterion, see e.g. *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, para. 72(iv) (**Exhibit CL-67**); *Deutsche Bank AG v. Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, paras. 295, 306-307 (**Exhibit CL-66**).

<sup>139</sup> See e.g. *Salini Costruttori S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52 (**Exhibit RL-34**); *Joy Mining Machinery Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (**Exhibit RL-35**); R. Dolzer & C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), p. 69 (**Exhibit CL-65**).

<sup>140</sup> Business Plan, pp. 18-20 (**Exhibit C-6**).

122. However, there is no evidence, and the Claimants do not allege, that any of this ever happened.<sup>141</sup> Rather, the Claimants argue that their investment consists in the creation of the Companies, to which they transferred funds of EUR 300,000, and in the contribution of know-how.<sup>142</sup>
123. These activities may well have involved elements of the categories listed in Article 1(1) of the Treaty, in particular “*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 de fonds de commerce;*” and “*toutes créances afférentes aux biens et droits ci-dessus visés et aux prestations qui s’y rapportent.*”<sup>143</sup>
124. The question remains whether these activities meet the three criteria of the legal test set out above, i.e. (i) a contribution to the host State; (ii) of a certain duration; (iii) that entails participating in the risks of the operation.<sup>144</sup> The Tribunal will look at each criterion in turn, while keeping in mind the flexibility of the test set out above.<sup>145</sup> For the sake of completeness, the Tribunal will also address some additional arguments made by the Parties.

*i. Contribution to the Host State*

125. Contributions to the host State can take several forms, not only financial. As the tribunal in *Deutsche Bank AG v. Sri Lanka* put it, “[a] contribution can take any form [and] [...] is not limited to financial terms but also includes know-how, equipment, personnel and services.”<sup>146</sup> Article 1(1) of the Treaty lists several non-financial assets, such as intellectual property rights. Yet, the listing of non-financial

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<sup>141</sup> The Claimants signed a “*promesse de vente*” which provided them with an option for the purchase of land (see agreement to sell lots 17 and 18 between Business Parks and DNA Services, dated August 2015 (**Exhibit C-16**)). However, this purchase of land never materialised, being contingent upon the issuance of “*l’autorisation d’achat d’un terrain,*” which according to the Respondent, the Claimants did not obtain (see Respondent’s Memorial, para. 93; Respondent’s Reply, para. 105(i)).

<sup>142</sup> See above, paras. 91, 96.

<sup>143</sup> France-Mauritius BIT, Article 1 (**Exhibit C-2**).

<sup>144</sup> See above, para. 118.

<sup>145</sup> See above, para. 120.

<sup>146</sup> *Deutsche Bank AG v. Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, para. 297 (**Exhibit CL-66**) (and authorities cited there: *Consortium R.F.C.C. v. Kingdom of Morocco* (ICSID Case No. ARB/00/6), Decision on Jurisdiction, 16 July 2001, para. 61; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction, 14 November 2005, para. 131; *LESI, S.p.A. and Astaldi, S.p.A. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, para. 73(i) (**Exhibit CL-67**)).

assets as possible forms of investments does not dispense them from the requirement that they embody the inherent characteristics of investments. Thus non-financial inputs may satisfy the test, but only as long as they have an economic value that can be contributed. In *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, the tribunal stated that contributions could “consist of loans, materials, works, services, as long as they have an economic value,” adding that the claimant “must have committed some expenditure, in whatever form, in order to pursue an economic objective.”<sup>147</sup> Indeed, the Respondent does not dispute the point that a contribution need not take the form of a financial asset, provided that it has an economic value.<sup>148</sup>

126. The Parties have discussed whether there is a requirement for the contribution to be “considerable,” “substantial” or of a certain minimum size.<sup>149</sup> Certain arbitral tribunals and scholarly writings have argued in favour of such a requirement.<sup>150</sup> The assessment of what constitutes considerable or substantial is difficult due to the subjective character of such qualifications. On the one hand, a contribution of EUR 1 seems insufficient to qualify as an investment. On the other hand, a fixed numerical threshold seems arbitrary. The Tribunal agrees with the Claimants that a numerical threshold could exclude smaller investors from the protection under the Treaty.<sup>151</sup> Therefore, in the view of the Tribunal, the reality of the contribution is to be assessed taking into account the totality of the circumstances and the elements of the economic goal pursued.
127. The Tribunal will look at the Claimants’ alleged two contributions in turn: the transfer of funds and the contribution of know-how.

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<sup>147</sup> *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, para. 73(i) (**Exhibit CL-67**).

<sup>148</sup> Respondent’s Reply, para. 96. Transcript, 13 June 2019, p. 12 (“any kind of asset that an investor may wish to contribute to a business venture, including know-how, must have economic value, and must be recorded in the accounts of the company as an asset, as an investment, as an asset, capital contribution that has been transferred to the business venture.”)

<sup>149</sup> See above, paras. 80, 94-95.

<sup>150</sup> See e.g. *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, pp. 67 *et seq.*, paras. 187-191 (**Exhibit RL-57**); *Fedax v. Venezuela*, ICSID Case No. ARB/96/7, Decision on Jurisdiction, 11 July 1997, p. 1387, para. 43 (**Exhibit CL-1**); B. Poulain, “L’Investissement international: définition ou définitions?”, in T.P. Kahn & T. Wälde (eds.), *Les aspects nouveaux du droit des investissements internationaux* (Brill Nijhoff Leiden, 2007), p. 124, para. 7 (**Exhibit RL-55**); R. Dolzer & C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), p. 68 (**Exhibit CL-65**).

<sup>151</sup> See above, para. 94.

- Transfer of Funds

128. As detailed above, the Claimants incorporated the Companies on 9 January 2015, 23 February 2015 and 24 September 2015, respectively.<sup>152</sup> The Claimants jointly control the Holding Company, which in turn controls the other two of the Companies.<sup>153</sup>
129. The First Claimant transferred EUR 100,000 on 20 May 2015, 25 June 2015 and 29 July 2015 (i.e. EUR 300,000 in total) to the bank account of the Holding Company.<sup>154</sup> On 7 July 2015, EUR 70,000 thereof were transferred from the bank account of the Holding Company to another of the Companies, DNA Services Mauritius Ltd.<sup>155</sup>
130. The transfer of funds was made by the First Claimant only, as stated on the bank statements.<sup>156</sup> This has also been confirmed by the Claimants at the Hearing:

“THE PRESIDENT: We also asked this morning some questions about the payment that was made at several moments in time to those three [C]ompanies, to the bank accounts of those [C]ompanies, at least. And I believe the relevant exhibit here, at least one of them, is C-13, which is the bank statement.

My understanding is that that bank statement is a bank statement of the [H]olding [C]ompany, and that it is three pages of different moments in time; the first is the bank statement of May 2015, the second is June 2015, and the third page is July 2015. And what we do see is three transfers of money of 100,000 euros each that are credited to this account. So this is a transfer to the [H]olding [C]ompany of 300,000 euros made in three different transfers.

I also see that the transfer has been made by Christian Doutremepuich, all three of those payments. At least that’s how I read the bank statement. Is that correct that the 300,000 have come under this bank statement from Professor Christian Doutremepuich?

ME. POULAIN: *Madame la présidente, oui, je pense que c’est absolument correct. Ce qu’il conviendrait de préciser... parce que M. Christian Doutremepuich, avant que la société... sa société, qui aujourd’hui exploite le laboratoire bordelais, soit constituée, c’est-à-dire l’entité corporate, exerçait avant en BNC. Donc, je ne sais pas si les fonds qui sont arrivés de M. Christian Doutremepuich sont de M. Christian Doutremepuich, ès qualités, profession libérale, ou personnels. Donc, c’est un point quand même à regarder, qui peut avoir une certaine importance, et on confirmera le sujet, on le clarifiera.*

[...]

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<sup>152</sup> See above, para. 13. See also Certificate of Incorporation of International DNA Services Holding Ltd (**Exhibit C-10**), Certificate of Incorporation of DNA Services (Mauritius) Ltd (**Exhibit C-11**), Certificate of Incorporation of International DNA Services (**Exhibit C-12**).

<sup>153</sup> See above, para. 13.

<sup>154</sup> Certificate of Incorporation of International DNA Services, pp. 1, 2, 3 (**Exhibit C-13**).

<sup>155</sup> Certificate of Incorporation of International DNA Services, p. 3 (**Exhibit C-13**).

<sup>156</sup> Certificate of Incorporation of International DNA Services, pp. 1, 2, 3 (**Exhibit C-13**).

THE PRESIDENT: I think my question actually related to the fact that they would not come from the [S]econd Claimant in this arbitration, Antoine Doutremepuich.

ME. POULAIN: *Absolument, vous avez raison. Oui.*<sup>157</sup>

131. Accordingly, the Tribunal concludes that the Second Claimant did not make any financial contribution.
132. Concerning the First Claimant, the question remains whether that transfer of funds constitutes a financial contribution. For the reasons set out above, the Tribunal does not consider that the transfer of “only” EUR 300,000 automatically categorises it as being too small for a financial contribution constitutive of an investment.<sup>158</sup>
133. However, the Tribunal is not satisfied that the funds were contributed in the first place. The First Claimant merely transferred the monies from one bank account he controlled (in France) to other bank accounts he controlled via the Holding Company (in Mauritius). As set out above, the monies were transferred to the bank account of (i) the Holding Company which is jointly controlled by the Claimants (90% by the First Claimant); and (ii) DNA Services Mauritius Ltd, itself controlled by the Holding Company. The monies deposited in those bank accounts were no more a financial contribution in Mauritius than they had been in the original bank account in France. The First Claimant was never dispossessed of the monies, nor did he contribute them in any other way.
134. Questioned at the Hearing about this point, the Claimants argued that the funds were “immobilized” and therefore could not be used for other purposes.<sup>159</sup> The Tribunal is unconvinced by this argument.

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<sup>157</sup> Transcript, 12 June 2019, pp. 147-149.

(“ME. POULAIN: Madam President, yes, I think it’s absolutely correct. What should be clarified ... because Mr. Christian Doutremepuich, before the company ... his company, which today operates the Bordeaux laboratory, was constituted, that is to say the corporate entity, he was set-up to operate on the basis of non-commercial profits. So, I do not know whether the funds that came from Mr. Christian Doutremepuich are from Mr. Christian Doutremepuich, in his professional capacity, or personal. So, it’s still a point to look at, which may be of some importance, and we will confirm the subject, we will clarify it.

[...]

THE PRESIDENT: I think my question actually related to the fact that they would not come from the [S]econd Claimant in this arbitration, Antoine Doutremepuich.

ME. POULAIN: Absolutely, you’re right. Yes.”) (Translation by the PCA).

<sup>158</sup> See above, para. 126.

<sup>159</sup> Claimants’ Rejoinder, para. 21; Transcript, 12 June 2019, pp. 101-102 (“ME. REGAUD: *Il faut rappeler que cela a été fait sur fonds propres des demandeurs. Ces fonds ont été immobilisés pendant une période de dix-neuf mois, ils ont été versés effectivement aux sociétés, en partie dépensés. Ils ont été immobilisés, ils n’ont pas pu être utilisés à d’autres fins, bien évidemment. Qu’ils aient été rapatriés en partie, comme on a pu l’évoquer,*

The Claimants never lost control over the use of the monies in the bank account. They could spend them, repatriate them or transfer them elsewhere at any time as they wished. In fact, the Claimants themselves explained that they kept full control over the funds during the whole period and could take them back at any time:

“PROF. CAPRASSE: *Puisque vous parlez de fonds versés, vous parlez des sociétés, peut-être est-ce à un autre moment que vous pourrez répondre, mais, si vous pouvez le faire maintenant: quel est le statut de ces 300 000 euros que vous évoqu[ez]? C’est de l’argent qui est mis sur un compte de la société? C’est de l’argent qui est nécessaire pour acquérir des actions? C’est de l’argent qui est constitutif du capital de la société? Faire une société à l’île Maurice nécessite-t-il un capital minimum? Vous voyez, la question que je pose est celle, sur cet aspect particulier que vous évoquez des 300 000 euros, de leur statut, en fait.*

ME. REGAUD: *Bien sûr. Les fonds ont bien évidemment été versés sur les comptes des sociétés, tout d’abord sur le compte de la holding puis après reversés à une autre entité créée par les demandeurs, et donc étaient nécessaires pour assurer le fonctionnement des sociétés et puis les différents investissements, c’est-à-dire que la promesse, par exemple, de vente nécessitait une mise sous séquestre de 10 % du prix de vente du terrain et donc, il fallait bien que les sociétés puissent s’acquitter des dépenses relatives, par exemple, à cette demande de séquestre, ou encore à d’autres factures au quotidien, que ce soit sur, par exemple, le suivi juridique des sociétés par la société ABAX. Cette somme n’a pas été mise au capital des sociétés. C’était nécessaire au fonctionnement des sociétés, c’est pour cela qu’elles ont été transférées sur les comptes à Maurice. [...]*

PROF. PAULSSON: *C’est quoi, exactement? Avance? Avance d’actionnaires?*

ME. POULAIN: *Oui, je l’assimile à un compte courant d’associés. C’est une créance contre la société.*

PROF. PAULSSON: *Qui est exigible?*

ME. POULAIN: *A tout moment. A condition de la demander. Et d’avoir l’accord des actionnaires.*<sup>160</sup>

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*n’enlève pas et ne permet pas de réduire à néant le fait que ces fonds ont été mobilisés et versés à un moment donné et pendant une longue durée afin d’assurer la mise en place du laboratoire. THE PRESIDENT: Et juste pour clarifier, quand vous dites ‘ces fonds’, vous vous réferez aux 300 000 euros qui ont été transférés au compte de la holding? ME REGAUD: Bien évidemment.”)*

(“ME REGAUD: It should be remembered that this was done with the Claimants’ own funds, these funds were immobilized for a period of nineteen months, they were actually paid to the companies, partly spent. They could not have been used for other purposes and the fact that they were repatriated in part, as has been mentioned, does not negate the fact that these funds were mobilized and paid at a given moment and for a long time to ensure the establishment of the laboratory. THE PRESIDENT: And just to clarify, when you say ‘these funds’, you refer to the 300 000 euros which have been transferred to the account of the holding? ME REGAUD: Of course.”) (Translation by the PCA).

<sup>160</sup> Transcript, 12 June 2019, pp. 91-92 (emphasis added). (“PROF. CAPRASSE: Since you’re talking about funds disbursed, you’re talking about companies, maybe you can answer it at later stage, but if you can do it now: what is the status of the 300,000 euros that you mentioned? Is it money that was put on the company account? Is it money that is needed to acquire shares? Does that money represent the capital of the company? Does incorporating a company in Mauritius require a minimum capital? You see, in fact the question I’m asking, with reference to the 300,000 euros that you mentioned, is their status.

135. Indeed, on 13 May 2016, shortly after the Rejection Letter and the winding down of the Companies, the First Claimant repatriated a large part of the initial funds (i.e. EUR 223,473) back to his bank account in France.<sup>161</sup> This shows that the Claimants never lost control over the monies, which they had never immobilized and never committed to any economic objective in Mauritius. In those circumstances, the Tribunal is not satisfied that the transfer of funds by the First Claimant qualifies as a financial contribution constitutive of an investment.
136. Although the Claimants did not necessarily argue this point, the Tribunal will also consider whether the Claimants made financial contributions by spending parts of the transferred funds in Mauritius. Of the EUR 300,000 transferred, it appears that the Claimants spent some EUR 76,000. This results from the delta between the amount transferred to Mauritius in 2015 (EUR 300,000) and the one transferred back to France in 2016 at the closing of the Holding Company's bank account (EUR 223,473).<sup>162</sup> It appears that those monies were used, at least partially, to pay bills such as for setting up the Companies, internet designs, architectural plans etc.<sup>163</sup>
137. If the Tribunal is satisfied that those expenses may as a matter of their nature qualify as financial

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ME. REGAUD: Of course. The funds were paid into the accounts of the companies, first of all in the account of the holding company and then transferred to another entity created by the Claimants, and thus were necessary to ensure the running of the companies and for the needs of different investments that is, the undertaking, for example, to sell required to place 10% of the sale price of the land in escrow, and therefore the companies had to be able to pay the expenses related to, for example, this request for escrow, or to other daily invoices, such as, the companies' day-to-day legal monitoring by the company ABAX. This sum was not invested in the capital of the companies. It was necessary for the functioning of the companies, that's why they were transferred to the accounts in Mauritius. [...]

PROF. PAULSSON: What is it exactly? Advance? Shareholders' advance?

MR. POULAIN: Yes, I equate it with a shareholders' current account. It is a claim against the company.

PROF. PAULSSON: Which is payable?

MR. POULAIN: *At any time. Provided that you ask for it.* And that you have the shareholders' agreement.") (Translation by the PCA).

<sup>161</sup> Bank account statements (in Euro) issued by The Mauritius Commercial Bank to International DNA Services Holding Ltd, p. 14, Annex No. 5 to the Damage Assessment Report of Mr Christian Colléter, p. 62 (**Exhibit CER-00-5**).

<sup>162</sup> Bank account statements (in Euro) issued by The Mauritius Commercial Bank to International DNA Services Holding Ltd, p. 14, Annex No. 5 to the Damage Assessment Report of Mr Christian Colléter, p. 62 (**Exhibit CER-00-5**).

<sup>163</sup> See some of the invoices submitted by the Claimants as examples of invoices paid by them or their companies for the implementation of the Project (**Exhibit C-31**). However, the Tribunal notes that several of the invoices are not in the name of the Companies or the Claimants, but the French Laboratory, and payable in France.

contributions, they do not meet the required test for investments under the duration and risk criteria. As detailed in the relevant sections below, they were one-off outlays at the Claimants' initiative, made as part of the process of prospecting an investment and as such generating no entitlement of duration or stake in a venture undertaken on an at-risk basis.<sup>164</sup>

- Know-How

138. The Claimants further submit that they contributed know-how, in the form of the Claimants' personal expertise, including for instance with respect to the layout of the Mauritius Laboratory, the purchase of expensive and specialised equipment, and the hiring and training of qualified personnel.<sup>165</sup>

139. While such contribution of know-how might have been envisaged, the Claimants have failed to provide evidence of any actual transfer or contribution of know-how of economic value. At the Hearing, the Claimants alleged that they contributed know-how by communicating to the BOI architectural plans of the internal layout of the Mauritius Laboratory.<sup>166</sup> Even assuming that such a communication did occur, the Tribunal considers that the Claimants have failed to provide evidence of a transfer of know-how of economic value. On the Claimants' own case, the internal layout of the Mauritius Laboratory was only one of the elements needed for the transfer of the know-how required for the activities of the Mauritius Laboratory.<sup>167</sup> It appears that none of the other elements went beyond the planning stage on the Claimants' side and thus never materialised. For instance, at the Hearing, the Claimants themselves referred to a possible training and transfer of know-how to qualified personnel as merely being contemplated for the future:

*“On a quand même signé un MoU avec l’université pour avoir le personnel qualifié et leur transmettre notre savoir-faire. Ils étaient censés venir à Bordeaux pour être formés directement.”<sup>168</sup>*

140. In light of this, the Tribunal is not satisfied that the Claimants made any contribution of know-how constitutive of an investment.

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<sup>164</sup> See below, paras. 143, 147.

<sup>165</sup> See above, para. 96.

<sup>166</sup> Transcript, 12 June 2019, p. 160.

<sup>167</sup> See above, para. 96.

<sup>168</sup> Transcript, 13 June 2019, pp. 38-39 (emphasis added) (“We still signed a MoU with the university to have qualified staff and pass on our expertise. **They were supposed to** come to Bordeaux to be trained directly.”) (Translation by the PCA).

*ii. Duration*

141. In order to meet the relevant test, any contribution to the host State must also be of a certain duration. There is a rather sterile debate as to how long is enough to meet the duration requirement. It has been posited as generally accepted that the required duration would be a period of at least two years.<sup>169</sup> However, the application of this requirement should not be excessively rigorous and the relevant duration is to be assessed in all the circumstances.<sup>170</sup> This criterion excludes “short-term economic activity, or assets used in that context, such as one-time sales transactions that do not face investment-specific risk.”<sup>171</sup>
142. As detailed above, the Claimants argue that they established themselves in Mauritius by the incorporation of the Companies once the Project was authorised by the No-Objection Letter on 14 October 2014 and until the Rejection Letter on 14 April 2016.<sup>172</sup> To the contrary, as also detailed above, the Respondent submits that since the Claimants failed to make a capital contribution, their alleged investment has, by definition, no duration.<sup>173</sup>
143. The Tribunal is of the view that there can be no fixed minimum duration requirement. Rather, the duration has to be assessed in light of all the circumstances of the situation as a whole. In the present case, it is clear, however that there is no duration at all. The financial contributions by the First Claimant, in the form of payments of bills and invoices in Mauritius, were one-off payments for goods or services that were incurred as part of the preparations for a project which was not yet off the ground, and thus did not correspond to commitments of discernible duration.

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<sup>169</sup> *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 124 (**Exhibit RL-29**); *Salini Costruttori S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, paras. 52-54 (**Exhibit RL-34**); *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, para. 73(ii) (**Exhibit CL-67**). See also R. Dolzer & C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), p. 68 (**Exhibit CL-65**).

<sup>170</sup> See e.g. *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, para. 225 (**Exhibit RL-32**) (“The Arbitral Tribunal does not consider that, as a matter of principle, there is some fixed minimum duration that determines whether assets qualify as investments. Short-term projects are not deprived of “investment” status solely by virtue of their limited duration. Duration is to be analyzed in light of all of the circumstances, and of the investor’s overall commitment.”); R. Dolzer & C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), p. 68 (**Exhibit CL-65**).

<sup>171</sup> *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, pp. 67 *et seq.*, para. 189 (**Exhibit RL-57**).

<sup>172</sup> See above, para. 101.

<sup>173</sup> See above, para. 84.

144. For the sake of completeness, the Tribunal notes that even if the transfer of EUR 300,000 had been considered a financial contribution (which in the Tribunal’s view was not the case<sup>174</sup>), the time during which the monies were deposited on the Companies’ bank accounts was short. The time between the transfers of the funds by the First Claimant (in May, June, and July 2015) and the repatriation of the funds (in May 2016) ranges from 9 months (counting from the last transfer) to 11 months (counting from the first transfer). In the view of the Tribunal, such a duration does not in and of itself disqualify a contribution as investment under the global assessment of the criteria under the legal test set out above.<sup>175</sup> Nevertheless, a project of this kind – which involved introducing enhanced technology – would take a much more time to assimilate in a new environment and therefore the duration of 9-11 months is unlikely to qualify as an investment under the present circumstances.

*iii. Risk*

145. The third criterion under the test set out above is that the contribution entails participating in the risks of the operation. The risks must be inherent in the contribution. The required element of risk is to be distinguished from “the ordinary commercial or business risk assumed by all those who enter into a contractual relationship.”<sup>176</sup> The type of risk normally associated with an investment was elaborated in *Romak S.A. v. The Republic of Uzbekistan* as follows:

“All economic activity entails a certain degree of risk. As such, all contracts – including contracts that do not constitute an investment – carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction.

An ‘investment risk’ entails a different kind of alea, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is ‘risk’ of this sort, the investor simply cannot predict the outcome of the transaction.”<sup>177</sup>

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<sup>174</sup> See above, paras. 133-135.

<sup>175</sup> See above, paras. 118-120.

<sup>176</sup> *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, para. 231 (**Exhibit RL-32**). See also *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award, 5 March 2011, pp. 77 *et seq.*, paras. 242-244 (**Exhibit RL-33**); *Joy Mining Machinery Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, para. 57 (**Exhibit RL-35**).

<sup>177</sup> *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, paras. 229-230, 231 (**Exhibit RL-32**). In *Fedax v. Venezuela*, ICSID Case No. ARB/96/7, Decision on Jurisdiction, 11 July 1997, paras. 40, 43 (**Exhibit CL-1**), concerning whether the risk requirement was satisfied in respect of promissory notes, the very existence of a dispute as to payment was held to evidence the risk taken by the holder of the notes. Cf. B. Poulain, “L’Investissement international: définition ou définitions?”, in T.P. Kahn &

146. As detailed above, the Claimants submit that the Project entailed different risks. The Claimants refer to the commercial risks of the Project described in the Business Plan, i.e. the commercial activity and profitability of the Mauritius Laboratory could fluctuate as a result of the economic, regulatory and political circumstances.<sup>178</sup> The Claimants also refer to technical risks in carrying out the operations of the Mauritius Laboratory.<sup>179</sup>
147. However, these risks relate to the planned future activity of the Mauritius Laboratory which never came into fruition. The Claimants have failed to point to any risk related to their (alleged) contribution. First, relating to the payment of certain bills and invoices in Mauritius, it is clear that these one-off payments entailed no risk; the Claimants merely received goods or services for which they paid. Second, relating to the transfer of funds (even though the Tribunal considers that this is not a financial contribution for the reasons set out above<sup>180</sup>), there is no risk related to such transfer. As explained above, the Claimants always remained in control over the funds and could (and indeed did) transfer and repatriate them when they wished.<sup>181</sup>
148. In sum, for the reasons set out above, the Tribunal finds that the Claimants' Project does not meet the requirements of the legal test for a protected investment under the Treaty.

*iv. Pre-Investment Expenditures*

149. For the sake of completeness, the Tribunal addresses submissions made by the Parties regarding pre-investment expenditures. The Parties discussed, with reference to *Mihaly International Corporation v. Sri Lanka*, whether the Claimants' activities are pre-investment expenditures.<sup>182</sup> In particular, the Parties discussed whether the No-Objection letter of 14 October 2014 qualifies as an approval of the investment, or whether, to the contrary, the Claimants were aware that further approvals (including changes to the DNA Identification Act) were needed for the Project to proceed.<sup>183</sup>

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T. Wälde (eds.), *Les aspects nouveaux du droit des investissements internationaux* (Brill Nijhoff Leiden, 2007), p. 127, para. 9 (**Exhibit RL-55**).

<sup>178</sup> See above, para. 100.

<sup>179</sup> See above, para. 100.

<sup>180</sup> See above, paras. 133-135.

<sup>181</sup> See above, paras. 133-135.

<sup>182</sup> See above, paras. 72, 81-82, 105.

<sup>183</sup> See above, paras. 82, 88(b), 102, 105.

150. The Tribunal does not need to decide these points since the possible approval of the Project in the form of the No-Objection letter is irrelevant in the present context. Even assuming such approval of the Project occurred, the Claimants still need to show that, following the approval, they made an investment according to the terms of the Treaty. Indeed, the approval of a project by the host State does not create an investment out of thin air; rather, the reality of any investment is still to be proven by the investor. As detailed in the previous sections, the Claimants failed to show they made any such investment.

*v. Planned Future Investments*

151. As detailed above, the Claimants make several references to their planned future investments. In particular the Claimants argue that they would have made financial and other contributions over a long time period had it not been for the termination of the Project by the Respondent.<sup>184</sup> In this context, the Claimants rely on the findings of the tribunal in *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria* which found that for the purpose of the assessment of the duration of the contribution, the tribunal must look at what was contractually agreed, irrespective of a premature termination of the project.<sup>185</sup> The Claimants also refer to *Phoenix Action, Ltd. v. The Czech Republic*, in which the tribunal held that “an investment that had come to a standstill, because of the host State’s action, would still qualify as an investment” because “otherwise the international protection of foreign investment provided by the BITs would be emptied of its purpose.”<sup>186</sup> According to the Claimants, the Tribunal therefore should take into account their planned future investment which would have occurred, had it not been for the Respondent’s termination of the Project.

152. The Tribunal is unpersuaded. The role of the Tribunal is not to second-guess what possible future investments the Claimants might have made. Rather, the Tribunal is to determine whether or not at the time of the termination of the Project an investment had occurred that qualifies as such under the Treaty. As detailed above, no such investment occurred.

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<sup>184</sup> See above, paras. 95, 102.

<sup>185</sup> *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, para. 73(ii) (**Exhibit CL-67**) (referred to in Claimants’ Rejoinder, para. 27).

<sup>186</sup> *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 133 (**Exhibit RL-29**) (referred to in Claimants’ Rejoinder, para. 34).

153. The present case is distinguishable from the cases referred to by the Claimants. In *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, the investor had signed a contract for the construction of a dam with the host State which foresaw a certain contractual duration of the project.<sup>187</sup> In this context, the tribunal found that in case of an early termination of the contract, the duration in question was the one contractually foreseen. In the present case, the Claimants and the Respondent did not enter into a contract with a contractually foreseen timeframe which could have been taken into account for the duration criterion. In *Phoenix Action, Ltd. v. The Czech Republic*, the tribunal expressed the view that the project's unprofitability due to a stand-still imposed by the host State would not have disqualified the operation as an investment.<sup>188</sup> In the present case, the economic prospects of the Claimants' Project are not at issue. The Project never materialised to a sufficient degree to constitute an investment of any duration at all, irrespective of its conceivable economic soundness as a prospective project.
154. Finally, the Claimants also refer to Article 9 of the France-Mauritius BIT which provides that "[a]greements concerning investments to be made in the territory of one Contracting State made by nationals, companies or other corporate bodies of the other Contracting State shall contain" an arbitration agreement.<sup>189</sup> The Claimants may be suggesting (although this is not explicit) an inference from the expression "investments to be made" ("*investissements à effectuer*") to the effect that the Tribunal should expand the definition of "investment" to encompass planned future investments.<sup>190</sup> For the avoidance of doubt, the Tribunal would also disagree with that proposition. Article 9 of the Treaty deals with investment contracts between an investor and a host State and provides that such contracts should include an arbitration agreement. These contracts perforce concern future investments, i.e. investments not yet made at the time when the parties enter into the investment contract. Article 9 does not imply in any way that future investments will automatically be covered by the Treaty for the purpose of establishing a tribunal's jurisdiction.
155. In sum, for the reasons detailed above, the Tribunal finds that the Claimants have not made an investment within the meaning of the France-Mauritius BIT. This is sufficient to decline the

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<sup>187</sup> *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006, para. 8 (**Exhibit CL-67**).

<sup>188</sup> *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 133 (**Exhibit RL-29**).

<sup>189</sup> See above, para. 106.

<sup>190</sup> See above, para. 106.

Tribunal's jurisdiction in the present case. The Tribunal will however also address the second issue (i.e. whether the Claimants can invoke the arbitration clause in the Finland-Mauritius BIT on the basis of the MFN clause in the France-Mauritius BIT), and this for the following reason. As pointed out above, both issues presented by the Parties are equally dispositive for the Tribunal's jurisdiction.<sup>191</sup> Therefore, if the Tribunal were wrong on the first issue and the Claimants had made a protected investment, the Claimants nevertheless could not establish arbitral jurisdiction unless their MFN contention is valid.

## C. Application of the Most-Favoured-Nation Clause

### 1. Respondent's Position

156. The Respondent's starting point is that the State's consent to arbitrate must be clear and unequivocal.<sup>192</sup> It maintains that "[n]on consent is the default rule; consent is the exception."<sup>193</sup> A State's consent to submit a dispute to international arbitration "must be certain"<sup>194</sup> and expressed "in a 'voluntary and indisputable' manner."<sup>195</sup> It further must be proven and cannot be assumed or inferred.<sup>196</sup> The burden of proof falls on a given claimant who invokes consent against a given respondent.<sup>197</sup> The Respondent highlights the strict standard of proof required and concludes that the

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<sup>191</sup> See above, para. 70.

<sup>192</sup> Respondent's Memorial, paras. 16-24; Respondent's Reply, paras. 15-19; Respondent's Opening Statements, pp. 6-11 (**Exhibit R-Pres 1**).

<sup>193</sup> Respondent's Memorial, para. 15, referring to *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, p. 70, para. 175 (**Exhibit RL-1**); *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, ICSID Case No. ARB/15/21, Award, 6 August 2016, pp. 40 *et seq.*, para. 130 (**Exhibit RL-2**).

<sup>194</sup> Respondent's Memorial, para. 15, referring to *Case Concerning Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, 4 June 2008, (2008) I.C.J. Reports 177, p. 204, para. 62 (**Exhibit RL-3**).

<sup>195</sup> Respondent's Memorial, para. 15, referring to *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, pp. 18 *et seq.*, para. 21 (**Exhibit RL-4**); *Corfu Channel (United Kingdom v. Albania)*, Preliminary Objection, Judgment, 25 March 1948, (1948) I.C.J. Reports 15, p. 27; (**Exhibit RL-5**); *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, pp. 620 *et seq.*, para. 40 (**Exhibit RL-6**); *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Preliminary Objection, Judgment of 22 July 1952, (1952) I.C.J. Reports 93, p. 114 (**Exhibit RL-7**).

<sup>196</sup> Respondent's Memorial, para. 22

<sup>197</sup> Respondent's Memorial, para. 21, referring to *ICS Inspection and Control Services Ltd. v. The Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, p. 93, para. 280 (**Exhibit RL-11**); Respondent's Reply, para. 15. See also Respondent's Reply, para. 16, referring to *Wintershall*

Claimants failed to meet the required standard.<sup>198</sup>

157. Second, the Respondent submits that there is no investor-State arbitration clause, or consent to arbitrate, in the France-Mauritius BIT.<sup>199</sup> It contains an arbitration clause for State-to-State disputes in Article 10 but no investor-State arbitration clause.<sup>200</sup> Regarding investor-State arbitration, its Article 9, according to the Respondent, does not express consent to arbitrate but merely that any investment contract between a national of a Contracting State and the other Contracting State should contain an arbitration clause.<sup>201</sup> The Respondent thus argues that Article 9 does not represent an “obligation on the State to arbitrate any future investment disputes with any investor” except if it decides to enter into an investment contract.<sup>202</sup> According to the Respondent, its contractual freedom whether or not to enter into an investment contract containing an arbitration agreement is unrestricted and, in the case at hand, no such contract has been signed between the Parties.<sup>203</sup>
158. According to the Respondent, the lack of consent to investor-State arbitration was also noted when France and the Republic of Mauritius negotiated and, on 8 March 2010, signed a new treaty (the “**2010 Treaty**”) aimed at replacing the France-Mauritius BIT from 1973. The 2010 Treaty, which has never entered into force, contains an arbitration clause for investor-State disputes.<sup>204</sup> The Respondent submits that the draft bill by the French government for the 2010 Treaty confirms that the Contracting States had not given consent to arbitrate in the 1973 Treaty.<sup>205</sup>
159. Third, the Respondent argues that the MFN clause in the France-Mauritius BIT cannot create consent

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*Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, pp. 99 *et seq.*, para. 160(3) (**Exhibit RL-37**).

<sup>198</sup> Respondent’s Memorial, para. 24; Respondent’s Reply, paras. 11-12.

<sup>199</sup> Respondent’s Memorial, paras. 25-31; Respondent’s Reply, paras. 20-29.

<sup>200</sup> Respondent’s Memorial, para. 26.

<sup>201</sup> France-Mauritius BIT, Article 9 (**Exhibit C-2**); Respondent’s Reply, para. 21.

<sup>202</sup> Respondent’s Reply, para. 24.

<sup>203</sup> Respondent’s Reply, paras. 24-27.

<sup>204</sup> Respondent’s Memorial, paras. 29-30, referring to the 2010 Treaty (**Exhibit R-2**). The Respondent states that “[t]his new treaty has not entered into force (although signed by French Republic and Republic of Mauritius), since it has not yet been ratified by France. The new treaty has neither been incorporated nor gazetted as per the provisions of Section 46 of the Constitution of Mauritius.” (Respondent’s Memorial, footnote 18).

<sup>205</sup> Respondent’s Memorial, paras. 29-30, referring to Draft Bill authorising Approval of the Agreement between the Government of the Republic of France and the Government of the Republic of Mauritius on the Reciprocal Encouragement and Protection of Investments, registered at the Presidency of the National Assembly on 24 October 2017 (**Exhibit R-4**).

to arbitrate and that the Claimants thus have no standing to invoke the Treaty.<sup>206</sup> The Respondent submits that the Claimants can invoke a right to more favourable treatment through the MFN clause only after having established the Respondent's consent to arbitrate from the basic treaty (i.e. an investment treaty entered into by the investor claimant's home country, containing an MFN clause relied upon by the claimant to import into that treaty a provision of another treaty to which its home country is not a party (the "**Basic Treaty**")), here: the France-Mauritius BIT. According to the Respondent there "is a well-established principle of international law that, to be able to rely on an MFN clause in the [B]asic [T]reaty, a party must first establish the tribunal's jurisdiction under that treaty."<sup>207</sup> In other words, the dispute resolution provision contained in the Finland-Mauritius BIT remains "independent of and isolated from the [B]asic [T]reaty" and therefore "cannot produce any legal effect as between [the Claimants and Mauritius]: it is *res inter alios acta*."<sup>208</sup>

160. The Respondent seeks support from the final report of the International Law Commission ("**ILC**") study group on the most-favoured-nation clause (the "**ILC 2015 Report**"),<sup>209</sup> as well as scholarly writing.<sup>210</sup> The Respondent further refers to arbitral decisions which it says confirm that an MFN clause cannot create a right to go to arbitration where none otherwise exists under the Basic Treaty.<sup>211</sup>

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<sup>206</sup> Respondent's Memorial, paras. 36-51; Respondent's Reply, paras. 33-45; Respondent's Opening Statements, pp. 12-22 (**Exhibit R-Pres 1**).

<sup>207</sup> Respondent's Memorial, para. 36, referring to *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Preliminary Objection, Judgment of 22 July 1952, (1952) I.C.J. Reports 93 (**Exhibit RL-7**).

<sup>208</sup> Respondent's Memorial, para. 38, referring to *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Preliminary Objection, Judgment of 22 July 1952, (1952) I.C.J. Reports 93, p. 109 (**Exhibit RL-7**).

<sup>209</sup> Respondent's Memorial, para. 40, referring to ILC 2015 Report, p. 4, para. 14 (**Exhibit CL-2 = RL-18**).

<sup>210</sup> Respondent's Memorial, paras. 39-41, referring to Z. Douglas, "The MFN Clause in Investment Arbitration – Treaty Interpretation Off the Rails", (2011) (2)1 *Journal of International Dispute Settlement* 97, p. 107 (**Exhibit RL-17**); C. McLachlan, L. Shore & M. Weiniger, "Most-Favoured-Nation Treatment", in *International Investment Arbitration, Substantive Principles* (Oxford International Arbitration Series, 2nd edn, 2017), p. 350, para. 7.330 (**Exhibit RL-19**). See also Respondent's Reply, paras. 40-44, referring to S. W. Schill, "Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction – A Reply to Zachary Douglas" (2011), (2) 2 *Journal of International Dispute Settlement* 353, pp. 363-367 (**Exhibit TL-1**).

<sup>211</sup> Respondent's Memorial, paras. 45-49, referring to *Venezuela US, S.R.L. v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Interim Award on Jurisdiction, 26 July 2016, p. 35, para. 105 (**Exhibit RL-22**); *ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, p. 99, para. 398. (**Exhibit RL-23**); *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, p. 20, para. 79 (**Exhibit RL-24**); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, pp. 82 *et seq.*, paras. 203-204 (**Exhibit RL-1**), referring to *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, ICSID Case No. ARB/15/21, Award, 6 August 2016, pp. 40 *et seq.* (**Exhibit RL-2**). See also Respondent's Reply, paras. 35-39, referring to *AIIY Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction, 9 February 2017, p. 26, para. 104 (**Exhibit RL-38**); *Garanti Koza LLP*

On this basis, the Respondent concludes that it never consented to arbitration under the France-Mauritius BIT, and the Claimants have no standing to import such consent from the Finland-Mauritius BIT through the MFN clause of the France-Mauritius BIT.<sup>212</sup>

161. Fourth, the Respondent argues that, in any event, the MFN clause of the France-Mauritius BIT does not extend to dispute resolution and therefore the Claimants cannot invoke it.<sup>213</sup> According to the Respondent, the language of the MFN clause in Article 8(2) of the Treaty makes it clear that it does not apply to consent to treaty-based investor-State dispute resolution.<sup>214</sup> In interpreting Article 8(2) of the Treaty, the Respondent refers to rules of interpretation in Article 31(1) VCLT and other rules of international law, such as the rules of severability, *ejusdem generis* and *effet utile*.

- Article 31(1) VCLT

162. The Respondent submits that the language of the MFN clause is the starting point for its interpretation under Article 31 of the VCLT.<sup>215</sup> Article 31 requires “neither a broad nor a restrictive approach to interpretation” (i.e. every “ambiguity, or alleged ambiguity, found in [...] treaties should be resolved in favour of the investor”) but a more “balanced interpretation” should be adopted.<sup>216</sup>
163. Applying the VCLT standard to the interpretation of the wordings of Article 8(2) of the France-Mauritius BIT, the Respondent observes that the MFN treatment obligation is limited to “*les matières régies par la présente Convention.*”<sup>217</sup> The Respondent submits that because investor-State arbitration is not a subject matter of the France-Mauritius BIT, it falls outside the scope of the MFN clause. The Respondent rejects the Claimants’ argument that Article 9 of the France-Mauritius BIT

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*v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on Jurisdiction, 3 July 2013, pp. 18 *et seq.*, paras. 38-39 (**Exhibit CL-4**).

<sup>212</sup> Respondent’s Memorial, para. 51.

<sup>213</sup> Respondent’s Memorial, paras. 52-67; Respondent’s Reply, paras. 46-82; Respondent’s Opening Statements, pp. 24-39 (**Exhibit R-Pres 1**).

<sup>214</sup> Respondent’s Reply, para. 48.

<sup>215</sup> Respondent’s Memorial, para. 55.

<sup>216</sup> Respondent’s Reply, paras. 51-52, referring to *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Jurisdiction, 22 November 2002, p. 15, para. 40 (**Exhibit RL-41**); *Sanum Investments Ltd. v. Government of the Lao People’s Democratic Republic*, PCA Case No. 2013-13, Judgment of the High Court of Singapore, 20 January 2015 [2015] SGHC 15, p. 45, para. 124 (**Exhibit RL-42**); *Saluka Investments B.V. v. The Czech Republic*, Partial Award, UNCITRAL, 17 March 2006, p. 6, para. 300 (**Exhibit RL-43**).

<sup>217</sup> France-Mauritius BIT, Article 8(2) (**Exhibit C-2**).

deals with dispute resolution as a “*matière*” which it governs.<sup>218</sup> According to the Respondent, Article 9 creates a right for either of the Contracting States (Mauritius or France), or for their nationals when dealing with the other Contracting State, to insist upon the inclusion of an ICSID arbitration clause once there has been agreement to an investment contract. That clause would then establish the parties’ consent to arbitrate.<sup>219</sup> In the hypothetical scenario where an investment contract was concluded, it “would merely be consent to contractual arbitration, not to treaty arbitration, which is an entirely different issue.”<sup>220</sup>

164. Furthermore, the Respondent rejects the notion that the Claimants can rely on the MFN clause merely because investor-State arbitration is not specifically excluded from its scope.<sup>221</sup> According to the Respondent, in 1973 investor-State arbitration was not the norm and it cannot be held liable for its failure to consider it at the time.<sup>222</sup> The Respondent submits that the onus is on the Claimants to establish that consent to investor-State arbitration is within the scope of the MFN clause without simply arguing that it is not excluded.<sup>223</sup>
165. The Respondent further submits that Article 8(2) of the France-Mauritius BIT provides MFN treatment for “*les investissements des ressortissants [...] de l’un des Etats contractants,*” which, according to the Respondent’s interpretation, means that the MFN treatment only extends to investments, but not to investors.<sup>224</sup> The Respondent adds that the right to access dispute resolution is not an accessory to the investment, but rather a personal right which allows investors to defend their investments, and that therefore the MFN clause does not apply to dispute resolution.<sup>225</sup>

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<sup>218</sup> Respondent’s Memorial, paras. 57-60; Respondent’s Reply, paras. 53-56.

<sup>219</sup> Respondent’s Memorial, para. 59.

<sup>220</sup> Respondent’s Reply, para. 58, referring to Jan Paulsson, “Arbitration Without Privity” (1995), (10) 2 *ICSID Review – Foreign Investment Law Journal* 232, pp. 232 *et seq.* (**Exhibit RL-44**).

<sup>221</sup> Respondent’s Memorial, paras. 58-60; Respondent’s Reply, para. 59.

<sup>222</sup> Respondent’s Memorial, para. 58.

<sup>223</sup> Respondent’s Memorial, para. 58; Respondent’s Reply, paras. 56-59, referring to *Azurix Corp. v. Argentine Republic*, Decision on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/12, 1 September 2009, p. 109, para. 215 (**Exhibit RL-45**).

<sup>224</sup> France-Mauritius BIT, Article 8(2) (**Exhibit C-2**).

<sup>225</sup> Respondent’s Memorial, para. 61, referring to *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, p. 16, paras. 60 *et seq.* (**Exhibit RL-24**). See also Respondent’s Reply, paras. 60-63, referring to *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, p. 31, para. 82 (**Exhibit CL-5**); *RosInvest Co UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, dated “October 2007”, pp. 77 *et*

- Severability Rule

166. The Respondent submits that arbitration agreements are severable or autonomous from the main agreement and therefore “fall[] 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.”<sup>226</sup> According to the Respondent, many investment treaty tribunals have held that MFN clauses do not apply to dispute resolution in the first place and therefore cannot be relied upon to import more favourable dispute resolution provisions from other treaties.<sup>227</sup>
167. Refuting the Claimants’ reliance on *Emilio Agustin Maffezini v. The Kingdom of Spain*, the Respondent submits that “there is another line of cases which has heavily criticised [*Maffezini*] and concluded that, in the absence of clear language to the contrary, MFN clauses cannot be applied to procedural provisions [...]”<sup>228</sup> In any event, *Maffezini*, and other cases that followed it, deal with the question whether to import a more favourable dispute resolution provision from another treaty and not whether to import a respondent State’s consent through the operation of an MFN clause, as is the case here.<sup>229</sup>

- Ejusdem Generis Rule

168. The Respondent states that the *ejusdem generis* rule is well established in international law<sup>230</sup> and

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*seq.*, para. 126 (**Exhibit RL-46**); *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, p. 50, para. 92 (**Exhibit RL-47**).

<sup>226</sup> Respondent’s Memorial, para. 52; Respondent’s Reply, paras. 64-68.

<sup>227</sup> Respondent’s Reply, para. 64, referring to *Plama Consortium Ltd. v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, pp. 67 *et seq.*, para. 212 (**Exhibit RL-26**). See also Respondent’s Opening Statements, pp. 27-29 (**Exhibit R-Pres 1**).

<sup>228</sup> Respondent’s Reply, para. 67, referring to *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 15 November 2004 (**Exhibit RL-48**); *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, Award, SCC Case No. 080/2004, 21 April 2006 (**Exhibit RL-49**); *Plama Consortium Ltd. v. The Republic of Bulgaria*, Decision on Jurisdiction, ICSID Case No. ARB/03/24, 8 February 2005 (**Exhibit RL-26**); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008 (**Exhibit RL-37**); *Renta 4 S.V.S.A. et al v. Russian Federation*, SCC Case No. V024/2007, Award on Preliminary Objections, 20 March 2009 (**Exhibit CL-15**); *ICS Inspection and Control Services Ltd. v. The Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 (**Exhibit RL-11**); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (**Exhibit RL-1**); *ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (**Exhibit RL-23**).

<sup>229</sup> Respondent’s Reply, para. 68.

<sup>230</sup> Respondent’s Memorial, paras. 63-64, referring to the ILC 1978 Draft Articles on most-favoured-nation clauses, and associated commentary (the “**ILC 1978 Draft Articles and Commentary**”), text adopted by the

more specifically in the interpretation of MFN clauses.<sup>231</sup> The Respondent submits that the rule supports its interpretation of Article 8(2) of the France-Mauritius BIT inasmuch as it 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 [...]”<sup>232</sup>

169. The Respondent submits that the application of the *ejusdem generis* rule translates into a non-entitlement to import more favourable provisions from the Finland-Mauritius BIT, except where the subject matter of such provisions is also regulated in the France-Mauritius BIT. According to the Respondent, investor-State dispute resolution is not regulated in the France-Mauritius BIT and therefore the Claimants are barred from relying on the MFN clause to import provisions relating to this subject matter.<sup>233</sup> The Respondent also refer to commentators allegedly supporting its position.<sup>234</sup>

- Effet Utile Rule

170. In response to the Claimants’ reference to the *effet utile* rule, Respondent submits that it cannot be used “to justify an illegitimate extension of meaning” and “certainly cannot be applied so as to create jurisdiction over the Claimants’ claims out of thin air.”<sup>235</sup> According to the Respondent, in the present case, a meaningful interpretation is already available for Article 8(2) of the BIT and there is therefore no scope for any interpretation of this provision arising out of its *effet utile*.<sup>236</sup>

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International Law Commission at its thirtieth session, *Yearbook of the International Law Commission, 1978*, vol. II, Part Two, p. 27, para. 1 (**Exhibit CL-6 = RL-27**).

<sup>231</sup> Respondent’s Memorial, para. 66, referring to *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, pp. 19 *et seq.* (**Exhibit RL-24**); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, pp. 85 *et seq.* (**Exhibit RL-1**).

<sup>232</sup> Respondent’s Memorial, para. 64, referring to ILC 1978 Draft Articles and Commentary, p. 30, para. 11 (**Exhibit CL-6 = RL-27**); Respondent’s Reply, para. 70.

<sup>233</sup> Respondent’s Memorial, para. 65; Respondent’s Reply, paras. 73-76; Respondent’s Opening Statements, pp. 31-34 (**Exhibit R-Pres 1**).

<sup>234</sup> Respondent’s Memorial, para. 66, referring to S. W. Schill, “Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses”, (2009) 27(2) *Berkeley Journal of International Law* 496, p. 557 (**Exhibit RL-28**).

<sup>235</sup> Respondent’s Reply, paras. 78-79, referring to *Dawood Rawat v. The Republic of Mauritius*, PCA Case 2016-20, Award on Jurisdiction, 6 April 2018, paras. 82, 182 (**Exhibit RL-20**); *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, p. 30, para. 114 (**Exhibit RL-52**). See also Respondent’s Opening Statements, p. 39 (**Exhibit R-Pres 1**).

<sup>236</sup> Respondent’s Reply, paras. 79-80.

## 2. Claimants' Position

171. The Claimants' interpretation of Articles 8(2) and 9 of the France-Mauritius BIT is that investor-State dispute settlement falls within the purview of the Treaty, and the Claimants can thus benefit from Article 9 of the Finland-Mauritius BIT via the MFN clause in Article 8(2) to settle their dispute with the Respondent through arbitration.<sup>237</sup> The Claimants observe that the same issue had already been put to the arbitral tribunal in *Dawood Rawat v. The Republic of Mauritius*, but it was not decided there because the tribunal dismissed jurisdiction on a different basis.<sup>238</sup> The Claimants stress the novelty of the question before the Tribunal, on which no other tribunal has so far opined.<sup>239</sup>
172. The Claimants submit that there is a consensus today that MFN clauses, in general, may apply to dispute resolution provisions.<sup>240</sup> According to the Claimants, given the wide variety of MFN clauses, the determination of the scope of each of these MFN clauses requires a case-by-case interpretation.<sup>241</sup> The Claimants refer in particular to the ILC 2015 Report which states *inter alia* that:

*“cette question est vraiment une question d’interprétation des traités à laquelle il ne peut être répondu qu’au regard de chaque cas particulier”*

*“il ne fait aucun doute que les dispositions NPF en matière d’investissement sont largement présentes dans les accords bilatéraux d’investissement, mais avec un libellé propre à chaque accord”*

*“la question clé de l’ejusdem generis [...] doit être déterminée au cas par cas.”*<sup>242</sup>

173. The Claimants note that the MFN clause is to be interpreted according to Article 31(1) VCLT and

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<sup>237</sup> Claimants' Counter-Memorial, paras. 28-29.

<sup>238</sup> Claimants' Counter-Memorial, paras. 30-31, referring to *Dawood Rawat v. The Republic of Mauritius*, PCA Case 2016-20, Award on Jurisdiction, 6 April 2018 (**Exhibit RL-20**).

<sup>239</sup> Claimants' Counter-Memorial, para. 31. See also Crépet-Daigremont Opinion, para. 2 (**Exhibit CER-1**).

<sup>240</sup> Claimants' Counter-Memorial, paras. 34-35, referring *inter alia* to *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (**Exhibit CL-5**); *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005 (**Exhibit CL-29**); *RosInvest Co UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, dated “October 2007” (**Exhibit RL-46**); *Impregilo S.p.A v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011 (**Exhibit CL-50**); *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011 (**Exhibit RL-24**).

<sup>241</sup> Claimants' Counter-Memorial, para. 34; Crépet-Daigremont Opinion, paras. 2-3 (**Exhibit CER-1**).

<sup>242</sup> Claimants' Counter-Memorial, para. 34, referring ILC 2015 Report, paras. 163, 145, 147 (**Exhibit CL-2 = RL-18**) (“the question is truly one of treaty interpretation that can be answered only in respect of each particular case”; “there is no doubt that MFN provisions relating to investment are largely contained in separate bilateral investment agreements, and that each agreement has worded its MFN provision in a particular way”; “the key question of *ejusdem generis* [...] has to be determined on a case-by-case basis.”) See also Claimants' Rejoinder, para. 75.

special attention must thus be paid to the ordinary meaning of the terms of the Treaty.<sup>243</sup> The Claimants therefore proceed to an analysis of the wording of the MFN clause in Article 8(2) of the Treaty and submit that it is drafted in the broadest possible manner.<sup>244</sup> The Claimants break down Article 8(2) in the following manner.

- “Pour les matières régies par la présente Convention autres que celles visées à l’article 7”<sup>245</sup>

174. According to the Claimants, the introductory sentence of Article 8(2) of the Treaty raises two interpretation issues. The first is whether investor-State dispute settlement is one of the “*matières*” governed by the Treaty and, if so, the second is whether investor-State dispute settlement is excluded from the operation of the clause by virtue of Article 7 of the Treaty.
175. Regarding the first point, the Claimants submit that investor-State dispute settlement is one of the subject matters (“*matières*”) of the France-Mauritius BIT pursuant to its Article 9.<sup>246</sup> According to the Claimants, Article 9 lays down the conditions under which the Respondent and French investors are to settle disputes and therefore investor-State dispute settlement is one of the “*matières*” governed by the France-Mauritius BIT.<sup>247</sup> The Claimants submits that, in order to determine the “*matières*” governed, it suffices that Article 9 deals with investor-State dispute resolution (which it does, according to the Claimants); it is irrelevant whether it deals with investor-State *treaty* dispute resolution.<sup>248</sup>
176. Regarding the second point, the Claimants submit that investor-State dispute settlement is not a matter excluded from the MFN clause of the France-Mauritius BIT. The Claimants point out that

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<sup>243</sup> Claimants’ Counter-Memorial, para. 37; Claimants’ Rejoinder, paras. 77-79.

<sup>244</sup> Claimants’ Counter-Memorial, para. 38.

<sup>245</sup> “With respect to matters governed by this Treaty other than those referred to in article 7” (Translation by the PCA).

<sup>246</sup> Claimants’ Counter-Memorial, paras. 40-43; Claimants’ Rejoinder, paras. 85-98. See also Crépet-Daigremont Opinion, paras. 10-13 (**Exhibit CER-1**); Nouvel Opinion, paras. 74-79, 81-84 (**Exhibit CER-2**).

<sup>247</sup> Claimants’ Counter-Memorial, para. 42; Claimants’ Rejoinder, para. 87.

<sup>248</sup> Claimants’ Rejoinder, paras. 94-97, referring to *Dawood Rawat v. The Republic of Mauritius*, PCA Case 2016-20, Award on Jurisdiction, 6 April 2018, paras. 161, 187, footnote 156 (**Exhibit RL-20**); S. W. Schill, “Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses”, (2009) 27(2) Berkeley Journal of International Law 496, p. 557 (**Exhibit RL-28**); ILC 2015 Report, p. 32 (**Exhibit CL-2 = RL-18**).

Article 8(2) expressly excludes from its scope matters governed by Article 7.<sup>249</sup> Article 7 relates to tax matters.<sup>250</sup> According to the Claimants, because Article 7 does not encompass investor-State dispute settlement, it follows that this subject matter is included in the operation of the MFN clause in Article 8(2). Had the Contracting States wished to exclude investor-State dispute settlement from the MFN clause, they would have made it clear, in the same way as they did for Article 7.<sup>251</sup>

177. The Claimants further note that the 2010 Treaty's MFN clause similarly does not provide for the exclusion of investor-State dispute settlement from its scope.<sup>252</sup> This, according to the Claimants, is a further indication that the application of the MFN clause to investor-State dispute settlement is not an issue for the Contracting Parties.<sup>253</sup>

- “les investissements des ressortissants, sociétés ou autres personnes morales de l'un des Etats contractants”<sup>254</sup>

178. The Claimants reject the Respondent's contention that the MFN clause of the Treaty refers to investments and not to investors and therefore does not apply to arbitration, which is a personal right of the investor.<sup>255</sup> According to the Claimants, such an interpretation is rejected by arbitral tribunals when the text of the MFN clause does not clearly distinguish between the regimes applicable to investors and those applicable to investments. In support of this argument the Claimants refer, among other things, to decisions in *Siemens AG v. The Argentine Republic*<sup>256</sup> and *Plama Consortium Ltd. v.*

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<sup>249</sup> Claimants' Counter-Memorial, para. 44.

<sup>250</sup> France-Mauritius BIT, Article 7 (**Exhibit C-2**).

<sup>251</sup> Claimants' Counter-Memorial, paras. 45-47, referring to ILC 2015 Report, p. 46, para. 188 (**Exhibit CL-2 = RL-18**).

<sup>252</sup> Claimants' Counter-Memorial, para. 50, referring to Draft Bill authorising Approval of the Agreement between the Government of the Republic of France and the Government of the Republic of Mauritius on the Reciprocal Encouragement and Protection of Investments, registered at the Presidency of the National Assembly on 24 October 2017 (**Exhibit R-4**).

<sup>253</sup> Claimants' Counter-Memorial, para. 50.

<sup>254</sup> “the investments of nationals, companies or other corporate bodies of one Contracting State” (Translation by the PCA).

<sup>255</sup> Claimants' Counter-Memorial, paras. 51-54; Claimants' Rejoinder, paras. 99-117. Crépet-Daigremont Opinion, paras. 15-16 (**Exhibit CER-1**); Nouvel Opinion, paras. 18-21 (**Exhibit CER-2**).

<sup>256</sup> Claimants' Counter-Memorial, para. 52, referring to *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, para. 92 (**Exhibit CL-5**).

*The Republic of Bulgaria*<sup>257</sup> and state that the Respondent’s reliance on *RosInvest Co UK Ltd. v. The Russian Federation*<sup>258</sup> and *Telenor Mobile Communications A.S. v. Republic of Hungary*<sup>259</sup> is misplaced.

- “*bénéficient également*”<sup>260</sup>

179. According to the Claimants, the term “*bénéficient également*” shows that the Contracting States wanted to give an automatic effect to the MFN clause in Article 8 of the France-Mauritius BIT.<sup>261</sup> The Claimants submit that they thus have an unconditional and automatic right to invoke the investor-State dispute settlement clause of the Finland-Mauritius BIT. According to the Claimants, this right is not subject to any other condition, including that of establishing the jurisdiction of the arbitral tribunal under the France-Mauritius BIT as alleged by the Respondent.<sup>262</sup> The Claimants further point out that Article 8(2) does not use terms such as “more favourable treatment” which may have been interpreted as limiting the effect of the MFN clause to the improvement of rights already acquired under a treaty and as excluding the creation of new rights.<sup>263</sup>

- “*de toutes les dispositions plus favorables que celles du présent Accord*”<sup>264</sup>

180. The Claimants highlight the particularly broad and inclusive wording of Article 8(2) of the France-

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<sup>257</sup> Claimants’ Counter-Memorial, para. 53, referring to *Plama Consortium Ltd. v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 190 (**Exhibit RL-26**).

<sup>258</sup> Claimants’ Rejoinder, paras. 102-108, referring to *RosInvest Co UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, dated “October 2007”, paras. 128, 132 (**Exhibit RL-46**).

<sup>259</sup> Claimants’ Rejoinder, paras. 109-117, referring to *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, para. 92 (**Exhibit RL-47**); ILC 2015 Report, para. 196 (**Exhibit CL-2 = RL-18**).

<sup>260</sup> “also benefit” (Translation by the PCA).

<sup>261</sup> Claimants’ Counter-Memorial, paras. 55-60, referring to *Dawood Rawat v. The Republic of Mauritius*, PCA Case No. 2016-20, Order regarding Claimants’ and Respondent’s Requests for Interim Measures, 11 January 2017, p. 16, note 8 (**Exhibit CL-7**) (noting that “the French present tense of ‘*bénéficient*’ denotes an existing imperative, as opposed to an obligation to do something in the future”); *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on Jurisdiction, 3 July 2013, pp. 18 *et seq.*, para. 61 (**Exhibit CL-4**) (noting that “[n]o action on the investor’s part other than the making of the investment is required to vest the investor with those rights. And the protection of the MFN clause applies to such an investor from the moment that the host State agrees”). See also Nouvel Opinion, para. 10 (**Exhibit CER-2**).

<sup>262</sup> Claimants’ Counter-Memorial, para. 56.

<sup>263</sup> Claimants’ Counter-Memorial, para. 59.

<sup>264</sup> “from any more favourable provisions than those in this Treaty” (Translation by the PCA).

Mauritius BIT and submit that it does not allow an inference that the MFN clause would not apply to investor-State dispute settlement clauses.<sup>265</sup> Rather, the Claimants submit that according to the ILC 2015 Report, similar MFN clauses have been interpreted as applying to dispute resolution provisions.<sup>266</sup>

- “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>267</sup>

181. According to the Claimants, the arbitration agreement in Article 9 of the Finland-Mauritius BIT is more favourable than Article 9 of the France-Mauritius BIT in several respects, including because the former does not contain any obligation to settle the dispute amicably and offers the investor a choice between different arbitral institutions.<sup>268</sup>
182. In sum, following their analysis of the wording of Article 8(2) of the France-Mauritius BIT, the Claimants conclude that they may benefit from the more favourable arbitration agreement in Article 9 of the Finland-Mauritius BIT. The Claimants also make some further submissions, mainly addressing a series of arguments made by the Respondent.
183. First, concerning the *ejusdem generis* principle, the Claimants agree that it limits the application of MFN clauses to rights that fall within the subject matter of the clause, but state that this condition is met in the present case.<sup>269</sup> The Claimants submit that they are merely seeking the application of an investor-State dispute settlement clause more favourable than that provided for in the Treaty, and are therefore in the presence of the provisions of the same “*matière*” with the same object and purpose,

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<sup>265</sup> Claimants’ Counter-Memorial, paras. 61-62.

<sup>266</sup> Claimants’ Counter-Memorial, para. 61, referring to ILC 2015 Report, p. 47, para. 162 (**Exhibit CL-2 = RL-18**).

<sup>267</sup> “which may result from international undertakings already entered into or hereafter entered into by the other Contracting State with the first-mentioned Contracting State or with third States” (Translation by the PCA).

<sup>268</sup> Claimants’ Counter-Memorial, paras. 63-66; Claimants’ Rejoinder, paras. 134-136. See also Crépet-Daigremont Opinion, paras. 17-24 (**Exhibit CER-1**); Nouvel Opinion, paras. 40-43, 85-89 (**Exhibit CER-2**).

<sup>269</sup> Claimants’ Counter-Memorial, paras. 69-72, referring to ILC 1978 Draft Articles and Commentary, p. 27, para. 1 (**Exhibit CL-6 = RL-27**); *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on Jurisdiction, 3 July 2013 (**Exhibit CL-4**). See also Crépet-Daigremont Opinion, paras. 27-34 (**Exhibit CER-1**); Nouvel Opinion, paras. 30-39 (**Exhibit CER-2**).

being the promotion and protection of investments.<sup>270</sup>

184. The Claimants accept that States that have consented to MFN clauses should not be faced with an obligation that they never envisaged.<sup>271</sup> However, according to the Claimants, this does not apply in the present case because the Respondent, among other things, agreed to (i) ICSID arbitration under the terms of Article 9 of the France-Mauritius BIT; (ii) the MFN clause in Article 8(2) in the broadest terms; (iii) ICSID arbitration and UNCITRAL arbitration in numerous BITs concluded with third States; (iv) ICSID arbitration in the 2010 Treaty, without excluding it from the scope of the MFN clause.<sup>272</sup>
185. Second, regarding the Respondent's contention that the Claimants must establish jurisdiction before being able to invoke the MFN clause in Article 8(2), the Claimants contest the existence of such a prerequisite.<sup>273</sup> The Claimants stress that no such conditions is foreseen in the Treaty and no such principle exists in international law.<sup>274</sup> Rather, referring to the Nouvel Opinion, the Claimants allege that "hundreds" of (unidentified) national court decisions show that consent to arbitrate need not be included in the Basic Treaty containing the MFN clause.<sup>275</sup> The Claimants state that the authorities cited by the Respondent deal with a different issue: they address the question whether it is possible to *broaden* a tribunal's jurisdiction via the MFN clause, whereas here the Claimants seek to *establish*

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<sup>270</sup> Claimants' Counter-Memorial, para. 71.

<sup>271</sup> Claimants' Counter-Memorial, para. 73.

<sup>272</sup> Claimants' Counter-Memorial, para. 73, referring to dispute settlement clauses concluded by the Republic of Mauritius in BITs (**Exhibit C-23**); Draft Bill authorising Approval of the Agreement between the Government of the Republic of France and the Government of the Republic of Mauritius on the Reciprocal Encouragement and Protection of Investments, registered at the Presidency of the National Assembly on 24 October 2017 (**Exhibit R-4**). The Claimants also noted that the Respondent presents itself as a place of arbitration and has concluded a headquarters agreement with the Permanent Court of Arbitration.

<sup>273</sup> Claimants' Counter-Memorial, paras. 76-84; Claimants' Rejoinder, paras. 53-76. Compare Nouvel Opinion, paras. 11-13 (**Exhibit CER-2**) (who addresses a different problem, i.e. whether the Claimants need to start arbitration proceedings before being able to invoke the MFN clause).

<sup>274</sup> Claimants' Counter-Memorial, paras. 81-82, referring to Crépet-Daigremont Opinion, para. 32 (**Exhibit CER-1**); Nouvel Opinion, paras. 11, 91 (**Exhibit CER-2**). See also Claimants' Counter-Memorial, para. 36, referring to *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on Jurisdiction, 3 July 2013, paras. 61-62 (noting that the commencement of an arbitration is not a prerequisite to invoking a right under an MFN clause) (**Exhibit CL-4**).

<sup>275</sup> Claimants' Rejoinder, paras. 55-56, referring to Nouvel Opinion, para. 14 (**Exhibit CER-2**); Secretariat of the International Law Commission, Summary of jurisprudence of national courts on the most-favoured-nation clause, Yearbook of the International Law Commission, 1973 Vol. II, Document No. A/CN.4/269 (**Exhibit CL-68**).

the Tribunal's jurisdiction based on the MFN clause in the first place.<sup>276</sup>

186. In any event, the Claimants submit that they have a right to arbitration pursuant to Article 9 of the France-Mauritius BIT, which contains a binding and mandatory obligation for the Contracting States.<sup>277</sup> According to Article 9, French nationals benefiting from an agreement relating to investments to be made in the Respondent's territory have a right to arbitration. The Claimants submit that such an agreement within the meaning of Article 9 exists in the form of the No-Objection Letter of 14 October 2014, by which the PMO accepted the Claimants' Project.<sup>278</sup>
187. Third, the Claimants address various arbitral decisions cited by the Respondent, arguing that they are distinguishable from the case at hand, rendered under differently-worded treaties.<sup>279</sup> The Claimants also submit that the Respondent showed its consent to arbitration by signing and ratifying the 2010 Treaty<sup>280</sup> and by its general policy favouring arbitration.<sup>281</sup> The Claimants further note that

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<sup>276</sup> Claimants' Rejoinder, paras. 58-74, referring to *AIY Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction, 9 February 2017, paras. 95, 97 (**Exhibit RL-38**); Z. Douglas, "The MFN Clause in Investment Arbitration – Treaty Interpretation Off the Rails" (2011), (2)1 Journal of International Dispute Settlement 97 (**Exhibit RL-17**); S. Schill, "Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction – A Reply to Zachary Douglas" (2011), 2(2) Journal of International Dispute Settlement, pp. 353-354, 363 (**Exhibit TL-1**).

<sup>277</sup> Claimants' Counter-Memorial, para. 77, referring to G. Bastid-Burdeau, "Nouvelles perspectives pour l'arbitrage dans le contentieux économique intéressant les États", Rev. arb. 1995, No. 1, pp. 11-13 (**Exhibit CL-35**); E. Loquin, Note under Paris Court of Appeal, 1 June 1999, JDI, 2000 p. 381 (**Exhibit CL-9**); Nouvel Opinion, para. 62 (**Exhibit CER-2**). See also Claimants' Rejoinder, para. 87.

<sup>278</sup> Claimants' Counter-Memorial on, para. 78, referring to Letter from the PMO to the Managing Director of the BOI, dated 14 October 2014 (**Exhibit C-7**); *Philip Morris Asia Ltd. v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, para. 513 (**Exhibit CL-8**). See also Nouvel Opinion, paras. 56-59 (**Exhibit CER-2**).

<sup>279</sup> Claimants' Counter-Memorial, paras. 85-97, referring to *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Preliminary Objection, Judgment of 22 July 1952, (1952) I.C.J. Reports 93 (**Exhibit RL-7**); *Venezuela US, S.R.L. v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Interim Award on Jurisdiction, 26 July 2016 (**Exhibit RL-22**); *ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (**Exhibit RL-23**); *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, p. 16, paras. 60 *et seq.* (**Exhibit RL-24**); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (**Exhibit RL-1**); *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, ICSID Case No. ARB/15/21, Award, 6 August 2016, p. 40, para. 130 (**Exhibit RL-2**).

<sup>280</sup> Claimants' Counter-Memorial, para. 100; Claimants' Rejoinder, paras. 80, 126-127. The Claimants also refer to Article 18 of the VCLT stating that "*la Défenderesse ne peut ignorer son obligation de ne pas agir en violation de l'objet et du but de ce nouveau traité*" ("the Respondent cannot ignore its obligation not to act in violation of the object and purpose of this new treaty" (Translation by the PCA)) seeming to suggest that the Respondent should have accepted the application of the arbitration agreement of the 2010 Treaty by anticipation, before the 2010 Treaty entering into force. See Claimants' Rejoinder, paras. 128-129.

<sup>281</sup> Claimants' Counter-Memorial, paras. 109-114.

Article 8(2) of the France-Mauritius BIT allows the application of more favourable provisions in future treaties between France and Mauritius (“*qui viendraient à être souscrites*”) and thus consider that the dispute settlement clause of the 2010 Treaty is accessible to them even though this treaty has not yet entered into force.<sup>282</sup>

### 3. Tribunal’s Decision

188. The second question before the Tribunal, in order to establish its jurisdiction, is whether the Claimants can invoke the arbitration agreement in Article 9 of the Finland-Mauritius BIT on the basis of the MFN clause in Article 8(2) of the France-Mauritius BIT. As a preliminary matter, the Tribunal will determine whether there is an arbitration agreement, or consent to arbitrate, in the France-Mauritius BIT. The Tribunal will then set out the legal standard it applies when assessing whether the MFN clause in Article 8(2) of the France-Mauritius BIT can be used to import the arbitration agreement in Article 9 of the Finland-Mauritius BIT. Finally, the Tribunal will apply this legal standard to the case at hand.

#### (a) *No Consent to Arbitrate in the France-Mauritius BIT*

189. First, the Tribunal will determine whether it can base its jurisdiction on any provision of the France-Mauritius BIT. It is uncontested that the France-Mauritius BIT does not contain an arbitration agreement for investor-State disputes; the Claimants accept that it does not provide for investor-State arbitration “except for contracts.”<sup>283</sup>

190. However, Article 9 of the France-Mauritius BIT contains a provision dealing with investor-State investment contracts. It provides as follows:

*“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>284</sup>

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<sup>282</sup> Claimants’ Counter-Memorial, para. 100.

<sup>283</sup> Notice of Arbitration, para. 42 (“[I]e *TBI franco-mauricien ne prévoit pas d’arbitrage investisseur-Etat hors contrat*”).

<sup>284</sup> France-Mauritius BIT, Article 9 (**Exhibit C-2**) (“Agreements concerning investments to be made in the territory of one of the Contracting States made by nationals, companies or other corporate bodies of the other Contracting State shall contain a clause providing that, in cases where an amicable settlement cannot be reached within a

191. Article 9 thus contains an obligation for the Contracting States to include an arbitration agreement in any possible investment contract they conclude with nationals of the other Contracting State, but no direct consent to arbitrate any future disputes between one Contracting State and a national of the other Contracting State.<sup>285</sup> In 1973, such direct consent to arbitrate was not well-known yet and would only become a commonly used provision in later investment treaties.<sup>286</sup> Accordingly, Article 9 of the France-Mauritius BIT cannot, in and of itself, be the basis for the Tribunal’s jurisdiction.
192. Indeed, the Claimants do not contend that Article 9 can be the basis for the Tribunal’s jurisdiction. Nevertheless, the Claimants submit that they have a “right to arbitration” because the Respondent agreed to an investment contract within the meaning of Article 9 in the form of the No-Objection Letter by which the PMO allegedly accepted the Claimants’ Project.<sup>287</sup>
193. The Tribunal is unconvinced. First, the No-Objection Letter is not an investment contract between the Claimants and the Respondent. It is a letter from the PMO to the BOI, merely noting that “[t]his Office has consulted different stakeholders” and that “[f]ollowing views received” there was “no objection to the [P]roject.”<sup>288</sup> Such a notification, which is not even addressed to the Claimants, falls short of an investment contract within the meaning of Article 9. Second, and in any event, it does not contain an arbitration agreement and therefore cannot be the basis for this Tribunal’s jurisdiction.<sup>289</sup>

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short time, disputes arising in connexion with such investments shall be brought before the International Centre for Settlement of Investment Disputes so that they may be settled by means of arbitration in accordance with the Convention on the settlement of investment disputes between States and nationals of other States.”) (Translation by the PCA).

<sup>285</sup> On this point, the Claimants’ legal expert notes correctly that “*si le consentement que l’Etat s’oblige à donner suppose un acte à réaliser (ici l’introduction dans l’accord relatif à l’investissement d’une clause), il ne paraît pas pouvoir s’analyser comme établissant par lui-même un consentement à la juridiction.*” Nouvel Opinion, para. 73 (**Exhibit CER-2**) (“If the consent which the State undertakes to give presupposes an act to be carried out (here, the introduction of a clause into the investment agreement), it does not seem to be able to be analysed as establishing consent to the jurisdiction by itself.”) (Translation by the PCA).

<sup>286</sup> See Crépet-Daigremont Opinion, para. 12 (**Exhibit CER-1**).

<sup>287</sup> See above, para. 186. See also Nouvel Opinion, paras. 56-59 (**Exhibit CER-2**).

<sup>288</sup> Letter from the PMO to the Managing Director of the BOI, dated 14 October 2014 (**Exhibit C-7**).

<sup>289</sup> For the avoidance of doubt, the Tribunal notes that the appropriate remedy for a violation of Article 9 of the Treaty (i.e. the conclusion of an investment contract between Contracting State A and nationals of Contracting State B which does not contain an arbitration agreement as foreseen in Article 9) would be an arbitration by Contracting State B against Contracting State A pursuant to Article 10 of the Treaty. Compare, for a similar situation, A. Broches, “Bilateral investment protection treaties and arbitration of investment disputes” in *The Art of Arbitration*, Liber Amicorum Pieter Sanders, Kluwer Law and Taxation, 1982, p. 66 (“if the host State refuses to give consent to the jurisdiction [...] after having been asked to do so by a national of its treaty partner, the latter State could demand that the former carry out its obligations under the treaty and, if that State persists

194. Accordingly, since there is no arbitration agreement, or consent to arbitrate, in the France-Mauritius BIT, the Tribunal will next assess whether the Claimants can use the MFN clause in Article 8(2) of the France-Mauritius BIT to import the arbitration agreement contained in Article 9 of the Finland-Mauritius BIT.

**(b) Legal Standard to Apply MFN Clauses to Dispute Resolution**

195. MFN clauses, as defined for instance in the ILC 1978 Draft Articles and Commentary, provide “treatment accorded by the granting State to the beneficiary State [...] not less favourable than treatment extended by the granting State to a third State [...]”<sup>290</sup> Importantly, MFN treatment is not an exception to the general rule of the effect of treaties vis-à-vis third States. The right of the beneficiary State to MFN treatment arises from the MFN clause in the Basic Treaty between the granting State and the beneficiary State and not from a treaty between the granting State and the third State.<sup>291</sup> This principle has been affirmed by the International Court of Justice, notably in the *Anglo-Iranian Oil Company* case.<sup>292</sup>

196. The extent to which MFN clauses apply to procedural obligations, such as the obligation to arbitrate disputes, is a much-debated topic.<sup>293</sup> Some arbitral awards have extended MFN clauses to include

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in its refusal, have recourse to such remedies as may be available under the treaty and other rules of international law binding on the parties, including arbitration, which is provided for in most investment protection treaties.”)

<sup>290</sup> ILC 1978 Draft Articles and Commentary, Article 5 (**Exhibit CL-6 = RL-27**).

<sup>291</sup> ILC 2015 Report, para. 14 (**Exhibit CL-2 = RL-18**).

<sup>292</sup> *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Preliminary Objection, Judgment of 22 July 1952, (1952) I.C.J. Reports 93, pp. 109-110 (holding that the UK was not entitled to invoke the MFN clause in the Basic Treaty because such Basic Treaty did not apply in the first place as a matter of *ratione temporis*, having been concluded in 1857 and 1903 and thus falling outside the scope of Iran’s declaration of its consent to the Court’s jurisdiction under the optional clause in article 36(2) of the Court’s Statute) (**Exhibit RL-7**). Cf. Respondent’s Reply, para. 34, fn. 48 (“The fundamental issue was the fact that the United Kingdom was unable to invoke the third-party treaty containing the consent to arbitration that it was hoping to rely on – regardless of the factual circumstances that limited Iran’s consent.”); Transcript, 12 June 2019, pp. 23-24 (MR Heiskanen: “It was not simply a question of jurisdiction in terms of time or Iran’s consent. The issue was not the effective date of Iran’s consent. The issue was whether the United Kingdom could rely on an MFN clause, solely on an MFN clause, for purposes of invoking Iran’s consent, as expressed in a third-party treaty, to create jurisdiction. The Court made clear that this could not be done.”)

<sup>293</sup> See e.g. arguing in favour of the application of MFN clauses to dispute resolution clauses S. W. Schill, “Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction – A Reply to Zachary Douglas”, (2011) (2) 2 Journal of International Dispute Settlement 353, pp. 363-367 (**Exhibit TL-1**). See also ILC 2015 Report, paras. 145, 148, 162-163 (**Exhibit CL-2 = RL-18**). Compare arguing against e.g. Z. Douglas, “The MFN Clause in Investment Arbitration – Treaty Interpretation Off the Rails”, (2011) (2)1 Journal of International Dispute Settlement 97, p. 107 (**Exhibit RL-17**); C. McLachlan, L. Shore &

arbitration agreements;<sup>294</sup> others have refused to do so.<sup>295</sup> While the Tribunal has paid careful attention to these and other decisions, it is of the opinion that they are only of limited assistance to this Tribunal because they have been rendered under differently-worded treaties and provide no clear generic consensus.

197. The Tribunal is of the view that there is no principled argument for or against the application of an MFN clause to dispute resolution provisions, i.e. there is no general rule that MFN clauses *always* or *never* apply to dispute resolution. Rather, according to the Tribunal, MFN clauses *may* apply to dispute resolution provisions, provided that this is what the contracting States intended. The question is one regarding the intended scope of the relevant MFN clause and thus a matter of interpretation of the provision in question.
198. The Tribunal refers, among other things, to the ILC 2015 Report which states that:

“Although controversial in some of the earlier decisions of tribunals, there is little doubt that in principle MFN provisions are capable of applying to the dispute settlement provisions of BITs. [...] In this sense, the *question is truly one of treaty interpretation that can be answered only in respect of each particular case*. Where the parties have explicitly included the conditions for access to dispute settlement within the framework of their MFN provision, then no difficulty arises. Equally, where the parties have explicitly excluded the application of MFN to the conditions for access to dispute settlement, no difficulty arises. But the vast majority of MFN provisions in existing BITs are not explicit on this point and thus the question of how such provisions are to be interpreted will arise in each case. At the very minimum, however, it can be

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M. Weiniger, “Most-Favoured-Nation Treatment”, in *International Investment Arbitration, Substantive Principles* (Oxford International Arbitration Series, 2nd edn, 2017), p. 350, para. 7.330 (**Exhibit RL-19**).

<sup>294</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000 (**Exhibit CL-3**); *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (**Exhibit CL-5**); *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005 (**Exhibit CL-29**); *RosInvest Co UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, dated “October 2007” (**Exhibit RL-46**); *Impregilo S.p.A v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011 (**Exhibit CL-50**); *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011 (**Exhibit RL-24**).

<sup>295</sup> *Plama Consortium Ltd. v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, pp. 67 *et seq.*, para. 212 (**Exhibit RL-26**); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 15 November 2004 (**Exhibit RL-48**); *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006 (**Exhibit RL-49**); *Plama Consortium Ltd. v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 (**Exhibit RL-26**); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008 (**Exhibit RL-37**); *Renta 4 S.V.S.A. et al v. Russian Federation*, SCC Case No. V024/2007, Award on Preliminary Objections, 20 March 2009 (**Exhibit CL-15**); *ICS Inspection and Control Services Ltd. v. The Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 (**Exhibit RL-11**); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (**RL-1**); *ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013 (**Exhibit RL-23**).

said that *there is no need for tribunals interpreting MFN provisions in BITs to engage in any enquiry into whether such provisions may in principle be applicable to dispute settlement provisions.*<sup>296</sup>

“Whether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise *the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis.*”<sup>297</sup>

199. In interpreting the scope of the MFN clause in Article 8(2) of the Treaty, the Tribunal applies the relevant standards of interpretation pursuant to Article 31 VCLT, namely the ordinary meaning of the terms of the Treaty in its context, as well as its object and purpose. Both the Claimants and the Respondent have unsurprisingly made reference to those interpretative principles.<sup>298</sup>

200. In addition, the Tribunal applies the principle of *ejusdem generis*, which operates as a general limit to the application of MFN clauses. The ILC 1978 Draft Articles and Commentary have set forth the *ejusdem generis* rule in the following terms:

“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>299</sup>

“Under a most-favoured-nation clause the beneficiary State acquires the right to most-favoured-nation treatment only if the granting State extends to a third State *treatment within the limits of the subject-matter of the clause.*”<sup>300</sup>

201. Referring, among other things, to the decision of the International Court of Justice in the *Anglo-Iranian Oil Company* case<sup>301</sup> and the *Ambatielos* tribunal’s holdings,<sup>302</sup> the ILC 1978 Draft Articles and Commentary note that the *ejusdem generis* rule “is generally recognized and affirmed by the jurisprudence of international tribunals and national courts and by diplomatic practice.”<sup>303</sup> The

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<sup>296</sup> ILC 2015 Report, paras. 162-163 (**Exhibit CL-2 = RL-18**) (emphasis added).

<sup>297</sup> ILC 2015 Report, para. 216 (**Exhibit CL-2 = RL-18**) (emphasis added).

<sup>298</sup> See above, paras. 162 *et seq.*, 173.

<sup>299</sup> ILC 1978 Draft Articles and Commentary, Article 9(1) (**Exhibit CL-6 = RL-27**) (emphasis added).

<sup>300</sup> ILC 1978 Draft Articles and Commentary, Article 10(1) (**Exhibit CL-6 = RL-27**) (emphasis added).

<sup>301</sup> *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Preliminary Objection, Judgment of 22 July 1952, (1952) I.C.J. Reports 93, p. 110 (**Exhibit RL-7**).

<sup>302</sup> *Commission of Arbitration established by the Agreement concluded on 24th February 1955 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Greece for the arbitration of the Ambatielos Claim*, Award, 6 March 1956, RIAA, vol. XII, p. 107 (**Exhibit CL-63**).

<sup>303</sup> ILC 1978 Draft Articles and Commentary, commentary to Articles 9 and 10, para. 1 (**Exhibit CL-6 = RL-27**).

Parties have stressed the importance of the *ejusdem generis* rule to interpret MFN clauses.<sup>304</sup>

202. The ILC 2015 Report summarises the legal standard to be applied to the interpretation of MFN clauses as follows:

“The interpretation of MFN clauses is to be undertaken on the basis of the *rules for the interpretation of treaties as set out in the VCLT*. The central interpretative issue in respect of the MFN clauses relates to the scope of the clause and the *application of the ejusdem generis principle*. That is, the scope and nature of the benefit that can be obtained under an MFN provision depends on the interpretation of the MFN provision itself.”<sup>305</sup>

203. Arbitral tribunals have sometimes provided further guidance on the standard of interpretation of MFN clauses, endorsing a restrictive standard with a high threshold for claimants. Because consent to arbitrate must be clear and unequivocal, those tribunals have found that an MFN clause may only be interpreted as extending to the procedural right to arbitrate if there is clear or express language in the MFN clause.<sup>306</sup>
204. The Tribunal agrees with the general principle that consent to arbitrate must be clear and unequivocal and thus cannot be assumed but must be proven by claimants.<sup>307</sup> However, the Tribunal sees no reason to deduce therefrom that an MFN clause must *expressly* refer to dispute resolution for those matters to be included. Indeed, when interpreting an MFN clause, as any other clause in a treaty, the Tribunal applies neither a restrictive nor an expansive but an even-handed approach.<sup>308</sup>

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<sup>304</sup> See above, paras. 168 *et seq.*, 183.

<sup>305</sup> ILC 2015 Report, paras. 213-214 (**Exhibit CL-2 = RL-18**) (emphasis added).

<sup>306</sup> See e.g. *Plama Consortium Ltd. v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, paras. 198-199 (**Exhibit RL-26**); *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, paras. 90-95 (**Exhibit RL-47**). See also *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 67 (**Exhibit RL-37**).

<sup>307</sup> See e.g. *Case Concerning Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, 4 June 2008, (2008) I.C.J. Reports 177, p. 204, para. 62 (**Exhibit RL-3**); *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, pp. 18 *et seq.*, para. 21 (**Exhibit RL-4**); *Corfu Channel (United Kingdom v. Albania)*, Preliminary Objection, Judgment, 25 March 1948, (1948) I.C.J. Reports 15, p. 27 (**Exhibit RL-5**); *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, pp. 620 *et seq.*, para. 40 (**Exhibit RL-6**); *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Preliminary Objection, Judgment of 22 July 1952, (1952) I.C.J. Reports 93, p. 114 (**Exhibit RL-7**).

<sup>308</sup> *ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, para. 382 (**Exhibit RL-23**) (with further references). See also *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on Jurisdiction, 22 November 2002, p. 15, para. 40 (**Exhibit RL-41**); *Sanum Investments Ltd. v. Government of the Lao People's Democratic Republic*,

(c) *Interpretation of the MFN Clause in Article 8(2) of the France-Mauritius BIT*

205. Article 8(2) of the France-Mauritius BIT provides as follows:

*“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>309</sup>

206. Pursuant to Article 31(1) VCLT, looking at the ordinary meaning of its terms of Article 8(2) of the France-Mauritius BIT, the Tribunal finds that the MFN clause contained therein is broadly worded, albeit with one important limitation.

i. *Broad Language of Article 8(2)*

207. The wording of the MFN clause, in particular regarding its scope, is broad in principle. It provides that its beneficiaries shall benefit from more favourable provisions found in existing or future treaties (*“bénéficient également de toutes les dispositions plus favorables que celles du présent Accord”*). In this context, the Tribunal notes in particular that Article 8(2) does not refer to any more favourable “treatment” or “treatment in the territory” which has been interpreted by some tribunals as limiting the scope of MFN clauses,<sup>310</sup> but rather to more favourable *provisions*.

208. Furthermore, the Tribunal is unconvinced by the Respondent’s argument that the wording *“investissements des ressortissants”* should be interpreted as limiting the scope of Article 8(2). The Respondent submits that because it provides MFN treatment for *“les investissements des ressortissants [...] de l’un des Etats contractants,”* the MFN treatment extends only to investments,

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PCA Case No. 2013-13, Judgment of the High Court of Singapore, 20 January 2015 [2015] SGHC 15, p. 45, para. 124 (**Exhibit RL-42**); *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, p. 6, para. 300 (**Exhibit RL-43**).

<sup>309</sup> France-Mauritius BIT, Article 8(2) (**Exhibit C-2**) (“With respect to matters governed by this Treaty other than those referred to in article 7, the investments of nationals, companies or other corporate bodies of one Contracting State shall also benefit from any more favourable provisions than those in this Treaty which may result from international undertakings already entered into or hereafter entered into by the other Contracting State with the first-mentioned Contracting State or with third States.”) (Translation by the PCA).

<sup>310</sup> See e.g. *Plama Consortium Ltd. v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 209 (**Exhibit RL-26**) (“It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.”); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, paras. 217-231 (**Exhibit RL-1**).

but not to investors.<sup>311</sup> According to the Respondent, the right to access dispute resolution is not an accessory to the investment, but rather a personal right of investors, and therefore the MFN clause in Article 8(2) does not apply to dispute resolution.<sup>312</sup>

209. The Tribunal notes that some tribunals have indeed made a distinction between investors and investments, based on the specific wording of the MFN clauses in the treaties they applied.<sup>313</sup> In the present case, however, the Tribunal does not find this distinction to be decisive. The France-Mauritius BIT never refers to “investors” (“*investisseurs*”) in any of its provisions, but rather to “nationals, companies or other corporate bodies” (“*ressortissants, sociétés ou autres personnes morales*”).<sup>314</sup> The Tribunal understands such reference as a reference to possible investors. Article 8(2) thus refers to investments of potential investors (“*les investissements des ressortissants, sociétés ou autres personnes morales*”) and, in those circumstances, construing it as not including investors’ rights would be overly formalistic.

*ii. Limitation of Article 8(2): “matières régies par la présente Convention”*

210. Despite its broad wording in principle, Article 8(2) contains an important limitation. It applies only to matters governed by the France-Mauritius BIT other than those referred to in its Article 7 (“*matières régies par la présente Convention autres que celles visées à l’article 7*”). In other words, the beneficiary of the MFN clause can only benefit from a more favourable provision in a third State treaty if the matter of that provision is also governed by the France-Mauritius BIT, and if it does not fall within Article 7.

211. First, it is clear that matters falling within the ambit of Article 7 are excluded from the scope of the MFN clause. Article 7 deals with tax matters.<sup>315</sup> Dispute resolution does not fall within the ambit of

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<sup>311</sup> See above, para. 165.

<sup>312</sup> See above, para. 165.

<sup>313</sup> See e.g. *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, p. 16, paras. 60 *et seq.* (**Exhibit RL-24**); *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, p. 31, para. 82 (**Exhibit CL-5**); *RosInvest Co UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, dated October 2007, pp. 77 *et seq.*, para. 126 (**Exhibit RL-46**); *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, p. 50, para. 92 (**Exhibit RL-47**).

<sup>314</sup> See e.g. France-Mauritius BIT, Articles 1(2), 2, 3 (**Exhibit C-2**).

<sup>315</sup> Article 7 provides : “*Les personnes physiques et les personnes morales ressortissantes de l’une des Parties ne sont pas assujetties sur le territoire de l’autre Partie à des droits, taxes et contributions, sous quelque dénomination que ce soit, autres ou plus élevés que ceux perçus sur les personnes physiques et les personnes*

Article 7. However, contrary to the Claimants' suggestion,<sup>316</sup> it does not follow from the fact that dispute resolution does not fall with the exception of Article 7 that it is necessarily included in the scope of Article 8(2). Rather, the Claimants still need to establish that the matter falls within one of the matters governed by the Treaty, as expressly provided for by Article 8(2).

212. Second, the question is thus whether the matter covered by the more favourable provision that the Claimants wish to invoke (i.e. Article 9 of the Finland-Mauritius BIT) is also governed by the France-Mauritius BIT, in particular its Article 9.<sup>317</sup> It is undisputed that Article 9 of the *Finland-Mauritius BIT* contains direct consent for investor-State arbitration and thus provides the investor with a right to arbitrate any dispute falling within the scope of the treaty. However, the Parties disagree as to the effect of Article 9 of the *France-Mauritius BIT*. The Respondent argues that it does not deal with investor-State arbitration since it only contains an obligation for the Contracting States to include an arbitration agreement in future investment contracts.<sup>318</sup> For their part, the Claimants argue that Article 9 of the *France-Mauritius BIT* deals with investor-State arbitration because it establishes the conditions under which the Respondent and French nationals are to settle their disputes.<sup>319</sup>
213. The Tribunal notes that both provisions (i.e. Article 9 of the *France-Mauritius BIT* and Article 9 of the *Finland-Mauritius BIT*) mention or contemplate investor-State arbitration. However, under Article 8(2) of the *France-Mauritius BIT*, the relevant test is not whether a matter is *contemplated* by the Treaty but whether it is *governed* by it. This is what the express wording of Article 8(2) requires

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*morales ressortissantes de ladite Partie et se trouvant dans la même situation. Cette disposition ne met pas obstacle à l'octroi par chaque Gouvernement à ses propres ressortissants d'avantages spécifiques préférentiels en matière d'investissements, dans la mesure où ces avantages ne sont pas de nature à fausser les conditions du marché.*" *France-Mauritius BIT (Exhibit C-2)* ("Individuals and legal persons of one of the Parties shall not be subject, in the territory of the other Party, to duties, taxes or contributions of any description which are other or higher than those levied on individuals or legal persons of the latter Party in the same situation. This provision shall not prevent each Government from granting specific preferential advantages to its own nationals with respect to investment to the extent that such advantages do not distort market conditions.") (Translation by the PCA).

<sup>316</sup> See above, para. 76.

<sup>317</sup> The Tribunal notes that this was also the question the *Dawood Rawat* tribunal indicated as being decisive. While the *Dawood Rawat* tribunal did not decide the issue, since it dismissed jurisdiction on a different basis, it indicated that "the question to be resolved would have included defined for MFN purposes the "*matière*" in Article 9 of the *France-Mauritius BIT* and the "*matière*" in Article 9 of the *Finland-Mauritius BIT*, and deciding whether those were of the same kind." *Dawood Rawat v. The Republic of Mauritius*, PCA Case 2016-20, Award on Jurisdiction, 6 April 2018, para. 187 (**Exhibit RL-20**).

<sup>318</sup> See above, paras. 157, 163.

<sup>319</sup> See above, para. 175.

by specifically stating that the MFN clause only applies to matters governed (“*régies*”) by the Treaty.

214. In the Tribunal’s view, Article 9 of the France-Mauritius BIT plainly does not govern investor-State arbitration. As detailed above, it contains an obligation for the Contracting States to include an arbitration agreement in an investment contract, if a Contracting State opts to enter into such a contract with a national of the other Contracting State.<sup>320</sup> In that situation, any dispute between the investor and the State would be governed by the arbitration clause in the contract and not by Article 9. Accordingly, investor-State arbitration is simply not one of the matters governed (“*matières régies*”) by Article 9. The contractual clauses *contemplated* by Article 9 may contain an infinite number of specificities unknown by the drafters of Article 9. The latter therefore could not and does not *govern* dispute resolution with respect to any claim concerning an investment under the France-Mauritius BIT.
215. In sum, for the reasons set out above, taking into account the specific wording of Article 8(2), the Tribunal finds that investor-State arbitration is not a matter governed by the France-Mauritius BIT and therefore the MFN clause contained in Article 8(2) does not extend to this matter. This conclusion, based on the specific wording of the MFN clause, is further confirmed by the *ejusdem generis* principle, discussed in the next section.

**(d) *Ejusdem Generis Principle***

216. As stated above, *ejusdem generis* is a generally recognized principle which operates as a limit to the application of MFN clauses.<sup>321</sup> As correctly pointed out by the Claimants’ legal expert, the limitation in Article 8(2) to “*matières régies par la présente Convention*” is a clear reference to this principle.<sup>322</sup> Its import is that the MFN treatment is limited to “rights which fall within the limits of the subject-matter of the clause.”<sup>323</sup> In the words of the tribunal in the *Ambatielos* case:

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<sup>320</sup> See above, paras. 191-192.

<sup>321</sup> See above, paras. 200-201.

<sup>322</sup> Crépet-Daigremont Opinion, para. 28 (“*La règle ejusdem generis découle de la supposition que les Etats parties à une clause NPF ont nécessairement limité son champ d’application à un domaine convenu de relations [...] en visant ‘les matières régies par la présente Convention’ à l’article 8 al. 2 du TBI, la France et la République de Maurice entendaient certainement rappeler ce principe d’identité de genre.*”) (“The *ejusdem generis* rule stems from the assumption that MFN States Parties have limited its scope to an agreed area of relations ... by referring to ‘matters governed by this Convention’ in Article 8(2) of the BIT, France and the Republic of Mauritius certainly intended to recall this principle of identity of type.”).

<sup>323</sup> ILC 1978 Draft Articles and Commentary, Article 9(1) (**Exhibit CL-6 = RL-27**).

“[...] the most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself related.”<sup>324</sup>

217. The purpose of the *ejusdem generis* rule is to prevent a State, via the application of the MFN clause, from seeing its obligations extended to matters it did not contemplate. As explained by the ILC 1978 Draft Articles and Commentary:

“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 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.*** Thus the rule follows clearly from the general principles of treaty interpretation. States cannot be regarded as being bound beyond the obligations they have undertaken.”<sup>325</sup>

218. The question is therefore whether there is a “substantial identity” between the subject matter of Article 9 of the France-Mauritius BIT and the subject matter of Article 9 of the Finland-Mauritius BIT. The Tribunal is not convinced that this is the case. The two provisions are fundamentally different. Article 9 of the Finland-Mauritius BIT allows Finnish investors to bring arbitral proceedings against France on the basis of direct consent given in that treaty, provided the dispute falls within the scope thereof. Article 9 of the France-Mauritius BIT does not allow French investors to do any such thing. It only allows French investors (or rather: France, as a Contracting State) to impose on the Respondent the inclusion of an arbitration clause in any investment contract it enters into with French nationals. However, the Respondent remains free to choose whether or not to enter into such investment contract and thus whether or not to be bound by an arbitration clause. Accordingly, whereas Finland has given consent to arbitrate treaty-disputes in Article 9 of the Finland-Mauritius BIT, the Respondent has not given any consent to arbitrate – not even with respect to contractual investor-State disputes – in Article 9 of the France-Mauritius BIT. In light of these fundamental differences, there cannot be any substantial identity between the subject matter of the two provisions.

219. Any other solution would result in the Respondent being bound by obligations it did not contemplate and thus would undermine the limits of MFN clauses in international law under the *ejusdem generis* principle. The Respondent did not consent to arbitrate investor-State disputes in the Treaty – whether

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<sup>324</sup> *Commission of Arbitration established by the Agreement concluded on 24th February 1955 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Greece for the arbitration of the Ambatielos Claim*, Award, 6 March 1956, RIAA, vol. XII, p. 107 (**Exhibit CL-63**).

<sup>325</sup> ILC 1978 Draft Articles and Commentary, commentary to Articles 9 and 10, para. 11 (**Exhibit CL-6 = RL-27**) (emphasis added).

for treaty disputes or contractual disputes. Using the MFN clause to import such consent would create new obligations the Respondent never undertook. As pertinently noted by Sir Gerald Fitzmaurice:

“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>326</sup>

220. The Claimants’ argument that the Respondent’s consent could be construed from the Respondent’s actions outside the Treaty (including by having accepted investor-State arbitration in BITs with other States or by favouring arbitration generally<sup>327</sup>) misses the point. The question is not whether the Respondent consented to arbitration *elsewhere*, but whether it consented to it *in* the Treaty, so that the subject matters of the Article 9 of the France-Mauritius BIT and Article 9 of the Finland-Mauritius could be considered of the same kind.
221. The Tribunal further notes that the *Dawood Rawat* tribunal also considered the *ejusdem generis* rule to be the core question for the application of the MFN provision. Even though that tribunal did not decide the issue related to the application of the MFN clause, it noted that the “heart” of the *ejusdem generis* test would have been to compare the “*matières*” of the two provisions in question (i.e. Article 9 of the France-Mauritius BIT and Article 9 of the Finland-Mauritius).<sup>328</sup> In this context, the tribunal further noted that “this would have involved an assessment of the level of granularity at which the ‘*matières*’ needed to be considered [...]”<sup>329</sup> By level of granularity the tribunal meant that “for instance ‘dispute settlement’ is less granular as a ‘*matière*’ than ‘investor-[S]tate dispute settlement,’ which is itself less granular than ‘contractual investor-[S]tate dispute settlement.’”<sup>330</sup>
222. The Tribunal agrees with the approach set out by the tribunal in *Dawood Rawat*. It is not convinced that the modest level of granularity achieved by the expression “dispute settlement” would be sufficient to find that two provisions are of the same kind. For instance, the mere fact that the Respondent agreed to dispute settlement for State-to-State arbitration in Article 10 of the France-

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<sup>326</sup> G. Fitzmaurice, *The Law and Procedure of The International Court of Justice* (Cambridge, 1986), p. 514 (**Exhibit RL-8**).

<sup>327</sup> See above, paras. 184, 187.

<sup>328</sup> *Dawood Rawat v. The Republic of Mauritius*, PCA Case 2016-20, Award on Jurisdiction, 6 April 2018, para. 187 (**Exhibit RL-20**).

<sup>329</sup> *Dawood Rawat v. The Republic of Mauritius*, PCA Case 2016-20, Award on Jurisdiction, 6 April 2018, para. 187 (**Exhibit RL-20**).

<sup>330</sup> *Dawood Rawat v. The Republic of Mauritius*, PCA Case 2016-20, Award on Jurisdiction, 6 April 2018, para. 187, note 156 (**Exhibit RL-20**).

Mauritius BIT cannot be sufficient to conclude that consent to investor-State arbitration could be imported from another treaty. These obligations concern substantially different subject matters. Moreover, for the reasons set out above, the France-Mauritius BIT in fact did not provided consent by the Respondent to arbitrate either investor-State treaty disputes or contractual investor-State disputes. Accordingly, the test set out in *Dawood Rawat* would defeat the Claimants' jurisdictional theory at either level of granularity.

223. Finally, the Tribunal notes that this is an area where other arbitral tribunals – albeit deciding under different treaties and in different contexts – have come to remarkably similar results. Indeed, even though none of the cases concern a situation in which the Basic Treaty lacks *any* consent to arbitrate investor-State disputes,<sup>331</sup> arbitral tribunals have concluded (with varied reasoning) that consent to arbitrate could not be imported via the MFN clause from a third State treaty.

224. For instance, in *Venezuela US, S.R.L. v. The Bolivarian Republic of Venezuela*, the tribunal found as follows:

“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] BIT.”<sup>332</sup>

225. In *AIIY Ltd. v. Czech Republic*, the tribunal explained that:

“[...] where there is no consent to arbitrate certain disputes under the [B]asic Treaty, an MFN clause cannot be relied upon to create that consent unless the Contracting Parties clearly and explicitly agreed thereto.”<sup>333</sup>

226. In the *Daimler Financial Services AG v. Argentine Republic* case, the tribunal noted 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.”<sup>334</sup>

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<sup>331</sup> The only case in which there was a lack of consent in the Basic Treaty containing the MFN clause is different in that it was not an investment treaty. 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, 5 August 2016 (**Exhibit RL-2**).

<sup>332</sup> *Venezuela US, S.R.L. v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Interim Award on Jurisdiction, 26 July 2016, para. 105 (**Exhibit RL-22**).

<sup>333</sup> *AIIY Ltd. v. Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction, 9 February 2017, para. 104 (**Exhibit RL-38**).

<sup>334</sup> *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 204 (**Exhibit RL-1**).

227. Other cases contain similar statements.<sup>335</sup>
228. The only decision cited by the Claimants as stating the contrary, *Garanti Koza LLP v. Turkmenistan*, is actually not on point. In that case, the MFN clause specifically provided that it applied to dispute resolution and it was clear that the Basic Treaty contained at least some form of consent to arbitrate.<sup>336</sup>
229. While the above-mentioned decisions were rendered under differently-worded treaties and in different contexts, and thus do not apply directly to the case at hand,<sup>337</sup> the consistency in results is noteworthy. Indeed, where the Basic Treaty does not contain consent to arbitrate investor-State disputes at all, the Tribunal cannot imagine any circumstances in which the *ejusdem generis* rule would be met. The subject matter of the provision to be imported from a third-State treaty containing consent to arbitrate would always be different from the one in the Basic Treaty containing no consent. The *ejusdem generis* rule constitutes the outer limit of any, even ever so broad, MFN clause.

*(e) Relevance of Post-Treaty Practice*

230. For the sake of completeness, the Tribunal further notes, by reference to the Parties' observations in this respect, that the above solution is also confirmed looking at the context of the Treaty under Article 31 VCLT.
231. First, the Parties have referred to one Contracting State's treaty practice with third States.<sup>338</sup> The Tribunal does not consider these of particular relevance. In the present case, the fact that France and Mauritius have included certain MFN clauses or dispute resolution clauses in treaties with third States does not bind them to a particular interpretation of the relevant provisions of the Treaty concluded between them. In that sense, the ILC 2015 Report noted that:

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<sup>335</sup> See e.g. *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, para. 81 (**Exhibit RL-24**) ("it cannot be assumed that [the Contracting States] intended that the MFN clause should create wholly new rights where none otherwise existed under the [Basic] BIT.").

<sup>336</sup> *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on Jurisdiction, 3 July 2013, paras. 26-29, 42-44 (**Exhibit CL-4**).

<sup>337</sup> The Claimants are thus right to point out that they are not directly relevant to the case at hand. See above, para. 187

<sup>338</sup> See above, para. 184.

“The actions of one State party to a BIT that do not involve the other State party might have some contextual relevance by demonstrating the attitude of one of the parties to the treaty. However, such actions do not fall under (3)(b) of the Vienna Convention, which considers the common intent of the parties but may be taken into account under article 32.”<sup>339</sup>

232. Second, the Parties have also discussed the 2010 Treaty in this respect.<sup>340</sup> As stated above, the Contracting States negotiated and signed (but did not ratify) a new treaty in 2010.<sup>341</sup> While the 2010 Treaty is not in force, it allows for some insight into the Contracting States’ views on the 1973 Treaty. For instance, the draft bill by which the French Parliament was asked to ratify the 2010 Treaty (but failed to do so), noted as follows:

*“À Maurice, les investisseurs français bénéficient de l’accord de protection des investissements (API) signé le 22 mars 1973 et entré en vigueur le 1er 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.”*<sup>342</sup>

233. Had France been convinced that its nationals have access to arbitration via the use of the MFN clause in the 1973 Treaty, it would not have insisted that the investor-State arbitration provision in the 2010 Treaty was one of the reasons the new treaty was needed.

234. The Claimants’ argument that the 2010 Treaty supports the opposite view is not convincing. For instance, the fact that the 2010 Treaty now contains an arbitration agreement with direct consent to

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<sup>339</sup> ILC 2015 Report, para. 182 (**Exhibit CL-2 = RL-18**).

<sup>340</sup> See above, paras. 158, 177, 184, 187.

<sup>341</sup> See above, para. 158.

<sup>342</sup> Draft Bill authorising Approval of the Agreement between the Government of the Republic of France and the Government of the Republic of Mauritius on the Reciprocal Encouragement and Protection of Investments, registered at the Presidency of the National Assembly on 24 October 2017, Statement of Reasons, p. 3 (**Exhibit R-4**) (emphasis added) (“In Mauritius, French investors benefit from the agreement on the protection of investments (API) signed on 22 March 1973 and which entered into force on 1 April 1974. However, this API *presents some weaknesses*. The scope of investor-State dispute settlement is limited because the agreement *presupposes the existence of an arbitration clause in the investment contract*. Yet, in accordance with the evolution of the international law of investments, French treaty practice has evolved to allow investors who have been harmed by the actions of the host State of their investment **to resort to international arbitration on the basis of the consent expressed by the State in the API**. It is therefore essentially to bring this agreement in line with the evolution of treaty practice that a renegotiation was initiated with the Government of Mauritius in 2005.”) (Translation by the PCA).

investor-State disputes does not mean that such a provision should also apply to the 1973 Treaty. To the extent that the Claimants' argument would have the result that the 2010 Treaty should apply even though it has not entered into force,<sup>343</sup> it goes directly against the most basic principles of international law. Even taking into account that the MFN clause in Article 8(2) refers to the application of future obligations to be entered into ("*obligations internationales [...] qui viendraient à être souscrites*") this presupposes that these future obligations come into effect.<sup>344</sup>

235. Moreover, the fact that the 2010 Treaty does not provide for an express exclusion of investor-State dispute settlement from the scope of the MFN clause<sup>345</sup> does not assist in the interpretation of the MFN clause in the 1973 Treaty. Any express exclusion of investor-State dispute settlement from the scope of the MFN clause in the 2010 Treaty (or lack thereof) merely applies to the interpretation of that treaty and not its predecessor.

236. In sum, for the reasons set out above, the Tribunal finds that the Claimants cannot invoke the arbitration agreement in Article 9 of the Finland-Mauritius BIT on the basis of the MFN clause in Article 8(2) of the France-Mauritius BIT. The Tribunal therefore holds that it has no jurisdiction over the Claimants' claims in this case.

## V. COSTS

### A. Respondent's Submissions on Costs

237. The Respondent requests an award on costs in its favour in the amounts of USD 458,875.96 (being the Respondent's counsel legal fees and expenses and the Respondent's in-house expenses) and EUR 225,000 (being the advances of costs paid by the Respondent to the PCA), including interest thereon at the rate of 6-month USD LIBOR + 2% per year, as from the date of this Award, and compounded semi-annually.<sup>346</sup>

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<sup>343</sup> See above, para. 187.

<sup>344</sup> For the same reasons, the Claimants' argument that the Respondent violated Article 18 VCLT by failing to accept the application of the arbitration agreement of the 2010 Treaty by anticipation, before the 2010 Treaty entered into force (see above, footnote 280), is equally mistaken.

<sup>345</sup> See above, para. 177.

<sup>346</sup> Respondent's Submissions on Costs, paras. 2-11, 22-23, 25. See also Respondent's Memorial, para. 96(c); Respondent's Reply, p. 41.

238. According to the Respondent, the successful party is entitled to costs under the UNCITRAL Rules, both for arbitration costs and costs of “legal representation and assistance.”<sup>347</sup> The Respondent argues that it has been “dragged into these proceedings” although the Claimants’ claims lacked “any basis under the France-Mauritius BIT” and that therefore the Claimants should pay the Respondent’s costs in full.<sup>348</sup>
239. Regarding the Claimants’ Submissions on Costs, the Respondent argues among other things that (i) the Claimants have not provided a break-down of their costs;<sup>349</sup> (ii) the Claimants’ internal costs are not recoverable unless there is “justification of reasonableness;”<sup>350</sup> (iii) the Claimants took a deliberate risk in initiating this arbitration;<sup>351</sup> and (iv) the fact that the Claimants are natural persons is of no relevance.<sup>352</sup>

## **B. Claimants’ Submissions on Costs**

240. The Claimants request that the Respondent be ordered to bear the following costs:<sup>353</sup>

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<sup>347</sup> Respondent’s Submissions on Costs, paras. 12-17, referring to UNCITRAL Rules, Article 40(1) and (2); *European Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, Award on Costs, 20 August 2014, p. 18, para. 46 (**Exhibit RL-58**); *Nova Scotia Power Inc. v. The Bolivarian Republic of Venezuela*, UNCITRAL/PCA, Award, 30 August 2010, pp. 7 *et seq.* (**Exhibit RL-59**); *Frontier Petroleum v. Czech Republic*, UNCITRAL/PCA, Final Award, 12 November 2010, para. 542 (**Exhibit RL-60**); *Alps Finance and Trade AG v. Slovak Republic*, Award [redacted], UNCITRAL, 5 March 2011, para. 263 (**Exhibit RL-33 = RL-61**); *ICS Inspection and Control Services Ltd. v. The Argentine Republic*, PCA Case. No. 2010-9, Award on Jurisdiction, 10 February 2012, para. 338 (**Exhibit RL-11 = RL-62**); *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility, 14 June 2013, para. 340 (**Exhibit RL-63**); *Achmea B.V. v. Slovak Republic*, PCA Case. No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, para. 288 (**Exhibit RL-64**); *ST-AD v. The Republic of Bulgaria*, PCA Case. No. 2011-06, Award on Jurisdiction, 18 July 2013, para. 427 (**Exhibit RL-23 = RL-65**).

<sup>348</sup> Respondent’s Submissions on Costs, paras. 18-23.

<sup>349</sup> Respondent Reply on Costs, para. 1.

<sup>350</sup> Respondent Reply on Costs, paras. 2-4, referring to B. Hanotiau, “Chapter 10. The Parties’ Costs of Arbitration”, in Y. Derains and R. Kreindler (eds), *Evaluation of Damages in International Arbitration, Dossiers of the ICC Institute of World Business Law*, Vol. 4 (Kluwer Law International; ICC, 2006), p. 217 (**Exhibit RL-66**); Ph. Cavalieros, “In-House Counsel Costs and Other Internal Party costs in International commercial Arbitration”, 30 *Arb. Intl.* 145 (2014), p. 150 (**Exhibit RL-67**).

<sup>351</sup> Respondent Reply on Costs, para. 8.

<sup>352</sup> Respondent Reply on Costs, para. 9.

<sup>353</sup> Claimants’ Counter-Memorial, para. 115 (“The Claimants request that the Tribunal condemns the Respondent, on the basis of Article 38 of the UNCITRAL Arbitration Rules, to pay the Claimants all of the costs they have incurred in these proceedings.”) (Translation by the PCA).

- “(a) les frais et honoraires payés au Tribunal et au secrétariat de la Cour permanente d’arbitrage;
- (b) les frais et honoraires payés au cabinet Ernst & Young pour leur assistance et représentation dans la présente procédure ;
- (c) les frais et honoraires payés aux deux experts cités par les Demandeurs ;
- (d) tous autres frais exposés dans le cadre de la présente procédure par les Demandeurs, y compris le temps et les coûts consacrés à la gestion de la présente procédure.”<sup>354</sup>

241. The Claimants list their costs as EUR 250,000 (being the advances on costs paid by the Claimants to the PCA), EUR 371,434.26 (being the fees and expenses of the Claimants’ counsel and experts), EUR 30,000 (being a lump sum of EUR 1,000 per day to compensate for the time spent by the First Claimant (10 days) and Second Claimant (20 days)) and EUR 2,180.81 (being the Claimants’ expenses).<sup>355</sup>
242. According to the Claimants, the Tribunal should (i) in case the Tribunal finds it has jurisdiction: order the Respondent to bear those costs in full, including interest at the legal rate as from this Award;<sup>356</sup> and (ii) in case the Tribunal finds it has no jurisdiction: not order the Claimants to bear any of the Respondent’s costs.<sup>357</sup> Regarding the latter scenario, the Claimants refer to their weak financial resources as individuals and to the fact that they had a legitimate belief they could bring the case to arbitration.<sup>358</sup>

### C. Tribunal’s Decision on Costs

243. Article 38 UNCITRAL Rules provides that the Tribunal “shall fix the costs of arbitration in its award” and defines the term “costs” as including:

- “(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;

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<sup>354</sup> Claimants’ Rejoinder, para. 137 (“(i) Costs and fees paid to the Tribunal and the secretariat of the Permanent Court of Arbitration; (ii) Fees paid to Ernst & Young for their assistance and representation in these proceedings; (iii) Fees paid to the two experts mentioned by the Claimants; (iv) Any other costs incurred by the Claimants in this proceeding, including the time and costs involved in the management of this proceeding.”) (Translation by the PCA).

<sup>355</sup> Claimants’ Submissions on Costs, paras. 2-8.

<sup>356</sup> Claimants’ Submissions on Costs, paras. 9-13, referring to UNCITRAL Rules, Article 40(1) and (2).

<sup>357</sup> Claimants’ Submissions on Costs, para. 14.

<sup>358</sup> Claimants’ Submissions on Costs, para. 14.

- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.”

244. Article 40 of the UNCITRAL Rules further provides in its relevant parts:

“(1) Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

(2) With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.”

245. In light of the above, and having carefully considered the Parties’ submissions on costs, the Tribunal decides as follows.

### 1. Arbitration Costs

246. Pursuant to Article 38 of the UNCITRAL Rules, the Tribunal fixes the arbitration costs at EUR 391,692.00. The PCA’s Statement of Account dated 22 August 2019 is annexed to this Award. The PCA will return the surplus (EUR 58,308) to the Parties in equal shares (EUR 29,154 to each Party).

247. Pursuant to Article 40(1) of the UNCITRAL Rules, these arbitration costs “shall in principle be borne by the unsuccessful party” unless the Tribunal determines that an apportionment of the arbitration costs between the parties “is reasonable, taking into account the circumstances of the case.” Arbitral tribunals have interpreted this provision as a presumption in favour of the “costs follow the event” rule.<sup>359</sup>

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<sup>359</sup> See e.g. *European Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, Award on Costs, 20 August 2014, para. 40 (**Exhibit RL-58**); *ICS Inspection and Control Services Ltd. v. The Argentine Republic*, PCA Case. No. 2010-9, Award on Jurisdiction, 10 February 2012, paras. 337-338 (**Exhibit RL-11 = RL-62**); *Achmea B.V. v. Slovak Republic*, PCA Case. No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, para. 287 (**Exhibit RL-64**); *ST-AD v. The Republic of Bulgaria*, PCA Case. No. 2011-06, Award on Jurisdiction, 18 July 2013, paras. 426-427 (**Exhibit RL-23 = RL-65**).

248. In the present case, the Tribunal sees no reason to depart from the presumption established in Article 40(1) of the UNCITRAL Rules. The Claimants were unsuccessful on both prongs of their jurisdictional argument. Accordingly, the Claimants as the unsuccessful Parties should bear the arbitration costs in full. The Claimants therefore are ordered to pay EUR 195,846 to the Respondent, corresponding to its share of the arbitration costs. The payment is to be made within 60 days of the date of this Award. After that date, in case of non-payment, interests are due at the rate of 6-month EUR LIBOR + 2% per year, compounded bi-annually.

## 2. Costs of Legal Representation

249. Article 40(2) of the UNCITRAL Rules deals with costs of legal representation and assistance referred to in Article 38(f). Contrary to Article 40(1) referred to above, Article 40(2) does not establish any presumption that the costs of legal representation and assistance shall be borne by the unsuccessful party. Rather, Article 40(2) of the UNCITRAL Rules provides broad discretion to arbitral tribunals, stating that they “shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.” The only direction given in Article 40(2) is that tribunals shall take “into account the circumstances of the case.”

250. Arbitral tribunals have noted the difference between Articles 40(1) and 40(2), and emphasised the broad discretion provided to them under the latter.<sup>360</sup> In the exercise of this discretion, arbitral tribunals have taken into account not only the relative success of the parties’ claims and defences, but also the proportionality of the prevailing party’s costs to the other’s, the material economy of the way the later marshalled its evidence and submissions, the sobriety and restraint in its choice of arguments, and its cooperativeness and civility with respect to matters of procedure.<sup>361</sup> Needless to say, the recovery of the prevailing party is likely to be higher if it had to face frivolous claims or unreasonable conduct. In addition, one may conceivably take account of the fact that the merits of the claims of a party which failed at the jurisdictional hurdle have not been heard, as opposed to the case of a

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<sup>360</sup> See e.g. *European Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, Award on Costs, 20 August 2014, paras. 40, 53 (**Exhibit RL-58**); *Frontier Petroleum v. Czech Republic*, UNCITRAL/PCA, Final Award, 12 November 2010, para. 541 (**Exhibit RL-60**); *ICS Inspection and Control Services Ltd. v. The Argentine Republic*, PCA Case. No. 2010-9, Award on Jurisdiction, 10 February 2012, para. 339 (**Exhibit RL-11 = RL-62**); *Achmea B.V. v. Slovak Republic*, PCA Case. No. 2013-12, Award on Jurisdiction and Admissibility, 20 May 2014, para. 287 (**Exhibit RL-64**).

<sup>361</sup> See e.g. *Frontier Petroleum v. Czech Republic*, UNCITRAL/PCA, Final Award, 12 November 2010, para. 544 (**Exhibit RL-60**); *ICS Inspection and Control Services Ltd. v. The Argentine Republic*, PCA Case. No. 2010-9, Award on Jurisdiction, 10 February 2012, para. 341 (**Exhibit RL-11 = RL-62**); *European Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17, Award on Costs, 20 August 2014, para. 56 (**Exhibit RL-58**).

claimant whose case has been exposed as invalid in substance.

251. In the present case, all of these factors justify moderation in the apportionment of costs in favour of the Claimants notwithstanding the outcome. Accordingly, taking into account the various circumstances of the case, the Tribunal decides that each Party shall bear its own costs of legal representation and assistance.<sup>362</sup>

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<sup>362</sup> For the avoidance of doubt, this also includes any costs of legal experts and any possible internal costs.

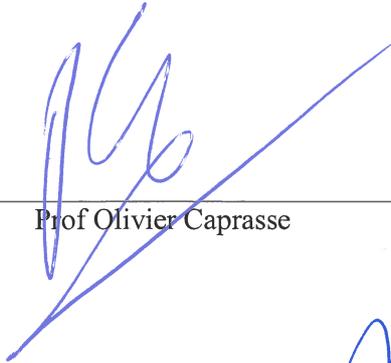
**VI. AWARD**

252. For the foregoing reasons, the Tribunal hereby:

- (a) Decides that it lacks jurisdiction to hear the claims made;
- (b) Fixes the costs of the arbitration at EUR 391,692.00;
- (c) Orders the Claimants to bear the costs of the arbitration and pay to the Respondent its share of EUR 195,846.00 within 60 days of this Award;
- (d) In case of non-payment of the amount in paragraph (c) within the timeframe set therein, orders that the amount shall produce interests at the rate of 6-month EUR LIBOR + 2% per year compounded bi-annually; and
- (e) Orders each Party to bear its own costs of legal representation and assistance.

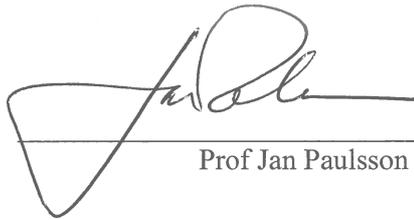
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SIGNED: 23 AUGUST 2019



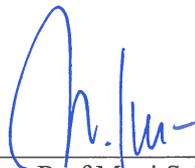
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Prof Olivier Caprasse



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Prof Jan Paulsson



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Prof Maxi Scherer  
(Presiding Arbitrator)

PCA Case No. 2018-37  
Statement of Account

Date: 22 August 2019

	Deposit	Expenses
<b>Parties</b>		
Claimant deposits	225,000.00	
Respondent deposits	225,000.00	
	<b>450,000.00</b>	
<b>Tribunal</b>		
Prof. O. Caprasse VAT		13,001.62
Prof. O. Caprasse fees		61,912.50
Prof. O. Caprasse expenses		639.48
Prof. M. Scherer VAT		25,568.86
Prof. M. Scherer fees		127,595.00
Prof. M. Scherer expenses		2,299.59
Prof. J. Paulsson fees		76,310.00
Prof. J. Paulsson expenses		11,071.62
		<b>318,398.67</b>
<b>Other Tribunal Expenses</b>		
Catering		2,430.00
Courier expenses		731.05
IT/AV support		12,377.80
Printing and Supplies		1,217.53
Bank charges		80.00
		<b>16,836.38</b>
<b>Registry</b>		
PCA expenses		1,335.95
PCA fees		55,121.00
		<b>56,456.95</b>
<b>Total</b>	EUR	
		<b>450,000.00</b>
		<b>391,692.00</b>
<b>Remaining deposit</b>	EUR	
		<b>58,308.00</b>

