

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

**PROFESSOR CHRISTIAN DOUTREMEPUICH &  
MR ANTOINE DOUTREMEPUICH**

Claimants

**VS.**

**THE REPUBLIC OF MAURITIUS**

Respondent

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**RESPONDENT'S REPLY ON JURISDICTION**

29 March 2019

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**Before:**

Professor Maxi Scherer (President)

Professor Olivier Caprasse

Professor Jan Paulsson

**LALIVE**

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## 1 INTRODUCTION

- 1 Pursuant to Procedural Order No. 2 of 14 September 2018, the Republic of Mauritius hereby submits its Reply on Jurisdiction (the “**Reply**”).<sup>1</sup>
- 2 This Reply addresses the arguments made by the Claimants in their Counter-Memorial on Jurisdiction dated 1 February 2019 (the “**Counter-Memorial**”). The Respondent refers to the redacted version of the Counter-Memorial, submitted on 12 March 2019, and does not address the arguments originally made on the basis of inadmissible privileged documents. The Respondent continues to fully rely on its main submissions in its Memorial on Jurisdiction of 23 November 2018 (the “**Memorial**”). For the avoidance of doubt, all the Claimants’ arguments that are not specifically addressed in this Reply are rejected.
- 3 The Counter-Memorial is accompanied by two expert opinions on international law, by Dr Claire Crépet Daigremont (the “**Crépet Daigremont Opinion**”) and Professor Yves Nouvel (the “**Nouvel Opinion**”). The Claimants make only scarce references to the Crépet Daigremont Opinion and the Nouvel Opinion – large parts of the two opinions are indeed never referred to in the Counter-Memorial, and in some instances, they are even inconsistent with the Claimants’ case. The Respondent is only required to respond to the arguments made by the Claimants, and it will therefore only refer to the Crépet Daigremont Opinion and the Nouvel Opinion to the extent that the Claimants have chosen to rely on them.
- 4 In their Counter-Memorial, the Claimants recognise that their attempt to initiate an investor-State arbitration in the absence of consent to arbitrate investor-State disputes in the invoked Treaty is *sui generis*<sup>2</sup> – in other words, such an attempt has rarely been made and never succeeded. From there, every case and authority relied upon by the Claimants and their experts is of no relevance for the purposes of establishing this Tribunal’s

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<sup>1</sup> The terms defined in the Respondent’s Memorial retain the same meaning in this Reply. For ease of reference, all defined terms are listed in **Annex 1** to the present Reply.

<sup>2</sup> Claimants' Counter-Memorial, p. 12 (para. 31) “*La question qui est donc aujourd’hui soumise à l’appréciation du Tribunal est [...] parfaitement inédite*”.

jurisdiction. There has been some debate on whether MFN clauses might be used to enlarge the scope of the jurisdictional provisions of an investment treaty. There has also been some debate, but no consensus has been reached, as to whether, and in what circumstances, such MFN clauses might be relied upon to improve the procedural provisions contained in investment treaties. However, **no tribunal has ever upheld its jurisdiction based on an MFN clause in the absence of State consent in the basic treaty**. That is because, to be able to rely on an MFN clause in the basic treaty, a party must **first** establish standing and prove the tribunal's jurisdiction under that treaty by clear and unequivocal consent to arbitration.

- 5 The Claimants' entire reasoning in the present case is based on an erroneous interpretation of Article 9 of the France-Mauritius BIT. This clause merely provides that investment contracts between a national of a Contracting State and the other Contracting State should contain a clause referring any dispute arising thereunder to arbitration under the auspices of ICSID. Yet the Claimants contend that Article 9 is a dispute resolution clause, even when their own experts do not agree with their position.
- 6 This Reply demonstrates that Article 9 of the BIT is of no help to the Claimants in establishing this Tribunal's jurisdiction. While Article 9 does contain a reference to ICSID arbitration, it is clearly not a dispute resolution clause as it does not contain any consent – direct or “indirect”<sup>3</sup> – to arbitrate. Article 9 merely provides that **if** a Contracting State decides to enter into an investment contract with an investor of the other Contracting State, it should insert an ICSID arbitration clause therein. Therefore, pursuant to Article 9, only when an investment contract is concluded, a decision over which the Contracting States retain full control (*i.e.* the State remains free to decide whether or not to enter into such investment contracts), is the State under an obligation to insert a particular dispute resolution clause to govern disputes arising from that contract. The **consent** would then be contained in the investment contract itself. Article 9 cannot be construed as a dispute resolution clause or a generalised

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<sup>3</sup> Crépet Daigremont Opinion, at **Exhibit CER-1**, p. 4 (para. 12).

consent to arbitrate disputes under the Treaty. The Tribunal therefore lacks jurisdiction *ratione voluntatis*.

- 7 The Claimants' attempt to derive jurisdiction from a mere MFN clause is fundamentally flawed and would have profound consequences in the field of investment treaty arbitration. It effectively undermines the very basis on which international dispute resolution has always relied – international jurisdiction requires clear and unequivocal consent of the State concerned.
- 8 As also demonstrated in the Respondent's Memorial, the Claimants have made no investment in Mauritius. The mere fact that no contract was ever signed with the Mauritian authorities is sufficient to demonstrate that the Claimants' investment was contemplated but never made. There is accordingly also no jurisdiction *ratione materiae*, as the Claimants' minimal pre-investment expenditures do not qualify as a protected investment under the France-Mauritius BIT.
- 9 The present Reply follows the same structure as the Respondent's Memorial, namely:
  - a) **Section 2** demonstrates that the Tribunal lacks jurisdiction *ratione voluntatis* over the Claimants' claims;
  - b) **Section 3** demonstrates that the Tribunal also lacks jurisdiction *ratione materiae* over those claims; and
  - c) **Section 4** sets out the Respondent's request for relief.
- 10 The Reply is accompanied by 21 Legal Authorities (**RLA-37** to **RLA-57**). These are listed in **Annex 2** to the present Reply.

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

- 11 The starting point of establishing jurisdiction *ratione voluntatis* is establishing **clear and unequivocal** consent to investor-state arbitration – a point of principle on which the Parties appear to be in agreement.<sup>4</sup> The Claimants recognise that no such consent to investor-State arbitration is contained in the basic treaty, the France-Mauritius BIT.<sup>5</sup> Rather, the Claimants infer the Respondent's consent from the combination of (i) the inclusion of an MFN clause in the France-Mauritius BIT, allegedly “*rédigée dans les termes les plus larges possibles*”<sup>6</sup> and; (ii) Mauritius' “clear and unequivocal” consent to arbitrate disputes with Finnish investors pursuant to the Finland-Mauritius BIT.<sup>7</sup> The Claimants' convoluted reasoning does not meet the required standard of **strict proof of consent**. The Claimants are unable to prove Mauritius' consent to arbitrate this dispute (**Section 2.1**).
- 12 The Claimants admit in their Counter-Memorial that the France-Mauritius BIT does **not** contain an investor-State dispute resolution clause.<sup>8</sup> They suggest that dispute resolution is one of the “*matières*”, or “subject-matters” governed (“*régies*”) by the Treaty by virtue of its Article 9.<sup>9</sup> However, even the Claimants' own expert considers that Article 9 of the France-Mauritius BIT cannot be construed as a consent to arbitrate disputes of any kind, with anyone.<sup>10</sup> In the absence of consent to arbitrate disputes arising under the Treaty in the France-Mauritius BIT, the Respondent has not consented to arbitrate the present dispute (**Section 2.2**).

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<sup>4</sup> Claimants' Counter-Memorial, p. 12 (para. 30).

<sup>5</sup> Claimants' Counter-Memorial, p. 25 (para. 76) and p. 33 (para. 98).

<sup>6</sup> Claimants' Counter-Memorial, p. 14 (para. 38) (emphasis omitted).

<sup>7</sup> Claimants' Counter-Memorial, p. 27 (para. 82).

<sup>8</sup> Claimants' Counter-Memorial, p. 15 (para. 42).

<sup>9</sup> Claimants' Counter-Memorial, p. 14 *et seq.* (s. II.A.1.a).

<sup>10</sup> Nouvel Opinion, at **Exhibit CER-2**, p. 22 *et seq.* (s. IV.2.b).

- 13 In any event, the Claimants cannot import consent using the MFN provision of Article 8 of the France-Mauritius BIT. In the absence of consent to arbitrate in the basic treaty, that is, the France-Mauritius BIT, **the Claimants lack standing to invoke the MFN clause** in Article 8(2) of the Treaty (**Section 2.3**).
- 14 Finally, even assuming the Claimants were entitled to invoke the MFN clause in Article 8(2) of the France-Mauritius BIT, this does not assist the Claimants as **arbitration agreements are severable** from the main treaty and therefore **cannot be imported from another treaty** on the basis of an MFN clause. Contrary to the Claimants' contention, it is clear from the language of Article 8(2) that it does not apply to dispute resolution, or more particularly to the consent to arbitrate (**Section 2.4**).

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

- 15 As recalled in the Respondent's Memorial,<sup>11</sup> consent to arbitrate is the cornerstone of investment arbitration.<sup>12</sup> Consent to arbitrate cannot be implicit and it cannot be assumed or inferred; it must be proven. Proof of consent is a matter of law, insofar as consent provides the legal basis of international jurisdiction, but it is also a matter of evidence, insofar as consent must be **proven in each and every case**.<sup>13</sup> The tribunal in the *Daimler v. Argentina* case reminded the parties of the underlying principle, "[n]on-consent is the default rule; consent is the exception".<sup>14</sup> Establishing

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<sup>11</sup> Respondent's Memorial, p. 6 (para. 11).

<sup>12</sup> *Dawood Rawat v. the Republic of Mauritius*, Award on Jurisdiction, PCA Case 2016-20, 6 April 2018, at **Exhibit RLA-20**, p. 40 (para. 158).

<sup>13</sup> Respondent's Memorial, p. 8 (para. 18).

<sup>14</sup> *Daimler Financial Services AG v. Argentine Republic*, Award, ICSID Case No. ARB/05/1, 22 August 2012, at **Exhibit RLA-1**, p. 70 (para. 175). See also the explanation provided by the *Menzies v. Senegal* tribunal: "*Premièrement, le Tribunal arbitral constate que le consentement du Sénégal qu'allèguent les Demanderesses, n'est pas exprès, clair et non-équivoque. Or, selon le droit international en général, et selon l'arbitrage d'investissement en particulier, un Etat souverain ne peut pas être assujéti à une juridiction internationale sans son consentement clairement exprimé et non-équivoque. Cette exigence découle du respect de la souveraineté des Etats et du principe qu'en matière de droit international, le consentement des Etats à*



consent therefore requires **affirmative evidence** from the party alleging that consent exists.<sup>15</sup>

- 16 In the same vein, the tribunal in *Wintershall v. Argentina* confirmed that consent cannot be presumed: “A presumed consent is not regarded as sufficient, because any restriction upon the independence of a State (not agreed to) cannot be presumed by courts”.<sup>16</sup>
- 17 The applicable standard of proof is strict.<sup>17</sup> As explained in the Respondent's Memorial, a State's consent to arbitrate must be **unequivocal, voluntary** and **indisputable**.<sup>18</sup> The ICJ has been consistent in recalling that the consent permitting the Court to assume jurisdiction “must be **certain**”.<sup>19</sup>
- 18 The Claimants admit that the France-Mauritius BIT alone is insufficient to establish the consent of the Republic of Mauritius to arbitrate the present dispute.<sup>20</sup> However, for the Claimants, the absence of consent in the basic treaty is not an obstacle to the Tribunal's jurisdiction.<sup>21</sup> Specifically, the

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*l'arbitrage est l'exception, et non pas la règle.*” *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, at **Exhibit RLA-2**, p. 40 *et seq.* (para. 130). One of the Claimants' experts, Professor Nouvel, was counsel for the claimants in this case and his argument that Senegal's consent to arbitration, which was absent from the basic treaty, could be imported from another treaty through an MFN provision, was rejected by the tribunal: 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, at **Exhibit RLA-2**, p. 42 *et seq.* (paras. 135-143).

<sup>15</sup> Respondent's Memorial, p. 9 *et seq.*

<sup>16</sup> *Wintershall Aktiengesellschaft v. Argentine Republic*, Award, ICSID Case No. ARB/04/14, 8 December 2008, at **Exhibit RLA-37**, p. 99 *et seq.* (para. 160(3)) (emphasis omitted).

<sup>17</sup> Respondent's Memorial, p. 7 (para. 16).

<sup>18</sup> Respondent's Memorial, p. 6 *et seq.* (paras. 15, 19-23).

<sup>19</sup> *Case Concerning mutual assistance in criminal matters (Djibouti v. France)*, Judgment of 4 June 2008, (2008) *I.C.J. Reports* 177, at **Exhibit RLA-3**, p. 204 (para. 62) (emphasis added).

<sup>20</sup> Claimants' Counter-Memorial, p. 22 (para. 67).

<sup>21</sup> Claimants' Counter-Memorial, p. 27 (para. 82).

Claimants contend that it is not necessary to establish the jurisdiction of the Tribunal under the basic treaty to be able to rely on the MFN clause contained therein.<sup>22</sup> The Claimants further argue that in the present circumstances, the Respondent's "unconditional, clear and unequivocal consent" to arbitrate a dispute under the Treaty can be found in the Finland-Mauritius BIT.<sup>23</sup>

- 19 The Claimants' reasoning defies logic. As demonstrated in the Memorial,<sup>24</sup> the Finland-Mauritius BIT (concluded almost thirty-five years after the France-Mauritius BIT) contains Mauritius' consent to arbitrate disputes with Finnish investors, arising under that treaty. It is *res inter alios acta*.<sup>25</sup>

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

- 20 As also demonstrated in the Memorial, it is black letter international law that the fundamental basis of jurisdiction *ratione voluntatis* of an investment treaty tribunal is the State's consent to arbitrate disputes with a foreign investor arising under the treaty.<sup>26</sup>
- 21 The Claimants do not argue that Article 9 of the BIT would contain unconditional consent to arbitrate as such. They argue that "[l]'article 9 du Traité a pour objet de fixer les conditions dans lesquelles la Défenderesse et des ressortissants français doivent régler leur différend."<sup>27</sup> In doing so,

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<sup>22</sup> Claimants' Counter-Memorial, p. 25 (s. C).

<sup>23</sup> Claimants' Counter-Memorial, p. 33 (para. 98) "*En conclusion de ces développements, les Demandeurs considèrent que le consentement au présent arbitrage de la Défenderesse résulte en premier lieu du consentement inconditionnel, clair et non équivoque de la Défenderesse à l'arbitrage accordé aux investisseurs finlandais en 2007*".

<sup>24</sup> Respondent's Memorial, p. 16 (para. 38).

<sup>25</sup> *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Preliminary objection, Judgment of 22 July 1952, (1952) *I.C.J. Reports* 93, at **Exhibit RLA-7**, p. 109. See also VCLT Article 34, which provides that "[a] treaty does not create either obligations or rights for a third State without its consent".

<sup>26</sup> Respondent's Memorial, p. 11 (para. 25).

<sup>27</sup> Claimants' Counter-Memorial, p. 15 (para. 42).

the Claimants misinterpret the clause. In fact, Article 9 does not “set the conditions under which the Respondent and French investors must settle their dispute”; it merely sets out a commitment by the Contracting States to include an ICSID dispute resolution clause in any potential future investment contracts.

- 22 The Claimants and the Crépet Daigremont Opinion rely heavily on the allegedly mandatory nature of Article 9.<sup>28</sup> The Claimants state that:

*“l'article 9 du Traité a bien pour objet de fixer un mode de règlement des différends **obligatoire** pour tout accord relatif à des investissements à effectuer par des ressortissants français à Maurice”.*<sup>29</sup>

- 23 The Claimants proceed to allege that Article 9 of the France-Mauritius BIT gives them a “right” to investor-State arbitration.<sup>30</sup>

- 24 However, Article 9 cannot be construed as an obligation on the State to arbitrate any future investment disputes with any investor – except if it chooses to enter into an investment contract with an investor of the other Contracting State. Consequently, the Contracting States’ obligation to arbitrate resulting from Article 9 of the France-Mauritius BIT is strictly conditional, that is, it is subject to the States’ unrestricted contractual freedom to choose whether or not to enter into such contracts. The Nouvel Opinion acknowledges as much:

*“[S]i 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”.*<sup>31</sup>

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<sup>28</sup> Claimants' Counter-Memorial, p. 27 (para. 82), citing to Crépet Daigremont Opinion, at **Exhibit CER-1**, p. 12 (para. 32).

<sup>29</sup> Claimants' Counter-Memorial, p. 17 (para. 49) (emphasis added).

<sup>30</sup> Claimants' Counter-Memorial, p. 25 *et seq.* (s. II.C.1).

<sup>31</sup> Nouvel Opinion, at **Exhibit CER-2**, p. 24 (para. 73).

- 25 The Respondent agrees with the Nouvel Opinion that **Article 9** of the France-Mauritius BIT is **not a dispute-resolution clause and contains no consent** to this Tribunal's – or indeed any other tribunal's – jurisdiction. The only obligation resulting from Article 9 is for the State to include a dispute resolution clause in future investment contracts, if it chooses to enter into any such contracts. No restriction is placed on the Contracting States' freedom to enter or not into such contracts. The use of the future tense (*i.e.* “*investissements à effectuer*”, “*comporteront*”)<sup>32</sup> shows that the Contracting States' obligation to include an ICSID arbitration clause in an investment contract is conditional on their right to choose whether or not to enter into any such contracts in the first place.
- 26 This was also the interpretation of Aron Broches, the main drafter of the ICSID Convention and founding Secretary-General of ICSID:
- “If the host State refuses to give consent to the jurisdiction of the Centre 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 obligation under the treaty and, if that State persists in its refusal, have recourse to such remedies as may be available under the treaty or other rules of international law binding on the parties, including arbitration which is provided for in most investment protection treaties. The above-quoted provision would not, however, by itself, enable the investor to institute proceedings before the Centre. A request to that effect would presumably be rejected by the Secretary-General of the Centre since the absence of the host State's consent, a crucial requirement of the Centre's jurisdiction, would be clear on the face of the request”.<sup>33</sup>
- 27 Consequently, French “*ressortissants*” having invested in Mauritius do not benefit from any existing “right” to arbitrate their investment disputes as

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<sup>32</sup> France-Mauritius BIT, at **Exhibit CLA-1**, p. 477 (Art. 9).

<sup>33</sup> A. Broches, Bilateral investment protection treaties and arbitration of investment disputes, in J. Schultz and A. J. Van der Berg (eds.), *The Art of Arbitration, Essays on International Arbitration, Liber Amicorum Pieter Sanders*, (Antwerp/Boston/London/Frankfurt 1982) 66, at **Exhibit CL-37**, p. 66, quoted in Nouvel Opinion, at **Exhibit CER-2**, p. 20. (para. 66).

wrongly submitted by the Claimants.<sup>34</sup> This “right” is only granted to specific investors who have entered into an investment contract with a Contracting State, and only to the extent of arbitrating disputes arising under the investment contract in question. The Respondent has never signed any such investment contract with the Claimants.

- 28 The Claimants alternatively argue that the no-objection letter sent by the Prime Ministers' Office on 14 October 2014<sup>35</sup> would constitute an “admission of the Claimants' project” and accordingly an “*accord*” or “agreement” as required under Article 9 of the Treaty.<sup>36</sup> This is, with respect, nonsense. The “*accord[s] d'investissements*” referred to in Article 9 are “investment contracts” not the “acceptance of a given project” (which was in any event never granted, as discussed in paragraphs 103 to 106 below). There never was any investment contract between Mauritius and the Claimants, and even assuming there had been one, and the contract neglected to include an ICSID clause, this would be a breach by Mauritius of a substantive obligation under the BIT, which could only be enforced by France, in accordance with the State-to-State arbitration procedure set out in Article 10 of the BIT. The Claimants would have no standing to invoke the Treaty and therefore no right under the Treaty to arbitrate any such dispute.
- 29 The Claimants further argue that no specific consent in the present case is required, as the Respondent has indicated its consent by the “obligations to which it has formally subscribed as well as its conduct.”<sup>37</sup> This includes more particularly the BITs it has concluded with other European States containing consent to investor-state arbitration,<sup>38</sup> entering into the 2010

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<sup>34</sup> Claimants' Counter-Memorial, p. 33 (para. 99).

<sup>35</sup> Lettre du BPM au BOI en date du 14 octobre 2014, at **Exhibit C-7**.

<sup>36</sup> Claimants' Counter-Memorial, p. 26 (para. 78) “[L]a lettre de non-objection du BPM en date du 14 octobre 2014 est constitutive d'une admission du projet des Demandeurs et, partant, d'un accord.”

<sup>37</sup> Claimants' Counter-Memorial, p. 34 (para. 102) “La Défenderesse a consenti à l'arbitrage pour le différend avec les Demandeurs tant par les obligations qu'elle a formellement souscrites que par son comportement.”

<sup>38</sup> Claimants' Counter-Memorial, p. 36 *et seq.* (para. 110).

France-Mauritius BIT<sup>39</sup> (which is not in force) and positioning itself “as a ‘place’ of international arbitration”.<sup>40</sup> This argument is not serious: none of these acts come close to constituting clear, unequivocal and specific consent – in the case of the last act there is no consent at all.

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

- 30 The Claimants complain that the Respondent is guilty of confusing “dispute resolution clauses”, with “consent to arbitrate” and “arbitration agreement”.<sup>41</sup> In reality it is the Claimants whose entire case is based on the argument that the BIT contains a **dispute resolution clause**,<sup>42</sup> although this is irrelevant: the question is rather whether the France-Mauritius BIT contains Mauritius’ **consent** to arbitrate disputes arising under the Treaty with French investors.
- 31 Although the France-Mauritius BIT provides consent to arbitrate State-to-State disputes (and as such it contains a “dispute resolution clause”),<sup>43</sup> it does **not** contain any consent to arbitrate disputes with investors of the other State party.<sup>44</sup> Only such consent could give the investor the right to invoke, and the Tribunal the right to consider, other clauses of the BIT, such as the MFN clause.
- 32 The Claimants contend that, by requesting that the Tribunal first establishes its jurisdiction through a valid consent to arbitrate disputes with investors before being able to rely on the MFN clause, the Respondent

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<sup>39</sup> Claimants' Counter-Memorial, p. 37 (para. 112).

<sup>40</sup> Claimants' Counter-Memorial, p. 37 (para. 113) “*En troisième lieu, il convient de rappeler le fait que la Défenderesse se positionne aujourd’hui comme une ‘place’ de l’arbitrage international.*”

<sup>41</sup> Claimants' Counter-Memorial, p. 25 (para. 76).

<sup>42</sup> See e.g. Claimants' Counter-Memorial, p. 13 *et seq.* (paras. 34-50, 61).

<sup>43</sup> France-Mauritius BIT, at **Exhibit CLA-1**, p. 476 (Art. 10).

<sup>44</sup> See e.g. “Mapping of the IIA” by the UNCTAD Investment Policy Hub Website (visited in November 2018), at **Exhibit R-1**, p. 4 *et seq.*, where it is stated “SSDS – yes” and “ISDS – No”.

would be “adding” a condition to the application of the MFN clause that is not required under the France-Mauritius BIT.<sup>45</sup> Citing the *Nouvel Opinion*, the Claimants suggest that such a “condition” would not be acceptable as “*elle reviendrait finalement à imposer en matière juridictionnelle de recourir à la clause la moins favorable pour obtenir le bénéfice de la disposition la plus favorable*”.<sup>46</sup> This approach is flawed.

- 33 The order in which the analysis is performed to establish the Tribunal’s jurisdiction is of tantamount importance. In the absence of consent to arbitrate disputes with investors in the basic treaty, a tribunal seized by an investor simply does not have power to examine the other clauses contained in such treaty. This does not mean relying on the “less favourable provision” to obtain the benefit of the “more favourable provision”, but rather respecting the cardinal difference between “dispute resolution” provisions and “consent”. One may enter into the debate of whether dispute resolution is covered by the MFN clause only **after** jurisdiction to interpret that clause has been established.
- 34 This is also what the ICJ emphasised in the *Anglo-Iranian Oil* case discussed in the Memorial.<sup>47</sup> The Claimants’ attempt to distinguish this case, as well as the numerous investment treaty decisions that followed it<sup>48</sup> and confirmed that consent must be established before the scope of the MFN clause can be determined,<sup>49</sup> is in vain. The Claimants’ contention that

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<sup>45</sup> Claimants' Counter-Memorial, p. 27 (para. 81).

<sup>46</sup> Claimants' Counter-Memorial, p. 27 (para. 81) citing to *Nouvel Opinion*, at **Exhibit CER-2**, p. 7 (para. 11).

<sup>47</sup> Respondent's Memorial, p. 15 *et seq.* (paras. 36-38), discussing *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran)*, Preliminary objection, Judgement of 22 July 1952, (1952) *I.C.J. Reports* 93, at **Exhibit RLA-7**, p. 109 and Individual (Concurring) Opinion of President McNair, 22 July 1952, at **Exhibit RLA-16**, p. 122.

<sup>48</sup> Claimants' Counter-Memorial, p. 28 *et seq.* (paras. 86-96). The *Nouvel Opinion*, by contrast, argues that the issue in the *Anglo-Iranian Oil* case was one of *ratione temporis*: See *Nouvel Opinion*, at **Exhibit CER-2**, p. 10 *et seq.* (paras. 22-24). This is, with respect, sophistry. 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.

<sup>49</sup> See Respondent's Memorial, p. 19 *et seq.* (paras. 45-49), citing to *Venezuela US, S.R.L. v. The Bolivarian Republic of Venezuela*, Interim Award on Jurisdiction, PCA

“every solution systematically depends on the exact terms of the MFN clause in question”<sup>50</sup> again entirely misses the point. It is a corollary of the confusion that the Claimants seek to sow between dispute resolution provisions and consent. Whether the MFN clauses interpreted by the ICJ and the numerous investment tribunals cited cover dispute resolution or not is irrelevant. On the preliminary question of whether the basic treaty provides consent to consider the scope of the MFN clause, the cases establish a *jurisprudence constante*, confirming the underlying legal principle.

- 35 Adding to that *jurisprudence constante*, the *AIYY v. Czech Republic* tribunal recently reached a similar conclusion, in unequivocal terms:

“The arbitral jurisprudence cited above confirms that where there is no consent to arbitrate certain disputes under the basic Treaty, **an MFN clause cannot be relied upon to create that consent** unless the Contracting Parties clearly and explicitly agreed thereto.”<sup>51</sup>

- 36 The Nouvel Opinion specifically disagrees with this conclusion that there is a *jurisprudence constante* on the need to establish consent before considering the scope of the MFN clause, alleging that it would be contradicted by “hundreds of decisions” of national courts.<sup>52</sup> This

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Case No. 2013-34, 26 July 2016, at **Exhibit RLA-22**; *ST-AD GmbH v. The Republic of Bulgaria*, Award on Jurisdiction, PCA Case No. 2011-06, 18 July 2013, at **Exhibit RLA-23**; *Hochtief AG v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/07/31, 24 October 2011, at **Exhibit RLA-24**; *Daimler Financial Services AG v. Argentine Republic*, Award, ICSID Case No. ARB/05/1, 22 August 2012, at **Exhibit RLA-1**; *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, at **Exhibit RLA-2**.

<sup>50</sup> Claimants' Counter-Memorial, p. 32 (para. 97) “*Car, en réalité, chaque solution est systématiquement dépendante des termes précis de la clause MFN en cause.*”

<sup>51</sup> *AIYY Ltd. v. Czech Republic*, Decision on Jurisdiction, ICSID Case No. UNCT/15/1, 9 February 2017, at **Exhibit RLA-38**, p. 26 (para. 104) (emphasis added); See also *Venezuela US, S.R.L. v. The Bolivarian Republic of Venezuela*, Dissenting Opinion of Professor Marcelo G. Kohen, PCA Case No. 2013-34, 26 July 2016, at **Exhibit RLA-39**, p. 14 *et seq.* (para. 32).

<sup>52</sup> Nouvel Opinion, at **Exhibit CER-2**, p. 8 (para. 14).



contention is not followed by any citation to any of such alleged decisions, and therefore remains unproven.

- 37 In any case, the argument is misplaced. Whether a party may invoke a specific provision of a treaty before national courts is not a matter of jurisdiction, as national courts' jurisdiction does not derive from a State's consent in a treaty but from its domestic law; it is a matter of admissibility, depending on whether a treaty has a direct effect or must be transposed into domestic law.
- 38 The Claimants further rely on the *Garanti Koza* decision on the basis that, in that case, the tribunal allegedly responded negatively to the "*question de savoir si la compétence du tribunal arbitral doit être d'abord établie en application du traité de base avant tout examen du jeu de la clause MFN*".<sup>53</sup>
- 39 The *Garanti Koza* case is irrelevant to the present Tribunal. In fact, in that case, as in **every** decision cited by the Claimants (see paragraph 68 below), the basic treaty contained a dispute resolution clause, expressing the States' consent to arbitrate disputes with investors.<sup>54</sup> The question was therefore not whether consent could be imported *via* an MFN clause,<sup>55</sup> but rather

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<sup>53</sup> Claimants' Counter-Memorial, p. 14 (para. 36).

<sup>54</sup> Article 8(1) of the UK-Turkmenistan BIT provides: "(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of four [months] from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes." See *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Décision sur la compétence du 3 juillet 2013, at **Exhibit CL-4**, p. 9 (para. 17).

<sup>55</sup> On this issue, see e.g. Claire Crépet Daigremont, "L'extension jurisprudentielle de la compétence des tribunaux arbitraux du CIRDI", in TP. Kahn & T. Wälde (eds.), *Les aspects nouveaux du droit des investissements internationaux* (Brill Nijhoff Leiden, 2007) 453, at **Exhibit RLA-40**, p. 514, where the Claimants' expert explains why MFN should not extend to consent: "*Seul un traitement plus avantageux peut en effet être acquis par le mécanisme de la clause de la nation la plus favorisée. Or, si les conditions de recevabilité d'une requête peuvent être plus favorables d'un traité à un autre (un délai de six mois est plus avantageux qu'un délai de dix-huit mois), le consentement d'un Etat à la compétence d'une juridiction s'analyse plus difficilement en termes d'avantages consentis. Il semble donc que l'on puisse encore douter de*

whether ICSID arbitration could be initiated where a formal requirement under the treaty for this specific form of dispute resolution was missing (*i.e.* that the consent be expressed “in writing”) by virtue of an MFN clause.<sup>56</sup>

- 40 It is also in the context of this issue – namely whether the jurisdictional provisions of the basic treaty should be enlarged, or the procedural provisions improved, by the use of an MFN clause – that one should consider the contribution of Stephan Schill, as requested by the Tribunal in its letter of 25 February 2019. Professor Schill was responding to the article by Professor Zachary Douglas that had considered the following question:

“Whether the jurisdiction of an international tribunal established in accordance with the terms of the basic treaty can be expanded by incorporating the more favourable ‘treatment’ reflected in the jurisdictional provisions of a third treaty through the investor’s invocation of the most-favoured-nation (MFN) clause in the basic treaty.”<sup>57</sup>

- 41 Accordingly, the issue considered by both academics was not whether consent can be provided by the use of an MFN clause, but whether jurisdiction can be expanded, once consent is established in the basic treaty. On the former issue, critical for present purposes, Professor Schill had provided his view, which is that no such consent can be imported through an MFN provision, in the 2009 article cited in the Memorial.<sup>58</sup> This was also confirmed in his later article, in which he states that:

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*l’applicabilité de la clause de la nation la plus favorisée pour étendre le consentement d’un Etat à la compétence d’un tribunal CIRDI.*” (emphasis added).

<sup>56</sup> *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Décision sur la compétence du 3 juillet 2013, at **Exhibit CL-4**, p. 18 *et seq.* (paras. 38-39).

<sup>57</sup> Z. Douglas, “The MFN Clause in Investment Arbitration - Treaty Interpretation Off the Rails”, (2011) (2)1 *Journal of International Dispute Settlement* 97, at **Exhibit RLA-17**, p. 97.

<sup>58</sup> Respondent's Memorial, p. 27, quoting from S. W. Schill, "Multilateralizing Investment Treaties through Most-Favored-Nation Clauses", (2009), 27(2), *Berkeley Journal of International Law* 496, at **Exhibit RLA-28**, p. 557.

“[t]he issue [...] is not whether a jurisdictional agreement based on the dispute settlement provisions of the basic treaty can be retroactively amended, but whether the MFN clause itself, in connection with the **broader consent** in another BIT, constitutes a title to jurisdiction.”<sup>59</sup>

- 42 While the Respondent is in agreement with Professor Schill on this basic question that consent cannot be imported wholesale from another treaty, it disagrees with his proposition that the severability doctrine is limited to commercial arbitration agreements.<sup>60</sup> Its application to jurisdictional provisions in treaties has been confirmed by the ICJ in a judgment that Professor Schill ignores,<sup>61</sup> and followed by arbitral tribunals that he does not discuss.<sup>62</sup>
- 43 The Respondent also submits that the critical issue for the debate is not one of “granting access to justice”, as Professor Schill suggests.<sup>63</sup> The investor always has access to domestic courts, as well as to diplomatic protection in many instances, including the present one. The issue is therefore simply, and merely, whether there is a consent to arbitrate that allows the investor to choose between domestic litigation and arbitration, not whether there is access to justice at all.

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<sup>59</sup> 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, at **Exhibit TLA-1**, p. 363.

<sup>60</sup> 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, at **Exhibit TLA-1**, p. 366.

<sup>61</sup> *Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment of 18 August 1972, (1972) *I.C.J. Reports* 46, at **Exhibit RLA-25**, p. 53 *et seq.* (para. 16) and p. 64 *et seq.* (paras. 31-32). See also Section 2.4.2 below.

<sup>62</sup> See *e.g. Plama Consortium Ltd v. the Republic of Bulgaria*, Decision on Jurisdiction, ICSID Case No. ARB/03/24, 8 February 2005, at **Exhibit RLA-26**, p. 68 (para. 212).

<sup>63</sup> 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, at **Exhibit TLA-1**, p. 367.

- 44 Professor Schill goes on to explain that his views are based on his “own underlying ideological preferences for a broad application of MFN clauses, [...] a choice pro-international law and pro-international dispute settlement at the expense of settling disputes in domestic courts.”<sup>64</sup> While it is the proper role of academics to engage in such debate in order to potentially contribute to the future development of the law (through differently drafted treaties), an international tribunal cannot base its decision on “ideological preferences”.
- 45 To conclude, in the present case, Mauritius has not consented to arbitrate investor-State disputes under the France-Mauritius BIT, and such consent cannot be “imported” through the MFN clause of the France-Mauritius BIT. This is because, in the absence of a dispute resolution clause in the basic treaty (the France-Mauritius BIT), the Claimants **have no standing** to invoke the MFN clause of that treaty in the first place.

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

- 46 Even assuming that the Claimants would have standing to invoke the MFN clause in Article 8 of the France-Mauritius BIT (which they do not), their case must fail.
- 47 The Claimants recognise that Article 8 of the Treaty must be interpreted in accordance with the “ordinary meaning” rule of VCLT Article 31(1). The Claimants further admit that relevant rules of international law, such as the *ejusdem generis* rule<sup>65</sup> or the *effet utile* rule,<sup>66</sup> should also be taken into account. The most important rule of international law for present purposes,

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<sup>64</sup> 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, at **Exhibit TLA-1**, p. 370. Dr Crépet Daigremont appears to share this ideological bent: see Crépet Daigremont Opinion, at **Exhibit CER-1**, p. 5 (para. 15): “*D’autres [tribunaux] ont fort heureusement rejeté l’argument [que la clause NPF ne pouvait jouer en matière procédurale].*” (emphasis added).

<sup>65</sup> Claimants' Counter-Memorial, p. 22 *et seq.* (s. B)

<sup>66</sup> Claimants' Counter-Memorial, p. 17 (para. 51).

however, is the one pertaining to the severability of dispute resolution provisions.

- 48 In the present case, the language of Article 8 of the France-Mauritius BIT makes it clear that it does not apply to consent to treaty-based investor-state dispute resolution. This is the case whether, in determining its meaning, one applies the rule of interpretation in VCLT Article 31(1) (**Section 2.4.1**), or other applicable rules of international law, namely the rule of severability (**Section 2.4.2**); the *ejusdem generis* rule (**Section 2.4.3**); or the *effet utile* rule (**Section 2.4.4**).

#### **2.4.1 Interpretation of Article 8 of the France-Mauritius BIT under Article 31(1) of the VCLT**

- 49 The Claimants do not dispute that the language of the MFN clause is the starting point of its interpretation.<sup>67</sup> The Claimants in their Counter-Memorial attempt to provide an interpretation of Article 8(2) of the BIT ostensibly in accordance with VCLT Article 31(1).<sup>68</sup>
- 50 The Claimants propose a literal interpretation of Article 8(2) of the France-Mauritius BIT and conclude that the wording of the clause would be so broad that Article 8(2) must be interpreted as applying to dispute resolution matters.<sup>69</sup> Based on other elements of the VCLT Article 31(1), they go as far as stating that the object of the BIT is to “*apporter la meilleure protection possible à ses bénéficiaires*”.<sup>70</sup>
- 51 Article 31 of the VCLT requires neither a broad nor a restrictive approach to interpretation.<sup>71</sup> It is a truism that the purpose of any BIT is to protect investments, but it does not follow from this general proposition that every

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<sup>67</sup> Claimants' Counter-Memorial, p. 13 (para. 35).

<sup>68</sup> Claimants' Counter-Memorial, p. 14 (para. 37).

<sup>69</sup> Claimants' Counter-Memorial, p. 14 (para. 38).

<sup>70</sup> Claimants' Counter-Memorial, p. 22 (para. 68).

<sup>71</sup> *United Parcel Service of America Inc. v. Government of Canada*, Award on Jurisdiction, ICSID Case No. UNCT/02/1, 22 November 2002, at **Exhibit RLA-41**, p. 15 (para. 40).

ambiguity, or alleged ambiguity, found in such treaties should be resolved in favour of the investor.<sup>72</sup> Such an argument confuses the purpose of the treaty with its interpretation.

- 52 As noted by the Tribunal in *Saluka v. Czech Republic*, a balanced interpretation of BITs is to be favoured:

“The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties’ economic relations. That in turn calls for a **balanced approach** to the interpretation of the Treaty’s substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties’ mutual economic relations.”<sup>73</sup>

- 53 The Claimants’ entire reasoning is based on “dispute resolution” being a “*matière*” governed by the Treaty and not expressly excluded from Article 8(2). Based on that premise, the Claimants examine whether Article 9 of the Finland-Mauritius BIT is more favourable than Article 9 of the France-Mauritius BIT and conclude that more favourable provisions contained in Article 9 of the Finland-Mauritius BIT can be imported to the basic Treaty.
- 54 As discussed in paragraphs 21-27 above, the Claimants’ interpretation of Article 9 of the BIT is misguided. The issue covered by Article 9 is the Contracting States’ obligation to include an ICSID arbitration clause, if they choose to enter into an investment contract with an investor of the other Contracting State. It does not contain consent to arbitrate. But even assuming that it did, this would merely be consent to contractual arbitration, not to treaty arbitration, which is an entirely different issue,

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<sup>72</sup> *Sanum Investments Limited v. Government of the Lao People's Democratic Republic*, Judgment of the High Court of Singapore, PCA Case No. 2013-13, 20 January 2015 [2015] SGHC 15, at **Exhibit RLA-42**, p. 45 (para. 124).

<sup>73</sup> *Saluka Investment B.V. v. The Czech Republic*, Partial Award, UNCITRAL, 17 March 2006, at **Exhibit RLA-43**, p. 65 (para. 300) (emphasis added).

treaty arbitration being “a new territory for international arbitration [and] a dramatic extension of arbitral jurisdiction in the international realm.”<sup>74</sup>

- 55 As for the Claimants’ premise, they do not in fact try to **prove** that the Treaty governs investor-State “dispute resolution” in respect of disputes arising **under the Treaty**. They merely “note it” or “assume it”, declaring at the outset that:

*“[s]ur ces fondements, **constatant** que le règlement des différends investisseur-Etat est donc une des ‘matières’ régies par le Traité, les Demandeurs bénéficient également de l’article 9 du traité conclu avec la Finlande pour régler leur différend avec la Défenderesse par un arbitrage ad hoc CNUDCP.”*<sup>75</sup>

- 56 The Claimants therefore fail to discharge their burden of proving that “dispute resolution” would be a “*matière*” governed by the Treaty.
- 57 The Claimants appear to suggest, nonetheless, that they can rely on the MFN clause because investor-State arbitration is not specifically excluded from the scope of the France-Mauritius BIT.<sup>76</sup> However, as recalled in paragraph 15 above, it is for the Claimants to establish that consent to investor-state arbitration is clearly and unequivocally included within the scope of the MFN clause; it does not suffice simply to argue that it is not excluded.
- 58 As held by the *ad hoc* committee in the *Azurix* case,

“the general principle in ICSID proceedings, and in international adjudication generally, [is] that ‘who asserts must prove’, and that

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<sup>74</sup> Jan Paulsson, "Arbitration Without Privity", (1995) (10) 2 *ICSID Review - Foreign Investment Law Journal* 232, at **Exhibit RLA-44**, p. 232 *et seq.*

<sup>75</sup> Claimants' Counter-Memorial, p. 11 (para. 29) (emphasis added).

<sup>76</sup> Claimants' Counter-Memorial, p. 16 (para. 45).

in order to do so, the party which asserts must itself obtain and present the necessary evidence in order to prove what it asserts.”<sup>77</sup>

- 59 The argument that a “*matière*” should be expressly excluded for Article 8(2) not to apply to it is disingenuous in circumstances where investor-state arbitration clauses hardly existed at the time the BIT was entered into, back in 1973, as already explained in the Memorial.<sup>78</sup> This is also acknowledged by one of the Claimants’ experts.<sup>79</sup> The Respondent cannot be faulted for excluding something that was not there to be included in the first place.
- 60 The Claimants’ textual interpretation breaks down when discussing **who** or **what** is entitled to MFN treatment under the terms of Article 8(2) of the BIT. As highlighted in the Memorial, only **investments** are entitled to MFN treatment, and investor-state dispute resolution is a right of the investor.<sup>80</sup> The Claimants invite the Tribunal to ignore the plain text of Article 8(2) on this specific issue, as apparently “*une telle interprétation est de nature à priver d’effet utile la clause MFN du Traité, ainsi que la sanction de sa violation.*”<sup>81</sup>
- 61 The Claimants proceed to rely on the *Siemens v. Argentina* tribunal’s finding,<sup>82</sup> which, according to the Claimants, supports the proposition that as long as the MFN clause refers to “*investissements des ressortissants*”, and does not specifically exclude dispute resolution, it extends to investor-state arbitration.<sup>83</sup>

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<sup>77</sup> *Azurix Corp. v. Argentine Republic*, Decision on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/12, 1 September 2009, at **Exhibit RLA-45**, p. 109 (para. 215).

<sup>78</sup> Respondent's Memorial, p. 18 (para. 41).

<sup>79</sup> Crépet Daigremont Opinion, at **Exhibit CER-1**, p. 4 (para. 13).

<sup>80</sup> Respondent's Memorial, p. 25 (para. 61).

<sup>81</sup> Claimants' Counter-Memorial, p. 17 (para. 51).

<sup>82</sup> Claimants' Counter-Memorial, p. 18 (para. 52), quoting from *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Décision sur la compétence du 3 août 2004, at **Exhibit CL-5**, p. 36 (para. 92).

<sup>83</sup> Claimants' Counter-Memorial, p. 18 (para. 54).



- 62 The question of the *effet utile* of Article 8(2) is discussed in Section 2.4.4 below, but for present purposes it suffices to point out that if the *Siemens* tribunal had erased the distinction between “investors” and “investments”, it would have erred. However, this is not what the tribunal did. The BIT it was interpreting in fact contained **two** separate MFN clauses, one for “investments”, and the other for “investors” (in clauses 3(1) and 3(2) of the treaty, respectively).<sup>84</sup> A similar clause was also found in the UK-Soviet Union BIT at issue in *RosInvest v. Russia*.<sup>85</sup> The tribunal in that case noted the difference by stating that “[t]he two paragraphs provide MFN protection by quite different wordings and thus with a different scope.”<sup>86</sup> The tribunal went on to **reject** the application of the first paragraph to dispute resolution, concluding that “protection of an arbitration clause [...] does not directly affect the ‘investment’, but rather the procedural rights of the ‘investor’”.<sup>87</sup> In *Telenor v. Hungary* there was only an MFN clause promising better treatment to “investments”, leading the tribunal to reject the claim to extend it to procedural rights of investors.<sup>88</sup>
- 63 This fortifies, rather than distracts from, the fact that the two are different, and MFN treatment promised to “investments of investors” does not extend to treatment that only applies to the investor, to the exclusion of the investment, such as dispute resolution.

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<sup>84</sup> See *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, *Décision sur la compétence* du 3 août 2004, at **Exhibit CL-5**, p. 31 (para. 82).

<sup>85</sup> *RosInvest Co UK Ltd. v. The Russian Federation*, Award on Jurisdiction, SCC Case No. V079/2005, October 2007, at **Exhibit RLA-46**, p. 77 *et seq.* (para. 126).

<sup>86</sup> *RosInvest Co UK Ltd. v. The Russian Federation*, Award on Jurisdiction, SCC Case No. V079/2005, October 2007, at **Exhibit RLA-46**, p. 78 (para. 127).

<sup>87</sup> *RosInvest Co UK Ltd. v. The Russian Federation*, Award on Jurisdiction, SCC Case No. V079/2005, October 2007, at **Exhibit RLA-46**, p. 78 (para. 128).

<sup>88</sup> *Telenor Mobile Communications A.S. v. Republic of Hungary*, Award, ICSID Case No. ARB/04/15, 13 September 2006, at **Exhibit RLA-47**, p. 50 (para. 92).

#### **2.4.2 Interpretation of Article 8 of the France-Mauritius BIT according to the severability rule**

- 64 In public international law, just like in private international law, the arbitration agreement is **severable** from the main agreement.<sup>89</sup> Severability has implications on the applicability of MFN clauses to such provisions, and indeed, 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>90</sup> This is because provisions relating to dispute resolution become applicable only **after** the dispute has arisen and therefore cannot be relied upon in support of the argument that investors should have been treated “more favourably”.<sup>91</sup>
- 65 The Claimants’ argument in response is premised on an alleged consensus that MFN clauses might extend to dispute resolution provisions.<sup>92</sup> This assumption is incorrect. The Claimants’ own expert disagrees with it: the Crépet Daigremont Opinion states that there is no such consensus.<sup>93</sup>
- 66 To avoid responding to the reasoning of the majority of arbitral tribunals that have found that MFN clauses should not apply to dispute resolution, the Claimants hide behind the alleged specificity of the wording of Article 8(2).<sup>94</sup> Somewhat inconsistently, the Claimants also argue that one decision should be considered by this Tribunal, *i.e.* the *Maffezini v. Spain* decision,<sup>95</sup> as allegedly a “turning point”, being the first decision in which

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<sup>89</sup> Respondent's Memorial, p. 15 *et seq.* (paras. 36-40).

<sup>90</sup> See *e.g.* *Plama Consortium Ltd v. the Republic of Bulgaria*, Decision on Jurisdiction, ICSID Case No. ARB/03/24, 8 February 2005, at **Exhibit RLA-26**, p. 67 *et seq.* (para. 212).

<sup>91</sup> Z. Douglas, “The MFN Clause in Investment Arbitration - Treaty Interpretation Off the Rails”, (2011) (2)1 *Journal of International Dispute Settlement* 97, at **Exhibit RLA-17**, p. 105.

<sup>92</sup> Claimants' Counter-Memorial, p. 13 (para. 34).

<sup>93</sup> Crépet Daigremont Opinion, at **Exhibit CER-1**, p. 1 (para. 2).

<sup>94</sup> Claimants' Counter-Memorial, p. 13 (para. 35).

<sup>95</sup> Claimants' Counter-Memorial, p. 13 (para. 36).

an investment tribunal extended the MFN clause to cover dispute resolution (albeit not consent). In the Claimants' view, this decision would have imposed an obligation upon States having entered into international instruments containing an MFN clause to modify **all** their existing obligations if they did not subscribe to the *Maffezini* tribunal's approach.<sup>96</sup> The Claimants' argument is not serious. It does not even begin to explain the entirely novel legal proposition that a given arbitral tribunal would have the power to impose an obligation on sovereign States not parties to the dispute to change or clarify their international commitments.

- 67 The Claimants' reliance on the *Maffezini* decision is also misguided – even assuming it is still “good law”, which is a contested proposition at best. While the *Maffezini* decision has been followed by a handful of tribunals cited by the Claimants,<sup>97</sup> there is another line of cases which has heavily criticised it and concluded that, in the absence of clear language to the contrary, MFN clauses cannot be applied to procedural provisions in the first place<sup>98</sup> – a position consistent with the principle of severability of dispute resolution provisions, as noted above.

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<sup>96</sup> Claimants' Counter-Memorial, p. 14 (para. 36).

<sup>97</sup> Claimants' Counter-Memorial, p. 13 (fn. 49).

<sup>98</sup> See, e.g. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, Decision on Jurisdiction, ICSID Case No. ARB/02/13, 15 November 2004, at **Exhibit RLA-48**; *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, Award, SCC Case No. 080/2004, 21 April 2006, at **Exhibit RLA-49**; *Plama Consortium Ltd v. the Republic of Bulgaria*, Decision on Jurisdiction, ICSID Case No. ARB/03/24, 8 February 2005, at **Exhibit RLA-26**; *Wintershall Aktiengesellschaft v. Argentine Republic*, Award, ICSID Case No. ARB/04/14, 8 December 2008, at **Exhibit RLA-37**; *Renta 4 c. Russie*, SCC, sentence sur exceptions, 20 mars 2009, at **Exhibit CL-15**; *ICS Inspection and Control Services Ltd v. the Argentine Republic*, Award on Jurisdiction, PCA Case No. 2010-9, 10 February 2012, at **Exhibit RLA-11**; *Daimler Financial Services AG v. Argentine Republic*, Award, ICSID Case No. ARB/05/1, 22 August 2012, at **Exhibit RLA-1**; *ST-AD GmbH v. The Republic of Bulgaria*, Award on Jurisdiction, PCA Case No. 2011-06, 18 July 2013, at **Exhibit RLA-23**. Moreover, many treaty tribunals have often been split on this issue: see the numerous dissenting opinions, e.g. *Impregilo S.p.A. c. République d'Argentine*, aff. CIRDI no ARB/07/17, 21 juin 2011, at **Exhibit CL-50**; *Hochtief AG v. The Argentine Republic*, Separate and Dissenting Opinion of J. Christopher Thomas, QC, ICSID Case ARB/07/31, 7 October 2011, at **Exhibit RLA-50**; *Garanti Koza LLP v. Turkmenistan*, Dissenting Opinion by Laurence Boisson de Chazournes, ICSID Case No. ARB/11/20, 3 July 2013, at **Exhibit RLA-51**; *Venezuela US, S.R.L.*

68 Moreover, in **all the cases** in which the issue of whether more favourable procedural provisions could be imported from another treaty through an MFN clause has arisen, **the basic treaty contained** a dispute resolution clause establishing **the respondent State's consent** to arbitrate investor-State disputes arising under the treaty, a point which the Claimants indirectly acknowledge.<sup>99</sup> In other words, the issue in these cases was not whether the claimant could import the respondent State's **consent** to arbitrate from another treaty by operation of the MFN clause; but whether **more favourable** dispute resolution provisions allegedly contained in another treaty concluded by the same State could be imported. Again, this is an entirely different issue to the one faced by the Tribunal in this case.

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

69 As explained in the Memorial, the *ejusdem generis* rule restricts the scope of application of MFN clauses to provisions of the same *genus* as those contained in the basic treaty.<sup>100</sup>

70 The fact that MFN clauses should be interpreted in light of the *ejusdem generis* rule is not disputed by the Claimants.<sup>101</sup> The Claimants further recognise that the *ejusdem generis* rule is meant to eliminate the risk of the imprudent use of an MFN clause to bind the contracting parties to a treaty by provisions to which they never intended to consent in the first place.<sup>102</sup>

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*v. The Bolivarian Republic of Venezuela*, Dissenting Opinion of Professor Marcelo G. Kohen, PCA Case No. 2013-34, 26 July 2016, at **Exhibit RLA-39**.

<sup>99</sup> Claimants' Counter-Memorial, p. 13 (para. 36).

<sup>100</sup> Respondent's Memorial, p. 26 (para. 65).

<sup>101</sup> Claimants' Counter-Memorial, p. 22 *et seq.* (s. II.B).

<sup>102</sup> Claimants' Counter-Memorial, p. 23 (para. 70) where the Claimants cite the Draft Articles on most-favoured-nation clauses, with commentaries, text adopted by the International Law Commission at its thirtieth session, *Yearbook of the International Law Commission, 1978*, vol. II, Part Two, at **Exhibit RLA-27**.

- 71 Relying on the Nouvel Opinion, the Claimants state that “l’Etat [...] est réputé savoir à quoi il s’oblige”.<sup>103</sup> Professor Nouvel proposes no authority to support his views, and indeed there is no such presumption. As demonstrated in Section 2.1 above, the State’s consent to arbitration cannot be presumed; it must be proven in each case. The burden of proving Mauritius’ consent to these proceedings lies on the Claimants who have failed to discharge it.
- 72 The Claimants contend in effect that by agreeing to arbitrate investment disputes with Finnish investors in 2007, Mauritius should have known that it was also consenting to arbitrate disputes with French investors under the 1973 France-Mauritius BIT.<sup>104</sup> The Claimants offer no justification which would allow them to draw such inference. The Claimants merely state that what they are required to prove.<sup>105</sup>
- 73 Moreover, to be able to argue that their proposed interpretation of Article 8(2) of the Treaty is compatible with the *ejusdem generis* rule, the Claimants are forced to interpret Article 9 of the France-Mauritius BIT as a dispute resolution clause:

“[d]ans la mesure où les Demandeurs ne font que solliciter sur la base de l’article 8(2) du Traité l’application d’une clause de règlement des différends investisseurs-Etat plus favorable **que celle prévue dans le Traité**, et sont donc en présence des dispositions d’une même ‘matière’ et des traités d’objet et de but également identiques (la promotion et la protection des investissements), les Demandeurs ne voient pas en quoi leur démarche peut poser une quelconque difficulté au regard du principe *ejusdem generis*.”<sup>106</sup>

- 74 As demonstrated in Section 2.2 above, this interpretation of Article 9 is incorrect. It is contradicted by the Claimants’ own expert, who expressly states that Article 9 does not provide consent to investor-state

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<sup>103</sup> Nouvel Opinion, at **Exhibit CER-2**, p. 5 (para. 6).

<sup>104</sup> Claimants' Counter-Memorial, p. 24 (paras. 73-74).

<sup>105</sup> Claimants' Counter-Memorial, p. 24 (para. 75).

<sup>106</sup> Claimants' Counter-Memorial, p. 23 (para. 71) (emphasis added).

arbitration.<sup>107</sup> As explained specifically in paragraphs 15-17 above, the relevant issue is not whether Article 9 deals with dispute resolution, but whether it contains consent to arbitrate disputes arising under the Treaty.

75 In any event, to say that the subject-matter of Article 9 is dispute resolution is one thing; to claim that it is a dispute resolution clause, is another. The Claimants' position does not comply with the *ejusdem generis* rule which they admit should apply unless the Tribunal finds that Article 9 is a dispute resolution clause. The Claimants' case is simply based on a false assumption.

76 As stated in the Memorial,<sup>108</sup> even assuming an MFN clause could apply to dispute resolution in the absence of express language to that effect (which is denied), the Claimants cannot rely on the MFN clause of Article 8 of the France-Mauritius BIT to import "more favourable" dispute resolution provisions from another treaty to which Mauritius is a party. There can be no "more favourable" provisions in any such other treaty in the absence of any provision in the basic treaty dealing with investor-State arbitration – and more particularly, providing **consent** to such investor-State arbitration.

#### **2.4.4 Interpretation of Article 8 of the France-Mauritius BIT according to the *effet utile* rule**

77 Throughout their Counter-Memorial, the Claimants refer to the *effet utile* rule to support their purported interpretation of the Treaty.<sup>109</sup> The Claimants do not, however, provide the Tribunal with any guidance as to how it should apply the rule.

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<sup>107</sup> Nouvel Opinion, at **Exhibit CER-2**, p. 22 (s. b).

<sup>108</sup> Respondent's Memorial, p. 27 *et seq.* (para. 67).

<sup>109</sup> See *e.g.* Claimants' Counter-Memorial, p. 6 *et seq.* (para. 15), p. 14 (para. 37), p. 17 (para. 51) and p. 23 (para. 72).

78 Investment treaty tribunals have cautioned that the *effet utile* rule cannot be used to justify an illegitimate extension of meaning.<sup>110</sup> As stated by the *Cemex v. Venezuela* tribunal:

“[T]his principle does not require that a maximum effect be given to a text. It only excludes interpretations which would render the text meaningless, when a meaningful interpretation is possible.”<sup>111</sup>

79 The *effet utile* rule certainly cannot be applied so as to create jurisdiction over the Claimants' claims out of thin air.<sup>112</sup> In the present case, a meaningful interpretation is already available for Article 8 of the BIT and there is therefore no scope for any interpretation of this provision arising out of its *effet utile*.

80 Article 8 of the Treaty could, for instance, be invoked to better factual treatment of an investor from another State. It could also arguably be used to seek to improve the provision regarding compensation for lawful expropriation. Hence, Article 3(2) of the Treaty provides:

*“D'autre part, les mesures d'expropriation, de nationalisation, de dépossession directe ou indirecte, qui pourraient être prises à l'égard de ses investissements, ne doivent être ni discriminatoires, ni contraires à un engagement spécifique. Elles doivent donner lieu au paiement d'une juste indemnité dont le montant est égal à la valeur des actifs expropriés, nationalisés au qui ont fait l'objet d'une dépossession quelconque, au jour de l'expropriation, de la nationalisation au de la dépossession.”*<sup>113</sup>

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<sup>110</sup> *Dawood Rawat v. the Republic of Mauritius*, Award on Jurisdiction, PCA Case 2016-20, 6 April 2018, at **Exhibit RLA-20**, p. 20 (para. 82) and p. 46 (para. 182).

<sup>111</sup> *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v Bolivarian Republic of Venezuela*, Decision on Jurisdiction, ICSID Case No. ARB/08/15, 30 December 2010, at **Exhibit RLA-52**, p. 30 (para. 114).

<sup>112</sup> *Dawood Rawat v. the Republic of Mauritius*, Award on Jurisdiction, PCA Case 2016-20, 6 April 2018, at **Exhibit RLA-20**, p. 20 (para. 83).

<sup>113</sup> France-Mauritius BIT, at **Exhibit CLA-1**, p. 475 (Article 3(2)) (emphasis added).

81 To take the example proposed by the Claimants, Article 8 of the Treaty could arguably be used to import the more favourable provisions of Article 5(2) of the Finland-Mauritius BIT, according to which:

“Such compensation shall amount to the value of the expropriated investment at the time immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier. The value shall be determined in accordance with generally accepted principles of valuation, **taking into account, inter alia**, the capital invested, replacement value, appreciation, current returns, **the projected flow of future returns, goodwill and other relevant factors.**”<sup>114</sup>

82 In this example, the treatment granted to French investors under Article 3(2) of the Treaty (compensation for expropriation) can be improved by the more favourable provision (as it provides for the inclusion of projected returns in the determination of the compensation while the Article 3.2 merely refers to the actual value) of a clause of the same *genus*, or subject-matter, contained in the Finland-Mauritius BIT. This example proves that Article 8 need not extend to consent to investor-State arbitration, or even dispute resolution, to comply with the *effet utile* rule.

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<sup>114</sup> Finland-Mauritius BIT, at **Exhibit C-3**, p. 609 *et seq.* (Art. 5(2)) (emphasis added).



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

- 83 To be able to invoke the provisions of the Treaty, the Claimants must prove that they are “protected investors”.<sup>115</sup> As explained in the *Nouvel Opinion*, this amounts to proving that they have “*constitué un investissement au sens de l’article 1 sur le territoire mauricien*”.<sup>116</sup>
- 84 The Respondent has already demonstrated that the Claimants’ alleged interests do not satisfy the definition of “investment” in Article 1(1) of the Treaty as they do not meet the applicable criteria of contribution, risk and duration.<sup>117</sup> In their Counter-Memorial, the Claimants fail to prove that they would have made any such investment (**Section 3.1**).
- 85 The Claimants are also unable to prove that their project was authorised by the Mauritian authorities, as it should have been. Consequently, the Claimants’ alleged expenditures in preparation of the project cannot be considered “investments” within the meaning of Article 1 of the Treaty (**Section 3.2**).

#### **3.1 The Claimants’ alleged interests are not investments**

- 86 The Parties largely agree on the definition of “investment” that this Tribunal should employ to determine its jurisdiction *ratione materiae*.<sup>118</sup>
- 87 The Claimants acknowledge that the “*critères de qualification de l’investissement*”, known as the “*Salini test*”, should apply.<sup>119</sup> These criteria are a substantial commitment or contribution of capital, the assumption of risk and a certain duration. In the Claimants’ view, not taking into account these criteria would be contrary to the object and

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<sup>115</sup> Respondent's Memorial, p. 29 *et seq.* (s. 3); Claimants' Counter-Memorial, p. 4 *et seq.* (s. I.A).

<sup>116</sup> *Nouvel Opinion*, at **Exhibit CER-2**, p. 11 (para. 25).

<sup>117</sup> Respondent's Memorial, p. 30 *et seq.* (s. 3.1).

<sup>118</sup> Respondent's Memorial, p. 29 (para. 68); Claimants' Counter-Memorial, p. 5 (para. 12).

<sup>119</sup> Claimants' Counter-Memorial, p. 5 (para. 12).

purpose of the Treaty to protect “*les ressortissants d’un Etat qui entendent investir durablement dans l’économie et le territoire de l’autre Etat contractant*”.<sup>120</sup>

- 88 The Parties however disagree on the definition of the “object and purpose” for the purposes of interpreting Article 1 of the France-Mauritius BIT. Contrary to the Claimants’ contention that the protection offered by the Treaty should extend to **prospective investors**, the Treaty only applies to **investments which have already been made**. Only the existing “*investissements des ressortissants*” are protected.<sup>121</sup>
- 89 The use of the French present tense in Article 1, as well as the requirement that the assets be “*acquis ou constitués*”,<sup>122</sup> leave no doubt on the object and purpose of the Treaty being to protect only **existing investments**. Accordingly, mere plans, or expressions of interest to invest, do not meet the definition of investments pursuant to Article 1 of the Treaty.
- 90 This is also clear from the title of the France-Mauritius BIT which provides merely for the “*protection des investissements*”,<sup>123</sup> to the exclusion of any form of promotion, as included in many other BITs. In any event, 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>124</sup> According to customary international law, States have the right to regulate the admission of 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>125</sup> The France-Mauritius BIT,

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<sup>120</sup> Claimants' Counter-Memorial, p. 5 (para. 12) (emphasis added).

<sup>121</sup> France-Mauritius BIT, at **Exhibit CLA-1**, p. 475 *et seq.* (Arts. 4(2) and 8).

<sup>122</sup> France-Mauritius BIT, at **Exhibit CLA-1**, p. 474 (Art. 1(1)).

<sup>123</sup> France-Mauritius BIT, at **Exhibit CLA-1**, p. 473.

<sup>124</sup> A. Newcombe, L. Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International, 2009) (excerpt), at **Exhibit RLA-53**, p. 3 of the pdf (p. 127).

<sup>125</sup> 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), at **Exhibit RLA-54**, p. 35 (para. C); B. Poulain, “L’Investissement international: définition ou définitions?”, in TP. Kahn & T. Wälde

like the vast majority of BITs, does not offer any positive right of admission to foreign investors from the other contracting State.<sup>126</sup>

- 91 In their Counter-Memorial, the Claimants do not refer to any tangible evidence to prove the existence of an investment, at any point in time.
- 92 Regarding the Claimants' alleged **contribution**, the Claimants rely on the incorporation of three companies, which has never been in dispute.<sup>127</sup> However, these companies were mere shells, vehicles for later investments, rather than investments in themselves.
- 93 On the basis of three **bank statements**,<sup>128</sup> the Claimants argue that these three companies would have been "*faiblement*" capitalised during the course of the year 2015.<sup>129</sup> The bank statements show, however, only a transfer of money; there is nothing to indicate that this was actually the paid-up **share capital** (or a capital / shareholder loan) of the companies. Monies lying in a bank account are not an "investment" qualifying for protection under the BIT.
- 94 According to the Claimants, the three companies, which admittedly never conducted any business, were capitalised up to the minimum amount required under Mauritius law (*i.e.*, EUR 100'000), but only over an extremely short period of time. The Claimants rely on the Mauritius Investment Promotion Act (2000) to argue that capital of EUR 100'000 per company would be sufficient "*afin que les trois sociétés constituées puissent notamment se prévaloir de la qualité 'd'investisseurs' au sens de*

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(eds.), *Les aspects nouveaux du droit des investissements internationaux* (Brill Nijhoff Leiden, 2007) 123, at **Exhibit RLA-55**, p. 143 *et seq.* (para. 39).

<sup>126</sup> See United Nations Conference on Trade and Development (UNCTAD), *Admission and Establishment* (New York and Geneva: United Nations, 1999) (UNCTAD/ITE/IIT/10), at **Exhibit RLA-56**, p. 16 (chapter B); Most European BITs are "post-entry" or "post-establishment" BITs, and do not provide any admission or establishment rights, see A. Newcombe, L. Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International, 2009) (excerpt), at **Exhibit RLA-53**, p. 134 (§ 3.11).

<sup>127</sup> Claimants' Counter-Memorial, p. 4 (para. 6).

<sup>128</sup> Transferts de fonds de Christian Doutremepuich, 2015, at **Exhibit C-13**.

<sup>129</sup> Claimants' Counter-Memorial, p. 4 (para. 6).

*la loi applicable.*"<sup>130</sup> The Claimants however ignore a second criterion of "annual turnover exceeding 4 million rupees".<sup>131</sup> It is clear from the facts presented by the Claimants that none of the companies incorporated by the Claimants ever had such an annual turnover. In any event, whether the Claimants' companies qualified as investments under a Mauritian law would be irrelevant for the interpretation of that term under the BIT and international law. This is because 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>132</sup>

- 95 It is in any event clear from the Claimants' presentation of the facts and evidence submitted that the funds injected in these companies were soon recovered by the Claimants when the Mauritian authorities informed the Claimants that their proposed investment was not authorised.<sup>133</sup>
- 96 The Claimants further contend, without proving it, that they would have invested **know-how**, and refer to a **prospective investment program** that was admittedly never implemented.<sup>134</sup> Both of these are planned future contributions, not existing ones, which is what is relevant for the purposes of establishing this Tribunal's jurisdiction. In any event, in order to qualify as "contribution", know-how would need to amount to something of

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<sup>130</sup> Claimants' Counter-Memorial, p. 6 (para. 13).

<sup>131</sup> Mauritius Investment Promotion Act 2000, at **Exhibit C-20**, p. 17 (Schedule 1, Part I, s. 1).

<sup>132</sup> See e.g. *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/14/32, 29 June 2018, at **Exhibit RLA-57**, p. 67 *et seq.* (paras. 187-191); *Fedax v. Venezuela*, ICSID Case No. ARB/96/7, Décision sur la compétence, 11 juillet 1997, at **Exhibit CL-1**, p. 1387 (para. 43); B. Poulain, "L'Investissement international: définition ou définitions?", in TP. Kahn & T. Wälde (eds.), *Les aspects nouveaux du droit des investissements internationaux* (Brill Nijhoff Leiden, 2007) 123, at **Exhibit RLA-55**, p. 124 (para. 7)

<sup>133</sup> Claimants' Counter-Memorial, p. 6 (para. 14); see e.g. Account Statement from 2 May 2016 to 20 May 2016 for INTERNATIONAL DNA SERVICES HOLDING LTD Account No. [REDACTED] showing that all funds in the account were returned to Mr. Christian Doutremepuich on 13 May 2016: Annexes au Rapport d'expertise du préjudice par C. Colléter, at **Exhibit C-17-Annex**, p. 75.

<sup>134</sup> Claimants' Counter-Memorial, p. 6 (para. 13).

tangible value, such as intellectual property rights, rather than just the professional expertise of a person.

- 97 The Claimants therefore have not made any **contribution** of capital in Mauritius constitutive of an investment.
- 98 As to the alleged **risk**, the Claimants' reasoning is tautological. After stating that "*les activités envisagées comportaient différents risques*",<sup>135</sup> the Claimants argue that the fact that they were prevented from investing shows that they assumed political risk, constitutive of that investment.<sup>136</sup> The Claimants are mistaken. In the context of 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>137</sup> which as noted above is not protected by the Treaty. The Claimants' contentions as to the alleged "political motivations" of the Respondent's decision not to authorise the investment are defamatory and, in any event, devoid of any supporting evidence.
- 99 The fact of the matter is that as the Claimants made no capital contribution, they risked nothing. The limited funds transferred into the companies' bank accounts were always under the Claimants' control,<sup>138</sup> and recovered when the companies were dissolved. In other words, the Claimants assumed no risk, at any point in time, in relation to their alleged investment.
- 100 Finally, as to the **duration**, the Claimants admit that the three companies created were "*dissoutes peu après l'arrêt du projet*",<sup>139</sup> on 14 April 2016 (which means, for International DNA Services, just over half a year after

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<sup>135</sup> Claimants' Counter-Memorial, p. 6 (para. 14).

<sup>136</sup> Claimants' Counter-Memorial, p. 6 (para. 14), where the Claimants state that "*l'arrêt du projet notifié aux Demandeurs le 14 avril 2016 caractérise à lui seul le risque (politique) pris en réalisant ce projet.*"

<sup>137</sup> See e.g. B. Poulain, "L'Investissement international: définition ou définitions?", in TP. Kahn & T. Wälde (eds.), *Les aspects nouveaux du droit des investissements internationaux* (Brill Nijhoff Leiden, 2007) 123, at **Exhibit RLA-55**, p. 127 (para. 9).

<sup>138</sup> Claimants' Counter-Memorial, p. 6 (para. 14).

<sup>139</sup> Claimants' Counter-Memorial, p. 6 (para. 15).

having been incorporated on 24 September 2015<sup>140</sup>). Moreover, as indicated in the Respondent's Memorial,<sup>141</sup> since the Claimants have failed to make a capital contribution, their alleged investment has, by definition, no duration.

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

101 As discussed in the Memorial, the Claimants in this case are like the claimants in *Mihaly v. Sri Lanka*, having incurred some pre-investment expenditures that could not constitute an investment, when the permission for that investment itself was denied.<sup>142</sup>

102 The Claimants attempt to distinguish themselves from *Mihaly* by arguing that a letter from the Prime Minister's Office dated 14 October 2014<sup>143</sup> would constitute an unconditional acceptance (*i.e.* “*accord inconditionnel*”) of their project, which would suffice to raise their (unproven) expenditures to the status of protected investment.<sup>144</sup> The Claimants further rely on the wording “*investissements à effectuer*” in Article 9 of the Treaty to conclude that:

“[t]outes les dépenses réalisées à compter de l'approbation du projet en date du 14 octobre 2014 et jusqu'à l'arrêt du projet par lettre de la même autorité le 14 avril 2016 sont donc indemnisables ou arbitrables.”<sup>145</sup>

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<sup>140</sup> Certificat d'incorporation International DNA Services, at **Exhibit C-12**.

<sup>141</sup> Respondent's Memorial, p. 35 (para. 85(C)).

<sup>142</sup> Respondent's Memorial, p. 35 *et seq.* (paras. 90-94); *Mihaly International Corporation v. Sri Lanka*, Award, ICSID Case No. ARB/00/2, 15 March 2002, at **Exhibit RLA-36**, p. 18 (para. 61).

<sup>143</sup> Lettre du BPM au BOI en date du 14 octobre 2014, at **Exhibit C-7**.

<sup>144</sup> Claimants' Counter-Memorial, p. 8. (para. 19).

<sup>145</sup> Claimants' Counter-Memorial, p. 8 (para. 20).

- 103 The letter from the Prime Minister's Office can, under no circumstances, be construed as an "unconditional approval" granted to the Claimants.<sup>146</sup> The very wording of the letter defies the interpretation given by the Claimants. This letter cannot even be construed as a positive "*accord de principe*".
- 104 First, the letter is not addressed to the Claimants. It is merely an indication given to the Board of Investment that the Prime Minister's Office has no *a priori* objection and that the project can be examined. After examining the project, and notably the Business Plan submitted by the Claimants, the Prime Minister's Office informed the Board of Investment that "the project has **not** been approved".<sup>147</sup>
- 105 Second, the correspondence submitted by the Claimants shows that they were perfectly aware that, in order to make an investment, they required at least the following authorisations, which they never obtained:
- (i) "*l'autorisation d'achat d'un terrain*",<sup>148</sup> pursuant to the Non-Citizens Property Restrictions Act;
  - (ii) "*un global acceptance auprès du Ministère de la Santé*";<sup>149</sup> and
  - (iii) "*une modification de la loi DNA Authentication Act*"<sup>150</sup> to "cater for a private lab other than the FSL to do Forensic DNA analysis in Mauritius and from foreign countries".<sup>151</sup>
- 106 Third, in a letter dated 21 October 2015, the Claimants ask the Prime Minister to support their project.<sup>152</sup> This request is incompatible with the

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<sup>146</sup> Respondent's Memorial, p. 37 (para. 93).

<sup>147</sup> Lettre du BPM au BOI en date du 14 avril 2016, at **Exhibit C-18** (emphasis in the original).

<sup>148</sup> Lettre du cabinet du premier ministre, at **Exhibit C-17-8**.

<sup>149</sup> Lettre du cabinet du premier ministre, at **Exhibit C-17-8**.

<sup>150</sup> Lettre du cabinet du premier ministre, at **Exhibit C-17-8**.

<sup>151</sup> Courriel du BOI à C. Doutrèmeuich en date du 22 octobre 2015, at **Exhibit C-14**, p. 3.

<sup>152</sup> Lettre du cabinet du premier ministre, at **Exhibit C-17-8**.

Claimants' contention that the government of Mauritius would have "unconditionally" approved their project in October 2014.

- 107 Further, Article 9 of the Treaty cannot be used to establish a qualifying investment, as it contains no definition of the term "investment". It establishes an additional right given to qualifying Investors with whom one of the Contracting States enters into an investment contract after the entry into force of the BIT. In the absence of any investment contract between the Claimants and the Respondent containing an ICSID resolution clause, this Article is as irrelevant to establishing this Tribunal's jurisdiction *ratione materiae* as it is to establishing the consent of Mauritius to these proceedings.



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

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

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

In the alternative,

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

In any event,

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

Respectfully submitted,

29 March 2019

For and on behalf of the Respondent,

**The Republic of Mauritius**

Counsel for the Respondent



Veijo Heiskanen  
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Eléonore Caroit  
Augustin Barrier

## ANNEX 1: DEFINED TERMS AND ABBREVIATIONS

<b>Defined term / Abbreviation</b>	<b>Description</b>
<b>BIT</b>	Bilateral investment treaty
<b>Claimants</b>	Christian Doutremepuich and Antoine Doutremepuich
<b>Contracting States</b>	The French Republic and the Republic of Mauritius, State parties to the France-Mauritius BIT
<b>Counter-Memorial</b>	Claimants' Counter-Memorial on Jurisdiction dated 1 February 2019
<b>Crépet Daigremont Opinion</b>	Legal opinion of Dr Claire Crépet Daigremont dated 21 January 2019 ( <b>Exhibit CER-1</b> )
<b>Finland-Mauritius BIT</b>	2007 bilateral investment agreement between the Government of Finland and the Government of the Republic of Mauritius on the promotion and protection of investments ( <b>Exhibit C-3</b> )
<b>France-Mauritius BIT or the Treaty or the BIT</b>	1973 bilateral investment agreement between the Government of the French Republic and the Government of the Republic of Mauritius on the protection of investments ( <b>Exhibit CLA-1</b> )
<b>GATS</b>	General Agreement on Trade and Services
<b>ICJ</b>	International Court of Justice
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>ICSID Convention</b>	1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States entered into force on 14 October 1966
<b>ILC</b>	International Law Commission
<b>Mauritius or the Respondent</b>	The Republic of Mauritius
<b>Memorial</b>	Respondent's Memorial on Jurisdiction dated 23 November 2018

<b>Defined term / Abbreviation</b>	<b>Description</b>
<b>MFN</b>	Most Favoured Nation
<b>Nouvel Opinion</b>	Legal opinion of Professor Yves Nouvel dated 21 January 2019 ( <b>Exhibit CER-2</b> )
<b>Reply</b>	Respondent's Reply on Jurisdiction dated 29 March 2019
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCITRAL Rules</b>	the 1976 UNCITRAL Arbitration Rules
<b>VCLT</b>	1965 Vienna Convention on the Law of Treaties

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

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

- R-1 “Mapping of the IIA” by the UNCTAD Investment Policy Hub Website (visited in November 2018)
- R-2 Accord entre le Gouvernement de la République française et le Gouvernement de la République de Maurice sur l’encouragement et la protection réciproque des investissements, signé à Port-Louis le 8 mars 2010
- R-3 Etude d'Impact sur le Projet de Loi autorisant l'approbation de l'accord entre le Gouvernement de la République française et le Gouvernement de la République de Maurice sur l'encouragement et la protection réciproques des investissements
- R-4 Projet de Loi autorisant l'approbation de l'accord entre le Gouvernement de la République française et le Gouvernement de la République de Maurice sur l'encouragement et la protection réciproques des investissements enregistré à la Présidence de l'Assemblée nationale le 24 octobre 2017

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

- RLA-1 *Daimler Financial Services AG v. Argentine Republic*, Award, ICSID Case No. ARB/05/1, 22 August 2012
- RLA-2 *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal*, Award, ICSID Case No. ARB/15/21, 5 August 2016

- RLA-3      *Case Concerning mutual assistance in criminal matters (Djibouti v. France)*, Judgment of 4 June 2008, (2008) *I.C.J. Reports* 177
- RLA-4      *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, 3 February 2006, (2006) *I.C.J. Reports* 6
- RLA-5      *Corfu Channel (United Kingdom v. Albania)*, Preliminary Objection, Judgment, 25 March 1948, (1948) *I.C.J. Reports* 15
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