

PCA CASE NO. 2018-37

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

between

(1) PROFESSOR CHRISTIAN DOUTREMEPUICH (France)

and

(2) ANTOINE DOUTREMEPUICH (France)

Claimants

and

THE REPUBLIC OF MAURITIUS

Respondent

before

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

Heard on

**13 June 2019**

**APPEARANCES**

## The Arbitral Tribunal

Presiding Arbitrator:

PROFESSOR MAXI SCHERER

Co-Arbitrators:

PROFESSOR OLIVIER CAPRASSE

PROFESSOR JAN PAULSSON

## Registry

Permanent Court of Arbitration:

MS. FEDELMA CLAIRE SMITH, Senior Legal Counsel

MS. CLÉMENCE ASSOULON, Assistant Legal Counsel

MS. NINA MAJOUR, Assistant Legal Counsel

## Claimant

Representatives:

MR. CHRISTIAN DOUTREMEPUICH

MR. ANTOINE DOUTREMEPUICH

Counsel:

E&amp;Y SOCIÉTÉ D'AVOCATS

ME. BRUNO POULAIN

ME. ROXANE REGAUD

ME. ANNE CAROLINE JUVIN

ME. HENRI VERCASSON

## Respondent

## Representatives:

MR. RAJESH RAMLOLL, Deputy Solicitor-General

## Counsel:

## LALIVE

DR. VEIJO HEISKANEN

MS. DOMITILLE BAIZEAU

MS. LAURA HALONEN

MS. ELÉONORE CAROIT

MR. AUGUSTIN BARRIER

1 THE PRESIDENT: Good morning, everyone, and  
2 welcome to the second day of the Hearing. We will start this  
3 morning with the Respondent's closing statements, and then we'll  
4 have a break of about 30 minutes, and then we'll hear the  
5 Claimants' closing statements, and then we will deal with any  
6 further questions, if any, and final issues.

7 Is there anything the parties would like to raise  
8 before we start with the closing statements? If not, we would  
9 proceed with them directly.

10  
11 DR. HEISKANEN: There's nothing from the  
12 Respondent.

13  
14 ME. POULAIN: Non, aucune question.

15  
16 THE PRESIDENT: Merci, thank you. So we will  
17 hear the Respondent's closing statement. Thank you.

18  
19 DR. HEISKANEN: Madam President, and members of  
20 the Tribunal, good morning, our colleagues, good morning. We  
21 propose to distribute a few slides that we have prepared for  
22 purposes of our closing before we start. We will start by making  
23 a few remarks on the Claimants' presentation yesterday on the  
24 existence of investment, in particular, on the evidence, then a  
25 few comments including further comments on the questions raised

1 by the Tribunal on the issue of consent.

2           Now, the Claimants kept complaining in their  
3 opening statement yesterday that the Respondent had not produced  
4 evidence relating to the 14 April 2016 letter C-18. This, of  
5 course, is the letter whereby the Prime Minister's office  
6 informed the Board of Investment that the Claimants' proposed  
7 project had not been approved.

8           The circumstances surrounding this letter were,  
9 of course, addressed by neither party in the course of this  
10 arbitration and in their written submissions for very  
11 understandable reasons, because the parties had agreed to  
12 bifurcate these proceedings, and deal with the Respondent's  
13 jurisdictional objections first. The submissions and the  
14 evidence was limited to the jurisdictional issues.

15           The Claimants' case, of course, is, as you will  
16 see from the notice of arbitration, paragraphs 22, 23 and 31, in  
17 particular, that there is the 14 April 2016 letter that  
18 constitutes a breach, or the alleged breach of the treaty in  
19 this case; and, therefore, evidence relating to this letter and  
20 the surrounding circumstances are a part of the merits of this  
21 case rather than jurisdiction, and they were not supposed to be  
22 addressed by the parties in this stage of the proceedings, and  
23 there was obviously no need for more Mauritius to produce  
24 evidence. But at the same time, it's also not true that there  
25 is no evidence at all on the record about the reasons or the

1 concerns that led the Prime Minister's office to send the non-  
2 approval letter.

3                   So let's look at what is missing from the  
4 chronology of the story that was summarized by the Claimants'  
5 yesterday in their opening statement.

6                   If you look at the evidence, you will see that a  
7 meeting took place on 19 October 2015 between the Board of  
8 Investment and the Prime Minister's office. That meeting was  
9 referred to by the Claimants when they wrote to the government  
10 to seek their support. You see that letter, which is C-14 on  
11 the slide. This was at the time when the Claimants were seeking  
12 support precisely because they were aware that the project had  
13 not yet been approved.

14                   There was another meeting that took place a bit  
15 later on 27 October 2015. This was also not mentioned  
16 yesterday. At this meeting, apparently concerns were raised,  
17 and recommendations were made, and it is after this meeting 27  
18 October 2015 meeting, that a new business plan was prepared by  
19 the Claimants and submitted to the Board of Investment. This is  
20 Pièce 13. This is also something you see on the slide.

21                   Now, the new business plan, the 4 November 2015  
22 business plan, unlike the earlier June 2014 business plan, which  
23 is Exhibit C-6, addresses 2 new issues in detail that were not  
24 addressed in the earlier business plan; that is,  
25 confidentiality, the protection of data, and waste management.

1                   You see the table of contents of the updated  
2 business plan, and we have highlighted the new topics that are  
3 now being addressed.

4                   The evidence, therefore, suggests that the  
5 government certainly did have concerns about the project, which  
6 were discussed and addressed in these meetings; in particular,  
7 in relation to data protection, DNA data is obviously sensitive,  
8 and waste management. And it appears that the conclusion was  
9 that these concerns were not sufficiently addressed in the  
10 Claimants' revised business plan, and, of course, there were all  
11 the other issues including the requirement to amend the laws,  
12 which we will come back to in a moment.

13                   It was at that stage that the government then  
14 decided not to pursue the project in April 2016. So that's by  
15 way of background.

16                   Now, there were also a number of points made  
17 yesterday that need to be corrected in terms of the chronology  
18 of events. There are four corrections specifically that need to  
19 be made to the summary of the facts that we heard yesterday.

20                   First of all, the engagement of Mr. Christian  
21 Doutremepuich, the first Claimant, by the Mauritius prosecution  
22 authorities, which in Mauritius incidentally are not *autorité*  
23 *judiciaires*, contrary to what was suggested yesterday. The  
24 engagement by Mauritius authorities and prosecutors of the first  
25 Claimant for these purposes has nothing to do with his decision

1 to set up a business in Mauritius for the full purposes of  
2 retirement or otherwise. As we heard yesterday, his business in  
3 Bordeaux appear to be doing not so well as Mr. Poulain  
4 explained.

5           What the evidence shows is that back in 2009 when  
6 the first Claimant approached the Board of Investment to find  
7 out whether and when he could establish a private laboratory in  
8 Mauritius was an initiative of the Claimant. There is no  
9 evidence on the record contrary to what was suggested yesterday  
10 that it was the Board of Investment that reached out to the  
11 first Claimant.

12           C-4, which is the relevant email, shows that it  
13 was the first Claimant who approached the Board of Investment  
14 and *vice versa*. He was not invited to invest in Mauritius.

15           There is no evidence on record of any steps,  
16 investigative or otherwise, between this initial contact in 2009  
17 and 2013 when a technical committee was formed to consider the  
18 proposed project. This is C-37.

19           The fact that during this period, 2009 to 2013,  
20 the Claimants' services were sought by the prosecution  
21 authorities in Mauritius, and which were provided by the  
22 laboratory in Bordeaux, is totally irrelevant to this case, and  
23 has nothing to do with the Claimants' planned investment in  
24 Mauritius.

25           In other words, contrary to what was suggested



1 yesterday, there is no basis on the evidence to support the  
2 Claimants' contention that there was a *phase d'instruction* from  
3 2009 for this project.

4           Second correction to the factual record concerns  
5 the Claimants' expenditures in Mauritius. We heard a lot about  
6 this yesterday, but let's look in more precisely at what exactly  
7 was paid by the Claimants between the no objection letter from  
8 the Prime Minister's office to the Board of Investment in  
9 October 2014, and the April 2016 letter, this period of 18  
10 months.

11           First, as the Tribunal is certainly aware, all  
12 the bank statements, bank account statements of the three  
13 companies month-by-month on record of this case, as between May  
14 2015 when he first transfer of 100,000 Euros was made to the  
15 holding by the first Claimant, and May 2016 when the funds were  
16 returned to the first Claimant.

17           What these bank statements show is that a total  
18 of some 76,000 Euros was spent on the project, which is the  
19 difference between the 300,000 Euros that was transferred and  
20 the 223,000 Euros that were returned to the first Claimant in  
21 late 2016.

22           Contrary to what was suggested yesterday by the  
23 Claimants, there is no evidence on record that 400,000 Euros  
24 were spent on the project in Mauritius. In fact, if you do an  
25 analysis of the Claimants' expert's table, which summarises the

1 amounts allegedly spent on the project, it also shows a figure  
2 that is very close to the 76,000 Euros. You see that on the  
3 slide, if you go to the previous slide, we have highlighted on  
4 this slide the amounts that were spent in France rather than  
5 Mauritius. These include expenses incurred in France, and  
6 salaries paid in France, as well as post April 2016 expenses.  
7 These are highlighted. When you do the math, which we have  
8 done, as you will see on this slide, the remaining amount is  
9 very close to the 76,000. It's around 73,000.

10                   So this is the evidence of the amounts spent in  
11 Mauritius, 76 to 73,000 Euros, but, of course, as was  
12 demonstrated yesterday, and in our written submissions as well,  
13 this does not mean that the 76,000 qualify as investments.

14                   These amounts were not committed as capital to  
15 the Claimants' business venture in Mauritius, and they do not  
16 constitute an investment.

17                   The figure of 76,000 Euros is not a substantial  
18 contribution either in terms of the criteria of investment under  
19 international law, even if it was considered capital, which is  
20 not the case.

21                   Nor is there any evidence on record that the  
22 three companies set up in Mauritius were ever capitalised. And  
23 even if they were, the amounts of the alleged paid up capital  
24 that were mentioned by the Claimants' counsel yesterday, of  
25 which there is no evidence on record, would not amount to a

1 substantial contribution either.

2           And, again, to remind the Tribunal, the Claimants  
3 do not argue that the three companies set up in Mauritius  
4 constitute an investment. That is not the case.

5           But just to be clear, because there was a  
6 suggestion made that this issue is somehow relevant, whether or  
7 not there is an investment in this case is not a question of the  
8 Claimants being small or medium sized investors. Had the  
9 Claimants, in fact, implemented the business plan that they  
10 proposed, and had they, in fact, made the investments that they  
11 proposed to make in accordance with their plan, the Respondent  
12 does not deny that there would have been an investment in the  
13 circumstances. It's just nothing to do about the size of the  
14 business being proposed. This is about what actually happened  
15 on the ground, and what the evidence shows.

16           This business plan was not implemented, and the  
17 business never took off, for the reasons that are now well known  
18 to all of us.

19           Now, as to the existence of the investment, we  
20 addressed yesterday the issue of risk and the alleged  
21 contribution of know-how by the Claimants as a contribution, and  
22 we do not propose to go to these issues in any detail now unless  
23 the Tribunal has further questions on them. It's just a couple  
24 of remarks to summarise our position on these two issues.

25           Contrary, again, to what was suggested yesterday,

1 the 76,000 that were transferred to Mauritius were never  
2 *immobilisés* if that is meant to suggest that they were somehow  
3 committed as capital to the project. That is not what happened.  
4 They were never at risk. They were always under the control of  
5 the Claimants, who could freely dispose of them, either by  
6 spending them in Mauritius, or by repatriating them, which is  
7 exactly what they did.

8           These amounts were never committed to the project  
9 in the sense of being a capital contribution. They were never  
10 committed as capital in a business venture in Mauritius for the  
11 simple reason that there was never a business venture in  
12 Mauritius. There was a planned one, but no actually business  
13 venture. These were pre-investment expenditures in the proper  
14 sense of this term.

15           As to know-how, as the *L.E.S.I. vs Astaldi*  
16 Tribunal found, and we refer to CL-67, paragraph 73,  
17 all investment, any kind of asset that an investor may wish to  
18 contribute to a business venture, including know-how, must have  
19 economic value, and must be recorded in the accounts of the  
20 company as an asset, as an investment, as an asset, capital  
21 contribution that has been transferred to the business venture.

22           None of this happened here, of course. There's  
23 not even an allegation that there is know-how of the Claimants  
24 was somehow transferred to any of the three legal entities in  
25 Mauritius.

1                   Now, a third correction to the factual record,  
2 the Claimants suggested yesterday that there was no evidence of  
3 an actual need to change the DNA Identification Act in Mauritius  
4 for purposes of enabling the project. The fact of the matter  
5 is, and this is what the evidence shows, that this is what the  
6 government believed at the time, and this is also what the Board  
7 of Investment and the Claimants themselves believed at the time.

8                   We showed Exhibit C-14 and C-17 on the slides  
9 yesterday, and we refer the Tribunal respectfully to that  
10 evidence.

11                   You will also see now on the slide Exhibit C-15,  
12 which is an advert published in Mauritius, and which shows when  
13 you read the French text on the document that the project was  
14 placed on the fast track at the time, and it states that a  
15 change in the law is required to allow this project to go  
16 forward.

17                   It is obvious from the record, from these  
18 documents, and other evidence on record that a change of the law  
19 was required for other obvious reasons. The DNA Identification  
20 Act deals with applications by the police to require that DNA  
21 samples be taken and a forensic analysis be carried out. Both  
22 of these functions can only be performed in Mauritius by the  
23 FSL, the Forensic Science Laboratory, the existing public  
24 laboratory, which has been functional throughout this period,  
25 but experienced some issues in the early 2000s and 2010, which

1 is precisely why assistance was sought from the Claimants.

2           Taking and analysing DNA samples is obviously a  
3 carefully regulated activity, and would have to be equally  
4 regulated if it was allowed to be performed by a private entity  
5 rather than a government laboratory. It would require  
6 regulation precisely for the reasons that we just discussed,  
7 including protection and storage of data for a long period, how  
8 and so on, as well as destruction of data, as well as waste  
9 management. This is all common sense.

10           A fourth correction to the factual record, the  
11 Claimants are seeking to rely on the fact that the project was  
12 put on the fast track by the government in 2015, and that this  
13 somehow suggests that it was prioritised and considered  
14 important by the government. Indeed, in 2015, the government  
15 did create fast track subcommittees at the level of each  
16 ministry. This you will see from Exhibit C-15, Page 3. But in  
17 practice, what happened is that all pending projects were placed  
18 on the fast track, including the Claimants' proposed project,  
19 and not only large investment projects. No conclusions can be  
20 drawn by the Tribunal from the fact that this was a fast track  
21 project. It did not imply any kind of initial assessment of  
22 priority or importance.

23           Now, a final few remarks more on the legal side  
24 on the issue of investment, just to clarify the Respondent  
25 position on the *Mihaly* award, a decision which was discussed

1 yesterday.

2           We are not saying that the *Mihaly* decision itself  
3 is law, obviously. We are saying that the rule applied by the  
4 *Mihaly* Tribunal, that pre-investment expenditures do not in and  
5 of themselves qualify as investments under investments treaties  
6 -- that finding is good law.

7           The Claimants do not actually challenge that this  
8 is a valid rule, which also applies in this case. What they  
9 suggest in their Counter-Memorial, and I refer to paragraph 20  
10 where they discuss the *Mihaly* decision, they seek to distinguish  
11 this case from the *Mihaly* decision, saying that *Mihaly* has no  
12 relevance to this case for two reasons, because there was no  
13 investment contract in this case, and because the three  
14 companies set up by the Claimants do not constitute an  
15 investment.

16           Now, whether or not pre-investment expenditures  
17 qualify as investment have -- it has nothing to do with the form  
18 the investment is taking.

19           Although we have not been able to find in the  
20 public domain any decisions of investment treaty tribunals that  
21 would have followed the *Mihaly* rule in the sense that claims  
22 would have been dismissed for lack of investment on the basis  
23 that the cost incurred qualify as pre-investment expenditures  
24 rather than investments, the case law does support *Mihaly* in the  
25 sense that the Tribunals have sought -- and there are several

1 tribunals that have approved the *Mihaly* rule, but have then  
2 distinguished the case that they have been dealing with from  
3 *Mihaly*. So there is support for *Mihaly*.

4           And we refer to cases that are not on record, but  
5 the Tribunal may wish to consult them because the issue was  
6 raised. I will mention just a few of these: *Deutsche Telekom*  
7 *vs India*, interim award paragraph 181; *Houben vs Burundi*, award  
8 paragraph 129, *RSM vs Grenada*, award paragraph 258; *PSEG vs*  
9 *Turkey*, award paragraph 302; *SGS vs Pakistan*, award on  
10 jurisdiction paragraph 137. So the case law is quite clear in  
11 the sense of endorsing *Mihaly*.

12           We were also asked by Professor Paulsson to  
13 comment on Mr. Suratgar's concurring opinion in the *Mihaly*  
14 case, so we are just jumping the gun now before we heard the  
15 questions, but, of course, if there are any further follow-up  
16 questions, we are happy to address that.

17           Now, Mr. Suratgar's concurring opinion is not on  
18 record, but since the Tribunal has raised a question about it,  
19 we have looked at it and, of course, it would be shared. It's  
20 in the public domain, so there should be no issue of the  
21 Claimants having easy access to it.

22           It's not a lengthy concurring opinion. We agree  
23 with the principle set out by Mr. Suratgar in his concurring  
24 opinion that costs incurred before the investment was made may  
25 accounting-wise become part or associated with the investment if



1 an investment is subsequently made. They may be associated with  
2 the investment as a sunk costs accounting-wise, and they may  
3 become claimable if there is subsequently an investment. But in  
4 this case, of course, there was never any investment. What we  
5 have only is evidence of pre-investment expenditures.

6           Mr. Suratgar also says in his concurring opinion  
7 that his position on the case would have been different if the  
8 claimant in that case, in *Mihaly*, could have demonstrated that  
9 the expenditures had been incurred not by the U.S. claimant, but  
10 by the Sri Lankan company in which it had a share.

11           On this point, the majority of the Tribunal did  
12 not agree with Mr. Suratgar, and rightly so. Pre-investment  
13 expenditures remain pre-investment expenditures regardless of  
14 the party who incurred them, whether it's the foreign entity or  
15 local entity. There is no relevance to the issue as to who  
16 incurred these expenditures.

17           And, again, we remind here the Tribunal of the  
18 Claimants' position, which is that a shareholding in itself is  
19 not an investment.

20           Now, of course, there is no case law supporting  
21 or endorsing Mr. Suratgar's concurring opinion; whereas, there  
22 is ample case law endorsing the approach of the majority, again,  
23 as far as we are aware in terms of what is available in the  
24 public domain.

25           Now, that is what we have to say at this stage

1 unless the Tribunal has any further questions on the issue of  
2 investment, the evidence, and the legal criteria.

3           Now -- thank you. A few further remarks on the  
4 question of consent. First of all, we would like to come  
5 briefly back to the question of the subject matter of Article 9  
6 of the France-Mauritius BIT and Article 9 of the Finland-  
7 Mauritius BIT as there were a number of questions raised by the  
8 Tribunal yesterday, and there were a number of comments made by  
9 both parties, but just to clarify the Respondent's position on  
10 these issues.

11           But before we do this, we should add a couple of  
12 words to what we said earlier to the Tribunal's question about  
13 the word "régies" in Article 8(2) of the France Mauritius BIT as  
14 this is relevant when we compare the 2 Articles 9s in the 2  
15 BITs.

16           So you see Article 8 on the slide. The use of  
17 the term "régies", regulated or governed, as opposed to *faisant*  
18 *référence à, étant mentionnées* implies that the subject matter  
19 is regulated in the treaty.

20           However, as you can see from Article 8 or Article  
21 9, the France-Mauritius BIT does not regulate investor-state  
22 arbitration in any way in the sense of the term "régies".

23           It does not even regulate contract-based  
24 arbitration in any way. It merely creates an obligation for the  
25 contracting states to include an ICSID arbitration clause in

1 investment contracts with investors that the state may conclude  
2 with the investors of the other contracting party.

3 Investment arbitration is, therefore, not a  
4 matter regulated in Article 9 of the BIT at all.

5 The fact that Article 9 makes a reference to  
6 investment contract arbitration, that it mentions it, does not  
7 mean that it regulates it. Investment contract arbitration is  
8 regulated in the ICSID convention and not in this provision.

9 The distinction between regulating and referring  
10 or mentioning is, of course, an important distinction as a  
11 matter of logic and language as well. It is a distinction that  
12 is similar to the distinction that was famously made between use  
13 and mention of words by the Oxford philosopher John Austin in  
14 his book "How To Do Things With Words", which can be found in  
15 the library of any self-respecting international arbitration  
16 lawyer. When you regulate, you use the words, but when you  
17 mention the words, you don't regulate. You don't intend to  
18 regulate, and this is exactly what is being done in Article 9 of  
19 the France Mauritius BIT.

20 It follows from this that since Article 9 of the  
21 France-Mauritius BIT does not regulate investment arbitration at  
22 all, it only refers to it, creating an obligation, the question  
23 of whether this provision and Article 9 of the Finland-Mauritius  
24 BIT regulate the same subject matter becomes moot.

25 The application of an MFN clause, such as the one

1 as we have in Article 8, requires the comparison between two  
2 provisions that regulate the same subject matter in order to  
3 determine whether one is more favourable than the other. This  
4 is a relative determination. It's a comparison. You compare  
5 two provisions that deal with the same subject matter, but you  
6 cannot make a relative determination between a provision that  
7 does not regulate investment arbitration at all, and a provision  
8 that does. Such a comparison would be wholly arbitrary. You  
9 can get any results you want.

10           But as we discussed yesterday, even in situations  
11 where there are two provisions that you can compare, two  
12 provisions that regulate investment arbitration, the  
13 determination to be made is not a question, as was suggested  
14 yesterday, of determining the level of granularity of  
15 regulation. It is a question, as the ILC, International Law  
16 Commission, put very clearly, it is a question of whether there  
17 is a substantial identity between the subject matters of the two  
18 relevant provisions, and this is very clear from legal authority  
19 RLA-27, Page 30, which is the relevant passage in the commentary  
20 of the International Law Commission. The standard and the test  
21 is substantial identity.

22           Now, just to make this issue clear, let's look at  
23 Article 9 of the Finland BIT, if only to see how a provision  
24 that indeed does regulate investment arbitration looks like.

25           Article 9 contains most of, if not all, of the

1 bells and whistles that a jurisdictional clause must contain.

2 We have highlighted some of these, but one could actually  
3 highlight all of the key provisions.

4           First of all, basic consent to arbitrate in  
5 paragraph 5. Whatever rule of arbitration you apply, it  
6 provides a certain and unequivocal consent to arbitrate, but  
7 this consent is only addressed to Finnish investors by Mauritius  
8 and to Mauritius investors by the Government of Finland.

9           It regulates the cooling off period in paragraph  
10 2, and it provides in sub-paragraphs 2(a) and to 2(c) a menu of  
11 procedural options available to the investors to choose when  
12 initiating arbitration, and so on, and there are other  
13 provisions. And as we know, the Claimants are actually relying  
14 on the cooling off provision, as well as the possibility of  
15 initiating UNCITRAL arbitration in this provision.

16           In this case, as you will see from paragraph 5,  
17 the consent of the 2 governments to arbitrate is not  
18 conditional, but as Professor Paulsson pointed out yesterday,  
19 there are treaties where the consent of the state may be  
20 conditional. For instance, in a situation where a consent is  
21 provided all before ICSID arbitration, and one of the  
22 governments or the state parties is not a member of the ICSID  
23 convention, the consent remains conditional as long as both  
24 parties are not members of the convention, which is precisely  
25 the reason why sometimes additional options are provided in

1 order to create an effective consent.

2           But then there are issues such as whether an  
3 investor has complied with the cooling off period before  
4 commencing arbitration proceedings. There is some debate in  
5 arbitral jurisprudence as to whether this is a question of  
6 conditioning the consent, or whether it's a question rather of a  
7 procedural admissibility of the claim. This is not an issue  
8 that needs to be debated in this case, but these are the issues  
9 that would arise under a regime such as this one, but they can  
10 only arise, of course, if there is a consent to arbitrate, which  
11 is the cornerstone of an international tribunal's jurisdiction.

12           Then a few words on comments that were made by  
13 the Claimants yesterday on a slightly different topic, the  
14 question of how the reference to investments in Article 8 of the  
15 BIT should be interpreted, what is the ordinary meaning of the  
16 term "investment" because what the MFN treatment is provided for  
17 in Article 8 is only for investments and not to investors.

18           This is not the same thing. The Claimants  
19 suggested yesterday, referring to case law, that a distinction  
20 or the interpretation that we suggested was not a valid one, but  
21 let's look at those cases a bit more carefully, and you will see  
22 that, in fact, the case law that was referred to supports the  
23 position that there is indeed a distinction to be made,  
24 depending on whether MFN treatment is applicable to the  
25 investors or investments.

1 First of all, *Siemens*. CL-5, the Tribunal pointed  
2 out that there were in that case 2 MFN clauses in the applicable  
3 BIT, one relating to investments, and the other one to  
4 investors. This is paragraph 82 of the decision. This meant,  
5 in the Tribunal's view, that Argentina could not raise the  
6 objection that the MFN clause only referred to investments, for  
7 the simple reason that there were two provisions covering both  
8 investments and investors, and in the circumstances, in the  
9 Tribunal's view, the difference was not relevant, but, of  
10 course, it's very relevant in our case if the Tribunal ever  
11 reaches the issue because the MFN clause only covers  
12 investments.

13 There was also a reference made to *Telenor* case,  
14 RLA-47, paragraph 92. We invite the Tribunal to look at that  
15 passage. It's a bit oblique, and it's a lengthy passage, so I  
16 don't want to waste the Tribunal's time by reading it to the  
17 record, but if you read it, you will see that the Tribunal also  
18 makes a distinction there between the rights between investment  
19 and investors, stating that this is a relevant distinction  
20 because investment is a reference to substantive rights;  
21 whereas, investors references or MFN clauses dealing with  
22 investors relate to procedural rights.

23 Similarly, *RosInvest*, RLA-46, that treaty again  
24 contained both MFN clauses applicable to investments and  
25 investors. In paragraph 126 the issue is discussed by the

1 Tribunal. Again, there is an analysis, which suggests and, in  
2 fact, the tribunal reaches the conclusion that there is a  
3 difference to be made between MFN provisions that relate to  
4 substantive treatment of the investment and the procedural  
5 treatment of the investors.

6           And, of course, yesterday we discussed *Hochtief*,  
7 decision RLA-24, which makes this distinction in even clearer  
8 terms. So that is a relevant distinction. In fact, if the  
9 Tribunal were to disregard the distinction between investors and  
10 investments, that would raise an issue because if there is ever  
11 any relevance in the *effet utile* rule it would be in this kind  
12 of context, if a tribunal were to disregard a term or a  
13 distinction between MFN treatment applicable to investments on  
14 the one hand, and investors on the other hand, it would not be  
15 acting consistently with the two requiring the tribunal to give  
16 effect to the relevant provisions of the treaty. So this  
17 distinction cannot be disregarded.

18           Now, finally, a minor point, but it needs to be  
19 corrected for the record, the Claimant suggested yesterday that  
20 Article 18 of the Vienna Convention on the Law of Treaties is  
21 somehow relevant to this case, apparently because Mauritius and  
22 France have now negotiated a new treaty, which contains a  
23 jurisdictional clause, a consent to arbitrate, but this treaty  
24 has not yet been ratified. This is frankly not an argument that  
25 makes sense.



1 Article 18 of the Vienna Convention deals with  
2 the obligation not to defeat the object and purpose of the  
3 treaty prior to its entry into force. This obligation obviously  
4 applies only to the 2010 treaty and not to the 1973 treaty. The  
5 obligation not to defeat the object and purpose of the treaty  
6 has nothing to do with treaty interpretation, and is of no  
7 relevance to interpreting the 1973 Treaty and the provisions in  
8 that treaty.

9 This concludes our comments on closing and if  
10 there are any further questions from the Tribunal, we are happy  
11 to address them, of course.

12  
13 THE PRESIDENT: Thank you very much, Dr.  
14 Heiskanen, for your concluding remarks. We might have a  
15 question from the Tribunal. We certainly do have time, so,  
16 please.

17  
18 PROF. PAULSSON: Correct me if I'm wrong, your  
19 argument regarding severability of dispute resolution provisions  
20 is not essential to your case, but is an additional argument; am  
21 I right?

22  
23 DR. HEISKANEN: It is part of the reasoning that  
24 the Tribunal must perform in interpreting the BIT. It's not an  
25 essential part. It's a step in the analysis. It's a step in

1 the analysis that it informs the way in which the MFN clause  
2 should be interpreted.

3  
4 PROF. PAULSSON: All right. I confess there's  
5 some difficulty in following the arguments. I'm just asking for  
6 clarification.

7 The *raison d'être* of the concept of severability  
8 is to avoid unilateral destruction of the effect of dispute  
9 resolution clauses simply by stating that the main agreement is  
10 invalid or unlawful, or has been breached, and therefore the  
11 whole thing is off the table. Or even perhaps more extremely,  
12 by breaching the treaty, such as India's over flight in the  
13 *India v. Pakistan* case, you are outside performance of the  
14 treaty, and therefore, the effect of an obligatory submission to  
15 the jurisdiction of the aviation council in that case is  
16 destroyed by a unilateral act. We're all very used to this as  
17 the reason for its severability.

18 I don't see how that rationale operates to impede  
19 the notion that a more favourable dispute resolution clause and  
20 a second treaty could become applicable due to the MFN clause in  
21 the basic treaty because there's no question of defeating  
22 unilaterally the effect of a dispute resolution clause. It's  
23 simply you have a state which is agreeing to another type of --  
24 I shouldn't say "another type" because it's prejudicial, but to  
25 a method of resolving disputes, which the party now claims is

1 more favourable, and the party entering into the new treaty does  
2 so realising that it has an MFN clause in the original treaty.  
3 So it's a promise of something which is allegedly -- and that's  
4 to be determined -- more favourable.

5 I don't see how the rationale of defeating the  
6 sabotage of dispute resolution clauses has any traction in those  
7 circumstances. The passage from *Plama*, I get it, but sometimes,  
8 if I may say so, sometimes arbitrators, and I confess to falling  
9 into that category could do with some editing when they write  
10 too much and too quickly, and so this matter can also be viewed  
11 as forming part of the nowadays generally accepted principle of  
12 severability yes, but can also be viewed -- it's a *vue de*  
13 *l'esprit* and the words come easily to hand, but as I said, I  
14 don't quite see this traction. *Plama* continues, [as read]:

15 Dispute resolution provisions constitute an  
16 agreement on their own...

17 So what, [as read]:

18 ...usually with interrelated provisions.

19 And I have no idea what that means.

20  
21 DR. HEISKANEN: Now, there are two aspects to the  
22 severability doctrine, and one of those is precisely that its  
23 rationale is to allow or protect the jurisdiction of any court  
24 or tribunal in circumstances where the validity of the treaty is  
25 challenged, so that the tribunal or the court then can, on the

1 basis of the severability doctrine, assess that argument without  
2 defeating its own jurisdiction by dealing with that objection.

3           So, severability simply is there to protect the  
4 integrity of the adjudication or the arbitration function.

5           Legally what it means is that there are two  
6 agreements in a treaty, and that the jurisdictional clause is a  
7 separate agreement. That's what severability means by  
8 definition.

9           Now, that is the second aspect. When you have  
10 two agreements in one and the same treaty, it means that this  
11 implies or is of relevance for interpretation of that treaty for  
12 the purposes of an MFN clause. If there's an MFN clause in the  
13 treaty, it must be clear from that provision that it applies to  
14 both agreements, not only to the substantive provisions of the  
15 treaty, but also to the jurisdictional clause. That's where it  
16 comes in.

17           And this is a legal standard that informs the  
18 interpretation of the MFN clause, and this is something that  
19 investment treaty tribunals have actually accepted.

20           The MFN clause can be extended to the  
21 jurisdictional clause and the dispute resolution provisions only  
22 if it's clear from the language, in light of the relevant rules  
23 of treaty interpretation, including *ejusdem generis* and ordinary  
24 meaning, that it also covers dispute resolution. That's the  
25 only point we are making.

1                   You cannot assume because there are two  
2 agreements. You cannot assume that it applies to both  
3 agreements; otherwise, severability would have no relevance, or  
4 would not be taken into account or reflected in the  
5 interpretation of the MFN clause. It must be taken into  
6 account.

7                   We agree, it's not a major part of our case, but  
8 it's simply something that needs to be taken into account when  
9 you do a careful analysis of an MFN clause in a treaty that  
10 contains both substantive provisions and a jurisdictional  
11 clause. Of course, this is an academic question in our  
12 submissions because there is no jurisdictional clause in the  
13 France-Mauritius BIT.

14  
15                   PROF. PAULSSON: Allow me to quibble about  
16 something you said, probably doesn't affect your argument, but  
17 severability doesn't mean that the dispute resolution agreement  
18 is separate from the main contract. It means that it has the  
19 potential of being separated. That's what "severability" means  
20 as opposed so separation. And for that reason, this really is a  
21 quibble, *autonomie de la clause compromissoire* is not an  
22 accurate translation of severability because it seems to be a  
23 declaration that it is autonomous. So the word ought to be  
24 *autonomabilité* or something like that, which doesn't exist in  
25 French, but you see the difference.

1  
2 DR. HEISKANEN: Yeah, I see that, and one can  
3 quibble whether it's severability or actually severed, but that  
4 is not really the point, because in legal terms, when a Tribunal  
5 relies on the doctrine of *kompetenz-kompetenz* to determine its  
6 own jurisdiction, and if it reaches the conclusion that the  
7 underlying treaty, or the main treaty is indeed invalid, that  
8 doesn't undermine the validity of the jurisdictional clause. So  
9 they are severed if the Tribunal reaches the conclusion that one  
10 is valid and the other one is not valid. Severability may be  
11 only a question of potentiality in the Aristotelian sense so  
12 long as the Tribunal has not concluded that the main treaty is  
13 indeed invalid. And in that point in time it becomes severed.  
14 That is our submission.

15  
16 PROF. PAULSSON: Yes, thank you.

17  
18 THE PRESIDENT: There are no further questions  
19 from the Tribunal, so thank you very much on the Respondent side  
20 for their closing submissions.

21 We now have a 30-minutes break, a little bit more  
22 than 30 minutes, and we will resume at 10:30 for the Claimants'  
23 closing statement. Thank you.

24  
25 *A short break.*

1  
2 THE PRESIDENT: Ten-thirty (10:30) on the spot.  
3 Thanks for being back on time. So, we will now hear the  
4 Claimants' closing statement, and without further ado, I give  
5 the floor to the Claimants.

6  
7 ME. REGAUD: Merci, Madame la présidente.  
8 Messieurs les coarbitres, quelques mots pour vous remercier pour  
9 les débats qui ont été organisés et pour la richesse des  
10 questions posées depuis hier. Bien évidemment, nous sommes à  
11 votre disposition pour répondre à toute autre question que vous  
12 auriez.

13 Je vais reprendre les éléments, quelques  
14 éléments, bien évidemment, factuels du dossier pour réagir  
15 effectivement à certaines questions qui ont été posées,  
16 notamment hier.

17 Premier point, la République de Maurice nous  
18 rappelle à plusieurs reprises que notre investissement, en toute  
19 hypothèse, n'aurait pas pu aboutir et n'était pas légalement  
20 possible. Encore une fois, la République de Maurice ne nous le  
21 prouve pas et affirmer cela vient finalement priver aussi de  
22 tout sens la lettre de non-objection qui nous a été adressée, et  
23 toutes les diligences qui ont été engagées par la suite ! Si  
24 nous avons des objections et une impossibilité, au niveau  
25 légal, de mettre en place notre projet d'investir comme il a été

1 fait, la République de Maurice a des informations à nous  
2 communiquer. Elle a un devoir, selon nous, de nous justifier et  
3 de nous expliquer sur quel fondement notre projet ne pourrait  
4 voir le jour. Je cite rapidement, puisqu'on ne l'a pas cité, ce  
5 passage de l'opinion du Professeur Nouvel qui fait état du fait  
6 que la lettre de non-objection a ouvert des droits et a créé des  
7 droits envers l'investisseur. Il dit qu'il s'est constitué de  
8 fait un accord relatif à l'admission, l'investissement, ce qui  
9 déclenche des obligations à la charge de l'État. Ce sont les  
10 paragraphes 57 à 61 de l'opinion du Professeur Nouvel, et je  
11 considère que, sur cette base-là, les demandeurs ont le droit de  
12 connaître ce qui fonde le revirement de situation qu'ils ont  
13 subi. Ils ont droit à une information claire et à une certaine  
14 motivation sur l'arrêt du projet. Dans les propos conclusifs on  
15 nous met en avant le fait qu'il serait parfaitement démontré  
16 qu'un changement législatif était *required* -- c'est comme cela  
17 que c'est présenté. Pour cela, la République de Maurice  
18 s'appuie sur une de nos pièces -- ce qu'il est quand même  
19 intéressant de noter -- qui est un article de presse. On a une  
20 loi mauricienne sur les analyses ADN. Donc, à aucun moment la  
21 République de Maurice ne nous produit cette loi et ne nous  
22 justifie en quoi des changements législatifs seraient *required*.  
23 D'autant plus que l'article de presse, quand on le lit  
24 attentivement, ne dit aucunement que des changements sont  
25 requis. Il dit : « Le gouvernement doit étudier si d'éventuels



1 amendements doivent être faits. » Les détournements qui sont  
2 faits des pièces doivent être portés à l'attention du Tribunal.

3           Autre point que l'on relève, suite au closing  
4 statement de la République de Maurice, ils reviennent sur le  
5 business plan qui a été soumis en 2015, qui est un business plan  
6 pas nouveau, ce n'est pas un nouveau business plan. C'est le  
7 business plan qui a été soumis en 2014, qui est actualisé. À  
8 aucun moment, bien évidemment, la République de Maurice ne fait  
9 état du fait que ce business plan actualisé, que nous avons  
10 mentionné hier, bien évidemment, dans nos plaidoiries, fait état  
11 de l'avancée du projet, de la structuration juridique des  
12 sociétés, qui est clairement démontrée et justifiée dans ce  
13 business plan actualisé, qui est là pour montrer l'avancée de  
14 nos investissements. Par contre, Maurice ne se gêne pas pour  
15 utiliser cette pièce pour nous dire que, finalement, encore une  
16 fois, ça démontrerait le fait que notre projet ne pouvait pas  
17 aboutir puisqu'il y avait des « *concerns* ». Les mots utilisés  
18 par la République de Maurice sont les suivants : Le *business*  
19 *plan suggests* -- donc, *it appears* --, mais concrètement, en quoi  
20 notre business plan, par rapport à une question de gestion des  
21 déchets, par rapport à une question de confidentialité, ne  
22 répond pas à la législation mauricienne ? Nous n'avons aucun  
23 élément formel. Étant rappelé quand même, sur la question de la  
24 gestion des déchets qu'on a eu une lettre de non-objection  
25 claire du ministère de l'Environnement dès 2014.

1                    Dernier point que je souhaite rectifier également  
2 sur les faits qui nous ont été présentés ce matin de manière, on  
3 va dire... une appréciation que l'on peut en tout cas contester,  
4 c'est sur le *fast track committee*. Donc, la République de  
5 Maurice n'objecte pas notre inscription sur le *fast track*  
6 *committee*. Mais désormais, il serait admis que, de toute façon,  
7 tous les projets étaient, en fait, inscrits sur le *fast track*  
8 *committee*. Et donc tous les projets de l'époque pouvaient  
9 bénéficier de ce droit spécifique accordé à certains  
10 investissements considérés comme des *large investment projects*.  
11 Encore une fois, on n'a aucun élément matériel qui nous est  
12 produit sur le *fast track committee*.

13                    Sur la contribution des demandeurs, on rappellera  
14 quand même brièvement que, sur notre chronologie des faits, elle  
15 n'est pas contestée par la République de Maurice. Ils estiment  
16 ce matin dans leur closing statement que nous aurions omis  
17 certains passages. Ils parlent donc notamment, par exemple, du  
18 business plan actualisé, que nous avons mentionné hier, mais en  
19 tout cas ils ne reviennent pas sur la chronologie des faits ;  
20 ils ne remettent pas en cause les différentes étapes de mise en  
21 œuvre du projet. Encore une fois, je pense qu'il est important  
22 de rappeler qu'il y a eu bien deux phases du projet. Il y a eu  
23 un projet d'une phase d'instruction de 2009 à 2014, et il y a eu  
24 une phase de mise en œuvre qui a suivi cette lettre de non-  
25 objection. La matérialisation du projet, la concrétisation et

1 la mise en œuvre de nos investissements a commencé à partir de  
2 2014. Le fait qu'ils aient été stoppés en 2016 par la lettre  
3 d'objection du Premier ministre ne peut anéantir tout ce qui a  
4 été fait pendant cette période de dix-neuf mois. Il faut  
5 rappeler également, sur la contribution, qu'aujourd'hui, on  
6 n'est pas là pour étudier notre préjudice. On est là pour  
7 analyser si les investissements réalisés correspondent à la  
8 définition de l'investissement au sens du traité. Il est bien  
9 évidemment intéressant de constater également la notion  
10 d'investissement au sens de la loi mauricienne, et bien  
11 évidemment au sens des critères *Salini*. Si l'on reprend la  
12 définition au sens du traité, il ne faut pas omettre que l'on  
13 vise bien, que le traité vise bien les droits de participation à  
14 des sociétés et autres sortes de participation. Il n'y a aucun  
15 seuil qui est visé. Il vise des éléments incorporels de fonds  
16 de commerce. Il vise aussi les créances afférentes aux droits  
17 ci-dessous. On a eu l'occasion de revenir en détail, les  
18 questions ont permis de préciser les choses sur ces différentes  
19 contributions, mais au sens du traité, nous répondons à la  
20 définition de l'investissement. Autre point sur la notion de  
21 définition de l'investissement qu'il est utile de rappeler,  
22 c'est quand même de regarder comment la définition de  
23 l'investissement est retenue dans le nouveau traité conclu entre  
24 la France et Maurice en 2010. Cette définition... Le nouveau  
25 traité est venu préciser, en fait, la définition du précédent

1 traité puisqu'il est écrit que le terme « investissement »  
2 désigne tous les avoirs, tels que les biens, les droits et  
3 intérêts de toute nature. Et donc, on rentre plus dans le  
4 détail de la définition du traité de 1973. Notamment sur les  
5 obligations, créances, et autres droits, toutes prestations  
6 ayant une valeur économique, mais également sur tout ce qui est  
7 savoir-faire, qui est directement visé dans le traité, outre les  
8 noms déposés, les procédés techniques. Donc, on a une  
9 définition qui est un peu plus complète et qu'il est intéressant  
10 tout de même de porter à l'attention du Tribunal. Si l'on  
11 regarde la contribution financière, on a eu l'occasion hier de  
12 rappeler le capital social des sociétés créées. On a eu  
13 l'occasion de rappeler la répartition et le nombre de parts des  
14 différents investisseurs. On est bien évidemment à votre  
15 disposition, si vous le souhaitez, pour vous communiquer ces  
16 pièces. Il faut tout de même rappeler, suite à l'objection  
17 évoquée par la République de Maurice, que les informations sur  
18 la structure de l'actionnariat des sociétés ont été communiquées  
19 dès la réclamation indemnitaire de 2017. On est donc étonné  
20 aujourd'hui de l'objection, en sachant que la création même et  
21 l'existence même des sociétés n'est pas contestée. Donc,  
22 fournir les statuts de la société ne vont pas remettre en cause  
23 l'existence même de ces sociétés. Sur les fonds qui ont été  
24 versés aux sociétés, on a donc ces 300 000 euros de versés qui,  
25 bien évidemment, ont été immobilisés, contrairement à ce que

1 l'on a pu entendre ce matin. Alors, oui, le simple fait de  
2 transférer de l'argent à l'international, on est d'accord, ne  
3 constitue pas en lui-même un investissement, mais là on est sur  
4 le transfert de fonds à une entité qui a été créée pour investir  
5 directement à Maurice. L'objet de cet apport était de financer,  
6 bien évidemment, de faire des dépenses et de permettre aux  
7 sociétés de fonctionner. Outre le fait qu'effectivement, il ne  
8 faut pas oublier qu'on a eu des dépenses. Alors, peut-être  
9 qu'elles semblent faibles, mais on a eu des dépenses qui ont été  
10 engagées, et qui ont été en pure perte puisque le projet s'est  
11 arrêté. Il faut rappeler qu'il n'y a pas de seuil visé, au sens  
12 du traité, sur les dépenses ou encore sur le capital social. Et  
13 si on venait à fixer des seuils, on s'interroge bien évidemment  
14 sur quels seuils et à quels curseurs doit être fixé, en sachant  
15 que la notion de contribution substantielle est bien évidemment  
16 relative et doit être évaluée conformément au contexte, au type  
17 de demandeur et au fait que notamment ils ont financé tout le  
18 projet en fonds propres. Le projet et l'investissement réalisé,  
19 on l'a rappelé hier également, doit être analysé dans sa  
20 globalité. La République de Maurice a eu l'occasion ce matin de  
21 viser la jurisprudence *L.E.S.I. and ASTALDI v. Algérie*. Elle  
22 est très pertinente pour nous également. Elle dit clairement,  
23 effectivement, que, pour juger de l'importance de l'apport, il  
24 faut se fonder sur la durée qui avait été conventionnellement  
25 prévue. Et donc, on analyse globalement le projet pour juger de

1 l'importance de cet apport. En sachant que le projet qui a été  
2 mis en œuvre a bien été autorisé sur la base d'un business plan  
3 qui était complet. Autre point à relever, les seuils qui sont  
4 fixés dans la loi mauricienne, on a eu l'occasion de le rappeler  
5 hier, sont parfaitement remplis en l'espèce. On a un apport  
6 financier supérieur aux 100 000 dollars et on avait un chiffre  
7 d'affaires projeté supérieur à ce qui était requis puisqu'il  
8 était également supérieur à 100 000 euros. C'est pourquoi  
9 d'ailleurs nous avons toujours été traités comme des  
10 investisseurs par la République de Maurice.

11 Sur le savoir-faire des demandeurs, il y a un  
12 savoir-faire qui a été mobilisé à la fois par les demandeurs, à  
13 la fois par le laboratoire de Bordeaux dans son ensemble pour  
14 mettre en place le projet. Sur la matérialisation de ce savoir-  
15 faire, la République de Maurice vise justement la décision  
16 *L.E.S.I. and ASTALDI v. Algérie* pour nous dire que, finalement,  
17 ça devrait être mis au capital... cela devrait constituer un  
18 asset. À aucun moment c'est écrit de la sorte. Ce qu'il  
19 importe effectivement c'est qu'il y ait une valeur économique et  
20 que l'on puisse justifier d'un savoir-faire. En l'espèce, on  
21 l'a démontré et explicité hier, il y a un vrai savoir-faire, à  
22 savoir, comment on va créer ce laboratoire, comment il va être  
23 conçu, comment on va former les personnes de ce laboratoire. On  
24 a quand même signé un MoU avec l'université pour avoir le  
25 personnel qualifié et leur transmettre notre savoir-faire. Ils

1 étaient censés venir à Bordeaux pour être formés directement.  
2 On a donc une matérialisation, à la fois financière mais à la  
3 fois de savoir-faire. Quand on nous dit que les sociétés  
4 finalement ne seraient que des véhicules pour de futurs  
5 investissements, finalement, on vient nous dire qu'il faudrait  
6 qu'on ait réalisé tout le projet, qu'on ait construit le  
7 laboratoire pour obtenir la protection du traité. Ce n'est pas  
8 l'objet ni le but du traité. Dès la constitution de nos  
9 sociétés, on a un droit à être protégés. Encore une fois, le  
10 faible montant engagé, ou la faiblesse des dépenses réalisées,  
11 ne peuvent pas nous disqualifier automatiquement de la notion  
12 d'investissement. Nous n'avons pas investi à nos propres  
13 risques, nous avons suivi clairement les instructions du BOI  
14 dans toutes les phases du projet. Si l'on regarde le risque, la  
15 notion de risque, au sens des critères Salini, bien évidemment  
16 que la notion de risque doit être analysée globalement, encore  
17 une fois. Il y a eu un risque qui s'est réalisé puisqu'on a eu  
18 des pertes, donc, dans tous les cas il y a un risque qui a eu  
19 lieu. Sur le risque relatif aux sommes qui ont été mises à  
20 disposition des sociétés, bien évidemment qu'en transférant  
21 300 000 euros à l'étranger sur les comptes de la société, on  
22 prend un risque (on prend un risque politique, on pourrait subir  
23 un risque d'expropriation), on s'engage dans un projet à long  
24 terme, étant rappelé qu'à cette époque on avait versé  
25 300 000 euros, mais l'objectif était bien évidemment de verser

1 sur le long terme beaucoup plus de fonds. On avait un terrain  
2 qui coûtait 400 000 euros, on avait un laboratoire à construire,  
3 donc on était effectivement peut-être au début des sommes qui  
4 devaient être versées, mais on a versé des sommes, on a investi.  
5 Le risque ne peut pas être nié complètement, et il faut le  
6 regarder à l'aune du projet qui était envisagé.

7                   Pour finir sur mes propos, simplement rappeler  
8 quand même que, au départ, il nous était finalement reproché  
9 d'avoir créé des sociétés qui étaient de simples « coquilles  
10 vides ». Le débat avec la République de Maurice permet  
11 aujourd'hui de parler de quel est notre « substantive  
12 business ». Donc, on a changé quand même d'échelle et, encore  
13 une fois, dans le contexte du dossier, dans le contexte pour les  
14 demandeurs, nous considérons que nous avons participé de manière  
15 substantive, nous avons eu un investissement substantiel.  
16 Je passe la parole à M<sup>e</sup> Poulain.

17  
18                   THE PRESIDENT: Merci, maître.

19  
20                   ME. POULAIN: Madame la présidente, messieurs les  
21 arbitres, il ne m'appartient pas de poser directement une  
22 question à la partie mauricienne dans cette audience, mais je  
23 voulais vous soumettre une interrogation.

24                   Il me semble que ce matin la partie mauricienne a  
25 franchi un cap en formalisant et en explicitant quelles seraient



1 ses objections au projet.

2 J'ai retenu que, des éléments du business plan  
3 actualisé, on devrait déduire qu'il y aurait eu des  
4 insuffisances de nos clients sur des questions de  
5 confidentialité ou de gestion des déchets. On n'a pas davantage  
6 d'éléments concrets pour pousser ces points ou pour les  
7 discuter. Surtout, je retiens que l'objection principale  
8 finalement serait une objection d'ordre légal. Il y aurait, il  
9 y a une législation à Maurice qui concerne les expertises ADN.  
10 J'entends qu'il nous est dit que seul le FSL serait habilité à  
11 réaliser des expertises ADN. Je ne sais pas quel est le  
12 fondement légal de cette restriction mais j'entends ce que l'on  
13 me dit, elle n'est pas démontrée. Mais ce que j'aimerais  
14 savoir, finalement, c'est toutes les réquisitions, toutes les  
15 analyses qui ont été réalisées par le laboratoire bordelais  
16 jusqu'à cette date, est-ce que ça veut dire qu'aujourd'hui la  
17 République de Maurice en conteste la légalité ? Est-ce que les  
18 expertises ADN qui sont aujourd'hui confiées à des bureaux  
19 anglais ou sud-africains, est-ce que Maurice en conteste la  
20 légalité? Ces analyses aujourd'hui font partie de dossiers, de  
21 dossiers criminels en cours, non résolus. Est-ce que la  
22 prétention de Maurice est de dire que ces analyses, qui  
23 participent à la manifestation de la vérité dans des dossiers  
24 criminels, sont illégales? Il y a derrière le comportement de  
25 la République de Maurice des sujets d'une gravité qui me

1 paraissent extrêmes.

2                   Pour en revenir à un sujet plus apaisé, la MFN.

3 Vous nous avez interrogés hier sur la signification à donner au

4 terme « régies » (les matières régies) à l'article 8(2). Après

5 réflexion, la seule explication que nous trouvons à l'emploi de

6 ce terme est de pouvoir distinguer dans le traité des

7 dispositions qui donnent ou qui prévoient des droits et des

8 obligations pour les parties ou pour les bénéficiaires du traité

9 des dispositions qui n'en donnent pas. Je m'explique.

10 L'article 1, qui comporte des définitions, par exemple, fixe

11 finalement le champ d'application ou le champ d'invocabilité du

12 traité, mais pour moi, il ne régit pas de matières

13 particulières. Les clauses de fin, ou les dispositions de fin,

14 à l'article 11 ou 12, les dispositions relatives à l'entrée en

15 vigueur ne sont pas des dispositions qui régissent des matières.

16 J'ai entendu ce matin mon confrère aller plus loin et considérer

17 finalement que régir, c'est aller dans la définition d'un

18 régime. Et il a dit ceci : « L'article 9 du traité ne régit pas

19 l'arbitrage. L'arbitrage est régi par la convention CIRDI. »

20 Son argument est de dire que l'article 9 fait référence à

21 l'arbitrage CIRDI, dans certaines conditions, et que

22 l'instrument qui régit l'arbitrage, ce n'est pas l'article 9,

23 c'est la convention CIRDI. Bon, je lui ferais la remarque que,

24 si on prend l'article 9 finlandais, l'article 9 finlandais fait

25 référence au règlement CNUDCI! L'article 9 finlandais fait

1 référence à la convention CIRDI! Est-ce que c'est un argument  
2 pour dire que l'article 9 finlandais ne régit pas l'arbitrage  
3 mais que l'arbitrage est régi par le règlement CNUDCI ou la  
4 convention CIRDI Je ne le crois pas.

5                   Vous nous avez interrogés sur la signification  
6 des commentaires faits par Yves Nouvel au point 82 de son  
7 Opinion. Alors, on a toujours du mal à qualifier, à concrétiser  
8 ou à matérialiser ce qu'il peut y avoir derrière l'opposition  
9 « objectif/subjectif », mais en l'occurrence, je me suis permis  
10 d'appeler Yves Nouvel hier soir, et il m'a dit « voilà ce que  
11 j'ai en tête quand j'écris cela » : c'est, pour lui, l'idée  
12 d'opposer l'objet de la disposition (la matière, l'objet) et les  
13 droits qu'offre cette disposition. Et dans sa logique, puisque  
14 la MFN est une disposition qui permet d'acquérir des droits ; on  
15 ne peut pas comparer droit à droit, on compare objet à objet.  
16 Et c'est pour cela que son raisonnement, qui oppose l'objectif  
17 au subjectif, conduit à dire qu'il y a identité de matière entre  
18 l'article 9 finlandais et l'article 9 dans le traité français.  
19 Il parle de « *in pari materia* ».

20                   Je reviens sur l'article 9 du traité, dont il a  
21 été dit finalement qu'il ne régissait pas ou qu'il ne se  
22 rapportait pas à l'arbitrage dans la mesure où c'était une  
23 référence à l'arbitrage CIRDI et que c'était la convention CIRDI  
24 qui régissait l'arbitrage. Ce que je retiens des débats que  
25 l'on a eus, notamment hier, c'est que l'article 9 n'est pas un

1 simple renvoi à l'autonomie des parties. On a évoqué la notion  
2 de « consentement conditionné », en l'occurrence à l'existence  
3 d'un accord. On pourrait dire qu'il y a dans l'article 9 un  
4 engagement à consentir à l'arbitrage, dans telles conditions.  
5 Il est bien clair qu'un arbitrage CIRDI qui aurait lieu sur la  
6 base de l'article 9 du traité ne serait pas uniquement un  
7 arbitrage pour entendre des *contract claims* mais aussi des  
8 *treaty claims*. Cela relève de l'évidence. Et ce que j'ai  
9 essayé de vous expliquer hier, c'est qu'il y a, excusez-moi  
10 l'expression, mais dans l'article 9, l'ADN de l'arbitrage  
11 *without privity*, c'est donc, à l'évidence, une disposition  
12 relative au règlement des différends investisseurs/États. Ce  
13 que je reproche, très courtoisement, à mes confrères, c'est  
14 d'avoir une interprétation et une application de l'accord de  
15 1973 comme si nous étions en 1974. Il y a une difficulté  
16 incompréhensible à prendre en compte la pratique des parties,  
17 les accords des parties ultérieurs à l'accord de 1973. Quand  
18 j'entends leurs démonstrations, on est en 1974. Or, ce n'est  
19 pas possible. Et ce n'est pas ce que prévoient les règles  
20 d'interprétation de la Convention de Vienne. On ne peut  
21 procéder à un exercice d'interprétation d'un traité qui va avoir  
22 50 ans que d'une façon dynamique, dans un contexte qui est étiré  
23 dans le temps. On est dans l'impossibilité personnelle,  
24 culturelle, physique, temporelle, de se replacer en 1973. On ne  
25 peut pas. C'est impossible de dire quelle était l'idée exacte

1 des parties en 1973. On peut essayer de la reconstituer, de la  
2 prouver, etc., mais ce n'est pas possible. La logique est  
3 d'interpréter le traité de 1973 à la lumière des événements  
4 subséquents. C'est pour cela que nous avons essayé de vous  
5 convaincre de l'anachronisme de l'affirmation de la République  
6 de Maurice à considérer qu'elle n'a pas consenti à l'arbitrage  
7 vis-à-vis des investisseurs français. C'était vrai en 1973, en  
8 tout cas c'était un consentement limité et conditionné, mais ce  
9 n'est plus vrai aujourd'hui. On a un nouveau traité en 2010, et  
10 ce nouveau traité est connecté au traité de 1973, la clause de  
11 connexion est la clause MFN elle-même, c'est la dernière phrase  
12 de la clause MFN qui connecte les deux traités. Et ces deux  
13 traités sont également connectés par les règles d'interprétation  
14 qui imposent de faire référence à la pratique ultérieure entre  
15 les parties. C'est pour cela qu'on a été relativement étonné,  
16 dans le cadre de nos échanges écrits, y compris dans l'opening  
17 statement des défendeurs hier matin. On n'a identifié aucune  
18 réaction, aucun commentaire aux éléments de notre dernier  
19 mémoire qui insiste, justement, sur l'importance de la prise en  
20 compte du traité de 2010 ; aucun commentaire de Maurice sur sa  
21 pratique en général, sur son approche générale en matière  
22 d'arbitrage investisseur/État. Ce matin, on a eu une très  
23 courte réaction sur l'article 18 de la Convention de Vienne,  
24 mais j'avoue que je n'ai pas bien compris ce qui a été dit dans  
25 la mesure où j'ai compris que, comme si nous prétendions que

1 l'article 18 devait s'appliquer au traité de 1973, non. Notre  
2 argument est de dire que, conformément à l'article 18 de la  
3 Convention de Vienne, la République de Maurice doit se comporter  
4 d'une manière conforme à l'objet et au but, et donc aux  
5 dispositions du traité de 2010, quand bien même ce traité n'est  
6 pas entré en vigueur. Et nous sommes allés jusqu'à indiquer,  
7 dans notre dernière soumission écrite, que ce consentement  
8 retenu, finalement par Maurice aujourd'hui viole la confiance  
9 légitime dont peut se prévaloir les investisseurs au moment où  
10 ils ont investi, en 2014. Aucun commentaire de Maurice sur ce  
11 sujet.

12 Je voudrais faire un dernier point sur l'argument  
13 de la *severability*, qui était la question de Jan Paulsson à  
14 Maurice. Évidemment, on rejette cet argument. On ne l'a pas  
15 commenté énormément dans nos écritures pour une raison assez  
16 simple, c'est qu'on n'est pas sûr de l'avoir bien compris. On  
17 comprend l'argument de l'autonomie de la clause d'arbitrage, de  
18 la clause compromissoire dans l'arbitrage commercial, on va dire  
19 « classique », et dans son rapport avec le contrat qui la  
20 prévoit. On peut l'entendre également dans le cadre d'un  
21 traité, pour les mêmes raisons, s'il y a un sujet de validité du  
22 traité, pourquoi pas, immuniser la clause d'arbitrage du traité  
23 des vices ou des conditions d'existence du traité. Lorsque j'ai  
24 lu Zachary Douglas, la façon dont il utilise cet argument, parce  
25 qu'il l'utilise, je l'ai compris comme un argument de protection

1 ou de protection de prérogatives d'un tribunal arbitral déjà  
2 constitué, un débat sur lequel on n'est pas rentré vraiment dans  
3 le détail, mais ce qui oppose, encore une fois, Stephan Schill  
4 et Zachary Douglas, ce n'est pas tellement une opposition, mais  
5 ils ne se positionnent pas du même point de vue. Zachary  
6 Douglas se positionne du point de vue d'un tribunal dont la  
7 compétence est déjà établie, et donc -- c'est comme cela que je  
8 le lis --, il protège, quelque part, il a une compétence un peu  
9 emmurée. Il protège sa compétence. Alors que le propos de  
10 Schill, et notre fondement pour fonder la compétence du Tribunal  
11 aujourd'hui, n'est pas une question d'extension de la compétence  
12 d'un tribunal. On veut établir la compétence du Tribunal sur la  
13 clause MFN et l'article 9 du traité finlandais. On est dans une  
14 configuration très différente, et je ne suis pas sûr que  
15 Zacharie Douglas aurait eu la même approche qu'il a pu avoir sur  
16 la question de l'extension de la compétence s'il avait été dans  
17 notre situation. Si la question de la séparabilité ou de  
18 l'autonomie de la clause compromissoire ou du fondement de la  
19 compétence d'un tribunal arbitral doit être abordée dans notre  
20 affaire, elle ne se positionne pas au niveau de l'article 9 du  
21 traité France-Maurice, elle se positionne au niveau de  
22 l'article 9 du traité finlandais que nous invoquons.

23                   Voilà, Madame la présidente, j'en ai fini pour  
24 mes observations.

25

1 THE PRESIDENT: Does this conclude your entire  
2 submissions?

3  
4 MALE SPEAKER: Oui.

5  
6 THE PRESIDENT: Well thank you. Merci beaucoup,  
7 maître.

8 Je me permets juste de clarifier un point par  
9 rapport à nos questions d'hier, et en particulier la question  
10 par rapport à l'article, pardon, au paragraphe 82 de l'Opinion  
11 juridique d'Yves Nouvel.

12 La question n'était pas tellement ce que lui  
13 voulait en dire, on a lu, on l'a bien lu, mais ce que sont les  
14 conclusions des demandeurs par rapport à cette position. Mais  
15 vous avez amplement répondu à la question, je voulais juste  
16 préciser la question, les termes de la question.

17  
18 ME. POULAIN: D'accord.

19  
20 THE PRESIDENT: With that, do we have any further  
21 question? We certainly do have some time if there were. I  
22 don't have any further questions. I don't think we have.  
23 Fantastic. So thank you, again, to those parties for the  
24 closing statements. We have two final matters to be discussed  
25 and those are post-Hearing briefs and cost submissions. This is



1 mentioned in paragraph 8 -- respectively 8.1 and 8.2 -- of our  
2 Procedural Order Number 4, regarding the Hearing organizations.  
3 We had a chance amongst the Tribunal members to discuss the  
4 needs for post-Hearing submissions and we believe that we had  
5 ample opportunity yesterday and today to hear the parties. You  
6 have had the chance to make the arguments obviously in addition  
7 to already the written submissions. We had the chance and we  
8 have amply used it to ask you questions. We've been very  
9 satisfied by the answers given, so from our perspective,  
10 certainly, there would be no need for written post-Hearing  
11 submissions or -- this morning was almost like a post-Hearing  
12 submission in a certain sense, but we wanted to see what the  
13 parties positions were on this point. Maybe the Respondent  
14 versus the moving party.

15  
16 DR. HEISKANEN: Thank you Madam President. The  
17 Respondent's position certainly is that there is no need for  
18 post-Hearing submissions. The very purpose of this Hearing  
19 including the closing statements was to address any outstanding  
20 questions that the Tribunal may have. We are very, very pleased  
21 to hear that the Tribunal has no further questions. If there  
22 was a reason for any post-Hearing submissions, the only reason  
23 would be if the Tribunal has any outstanding questions and if  
24 there are none, we don't see any need for any further written  
25 submissions.

1

2 THE PRESIDENT: Thank you. On the Claimant side?

3

4 ME. POULAIN: Madame la présidente. Les débats,  
5 effectivement, ont été, je pense, nourris.

6

7 Sur la nécessité d'un post-Hearing brief, bien  
8 que nous puissions réserver notre position à la prise de  
9 connaissance des transcripts, mais je pense qu'on s'est tous  
10 très bien compris et que les arguments échangés ont été compris  
11 par tous. La nécessité d'un post-Hearing brief n'est pas, de  
12 notre côté, évidente. En revanche, nous sommes, encore une  
13 fois, à votre entière disposition si vous voulez nous  
14 communiquer une liste de questions précises ou une demande de  
15 communication de pièce précise, nous sommes à votre entière  
16 disposition pour y répondre.

16

17 THE PRESIDENT: It is very much appreciated and I  
18 should say for the record what I've already said -- I think  
19 yesterday -- that if any documents that were mentioned that are  
20 not exhibits, that are not on the record -- if in for the  
21 deliberations on the Tribunal side, we were to believe that  
22 somehow, these references were relevant for our decision-making  
23 process, we would obviously give the parties an opportunity to  
24 comment, but I don't expect that at this stage to happen. So I  
25 don't think we would need to go there; but if that arises and if

1 there are any other questions, we would obviously tell the  
2 parties.

3           On cost submissions, obviously we would need  
4 those. I don't know if parties' representatives had a chance to  
5 discuss this amongst themselves; if there are any proposals as  
6 to the format, timing of cost submissions. We didn't have a  
7 chance to talk about it. Maybe we can also do this in  
8 subsequent correspondence, but maybe the parties can already  
9 indicate if they have any -- at this stage -- any preferences  
10 regarding format and timing of submissions.

11  
12           DR. HEISKANEN: We have not yet been able to  
13 discuss this with the opposing counsel. What we would suggest  
14 that it would be most practical if counsel first confer and try  
15 to reach an agreement on format and timetable and then we, if  
16 there's an agreement communicated to the Tribunal, if there's  
17 any disagreement, then we can seek the Tribunal's assistance.

18  
19           THE PRESIDENT: That is certainly a way forward  
20 that is agreeable with us. Is that fine for the Claimant's too?

21  
22           ME. POULAIN: Nous devrions parvenir à un accord  
23 sur ce sujet.

24  
25           THE PRESIDENT: Excellent. So I will encourage

1 both sides to talk about this and then maybe you can in the next  
2 few days let us know about anything that you have, an agreement  
3 you've found or let us know if not so.

4 I think that concludes our Hearing, but I should  
5 not let you go without telling you a couple of things and that  
6 is, "Thank You's" on the Tribunal side -- first of all for the  
7 party representatives on both sides that have been here; the  
8 Claimants and the representatives of the Respondents. We  
9 appreciate that you took the time of being here. We also would  
10 like to thank the legal teams on both sides. We have certainly  
11 appreciated the intellectually very satisfying debate as well as  
12 the very pleasant and polite way it was done, which was  
13 appreciated by all of us; I should say. We also would like to  
14 thank everyone who is sitting behind the screens and less  
15 visibly. So thanks to all the technicians and last, but not  
16 least, we would like to thank the PCA for hosting us here for  
17 these two days at the Hearing, and Fedelma Smith, who's a legal  
18 senior counsel here for having organized it all so  
19 professionally. So thanks to all of you; have a good afternoon.  
20 Safe travels back to your respective home countries.

21  
22 DR. HEISKANEN: Thank you Madam President and on  
23 behalf of the Respondent, we thank the members of the Tribunal  
24 for your time and for your availability and for your attention  
25 to the case. Thank our colleagues for a very constructive

1 approach. This arbitration and we thank the worldwide audience  
2 for their undivided attention at this Hearing.

3  
4 ME. POULAIN: Madame la présidente, également,  
5 nous remercions bien évidemment le Tribunal pour la conduite de  
6 cette première phase de cette affaire. Nous remercions le  
7 secrétariat de la Cour permanente pour son accueil remarquable  
8 et les conditions dans lesquelles nous avons été reçus, toujours  
9 très agréables. Cela contribue à la sérénité des débats d'être  
10 aussi proche de la Cour international de Justice, et en présence  
11 de membres de Tribunal aussi éminents. On est très honoré que  
12 vous ayez participé à ce Tribunal arbitral. Je remercie  
13 également nos confrères pour la sérénité des échanges et  
14 j'espère que nous aurons l'occasion de continuer à débattre,  
15 cette fois-ci sur le fond, dans cette affaire.

16  
17 DR. HEISKANEN: That may be the first point of  
18 disagreement.

19  
20 MATTER ADJOURNED