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By email

Geneva, 31 July 2019

**RE: PCA No. 2018-37 – Prof. Christian Doutremepuich and Mr Antoine
Doutremepuich v. The Republic of Mauritius – Respondent’s Reply on
Cost Submission**

Dear Madam President,
Dear Members of the Tribunal,

Pursuant to the Tribunal’s letter of 27 June 2019, the Respondent sets out below its brief comments on the Claimants’ cost submission.

The Claimants’ schedule of costs is deficient

- 1 The Respondent notes that the Claimants have not provided a breakdown of their counsel’s fees and expenses, save to indicate that, among the Claimants’ expenses, a lump sum of EUR 34,000 concerns the fees of their two experts (but without providing any breakdown between them).
- 2 The Claimants also claim compensation for the time allegedly spent by the Claimants themselves in relation to this case. This claim is disputed.

- 3 First, contrary to the Claimants' allegation,¹ a party's internal costs are not recoverable as a matter of course. A decision on such costs is to be taken on a case-by-case basis and many arbitral tribunals have indeed found such costs not to be recoverable.²
- 4 Second, where tribunals have accepted the possibility of recovering internal costs, they have required that these be sufficiently explained to permit an assessment of their "justification and reasonableness".³ Here, the Claimants have failed to provide any explanation for the number of days claimed, the task performed and the daily rate applied.⁴ The claim should therefore be rejected.

The Claimants' arguments on cost allocation have no basis

- 5 To support their own cost claim, the Claimants allege that Mauritius "simulated" an amicable settlement process.⁵ This allegation is not only wrong on the facts as there is no evidence of any "simulation", but also fails as a matter of law. There is simply nothing inappropriate about a party seeking to settle a dispute while reserving its legal position, including on jurisdiction.
- 6 Furthermore, as the Tribunal ruled in Procedural Order No. 3, the without prejudice settlement correspondence between the Parties on which the Claimants

¹ Claimants' Cost Submission, p. 4 (para. 6).

² See e.g. B. Hanotiau, "Chapter 10. The Parties' Costs of Arbitration", in Y. Derains and R. Kreindler (eds), *Evaluation of Damages in International Arbitration, Dossiers of the ICC Institute of World Business Law*, Vol. 4 (Kluwer Law International; ICC, 2006), at **Exhibit RLA-66**, p. 217, citing to ICC case No. 6293; Ph. Cavalieros, "In-House Counsel Costs and Other Internal Party costs in International commercial Arbitration", 30 *Arb. Intl.* 145 (2014), at **Exhibit RLA-67**, p. 150, citing the "Guidelines for Arbitrators on Making Orders Relating to the Costs of the Arbitration", in *The Journal of the Chartered Institute of Arbitrators* (2003).

³ See B. Hanotiau, *op. cit.* at **RLA-66**, p. 216, citing to ICC case No. 6564 ("There is, however, an important difference between the costs for outside counsel and those incurred in-house: the former are expenditures and can be clearly identified and evidenced; in the case of the latter this is not always the case. In view of this difference it appears justified to require some substantiation inter alia with respect to the nature of the cost, the personnel involved, and type of work performed. In the present case, neither Party satisfied these requirements. Their claims are too general to permit an assessment of the justification and reasonableness of the costs claimed. Therefore, no allowance will be made for internal costs of the Parties"); See also Ph. Cavalieros, *op. cit.* at **RLA-67**, p. 151 and footnote n°37.

⁴ The Claimants merely state that Messrs Antoine and Christian Douremepuich spent "*un nombre de jours important pour le bon suivi de la procédure d'arbitrage*", which they arbitrarily estimate at 20 and 10 days respectively, and only provide a vague indication of the work done ("*revu [sic] des écritures des parties, preparation et participation à l'audience*") (Claimants' Cost Submission, p. 4 (para. 7)).

⁵ Claimants' Cost Submission, p. 5 (para. 11).

again seek to rely, is privileged and inadmissible. On that basis also the Claimants' argument should be rejected outright.

- 7 The Claimants' attempt to avoid an adverse cost award is equally baseless.
- 8 The Claimants argue that it was "legitimate" for them to initiate this arbitration, in light of the purported "admission" of their project, their alleged investments in Mauritius and their "expectation" that jurisdiction could be created on the basis of an MFN clause alone. The Claimants' arguments are misguided. In the absence of any, even remotely, relevant precedents on their alleged "expectation" that an MFN clause alone could serve as a basis of jurisdiction, and the many decisions that had taken the contrary view, that "expectation" had no basis. The Claimants simply took a deliberate risk in initiating this arbitration. Nor is there any "legitimacy" in the Claimants' attempt to gain a windfall on a project in which they made no "investment" and had spent only a very modest amount of money in the form of pre-investment expenditures. Ultimately, the Claimants took a gamble the consequence of which they, and not the Republic of Mauritius, should bear.
- 9 The Claimants also seek to hide behind the fact that they are natural persons with alleged limited financial capacity.⁶ This argument does not withstand scrutiny. Whether the Claimants are natural persons or corporate entities is of no relevance as to whether a cost award is warranted in this case. In any event, there is no evidence of the Claimants' impecuniosity. On the contrary, the evidence on record shows that the Claimants had no difficulty spending almost EUR 600,000 in counsel fees, expenses and arbitration costs for this jurisdictional phase of the proceeding. The Claimants were also allegedly prepared to invest substantial amounts in Mauritius, including EUR 1.5 million in equity for their first year of operation.⁷ They must therefore be in a position to face the consequences of the risk they took by initiating this arbitration.
- 10 Finally, the Claimants argue that the Respondent's costs should be lower in this case than in the *Rawat* case, because its arguments on MFN jurisdiction were

⁶ Claimants' Cost Submission, p. 6 (para. 14(iii)).

⁷ See Transcript, Day 1, p. 79 (12-15) ("*[P]our les demandeurs, il faut quand même rappeler qu'il[s] finance[nt] sur fonds propres un projet qui, lorsque l'on regarde en détail le business plan, nécessite, sur la première année de fonctionnement du laboratoire, un engagement de 1,5 million sur fonds propres pour des demandeurs personnes physiques.*").

identical in both proceedings.⁸ First, the Respondent's costs are indeed, and quite significantly, lower in this case than in the *Rawat* case. Second, and in any event, the comparison is inapposite. The cases raised different legal issues, in addition to that of the Tribunal's lack of jurisdiction *ratione voluntatis*, and were argued differently by different counsel.

- 11 For all these reasons, as well as those set out in the Respondent's cost submission of 24 July 2019, the Respondent reiterates that, absent the Tribunal's jurisdiction to hear the Claimants' case on the merits, the Respondent should be awarded the entirety of its costs.

Yours sincerely,



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⁸ Claimants' Cost Submission, p. 6 (para. 14(ii)).