LALIVE

Christian DOUTREMEPUICH
and
Antoine DOUTREMEPUICH

v.

REPUBLIC OF MAURITIUS

Respondent's Opening Statement

The Hague, 12 June 2019

The Tribunal must decide two issues:

I. Has Mauritius given its consent to arbitrate claims of French investors under the France-Mauritius BIT?
   = Is there jurisdiction *ratione voluntatis?*

II. Have the Claimants made a protected investment in Mauritius?
   = Is there jurisdiction *ratione materiae?*

An objection to jurisdiction *ratione voluntatis* is more fundamental than an objection to jurisdiction *ratione materiae*

The objection relating to the MFN clause is about the existence of the alleged consent, whereas the investment issue is about the scope of the alleged consent.

I. The Tribunal lacks jurisdiction *ratione voluntatis*

A. International jurisdiction requires strict proof of consent

B. The Claimants have no standing to invoke the France-Mauritius BIT

C. An MFN clause alone cannot create jurisdiction

D. The MFN clause in Article 8 of the France-Mauritius BIT does not extend to investor-State claims arising under the Treaty

1. Dispute resolution provisions are autonomous and severable from the basic treaty
2. The *ejusdem generis* rule does not support the Claimants' interpretation of Article 8
3. The Claimants' interpretation of the MFN clause fails under Article 31 of the VCLT
4. The Claimants' interpretation of the MFN clause fails under the *effet utile* rule

I.A. International jurisdiction requires strict proof of consent

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prestige of this jurisdiction—since nothing undermines confidence in the process of international adjudication so quickly and completely as the feeling that international tribunals may assume jurisdiction in cases not really covered by the intended scope of the consents given by the parties. It is sometimes urged that because international jurisdiction is limited by the necessity for consent, and this limitation is a severe one, there is every justification for giving the maximum scope to any given consent that it can be made to bear—a sort of principle of *caveant proferentes*. States, it may be said, enjoy the benefit of the fact that their subjection to international jurisdiction is limited by their own consent: therefore the onus is on them to make sure that their consents do not cover more than they are intended to cover and are so framed that their limits are unmistakable. This is a

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consent was given, and whether it covers the dispute. This is putting it less high than it can be put: strictly, jurisdiction ought only to be assumed if it is quite clear that the parties have agreed to its exercise in relation to the dispute before the tribunal—that is to say that they have expressed themselves in such terms, or performed such acts, or have otherwise so conducted themselves, that (whatever they may subsequently have professed or may now contend) the view that they did *not* consent cannot, in law, be reconciled with the term used, or the acts performed, or the behaviour manifested. It is only too easy in this matter for international tribunals to pay lip-service to the principle of consent and to profess only to assume jurisdiction by the consent, express or implied, of the parties, while adopting an interpretation of what is involved by consent, and more particularly of what matters are covered by a particular consent, such that, in practice, a jurisdiction is assumed going well beyond what was intended to be conferred—or which was not intended to be conferred at all. To sum up—what is required, if injustice is not to be done to the one party or the other, is neither restricted nor liberal interpretations of jurisdictional clauses, but *strict proof* of consent.

(*b*) *Consent by inference*. Apart from those cases where there is genuine ambiguity of terminology, or where some inherent indeterminacy is involved (e.g. by reason of difficulties of classification in relation to the

Fitzmaurice, RLA-8, p. 514

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respondent State has, through its conduct before the Court or in relation to the applicant party, acted in such a way as to have consented to the jurisdiction of the Court (*Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 24).

62. The consent allowing for the Court to assume jurisdiction must be certain. That is so, no more and no less, for jurisdiction based on *forum prorogatum*. As the Court has recently explained, whatever the basis of consent, the attitude of the respondent State must "be capable of being regarded as 'an unequivocal indication' of the desire of that State to accept the Court's jurisdiction in a 'voluntary and indisputable' manner" (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 18; see also *Corfu Channel*

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of the Court to entertain a case upon a consent thereto yet to be given or manifested by another State to file an application setting out its claims and inviting the latter to consent to the Court dealing with them, without prejudice to the rules governing the sound administration of justice. Before this revision, the Court treated this type of application in the same way as any other application submitted to it: the Registry would issue the usual notifications and the "case" was entered in the General List of the Court. It could only be removed from the List if the respondent State explicitly rejected the Court's jurisdiction to entertain it. The Court was therefore obliged to enter in its General List "cases" for which it plainly did not have jurisdiction and in which, therefore, no further action could be taken; it was consequently obliged to issue orders so as to remove them from its List (see *Treatment in Hungary of Aircraft and Crew of United States of America (United States of America* v. *Hungary), Order of 12 July 1954, I.C.J. Reports 1954*, p. 99; *Treatment in Hungary of Aircraft and Crew of United States of America (United States of*

Case Concerning Mutual Assistance in Criminal Matters (ICJ), RLA-3, p. 204

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106. It may be correct to assert, as the Respondent does,[54] that due to particular historical circumstances the Bolivarian Republic of Venezuela, like some other Latin American countries,

111. The statement made in the previous paragraph is definitive. Even in the case of a dispute between private citizens, the rule is that they must settle their disputes in court. The exception is

110. It is also an unquestionable fact that the basis for arbitration is consent.[55] There cannot be an arbitration, national or international, *ad hoc* or institutional, before ICSID or any other entity that administers arbitration proceedings, if the parties do not agree to arbitrate.

111. The statement made in the previous paragraph is definitive. Even in the case of a dispute between private citizens, the rule is that they must settle their disputes in court. The exception is that, only if they agree, they may resolve their dispute through arbitration. If this is true in the ambit of private law, it is even more so when a State is involved, because when a State submits to arbitration proceedings, it is waiving the possibility of resorting to its own courts.

55 *See* Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March, 1965, ("Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1)).").

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58 *Société Ouest Africaine des Bétons Industriels* v. *Republic of Senegal* (ICSID Case No. ARB/82/1), Award dated 25 February, 1988, ¶ 4.09.

57 *See* Letter from Brandes to the Tribunal dated 10 January, 2011 at pp. 4-5; Brandes' presentation at the Hearing on 15-16 November, 2010 at pp. 43 and 124.

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Brandes v. Venezuela (ICSID), RLA-10, pp. 31-32

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112. As expressed in a well-known award:

"Article 25 of the ICSID Convention is by no means an exception to the law of the land. It

113. Even if there is no requirement that consent to ICSID arbitration should have any characteristic other than to be expressed in writing in accordance with Article 25 of the Convention, it is self-evident that such consent should be expressed in a manner that leaves no doubts.

from the conclusions arrived at by those tribunals with respect to the specific matter at issue here.

[36] *Société Ouest Africaine des Bétons Industriels v. Republic of Senegal* (ICSID Case No. ARB/82/1), Award dated 25 February, 1988, ¶ 4.09.

[37] *See* Letter from Brandes to the Tribunal dated 10 January, 2011 at pp. 4-5; Brandes' presentation at the Hearing on 15-16 November, 2010 at pp. 43 and 124.

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Brandes v. Venezuela (ICSID), RLA-10, p. 32

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Menzies Middle East and Africa S.A. et Aviation Handling Services International Ltd. c. République du Sénégal (Affaire CIRDI ARB/15/21) Sentence

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et non pas la règle. Ainsi, le Tribunal arbitral adhère aux conclusions des tribunaux arbitraux

130. 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 assujetti 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 l'arbitrage est l'exception, et non pas la règle. Ainsi, le Tribunal arbitral adhère aux conclusions des tribunaux arbitraux suivants :

paragraphes qui suivent.

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complètement muet sur l'arbitrage international ou même la résolution des différends. Cette disposition, en raison de sa généralité et de son libellé, ne peut pas être considérée comme un consentement actuel, exprès et non-équivoque à l'arbitrage:

« *Article II*
Traitement de la nation la plus favorisée

1. En ce qui concerne toutes les mesures couvertes par le présent accord, chaque Membre accordera immédiatement et sans condition aux services et fournisseurs de services de tout

Menzies v. Senegal (ICSID), RLA-2, pp. 40-41

I.A. International jurisdiction requires strict proof of consent

of the contracting parties as expressed in the text. To go beyond those bounds would be to act *ultra vires*.

173. The Vienna Convention itself unequivocally emphasizes the foundational role of State consent in the law of treaties. The Convention employs the word "consent" no fewer than 62

international tribunal's jurisdiction or on the basis of acts "conclusively establishing" such consent.[321] What is not permissible is to presume a state's consent by reason of the state's failure to proactively disavow the tribunal's jurisdiction. Non-consent is the default rule; consent is the exception. Establishing consent therefore requires affirmative evidence. But the impossibility of

175. This basic rule was often recalled by the International Court of Justice, as in particular in the *Ambatielos* case[319] as well as in the *Monetary Gold* case.[320] Against this background, it is not possible to presume that consent has been given by a state. Rather, the existence of consent must be established. This may be accomplished either through an express declaration of consent to an international tribunal's jurisdiction or on the basis of acts "conclusively establishing" such consent.[321] What is not permissible is to presume a state's consent by reason of the state's failure to proactively disavow the tribunal's jurisdiction. Non-consent is the default rule; consent is the exception. Establishing consent therefore requires affirmative evidence. But the impossibility of basing a state's consent on a mere presumption should not be taken as a "strict" or "restrictive" approach in terms of interpretation of dispute resolution clauses. It is simply the result of respect for the rule according to which state consent is the incontrovertible requisite for any kind of international settlement procedure. This was already established by the Permanent Court of International Justice in the famous *Lotus* case of 1927[322] and further recalled by the ICJ in the case of the *Aerial Incident of July 27, 1955*[323] as well as in the *East Timor* case of 1995.[324] What is true of the very existence of consent to have recourse to a specific international dispute resolution mechanism is also true as far as the scope of this consent is concerned.[325]

Daimler v. Argentina (ICSID), RLA-1, pp. 69-70

I.B. The Claimants have no standing to invoke the France-Mauritius BIT

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CONVENTION

ENTRE LE GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE ET LE GOUVERNEMENT DE L'ILE MAURICE SUR LA PROTECTION DES INVESTISSEMENTS, SIGNÉE A PORT-LOUIS LE 22 MARS 1973

Article 9.

Les accords relatifs aux investissements à effectuer sur le territoire d'un des Etats contractants, par les ressortissants, sociétés ou autres personnes morales de l'autre Etat contractant, comporteront obligatoirement une clause prévoyant que les différends relatifs à ces investissements devront être soumis, au cas où un accord amiable ne pourrait intervenir à bref délai, au Centre international pour le règlement des différends relatifs aux investissements, en vue de leur règlement par arbitrage conformément à la Convention sur le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats.

empêché ou s'il est ressortissant d'un des deux Etats, les nominations seront faites par le membre le plus ancien de la Cour qui n'est ressortissant d'aucun des deux Etats.

A moins que les Etats contractants n'en décident autrement, le tribunal fixe lui-même sa procédure.

Les décisions du tribunal sont obligatoires pour les Etats contractants.

France-Mauritius BIT, C-2, Art. 9

I.B. The Claimants have no standing to invoke the France-Mauritius BIT

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

C. A number of investment protection treaties go a step farther and do require the host State to give consent to ICSID arbitration (in many cases also conciliation) at the request of the investor. The typical provision found in the Netherlands treaties reads as follows:

'The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment shall assent to any demand on the part of such national to submit, for conciliation or arbitration, to the International Centre for the Settlement of Investment Disputes established by the Convention of Washington of the 18th March, 1965, any dispute that may arise in connection with that investment'.[14] [15]

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 juridiction, would be clear on the face of the request[16].

Broches, CL-37, p. 65

I.C. An MFN clause alone cannot create jurisdiction

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the United Kingdom in conjunction with the Treaty of 1934 between Iran and Denmark. There could be no dispute between Iran and the United Kingdom upon the Iranian-Danish Treaty alone.

The United Kingdom also put forward, in a quite different form, an argument concerning the most-favoured-nation clause. If Denmark, it is argued, can bring before the Court questions as to the application of her 1934 Treaty with Iran, and if the United Kingdom cannot bring before the Court questions as to the application of the same Treaty to the benefit of which she is entitled under

not be in the position of the most-favoured nation. The Court needs only observe that the most-favoured-nation clause in the Treaties of 1857 and 1903 between Iran and the United Kingdom has no relation whatever to jurisdictional matters between the two Governments. If Denmark is entitled under Article 36, paragraph 2, of the Statute, to bring before the Court any dispute as to the application of its Treaty with Iran, it is because that Treaty is subsequent to the ratification of the Iranian Declaration. This can not give rise to any question relating to most-favoured-nation treatment.

to invoke its own Treaty of 1857 or 1903 with Iran, it cannot rely upon the Iranian-Danish Treaty, irrespective of whether the facts of the dispute are directly or indirectly related to the latter treaty.

The Court must, therefore, find in regard to the Iranian-Danish Treaty of 1934, that the United Kingdom is not entitled, for the purpose of bringing its present dispute with Iran under the terms of the Iranian Declaration, to invoke its Treaties of 1857 and 1903 with Iran, since those Treaties were concluded before the ratification of the Declaration ; that the most-favoured-nation clause contained in those Treaties cannot thus be brought into operation ; and that, consequently, no treaty concluded by Iran with any third party can be relied upon by the United Kingdom in the present case.

Anglo-Iranian Co. Case (ICJ), RLA-7, p. 110

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Company constitutes a breach of the principles and practice of international law which by her treaty with Denmark Iran

The Court cannot accept this contention. It is obvious that the term *traités ou conventions* used in the Iranian Declaration refers to treaties or conventions which the Party bringing the dispute before the Court has the right to invoke against Iran, and does not mean any of those which Iran may have concluded with any State. But in order that the United Kingdom may enjoy the benefit of any treaty concluded by Iran with a third party by virtue of a most-favoured-nation clause contained in a treaty concluded by the United Kingdom with Iran, the United Kingdom must be in a position to invoke the latter treaty. The treaty containing the most-favoured-nation clause is the basic treaty upon which the United Kingdom must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran : it is *res inter alios acta*.

Treaty of 1954 between Iran and Denmark, but the application of the Treaty of 1857 or the Convention of 1903 between Iran and

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Anglo-Iranian Co. Case (ICJ), RLA-7, p. 109

I.C. An MFN clause alone cannot create jurisdiction

103. In the present case, it is clear that the Contracting Parties' consent to arbitrate expressed in Article 8 of the Treaty is limited. The Contracting Parties explicitly agreed in this provision that they would consent to arbitrate disputes arising out of a certain and limited number of articles of the Treaty. The Tribunal is therefore of the view that, under the Treaty, the Contracting Parties have not provided their consent to arbitrate disputes arising out of any

104. 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.

include a third sub-paragraph in Article 3 which reads as follows:

3(3) For avoidance of doubt, it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

106. In the present Treaty, such a paragraph was not included. A review of treaties concluded by the UK shows that, where the scope of the dispute settlement provision is limited, there is

[43] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, CL-37, para. 212.

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A11Y v. Czech Republic, RLA-38, p. 26

I.C. An MFN clause alone cannot create jurisdiction

thereby rendering it inapplicable to Article 8 as is the view preferred in the attached dissenting opinion.

103. Article 3(3) of the Barbados-Venezuela BIT is almost identical to the United Kingdom Model BIT (2008), the only difference being that in the UK Model Treaty Article 3(3) starts with the words

that it does not seek to import consent to arbitration in the present case from ano concluded by Venezuela with a third State.[84]

106. The question which has to be answered is whether Venezuela has given its consent to inte arbitration for disputes with Barbadian investors in the BIT at hand.

105. It is now for the Tribunal to determine how Article 3(2) impacts the provisions of Article 8 on settlement of disputes between an investor and a State. The Tribunal agrees with the Respondent that the MFN clause cannot serve the purpose of importing consent to arbitration when none exists under the BIT between Barbados and Venezuela.[83] It also appears that the Claimant is arguing that it does not seek to import consent to arbitration in the present case from another BIT concluded by Venezuela with a third State.[84]

dispute settlement provisions only through the operation of Article 3(2) of the Treaty. "Investment" as such has no procedural rights, therefore Article 3(1) is without relevance for the purpose of the Tribunal's inquiry into its jurisdiction.

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provisions of this Article", makes such submission of disputes to international arbitratio to the conditions specified in paragraphs (1) and (2) of Article 8. These conditions deter arbitration forum to which a dispute can be submitted, either ICSID, the ICSID Additiona or arbitration under the UNCITRAL Rules. Yet, the fact remains that Article 8(4) expr Contracting Parties' overall "unconditional consent" to international arbitration. Vene: given in Article 8 one consent to international arbitration, not three different consent ICSID arbitration, one to ICSID Additional Facility arbitration and one to *ad hoc* arbitrati UNCITRAL Rules). That consent covers three different arbitral fora (ICSID, Additional UNCITRAL) under the conditions specified in Article 8.

Venezuela US v. Venezuela (PCA), RLA-22, pp. 35-36

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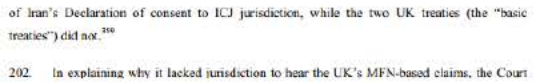
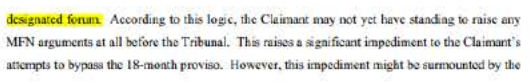


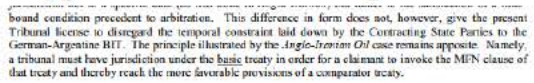
of Iran's Declaration of consent to ICJ jurisdiction, while the two UK treaties (the "basic treaties") did not.[259]

202. In explaining why it lacked jurisdiction to hear the UK's MFN-based claims, the Court



designated forum. According to this logic, the Claimant may not yet have standing to raise any MFN arguments at all before the Tribunal. This raises a significant impediment to the Claimant's attempts to bypass the 18-month proviso. However, this impediment might be surmounted by the

204. In the present matter, of course, Argentina's consent to international arbitration is contained within the same instrument as the MFN guarantees giving rise to some of the Claimant's jurisdictional arguments. But the physical location (external instrument versus within the same treaty) of a State's consent to a particular type of dispute resolution does not eviscerate the requirement, stressed by the ICJ, that the State must have consented to the particular type of dispute settlement in question before the claimant may raise any MFN claims before the designated forum. According to this logic, the Claimant may not yet have standing to raise any MFN arguments at all before the Tribunal. This raises a significant impediment to the Claimant's attempts to bypass the 18-month proviso. However, this impediment might be surmounted by the



bound condition precedent to arbitration. This difference in form does not, however, give the present Tribunal license to disregard the temporal constraint laid down by the Contracting State Parties to the German-Argentine BIT. The principle illustrated by the *Anglo-Iranian Oil* case remains apposite. Namely, a tribunal must have jurisdiction under the basis treaty in order for a claimant to invoke the MFN clause of that treaty and thereby reach the more favorable provisions of a comparator treaty.

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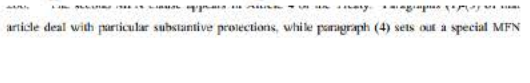

article deal with particular substantive protections, while paragraph (4) sets out a special MFN

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Daimler v. Argentina (ICSID), RLA-1, pp. 82-83

I.C. An MFN clause alone cannot create jurisdiction

an MFN clause containing this phrase could be applied to international arbitration proceedings without discounting the explicit territorial limitation upon the scope of the clause.[419]

396. Through its interpretation of the ordinary meaning of the text of Article 4(5) of the BIT, the Tribunal thus concludes that the MFN clause does not apply *prima facie* to the dispute settlement mechanism.

397. This conclusion is comforted by an interpretation of the object and purpose of Article 4(5) of the BIT. The object and purpose of the BIT's MFN clause is to grant protected investors the

398. As the question here is one of jurisdiction, it must be stated quite firmly that the Tribunal has to determine its jurisdiction under the conditions of the BIT by application of the rule of *compétence-compétence*, but that this does not authorise the Tribunal to use the MFN clause to create a jurisdiction that it does not possess to begin with. In other words, consent has to be exchanged first, under the conditions stated in the BIT, before the Tribunal can even discuss the scope of the MFN clause.

create a jurisdiction that it does not possess to begin with. In other words, consent has to be exchanged first, under the conditions stated in the BIT, before the Tribunal can even discuss the scope of the MFN clause.

399. This analysis reinforces the Tribunal' view that the MFN clause in Article 4(5) of the BIT does not apply to the dispute settlement mechanism.

400. However, the Tribunal notes that, contrary to many other BITs, the MFN clause here is included in the same article as the dispute settlement provision, which also includes both substantive protections (against a violation of the standard of FPS – Full Protection and Security – and

ST-AD v. Bulgaria (PCA), RLA-23, p. 99

I.C. An MFN clause alone cannot create jurisdiction

The claimant, by relying upon an MFN clause in respect of a jurisdictional matter, is in essence asking the tribunal to *declare* that it is entitled to the more favourable 'treatment' represented by the terms of a third treaty dealing with the jurisdiction of the tribunal that is to be constituted in the event of a dispute arising under that third treaty. A declaration is a *remedy* (or a secondary

before the standing offer is even invoked by the putative claimant. The MFN clause does not automatically incorporate the terms of a third treaty into the basic treaty. It secures the treatment afforded by the host state to investors with the requisite nationality under a third treaty for the benefit of investors with the requisite nationality under the basic treaty. The more favourable treatment must be identified and then compared with the treatment afforded to the particular claimant. The claimant must assert a right to more favourable treatment by claiming through the MFN clause in the basic treaty. It can only do so by instituting arbitration proceedings and thus by accepting the terms of the standing offer of arbitration in the basic treaty. At that point an arbitration agreement between the claimant and the host state comes into existence. And the existence of that arbitration agreement is critical to the viability of the arbitration regime envisaged by the investment treaty. For instance, it

the standing offer of arbitration in the basic treaty. At that point an arbitration agreement between the claimant and the host state comes into existence. And the existence of that arbitration agreement is critical to the viability of the arbitration regime envisaged by the investment treaty. For instance, it is essential to the application of the New York Convention on the Recognition

Douglas, RLA-17, p. 107

I.D. The MFN clause in Article 8 of the France-Mauritius BIT does not extend to investor-State claims arising under the Treaty

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Article 9

Disputes between an Investor and a Contracting Party

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

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

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

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

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

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

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

5. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute between it and an investor of the other Contracting Party to arbitration in accordance with this Article.

6. Neither of the Contracting Parties, which is a party to a dispute, can raise an objection, at any phase of the arbitration procedure or of the execution of an arbitral award, on account of the fact that the investor, which is the other party to the dispute, has received an indemnification covering a part or the whole of its losses by virtue of an insurance.

7. The award shall be final and binding on the parties to the dispute and shall be executed in accordance with national law of the Contracting Party in whose territory the award is relied upon, by the competent authorities of the Contracting Party by the date indicated in the award.

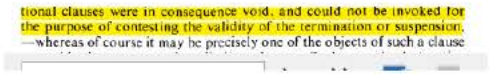
Finland-Mauritius BIT, C-3, Art. 9

I.D.1 Dispute resolution provisions are autonomous and severable from the basic treaty

I.D.1 Dispute resolution provisions are autonomous and severable from the basic treaty

31. In considering further the Indian contentions described in paragraph 29, *supra*, a convenient point of departure will be the question mentioned in sub-paragraph *(c)* of paragraph 30 because, in the proceedings before the Court, this question assumed almost more prominence in the Indian arguments than any other. Furthermore, it involves a point of principle of great general importance for the jurisdictional aspects of this—or of any—case. This contention is to the effect that since India, in suspending overflights in February 1971, was not invoking any right that might be afforded by the Treaties, but was acting outside them on the basis of a general principle of international law, "therefore" the Council, whose jurisdiction was derived from the Treaties, and which was entitled to deal only with matters arising under them, must be in-

32. To put the matter in another way, these contentions are essentially in the nature of replies to the charge that India is in breach of the Treaties: the Treaties were at the material times suspended or not operative, or replaced,—hence they cannot have been infringed. India has not of course claimed that, in consequence, such a matter can never be tested by any form of judicial recourse. This contention, if it were put forward, would be equivalent to saying that questions that prima facie may involve a given treaty, and if so would be within the scope of its jurisdictional clause, could be removed therefrom at a stroke by a unilateral declaration that the treaty was no longer operative. The acceptance of such a proposition would be tantamount to opening the way to a wholesale nullification of the practical value of jurisdictional clauses by allowing a party first to purport to terminate, or suspend the operation of a treaty, and then to declare that the treaty being now terminated or suspended, its jurisdictional clauses were in consequence void, and could not be invoked for the purpose of contesting the validity of the termination or suspension, —whereas of course it may be precisely one of the objects of such a clause to enable that matter to be adjudicated upon. Such a result, destructive of the whole object of adjudicability, would be unacceptable.


tional clauses were in consequence void, and could not be invoked for the purpose of contesting the validity of the termination or suspension, —whereas of course it may be precisely one of the objects of such a clause

Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan), RLA-25, p. 64

I.D.1 Dispute resolution provisions are autonomous and severable from the basic treaty

211. The decision in *Ceskoslovenska Obdchodni Banka, A.S. v. The Slovak Republic*[16] is not relevant. The case concerned a clause in a specific contract ("Consolidation

212. In the Tribunal's view, the lack of precedent is not surprising. When concluding a multilateral or bilateral investment treaty with specific dispute resolution provisions, states cannot be expected to leave those provisions to future (partial) replacement by different dispute resolution provisions through the operation of an MFN provision,

[16] ICSID Case No. ARB/97/4, Decision on Jurisdiction of 24 May 1999, reprinted in 14 ICSID Rev.-F.I.L.J. 250 (1999).

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unless the States have explicitly agreed thereto (as in the case of BITs based on the UK Model BIT). This matter can also be viewed as forming part of the nowadays generally accepted principle of the separability (autonomy) of the arbitration clause. Dispute resolution provisions constitute an agreement on their own, usually with interrelated provisions.

unless the States have explicitly agreed thereto (as in the case of BITs based on the UK Model BIT). This matter can also be viewed as forming part of the nowadays generally accepted principle of the separability (autonomy) of the arbitration clause. Dispute resolution provisions constitute an agreement on their own, usually with interrelated provisions.

Plama v. Bulgaria, RLA-26, pp. 67-68

I.D.1 Dispute resolution provisions are autonomous and severable from the basic treaty

decision. Actually, the *Siemens* decision illustrates the danger caused by the manner in which the *Maffezini* decision has approached the question: the principle is retained in the form of a "string citation" of principle and the exceptions are relegated to a brief examination, prone to falling soon into oblivion (Decision, at paragraphs 105, 109 and 120).

227. For the foregoing reasons, the Tribunal concludes that the MFN provision of the Bulgaria-Cyprus BIT cannot be interpreted as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration and that the Claimant cannot rely on dispute settlement provisions in other BITs to which Bulgaria is a Contracting Party in the present case.

Mr. Vautrin had become the owner of PCL. If it had known these facts, the Respondent affirms that it would not have approved the purchase of Nova Plama by PCL. Under Bulgarian law, and, in particular, Article 5(1) of the Bulgarian Privatization Act, the obtaining of Bulgaria's consent to the investment by such misrepresentation vitiates Bulgaria's consent so that there is no valid investment under the ECT and consequently no ICSID jurisdiction under that treaty.

229. As the Arbitral Tribunal has already stated, in paragraphs 126-130 of this Decision, the Respondent's allegation of misrepresentation by the Claimant does not deprive the Tribunal of jurisdiction in this case. Nevertheless, these assertions by the Respondent are serious charges which, the Tribunal will have to examine on the merits.

230. In its Reply, the Respondent reserved the right, should the Tribunal sustain its jurisdiction, to raise an objection relating to whether the Claimant's investment was made in accordance with law, given the alleged misrepresentation. The Tribunal, consequently, joins the issue of misrepresentation to the consideration of the merits of the case.

Plama v. Bulgaria, RLA-26, p. 72

I.D.1 Dispute resolution provisions are autonomous and severable from the basic treaty

effect of the "public policy considerations" is that they take away much of the breadth of the preceding observations made by the tribunal in *Maffezini*.

222. In *Maffezini* the tribunal pointed out:

> *It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand.* (*Id.*)

223. The present Tribunal agrees with that observation, albeit that the principle with multiple exceptions as stated by the tribunal in the *Maffezini* case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.

present.

225. Whilst the Tribunal has not relied on it since the parties have not been in a position to include it in their pleadings, the Tribunal notes that the foregoing considerations are in line with the recent award in *Salini v. Jordan*[22].

226. In light of the foregoing review, the Tribunal need not examine the decisions in *Técnicas Medioambientales Tecmed v. United Mexican States*[23] and *Siemens AG v. The Argentine Republic*[24] as both decisions are partially based on the *Maffezini*

[22] See footnote 7, *supra*
[23] ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, reprinted in Spanish in 19 ICSID Rev.-F.I.L.J. 158 (2004).
[24] See footnote 11, *supra*.

Plama v. Bulgaria, RLA-26, p. 71

I.D.2 The *ejusdem generis* rule does not support the Claimants' interpretation of Article 8

I.D.2 The *ejusdem generis* rule does not support the Claimants' interpretation of Article 8

clause. The extent of the favours to which the beneficiary of that clause may lay claim will be determined by the actual favours extended by the granting State to the third State.

Commentary to articles 9 and 10

Scope of the most-favoured-nation clause regarding its subject-matter

Article 9. Scope of rights under a most-favoured-nation clause

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

2. The beneficiary State acquires the rights under paragraph 1 only in respect of persons or things which are specified in the clause or implied from its subject-matter.

only if the granting State extends to a third State treatment within the limits of the subject-matter of the clause.

2. The beneficiary State acquires rights under paragraph 1 in respect of persons or things in a determined relationship with it only if they:

(*a*) belong to the same category of persons or things as those in a determined relationship with a third State which benefit from the treatment extended to them by the granting State and

(*b*) have the same relationship with the beneficiary State as the persons and things referred to in subparagraph (*a*) have with that third State.

[116] See articles 11, 12 and 13 below, and the commentary thereto.

The Commission [of Arbitration] does not deem it necessary to express a view on the general question as to whether the most-favoured-nation clause can never have the effect of assuring to its beneficiaries treatment in accordance with the general rules of international law, because in the present case the effect of the clause is expressly limited to "any privilege, favour or immunity which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State",

[115] McNair, *op. cit.*, p. 287.

[116] *Anglo-Iranian Oil Co. case (Preliminary objection), Judgment of 22 July 1952, I.C.J. Reports 1952*, p. 110. For the facts and other aspects of the case, see *Yearbook ... 1970*, vol. II, pp. 202 and 205, doc. A/CN.4/228 and Add.1, paras. 10-30.

[117] *The Ambatielos case (merits : obligation to arbitrate), Judgment of 19 May 1953, I.C.J. Reports 1953*, p. 10.

ILC Draft Articles on MFN, RLA-27, p. 27

I.D.2 The *ejusdem generis* rule does not support the Claimants' interpretation of Article 8

Hungary of an attitude contrary to the interests of the Kingdom by collaborating in the German attack against Yugoslavia. This case surely does not fit in with the provisions of the 1829 Treaty. From the preceding it follows that the shipowners are wrong in their opinion that the Court should not apply the Decree as being contrary to international provisions.[129]

(9) According to one source, "some authority exists"

(12) The essence of the rule is that the beneficiary of a most-favoured-nation clause cannot claim from the granting State advantages of a kind other than that stipulated in the clause. For instance, if the most-favoured-nation clause promises most-favoured-nation treatment solely for fish, such treatment cannot be claimed under the same clause for meat.[134] The granting State cannot evade

(11) The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated.[133] Thus the rule follows clearly from the general principles of treaty interpretation. States cannot be regarded as being bound beyond the obligations they have undertaken.

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[129] Judgment of 6 March 1959 by the Supreme Court of the Netherlands (*Nederlandse Jurisprudentie 1962*, No. 2, pp. 18 and 19).

[130] McNair, *op. cit.*, p. 302.

[131] *Ibid.*, p. 303.

[132] See *Yearbook ... 1970*, vol. II, p. 210, doc. A/CN.4/228 and Add.1, para. 68.

[133] *Ibid.*, p. 211, doc. A/CN.4/228 and Add.1, para. 72.

report (*Yearbook ... 1969*, vol. II, p. 178, doc. A/CN.4/213, annex I), and articles I, II and XIII of the General Agreement on Tariffs and Trade (GATT, *Basic Instruments and Selected Documents*, vol. IV, *op. cit.*, pp. 2-5 and 21-23). Notable efforts are being made to facilitate the identification and comparison of products by setting up uniform standards for the purpose; these efforts include the Brussels Convention of 15 December 1950 establishing a Customs Co-operation Council (United Nations, *Treaty Series*, vol. 157, p. 129) and the Convention on the Nomenclature for the Classification of Goods in Customs Tariffs of 15 December 1950 (*ibid.*, vol. 347, p. 127).

[135] See article 29 below, and commentary thereto.

[136] Vignes, *loc. cit.*, p. 282.

[137] With very rare exceptions, there is no clause in modern times that would not be restricted to a certain sphere of relations, e.g. commerce, establishment and shipping. See article 4 above, paras. (14) and (15) of the commentary.

ILC Draft Articles on MFN, RLA-27, p. 30

I.D.2 The *ejusdem generis* rule does not support the Claimants' interpretation of Article 8

CONVENTION

ENTRE LE GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE ET LE GOUVERNEMENT DE L'ILE MAURICE SUR LA PROTECTION DES INVESTISSEMENTS, SIGNÉE A PORT-LOUIS LE 22 MARS 1973

Article 8.

Pour les matières régies par la présente Convention, les investissements des ressortissants, sociétés ou autres personnes morales de l'un des Etats contractants bénéficient de toutes les dispositions plus favorables que celles du présent Accord qui pourraient résulter de la législation actuelle ou future de l'autre Etat contractant.

Pour les matières régies par la présente Convention autres que celles visées à l'article 7, les investissements des ressortissants, sociétés ou autres personnes morales de l'un des Etats contractants bénéficient également de toutes les dispositions plus favorables que celles du présent Accord qui pourraient résulter d'obligations internationales déjà souscrites ou qui viendraient à être souscrites par cet autre Etat avec le premier Etat contractant ou avec des Etats tiers.

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Pour les matières régies par la présente Convention autres que celles visées à l'article 7, les investissements des ressortissants, sociétés ou autres personnes morales de l'un des Etats

France-Mauritius BIT, C-2, Art. 8

I.D.2 The *ejusdem generis* rule does not support the Claimants' interpretation of Article 8

EXPOSÉ DES MOTIFS

MESDAMES, MESSIEURS,

À Maurice, les investisseurs français bénéficient de l'accord de protection des investissements (API) signé le 22 mars 1973 et entré en vigueur le 1er avril 1974. Cependant, cet API présente des faiblesses, notamment en ce qui concerne l'indemnisation de l'investisseur en cas d'expropriation. Il ne contient ni clause d'exception culturelle ni exception à la liberté de transfert de capitaux en cas de difficultés de balance des paiements. Le champ du règlement des différends investisseur-État est limité puisque l'accord présuppose l'existence d'une clause compromissoire dans le contrat d'investissement. Or, conformément à l'évolution du droit international des investissements, la pratique conventionnelle française a évolué afin de permettre aux investisseurs connaissant un préjudice du fait des agissements de l'État d'accueil de leur investissement de recourir à l'arbitrage international sur la base du consentement exprimé par l'État dans l'API. C'est donc essentiellement pour mettre cet accord en conformité avec l'évolution de la pratique conventionnelle qu'une renégociation a été engagée avec le gouvernement de Maurice en 2005.

Le **préambule** souligne la volonté des Parties de renforcer la coopération économique et d'encourager les investissements réciproques.

Projet de Loi, R-4, p. 3

I.D.3 The Claimants' interpretation of the MFN clause fails under Article 31 of the VCLT

I.D.3 The Claimants' interpretation of the MFN clause fails under Article 31 of the VCLT

CONVENTION

ENTRE LE GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE ET LE GOUVERNEMENT DE L'ILE MAURICE SUR LA PROTECTION DES INVESTISSEMENTS, SIGNÉE A PORT-LOUIS LE 22 MARS 1973

33 (476)

produits par le capital investi ; le transfert de ce dernier s'effectue dans des conditions qui ne sauraient être moins favorables que celles accordées aux investissements des ressortissants, sociétés ou autres personnes morales d'un Etat tiers.

Article 8.

Pour les matières régies par la présente Convention, les investissements des ressortissants, sociétés ou autres personnes morales de l'un des Etats contractants bénéficient de toutes les dispositions plus favorables que celles du présent Accord qui pourraient résulter de la législation actuelle ou future de l'autre Etat contractant.

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France-Mauritius BIT, C-2, Art. 8

I.D.3 The Claimants' interpretation of the MFN clause fails under Article 31 of the VCLT

choose between broad doctrines or schools of thought, or to conduct a head-count of arbitral awards taking various positions and to fall in behind the numerical majority.

VI Does the MFN provision apply to dispute settlement?

59. The first question for the Tribunal is whether the MFN provision in BIT Article 3 is in principle capable of applying to dispute settlement provisions so as to modify BIT Article 10.

60. Article 3 contains provisions extending MFN treatment both to investments (Article

60. Article 3 contains provisions extending MFN treatment both to investments (Article 3(1)), and to investors (Article 3(2)). The obligation is the same in each case.[8] The entitlement is to treatment that is not less favourable than the State accords to its own nationals or companies or to investments of nationals or companies of any third State. In the present case it is the entitlement of the investor that is relevant, because it is the treatment of the investor as a disputing party that is in issue.

"(a) The following shall more particularly, though not exclusively, be deemed "activity" within the meaning of article 3, paragraph 2: the management, utilization, use and enjoyment of an investment. The following shall more particularly, though not exclusively, be deemed "treatment less favourable" within the meaning of article 3: less favourable measures that affect the purchase of raw materials and other inputs, energy or fuel, or means of production or operation of any kind or the marketing of products inside or outside the country. Measures that are adopted for reasons of internal or external security or public order, public health or morality shall not be deemed "treatment less favourable" within the meaning of article 3."

Hochtief v. Argentina (ICSID), RLA-24, p. 16

I.D.4 The Claimants' interpretation of the MFN clause fails under the *effet utile* rule

I.D.4 The Claimants' interpretation of the MFN clause fails under the *effet utile* rule

to play in the law of treaties and the jurisprudence of this Court, however, what is required in the first place for a reservation to a declaration made under Article 36(2) of the Statute is that it should be interpreted in a manner compatible with the effect sought by the reserving State."[100]

114. In this respect one must recall that this 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. Thus, in a number of cases, the International Court of Justice, when interpreting agreements or treaties, has given a very limited effect to the text it had to construe. In the *Aegean Sea Continental Shelf* case, the Court decided that the agreed communiqué invoked by Greece did not give jurisdiction to the Court. It added that "it is for the two Governments to consider ... what effect, if any, is to be given to [this text] in their further efforts to arrive to an amicable settlement of the dispute."[101] In three other cases, the Court had to interpret bilateral treaties providing for "firm and enduring peace and sincere friendship" between the Contracting States or using comparable formulae. It construed those provisions as fixing only an "objective in the light of which the other treaty provisions are to be interpreted and applied."[102]

[100] *Aegean Sea Continental Shelf* (Greece v. Turkey), ICJ Reports 1978, p. 44, ¶ 108.

[101] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 136 ¶ 273; *Oil Platforms* (Islamic Republic of Iran v. United States of America), ICJ Reports 1996 (II), p. 814 ¶ 28; *Case concerning certain questions of mutual assistance in criminal matters*, (Djibouti v. France), Judgment of 4 June 2008, ¶¶ 110–11.

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Cemex v. Venezuela (ICSID), RLA-52, p. 30

II. The Tribunal lacks jurisdiction *ratione materiae*

II. The Tribunal lacks jurisdiction *ratione materiae*

A. The Claimants have failed to show they have made an investment

B. The Claimants' pre-investment expenditures do not amount to an investment

II.A The Claimants have failed to show that they have made an investment

II.A. The Claimants have failed to show that they have made an investment

CONVENTION

ENTRE LE GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE ET LE GOUVERNEMENT DE L'ILE MAURICE SUR LA PROTECTION DES INVESTISSEMENTS, SIGNÉE A PORT-LOUIS LE 22 MARS 1973

Article 1er.

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

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

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

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

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

— toutes créances afférentes aux biens et droits ci-dessus visés et aux prestations qui s'y rapportent.

2. Sous réserve des dispositions du paragraphe 2 de l'article 4, sont également soumis aux dispositions du présent Accord, à compter de la date de son entrée en vigueur, les investissements que les ressortissants, sociétés ou autres personnes morales de l'un des Etats contractants ont, en conformité de la législation de l'autre Etat contractant, effectués avant cette date sur le territoire de ce dernier.

France-Mauritius BIT, C-2, Art. 1

II.A. The Claimants have failed to show that they have made an investment

CONVENTION

ENTRE LE GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE ET LE GOUVERNEMENT DE L'ILE MAURICE SUR LA PROTECTION DES INVESTISSEMENTS, SIGNÉE A PORT-LOUIS LE 22 MARS 1973

Article 2.

Les investissements appartenant aux ressortissants, sociétés ou autres personnes morales, de l'un des Etats contractants et situés sur le territoire de l'autre Etat, bénéficient de la part de

Article 3.

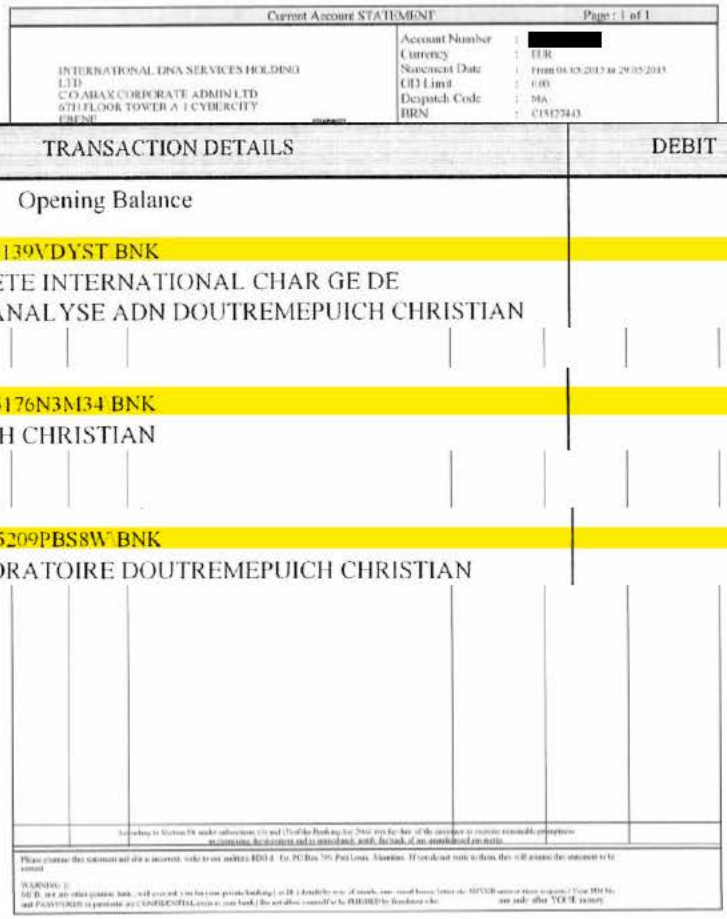
Les investissements réalisés sur le territoire d'un des Etats contractants par les ressortissants, sociétés ou autres personnes morales de l'autre Etat ne peuvent faire l'objet d'expropriation que pour cause d'utilité publique.

Article 2.

Les investissements appartenant aux ressortissants, sociétés ou autres personnes morales, de l'un des Etats contractants et situés sur le territoire de l'autre Etat, bénéficient de la part de

France-Mauritius BIT, C-2, Art. 1

II.A. The Claimants have failed to show that they have made an investment



Current Account STATEMENT — Page : 1 of 1

INTERNATIONAL DNA SERVICES HOLDING LTD
C/O ABAX CORPORATE ADMIN LTD
6TH FLOOR TOWER A 1 CYBERCITY
EBENE

Account Number : [redacted]
Currency : EUR
Statement Date : From 04/05/2015 to 29/05/2015
OD Limit : 0.00
Despatch Code : MA
BRN : C15127843

TRANS DATE	VALUE DATE	TRANSACTION DETAILS	DEBIT	CREDIT	BALANCE (-) Indicates a debit
		Opening Balance			0.00
19/05/2015	20/05/2015	Inward Transfer FT15139VDYST BNK CREATION SOCIETE INTERNATIONAL CHAR GE DE DEVELOPPER L ANALYSE ADN DOUTREMEPUICH CHRISTIAN		100,000.00	100,000.00
25/06/2015	25/06/2015	Inward Transfer FT15176N3M34 BNK DOUTREMEPUICH CHRISTIAN		100,000.00	177,533.27
28/07/2015	29/07/2015	Inward Transfer FT15209PBS8W BNK CREATION LABORATOIRE DOUTREMEPUICH CHRISTIAN		100,000.00	207,533.27

Bank statements, C-13, p. 1-3

II.A. The Claimants have failed to show that they have made an investment

MCB

Current Account STATEMENT — Page : 1 of 1

INTERNATIONAL DNA SERVICES HOLDING LTD
C/O ABAX CORPORATE ADMIN LTD
6TH FLOOR TOWER A 1 CYBERCITY
EBENE
MAURITIUS

Account Number : [redacted]
Currency : EUR
Statement Date : From 02/05/2016 to 20/05/2016
OD Limit : 0.00
Despatch Code : MA
BRN : C15127442

13/05/2016	13/05/2016	Account Transfer FT16134ZV6B8 BNK DNA SERVICES (MAURITIUS) LTD		43,611.72	223,473.84
13/05/2016	13/05/2016	Outward Transfer FTAF04414769 BNK /RFB/ACCOUNT CLOSURE MR DOUTREMEPUICH CHRISTIAN	223,473.84		0.00
		Closing Balance			0.00

According to Section 38, under subsections (1) and (2) of the Banking Act 2004, it is the duty of the customer to exercise reasonable precautions in examining the statement and to immediately notify the bank of any unauthorised payments

Please examine this statement and if it is incorrect, write to our address HSBC & Co, PO Box 799, Port Louis, Mauritius. If you do not write to them, they will assume this statement to be correct

WARNING !!!
MCB, nor any other genuine bank , will ever ask you for your private banking (or IB) details by way of emails, sms, snail boxes, letters etc. NEVER ensure these requests ! Your PIN No and PASSWORDS in particular are CONFIDENTIAL...even to your bank ! Do not allow yourself to be PHISHED by fraudsters who may only affect YOUR money !

The Mauritius Commercial Bank Ltd. - P.O. Box 52 - Sir William Newton St. - Port Louis - Republic of Mauritius
Tel: (230) 202 5000 - Fax: (230) 208 7654 - E-mail: contactcentre@mcb.mu - Swift Code: MCBLMUMU
Website: www.mcb.mu - BRN: C07000914

C-17(RfA)/Pièce 17, Annex 5, p. 14

II.B. Pre-investment expenditures do not constitute an investment

II.B. Pre-investment expenditures do not constitute an investment

CASES 159

contradict the contingent and non-binding character of the three Letters of

61. The Tribunal is consequently unable to accept as a valid denomination of "investment", the unilateral or internal characterization of certain expenditures by the Claimant in preparation for a project of investment. The only reference made by the Claimant to the BIT, in particular, Article II(2), is not to any extended definition of investment but to existing "investment" or investment *in esse* or in being, which is to be accorded "fair and equitable treatment". In the case under review, the Tribunal finds that the Claimant has not provided evidence of such an investment in being which qualifies for "full protection and security." Failing to provide evidence of admission of such an investment, the Claimant's request for initiation of a proceeding to settle an investment dispute is, to say the least, premature. However, in finding the request to be unfounded, the Tribunal

outside the jurisdiction of ICSID and beyond the competence of the Tribunal preclude whatever recourse the Claimant may have at its disposal to pursue its claim arising out of a commercial, financial or other types of dispute. The Tribunal's conclusions are declared to be without prejudice to any rights of action which may be available before other instances, national or international, with the consent of the Parties, if required.

Mihaly v. Sri Lanka,
RLA-36, p. 159

II.B. Pre-investment expenditures do not constitute an investment

PRIME MINISTER'S OFFICE
REPUBLIC OF MAURITIUS

1137/190 V9

14 October 2014

Dear Sir,

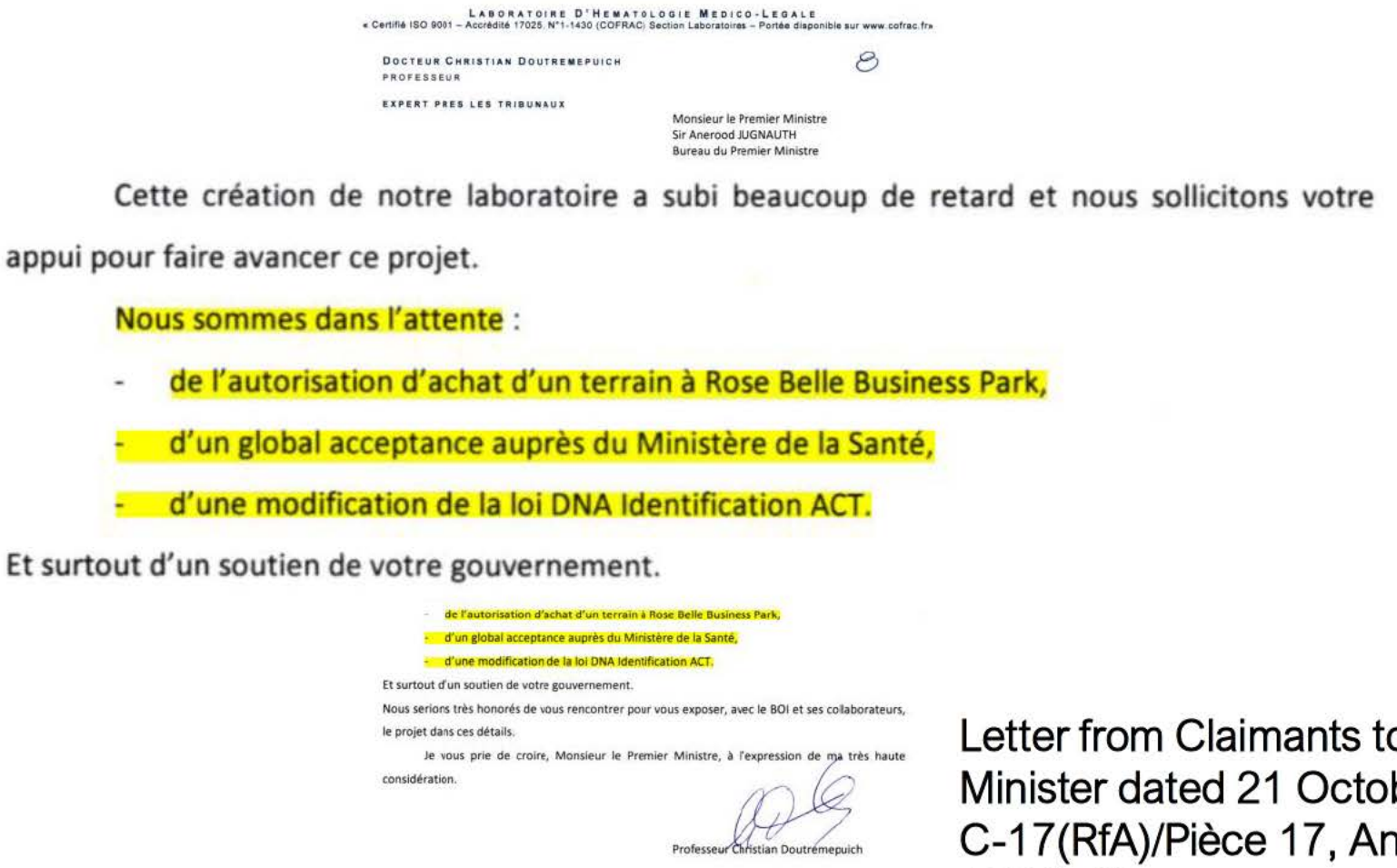
This Office has consulted different stakeholders, including the Forensic Science Laboratory and the Office of the Solicitor-General on the above proposal submitted by Prof. Doutremepuich in regard to the above project.

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

The Managing Director
Board of Investment
10th Floor, One Cathedral Square Building
16 Jules Koenig Street
Port Louis

Letter from Prime Minister's Office to Board of Investments dated 14 October 2014, C-7

II.B. Pre-investment expenditures do not constitute an investment



LABORATOIRE D'HEMATOLOGIE MEDICO-LEGALE
« Certifié ISO 9001 – Accrédité 17025. N°1-1430 (COFRAC) Section Laboratoires – Portée disponible sur www.cofrac.fr»

DOCTEUR CHRISTIAN DOUTREMEPUICH
PROFESSEUR

EXPERT PRES LES TRIBUNAUX

Monsieur le Premier Ministre
Sir Anerood JUGNAUTH
Bureau du Premier Ministre

Cette création de notre laboratoire a subi beaucoup de retard et nous sollicitons votre appui pour faire avancer ce projet.

Nous sommes dans l'attente :

- de l'autorisation d'achat d'un terrain à Rose Belle Business Park,
- d'un global acceptance auprès du Ministère de la Santé,
- d'une modification de la loi DNA Identification ACT.

Et surtout d'un soutien de votre gouvernement.

- de l'autorisation d'achat d'un terrain à Rose Belle Business Park,
- d'un global acceptance auprès du Ministère de la Santé,
- d'une modification de la loi DNA Identification ACT.

Et surtout d'un soutien de votre gouvernement.

Nous serions très honorés de vous rencontrer pour vous exposer, avec le BOI et ses collaborateurs, le projet dans ces détails.

Je vous prie de croire, Monsieur le Premier Ministre, à l'expression de ma très haute considération.

Professeur Christian Doutrémepuich

41-43 avenue de la République CS 51636 33073 BORDEAUX Cedex
TEL. 05 57 22 03 03 – FAX 05 57 22 04 04

Letter from Claimants to Prime Minister dated 21 October 2015 C-17(RfA)/Pièce 17, Annex 8, p. 102 (pdf)

II.B. Pre-investment expenditures do not constitute an investment

Way Forward

- The approval for the acquisition of 2 Arpents of land at BPML is still awaited. Once the BOI processes the application and PMO approves the acquisition, the promoter will apply for a land and building permit from the relevant authority and begin construction of the laboratory,

- Currently, according to the DNA identification Act only the Forensic Science Laboratory is eligible to collect DNA samples for legal purposes. Hence, an amendment to the DNA Identification Act is needed to cater for a private DNA laboratory to carry out DNA sampling and analysis in Mauritius

- The promoter has expressed a keen interest to meet with officials of the Prime Minister`s Office for further discussions on potential avenues of collaboration between the laboratory and Mauritius.

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E-mail from the BOI to the Claimants forwarding a brief on the DNA Project sent to the PM, 10 August 2015, C-37, p. 3 (pdf)