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
I.A. International jurisdiction requires strict proof of consent

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.

Fitzmaurice, RLA-8, p. 514
I.A. International jurisdiction requires strict proof of consent

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.”

Case Concerning Mutual Assistance in Criminal Matters (ICJ), RLA-3, p. 204
I.A. International jurisdiction requires strict proof of consent

110. It is also an unquestionable fact that the basis for arbitration is consent. 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.

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55 See Report of the Executive Director on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March, 1985, ("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)(b))."


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. 41 and 52.

Brandes v. Venezuela (ICSID), RLA-10, pp. 31-32
I.A. International jurisdiction requires strict proof of consent

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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.

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.

Brandes v. Venezuela (ICSID), RLA-10, p. 32
I.A. International jurisdiction requires strict proof of consent

Menzies v. Senegal (ICSID), RLA-2, pp. 40-41
I.A. International jurisdiction requires strict proof of consent

This basic rule was often recalled by the International Court of Justice, as in particular in the *Ambatielos case* as well as in the *Monetary Gold case*. 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. 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 and further recalled by the ICJ in the case of the *Aerial Incident of July 27, 1955* as well as in the *East Timor case* of 1995. 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.
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’île Maurice sur la protection des investissements, signée à Port-Louis le 22 mars 1973

Article 9.

Les accords relatifs aux investissements à effectuer sur le territoire d’un des États contractants, par les ressortissants, sociétés ou autres personnes morales de l’autre État 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 États et ressortissants d’autres États.
I.B. The Claimants have no standing to invoke the France-Mauritius BIT

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:

"If the host State refuses to give consent to the jurisdiction of the Centre after having been asked to do so by a national of its treaty partner, the latter State could demand that the former carry out its obligation under the treaty and, if that State persists in its refusal, have recourse to such remedies as may be available under the treaty or other rules of international law binding on the parties, including arbitration which is provided for in most investment protection treaties. The above-quoted provision would not, however, by itself, enable the investor to institute proceedings before the Centre. A request to that effect would presumably be rejected by the Secretary-General of the Centre since the absence of the host State’s consent, a crucial requirement of the Centre’s jurisdiction, would be clear on the face of the request."
I.C. An MFN clause alone cannot create jurisdiction
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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
I.C. An MFN clause alone cannot create jurisdiction

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*.

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

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40 Piama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, CL-37, para. 212.
I.C. An MFN clause alone cannot create jurisdiction

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. 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.

Venezuela US v. Venezuela (PCA), RLA-22, pp. 35-36
I.C. An MFN clause alone cannot create jurisdiction

Daimler v. Argentina (ICSID), RLA-1, pp. 82-83
I.C. An MFN clause alone cannot create jurisdiction

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.

ST-AD v. Bulgaria (PCA), RLA-23, p. 99
I.C. An MFN clause alone cannot create jurisdiction

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
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.
I.D.1 Dispute resolution provisions are autonomous and severable from the basic treaty
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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 26 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 1974, 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.
I.D.1 Dispute resolution provisions are autonomous and severable from the basic treaty

211. The decision in *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*\(^8\) 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,

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

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.

Plama v. Bulgaria, RLA-26, p. 72
I.D.1 Dispute resolution provisions are autonomous and severable from the basic treaty

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.

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*Plama v. Bulgaria, RLA-26, p. 71*
I.D.2 The *ejusdem generis* rule does not support the Claimants’ interpretation of Article 8
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**Article 9. Scope of rights under a mostfavoured-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.

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*Note:* The Commission [Arbitration] does not deem it necessary to express a view on the general question as to whether the most-favoured-nation clause can ever have the effect of assuring in 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 thereafter grant to the subjects or citizens of any other State.”

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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

(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.*

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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*See articles 29 below, and commentary thereto.*

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*With very rare exceptions, there is no clause in modern times that would not be restricted to a certain sphere of operations, e.g., commerce, establishment and shipping; see article 4 above, paras. (14) and (15) of the commentary.*
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’ÎLE 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 États 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 État 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 États 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 État avec le premier État contractant ou avec des États tiers.*
I.D.2 The *ejusdem generis* rule does not support the Claimants’ interpretation of Article 8

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EXPOSÉ DES MOTIFS

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

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. 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.

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

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

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II. The Tribunal lacks jurisdiction *ratione materiae*
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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
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CONVENTION
ENTRE LE GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE ET LE GOUVERNEMENT DE L’ÎLE MAURICE SUR LA PROTECTION DES INVESTISSEMENTS, SIGNÉE À PORT-LOUIS LE 22 MARS 1973

Article 1º.

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 États contractants ont, en conformité de la législation de l’autre Etat contractant, effectués avant cette date sur le territoire de ce dernier.
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’ÎLE MAURICE SUR LA PROTECTION
DES INVESTISSEMENTS, SIGNÉE À PORT-LOUIS LE 22 MARS 1973

Article 2.

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

Article 3.

Les investissements réalisés sur le territoire d’un des États
contractants par les ressortissants, sociétés ou autres personnes
morales de l’autre État ne peuvent faire l’objet d’expropriation
que pour cause d’utilité publique.
II.A. The Claimants have failed to show that they have made an investment

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<td>DOUTREMEPUIU CHRISTIAN</td>
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II.A. The Claimants have failed to show that they have made an investment
II.B. Pre-investment expenditures do not constitute an investment
II.B. Pre-investment expenditures do not constitute an investment

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

Mihaly v. Sri Lanka, RLA-36, p. 159
II.B. Pre-investment expenditures do not constitute an investment

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.

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

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.

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)