PCA CASE NO. 2018-37

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

between

(1) PROFESSOR CHRISTIAN DOUTREMEPUICH (France)

and

(2) ANTOINE DOUTREMEPUICH (France)

Claimants

and

THE REPUBLIC OF MAURITIUS

Respondent

before

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

Heard on

13 June 2019

APPEARANCES

The Arbitral Tribunal

Presiding Arbitrator:

PROFESSOR MAXI SCHERER

Co-Arbitrators:

PROFESSOR OLIVIER CAPRASSE

PROFESSOR JAN PAULSSON

Registry

Permanent Court of Arbitration:

MS. FEDELMA CLAIRE SMITH, Senior Legal Counsel

MS. CLÉMENCE ASSOU, Assistant Legal Counsel

MS. NINA MAJOOR, Assistant Legal Counsel

Claimant

Representatives:

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MR. ANTOINE DOUTREMEPUICH

Counsel:

E&Y SOCIÉTÉ D'AVOCATS

ME. BRUNO POULAIN

ME. ROXANE REGAUD

ME. ANNE CAROLINE JUVIN

ME. HENRI VERCASSON

Respondent

Representatives:

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Counsel:

LALIVE

DR. VEIJO HEISKANEN

MS. DOMITILLE BAIZEAU

MS. LAURA HALONEN

MS. ELÉONORE CAROIT

MR. AUGUSTIN BARRIER

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

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

DR. HEISKANEN: There's nothing from the Respondent.

ME. POULAIN: Non, aucune question.

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

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

by the Tribunal on the issue of consent.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In other words, contrary to what was suggested

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

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

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

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

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

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

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

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

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

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

substantial contribution either.

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

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

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

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

Contrary, again, to what was suggested yesterday,

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

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

As to know-how, as the *L.E.S.I. vs Astaldi* Tribunal found, and we refer to CL-67, paragraph 73,

all investment, any kind of asset that an investor may wish to contribute to a business venture, including know-how, must have economic value, and must be recorded in the accounts of the company as an asset, as an investment, as an asset, capital contribution that has been transferred to the business venture.

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

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

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

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

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

is precisely why assistance was sought from the Claimants.

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

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

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

yesterday.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The application of an MFN clause, such as the one

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

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

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

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

bells and whistles that a jurisdictional clause must contain. We have highlighted some of these, but one could actually highlight all of the key provisions.

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

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

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

order to create an effective consent.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Dispute resolution provisions constitute an agreement on their own...

So what, [as read]:

> ...usually with interrelated provisions.

And I have no idea what that means.

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

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

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

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

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

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

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

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

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

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

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

PROF. PAULSSON: Yes, thank you.

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

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

A short break.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE PRESIDENT: Merci, maître.

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

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

ses objections au projet.

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

paraissent extrêmes.

Pour en revenir à un sujet plus apaisé, la MFN. Vous nous avez interrogés hier sur la signification à donner au terme « régies » (les matières régies) à l'article 8(2). Après réflexion, la seule explication que nous trouvons à l'emploi de ce terme est de pouvoir distinguer dans le traité des dispositions qui donnent ou qui prévoient des droits et des obligations pour les parties ou pour les bénéficiaires du traité des dispositions qui n'en donnent pas. Je m'explique. L'article 1, qui comporte des définitions, par exemple, fixe finalement le champ d'application ou le champ d'invocabilité du traité, mais pour moi, il ne régit pas de matières particulières. Les clauses de fin, ou les dispositions de fin, à l'article 11 ou 12, les dispositions relatives à l'entrée en vigueur ne sont pas des dispositions qui régissent des matières. J'ai entendu ce matin mon confrère aller plus loin et considérer finalement que régir, c'est aller dans la définition d'un régime. Et il a dit ceci : « L'article 9 du traité ne régit pas l'arbitrage. L'arbitrage est régi par la convention CIRDI. » Son argument est de dire que l'article 9 fait référence à l'arbitrage CIRDI, dans certaines conditions, et que l'instrument qui régit l'arbitrage, ce n'est pas l'article 9, c'est la convention CIRDI. Bon, je lui ferais la remarque que, si on prend l'article 9 finlandais, l'article 9 finlandais fait référence au règlement CNUDCI! L'article 9 finlandais fait

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

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

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

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

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

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

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

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

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

THE PRESIDENT: Does this conclude your entire submissions?

MALE SPEAKER: Oui.

THE PRESIDENT: Well thank you. Merci beaucoup, maître.

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

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

ME. POULAIN: D'accord.

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

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

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

THE PRESIDENT: Thank you. On the Claimant side?

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

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

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

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

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

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

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

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

THE PRESIDENT: Excellent. So I will encourage

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

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

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

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

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

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

MATTER ADJOURNED