

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**THOMAS GOSLING, PROPERTY PARTNERSHIPS DEVELOPMENT MANAGERS (UK)  
LIMITED, PROPERTY PARTNERSHIPS DEVELOPMENTS (MAURITIUS) LTD,  
PROPERTY PARTNERSHIPS HOLDINGS (MAURITIUS) LTD  
AND TG INVESTMENTS LTD**

Claimants

and

**REPUBLIC OF MAURITIUS**

Respondent

**ICSID Case No. ARB/16/32**

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**AWARD**

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***Members of the Tribunal***

Dr. Andrés Rigo Sureda, President of the Tribunal  
Prof. Stanimir Alexandrov, Arbitrator  
Prof. Brigitte Stern, Arbitrator

***Secretary of the Tribunal***

Ms. Anna Holloway

*Date of dispatch to the Parties:* February 18, 2020

## REPRESENTATION OF THE PARTIES

*Representing Thomas Gosling, Property Partnerships Development Managers (UK) Limited, Property Partnerships Developments (Mauritius) Ltd, Property Partnerships Holdings (Mauritius) Ltd, and TG Investments Ltd:*

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*and*

Mr. Paul Reichler  
Dr. Constantinos Salonidis  
Ms. Tafadzwa Pasipanodya  
Ms. Christina Beharry  
Mr. Yuri Parkhomenko  
Ms. Rebecca Gerome  
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**TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS**

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings (April 10, 2006)
BIT (or “Treaty”)	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius for the Promotion and Protection of Investments which entered into force on October 13, 1986
C-[#]	Claimants’ Exhibit
CL-[#]	Claimants’ Legal Authority
Cl. C-Mem.	Claimants’ Counter-Memorial on Jurisdiction, dated February 2, 2019
Cl. Mem.	Claimants’ Memorial on the Merits dated January 16, 2018
Cl. Reply	Claimants’ Reply on the Merits dated February 2, 2019
Cl. SoC	Claimants’ Statement of Costs dated August 5, 2019
Hearing	Hearing on the Merits and Jurisdiction held June 17-25, 2019
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
R-[#]	Respondent’s Exhibit
Resp. C-Mem.	Respondent’s Counter-Memorial on the Merits and Memorial on Jurisdiction dated October 30, 2018
Resp. Rej.	Respondent’s Rejoinder on the Merits and Reply on Jurisdiction dated May 9, 2019

Resp. SoC	Respondent's Statement of Costs dated August 6, 2019
RL-[#]	Respondent's Legal Authority
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on January 26, 2017

## **I. INTRODUCTION AND PARTIES**

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius for the Promotion and Protection of Investments which entered into force on October 13, 1986 (the “BIT” or “Treaty”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated October 14, 1966 (the “ICSID Convention”).
2. The claimants are:
  - a. Mr. Thomas Gosling (“Mr. Gosling”), a natural person having the nationality of the United Kingdom;
  - b. Property Partnerships Development Managers (UK) Limited (“PPDM (UK)”), a company incorporated in England and Wales, United Kingdom;
  - c. Property Partnerships Developments (Mauritius) Ltd (“PPD”), a company incorporated in the Republic of Mauritius;
  - d. Property Partnerships Holdings (Mauritius) Ltd (“PPH”), a company incorporated in the Republic of Mauritius; and
  - e. TG Investments Ltd (“TGI”), a company incorporated in the Republic of Mauritius (together, the “Claimants”).
3. The respondent is the Republic of Mauritius (“Mauritius” or the “Respondent”).
4. The Claimants and the Respondent are collectively referred to as the “Parties.” The Parties’ representatives and their addresses are listed above on page (i).
5. This dispute relates to the Claimants’ alleged investments in two real estate and tourism developments in Mauritius.

## II. PROCEDURAL HISTORY

6. On September 13, 2016, ICSID received the complete request for arbitration dated September 13, 2016 from Thomas Gosling, Property Partnerships Development Managers (UK) Limited, Property Partnerships Developments (Mauritius) Ltd, Property Partnerships Holdings (Mauritius) Ltd, and TG Investments Ltd against the Republic of Mauritius (the “Request”). The Request was supplemented by letter of September 23, 2016.
7. On September 27, 2016, the Acting Secretary-General of ICSID registered the Request, as supplemented, in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Acting Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
8. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by the co-arbitrators in consultation with the Parties.
9. The Tribunal is composed of Dr. Andrés Rigo Sureda, a national of Spain, President, appointed by the co-arbitrators in consultation with the Parties; Prof. Stanimir Alexandrov, a national of Bulgaria, appointed by the Claimants; and Prof. Brigitte Stern, a national of France, appointed by the Respondent.
10. On January 26, 2017, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Anna Holloway, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
11. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on February 27, 2017 in Washington, D.C., USA.

12. Following the first session, on March 6, 2017, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. On March 10, 2017, the Tribunal issued a corrected version of Procedural Order No. 1. Procedural Order No. 1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural language would be English, and that the place of proceeding would be Washington, D.C., USA. Procedural Order No. 1 also set forth a procedural calendar.
13. Following agreement between the Parties, on July 21, 2017, the Tribunal issued Procedural Order No. 2 modifying the procedural calendar.
14. Following agreement between the Parties, on September 8, 2017, the Tribunal issued Procedural Order No. 3 further modifying the procedural calendar.
15. Following agreement between the Parties, on November 10, 2017, the Tribunal issued Procedural Order No. 4 further modifying the procedural calendar.
16. On January 4, 2018, the Tribunal approved further minor modifications to the procedural calendar agreed between the Parties.
17. Pursuant to the procedural calendar, on January 16, 2018, the Claimants filed their Memorial on the Merits ( “Claimants’ Memorial”), together with Exhibits C-001 through C-144, Legal Authorities CL-001 through CL-076, a Witness Statement of Mr. Thomas Gosling dated January 16, 2018, an Expert Report of Mr. Phalgoony Ramrekha dated January 15, 2018 with Appendices A through E, and an Expert Report of Mr. Peter Stoughton-Harris dated January 16, 2018 with Exhibits PSH-001 through PSH-033.
18. On January 18, 2017, the Tribunal issued Procedural Order No. 5 confirming the modifications to the procedural calendar approved on January 4, 2018.
19. On February 15, 2018, the Respondent filed its Notice of Objections to Jurisdiction and Competence and Request for Bifurcation ( “Request for Bifurcation”), together with Exhibits R-001 through R-010 and Legal Authorities RL-001 through RL-043.

20. On March 8, 2018, the Claimants filed their Observations on the Request for Bifurcation, together with Legal Authorities CL-077 through CL-081.
21. On April 9, 2019, the Tribunal issued Procedural Order No. 6 on the Request for Bifurcation (“Decision on Bifurcation”) wherein it denied the Respondent’s Request and confirmed that the proceedings shall continue in accordance with the “Scenario B” procedural calendar set forth in Procedural Order No. 5.
22. On October 30, 2018, the Respondent filed its Counter-Memorial on the Merits and Memorial on Jurisdiction (“Respondent’s Counter-Memorial”), together with Exhibits R-011 through R-171, Legal Authorities RL-044 through RL-139, a Witness Statement of Mr. Fareed Chuttan dated October 25, 2018, a Witness Statement of Mr. Namasivayen Poonosamy dated October 19, 2018, a Witness Statement of Ms. Indira Ujoodha dated October 25, 2018, a Witness Statement of Dr. Francois Odendaal dated October 25, 2018, an Expert Report of Prof. Jean-Baptiste Seube dated October 26, 2018 with Exhibits EXP-001 through EXP-016, and an Expert Report of Mr. Anton Mélard de Feuarent dated October 25, 2018 with Exhibits FL-001 through FL-039.
23. Following agreement between the Parties, on November 19, 2018, the Tribunal issued Procedural Order No. 7 further modifying the procedural calendar.
24. On December 20, 2018, the Tribunal issued Procedural Order No. 8 concerning document production.
25. By letter of January 9, 2019, the Claimants requested the Tribunal to order the Respondent to “produce certain documents that it has withheld from production without valid justification, and [to] produce in unredacted form certain documents that it has improperly redacted.” The Claimants’ letter also contained a request for the extension of deadlines in the current procedural calendar. Upon invitation from the Tribunal, the Respondent provided comments on the Claimants’ request by letter of January 11, 2019. By letter of January 14, 2019, the Claimants responded to the Respondent’s January 11 letter. Upon invitation from the Tribunal, the Respondent provided further comments on the Claimants’ request by letter of January 15, 2019.

26. On January 18, 2019, the Tribunal issued Procedural Order No. 9 concerning the Claimants' request of January 9, 2019 and further modifying the procedural calendar.
27. On February 3, 2019, the Claimants filed their Reply on the Merits ("Claimants' Reply") and Counter-Memorial on Jurisdiction ("Claimants' Counter-Memorial") (both of which were dated February 2, 2019), together with Exhibits C-145 through C-179, Legal Authorities CL-082 through CL-138, a Second Witness Statement of Mr. Thomas Gosling dated February 2, 2019, a Witness Statement of Mr. Gangess Naidoo dated January 29, 2019, a Witness Statement of Mr. Richard Price dated February 1, 2019, a Second Expert Report of Mr. Phalgoony Ramrekha dated February 1, 2019, a Second Expert Report of Mr. Peter Stoughton-Harris dated February 1, 2019 with Exhibits PSH2-001 through PSH2-007, an Expert Report of Ms. Vikki Wall dated February 1, 2019 with Exhibits 2.1 through 6.1 and Exhibits A through F, and an Expert Report of Mr. Jalill Foondun dated February 1, 2019 with Exhibits JF-001 through JF 011.
28. Following agreement between the Parties, the Tribunal wrote to the Parties on February 15, 2019 to confirm further modifications to the procedural calendar. Also in its letter, the Tribunal invited the Parties to confirm a date for the pre-hearing organizational meeting and requested that the Parties seek to agree on a proposed duration for the upcoming hearing.
29. By letter of February 27, 2019, the Respondent wrote to the Tribunal concerning the examination of one of its witnesses during the hearing. The Claimants responded by letter of February 28, 2019. Upon invitation from the Tribunal, the Respondent provided further observations on the matter by letter of March 4, 2019 and the Claimants provided a further response by letter of March 5, 2019.
30. On March 7, 2019, by letter transmitted by the Secretary of the Tribunal, the Tribunal wrote to the Parties concerning the examination of witnesses and confirming that the hearing would take place on June 17 through 25, 2019. By this letter, the Tribunal confirmed its consent to the remote cross-examination of Dr. Odendaal, one of the Respondent's witnesses, at the hearing.

31. On May 10, 2019, the Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction (“Respondent’s Rejoinder”), together with Exhibits R-172 through R-230, Legal Authorities RL-140 through RL-184, a Witness Statement of Mr. Heerun Ghurburrun dated May 3, 2019, a Witness Statement of Prof. George Okello Abungu dated May 6, 2019, a Second Witness of Mr. Fareed Chuttan dated May 7, 2019, a Second Witness Statement of Ms. Indira Devi Ujoodha dated May 7, 2019, a Second Witness Statement of Mr. Namasivayen Poonoosamy dated May 7, 2019, a Second Expert Report of Prof. Jean-Baptiste Seube dated May 1, 2019, and a Second Expert Report of Mr. Anton de Feuarent of Fair Links dated May 8, 2019 with Exhibits 1 through 13 and Appendices FL-027, FL-028, FL-030 and FL-031 (updated) and Exhibits FL-040 through FL-053.
32. On May 21, 2019, the Claimants requested an order that both Parties’ witnesses be permitted to give evidence remotely, with the exception of the Claimants’ primary witness of fact, Mr. Gosling, and both Parties’ valuation experts.
33. On May 24, 2019, in accordance with the Tribunal’s directions, the Respondent provided its observations on the Claimants’ May 21, 2019 request.
34. On May 28, 2019, by letter transmitted by the Secretary of the Tribunal, the Tribunal rejected the Claimants’ May 21, 2019 application.
35. On May 30, 2019, the President of the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.
36. On June 3, 2019, the Tribunal issued Procedural Order No. 10 concerning the organization of the upcoming hearing.
37. A hearing on Jurisdiction and the Merits was held in Washington, D.C., USA, from June 17–25, 2019 (June 22–23 excluded) (the “Hearing”). In addition to the Members of the Tribunal and the Secretary of the Tribunal, the following persons were present at the Hearing:

For the Claimants:

*Counsel:*

Ms. Sophie Lamb  
Mr. Samuel Pape  
Ms. Shreya Ramesh  
Mr. Gustavo Ruiz  
Mr. Sean Mulloy

Latham & Watkins LLP  
Latham & Watkins LLP  
Latham & Watkins LLP  
Latham & Watkins LLP  
Latham & Watkins LLP

*Parties:*

Mr. Thomas Gosling

*Witnesses:*

Mr. Richard Price  
Mr. Gangess Puran Naidoo

*Experts:*

Mr. Mohamud Jalill Foondun  
Mr. Peter Stoughton-Harris  
Mr. Phalgoony Ramrekha  
Ms. Vikki Wall

CBRE UK

Haberman Ilett

For the Respondent:

*Counsel:*

Mr. Paul Reichler  
Ms. Tafadzwa Pasipanodya  
Dr. Constantinos Salonidis  
Ms. Alison Macdonald QC  
Ms. Christina Beharry  
Mr. Yuri Parkhomenko  
Ms. Rebecca Gerome  
Mr. Antoine Lerosier  
Mr. Sudhanshu Roy  
Ms. Mikiko Takara  
Ms. Ela Leshem  
Ms. Flannery Sockwell  
Ms. Nanami Hirata  
Ms. Carmen de Jesus  
Ms. Nancy Lopez

Foley Hoag LLP  
Foley Hoag LLP  
Foley Hoag LLP  
Essex Court Chambers  
Foley Hoag LLP  
Foley Hoag LLP

*Parties:*

Ms. Mary Jane Lau Yuk Poon  
Ms. Sureka Angad

Republic of Mauritius  
Republic of Mauritius

*Witnesses:*

Dr. George Abungu  
Mr. Fareed Chuttan

Mr. Heerun Ghurburrun

Dr. Francois Odendaal  
Mr. Namasivayen Poonoosamy

Ms. Indira Ujoodha

Okello Abungu Heritage Consultants  
Ministry of Industry, Commerce, and  
Consumer Protection, Republic of Mauritius  
Economic Development Board, Republic of  
Mauritius  
EcoAfrica  
Economic Development Board, Republic of  
Mauritius  
Ministry of Housing and Lands, Republic of  
Mauritius

*Experts:*

Mr. Anton M elard de Feuardent  
Mr. Benjamin Roux  
Ms. Jeanne Vallard  
Prof. Jean-Baptiste Seube

Fair Links  
Fair Links  
Fair Links  
University of La R union

*Technical Support:*

Mr. John Hicks  
Mr. Manuel Reese  
Mr. Brian Bucher  
Mr. Peter Hakim

DOAR  
DOAR  
DOAR  
Foley Hoag LLP

*Court Reporters:*

Ms. Dawn Larson

Worldwide Reporting LLP

38. During the Hearing, the following persons were examined:

*On behalf of the Claimants:*

Mr. Thomas Gosling  
Mr. Richard Price  
Mr. Gangess Puran Naidoo  
Mr. Mohammud Jalill Foondun  
Ms. Vikki Wall  
Mr. Phalgoony Ramrekha  
Mr. Peter Stoughton-Harris

Haberman Ilett

CBRE UK

*On behalf of the Respondent:*

Dr. Francois Odendaal  
Ms. Indira Ujoodha

EcoAfrica  
Ministry of Housing and Lands, Republic of  
Mauritius

Mr. Namasivayen Poonoosamy	Economic Development Board, Republic of Mauritius
Mr. Heerun Ghurburrun	Economic Development Board, Republic of Mauritius
Mr. Fareed Chuttan	Ministry of Industry, Commerce, and Consumer Protection, Republic of Mauritius
Mr. Anton Mélard de Feuarent	Fair Links
Prof. Jean-Baptiste Seube	University of La Réunion
Dr. George Abungu	Okello Abungu Heritage Consultants

39. The Claimants filed a Statement of Costs on August 5, 2019; the Respondent filed a Statement of Costs on August 6, 2019.
40. The proceeding was closed on February 4, 2020.

### **III. FACTUAL BACKGROUND**

41. The dispute concerns two areas in Mauritius, Le Morne Brabant (“Le Morne”) and Pointe Jérôme. The facts related to each area are described separately below. A brief summary of the factual background related to each area, as set out in the Parties’ submissions and factual exhibits, is also provided below. This summary does not constitute any finding by the Tribunal on any facts disputed by the Parties.

#### **A. LE MORNE**

42. Le Morne is a peninsula of outstanding beauty, and cultural and historical significance. It had been a place of refuge for escaped slaves, known as “maroons.” Because of its natural beauty and significance, Mauritius was interested in inscription of Le Morne in UNESCO’s World Heritage List. For this purpose, Mauritius engaged in March 2003 two consultants, Mr. Hadi Saliba and Dr. Elizabeth Wangari, to prepare a Tentative List of possible UNESCO World Heritage Sites, a first step for their eventual inscription in the World Heritage List. The Tentative List was submitted to UNESCO in July 2003. It included Le Morne.<sup>1</sup>

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<sup>1</sup> Cl. Mem., paras. 3, 23; Resp. C-Mem., para. 40.

43. Beginning in 2003, Mr. Gosling explored possible investments in Mauritius. The opportunity to develop the Le Morne site arose as a result of Mr. Gosling's relationship with the local landowners, the Cambier family, which held land through Société du Morne Brabant ("SMB").<sup>2</sup>
44. In 2003, Mr. Gosling established with other UK investors Mauritian Property Partnerships ("MPP").<sup>3</sup>
45. In early 2004, Mr. Saliba recommended boundaries for the Le Morne site. He divided it into a core and a buffer zone. He advised the Government to demolish houses on the higher northern slopes and recommended that regulations preventing alterations or extensions to existing tourist facilities or private houses be enforced. On January 30, 2004, the Cabinet took note of the recommendations and published Mr. Saliba's report (the "Saliba Report").<sup>4</sup>
46. On April 21, 2004, PPDM (UK) and Mr. Bertrand Giraud of SMB entered into a Co-operation Agreement (the "2004 Co-operation Agreement") with a view to carrying out a tourist development at Le Morne (the "Le Morne Project").<sup>5</sup> The Co-operation Agreement envisaged other contracts including a development agreement and land purchase agreement.<sup>6</sup>
47. On May 7, 2004, the Claimants presented the Le Morne Project to Mauritius.<sup>7</sup>

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<sup>2</sup> Cl. Mem., paras. 19-20.

<sup>3</sup> Cl. Mem., para. 19; First Gosling WS, para. 10.

<sup>4</sup> Resp. C-Mem., paras. 45-50; H. Saliba, *Definition of the Limits of Le Morne Mountain* dated January 2004 (the "Saliba Report") (**R-041**).

<sup>5</sup> Co-Operation Agreement between MPP and B. Giraud dated April 21, 2004 (the "2004 Co-operation Agreement") (**C-012**).

<sup>6</sup> Cl. Mem., paras. 127-128.

<sup>7</sup> Cl. Mem., para. 27.

48. On May 4, 2004, Le Morne Heritage Trust Fund Act was enacted. It adopted the core and buffer zone boundaries proposed in the Saliba Report and established the Le Morne Heritage Trust Fund (“LMHTF”). It came into force on July 1, 2004.<sup>8</sup>
49. On June 23, 2004, SMB applied to the Board of Investment (“BOI”) for an Investment Certificate (“IRS Investment Certificate”) pursuant to the Investment Promotion Integrated Resort Scheme Regulations (“IRS Regulations”).<sup>9</sup>
50. On September 21, 2004, BOI sought the views of the Ministry of Arts and Culture (“MAC”).<sup>10</sup> One day later, MAC advised BOI to be guided by the recommendations of the Saliba Report, “especially regarding the delimitation of the core and buffer zones of the Le Morne Heritage site [...]”.<sup>11</sup>
51. In order to implement the Le Morne Project, LMB was incorporated on January 13, 2005.<sup>12</sup>
52. On March 15, 2005, LMHTF recommended that MAC request assistance of an expert from UNESCO’s World Heritage Center to advise, among other matters, on the Le Morne Project submitted by SMB pursuant to the IRS Regulations submitted by SMB. Dr. George Abungu was the expert selected to provide assistance to Mauritius.<sup>13</sup>
53. On August 1, 2005, Dr. Abungu submitted his first report (the “First Abungu Report”).<sup>14</sup>
54. On August 26, 2005, SMB pressed BOI to issue a Letter of Intent (“LOI”) in view of the conclusions reached by Dr. Abungu.<sup>15</sup>

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<sup>8</sup> Resp. C-Mem., para. 52.

<sup>9</sup> Resp. C-Mem., para. 59.

<sup>10</sup> Letter from G. Sanspeur of BOI to MAC dated September 21, 2004 (**R-050**).

<sup>11</sup> Letter from F. Chuttan of MAC to G. Sanspeur of BOI dated September 22, 2004 (**R-051**).

<sup>12</sup> Cl. Mem., para. 129.

<sup>13</sup> Letter from B. Perrine of LMHTF to F. Chuttan of MAC dated March 15, 2005 (**R-057**).

<sup>14</sup> Cl. Mem, para. 40; Mission Report of Dr. George O. Abungu dated August 1, 2005 (the “First Abungu Report”) (**C-025**).

<sup>15</sup> Resp. C-Mem., para. 90; Letter from B. Giraud of SMB to BOI dated August 26, 2005 (**R-062**).

55. On September 1, 2005, BOI sought the views of MAC and requested a copy of the First Abungu Report.<sup>16</sup>
56. On September 7, 2005, Dr. Abungu submitted his second report (the “Second Abungu Report”).<sup>17</sup>
57. On September 23, 2005, SMB wrote to MAC criticizing the Second Abungu Report.<sup>18</sup>
58. On December 18, 2005, SMB wrote to BOI stating that SMB was now prepared to accept the revised recommendations of Dr. Abungu, which it had previously criticized, seeking a meeting with MAC to go over them, and pressing BOI to issue a LOI before the end of the year.<sup>19</sup>
59. On December 20, 2005, BOI requested the views of MAC on the issuance of the LOI for an IRS Investment Certificate for the Le Morne Project.<sup>20</sup>
60. On December 30, 2005, the Cabinet approved the recommendations of Dr. Abungu and allowed BOI to issue the LOI. The LOI was issued by BOI on the same day (the “2005 LOI”). The LOI was valid for six months.<sup>21</sup>
61. On January 3, 2006, BOI issued to SMB an LOI for a Tourism Development Certificate with a three-month validity.<sup>22</sup>

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<sup>16</sup> Letter from G. Sanspeur of BOI to B. Giraud of SMB dated September 1, 2005 (**R-063**).

<sup>17</sup> Cl. Mem, para. 41; Preliminary Recommendations of Dr. Abungu Re. Le Morne Heritage Site dated September 7, 2005 (the “Second Abungu Report”) (**C-027**).

<sup>18</sup> Resp. C-Mem., para. 88; Letter from B. Giraud of SMB to M. Gowressoo of MAC dated September 23, 2005 (**R-064**).

<sup>19</sup> Resp. C-Mem., para. 93; Email from B. Giraud to R. Jaddoo of BOI dated December 18, 2005 (**R-065**).

<sup>20</sup> Resp. C-Mem., para. 95; Letter from R. Jaddoo of BOI to MAC dated December 20, 2005 (**R-067**).

<sup>21</sup> Resp. C-Mem., paras. 95-96; Letter of Intent from BOI to SMB dated December 30, 2005 (the “2005 LOI”) (**C-039**).

<sup>22</sup> Resp. C-Mem., para. 96; Letter of Intent from BOI to SMB dated January 3, 2006 (**C-041**).

62. On January 24, 2006, Le Morne was designated a National Heritage site by the Ministry of Housing and Lands (“MHL”).<sup>23</sup>
63. In January 2006, Mauritius submitted Dr. Abungu’s dossier to UNESCO. It was rejected on March 1, re-submitted on April 7, and rejected again on May 2, 2006.<sup>24</sup>
64. In the meantime, the Claimants requested on March 22, and obtained on April 21, 2006, an extension of three months of the LOI for a tourism investment certificate.<sup>25</sup>
65. On April 26, 2006, MAC requested UNESCO to recommend an expert to help prepare a draft management plan.<sup>26</sup>
66. On May 30, 2006, Mr. Giraud explained to BOI that his major issue was that he needed “to purchase the land from my family before the 30th of [J]une, failing which, my option with my family will become null and void. The money from MPP will be on the notary account before the end of [J]une but if the BOI does not issue the investment certificate, no transaction will be possible.”<sup>27</sup> Mr. Giraud requested that BOI confirm that the IRS Investment Certificate could be issued without difficulty subject to submission of an Environmental Impact Assessment (“EIA”) and development permits.<sup>28</sup>
67. On June 2, 2006, BOI reminded SMB of the requirements set forth in the LOI for the IRS Investment Certificate.<sup>29</sup>
68. On June 30, 2006, the LOI for an IRS Investment Certificate expired. On the same date, LMB purchased the property at Le Morne and PPH entered into a Shareholders Agreement

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<sup>23</sup> Resp. C-Mem., para. 107.

<sup>24</sup> Resp. C-Mem., paras. 108-109.

<sup>25</sup> Letter from C. Wilkins of LMB and MPP to H. Ghurburrun of BOI dated March 22, 2006 (**R-185**); Letter from R. Jadoo of BOI to C. Wilkins of MPP dated April 21, 2006 (**R-187**).

<sup>26</sup> Resp. C-Mem., para. 113.

<sup>27</sup> Email from D. Heerah to B. Henri dated June 5, 2006, forwarding email from B. Giraud to R. Jadoo of May 30, 2006 (**R-079**).

<sup>28</sup> Email from D. Heerah to B. Henri dated June 5, 2006, forwarding email from B. Giraud to R. Jadoo of May 30, 2006 (**R-079**).

<sup>29</sup> Letter from R. Jadoo of BOI to B. Giraud of SMB dated June 2, 2006 (**C-047**).

with SMB, which set out the share ownership of LMB, and the entitlement to profits of the UK investors (the “2006 Shareholders’ Agreement”). PPH was given control of LMB and entitled to a priority dividend equal to 25% of the total development costs that it incurred, and then half of the profits of LMB.<sup>30</sup>

69. PPH’s share ownership needed to be authorized by the Prime Minister’s office under the Non-Citizen (Property Restriction) Act. For this reason, on June 30, 2006, an intermediary agreement was also entered into between PPH and SMB as an addendum to the 2006 Shareholders’ Agreement (the “2006 Intermediary Agreement”). It was agreed that Mr. Giraud would hold all of the shares in LMB and that, upon receiving approval from the Prime Minister’s office, Mr. Giraud would issue shares in LMB to PPH in order to give effect to the terms of the 2006 Shareholders’ Agreement. However, if such authorization was not forthcoming or necessary, “PPH will be appointed to promote and conclude the project in all its aspects as provided in the Agreement and in prior Development Agreements entered into by the parties. This contract will provide, inter alia, for funding of the Project and sharing of profits as already set out in the Agreement.”<sup>31</sup>
70. On August 30, 2006, the Ministry of Environment acknowledged receipt of the EIA.<sup>32</sup>
71. In January 2007, Mauritius submitted to UNESCO the nomination dossier and draft management plan prepared by Dr. Francois Odendaal and Prof. Karel Bakker.<sup>33</sup>
72. On March 9, 2007, UNESCO informed Mauritius that the nomination dossier met all the technical requirements.<sup>34</sup>

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<sup>30</sup> Cl. Mem, paras. 129-131; 2005 LOI (C-039); Shareholders Agreement between PPH and SMB dated 30 June 2006 (the “2006 Shareholders’ Agreement”) (C-050).

<sup>31</sup> Cl. Mem, para. 132; Intermediary Agreement between PPH and SMB dated June 30, 2006 (the “Intermediary Agreement”) (C-048), p. 3.

<sup>32</sup> Ministry of Environment and NDU, Acknowledgement Receipt of EIA Reports dated August 30, 2006 (C-055).

<sup>33</sup> Resp. C-Mem., para. 148.

<sup>34</sup> Resp. C-Mem., para. 154.

73. In June 2007, to guide the development of planning legislation, Mauritius published a document entitled Planning Policy Guidance-2 (“PPG2”) on the MHL website. PPG2 permitted development in the buffer zone: “Quality/luxury hillside retreats and eco-tourism lodges should be the preferred development type.”<sup>35</sup>
74. In July–August 2007, Dr. Odendaal and Prof. Bakker advised that the Government revise PPG2. MHL withdrew PPG2 from its website.<sup>36</sup>
75. In September 2007, Mauritius revised PPG2 (“Revised PPG2”). That revised version was approved on October 8, 2007. Under Revised PPG2, no development was permitted in the land of LMB.<sup>37</sup>
76. In early July 2008, UNESCO inscribed Le Morne Cultural Landscape as a World Heritage Site.<sup>38</sup>
77. As part of a re-structuring in 2009, TGI succeeded to PPH’s interest in LMB. On April 30, 2009, LMB and TGI entered into an intermediary agreement<sup>39</sup> by the terms of which Mr. Giraud was to hold all the shares in LMB, pending authorization of the Prime Minister for the transfer of 50% of the shares in LMB to TGI. If the transfer was not authorized, this intermediary agreement was to be converted in a consultancy agreement whereby TGI was to obtain remuneration equivalent to a 50% share of LMB’s profits.<sup>40</sup>
78. The Prime Minister never authorized PPH or TGI to own shares in LMB.<sup>41</sup>

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<sup>35</sup> Resp. C-Mem., paras. 155-160; MHL, Planning Policy Guidance 2: Le Morne Cultural Landscape dated June 2007 (“PPG2”) (C-051 of RfA), p. 8.

<sup>36</sup> Resp. C-Mem., paras. 161-162.

<sup>37</sup> Resp. C-Mem., paras. 162-166; MHL, Planning Policy Guidance 2: Le Morne Cultural Landscape dated September 2007 (“Revised PPG2”) (C-052 of RfA).

<sup>38</sup> Resp. C-Mem., para. 182.

<sup>39</sup> Intermediary Agreement between LMB and TGI dated April 30, 2009 (C-113).

<sup>40</sup> Cl. Mem., para. 118.

<sup>41</sup> Resp. C-Mem., fn. 200.

**B. POINTE JÉRÔME**

79. Pointe Jérôme is an area comprising a salt-water lagoon bounded by islands and smaller lagoons. The leased area covers over 13 hectares and had been leased to Pointe Jérôme Development Limited (“PJD”), a company controlled by Mr. Yves Tostée, under the terms of an industrial lease dated May 7, 2004 (the “Lease”) for a tourism development project. The Lease required that construction of the development start within 15 months from signing and be finished within three years. The period to start construction had been extended a “final” time for six months. Thus, it was due to expire on February 7, 2006.<sup>42</sup>
80. On October 25, 2005, PPDM (UK), at the time known as Possessio No. 2 Limited, entered into a share purchase agreement with Mr. Tostée (the “2005 SPA”) for the acquisition of 90% of Mr. Tostée’s shares in the Silver Management Co, Ltd. (“SML”), which in turn owned all the shares in PJD.<sup>43</sup> In 2007, Mr. Tostée, PPH and PJD entered into a shareholders’ agreement (the “Pointe Jérôme SHA”).<sup>44</sup> Under the Pointe Jérôme SHA, PPH was designated by PPDM (UK) as the entity to acquire the shares of Mr. Tostée. The Pointe Jérôme SHA was undated and the date of signature is disputed by the Parties as discussed later in this Award.<sup>45</sup> The PPH shareholding in SML was registered on April 30, 2008.<sup>46</sup>
81. The Claimants allege that on January 23, 2006, they notified the BOI that they would require a further extension.<sup>47</sup> The significance of the letter of PJD to MHL is controversial between the Parties.

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<sup>42</sup> Cl. Mem., paras. 65, 68-70; Industrial Site Lease Agreement between Government of Mauritius and PJD dated May 7, 2004 (**C-041 of RfA**); Pointe Jérôme Proposal dated July 2007 (**C-075**); Email from MPP to H. Ghurburrun and A. Cyparsade dated January 23, 2006 (**C-042**).

<sup>43</sup> Share Purchase Agreement between Y. Tostée and Possessio No. 2 Limited dated October 25, 2005 (the “2005 SPA”) (**C-042 to RfA**).

<sup>44</sup> Shareholders’ Agreement between Y. Tostée and PJD (undated) (the “Pointe Jérôme SHA”) (**C-079**).

<sup>45</sup> *See below* at paras. 113, 152-155.

<sup>46</sup> Cl. Mem., pp. 1-2, fn. 113, and paras. 73, 138-140; Resp. C-Mem., fn. 397.

<sup>47</sup> Cl. Mem., para. 75.

82. The time limit to start construction, as extended for a “last” time when Mr. Tostée was the leaseholder, expired on February 7, 2006.<sup>48</sup>
83. On August 1, 2006, PJD “formally” requested an extension of the period to start construction.<sup>49</sup>
84. On September 20, 2007, MHL rejected the request for an extension and cancelled the Lease.<sup>50</sup>

#### **IV. THE PARTIES’ CLAIMS AND REQUESTS FOR RELIEF**

##### **A. THE CLAIMANTS’ REQUEST FOR RELIEF**

85. The Claimants seek the following relief:

*For the reasons set out in their Memorial and in this Reply, the Claimants request that the Tribunal render an award:*

*(a) Declaring that the Respondent has violated Articles 2, 3 and 5 of the Treaty in relation to the Claimants’ Le Morne investments;*

*(b) Ordering that the Respondent pay damages and compensation to the Le Morne Claimants in respect of the Respondent’s violations of the Treaty in relation to the Le Morne investments in the amount of EUR 18 million, or such other amount as the Tribunal may determine to be payable;*

*(c) Declaring that the Respondent has violated Articles 2, 3 and 5 of the Treaty in relation to the Claimants’ Pointe Jerome investments;*

*(d) Ordering that the Respondent pay damages and compensation to the Pointe Jerome Claimants in respect of the Respondent’s violations of the Treaty in relation to the Pointe Jerome investments in the amount of EUR 5.7 million, or such other amount as the Tribunal may determine to be payable;*

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<sup>48</sup> Cl. Mem., fn. 116.

<sup>49</sup> Cl. Mem., para. 75; Letter from Mr. C. Wilkins of MPP to MHL dated August 1, 2005 (C-052).

<sup>50</sup> Cl. Mem., para. 90.

*(e) Ordering that the Respondent pay moral damages to Mr. Gosling in respect of the Respondent's violations of the Treaty in an amount that the Tribunal deems appropriate;*

*(f) Ordering that the Respondent pay interest on the amounts that the Tribunal orders the Respondent to pay to the Claimants calculated from the date on which the respective amounts became due at the rates specified in Section IV.G above, until the Claimants receive full payment of the amount ordered by the Tribunal;*

*(g) Ordering that the Respondent pay the costs of the arbitration, including all of the fees and expenses of ICSID and the Tribunal along with all of the cost and expenses, including legal costs and expenses and funding costs incurred by the Claimants, with interest calculated in accordance with paragraph IV.G above; and*

*(h) Ordering such other and further relief as the Tribunal deems appropriate.<sup>51</sup>*

**B. THE RESPONDENT'S REQUEST FOR RELIEF**

86. The Respondent seeks the following relief:

*For the foregoing reasons, Mauritius respectfully requests that the Tribunal render an award in its favor. Mauritius requests in particular that the Tribunal:*

*a. Find that jurisdiction is lacking over all claims raised by Claimants and dismiss all claims in their entirety and with prejudice;*

*b. In the alternative, and with respect to any claim not dismissed for lack of jurisdiction, find that Mauritius has not breached any right of Claimants conferred or created by the Treaty and dismiss all claims in their entirety and with prejudice;*

*c. In the event and to the extent that Mauritius is found to have breached any such right, Mauritius requests that the Tribunal find that Claimants have suffered no compensable loss, deny the*

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<sup>51</sup> Cl. Reply, para. 250.

*compensation requested by Claimants, and dismiss the claims in their entirety and with prejudice;*

*d. In all events, order Claimants to pay all costs and expenses of this proceeding, including but not limited to, the fees and expenses of the Tribunal, the administrative fees and expenses of ICSID, all costs of Mauritius' legal representation and expert assistance, all other associated costs of arbitration (translators, interpreters, travel, etc.), plus pre-award and post-award interest thereon calculated from the date on which these amounts were incurred at the average 6-month U.S. LIBOR rate until the date of payment, compounded semiannually or at any rate the Tribunal deems appropriate; and*

*e. Grant any other or additional relief as may be appropriate under the circumstances or as may otherwise be just and proper.*

*Mauritius reserves its right to supplement or otherwise amend the above requests.<sup>52</sup>*

## **V. APPLICABLE LAW**

87. Applicable law is not a subject on which the Parties differ or that has been a matter of discussion between the Parties. Article 8 of the BIT does not set forth the rules to be applied by the Tribunal in deciding the dispute. Absent the Parties' agreement, Article 42(1) of the ICSID Convention requires the Tribunal to "apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."
88. Given the nature of the claims that the Respondent breached its obligations under the BIT, the Tribunal shall apply the provisions of the BIT and interpret them in accordance to the rules of interpretation set forth in Article 31 of the Vienna Convention on the Law of the Treaties. This notwithstanding, there are matters underlying the claims such as the conditions to acquire rights to land in Mauritius or to its development to which Mauritian law applies.

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<sup>52</sup> Resp. Rej., paras. 474-475.

## VI. JURISDICTION AND ADMISSIBILITY

### A. POSITIONS OF THE PARTIES

#### (1) The Claimants' Memorial

89. In their Memorial, the Claimants explain that their dispute meets the jurisdictional requirements of the BIT and the ICSID Convention:<sup>53</sup>
- a. The dispute arises under the BIT. In Article 8(1) of the BIT, the Respondent agreed to arbitration under the ICSID Convention. The Claimant agreed to submit disputes to arbitration by submitting their Request for Arbitration to ICSID.
  - b. Mr. Gosling is a national of the UK and PPDM (UK) is a company incorporated or constituted under the law in force in the UK. TGI, PPD and PPH are companies incorporated or constituted under Mauritian law and the majority of their shares were at all times owned before the dispute arose by UK nationals or UK companies. Mr. Gosling owned the majority of the shares of TGI. PPD was owned from June 16, 2006 until early 2008 by Mr. Gosling (50%) and another UK national, Mr. Christopher Wilkins (50%). Afterwards, PPD was indirectly owned by Mr. Gosling through TGI. PPH was at all times owned by PPD and, indirectly, by nationals of the UK. In 2009, the Claimants restructured their investment in Le Morne as a result of which TGI took over PPH's interest in LMB. The Claimants affirm that TGI, PPD and PPH continue to be controlled by nationals or companies of the UK to this date.
  - c. The Claimants describe generally their investment to be constituted by funds expended on development projects, the Claimants' contractual rights in relation to the projects giving rise to a right to returns from and control over the projects, and the Claimants' shares in companies involved in the projects. The Tribunal will describe later the investments in more detail as necessary for the understanding of the claims and the analysis of the Tribunal.

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<sup>53</sup> See Cl. Mem., Sec. III.

- d. The dispute arises directly out of the investments, and the actions affecting the investments of the PMO, the BOI, the MHL, the MAC, the LMHTF, the LMHTFB, and the Ministry of Environment, which are all entities or individuals whose actions may be attributed to the State.

**(2) The Respondent’s Counter-Memorial on the Merits and Memorial on Jurisdiction**

90. The Respondent sets out the full factual and legal context of its objections to the jurisdiction of the Tribunal in its Request for Bifurcation.<sup>54</sup> The Respondent expands on this in its Counter-Memorial on the Merits and Memorial on Jurisdiction. The Respondent argues that the BIT only protects rights and assets acquired in accordance with domestic law even when this requirement is not expressly stated as part of the BIT’s definition of investment, which is the case here. The contention of the Respondent is that protection by the BIT is contingent upon the Claimants demonstrating that the alleged investments were admitted by the Respondent and the alleged rights lawfully acquired under Mauritian law.<sup>55</sup>
91. The Respondent’s position is premised on the requirements imposed by the Non-Citizen (Property Restriction) Act on ownership of property, widely defined, by non-citizens in Mauritius. The Respondent points out that the alleged rights under the 2004 Co-operation Agreement and the 2006 Shareholders’ Agreement were tied to the ownership of shares in LMB. The Claimants admit that the purchase of these shares never received the required PMO approval.<sup>56</sup> The Respondent argues that “[i]f the Le Morne Claimants never lawfully acquired the shares in LMB, they likewise never acquired the contractual rights attaching to them.”<sup>57</sup>
92. The Respondent also points out that Claimants PPH and TGI concluded the 2006 and 2009 Intermediary Agreements pending PMO approval. The Respondent contests that, as

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<sup>54</sup> See Req. for Bifurcation, Sec. II.

<sup>55</sup> Resp. C-Mem., paras. 236-240.

<sup>56</sup> Resp. C-Mem., paras. 242-245, citing RfA, para. 4.9.

<sup>57</sup> Resp. C-Mem., para. 245.

affirmed by the Claimants, these agreements conferred on Mr. Giraud “contractual rights to promote a development project and share in its profits,” and that he would “remain the sole beneficial holder of the rights and interests in the Le Morne land should PMO consent not be granted.”<sup>58</sup> The Respondent argues that, in fact, under the Intermediary Agreements, Mr. Giraud could not take any action or sign or agree to any document or proposition without the prior approval of PPH and TGI and hence, notwithstanding the appearances, LMB would be managed and controlled by non-citizens.<sup>59</sup>

93. The Respondent also disputes the Claimants’ assertion that they applied for PMO approval. Only PPH applied for PMO’s approval of its share ownership in LMB, a year and a half after concluding the Shareholders’ Agreement. The Respondent contends that “[a]n investor cannot rely on an investment treaty to claim protection for a private contract the object of which is not permitted by law.”<sup>60</sup>
94. The Respondent affirms that it never approved the Claimants’ investments nor waived its right to raise the present objections. The Respondent disputes the significance attributed by the Claimants to the identification of the project as a “Top Priority Project” and fast tracking for approval by the Cabinet Fast Track Committee and the BOI. The Respondent explains that at the time it had no knowledge of the Intermediary Agreements, and there is no evidence that the Claimants ever submitted them to BOI or with the application for the approval of issuing shares of LMB to PPH. Similarly, the LOIs do not amount to a waiver or approval. Furthermore, the BOI is not authorized to approve investments, a letter of intent is no more than “an informal step in the process of seeking certain incentives”, and the LOIs were issued to Mr. Giraud as Managing Director of LMB and SMB and not to the Claimants.<sup>61</sup>

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<sup>58</sup> Resp. C-Mem., para. 246, quoting Cl. Observations, para. 16(b).

<sup>59</sup> Resp. C-Mem., para. 246.

<sup>60</sup> Resp. C-Mem., paras. 250-251.

<sup>61</sup> Resp. C-Mem., paras. 252-255.

95. According to the Respondent, the Claimants mischaracterize the negotiations with the Government on possible compensation. The Respondent claims that, until the Claimants initiated their Supreme Court case, Government officials negotiating with the Claimants on a possible land swap were not aware that the Claimants had not obtained PMO approval to acquire immovable property at Le Morne. The Respondent contends that Mr. Gosling was negotiating as the owner of LMB and owner of land as if he had obtained approval.<sup>62</sup>
96. The Respondent argues that even if the rights and interests of PPH in the Le Morne Project would qualify for protection, PPH divested itself of them in favor of TGI under the 2006 Shareholders' Agreement and 2006 Intermediary Agreement or by way of the "Consent Judgment" where PPH and Mr. Gosling agreed to SMB's subrogation of all the rights, interests and stake of PPH into LMB.<sup>63</sup>
97. As regards Pointe Jérôme, the Respondent contends that the claims arising from PPDM (UK) and PPH's alleged contractual rights in the Pointe Jérôme SPA and the Pointe Jérôme SHA refer to rights that did not come into existence before the alleged breach which occurred on September 20, 2007, when the lease was cancelled. In support, the Respondent points out, *inter alia*, that (i) the actual share transfer from SML to PPDM (UK) (MPP) was not registered until April 28, 2008; (ii) on April 17, 2008, the Claimants declared that Mr. Tostée still owned 100% of the shares in SML; and (iii) in contradiction to what is claimed here, the Claimants have argued before the Mauritian courts that the Pointe Jérôme SPA was null and void.<sup>64</sup>
98. The Respondent submits that Mr. Gosling and PPD cannot assert claims in respect of indirectly held contractual rights. The Respondent explains that neither Mr. Gosling nor PPD are party to the contracts related to the proposed developments at Le Morne and Pointe Jérôme. They advance their claims as direct or indirect shareholders in the companies

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<sup>62</sup> Resp. C-Mem., paras. 257-258.

<sup>63</sup> Resp. C-Mem., para. 264, citing *Societe SMB & Anor v. Property Partnership Holdings (Mauritius) Ltd & Anor.*, Supreme Court of Mauritius SCR No. 10236 – 1/147/09, Judgment, March 23, 2009 (the "Consent Judgment") (C-037 of RfA).

<sup>64</sup> Resp. C-Mem., paras. 275-281.

which are party to those contracts. The Respondent observes that the BIT definition of investment does not include investments indirectly controlled by nationals or companies of the other party.<sup>65</sup>

99. The Respondent similarly dismisses the Claimants' argument that pre-investment expenditures constitute assets under the BIT. Furthermore, in the case of pre-investment expenditures for the Le Morne Project, the LOI from BOI explicitly disclaimed any liability if "the project is not implemented as a consequence of the non-obtention of any permits and clearances required in furtherance of the realization of the project or for any other reason not within the control of the Board of Investment."<sup>66</sup>
100. The Respondent asserts that the Claimants' case is not premised on the basis that either their shareholdings, or rights owing under Mauritian law to the Claimants' status as shareholders, have been wrongfully treated by Mauritius.<sup>67</sup> According to the Respondent, the "Claimants focused their case exclusively on inquiring into the value of the Le Morne and Pointe Jérôme sites, and of the claimed contractual instruments and obligations purportedly undertaken by Mauritius [...]."<sup>68</sup>
101. The Respondent further argues that TGI is not a UK company under Article 8(1) of the BIT; it had not even been created before the dispute arose. Therefore, it is not entitled to the BIT protection.<sup>69</sup>
102. The Respondent pleads that the Tribunal should decline to hear the Le Morne claims under the doctrines of *lis pendens* and abuse of rights. According to the Respondent, "[w]hen considering whether the proceedings overlap sufficiently to require the application of *lis pendens*, the contemporary approach is to employ a measure of flexibility [...]."<sup>70</sup> The

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<sup>65</sup> Resp. C-Mem., paras. 284-293.

<sup>66</sup> Resp. C-Mem., paras. 297-305, quoting 2005 LOI (C-039).

<sup>67</sup> Resp. C-Mem., paras. 309-312.

<sup>68</sup> Resp. C-Mem., para. 314.

<sup>69</sup> Resp. C-Mem., paras. 316-321.

<sup>70</sup> Resp. C-Mem., para. 327.

Respondent asserts that the parties in this proceeding and the Mauritian domestic proceedings are substantially the same, and the key allegations in the two sets of proceedings concern the allegation that the approval of PPG2 was arbitrary and unfair.<sup>71</sup>

103. As regards abuse of process, the Respondent contends that the same factors that support dismissal on grounds of *lis pendens* also support a claim of abuse of right by the Le Morne Claimants.<sup>72</sup>

### **(3) The Claimants' Counter-Memorial on Jurisdiction**

104. The Claimants assert that their contractual rights are protected investments because the definition of investment does not contain any requirement that an investment be made in accordance with the law of the host State. Furthermore, the decisions of arbitral tribunals adduced by the Respondent are not pertinent because the relevant wording in the treaties was different or applied different principles. The Claimants add that the Non-Citizen (Property Restriction) Act does not restrict conditional agreements.<sup>73</sup>

105. The Claimants affirm that the procedure followed in Le Morne was the same as in the case of a project at Les Salines. The Claimants contend that the Intermediary Agreements “expressly recognized that the acquisition of shares in LMB would require PMO consent, and that, if consent could not be obtained in a timely manner, PPH and TGI were to be conferred contractual rights to promote a development project and share in its profits. Mr. Giraud (a Mauritian citizen) was to remain the sole beneficial holder of the rights and interests in the Le Morne land should PMO consent not be granted.”<sup>74</sup> The Claimants assert that successive Prime Ministers *de facto* approved the Le Morne Project and argue that the LOI should preclude the Respondent from relying on belated technical objections.<sup>75</sup>

106. According to the Claimants, the Respondent did not exercise the “powers conferred by its laws” under Article 2(1) of the BIT. In support, the Claimants rely on the alleged

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<sup>71</sup> Resp. C-Mem., para. 324-333.

<sup>72</sup> Resp. C-Mem., para. 342-343.

<sup>73</sup> Cl. C-Mem., paras. 12-26, 30.

<sup>74</sup> Cl. C-Mem., paras. 32, 35.

<sup>75</sup> Cl. C-Mem., para. 42.

encouragement to invest they received from high level members of Government and on the fact that the project was identified as a “Top Priority Project” and fast tracked for approval by the Cabinet Fast Track Committee and BOI. The Claimants assert that, as part of the approval process, they submitted copies of all relevant documents to BOI, including the 2004 Co-operation Agreement, and, following the grant of the LOI, they entered into the 2006 Shareholders’ Agreement and the 2006 Intermediary Agreement.<sup>76</sup> The Claimants conclude that, “[i]n light of this course of conduct engaged in by Mauritius, including its decision not to reject the Claimants’ investment at Le Morne, Mauritius cannot now raise an objection based on the alleged non-compliance of the investment with Mauritian law.”<sup>77</sup>

107. The Claimants contend that, even if they had breached the Non-Citizen (Property Restriction) Act, the Tribunal would still have jurisdiction. The Claimants argue that trivial breaches of the host State’s legal order do not fall within the requirement that an investment be made in accordance with such order. The Claimants place emphasis on the application of the principle of proportionality between the alleged breach and the denial of the BIT protection.<sup>78</sup>
108. The Claimants dispute that PPH transferred its rights to claim under the BIT when transferring rights in LMB to TGI in 2009. They contend that it is for Mauritius to prove that such rights were transferred since it is Mauritius that made the allegation that the rights had been transferred. Furthermore, even if PPH had transferred its right to claim under the BIT to TGI, TGI is party to this arbitration and could and does assert those rights. In any case, the transfer would not extinguish Mr. Gosling’s rights. The Claimants also submit that the restructuring of the Claimants’ investment in 2009 was due to the prohibition of the Le Morne Project in violation of the BIT.<sup>79</sup> Accordingly, “Mauritius cannot therefore

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<sup>76</sup> Cl. C-Mem., paras. 43-44.

<sup>77</sup> Cl. C-Mem., para. 45.

<sup>78</sup> Cl. C-Mem., paras. 46-58.

<sup>79</sup> Cl. C-Mem., paras. 63-70.

rely on a consequence of its own internationally wrongful conduct to form an objection to the Tribunal’s jurisdiction.”<sup>80</sup>

109. The Claimants argue that the BIT protects rights indirectly held by Mr. Gosling and PPD. The Claimants dispute the relevance of the *Barcelona Traction* case relied on by the Respondent and assert that indirectly held investments are not excluded given the ample definition of “investment” as “every kind of asset” in Article 1(a) of the BIT and Article 5(2) of the BIT, which contemplates treaty protection of indirectly held assets.<sup>81</sup>
110. The Claimants next address the objection that the dispute does not relate to their shareholdings and rights derived from them. According to the Claimants, the objection is not a proper jurisdictional objection; even if the allegations made by the Respondent would be established, the objection would not deprive the Tribunal of jurisdiction. The Claimants insist that their claims include expropriation of the Claimants’ investment, including the shareholdings and contend that the destruction of a company’s assets necessarily results in the destruction in the value of the shares in that company.<sup>82</sup>
111. The Claimants also affirm that the funds expended by the Claimants in connection with the Le Morne and Pointe Jérôme Projects are an integral part of the investments protected by the BIT. The Claimants’ investment has to be looked at holistically. The Claimants affirm that each of them held and contributed a different aspect of the investment made, as is the nature of these projects.<sup>83</sup> Furthermore, this objection is inconsequential as a matter of jurisdiction, “To the extent Mauritius contests the fact that the Claimants expended funds in connection with their investments in the Le Morne and Pointe Jérôme Project[s], this is a matter relating to quantum not jurisdiction.”<sup>84</sup>

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<sup>80</sup> Cl. C-Mem., para. 70.

<sup>81</sup> Cl. C-Mem., paras. 72-73, referring to *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Case No. 50, Judgment, February 5, 1970 (“*Barcelona Traction*”) (RL-002).

<sup>82</sup> Cl. C-Mem., paras. 86-91.

<sup>83</sup> Cl. C-Mem., paras. 92-95.

<sup>84</sup> Cl. C-Mem., para. 96.

112. As regards the objection related to TGI as an investor, the Claimants contest the date on which the Respondent assumes that the dispute crystallized. They also contest the Respondent's premise that each violation of the BIT occurred in September 2007. According to the Claimants, TGI was incorporated on October 29, 2007 and the dispute regarding the expropriation arose on November 16, 2007, when it became apparent that the Respondent was stalling in the negotiations for compensation. The breach of Articles 2 and 3 of the BIT occurred later when LMDC/Rogers Group was treated more favourably.<sup>85</sup>
113. The Claimants dispute that the Pointe Jérôme SHA was entered into only after Mauritius cancelled the lease.<sup>86</sup> They argue that it would not have made commercial sense, that Mr. Gosling testifies otherwise, and that the Pointe Jérôme SHA was in force by August 1, 2007, which permitted it "to be amended together with clause 7.2 of the Pointe Jérôme Share Purchase Agreement on that date."<sup>87</sup>
114. As to the Respondent's argument that the share transfer pursuant to the Pointe Jérôme SPA was not registered until after the dispute arose and did not produce effects in respect of third parties, the Claimants argues that the SPA was a valid and binding instrument between the parties to it, and only reflects a change in the form in which Mr. Gosling's and PPDM (UK)'s assets were invested.<sup>88</sup> The Claimants further contend that arguments made by PPH against Mr. Tostée in domestic proceedings have no bearing on the jurisdiction of this Tribunal and point out that "[n]o findings as to the invalidity of the Pointe Jérôme SPA have been made by the Mauritian courts."<sup>89</sup>
115. The Claimants dispute the admissibility arguments advanced by the Respondent. The doctrine of *lis pendens* requires the triple identity test of parties, object and cause of action. The Claimants observe that (i) the parties in the domestic proceedings – LMB and SMB –

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<sup>85</sup> Cl. C-Mem., paras. 97-101.

<sup>86</sup> Cl. C-Mem., paras. 102-103.

<sup>87</sup> Cl. C-Mem., para. 104.

<sup>88</sup> Cl. C-Mem., paras. 105-106.

<sup>89</sup> Cl. C-Mem., para. 107.

are not parties in this arbitration; (ii) the cause of action is different: violation of property rights under Mauritian law as opposed to breach of the BIT; and (iii) the relief sought in the local proceedings and in this arbitration is not the same.<sup>90</sup> The Claimants note, that to the extent that the proceedings are related and arise from an overlapping factual matrix, “[b]oth courts and tribunals have adequate tools to address any risk of inconsistent judgments or double recovery. To the best of the Claimants’ knowledge, the proceedings pending before the Mauritian Courts involving LMB are now in their 10<sup>th</sup> year, and this Tribunal’s decision is overwhelmingly more likely to be issued before the proceedings in Mauritius are finally determined.”<sup>91</sup>

116. As to whether the proceedings have been commenced in bad faith, it is the Claimants’ contention that:

*There is nothing abusive about these proceedings which the Claimants have been forced to bring due to Mauritius’s continued failure to provide compensation for the Claimants’ losses despite Mauritius’s multiple and repeated acknowledgments that such compensation is due. The fact that LMB and SBM are pursuing separate claims before the domestic courts, under domestic law does not change that conclusion, nor can it in any way suggest that this arbitration has been brought in bad faith.*<sup>92</sup>

**(4) The Respondent’s Rejoinder on the Merits and Reply on Jurisdiction**

117. In its Rejoinder on the Merits and Reply on Jurisdiction, the Respondent maintains the arguments advanced in its Memorial on Jurisdiction, namely, that the Claimants: (i) never acquired a right to the land at Le Morne or a right to develop it; (ii) never acquired a right to shares in LMB; and (iii) never acquired enforceable contractual rights to returns under the 2006 and 2009 Intermediary Agreements because they were void from the start for non-compliance with the Non-Citizen (Property Restriction) Act.<sup>93</sup> In sum, the Respondent

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<sup>90</sup> Cl. C-Mem., paras. 108-126.

<sup>91</sup> Cl. C-Mem., para. 127.

<sup>92</sup> Cl. C-Mem., para. 129.

<sup>93</sup> Resp. Rej., Sec. II.

contends that “the Le Morne Project was an empty and speculative mechanism to share proceeds which were never generated from a project that never materialized.”<sup>94</sup>

## **B. ANALYSIS OF THE TRIBUNAL**

118. In its Decision on Bifurcation, the Tribunal noted that it was “not persuaded that upholding some of the jurisdictional objections at a preliminary phase would materially narrow the scope or complexity of the issues to be addressed at the merits phase.”<sup>95</sup> Further, the Tribunal believed that

*[...] addressing the majority of the objections as a preliminary matter would require an examination of facts and legal questions that will also be relevant to the merits. For example, making a determination on matters such as when the dispute arose, whether certain contractual rights were contingent on approval, void ab initio, or extinguished, and which entity or individual acquired what rights, at what time, and in what manner, are likely to require findings of facts and decisions on legal questions that may also require examination at the merits phase. Thus, the majority of the questions to be heard at the requested preliminary phase may be intertwined with the merits of the dispute and may need to be joined to the merits.*<sup>96</sup>

119. After receipt of all the Parties’ submissions and following the Hearing, the Tribunal is in a better position to address each of the objections to jurisdiction raised by the Respondent in respect of the Le Morne and Pointe Jérôme claims. The Respondent objects to the Tribunal’s jurisdiction over the Le Morne claims on grounds that: (a) the Claimants lack standing to assert BIT claims; (b) pre-investment expenditures are not protected by the BIT; (c) the dispute is not related to Claimants’ shareholdings or rights arising from them; and (d) the Claimant TGI was not a UK company before the dispute arose. The Tribunal will first turn to each of those objections with regard to the Le Morne claims, and thereafter

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<sup>94</sup> Resp. Rej., para. 15(e).

<sup>95</sup> Procedural Order No. 6, para. 40.

<sup>96</sup> Procedural Order No. 6, para. 41.

will consider objections to jurisdiction over Pointe Jérôme claims and admissibility of claims on grounds of *lis pendens* and abuse of rights.

**(1) Le Morne**

***a. Do the Alleged Contractual Rights Confer on Claimants Standing to Assert Their BIT Claims?***

120. The Respondent justifies the objection on the Claimants' lack of standing on the following grounds: (i) the Claimants' contractual rights were not entered into in conformity with Mauritian law; (ii) any rights and interests of PPH in LMB and the Le Morne Project had been voluntarily extinguished; (iii) the Claimants did not have protected assets; and (iv) Mr. Gosling and PPD cannot bring claims relating to rights under contracts of the companies in which they hold shares.

(i) Were the Claimants' Contractual Rights Illegal?

121. The Respondent has argued that the Claimants' contractual rights were entered into in violation of the Non-Citizens (Property Restriction) Act. As explained by the Claimants, the 2004 Cooperation Agreement and 2006 Shareholders' Agreement conferred rights to control the Le Morne Project and receive priority returns. Under the Intermediary Agreements, PPH was entitled to those rights as holder of shares in LMB if the PMO approved or, if approval was not granted, as a beneficiary of contractual rights in relation to the Le Morne Project under a promoter's contract. The Claimants emphasize that the Intermediary Agreements recognized that the acquisition of shares in LMB would require PMO consent.

122. In the view of the Tribunal, the illegality objection lacks merit for the following reasons.

123. First, the Non-Citizen (Property Restriction) Act does not prohibit control. Article 3(1) of the Act requires that the non-citizen obtain an authorization, if that non-citizen "wishes to hold or purchase or otherwise acquire a property [...]"<sup>97</sup> The Claimants did not "hold or

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<sup>97</sup> Republic of Mauritius, Non-Citizens (Property Restriction) Act of 1975, Act. No. 22/1975 (CL-003), Art. 3.

purchase or otherwise acquire a property” without authorization. That they controlled LMB is not a situation which the Non-Citizens (Property Restriction) Act prohibited.<sup>98</sup>

124. Second, pursuant to Article 5 of the Act, if there was a “contravention”, the Government would either “take possession of the property” or “cause it to be sold.” The Respondent has not taken any steps in that regard since the property (*i.e.*, the land) was never in the possession of the Claimants. No Government official or agency ever suggested that there was any illegality with respect to the Non-Citizen (Property Restriction) Act or any other laws.
125. Third, the 2006 Shareholders’ Agreement was a conditional agreement in the sense that the Claimants would purchase/acquire the land only on the condition that PMO authorization was granted. The Respondent’s expert, Prof. Seube, confirmed at the Hearing that it was normal practice in Mauritius to enter into an agreement for the purchase or acquisition of land on the condition that the PMO authorization would be granted: “Indeed, it is a very frequent arrangement, the signing of a sales agreement under the condition that the authorization from the Prime Minister be granted.”<sup>99</sup>
126. Fourth, the Government agencies dealt with the Claimants over an extensive period with respect to both the Le Morne and the Pointe Jérôme Projects. With respect to the Le Morne Project, the Government issued the LOIs knowing that UK investors were applying to develop it.<sup>100</sup> The Government agencies themselves informed the Claimants that they needed to obtain PMO authorization before the purchase of the land (through shares in LMB). With respect to Pointe Jérôme, the situation is very similar. In paragraph 8 of his February 16, 2006 letter to Mr. Wilkins, Mr. Ghurburrun stated explicitly that “Pointe Jérôme Development Ltd has informed BOI, in its letter dated 14<sup>th</sup> February 2006, of its development agreement made with Property Partnerships (Mauritius) Development Ltd

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<sup>98</sup> See Tr. Day 6 for the replies of Prof. Seube to Prof. Alexandrov: pp. 1498ff.

<sup>99</sup> Tr. Day 6, 1496:13-16.

<sup>100</sup> See BOI Memo dated December 30, 2005 (C-160); Letter from MAC to BOI dated December 30, 2005 (C-161).

(MPP) on 08<sup>th</sup> December 2005 for the acquisition of 90% of the shares of the company.”<sup>101</sup> In two other letters that Mr. Wilkins sent to Mr. Ghurburrun, one dated March 23, 2006,<sup>102</sup> and another dated May 15, 2006,<sup>103</sup> Mr. Wilkins provided details (including charts) of Claimants’ corporate structure and the corporate structure of the Projects.

127. In sum, on the facts before the Tribunal, the Tribunal dismisses the allegations of illegality. In view of this finding, the Tribunal does not need to engage in the debate on the relevance of the absence in the BIT of an explicit requirement that the investment be made in accordance with law.

(ii) Were the Claimants’ Contract Rights in LMB Relinquished?

128. The next ground for lack of standing argued by the Respondent concerns whether the Claimants waived their rights to claims for BIT violation through the settlement under the Consent Judgment.<sup>104</sup> The Respondent bases its argument on paragraph 10 of the Judgment:

*Whereas plaintiffs aver that the defendant no.1 [PPH] has, in breach of contract, failed and neglected to fund the payment of the balance of the sale price due, i.e. the amount of £2,180,655 with interest, as well as the other amounts due to the plaintiff no.1 [SMB] as set out in paragraph 4(d) above and has accordingly lost all of its rights and interests in the defendant no.2 [LMB] to the plaintiffs, in accordance with what has been commercially agreed between the plaintiffs on the one hand and the defendants on the other hand.*<sup>105</sup>

129. The Tribunal observes that this paragraph is not a waiver of BIT rights or claims, nor is it a waiver of claims against the Respondent for any actions by the Government or its agencies affecting the Claimants’ contractual rights. The Consent Judgment was concluded

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<sup>101</sup> Letter from H. Ghurburrun of BOI to C. Wilkins of Les Salines IRS Co. Ltd dated February 16, 2006 (C-162).

<sup>102</sup> Letter from C. Wilkins of MPP to H. Ghurburrun of BOI dated March 23, 2006 (R-186).

<sup>103</sup> Letter from C. Wilkins of MPP to H. Ghurburrun of BOI dated May 15, 2006 (R-189).

<sup>104</sup> Consent Judgment (C-037 of RfA).

<sup>105</sup> Supreme Court Judgement by consent of March 23, 2009 (C-037 of RfA), para. 10.

in March 2009, years after the alleged breaches of the BIT. For these reasons, the Tribunal is unpersuaded by the Respondent's argument.

(iii) Did the Claimants have BIT-Protected Assets?

130. The Respondent disputes that the Claimants had protected assets before the date of the alleged breach. The Respondent restricts the BIT "investments" definition to rights *in rem*. According to the Respondent, where rights to assets are claimed to arise under a contract it must be shown that "those contracts give rise to property rights—rights *in rem*."<sup>106</sup> This restricted view of the term "assets" ignores the plain meaning of the BIT, which refers to "every kind of asset." Claims to money or performance under contracts may include contracts for services and not only contracts for real estate.
131. The Respondent has also argued that a right does not qualify as an "asset" – as an investment – if it is speculative or contingent. According to the Respondent, the asset "must have vested specifically in a claimant before the date of the alleged breach. It is not sufficient merely that a claimant can point to the possibility that the right might vest at some future point, if a particular event occurs."<sup>107</sup>
132. The Tribunal understands that, in the present context, "vested" is used in the sense of being contrary to conditional or contingent, dependent on a future event. This is confirmed by the case law quoted by the Respondent in support of its argument. In this respect, the 2004 Co-operation Agreement, the 2006 Shareholders' Agreement, the 2006 Intermediary Agreement and the 2009 Intermediary Agreement are not contingent in the sense argued by the Respondent. They conferred contractual rights among their respective parties and constitute the contractual structure for the investors to carry out the Le Morne Project. For this project to become a reality, the Claimants needed the PMO authorization but also had contemplated in the alternative a sponsor's contract if that authorization was not forthcoming. Under whichever alternative, the Claimants needed the permits listed in the 2005 LOI. In other words, they had a potential investment, based on their contractual rights,

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<sup>106</sup> Resp. Rej., para. 18, second bullet.

<sup>107</sup> Resp. Rej., para. 18, third bullet.

in case they would obtain the necessary permits to develop their investment. The extent that progress or lack of it in the realization of the Project implicated the responsibility of the Respondent as argued by the Claimants is a matter for the merits.

133. The Respondent has also argued that none of the agreements is listed as an asset in the Claimants' financial statements. The Tribunal is not convinced by this argument. First, whether and how contractual rights are shown in a company's financial statements is a matter of accounting rules and practice, which depend on the relevant jurisdiction. It is not an indication of whether such rights exist or whether they are assets under the BIT's definition.
134. Second, there is evidence that the contractual rights were in fact reflected in PPH's financials. The note to the financial statements of December 31, 2006, under the rubric "Investments", states: "Additionally, the Company has entered into an agreement with the sole shareholder of Le Morne Brabant IRS Co. Limited, pursuant to which the Company has effective voting control. When the company receives the relevant Prime Minister[']s Office Authorization to hold the shares in Le Morne Brabant IRS Co. Limited that company will issue new shares to the Company." That statement is followed by the description of the flow of the profits.<sup>108</sup>
135. To conclude, the Tribunal finds that the arguments based on the alleged lack of potentially protected assets prior to the date of the alleged breach have no merit.

(iv) Do Mr. Gosling and PPD have Standing to Assert Claims Based on Contractual Rights Owned by PPH?

136. The Respondent has observed that Mr. Gosling and PPD are advancing their contractual claims based on their status as direct or indirect shareholders in the companies that are parties to the contracts for Le Morne, namely, the 2004 Co-operation Agreement, the 2006 Shareholders' Agreement, and the 2009 Intermediary Agreement. Consequently, the Respondent has argued that a shareholder of a company incorporated in the host State does not have standing to pursue claims directly over the company's contractual rights unless

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<sup>108</sup> PPH's Annual Return dated July 27, 2007 (FL-002.3), p. 17.

there is a provision in the BIT protecting such rights. The Respondent bases its argument on the fact that the BIT does not protect indirect investments and on the ICJ ruling in *Barcelona Traction*.<sup>109</sup> The Claimants contest the relevance of *Barcelona Traction* and rely on the wider interpretation of the definition of “investment” and on Article 5(2) of the BIT, which contemplates precisely treaty protection to cover indirectly held assets.

137. The plain meaning of “any kind of asset” in Article 1(1)(a) of the BIT could not be more general. “Any” means “every” in order to indicate “one selected without restriction.” The term “kind” means “category” defined as “a group united by common traits or interests.”<sup>110</sup> Thus, the text of Article 1(1)(a) itself means every category of assets. The fact that other treaties may add a reference to “directly or indirectly owned or controlled assets” does not mean that a limitation should be introduced into this BIT by this Tribunal when it is not supported by the text of the BIT itself. This conclusion is reinforced by considering the definition of investment in the context of Article 5(2) of the BIT that contemplates compensation in case of expropriation of indirectly held assets.<sup>111</sup>
138. As regards *Barcelona Traction*, the Tribunal notes that this case has not been followed in investment treaty cases. For instance, the *GAMI* tribunal did not accept the extension of the *Barcelona Traction* rule beyond the issue of the right of espousal by diplomatic protection and noted that “[t]he ICJ itself accepted in *ELSI* that US shareholders of an Italian corporate

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<sup>109</sup> *Barcelona Traction* (RL-002).

<sup>110</sup> See *Merriam-Webster Dictionary*, digital version; available at: <https://www.merriam-webster.com/>.

<sup>111</sup> Article 5(2) of the BIT provides:

*Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of these shares.*

UK-Mauritius BIT (CL-004).

entity could seize the international jurisdiction when seeking to hold Italy liable for alleged violation of a treaty by way of measures *imposed on that entity*.”<sup>112</sup>

139. Similarly, the *CMS* tribunal observed that the ICJ case was “concerned only with the exercise of diplomatic protection in that particular triangular setting, and involved what the Court considered to be a relationship attached to municipal law, but it did not rule out the possibility of extending protection to shareholders in a corporation in different contexts. Specifically, the International Court of Justice was well aware of the new trends in respect of the protection of foreign investors under the 1965 [ICSID] Convention and the bilateral investment treaties related thereto.”<sup>113</sup> As equally noted by the *CMS* tribunal, “[i]n point of fact, the [*ELSI*] decision evidences that the International Court of Justice itself accepted, some years later, the protection of shareholders of a corporation by the State of their nationality in spite of the fact that the affected corporation had a corporate personality under the defendant State’s legislation.”<sup>114</sup> It is notable that the Respondent has not engaged in its argument with the *ELSI* judgment.
140. It is apparent from the arguments of the Parties and the case law that the issue is not whether the indirect investor may seek compensation for breaches of the BIT as if it were the local company in which it has invested. Rather, the question is whether a foreign investor can claim compensation for losses that it itself has suffered as shareholder in its interest in the local company. Thus, the issue so articulated, the Tribunal has no doubt about its competence to consider it, and it dismisses the objection related to the standing of Mr. Gosling and PPD.

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<sup>112</sup> *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Final Award, November 15, 2004 (“*GAMI*”) (CL-079), para. 30 (internal citations omitted) (emphasis in original). See also *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Final Award, January 18, 2019 (CL-112), para. 203.

<sup>113</sup> *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, July 17, 2003 (“*CMS*”) (RL-071), para. 43.

<sup>114</sup> *CMS* (RL-071), para. 44.

***b. Do the Investment Disputes Relate to the Claimants' Shareholdings or Rights Arising from Them?***

141. The Respondent argues that the Claimants do not show how the legal dispute concerning their investment affects their shareholdings or rights flowing from them, “[n]or have Claimants attempted to show how the alleged facts have diminished the value of their shareholdings, let alone harmed rights inherent to their shareholder status.”<sup>115</sup> The Claimants confirm in their Counter-Memorial on Jurisdiction that they claim for harm to the shareholdings of Mr. Gosling, PPD and TGI, and explain that “for the sake of completeness, the Claimants have now adduced expert evidence on the valuation of their shareholdings and losses suffered to their equity value of the companies holding the property interests as a result of Mauritius’s actions, to confirm the very basic fact that the destruction of a company’s asset necessarily results in the destruction in the value of the shares in that company.”<sup>116</sup>
142. In its Reply on Jurisdiction, the Respondent affirms that the sole issue is whether the Claimants have shown the diminution in value of the shareholdings that the Claimants claimed to be protected investments. The Respondent concludes that “[s]ince Claimants have failed to show that the value of their shareholdings in the companies listed above diminished as a result of the alleged wrongful conduct, the Tribunal should declare this aspect of their claim inadmissible.”<sup>117</sup>
143. The issue here is not a matter of admissibility but of merits. *Prima facie*, the events leading to the decision by the Respondent to forbid development in the Le Morne land owned by LMB might have an impact in the value of the shareholdings. Whether they had such impact and by how much are issues to be considered as part of liability and quantum, if the Tribunal reaches these stages. As the *GAMI* tribunal reasoned in the context of Article 1116 of NAFTA:

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<sup>115</sup> Req. for Bifurcation, para. 66.

<sup>116</sup> Cl. C-Mem., para. 91.

<sup>117</sup> Resp. Rej., para. 94.

*[t]he fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment. Whether GAMI can establish such a prejudice is a matter to be examined on the merits. Uncertainty in this regard is not an obstacle to jurisdiction.*<sup>118</sup>

***c. Are the Funds Expended to Develop the Le Morne Project Protected Investments?***

144. This objection is incidental to the larger question of whether the Claimants had protected investments, which has been dealt with above. The question for the Tribunal is whether the expenses in preparation of the Le Morne Project are, by themselves, a protected investment. The Respondent bases its objection on the fact that those expenses do not constitute assets because “assets entail *property rights* (that is rights *in rem*).”<sup>119</sup> As already noted earlier, the Claimants dispute the Respondent’s understanding of the term “assets” in the BIT and affirm that the funds expended in connection with the Le Morne Project were an integral part of the investments protected under the BIT. Based on the case law, the Claimants argue that an investment must be looked at holistically and that their case is distinguishable from *Mihaly*.<sup>120</sup> The Claimants explain that in that case the investor did not acquire contractual rights to build, own and operate a power station, while “the funds expended by the Claimants are an ‘investment’ in connection with the Le Morne Project for which the Claimants did acquire contractual rights from the Government.”<sup>121</sup>
145. The Tribunal has already discussed the meaning of “assets” under the BIT and concluded that the meaning of the term under the BIT is wider than argued by the Respondent. The Tribunal further notes that its understanding of “investment” may include different components that need to be pulled together to determine whether an investment has been made. The Claimants have argued that their case is distinguishable from *Mihaly*, on the basis that they acquired contractual rights from the Government. The Claimants are

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<sup>118</sup> *GAMI (CL-079)*, para. 33.

<sup>119</sup> Resp. Rej., para. 95 (emphasis in original).

<sup>120</sup> *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, March 15, 2002 (“*Mihaly*”) (RL-064).

<sup>121</sup> Cl. C-Mem., para. 95.

mistaken. As already concluded by the Tribunal, the Claimants did not acquire contractual rights from the Government. In entering into the different contracts with private parties, the Claimant acquired contractual rights that had the potential to become rights to develop an investment, in case the relevant permits necessary to such development were obtained. It should not be forgotten that the LOI was extremely clear concerning this aspect, as it stated:

*It should be understood that this letter does not in any way whatsoever create any contractual relation between the Board of Investment and Le Morne Brabant IRS Co. Ltd and the Board of Investment will not be liable to any claim for compensation for any expenditure incurred by the company in the event that the project is not implemented as a consequence of the non-obtention of any permits and clearances required in furtherance of the realization of the project or for any other reason not within the control of the Board of Investment.*<sup>122</sup>

146. If the Tribunal were to conclude that the potential investment based on development rights granted by the Respondent has materialized, then the funds expended to develop the project would have to be considered as investments.

***d. Is TGI a Protected Investor?***

147. The question in dispute is whether TGI existed before the dispute arose. It is not disputed that TGI was incorporated on October 29, 2007, but the Parties hold different views on the date on which the dispute arose. The Claimants argue that “as at 16 November 2007, Mauritius’s violation of Article 5 of the BIT had not crystallized.”<sup>123</sup> This is the date when the Claimants met with Mauritius’ officials because of the failure of Mauritius to pay prompt, adequate and effective compensation for the taking of the Claimants’ investment due to Revised PPG2. Further, the Claimants explained that TGI was already incorporated when Mauritius violated Article 2 and Article 3 of the BIT, by “treating the Claimants less

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<sup>122</sup> 2005 LOI (C-039), p. 2.

<sup>123</sup> Cl. C-Mem., para. 99.

favorably than LMDC/Rogers Group in compensation discussions and the offers made in that regard.”<sup>124</sup>

148. On the other hand, the Respondent places the beginning of the dispute on September 24, 2007, when the Claimants sent MHL a letter, which the Respondent has characterized as formally objecting to the decision to revise PPG2, and a follow-up letter sent on the following day by the Claimants to the Deputy Prime Minister and Minister of Finance, in which the Claimants formulated their compensation claims.<sup>125</sup>
149. The key element that triggered the dispute was the recently published Revised PPG2. The Claimants consider piecemeal the consequences of this measure and relate them to distinct obligations of the Respondent under the BIT. Thus, they separate the act of the alleged taking under Article 5 from the compensation due or the treatment of the Claimants in the negotiations that ensued. The Tribunal considers that this not a tenable premise. The determining issue is the measure that caused the dispute. Even if the same facts may give rise to different claims, it does not follow that there is a different dispute for each of the claims. The Claimants seem to accept that TGI was not incorporated when the alleged taking took place. The contemporaneous record does not support the argument that the Claimants considered the negotiation related to compensation distinct from the alleged taking by Revised PPG2. In the view of the Tribunal, the dispute arose on September 25, 2007, more than a month before TGI was incorporated, when the Claimants decided to have the dispute solved by writing to the Government. Therefore, the Tribunal upholds the jurisdictional objection in respect of TGI’s lack of standing in this proceeding.

## **(2) Pointe Jérôme**

150. The Respondent has objected to the jurisdiction of the Tribunal in respect of the Pointe Jérôme claims on grounds largely similar to those argued with respect to the Le Morne claims. In addition, the Respondent has objected to the jurisdiction of the Tribunal vis-à-

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<sup>124</sup> Cl. C-Mem., para. 100.

<sup>125</sup> See Resp. C.-Mem., para. 318, quoting Cl. Mem., para. 93; Letter from MPP to MHL (undated), recorded as sent on September 24, 2007 (C-090); Letter from MPP to Hon. Rama Sithanen Deputy Prime Minister and Minister of Finance and Economic Development dated September 25, 2019 (R-004).

vis the Pointe Jérôme claims on grounds of *ratione temporis*, because the alleged contractual rights were acquired after the alleged breaches of the BIT in relation to Pointe Jérôme. The Tribunal will consider this objection first. For this purpose, it will be useful to recall the sequence of key events and their dates:

- a. The Lease was signed on May 7, 2004.
  - b. The Pointe Jérôme SPA was dated October 25, 2005.
  - c. The share transfer forms were signed on December 8, 2005.
  - d. The time limit to start construction as extended for a “last” time expired on February 7, 2006.
  - e. The extension of that time limit was requested on August 1, 2006.
  - f. The Pointe Jérôme SHA was dated June 2007.
  - g. MHL cancelled the Lease on September 20, 2007.
  - h. The transfer of the shares under the Pointe Jérôme SHA was registered on April 28, 2008.
151. The Respondent has contested that the contractual rights claimed by the Claimants came into existence before the alleged breach occurred on September 20, 2007. The Respondent alleges that the Pointe Jérôme SHA had not been signed by that date. The Respondent relies on the fact that the letter of MHL cancelling the Lease was addressed to PJD and MPP not to PJD and PPH. The Respondent has also argued that the Claimants sought to declare the Pointe Jérôme SPA null and void in a lawsuit filed against Mr. Tostée in July 2010. Furthermore, the Pointe Jérôme SPA was not registered until April 28, 2008, after the dispute arose. Therefore, according to the Respondent, under Mauritian law, the Pointe

Jérôme SPA did not produce effects in respect of third parties, including the Government.<sup>126</sup>

152. On the other hand, the Claimants dispute the contention that the Pointe Jérôme SHA was not signed in June 2007. They adduce in support that: (i) Mr. Gosling confirmed that it was signed in his Witness Statement; (ii) the Claimants' in-house lawyer refers to an amendment to the Lease in an email to Mr. Tostée dated June 29, 2007;<sup>127</sup> and (iii) the Pointe Jérôme SHA was amended on August 1, 2007. The Claimants explain that on the same date the Pointe Jérôme SPA was amended in order to postpone the date on which Mr. Tostée could exercise his put option in respect of his 10% shareholding in PJD. This leads the Claimants to conclude that the Pointe Jérôme SHA needed to have been signed by August 1, 2007.<sup>128</sup>
153. The evidence of the addressees of the Lease cancellation letter does not seem compelling in order to determine who was the beneficial fiduciary of 90% of the shares in PJD. The Pointe Jérôme SHA had been signed between Mr. Tostée and MPP. MPP acted under this agreement to designate PPH as the party to acquire 90% of the shares. The letter only proves that MHL was not informed of the designation of PPH as beneficiary of the shares. The Tribunal is not aware that there was an obligation for the Parties to inform MHL. On the other hand, and as a matter of logic, the evidence relied on by the Claimants seems more convincing since an agreement needs to be concluded before it can be amended.
154. As regards the argument related to the Claimants' allegations before the Supreme Court of Mauritius in the case of *PPH v. Mr. Tostée*,<sup>129</sup> in the view of the Tribunal, those allegations were made before another tribunal considering a different matter and are of no import in

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<sup>126</sup> Resp. C-Mem., paras. 276 *et seq.*

<sup>127</sup> Email from A. Dodwell to Y. Tostee dated June 29, 2007 (**C-147**).

<sup>128</sup> Cl. C-Mem., para. 104.

<sup>129</sup> *Property Partnerships Holdings Ltd. v. Jacques Yves Tostée*, Supreme Court of Mauritius (Commercial Division), Plea in Limine Litis, September 28, 2010 ("*PPH v. Mr. Tostée*") (**R-006**).

the case before this Tribunal. In any case, the Supreme Court never decided the case, as indicated by the Respondent, since PPH withdrew its lawsuit.<sup>130</sup>

155. To conclude, the Tribunal finds that the objection to jurisdiction vis-à-vis the Pointe Jérôme claims on grounds that the Claimants' contractual rights came into existence after the alleged breach occurred lacks in merit.
156. The Respondent has also argued that, even if the Claimants had obtained shares in PJD or SML before the critical date, the alleged right to develop the leasehold land lacked substance because of the inherent conditions, and each condition was essential to allow the development at the Pointe Jérôme. The Claimants had not taken any steps to fulfil these conditions when the Lease was cancelled and the right to develop the leasehold land never materialized. For this reason, the Respondent contends that the Claimants could have "no basis to claim returns under the contractual framework they established under their Pointe Jérôme SHA and SPA."<sup>131</sup> But the issue is whether, if it had not been for the measures allegedly taken by the Respondent in breach of the BIT, the returns would have been materialized. The answer to this question depends on a finding by the Tribunal that the Respondent breached the BIT and must be considered as part of the merits.
157. The Respondent further claims that the rights under the Pointe Jérôme SPA and the Pointe Jérôme SHA were rights *in personam*, and none conferred property rights.<sup>132</sup> This argument mirrors that made in respect of Le Morne. It is based on a narrow concept of investment as defined in the BIT. The considerations of the Tribunal in that instance are equally pertinent here and the Tribunal will not repeat them.
158. The Respondent contends that the Pointe Jérôme SPA had no effect in respect of third parties. The Claimants assert that the Pointe Jérôme SPA was a binding instrument which provided the Claimants with an interest in the shares enforceable by PPD (UK) against

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<sup>130</sup> Req. for Bifurcation, para. 47.

<sup>131</sup> Resp. Rej., para. 126.

<sup>132</sup> Resp. Rej., paras. 115 *et seq.*

SML, its contractual counterparty. According to the Claimants, the registration of the Pointe Jérôme SPA merely changed the form in which Mr. Gosling's and PPDM (UK)'s assets were invested.<sup>133</sup> The question for the Tribunal is whether on September 20, 2007, those assets, the alleged contractual rights, were opposable to the Respondent. In the view of the Tribunal, this question is only relevant if the Tribunal finds that the Lease was unlawfully cancelled by the Respondent and, therefore, will be considered as part of the merits.

159. The Respondent has argued that, like in the case of Le Morne, the Claimants had no right or interest in the company's assets. Their property right was to the shares, their own shares. As stated in considering this argument previously, "the question is whether a foreign investor can claim compensation for losses that it itself has suffered as shareholder in its interest in the local company. Thus, the issue articulated, the Tribunal has no doubt about its competence to consider it, and it dismisses the objection related to the standing of Mr. Gosling and PPD."<sup>134</sup>
160. Next, the Respondent has argued that the Claimants have failed to show that their direct or indirect shareholding in PPH diminished in value. For the reasons given in considering the Le Morne claims, the Tribunal rejects this contention as a jurisdictional objection. This is a matter to be dealt with as part of the quantum, if the Tribunal reaches this stage.
161. As in the case of the Le Morne claims, the Respondent argues that "[e]xpenditures by themselves do not constitute a protected investment unless they are *linked to* a protected investment. Simply spending money in the hope of one day acquiring a property right cannot, of itself, amount to a property right, and thus a protected investment."<sup>135</sup> As in the case of the parallel argument in respect of Le Morne, the question for the Tribunal is whether the expenses incurred in Pointe Jérôme are part of a bigger whole that may have been realized were it not for actions of the Respondent that, according to the Claimants,

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<sup>133</sup> Cl. C-Mem., para. 106.

<sup>134</sup> See above paragraph 140.

<sup>135</sup> Resp. Rej., para. 137 (emphasis in original).

constitute a breach of the BIT. Therefore, this argument will be considered as part of the merits, if such breach is determined by the Tribunal.

### (3) Admissibility of the Claims

162. The Respondent contends that the Claimants' claims in respect of the Le Morne Project are inadmissible on grounds of *lis pendens* or, in any case, abuse of rights. On the *lis pendens* question, the Respondent relies mainly on the recommendations of the "ILA Final Report on *Lis Pendens* and Arbitration" (the "ILA Report").<sup>136</sup> The Claimants base their arguments on the triple identity test – identity of parties, cause of action and relief – and question the relevance of the ILA Report recommendations.
163. The Tribunal observes that the BIT has no fork-in-the-road provision and it is not persuaded by the arguments of the Respondent. Abundant jurisprudence shows that tribunals have applied the triple test. On the other hand, the Respondent does not refer to any investment treaty case where the recommendation of the ILA has been followed. It is notable that the Respondent in its Reply on Jurisdiction failed to contest the arguments of the Claimants' rebuttal of the relevance of the ILA recommendations to the instant case. The *lis pendens* and abuse of right arguments were not further discussed at the Hearing.
164. The parties in the Mauritius Supreme Court proceedings are SMB and LMB; neither is a party to this proceeding. The causes of action are based on Mauritian law in the case of the local proceedings, while in this proceeding the causes of action concern issues arising under international law. As stated by the *GAMI* tribunal, "ultimately each jurisdiction is responsible for the application of the law under which it exercises its mandate."<sup>137</sup> The Respondent has affirmed that the relief sought by the Parties in the respective proceedings is "essentially the same,"<sup>138</sup> and that "the damage claims in both proceedings attempt to quantify the losses allegedly suffered by the Le Morne Project as a whole."<sup>139</sup> Given the

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<sup>136</sup> F. de Ly and A. Sheppard "ILA Final Report on Lis Pendens and Res Judicata and Arbitration" in 25(1) *Arbitration International* 83 (2009) (the "ILA Report") (RL-020).

<sup>137</sup> *GAMI* (CL-079), para. 41.

<sup>138</sup> Req. for Bifurcation, para. 96.

<sup>139</sup> Req. for Bifurcation, para. 96 (emphasis in original).

lack of parity of parties and causes of action, the overlap in possible compensation is not by itself an issue that affects the Tribunal's jurisdiction. It is a matter of potential double recovery that may be taken into account at the time of calculating the quantum, if the Tribunal reaches that stage.

165. The abuse of rights doctrine is based on bad faith. The case of *Phoenix*<sup>140</sup> relied on by the Respondent is a glaring example of bad faith. In that case, the claimant manipulated its nationality in order to have standing before an ICSID tribunal after the start of the dispute. Nothing of that sort has been adduced here, and no evidence has been submitted to show that the Claimants had acted in bad faith.

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166. To conclude on the jurisdictional objections and allegations of inadmissibility:
- (i) in respect of Le Morne, the Tribunal upholds the jurisdictional objection in respect of TGI's lack of standing in this proceeding, and dismisses the objections based on illegality, relinquishment of contract rights in LMB, lack of protected assets and inability of Mr. Gosling and PPD to claim that an interference with rights under contracts of companies in which they hold shares have violated their rights as shareholders. The Tribunal also dismisses allegations of inadmissibility related to Claimants' shareholdings or rights arising from them; and
  - (ii) in respect of Pointe Jérôme, the Tribunal dismisses the objection *ratione temporis*, the objection related to the standing of Mr. Gosling and PPD, and the objection that the rights under the SPA and the SHA did not confer property rights. It joins to the merits the objections based on (i) lack of substance of the alleged right to develop the leasehold, (ii) the allegation that contractual rights are not opposable to the Respondent, (iii) the alleged failure of the Claimants to show diminished value in the direct or indirect shareholding in PPH, and (iv) the alleged lack of a protected investment. The

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<sup>140</sup> *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009 ("*Phoenix*") (RL-021).

Tribunal rejects the allegations of inadmissibility based on *lis pendens* and abuse of rights.

## VII. LIABILITY

### A. POSITIONS OF THE PARTIES

#### (1) The Claimants' Memorial on the Merits

##### *a. Le Morne*

167. The Claimants claim that the Respondent breached Article 5(1) of the BIT by indirectly expropriating their investment in Le Morne. According to the Claimants, the Respondent changed its policy when it issued Revised PPG2 contrary to specific assurances to the Claimants and the LOI. The Claimants contend that as a result of PPG2 their investment lost most of its value. The Claimants affirm that the Respondent has acknowledged to them publicly and to the International Council on Monuments and Sites (“ICOMOS”) (an advisory body to UNESCO) that compensation would need to be provided, but none has been paid.<sup>141</sup>
168. The Claimants also assert that the Respondent also breached Article 2 of the BIT because it has not complied with its promise to pay compensation to the Claimants, and did not treat the Claimants fairly and equitably. The Claimants explain that under the obligation to treat an investor fairly and equitably (“FET standard”), the Respondent needed to treat the Claimants in accordance with due process, consistently, transparently and in an even-handed manner. The Claimants argue that the Respondent frustrated their legitimate expectations by failing to honor the specific assurances in the LOI and prior assurances received from Government officials at the highest levels, assurances on which the Claimants relied. The Claimants observe that the Respondent issued Revised PPG2 in a hurry and without consulting them, which had been the prior practice of the Government in matters of planning policy that affected them.<sup>142</sup> The Claimants insist on the

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<sup>141</sup> Cl. Mem., Sec. IV.A.

<sup>142</sup> Cl. Mem., Secs. IV.B and IV.C.

inconsistency of the Respondent's actions: "On the one hand, in December 2005, the Government specifically assured that their development could proceed and the Board of Investment issued the Claimants with a Letter of Intent. On the other hand, the Ministry of Housing and Lands prohibited development on the Claimants' land by issuing Revised PPG2 in September 2007."<sup>143</sup>

169. The Claimants finally argue that the discriminatory actions of the Respondent breached Articles 2 and 3 of the BIT. They were contrary to the obligation to treat the Claimants fairly and equitably under Article 2, and also contrary to the obligation to not afford less favourable treatment to the Claimants' investments than to the investments of Mauritian nationals or nationals of third States under Article 3. The claim of discrimination is based on the fact that Mauritian nationals (the LMDC/Rogers Group) and nationals of a third State (Tatorio Holdings) were allowed to develop their land in the buffer zone notwithstanding being in like circumstances, while development on the entirety of the Claimants' land was prohibited. Furthermore, in the case of the LMDC/Rogers Group, the Government offered compensation for the part of the land where development was prohibited by Revised PPG2.<sup>144</sup>

***b. Pointe Jérôme***

170. The Claimants argue that the failure to extend the commencement period and the summary cancellation of the Lease constitute unfair and inequitable treatment in breach of Article 2 of the BIT. The Respondent was not permitted under its own law to deny the extension and cancel the Lease without good reason. The cancellation was also not in keeping with the Respondent's normal practice, which frustrated the legitimate expectations of the Claimants.<sup>145</sup>

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<sup>143</sup> Cl. Mem., para. 186.

<sup>144</sup> Cl. Mem., para. 187 and Sec. IV.D.

<sup>145</sup> Cl. Mem., Sec. V.A.

171. The Claimants also argue that by cancelling the Lease the Respondent deprived the Claimants of the value of their investment and indirectly expropriated it. According to the Claimants, “Without PJD’s leasehold interest in the site, the Claimants could no longer develop the Pointe Jérôme site. The cancellation of the Lease rendered the Claimants’ contractual rights to acquire the shares in PJD under the Pointe Jérôme SPA and SHA worthless, and permanently deprived the Claimants of the benefits of their investment.”<sup>146</sup>
172. The Claimants further argue that, by cancellation of the Lease, the Respondent meant to gain leverage in its negotiations with the Claimants because the Lease was cancelled three days after the Claimants were notified of the issuance of Revised PPG2, and the Government proposed to reinstate the Pointe Jérôme Lease “*as part of*”<sup>147</sup> a land exchange for Le Morne (the value of the leased land would be deducted from the compensation to be paid in respect of Le Morne); the cancellation was counter the Government’s policy of encouraging development. To this day, the Claimants have not been compensated and Pointe Jérôme has not been rehabilitated.<sup>148</sup>
173. The Claimants argue that their investments were treated less favourably than those of Mauritian nationals or of third States in violation of Article 3 of the BIT. In support, the Claimants adduce examples of cases of industrial leases of investors in like circumstances to the Claimants in which the Respondent did not insist on adherence to the commencement periods. The Claimants also refer to the testimony of the former Permanent Secretary of MHL before the Mauritian Supreme Court in which he affirmed that commencement period clauses were not normally insisted upon.<sup>149</sup>
174. Finally, the Claimants also argue that the Respondent also breached the umbrella clause under Article 2 of the BIT by (i) denying the extension of the commencement period and

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<sup>146</sup> Cl. Mem, para. 218.

<sup>147</sup> Cl. Mem, para. 222(b) (emphasis in original).

<sup>148</sup> Cl. Mem., paras. 83-89, Sec. V.B.

<sup>149</sup> Cl. Mem., Sec. V.C.

wrongfully cancelling the Lease, and (ii) failing to reinstate the Lease or to issue a new lease notwithstanding its undertakings to the Claimants in that respect.<sup>150</sup>

## **(2) The Respondent’s Counter-Memorial on the Merits**

### *a. Le Morne*

175. The Respondent affirms that it did not expropriate indirectly the alleged investments in Le Morne for the following reasons. First, Revised PPG2 did not destroy the economic value of the Claimants’ investment. The land can still be used for grazing and hunting, activities for which it was used at the time the Claimants bought the land for 5.2 million pounds.<sup>151</sup> The current value estimated by the Respondent’s appraiser – Mr. Feuerdent – is still EUR 1.5 million without taking into account “the Claimants gaining control over substantially valuable land through a land exchange with the Government.”<sup>152</sup> Thus, according to the Respondent, the Le Morne land has retained at least a quarter of its fair market value. The Respondent concludes that Claimants have not satisfied the “dispositive element of an indirect expropriation claim: a regulation’s destruction of the value of an investment.”<sup>153</sup>
176. Second, the Respondent argues that the Claimants had no reasonable investment-backed expectation that Mauritius would not limit development in pursuit of the goal of inscription of Le Morne in the UNESCO World Heritage List.<sup>154</sup> The Respondent disputes the Claimants’ assertions that the LOI constituted “a promise or specific assurance that the Promoters could develop their Project irrespective of the efforts to inscribe Le Morne.”<sup>155</sup> The Respondent explains that the LOI merely notes the willingness of the Government to consider granting a developer the incentives specified in the IRS Regulations, and even this is “subject to the developer’s acquisition of all required authorizations and permits

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<sup>150</sup> Cl. Mem., Sec. V.D.

<sup>151</sup> Resp. C-Mem., Sec. IV.A.1.a.

<sup>152</sup> Resp. C-Mem., para. 350.

<sup>153</sup> Resp. C-Mem., para. 351.

<sup>154</sup> Resp. C-Mem., Sec. IV.A.1.b.

<sup>155</sup> Resp. C-Mem., para. 358.

[...].”<sup>156</sup> Furthermore, BOI emphasized that the LOI was not of a contractual nature and that BOI would not be liable for compensation claims if the project is not executed because permits were not obtained. The Respondent concludes: “Since the Government never promised Claimants that it would refrain from regulatory actions aimed at facilitating the inscription of the site, even if its regulations, adopted for that purpose, might have negatively impacted the Promoters’ proposed Project, the claim that PPG2 constituted an indirect expropriation must fail.”<sup>157</sup>

177. Third, the Respondent asserts that PPG2 was “an appropriate, non-discriminatory exercise of police power undertaken as part of a *bona fide* effort to achieve Mauritius’ long-standing goal to inscribe Le Morne as a World Heritage Site. As such, it cannot constitute expropriation under international law.”<sup>158</sup>
178. As regards the alleged breach of the umbrella clause, the Respondent asserts that it never acknowledged obligations to compensate the Claimants for the issuance of PPG2, and that it offered to the Claimants, like to the other private landowners, a land-exchange mechanism, but the Claimants were unwilling to accept any of the Government’s good faith proposals.<sup>159</sup>
179. The Respondent then addresses the claim of breach of Article 2(2) of the BIT. First, the Respondent affirms that Article 2(2) does not require treatment beyond the customary international law minimum standard of treatment. According to the Respondent, the plain reading of the text of Article 2(2) supports the application of the minimum standard. The Respondent contends that the Claimants are wrong as to the normative source: it is not the practice of prior investment tribunals but the practice of States and *opinio juris* of which the Claimants have not presented any evidence. The Respondent admits that it is generally accepted that international law does recognize a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation or a general,

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<sup>156</sup> Resp. C-Mem., para. 358.

<sup>157</sup> Resp. C-Mem., para. 360.

<sup>158</sup> Resp. C-Mem., para. 363. *See also* Resp. C-Mem., Sec. IV.A.1.c.

<sup>159</sup> Resp. C-Mem., Sec. IV.A.2.

self-standing duty of transparency. According to the Respondent, arbitrariness or discrimination may lead to a breach of the minimum standard of treatment but, in the case of arbitrariness, only in situations “where the action constitutes an unexpected and shocking repudiation of a policy’s very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive,”<sup>160</sup> and, in the case of discrimination, only when a measure targets a particular investor or investment based on nationality or other characteristics.<sup>161</sup>

180. The Respondent affirms that the facts do not support the Claimants’ argument of the breach of the FET obligation. Thus, the Claimants place great weight on the LOI and on the fact that the sole condition with respect of the UNESCO inscription was compliance with the parameters established in Dr. Abungu’s reports. But the Respondent explains that Dr. Abungu’s report had been rejected as incomplete and had not been transmitted to the World Heritage Committee about four months before the date of the Claimants’ investment on June 30, 2006. Therefore, it was unreasonable to expect that the Government would insist on the parameters in Dr. Abungu’s report.<sup>162</sup>
181. The Respondent disputes the Claimants’ affirmation that at meetings with Government officials the Claimants received assurances that they could develop the Le Morne Project. On the contrary, they were told that the proposed project may not be compatible with the nomination of Le Morne to the WHL.<sup>163</sup> The Respondent also disputes the contention that the Government did not consult the Claimants, and affirms that they were consulted extensively on planning policy, but consultation does not mean that the Respondent needed to agree with the Claimants’ views. In the view of the Respondent, “It is sufficient that the developer has been made aware of the proposed regulatory measure and has been given an

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<sup>160</sup> Resp. C-Mem., para. 379, third bullet, quoting *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009 (CL-052), para. 293.

<sup>161</sup> Resp. C-Mem., Sec. IV.A.3.a.

<sup>162</sup> Resp. C-Mem., paras. 382-386.

<sup>163</sup> Resp. C-Mem., para. 387.

opportunity to express its views to the relevant governmental authorities. That plainly occurred [...].”<sup>164</sup>

182. As regards the Claimants’ argument of inconsistency in the Respondent’s actions, the Respondent insists that its “administrative actions are perfectly reconcilable when viewed in the context of the Government’s repeated assertions of its firm commitment to secure the inscription of the Le Morne site.”<sup>165</sup>
183. With respect to the Claimants’ argument that their alleged investments at Le Morne have been discriminated against contrary to Article 3(1) of the BIT, the Respondent contends that the Claimants misconstrue the scope of the Respondent’s obligations under Article 3 of the BIT because: (i) in the Claimants’ analysis of “like circumstances,” they rely exclusively on decisions of tribunals under NAFTA and ignore that, in interpreting similarly worded clauses in other BITs, tribunals have rejected the broad-brush “same sector” approach in favor of “a broad coincidence of similarities covering a range of factors;”<sup>166</sup> and (ii) “the existence of a legitimate public policy objective on the part of the State is not a mere afterthought in the analysis under Article 3 of the Treaty, but it is fundamental to the identification of a comparator and the question of whether there has been a difference in treatment.”<sup>167</sup>
184. The Respondent considers invalid the assumption of the Claimants that there was no justification for different treatment of areas within the buffer zone. The Respondent explains that the decision of prohibiting all development in Area E was justified because: (i) in that area there were archaeological artifacts, (ii) the development would be highly visible, (iii) Area E constitutes a bridge between Le Morne and the Black River mountain range and Black River gorges, and (iv) it is a biodiversity corridor. None of these

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<sup>164</sup> Resp. C-Mem., para. 391.

<sup>165</sup> Resp. C-Mem., para. 392.

<sup>166</sup> Resp. C-Mem., para. 398, quoting *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, June 29, 2009 (**RL-093**), para. 415.

<sup>167</sup> Resp. C-Mem., para. 401.

considerations apply to Areas F and H (where Tatorio Holdings' land was situated) or D (where the LMDC/Rogers Group's land was situated). The Respondent further explains that it imposed conditions on the development of these areas. The developers considered them so onerous that they decided not to proceed with their development plans.<sup>168</sup>

185. The Respondent dismisses the argument of different treatment in relation to compensation. First, the fair compensation in the case of the LMDC/Rogers Group, who was allowed partial development, would not necessarily be fair in the case of the Claimants. Second, no land exchange was ever concluded with the LMDC/Rogers Group. Third, negotiations with the Claimants for a land exchange failed because of LMB's conduct.<sup>169</sup>

***b. Pointe Jérôme***

186. The Respondent denies that it breached the fair and equitable treatment obligation in relation to Pointe Jérôme. The Lease was cancelled because the Claimants breached Article 14 of the Lease. The *South Seas Development* case on which the Claimants rely is inapposite because commencement of construction was delayed by the Government itself or by events beyond the Claimants' control.<sup>170</sup> The Respondent disputes the date of the alleged request for an extension. The Respondent points out that, on the date of January 23, 2006 used by the Claimants, they only notified BOI and not MHL of their intention to request an extension. The Respondent recalls that at that time the BOI alerted the Claimants that at that stage the MHL may not approve an amendment to the Pointe Jérôme Project. Nonetheless, the Claimants presented to MHL a new project six months after the expiration of the final extension deadline to start construction. But the indicative project proposal of the Claimants lacked precision on the height, size and location of the buildings, situated the development within the statutory setback from the high-water mark, and failed to

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<sup>168</sup> Resp. C-Mem., paras. 402-407.

<sup>169</sup> Resp. C-Mem., para. 408.

<sup>170</sup> Resp. C-Mem., paras. 416-418, citing *South Seas Development Co. Ltd. v. Government of Mauritius*, Supreme Court of Mauritius Case No. 64766, Judgement, May 16, 2006 ("*South Seas Development*") (CL-037).

indicate the actions it proposed to take to widen the main access road and the relocation of two persons living on the site.<sup>171</sup>

187. The Respondent affirms that the Claimants exaggerate their preparatory actions. Furthermore, in the case before the Supreme Court in which Mr. Tostée and the Claimants are parties, the Claimants blamed Mr. Tostée and not MHL for their predicament.<sup>172</sup>
188. The Respondent contends that cancellation of the Lease was in accordance with its own established practice. The Respondent clarifies that, in the case of *South Seas Development* on which the Claimants rely, Mr. Chan testified that the commencement period was not *normally*, but not *never*, insisted on. According to the Respondent, “[a] request for a second extension of the commencement period made (a) six months after the expiration of the extended commencement period; (b) despite Claimants’ awareness that MHL had pronounced the previous extension to have been the ‘final’ extension; (c) by a new shareholder of which, until that point, MHL had not been informed; (d) who requested the extension not on grounds of *force majeure* but because it had come to believe that the project as designed by the leaseholder was not viable, was not considered ‘normal’ by MHL, and Claimants have introduced no evidence to suggest that it was.”<sup>173</sup> Furthermore, the practice described by Mr. Chan referred to industrial leases that had commencement periods of six-months, not a realistic period to commence substantial construction as opposed to the fifteen-month period in the Lease plus the first extension.<sup>174</sup>
189. The Respondent disputes the claim of expropriation. First, the Respondent explains that, for a State to have expropriated an investor’s contractual rights, a claimant needs to demonstrate that the State acted on the basis of superior governmental authority and not pursuant to its rights under a contract. Second, in the instant case, the Respondent had the contractual right to cancel the Lease.<sup>175</sup>

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<sup>171</sup> Resp. C-Mem., paras. 413-424.

<sup>172</sup> Resp. C-Mem., paras. 425-426.

<sup>173</sup> Resp. C-Mem., para. 428.

<sup>174</sup> Resp. C-Mem., paras. 427-429.

<sup>175</sup> Resp. C-Mem., paras. 434-446.

190. The Respondent also disputes the Claimants' assertion that the cancellation was done to gain leverage in the negotiations with the Claimants with respect to Le Morne. First, the decision to cancel the Lease was taken not on September 20, 2007 but on May 12, 2007, even before the issuance of the original PPG2 in June 2007. Second, "it was Claimants who first suggested a land swap in which they would receive a freehold (not a leasehold) at Pointe Jérôme in exchange for their land at Le Morne."<sup>176</sup> Third, the decision was consistent with the Government's policy to require lessees to commence construction within a specified period to prevent land speculation.<sup>177</sup>
191. As to the claim of discrimination, the Respondent argues that the companies mentioned by the Claimants were not in like circumstances. In one case, the lease was cancelled and in the other two, the extension was granted because events beyond the control of the lessees delayed construction. The Respondent adduces additional cases of lease cancellations for failure to commence construction.<sup>178</sup>

### **(3) The Claimants' Reply on the Merits**

#### *a. Le Morne*

192. As regards the claim of expropriation, the Claimants reiterate that Revised PPG2 destroyed their investment because it prohibited outright the commercial activity underpinning its value. The Claimants deny that they acted recklessly.<sup>179</sup> On the contrary, they

*carried out extensive due diligence into the Le Morne Project, and mitigated entirely the risk that the Government may elect to prohibit development on the Le Morne land by engaging with the Government, specifically requesting its confirmation that the Le Morne Project could proceed notwithstanding the inscription aspiration and alongside it. As part of that process, the Claimants scaled down their proposed project in accordance with*

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<sup>176</sup> Resp. C-Mem., para. 454.

<sup>177</sup> Resp. C-Mem., paras. 452-456.

<sup>178</sup> Resp. C-Mem., paras. 457-464.

<sup>179</sup> Cl. Reply, paras. 24-33.

*Dr. Abungu's recommendations, and obtained for it the approval of the Cabinet and the LOI formalising that approval.*<sup>180</sup>

In fact, the Claimants point out that Mauritius admits that the Claimants specifically sought its “assurance prior to investing, and relies on the very correspondence in which it was made clear to the Government that the Claimants intended to rely on the LOI in order to invest, and that they would withdraw if it were not issued.”<sup>181</sup>

193. The Claimants recall that: (i) Dr. Abungu was recommended to the Respondent by UNESCO and at the Respondent’s request to consider the Claimants’ project in light of the inscription of Le Morne in the WHL;<sup>182</sup> (ii) in his Second Report, Dr. Abungu “confirmed that development should be permitted alongside inscription, subject to the Claimants reducing the maximum number of villas to 65 and limiting the hotel to 35 rooms;”<sup>183</sup> and (iii) after considering the Le Morne Project, Dr. Abungu’s recommendations, the input of Ministries and authorities concerned, the Claimants agreed to reduce the project to the size set by Mr. Abungu, the Cabinet approved the project and directed the BOI to issue the LOI.<sup>184</sup> In the context of this factual background, it was reasonable for the Claimants to rely on the LOI. Furthermore, “the BOI’s own Guidance makes clear that the issuance of a LOI is a key stage of the approval process for any IRS projects and requires Cabinet approval.”<sup>185</sup>
194. The Claimants point out that UNESCO’s rejection of Mauritius’ dossier in March 2006 was not in any way related to the Claimants’ project and the Mauritian authorities never suggested otherwise, nor did they withdraw or revise the conditions of the LOI. The dossier was rejected because it was incomplete.<sup>186</sup>

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<sup>180</sup> Cl. Reply, para. 33.

<sup>181</sup> Cl. Reply, para. 34, citing, *inter alia*, Resp. C-Mem., paras. 90-94.

<sup>182</sup> Cl. Reply, para. 44.

<sup>183</sup> Cl. Reply, para. 47.

<sup>184</sup> Cl. Reply, para. 48.

<sup>185</sup> Cl. Reply, para. 50.

<sup>186</sup> Cl. Reply, para. 68(c).

195. The Claimants dispute the relevance of the purpose of Revised PPG2 in assessing whether it was an expropriatory measure. They dispute that the Respondent’s measure fell within the police powers exception and note that there is no exception in the BIT for expropriation for a public purpose. Actually, according to the BIT, the Respondent may only lawfully expropriate an investment if the expropriation is for a public purpose and the Respondent pays prompt, adequate and effective compensation.<sup>187</sup>

196. According to the Claimants, Revised PPG2 was not necessary but self-imposed. They argue:

*As is now clear from the documents Mauritius has been compelled to produce in unredacted form through disclosure, Dr. Odendaal was engaged by the Ministry of Arts and Culture on the basis that half of his fees would be paid upon UNESCO’s acceptance of the dossier. In these circumstances, and perhaps also by reason of his partisan views and those of Dr. Bakker, as later explained by them in an article, a complete prohibition of the Claimants’ development at Le Morne was naturally a safer bet for a successful inscription of Le Morne than a balanced approach that promotes both heritage conservation and economic development.*<sup>188</sup>

197. The Claimants contend that Revised PPG2 was not proportional to the State’s objective and was not adopted in good faith. The Claimants argue that the process followed by Mauritius “to enact the Revised PPG2 was non-consultative, deliberately opaque, and it appears intended to prevent Claimants and other developers from participating.”<sup>189</sup>

198. On compensation, the Claimants assert, “Mauritius has always known and acknowledged that it would be required to compensate the Claimants should it ultimately decide to proceed with inscription without allowing the Claimants’ development. These consistent and repeated acknowledgements have come from a diverse range of senior [G]overnment officials, at different points in time.”<sup>190</sup>

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<sup>187</sup> Cl. Reply, paras. 72-84.

<sup>188</sup> Cl. Reply, para. 88.

<sup>189</sup> Cl. Reply, para. 98.

<sup>190</sup> Cl. Reply, para. 106.

199. The Claimants argue that the facts that sustain the argument of expropriation also give rise to a breach of the FET standard. In this respect, the Claimants affirm that the FET standard in the BIT requires the Respondent to treat the Claimants not merely in accordance with the minimum standard of treatment and point out to the language in Article 2 of the BIT, which refers “to *‘fair and equitable treatment’*, not minimum standard of treatment or customary international law.”<sup>191</sup> The Claimants contend that “even if Mauritius could, despite the clear wording of the BIT and weight of authority, read the FET standard as the minimum standard of treatment in accordance with customary international law, for all practical purposes, in light of the evolution of the customary international law minimum standard, the content of the standard and investment protections provided by it would be similar.”<sup>192</sup>
200. The Claimants reiterate their arguments on legitimate expectations and concentrate their allegations on the inconsistent and unpredictable treatment of the Claimants’ investment. According to the Claimants, “the policy of pursuing inscription alongside the Claimants’ development in accordance with the Mauritian Cabinet’s decision of 30 December 2005 and [the] LOI issued the same day, while subsequently changing that policy without informing the Claimants, Mauritius deprived the Claimants of an opportunity to adopt a commercial strategy that could be implemented over time despite their due diligence and experience.”<sup>193</sup> In sum, the Claimants assert that the Respondent violated the FET standard by failing to act in good faith.<sup>194</sup>
201. The Claimants reiterate their claim of discrimination. They argue that they and the LMDC/Rogers Group were in exactly the same circumstances: both were developers with IRS projects in Le Morne, the projects overlapped with the buffer zone, the projects were stopped by Revised PPG2, and both were offered by the Government to enter into a settlement by way of a land exchange. The Claimants reject the argument of the

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<sup>191</sup> Cl. Reply, para. 113 (emphasis in original).

<sup>192</sup> Cl. Reply, para. 120.

<sup>193</sup> Cl. Reply, para. 127.

<sup>194</sup> Cl. Reply, paras. 129-131.

Respondent that the negotiations failed because the Claimants valued the land as if it had development rights when it did not.<sup>195</sup> The Claimants re-affirm their position that they indeed had development rights: the “Cabinet had approved their development and BOI had granted an LOI. The Claimants’ scheme was compliant with the NDS and Outline Planning Scheme. Any purchaser would have taken this into account for valuation purposes, as did other purchasers in Mauritius who acquired sites whose developments were in the same stage of the permitting process. The Claimants’ development was in fact more advanced than LMDC/Rogers’, which did not have an LOI at the time Revised PPG2 was issued.”<sup>196</sup>

202. Because of their clear claims for expropriation and breach of the FET standard, the Claimants manifest that they no longer pursue a claim for discrimination on the basis that the Respondent permitted other developments at Le Morne nor their claims for breach of the umbrella clause.<sup>197</sup> Nonetheless, the Claimants maintain the claim for discrimination in respect of the compensation offered to other investors. As confirmed at the Hearing by the Claimants: “There has been discrimination because others, specifically LMDC, have been offered compensation in far more generous terms on a completely different basis to us. They were the other significant private landowner; so, it’s a relevant and direct comparison.”<sup>198</sup>

***b. Pointe Jérôme***

203. The Claimants argue that the Respondent violated the FET standard by discriminating against them and by failing to afford them due process in administrative decision-making. The Claimants affirm that they duly applied for an extension and advised the Government through BIO on January 23, 2006, before the expiration of the commencement period, that construction could not commence before mid-November 2006. The BOI did not indicate

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<sup>195</sup> Cl. Reply, paras. 132-138.

<sup>196</sup> Cl. Reply, para. 139.

<sup>197</sup> Cl. Reply, para. 141.

<sup>198</sup> Tr. Day 1, 90:14ff.

that MHL may not approve the Pointe Jérôme Project, but that it may need to be issued with a new LOI.<sup>199</sup>

204. The Claimants assert that, at the time the Lease was cancelled, the Respondent did not justify the cancellation on the basis of any of the reasons advanced now by the Respondent, namely, that the request was out of time, that the previous extension was final, that the project had been changed or that the Claimants were land speculators. According to the Claimants, these are all *ex post facto* excuses to justify an arbitrary decision.<sup>200</sup>
205. The Claimants recall that, while their application was pending, the Respondent accepted rent from the Claimants, withheld the decision for four months, and knew that the Claimants had already expended in excess of GBP 1 million and the project was progressing. In the circumstances, “the Claimants reasonably expected that they would be consulted and afforded the opportunity to make representations in relation to any matters that were genuinely of concern to the Ministry of Housing and Lands.”<sup>201</sup>
206. The Claimants also argue that the expropriation was unlawful. They contend that the Respondent cancelled the Lease acting in its sovereign capacity because the Lease was not a private contract: it concerned State land and the reference to “private contract” in the *Pas Géométriques Act* merely means that the contract is not advertised to the public. Furthermore, commencement periods for construction and cancellation pursuant a policy against land speculation are indications that the contract was not private.<sup>202</sup>
207. The Claimants also insist that, for the same reasons that the Respondent breached the FET standard, the expropriation of the Lease was unlawful as a matter of its governing law.<sup>203</sup>

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<sup>199</sup> Cl. Reply, paras. 142-147.

<sup>200</sup> Cl. Reply, paras. 154-164.

<sup>201</sup> Cl. Reply, paras. 166-167.

<sup>202</sup> Cl. Reply, paras. 169-172.

<sup>203</sup> Cl. Reply, paras. 173-175.

208. On discrimination, the Claimants argue that none of the grounds adduced by the Respondent renders the circumstances of Pointe Jérôme exceptional nor were any of these grounds used at the time of the cancellation. The instances of deadline extensions to start construction which are part of the record show that such extensions were not normally denied because of previous extensions.<sup>204</sup> Further, “[t]he fact that the Ministry of Housing and Lands took legal advice over a four-month period after having made its decision before notifying the Claimants suggests that it knew that there were no exceptional circumstances warranting a departure from its normal practice. Including in light of the *South Seas* decision that had recently been rendered at the time, this would necessarily have been a real concern to the Ministry.”<sup>205</sup>

#### **(4) The Respondent’s Rejoinder on the Merits**

##### ***a. Le Morne***

209. The Respondent recalls that its paramount policy objective at Le Morne was the inscription of the mountain and its surroundings as a UNESCO World Heritage Site. According to the Respondent, the Claimants have admitted that they were aware of this objective before they made their plans to build a resort at Le Morne. As decided by UNESCO, it was impossible for Mauritius to have both the UNESCO inscription of Le Morne and the Claimants’ Project.<sup>206</sup>

210. The Respondent questions the reliance of the Claimants on Dr. Abungu’s recommendations because they were based on incomplete information and UNESCO and its Advisory Bodies differed from his opinion on the Claimants’ Project, as acknowledged by Dr. Abungu himself. As explained by Dr. Odendaal, who prepared the second submission which was accepted by UNESCO, the World Heritage Committee requested that the Government not allow more development at Le Morne. The Respondent explains that Revised PPG2 was

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<sup>204</sup> Cl. Reply, paras. 173-177.

<sup>205</sup> Cl. Reply, para. 177.

<sup>206</sup> Resp. Rej., paras. 143-145.

adopted solely to satisfy UNESCO's conditions for inscribing Le Morne and, hence, it was consistent with the Respondent's priority of obtaining UNESCO inscription of the site.<sup>207</sup>

211. The Respondent disputes that it ever would approve the Le Morne Project unless UNESCO deemed it compatible with the inscription of Le Morne. The Respondent observes that the Claimants ignore the advice of their own consultant, who in his EIA emphasized that many people felt that development of the Peninsula should be stopped and that this sentiment was in line with the initial standards set by UNESCO for the protection of the site.<sup>208</sup>
212. The Respondent confirms that the Advisory Bodies of UNESCO and in particular ICOMOS, as well as the World Heritage Committee, were aware of the Claimants' Le Morne Project, which had been described in the dossiers of Dr. Abungu and Dr. Odendaal.<sup>209</sup>
213. The Respondent takes exception to the accusation that Dr. Odendaal and Prof. Bakker were partisan consultants because of the so-called "secret contingency fee." The Respondent clarifies that: (i) the second half of Dr. Odendaal's fee was payable when UNESCO would accept his submission as complete and not upon inscription of Le Morne as stated by the Claimants, and (ii) it was paid long before he advised the Government on PPG2.<sup>210</sup>
214. The Respondent argues that PPG2 was not more restrictive than prior legislation, and that, under that legislation, the Claimants would not have been allowed to develop the property at Le Morne.<sup>211</sup>
215. The Respondent denies that Mauritius ever approved or authorized the project because the Claimants needed: (i) approval of the PMO to acquire any interest in land, and (ii) to acquire the right to develop the property through the issuance of a Building and Land Use

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<sup>207</sup> Resp. Rej., paras. 146-147.

<sup>208</sup> Resp. Rej., paras. 149, 167-169.

<sup>209</sup> Resp. Rej., paras. 172-184.

<sup>210</sup> Resp. Rej., paras. 213-216.

<sup>211</sup> Resp. Rej., paras. 217-218.

Permit by the local district council, which in turn requires other licenses and clearances. The Claimants did not obtain any of these.<sup>212</sup>

216. In the Respondent's view, the reliance of the Claimants on the LOIs is mistaken because LOIs do not constitute approvals of a project and explicitly identify the licenses and clearances required prior the issuance of an investment certificate. Furthermore, there is no evidence supporting the Claimants' assertions that senior Government officials approved the Le Morne Project.<sup>213</sup>
217. The Respondent explains that its interest in acquiring the land at Le Morne was not, as argued by the Claimants, an indication that the Government would be required to pay compensation for the prohibition of development at Le Morne. It was simply an offer to trade or swap one parcel of land for another to protect Le Morne from development that might be inconsistent with Le Morne's character as a UNESCO World Heritage site.<sup>214</sup>
218. The Respondent clarifies that the claim of expropriation is not about taking of land but rather about allegedly taken rights to develop the land, which, according to the Respondent, never existed and could not be expropriated. The Respondent observes that the Claimants themselves never recorded these supposed valuable rights as assets on their financial statements.<sup>215</sup>

***b. Pointe Jérôme***

219. The Respondent contests the factual propositions on which the Claimants base their BIT violation arguments. Contrary to the Claimants' arguments, the cancellation of the Lease was not a violation of the BIT because the Respondent had the right to cancel it, the Claimants had failed to meet other conditions in the Lease besides failing to start

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<sup>212</sup> Resp. Rej., paras. 224-228.

<sup>213</sup> Resp. Rej., paras. 229-253.

<sup>214</sup> Resp. Rej., paras. 254-267.

<sup>215</sup> Resp. Rej., paras. 268-274.

construction in time, and, despite its untimeliness, the second extension request was considered carefully and in good faith.<sup>216</sup>

220. The Respondent disputes that there was any basis for Mr. Gosling to believe that the construction period would naturally be extended as required. The Respondent insists that the Minister acted on the basis of a memorandum of Mr. Seebun, the Deputy Chief Surveyor at MHL, outlining the obligations that the Lessee had not fulfilled.<sup>217</sup>
221. According to the Respondent, the cancellation of the Lease was in consonance with prior practice, and the Respondent argues that “Mr. Gosling himself recognized that Mauritius’ decision to cancel the lease was consistent with its prior practice, when he requested in 2009 that Mauritius provide him with freehold land instead of leasehold land ‘in view of the large number of cases where Government has cancelled or attempted to cancel leases.’”<sup>218</sup> The Respondent emphasizes that, contrary to the Claimants’ understanding, Mr. Ujoodha’s evidence shows that MHL had exercised its power to cancel leases for failure to start construction after the lessee had requested an extension.<sup>219</sup>
222. The Respondent affirms that the claim of breach of the FET standard fails under any understanding of this standard. The Lease was cancelled lawfully. The Respondent disputes that the extension request was filed on time on January 23, 2006, before the Lease expired. The Respondent contests that the Claimants’ letter received at the time was a proper application.<sup>220</sup> The Respondent also contests that the actual application on August 1, 2006 provided “ample details;” in fact, it was only an “indicative project proposal.”<sup>221</sup>
223. The Respondent asserts that the Lease cancellation did not violate due process. In answer to the Claimants’ arguments, the Respondent refers to the process followed, and points out that the Claimants never paid rent; rather, the rent was paid by PJD. The Respondent finds

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<sup>216</sup> Resp. Rej., paras. 300-305.

<sup>217</sup> Resp. Rej., paras. 312, 325.

<sup>218</sup> Resp. Rej., para. 329. The reference to Mr. Gosling is taken from Resp. C-Mem., para. 192 (citing, in turn, Letter from B. Giraud and T. Gosling to MHL dated February 5, 2009 (**R-135**)).

<sup>219</sup> Resp. Rej., paras. 330-336.

<sup>220</sup> Resp. Rej., paras. 337-340.

<sup>221</sup> Resp. Rej., para. 341.

unpersuasive the Claimants’ argument that it was unfair to cancel the Lease because MHL was aware of the amount already spent on the Pointe Jérôme Project and the Project was progressing. The Respondent questions whether the alleged expenditure was made and whether the Project was progressing. The Respondent indicates that, at the time of the alleged expenditure, the Claimants were aware that the construction commencement deadline had expired, that the prior extension was final and, therefore, that the money was spent at their own risk.<sup>222</sup>

224. As regards expropriation, the Respondent re-affirms that cancellation by a State of “a contract on the basis of its rights under that contract does not constitute expropriation under international law.”<sup>223</sup> The Respondent disputes the Claimants’ argument that the Lease was not a private contract, adducing evidence of the Mauritius Supreme Court in support. The Respondent also contests the notion that, because the Lease was issued by a Government agency, it must have been for a public purpose. Similarly, the Respondent contests that public policy objectives convert the exercise of a contractual right to terminate a contract in an expropriation. The Respondent insists that it cancelled the Lease as a mere party to a contract.<sup>224</sup>
225. The arguments of the Respondent on the claim of discrimination overlap substantially with those advanced in relation to the alleged breach of the FET standard. The Tribunal considers that there is no need to summarize them here and, to the extent necessary, they will be specifically referred to in the Tribunal’s analysis.

## **B. ANALYSIS OF THE TRIBUNAL**

### **(1) Le Morne**

#### ***a. Indirect Expropriation***

226. The Claimants’ indirect expropriation claim is based on the effect that Revised PPG2 had on the contractual rights of the Claimants. According to the Claimants, Revised PPG2

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<sup>222</sup> Resp. Rej., paras. 342-344.

<sup>223</sup> Resp. Rej., para. 346.

<sup>224</sup> Resp. Rej., paras. 347-352.

substantially deprived the Claimants of the use and value of those rights and the Respondent has not paid compensation. The Respondent has questioned that the Claimants had any contractual development rights because: (i) the Respondent never authorized or approved the Le Morne Project, (ii) Revised PPG2 did not indirectly expropriate their contractual rights because it did not destroy the value of the Claimants' investment, (iii) the Claimants were aware of the overriding policy objective of Mauritius to inscribe Le Morne on UNESCO's World Heritage List, and (iv) the nature of the regulatory measure was a *bona fide* non-discriminatory measure. The Respondent recalls that the right to develop land is conveyed by a Building and Land Use Permit by the local district that, in the instant case, was the Black River District Council, which in turn requires other licenses and clearances, none of which the Claimants obtained.

227. The first questions for the Tribunal to determine are whether the Claimants had development rights in respect of the Le Morne Project and whether the alleged assurances of the Respondent created reasonable expectations for the Claimants to invest. The Claimants assert that they received assurances from the Government that the Le Morne Project would be compatible with the UNESCO inscription process, and that the Cabinet and BOI approved the Le Morne Project and encouraged the Claimants to proceed ahead with it. According to the Claimants, these assurances were later frustrated by the Respondent's issuance of Revised PPG2.
228. As regards assurances received from the Government that the proposed project would be compatible with the UNESCO inscription, the Claimants rely on the testimony of Mr. Gosling and on a sequence of meetings with senior members of the Government and their visits to the site. The only documentary evidence is an undated interview of the Prime Minister published in a local magazine where the Prime Minister is quoted as saying that the Le Morne Project is "extremely interesting."<sup>225</sup> The Minister did not mention UNESCO or give any assurances. In the same article, the reporter commented that he did not see what would stop the Project from taking off, but it would depend on the decision of the Le Morne

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<sup>225</sup> See Interview with Prime Minister Berenger (undated) (C-140).

Heritage Trust Fund. Then, the article quotes Mr. Bertrand Giraud who refers to UNESCO and affirms that he will do what UNESCO requires.

229. The meetings and visits referred to above were followed by a Fast Track Committee's<sup>226</sup> consideration of the Claimants' revised application for an IRS investment certificate lodged in June 2004, and the issuance of the 2005 LOI.<sup>227</sup> The application had been revised in line with Dr. Abungu's recommendations. The Claimants place great significance on the LOI. What does the LOI say? First, the LOI informs Mr. Giraud, as Managing Director of SMB, that BOI has favourably considered the application for an investment certificate and requests him to make arrangements for incorporation of a new company and to submit certain documents within six months. Second, the LOI confirms that the project should be in strict adherence to the recommendations of Dr. Abungu's Reports. Third, it stipulates that after the requested "documents are submitted, the issue of an Investment Certificate under the Integrated Resort Scheme will be considered."<sup>228</sup> Fourth, the LOI makes clear that the issuance of the Investment Certificate was subject to further submission of documentation, including a land conversion permit, an EIA license, development and building permits, etc. Fifth, the LOI ends with the following paragraph:

*It should be understood that this letter does not in any way whatsoever create any contractual relation between the Board of Investment and Le Morne Brabant IRS Co. Ltd and the Board of Investment will not be liable to any claim for compensation for any expenditure incurred by the company in the event that the project is not implemented as a consequence of the non-obtention of any permits and clearances required in furtherance of the realization of the project or for any other reason not within the control of the Board of Investment.*<sup>229</sup>

230. This paragraph alone should be sufficient to show that the LOI did not confer any development rights to the Claimants. It is consequent with the preceding paragraphs, which indicate no more than a favourable disposition to consider the request for an Investment

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<sup>226</sup> The Fast Track Committee was chaired by the Prime Minister.

<sup>227</sup> Unless otherwise indicated, references to the LOI mean the 2005 LOI.

<sup>228</sup> 2005 LOI (C-039), para. 4.

<sup>229</sup> 2005 LOI (C-039), p. 2.

Certificate after receipt of certain documents and then the Certificate itself would be subject to submission of further documentation. There is no indication that this first step would be followed by a favourable disposition to issuing the Investment Certificate. If there could be any doubt, the last paragraph dispels it.

231. The Claimants have argued that this last paragraph of the LOI is limited to proceedings in Mauritius, a matter disputed by the Respondent. There is no indication in the text of the LOI on which to ground such limitation and no other provision of a legal instrument has been adduced by the Claimants.
232. The next document relied on by the Claimants is the letter of BOI of June 2, 2006.<sup>230</sup> The Claimants view this letter as confirming the LOI by “inviting [the Claimants] to submit the plans, feasibility studies, and other documents set out in the Letter of Intent ‘to enable the BOI to process the Investment Certificate.’”<sup>231</sup> It should be recalled that LMB had six months to submit the first set of documents and the six-month period was expiring on June 30, 2006. The June 2, 2006 letter starts by saying that it will consider “the issue of an Investment Certificate to Le Morne Brabant IRS Co. Ltd once the following documents are submitted [...]”<sup>232</sup> The list of the first set of documents follows. Then, the letter invites LMB “to submit the requested documents as soon as possible so as to enable BOI to process the Investment Certificate.”<sup>233</sup> The letter also confirms that “the Investment Certificate, to be issued pending submission of the proper documents, will be subject to terms and conditions, among which [...]”<sup>234</sup> The list of the second set of permits, EIA license, etc., follows.
233. In the view of the Tribunal, the letter is not a letter providing assurances, but is nothing more than a reminder, a month before the time limit expired, to submit the first set of

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<sup>230</sup> Letter from R. Jaddoo of BOI to B. Giraud of SMB dated June 2, 2006 (C-047).

<sup>231</sup> Cl. Mem., para. 46 (emphasis in original).

<sup>232</sup> Letter from R. Jaddoo of BOI to B. Giraud of SMB dated June 2, 2006 (C-047), para. 2.

<sup>233</sup> Letter from R. Jaddoo of BOI to B. Giraud of SMB dated June 2, 2006 (C-047), para. 2.

<sup>234</sup> Letter from R. Jaddoo of BOI to B. Giraud of SMB dated June 2, 2006 (C-047), para. 3.

documents needed by the BOI for further processing of the Investment Certificate, and to remind LMB of the further conditions applicable to the Investment Certificate.

234. The Claimants conclude that “the decision of [the] Cabinet as confirmed by the BOI in its Letter of Intent and follow-up letter created reasonable and legitimate expectations for the Claimants that their project would proceed subject only to strict adherence with the three reports of Dr. Abungu and compliance with the routine further conditions set out in the Letter of Intent.”<sup>235</sup> According to the Claimants, on the basis of, and reliance on, the LOI, the Claimants through PPH concluded contractual agreements with the local owners of the Le Morne land on June 30, 2006.<sup>236</sup>
235. In between the issuance of the LOI on December 30, 2005, and June 30, 2006, UNESCO twice rejected the dossier prepared by Dr. Abungu.<sup>237</sup> The Respondent has argued that the Claimants received no assurance from the Respondent after March 1, 2006 that Dr. Abungu’s parameters would remain valid. While the Respondent highlights the lack of diligence of the Claimants and their ignoring the rejection of Dr. Abungu’s prepared dossier, the Tribunal fails to understand why the Respondent continued to request from the Claimants the same documentation to process the Investment Certificate as requested five months earlier notwithstanding the intervening UNESCO’s rejections. While the letter of June 2, 2006 by itself is nothing more than a reminder, the rejections by UNESCO of Dr. Abungu’s reports should have given the Claimants a hint that conditions may change. On the other hand, the Respondent missed the opportunity to advise SMB of any possible changes consequent with the decisions of UNESCO, if the Respondent envisaged any at the time. For instance, the Respondent contends that “under the legal framework in force at the time of their alleged investments, the issuance of development permits at Le Morne would have required MAC’s approval, which, especially after the rejection of the first nomination dossier in March 2006, would never have been forthcoming.”<sup>238</sup>

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<sup>235</sup> Cl. Mem., para. 47.

<sup>236</sup> Cl. Mem., para 48.

<sup>237</sup> Letter from UNESCO dated March 1, 2006 (**R-072**); Letter from UNESCO dated May 2, 2006 (**R-077**).

<sup>238</sup> Resp. C-Mem., para. 388.

236. The letter of June 2, 2006 may have given SMB the impression that there were no updates necessary notwithstanding the UNESCO rejections, particularly in respect of the condition that the investment should adhere strictly to the recommendations in the three reports of Dr. Abungu. On the other hand, it should have been of some concern to the Claimants that the recommendations to which they adjusted the Le Morne Project had not been approved given the overall objective of the Government to inscribe Le Morne in the World Heritage List. It is doubtful that the LOI and the letter of June 2, 2006 by themselves would have been sufficient to generate, in a prudent businessman, expectations to proceed with an investment such as the Claimants had planned to carry out. The reliance of the Claimants seems misplaced. In their Reply, the Claimants themselves explain that in the 2004 Co-operation Agreement<sup>239</sup> they “committed to no more than preparing plans for the development, and to incorporating a joint venture vehicle (the “IRS Co”, *i.e.*, LMB) with Mr. Giraud, which was only to proceed with the acquisition of the land ‘upon receipt of all Government permissions, consents and permits required for the implementation and development of an Integrated Resort Scheme on the Property.’ Had the Government not granted the LOI, the Claimants would have pulled out, as Mr. Giraud was well aware and confirmed to the BOI in no uncertain terms.”<sup>240</sup> To consider that the LOI stands as an equivalent to receiving all Government permissions, consent and permits is not supported by the record in this proceeding.
237. At this point, it would be useful to return to the question of the Le Morne Project in the context of UNESCO’s inscription process and the extent to which the Claimants were assured that their project could be prepared in parallel. As early as September 30, 2004, at a meeting chaired by the Prime Minister in which Mr. Giraud presented the Project, Mr. Siew, SMB’s architect, under the item “Request from promoters,” stated that two options could be considered:

*1. The decision of UNESCO regarding the inclusion of Le Morne in the list of World Heritage sites be awaited; or*

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<sup>239</sup> 2004 Co-operation Agreement, Clause 1.1(1) (C-012).

<sup>240</sup> Cl. Reply, para. 67(d).

*2. The proposed project be allowed to be implemented taking into account the guidelines and requirements of UNESCO. He added that the promoters are agreeable to amend the Master Plan of the project to be in line with the recommendations of UNESCO to promote Le Morne as a heritage site.*<sup>241</sup>

238. The Parties differ on whether a decision on this choice was requested from the Government, as the Claimants interpret the minutes from this meeting to demonstrate, or it was a choice for the Claimants' prerogative to make, as the Respondent has argued. These different understandings of the Minutes are relevant in the context of whether, at the request of the Claimants' architect, the Government considered that the Le Morne Project could progress in parallel to the Le Morne UNESCO inscription. As noted, the two alternatives are placed under the heading "Request from promoters." Hence, it would seem that the Claimants' interpretation is correct in terms of asking the Government for a choice, particularly when read with the preceding sentence of Mr. Siew's statement: "[T]he project proposal has reached an advanced stage and [...] the approval of the government is being awaited for the implementation of the project."<sup>242</sup> Evidently, the Prime Minister did not decide either way at that meeting but he did hint at the risk of going ahead. Thus, immediately after the Claimants' architect spoke, the Prime Minister, under the heading of "Nomination of Le Morne as World Heritage [S]ite," "informed members that, as per Government decision, the nomination of Le Morne as a World Heritage Site is being submitted to UNESCO. The proposed IRS project may not be compatible with this nomination and the recommendations of the UNESCO report."<sup>243</sup> The Prime Minister had earlier informed the Committee that "an IRS project was proposed by the Rogers Group on a different façade of Le Morne Mountain. However, following the recommendations of the UNESCO Consultant of not allowing any development on the higher slopes [of] Le Morne Mountain, the promoters had to drop the project, as it was no longer economically viable."<sup>244</sup> The

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<sup>241</sup> Minutes of the September 30, 2004 Meeting in the office of the Prime Minister (**R-052**), para. 4.1.

<sup>242</sup> Minutes of the September 30, 2004 Meeting in the office of the Prime Minister (**R-052**), para. 4.1.

<sup>243</sup> Minutes of the September 30, 2004 Meeting in the office of the Prime Minister (**R-052**), para. 5.

<sup>244</sup> Minutes of the September 30, 2004 Meeting in the office of the Prime Minister (**R-052**), para. 3.2.

Minutes of this meeting show the paramount interest of the Government in the inscription of the site in UNESCO's World Heritage List.

239. The Claimants have also placed particular significance on the exchanges of Mr. Giraud and the BOI in the months preceding the issuance of the 2005 LOI to show that the Claimants relied on the LOI in order to invest and the Respondent was aware of this. The Claimants refer as an example to Mr. Giraud's letter of August 26, 2005 in which Mr. Giraud advised BOI that the LOI was required because the Claimants "must give guarantees to their donors that this project has obtained approval from the Mauritian authorities and to date we have nothing!"<sup>245</sup> The purpose of this letter was, *inter alia*, to "request a board meeting with all concerned parties to explain the extreme urgency that must be brought to my application to obtain the 'Letter of Intent' from the B.O.I., a project that was submitted on 23 June 2004 and which to date has remained unanswered."<sup>246</sup>
240. A Fast Track Committee meeting was held on September 8, 2005 to discuss the Le Morne Project among others. The Minutes record that the final report of Dr. Abungu was not yet submitted, show that some members had expressed some doubt on the probability of listing Le Morne as a World Heritage Site, and also show that Mr. Giraud was in attendance and the Prime Minister informed him that "a decision would be taken on the project in the light of Dr. Abungu's final report."<sup>247</sup> A few days later, the Managing Director of BOI wrote to Mr. Giraud to thank him for his presentation to the Fast Track Committee and inform him that a meeting will be arranged "to discuss the implications of the recommendations of the UNESCO report regarding your project."<sup>248</sup> After Dr. Abungu's Second Report, Mr. Giraud had a number of comments on and criticisms to the recommendations.<sup>249</sup> Dr. Abungu discussed those with the Minister of Arts and Culture "with a view to reaching a solution that is appropriate for the site as well as leaving room for development."<sup>250</sup> A

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<sup>245</sup> Letter from B. Giraud of SMB to BOI dated August 26, 2005 (**R-062**), p. 3. Translation from the French original provided by the Respondent.

<sup>246</sup> Letter from B. Giraud of SMB to BOI dated August 26, 2005 (**R-062**), p. 1.

<sup>247</sup> Extract of Minutes of Fast Track Committee Meeting No. 1 dated September 8, 2005 (**C-159**), p. 8.

<sup>248</sup> Letter from BOI to B. Giraud of SMB dated September 15, 2005 (**C-028**).

<sup>249</sup> *See* Letter from B. Giraud of SMB to M. Gowressoo of MAC dated September 23, 2005 (**R-064**).

<sup>250</sup> Letter from G. Abungu regarding Le Morne dated October 12, 2005 (**C-029**).

second Fast Track Committee meeting was held on November 16, 2005. Dr. Abungu's counter-proposal was discussed with Mr. Giraud at a BOI meeting the day before and Mr. Giraud opposed it. However, on December 18, 2005, Mr. Giraud changed his mind and informed Mr. Jadoo of BOI that:

*I think that I am now willing to accept this proposal because my entire project is now in danger; MY ENGLISH PARTNERS HAVE CLEARLY LET ME KNOW THAT IF BOI DOES NOT DELIVER THE L.O.I BEFORE THE END OF THIS YEAR, THEY WILL DROP OUT OF MY PROJECT!!!!!!*

*Once the LOI is obtained, we will have more time to explain to various parties the validity of our arguments and make necessary changes to our project!*<sup>251</sup>

241. This communication ends with a plea for the issuance of the LOI shortly: “[I]f I don’t receive the letter of intent in the coming days, my partners will drop everything, I’ll end up bankrupt and I’ll [be] forced to safeguard my rights in court. No one wants such an outcome.”<sup>252</sup> This email was followed up by a formal letter next day.<sup>253</sup> In view of the acceptance of the proposal by SMB, BOI requested, on December 20, 2005, the greenlight from MAC to issue the LOI.<sup>254</sup> On December 30, 2005, MAC replied to the letter of December 20, 2005, by informing BOI that the Government has on that day “approved the recommendations of Dr. Abungu, UNESCO Expert, in respect of the above project [the SMB IRS Project at Le Morne], which will comprise the construction of 65 villas, a hotel of 35 rooms, a small restaurant and a golf course of 18 holes with a small club house.”<sup>255</sup> The letter advises that the recommendations of the three Abungu reports need to be strictly adhered to and adds that “[t]he core and buffer zones of Le Morne, as delimited by

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<sup>251</sup> Email from B. Giraud of SMB to R. Jadoo of BOI dated December 18, 2005 (**R-065**) (emphasis in original). Translation from the French original provided by the Respondent.

<sup>252</sup> Email from B. Giraud of SMB to R. Jadoo of BOI dated December 18, 2005 (**R-065**).

<sup>253</sup> Letter from B. Giraud of SMB to R. Jadoo BOI dated December 19, 2005 (**R-066**).

<sup>254</sup> Letter from R. Jadoo of BOI to MAC dated December 20, 2005 (**R-067**).

<sup>255</sup> Letter from MAC to BOI dated December 30, 2005 (**C-161**).

Dr. Abungu in plan at Annex IV, have been approved for the Nomination Dossier for the inscription of Le Morne on the World Heritage List.”<sup>256</sup>

242. The interactions of SMB prior to December 30, 2005 and the intra-Government communications show that pertinent Government parties had been involved in the proceedings leading up to the LOI. While these interactions do not mean that BOI approved more than what the text of the LOI says, they indicate that the Government was fully aware of the predicament of Mr. Giraud in relation to his partners, that the Le Morne Project could continue to proceed subject to certain conditions and safeguards, and that the Government was ready at least to permit some development in the buffer zone as delimited by Dr. Abungu. But the fact remains that the LOI expired six months later without being extended and without the Claimants having fulfilled the conditions for issuance of an Investment Certificate. In fact, no Investment Certificate was ever issued nor did the BOI ever consider it after June 30, 2006. Furthermore, the Claimants did not acquire development rights, interference with which may have given rise to a justifiable claim for compensation. In view of this conclusion, the Tribunal does not need to consider the remainder of the Claimants’ arguments in respect of their claim of indirect expropriation.

***b. Breach of Fair and Equitable Treatment***

(i) Scope

243. The Parties differ on whether the FET is an autonomous standard or it requires merely the minimum standard of treatment under international law. The Tribunal questions the relevance of the differentiation. Whether it is considered equivalent to the minimum standard of treatment or an autonomous standard, the level of the treatment required to breach the standard has evolved. What was considered minimum treatment in the nineteenth century is not the minimum required in the twenty-first, particularly in the context of a treaty specifically providing for fair and equitable treatment.

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<sup>256</sup> Letter from MAC to BOI dated December 30, 2005 (C-161).

244. Given the wide variety of situations to which fair and equitable treatment may be applicable, there is no comprehensive definition of the FET standard. The standard is “a flexible one which must be adapted to the circumstances of each case.”<sup>257</sup> However, flexibility does not mean that treatment will be determined by the subjective expectations of the investors. Their expectations “to be protected, must rise to the level of legitimacy and reasonableness *in light of the circumstances*.”<sup>258</sup>

245. As pointed out by other tribunals, the fair and equitable treatment obligation needs to be interpreted in a balanced manner. As stated by the *El Paso* tribunal:

*This Tribunal considers that a balanced interpretation is needed, taking into account both State sovereignty and the State’s responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow.*<sup>259</sup>

246. To sum up, the Tribunal understands fair and equitable treatment to mean treatment that objectively will be considered just by an impartial observer bearing in mind the circumstances.

(ii) Application of the FET standard to the facts

247. The Claimants rely here on the same facts to claim breach of the FET standard as they did in their claim for indirect expropriation. On these facts, the Claimants contend that the Respondent frustrated their treaty-protected legitimate expectations, treated the Claimants’ investment inconsistently and unpredictably, and failed to act in good faith.

248. The Tribunal has just reviewed and rejected the claim of indirect expropriation. The considerations that led the Tribunal to this conclusion are equally valid here and there is no need to repeat them. The Claimants have based their contention of inconsistent and

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<sup>257</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004 (RL-073), para. 99.

<sup>258</sup> *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, March 17, 2006 (CL-036), para. 304 (emphasis in original).

<sup>259</sup> *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, April 27, 2006 (RL-150), para. 70.

unpredictable treatment on the change in policy of the Respondent in respect of development in the buffer zone and associated with this contention is the argument that the Respondent failed to act in good faith.

249. The Respondent's objective had always been to inscribe Le Morne as a heritage site. The Claimants were aware of this objective. The Claimants pressed BOI to issue the LOI for their own internal arrangements and those of Mr. Giraud with his family. The Respondent was entitled to change its policy in respect of development in Le Morne and had never given any assurance that it would not change it. The change in policy as regards the buffer sub-zones needs to be assessed in the context of the progress made by the Claimants in obtaining all the permits required for the Le Morne Project. By the time Revised PPG2 was issued, the Claimants had not obtained the permits necessary for BOI to consider the issuance of an Investment Certificate. In fact, the LOI had expired more than a year earlier, and the Claimants had not obtained the permits from the local authorities in charge of issuing development rights.

250. The claim of failure to act in good faith is based on the alleged secrecy and lack of consultation before Revised PPG2 was issued. The lack of consultation is disputed by the Respondent. Mr. Odendaal describes the consultations with developers in his witness statement: "Although the various developers and landowners seldom attended the public meetings organized by the Government, the Government specifically arranged so that I could meet with them and learn about their projects. Indeed, the Government was very proactive in setting up meetings with developers, even though it was not necessary for them to express their views directly to me (they could interact with the Government instead)."<sup>260</sup> The Claimants did interact with the Government.<sup>261</sup> It seems from the record that the issue was not one of lack of consultation but that the Claimants confused "non-consultative" with "not agreeing to our project or aspects of it."<sup>262</sup> In view of these considerations, the

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<sup>260</sup> Odendaal Witness Statement, para. 63.

<sup>261</sup> See Letter from C. Wilkins of LMB to A. Dulull of MHL dated October 5, 2006 (**R-086**); Letter from C. Wilkins and T. Gosling of LMB to Prime Minister and others dated January 22, 2007 (**R-094**); SMB Comments on the Draft Management Plan dated April 30, 2007 (**R-102**).

<sup>262</sup> Odendaal Witness Statement, para. 73.

Tribunal finds that the lack of good faith claim is not sustained by the evidence, and there is no merit in the claim that the Respondent breached the FET standard.

*c. Discrimination*

251. The Claimants in their Reply on the Merits state that, “[i]n light of, *inter alia*, the fact that the Claimants have a clear claim for expropriation of their Le Morne investments, as well as for breach of the FET standard and non-discrimination standard [...] in the interest of narrowing the issues in dispute, the Claimants no longer pursue a claim for discrimination on the basis that Mauritius permitted other developments at Le Morne while prohibiting the Claimants.”<sup>263</sup>
252. Before the Claimants amended their discrimination claim, they had advanced discrimination on two grounds: (i) development was permitted by the Government in other owners’ land within the buffer zone (Tatorio Holdings and LMDC/Rogers Group), and (ii) a local developer (LMDC/Rogers Group) was offered fair compensation and no such offer was made to the Claimants. Thus, after the amendment, the discrimination claim has been reduced to discrimination in the compensation offered. Nonetheless, considerations on whether the other investor was in like circumstances still apply because differences in compensation were related to whether, under Revised PPG2, development was allowed in a particular sub-zone.
253. The Parties first disagree on the interpretation of “like circumstances,” whether it means “the same sector” or “a broad coincidence of similarities covering a range of factors.” The Respondent has taken exception to the use by the Claimants of the case law of NAFTA, because NAFTA jurisprudence is based on a context of trade law, and the fact that the project and business sectors may be relevant in the trade law context, but, as held in *Bayindir*, “[u]nder a free-standing test, however, such as the one applied here, that degree of identity does not suffice to displace the differences between the two contractual relationships.”<sup>264</sup> The Respondent also takes exception to the Claimants’ argument that

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<sup>263</sup> Cl. Reply, para. 141.

<sup>264</sup> Resp. C-Mem., para. 398, quoting *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009 (“*Bayindir*”) (RL-094), para. 402.

once the difference in treatment is established, then it is for the Respondent to provide a rational justification for the difference in treatment. The Respondent insists that it offered compensation to LMB, but this did not lead to an agreement because LMB repeatedly changed its position and insisted on the land at Le Morne to be valued for exchange purposes as if LMB had development rights.

254. The Tribunal points out that NAFTA jurisprudence may be persuasive in a wider context than NAFTA cases and is not limited to the identity of economic or business sectors. The Tribunal considers that, in the instant case, the circumstances adduced by the Claimants to establish that other developments were in similar situation are valid comparators: sector identity, IRS projects and location in the buffer zone. The analysis of the Claimants stops here, but the Respondent goes deeper to identify particularities that allegedly justify different treatment. The division of the buffer zone in sub-zones by Revised PPG2 was justified by objective criteria of fauna, flora, and visual integrity on the basis of the recommendations of the UNESCO's experts. The location of other developers' land was in different sub-zones from LMB's land. In this respect, LMB's land was not in like circumstances.
255. The Tribunal has already determined that the 2005 LOI did not confer to SMB development rights. Therefore, it would not be congruent with this determination to consider that development rights should be part of the valuation for a land exchange. This notwithstanding, the Tribunal notes that the Respondent offered compensation not on the basis of opportunities lost but based on what were the rights that owners may have had under PPG2. Thus, the Respondent has argued that "development, albeit limited, on LMDC/Rogers's land was permissible under PPG2. In contrast, development was not permissible on LMB's land. What is 'fair' compensation for LMDC/Rogers's land, accordingly, would not necessarily be fair for LMB's land."<sup>265</sup>
256. The alleged discrimination argument fails because the Respondent applied the same gage to measure compensation for land in the buffer zone. Compensation depended on the

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<sup>265</sup> Resp. C-Mem., para. 408.

opportunities for development in the different buffer sub-zones under Revised PPG2. This is consequent with the purpose of the land exchanges pursued by the Respondent in which the valuation proposals were discussed. Land was valued not to assess the impact of Revised PPG2 but to value the land as it was at the time of the exchange after adoption of PPG2.

**(2) Pointe Jérôme**

257. The Claimants assert that the Respondent has breached its obligations under the BIT in respect of the Claimants' investment at Pointe Jérôme on account of unfair, inequitable, and discriminatory treatment and by expropriating it indirectly. The Tribunal will consider first the discrimination claim.

*a. Discrimination*

258. It has been a matter of dispute between the Parties whether the cancellation of the Lease was conforming to past practice. The Claimants rely on the testimony of Mr. Chan Wan, ex-Permanent Secretary of MHL, in the *South Seas Development* case. Mr. Chan Wan testified that the start of the construction deadline in the instance of a six-month commencement period would not normally be insisted on because each case would be taken on its own merits.<sup>266</sup> On the other hand, the Respondent stresses that it had the right to cancel the Lease and there is no support for the argument that this right could only be exercised in exceptional circumstances.

259. The cases discussed by the Parties show that each case was taken on its own merits, but do not support the conclusion that the deadline to start construction was not normally insisted on. Differences between the instant case and the cases adduced by the Claimants in support of their claim of discrimination have been explained by the Respondent. With regards to Subco, the developer commenced construction in time but construction was delayed by a

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<sup>266</sup> *South Seas Development (CL-037)*, p. 23.

court case.<sup>267</sup> For Osprey, by the time Osprey requested an extension, it had applied for the necessary permits and all other clearances had been obtained.<sup>268</sup> In contrast, the Claimants had not applied for a single permit by the time they requested the extension. Concerning Hassamal, the lessee faced circumstances beyond its control.<sup>269</sup> For New Mauritius Hotel, the extension of the deadline to start construction was final and was not extended; the extension granted referred to the deadline for completion of the construction.<sup>270</sup>

260. The Claimants had questioned whether the lessees in the cases relied on by the Respondent had requested an extension when their leases were cancelled. In its Rejoinder on the Merits, the Respondent explains that, in the case of Aquarius Village, the lease was cancelled and the lessee requested MHL to reconsider the cancellation but MHL decided to maintain the decision.<sup>271</sup> Regarding Ra & Si, the Government cancelled the lease with the extension request pending.<sup>272</sup> The industrial lease held by Mr. Seeruthum was cancelled while there was a pending extension request.<sup>273</sup>
261. The Tribunal concludes that there is no basis for the discrimination claim. The review of the instances on which the Claimants have based their claim of discrimination shows that each of the cases can be distinguished from the case before the Tribunal and also shows that there was no practice of extending routinely the period to start construction. The Claimants were aware of the risk that they ran. BOI's letter of February 16, 2006 (nine days after the deadline had expired) drew the attention of the Claimants to "the fact that amendment of the Pointe Jérôme Project at this stage may question the validity of the Letter of Intent issued by BOI and the various permits and clearances granted by different

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<sup>267</sup> Resp. C-Mem., para. 461(2), referring to Industrial Site Lease Agreement between the State of Mauritius and Subco Ltd dated October 10, 2007 (C-092).

<sup>268</sup> Resp. C-Mem., para. 461(3), referring to Industrial site lease agreement between the State of Mauritius and Osprey Co Ltd dated June 13, 2002 (C-004).

<sup>269</sup> Resp. Rej., para. 359, referring to Ledger Summarizing Extension Requests Granted by MHL dated December 31, 2018, line 3 (C-175).

<sup>270</sup> Resp. Rej., para. 359, citing Naidoo Witness Statement, para. 10.

<sup>271</sup> Resp. Rej., para. 362(a).

<sup>272</sup> Resp. Rej., para. 362(b).

<sup>273</sup> Resp. Rej., para. 362(c).

Government bodies.”<sup>274</sup> Mr. Gosling himself was aware that the Government had cancelled or attempted to cancel leases in “a large number of cases.” For this reason, he requested that the LMB property be exchanged against freehold State land.<sup>275</sup>

*b. Fair and Equitable Treatment*

262. The Tribunal has set out its understanding of this BIT obligation in considering the claims related to Le Morne and will not repeat it here. The Claimants based their arguments of breach of the FET standard on difference of treatment, unlawful cancellation and lack of due process. The Tribunal has already considered and rejected whether the Respondent subjected the Claimants to discriminatory treatment and will consider the other two grounds next.
263. The Lease was cancelled on the basis of Article 14. The Respondent had the right to cancel it, if certain conditions had not been met. The Respondent relied on the undisputed fact that construction had not started. Mr. Gosling, in the negotiations with Respondent after the Lease cancellation, accepted that “we were technically in breach of the lease by not commencing construction on site.”<sup>276</sup> Mr. Gosling attributed it to the fact that, “in the period leading up to the [L]ease being rescinded, all of our efforts were being diverted into trying to reach accommodation with [the] Government on reconciling our proposed development at Le Morne with the UNESCO application [...]”<sup>277</sup> In an email from MPP to Mr. Ghurburrun, Mr. Wilkins says that “at present the start date in the lease is mid-February 2006.”<sup>278</sup> In order to achieve an appropriate and sensitive design for this site we are requesting an extension of 1 year which will give adequate time if the present programme is achieved and allow for delays in the event of environmental issues.”<sup>279</sup> The

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<sup>274</sup> Letter from H. Ghurburrun of BOI to C. Wilkins of Les Salines IRS Co. Ltd dated February 16, 2006 (**R-071**), p. 3.

<sup>275</sup> See Letter from B. Giraud and T. Gosling of LMB and MPP to A. Burrenchobay of MHL dated February 5, 2009 (**R-135**).

<sup>276</sup> Letter from T. Gosling of LMB to MHL dated June 20, 2006 (**R-124**).

<sup>277</sup> Letter from T. Gosling of LMB to MHL dated June 20, 2006 (**R-124**).

<sup>278</sup> The Claimants contend that the actual date was February 7, 2006: Cl. Mem., fn. 116.

<sup>279</sup> Email from MPP to H. Ghurburrun and A. Cyparsade dated January 23, 2006 (**C-042**).

Respondent understands that it expressed only an intention.<sup>280</sup> The Claimants themselves describe it as a notification of their need for an extension.<sup>281</sup> BOI replied and warned that changes in the Project at this stage may require permits and clearances.<sup>282</sup> The Claimants actually requested an extension seven months later on August 1, 2006,<sup>283</sup> which confirms that they themselves saw the need to submit a request beyond the communication of January 23, 2006. When they finally did so, the Claimants presented an indicative project proposal but had not yet applied for any of the required permits, including the planning permission and the EIA license.

264. The Claimants have also argued as part of the breach of Article 2(2) of the BIT that the cancellation violated due process by summarily dismissing the request, accepting rent from the Claimants and cancelling the Lease notwithstanding MHL being on notice about the amount already spent by the Claimants in the Pointe Jérôme Project. The Respondent rebuts these arguments by pointing out the careful attention that the request merited from the authorities and that it never accepted rent from the Claimants but only from the leaseholder. Furthermore, the Respondent questions whether the alleged expenditure was actually made.
265. The documentation for the period between January 2006 and September 2007 is scarce. The Tribunal will refer to each of the documents available. On March 8, 2007, the Permanent Secretary of MHL chaired a meeting with representatives of, among others, BOI to consider projects submitted by BOI. The minutes of the meeting consist of a table of the pending projects showing the status of each project followed by remarks. The status of the Pointe Jérôme Project is described in these terms: “[c]onsideration is being given for

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<sup>280</sup> Resp. Rej., para. 340.

<sup>281</sup> Cl. Reply, para. 144.

<sup>282</sup> Letter from H. Ghurburrun of BOI to C. Wilkins of Les Salines IRS Co. Ltd dated February 16, 2006 (C-162), p. 3: “Furthermore, we wish to draw your attention on the fact that amendment of the Pointe Jérôme project at this stage may question the validity of the Letter of Intent issued by BOI and the various permits and clearances granted by different Government bodies. You are requested to submit new proposals for the amended project which will [be] considered under its specific merit and criteria.”

<sup>283</sup> Letter from C. Wilkins to MHL dated August 1, 2006 (C-052).

the extension of the period of reservation.” Under “remarks”, the minutes record that “[t]he chairperson pointed out that normally when land is allocated, the Promoter is granted a delay to start construction. So far nothing has been done on site for that particular project. He equally added that when the promoter sells their project, there is a change in the ownership which automatically results in the cancellation of the lease as per Government decision. The implications will also have to be looked into.”<sup>284</sup> There is no record whether this matter was considered further. At the time of this meeting, the Government had been aware of the development agreement for the purchase of the PJD shares since it was noted in the letter of Mr. Ghurburrun to Mr. Wilkins of February 16, 2007.<sup>285</sup>

266. The next document, titled on its face “minutes” but reading as an internal memorandum, is addressed from Mr. Seebun to Mr. Conhye and is dated March 19, 2007.<sup>286</sup> This document gives the background to PJD’s request, the relevant terms of the Lease and three “observations” related to pending matters: the relocation of two persons, agreement with lessees of the land needed to widen the road and failure to commence construction. It concludes by pointing out that a decision is required as to whether to grant a last and final extension up to August 6, 2007, whilst taking into consideration the issues raised above. There is an additional handwritten paragraph, dated March 27, 2007, saying the memorandum was being “submitted for approval, please.” This memo was submitted by Mr. Conhye to the Permanent Secretary and the Minister with a further handwritten note expressing support for granting a final extension to the company to deal with the issues set forth by Mr. Seebun. It seems that the fact that the previous extension had been “final” was

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<sup>284</sup> Notes of Meeting between MHL, Ministry of Agro Industry & Fisheries, and BOI dated March 8, 2007 (**R-098**), Annex, item 3.

<sup>285</sup> Letter from H. Ghurburrun of BOI to C. Wilkins of Les Salines IRS Co. Ltd dated February 16, 2008 (**C-162**), para. 8: “Pointe Jérôme Development Ltd has informed BOI, in its letter dated 14<sup>th</sup> February 2006, of its development agreement made with Property Partnerships (Mauritius) Development Ltd (MPP) on 08<sup>th</sup> December 2005 for the acquisition of 90% of the shares of the company. However, as indicated in the paragraph above, MPP will have to get the official approval of the Prime Minister’s Office before the transfer of shares can be officially realised.”

<sup>286</sup> Letter from V. Seebun to Mr. Conhye dated March 19, 2007 (**R-099**). The description of this exhibit set forth in this footnote is the description agreed to by the Parties in their combined index of factual exhibits.

no obstacle to staff of MHL to support a further extension.<sup>287</sup> Next in the record is a handwritten note of the Permanent Secretary to the Minister of Housing and Lands dated April 4, 2007, transmitting Mr. Seebun's memo. This note says, "[y]ou may wish to discuss. Please."<sup>288</sup> On May 12, 2007, the Minister wrote: "Please cancel lease as lessee has not fulfilled the conditions as agreed. Please consider to reallocate the land to a bona-fide developer."<sup>289</sup>

267. While the record shows that the request of the Claimants had been considered by the various ministries and BOI, the Minister did not pay any heed to the recommendation of the staff. There is no record of any discussion of the recommendation with the Permanent Secretary or anyone else. Nonetheless, the Minister of Housing and Lands decided on the basis of the minutes of Mr. Conhye, which listed the conditions of the Lease that had not yet been fulfilled by the Lessee. In its laconic order, the Minister precisely referred to those conditions.
268. The Claimants have relied on the fact that the rent for the Lease was paid and accepted by the Respondent until the Lease was cancelled. The Respondent has explained that the rent was paid by PJD and not the Claimants, and the Respondent was entitled by the terms of the Lease to accept the rent of PJD pending consideration of the extension. Further, the rent was paid annually in advance and cancellation under Article 14(a) of the Lease did not entitle the lessee to a refund of any portion of rent paid in advance.
269. The third ground for lack of due process argued by the Claimants is the fact that they had expended in excess of GBP 1 million on the Pointe Jérôme Project. The Respondent questions whether the expenditure was made as well as the progress in preparing the Project. Furthermore, funds were expended without any assurance from the Respondent

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<sup>287</sup> Mr. Naidoo in his Witness Statement manifests that, during his tenure as Permanent Secretary, he "came across a number of industrial leases where an extension to the commencement period has been described as a 'final' extension, but this did not prevent the granting of further extensions where doing so served with the Ministry's objective of ensuring that the site be developed": Naidoo Witness Statement, para. 10.

<sup>288</sup> Note from Permanent Secretary to MHL dated April 4, 2007 (**R-103**).

<sup>289</sup> Note from Permanent Secretary to MHL dated April 4, 2007 (**R-103**) (emphasis in original).

that the extension would be granted and the Claimants were on notice that the current extension was “final.”

270. In the view of the Tribunal, the Claimants invested in a potential project knowing that it depended on a lease in which the construction commencement deadline was expiring within two months, the current extension had been labelled “final,” and, under the terms of the Lease, this could be cause for cancellation. Notwithstanding the Claimants’ assertions of continuing progress in the preparation of the Pointe Jérôme Project, none of the additional permits had even been requested by the time the Lease was cancelled.<sup>290</sup>
271. It is surprising that the Government would take thirteen months to make a decision on the request for an extension and then that the decision would not be communicated to the requester for four months, even if legal advice was sought. During this time, there were no interactions with the investors, no further information was requested, no meetings with the authorities were convened, no indication on the administrative progress of the request was given. There is no record either that the Claimants bothered to inquire.
272. While the process could be improved, the Respondent was within its contractual rights to cancel the Lease and the Claimants had not been given any indication that it would be extended. In fact, they had been warned as early as February 2006 that a new set of permits would be required if they revised the Project. This notwithstanding, the Claimants revised the project and only submitted an “indicative project.” It is a risk the Claimants took, for which the Respondent is not liable. The Tribunal concludes that the Respondent did not breach Article 2(2) of the BIT.

*c. Indirect Expropriation*

273. Claimants base their claim for indirect expropriation on the unlawful cancellation of the Lease and on Mauritius acting in its sovereign capacity. The Tribunal has already rejected the allegation that the cancellation was unlawful and will consider here only whether the

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<sup>290</sup> See Resp. Rej., para.124: The “Claimants never applied for an EIA Licence or any of the statutory permits required to allow development at the site. Without even applying for, let alone obtaining, such permits, they had no legal basis for carrying out any development at the site. The luxury hotel complex, and their proposed investment in it, remained nothing but pie in the sky.”

Respondent acted as a sovereign. In this respect, the Claimants argue that the Lease was not a private contract and the decision to cancel it was an exercise of the Respondent's sovereign policy-based rights. Indeed, the Lease concerned State land and it was granted pursuant to the Government's policy of encouraging development in the tourism sector. The Claimants rely also on the fact that an industrial lease sets commencement periods for construction and that Mauritius cancelled the Lease for reasons connected to its policy against land speculation. The Respondent explains that under Mauritian law an industrial lease is a private contract and the private nature of such contract has been confirmed by the Mauritian Supreme Court. The Respondent adds that the Supreme Court reached the same conclusion precisely in a case concerning a Government's decision to cancel a lease for failure to start construction. Furthermore, the contract was not offered in a public auction.<sup>291</sup>

274. The Tribunal agrees with the Claimants that whether or not a private party is selected by the Government through a public auction is not a defining feature of a public contract. On the other hand, the State may administer its real estate as any private entity and not necessarily invoke its public authority, as it has been recognized by the Supreme Court. The development of land and avoidance of speculation may explain the objectives that inform the policy of the Government without turning legitimate contractual considerations into an exercise of its prerogative as a sovereign.
275. The Parties have discussed arbitral case law in which contracts have been cancelled by the Government. In their Reply, the Claimants questioned the reliance of Mauritius on *Siemens*, *Suez*, *Malicorp* or *RFCC* because these cases concern “concession contracts or similar arrangements intended to allow a foreign investor to extract natural resources or provide a public service in exchange, not leases to state land granted for the purposes of

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<sup>291</sup> Resp. Rej., para. 347, fn. 610.

fostering development. In any event, each of these decisions confirms that the tribunal must consider each case on its own facts.”<sup>292</sup>

276. The Tribunal agrees that each case should be considered on its own facts, but the cases discussed by the Parties are relevant because they show the circumstances in which tribunals have determined that a State had exercised its public authority. In addition to the cases mentioned above, the Respondent has also referred to the *Almås* case which concerned State-owned real estate. The tribunal held: “[t]he management of real property, including the exercise of the contractual right to terminate the lease, derives from the general law; it is *a capacity of any entity that holds and rents out land*.”<sup>293</sup> Tribunals in a long string of cases have held similarly.<sup>294</sup>
277. The Claimants have also argued that the Respondent abused its rights by cancelling the Lease in order to leverage its position in the negotiation of the land exchange for the Le Morne land. The Respondent has indicated that Revised PPG2 had not yet been adopted when it took the decision to cancel the Lease in May 2007. The Tribunal observes that the decision had been made but the Claimants had not been informed by the time Revised PPG2 was published in July 2007. Irrespective of that, the record shows that there were lengthy negotiations on a possible land exchange and Mr. Gosling himself had expressed willingness to receive rights to land as part of such exchange.<sup>295</sup> To conclude, the lessee, PJD, had breached the Lease and the Government had the right to cancel the Lease *de plein*

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<sup>292</sup> Cl. Reply, para. 172, citing Resp. C-Mem., para. 436-441 (referring to, in turn, *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, February 6, 2007 (“*Siemens*”) (**RL-077**); *Suez, Sociedad General de Aguas de Barcelona, InterAgua Servicios Integrales del Agua v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, July 30, 2010 (“*Suez*”) (**RL-103**); *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, February 7, 2011 (“*Malicorp*”) (**CL-060**); *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, December 22, 2003 (“*RFCC*”) (**RL-148**)).

<sup>293</sup> Resp. Rej., para. 348, quoting *Kristian Almås and Geir Almås v. Republic of Poland*, UNCITRAL, Award, June 27, 2016 (“*Almås*”) (**RL-176**), para. 219 (emphasis added by the Respondent).

<sup>294</sup> See cases listed in Resp. Rej., para. 348 and fn. 615.

<sup>295</sup> Letter from T. Gosling of LMB to MHL dated June 20, 2008 (**R-124**); Letter from T. Gosling of LMB to MHL dated September 4, 2008 (**R-126**).

*droit* as permitted by the terms of the Lease and, therefore, without exercising any other rights than its contractual rights.

***d. Jurisdictional Objections Joined to the Merits***

278. The Tribunal has joined to the merits the objection to its jurisdiction related to the lack of substance of the alleged right to develop the leasehold. As framed above by the Tribunal, the issue is whether, “if it had not been for the measures allegedly taken by the Respondent in breach of the BIT, the returns would have been materialized. The answer to this question depends on a finding by the Tribunal that the Respondent breached the BIT [...]”<sup>296</sup> The Tribunal has found that the Respondent did not breach the BIT and, therefore, does not need to consider this objection further.
279. Similarly, the Tribunal has joined to the merits consideration of the objection that the contractual rights of the Claimants were not opposable to the Respondent. As stated earlier,<sup>297</sup> this objection is only relevant if the Tribunal finds that the Lease was unlawfully cancelled by the Respondent. The Tribunal has found that the cancellation of the Lease was not unlawful and, therefore, there is no need for the Tribunal to consider this matter further.
280. The Tribunal has rejected as a jurisdictional objection the objection based on the Claimants’ failure to show that their direct or indirect shareholding in PPH had diminished in value. The Tribunal has determined that this was a matter to be dealt with as part of the quantum, if the Tribunal reached that stage.<sup>298</sup> The Tribunal has not reached that stage.
281. The Tribunal also joined to the merits the objection based on lack of a protected investment. According to the Tribunal, the issue was whether the expenses incurred in Pointe Jérôme were part of a bigger whole that may have been realized were it not for actions of the Respondent that, according to the Claimants, constituted a breach of the BIT.<sup>299</sup> No such actions have been found by the Tribunal.

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<sup>296</sup> See above paragraph 156.

<sup>297</sup> See above paragraph 158.

<sup>298</sup> See above paragraph 160.

<sup>299</sup> See above paragraph 161.

## VIII. COSTS

### A. THE CLAIMANTS' COSTS

282. The Claimants have submitted the following claims for legal and other costs (excluding advances made to ICSID, detailed below):

- a. Counsel Fees and Expenses – EUR 3,643,821.74;
- b. Expert Fees and Expenses – EUR 214,434.47;
- c. ICSID Filing Fee – EUR 21,110.16; and
- d. Third Party Funding-Related Costs – EUR 43,385.60.

These items amount to a total of EUR 3,922,751.97.<sup>300</sup>

### B. THE RESPONDENT'S COSTS

283. The Respondent has submitted the following claims for legal and other costs (excluding advances made to ICSID, detailed below):

- a. Legal Fees – USD 4,576,334.12;
- b. Costs for Expert Services – USD 286,954.00;
- c. Witnesses' Travel Costs – USD 53,958.43; and
- d. Administrative Costs – USD 359,562.62.

These items amount to a total of USD 5,276,809.17.<sup>301</sup>

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<sup>300</sup> Cl. SoC, p. 2.

<sup>301</sup> Resp. SoC, p. 3.

**C. THE PARTIES' SUBMISSIONS ON COSTS**

284. Each Party has pleaded that the Tribunal order the other to pay all the costs of the arbitration and its legal costs.

**D. THE TRIBUNAL'S DECISION ON COSTS**

285. Article 61(2) of the ICSID Convention provides:

*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

286. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties, as it deems appropriate. The Tribunal has rejected the majority of the objections advanced by the Respondent as regards its jurisdiction as well as the Respondent's claims of inadmissibility, finding that it has jurisdiction vis-à-vis all of the Claimants except TGI. On the other hand, the Tribunal has rejected the Claimants' claims on the merits. In these circumstances the Tribunal considers it appropriate that each Party pay for its own costs related to the arbitration and for 50% of the fees and expenses of the Tribunal and of ICSID's administrative fees and direct expenses.

287. The fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Dr. Rigo Sureda	\$116,706.30
Prof. Alexandrov	\$101,589.50
Prof. Stern	\$124,973.26
ICSID's administrative fees	\$158,000.00
Direct expenses (estimated)	\$76,342.72
<b>Total</b>	<b><u>\$577,611.78</u></b>

288. The above costs have been paid out of the advances made by the Parties in equal parts.<sup>302</sup> As a result, each Party's share of the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses amounts to USD 288,805.89.

## **IX. AWARD**

289. For the reasons set forth above, the Tribunal decides as follows:

- (1) To accept the objection to jurisdiction vis-à-vis claimant TGI;
- (2) To dismiss all other objections to its jurisdiction and the inadmissibility claims;
- (3) By majority, to dismiss all claims on the merits; and
- (4) Each Party shall pay for (i) its own arbitration costs, and (ii) 50% of the fees and expenses of the members of the Tribunal and the administrative fees and direct expenses of the ICSID Secretariat.

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<sup>302</sup> The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.



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Prof. Stanimir Alexandrov  
Arbitrator  
(*subject to the attached dissenting  
opinion*).

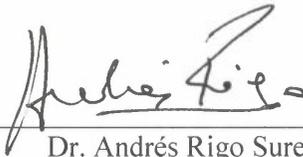
Date: FEB 14 2020



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Prof. Brigitte Stern  
Arbitrator

Date: FEB 07 2020



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Dr. Andrés Rigo Sureda  
President of the Tribunal

Date: FEB 17 2020

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**THOMAS GOSLING, PROPERTY PARTNERSHIPS DEVELOPMENT MANAGERS (UK) LIMITED,  
PROPERTY PARTNERSHIPS DEVELOPMENTS (MAURITIUS) LTD, PROPERTY PARTNERSHIPS  
HOLDINGS (MAURITIUS) LTD**

**AND TG INVESTMENTS LTD**

Claimants

and

**Republic of Mauritius**

Respondent

**ICSID Case No. ARB/16/32**

**DISSENTING OPINION  
OF ARBITRATOR ALEXANDROV**

1. With respect, and with regret, I part company with my colleagues regarding the Award's analysis and conclusions on liability, both with respect to Le Morne Brabant and Pointe Jérôme.

#### **A. Le Morne Brabant**

2. The salient facts are as follows. A local company, LMB, was incorporated to implement the Le Morne Brabant project. It acquired the land for the project. Claimants could not acquire shares in LMB before they received an authorization to own the land. Instead, Claimants entered into two contracts with their local partner SMB: the 2006 Shareholders Agreement and the 2006 Intermediary Agreement. The 2006 contracts covered both possible scenarios: (i) if Claimants received authorization to own the land, they would acquire shares in LMB from SMB; (ii) if such an authorization was not granted, the local partner SMB would remain the shareholder in LMB but Claimants would implement the project and receive the income stream from it, even without land or share ownership. Thus, regardless of whether the land ownership authorization was granted or denied, Claimants had valuable contractual rights in relation to the project. They contracted to develop the project in exchange for a defined income stream. That income stream never materialized, however, as a result of the acts of Respondent.

3. In early 2004, Mr. Saliba, a consultant engaged by Respondent, prepared a report, referred to as the Saliba report (R-041), recommending boundaries for the Le Morne site. Mr. Saliba divided the site into a core and a buffer zone. He advised the Government to demolish houses on the higher northern slopes and recommended that regulations preventing alterations or extensions to existing tourist facilities or private houses be enforced. On January 30, 2004, the Government took note of the recommendations and published the Saliba report (R-042).

4. On May 28, 2004, the Le Morne Heritage Trust Fund Act was enacted (R-045). It adopted the core and buffer zone boundaries proposed in the Saliba report and established the Le Morne Heritage Trust Fund ("LMHTF"). On June 23, 2004, SMB applied to Respondent's Board of Investment ("BOI") for an Investment Certificate (C-016). On September 21, 2004, the BOI sought the views of the Ministry of Arts and Culture (R-050). One day later, the Ministry of Arts and Culture advised the BOI that it should be guided by the recommendations of the Saliba report, "especially regarding the delimitation of the core and buffer zones of the Le Morne Heritage site [...]" (R-051). At that point, therefore, Respondent had embraced the recommendations of the Saliba report, including in relation to the establishment of the core and the buffer zone.

5. On March 15, 2005, LMHTF recommended that the Ministry of Arts and Culture request assistance of an expert from UNESCO's World Heritage Center to advise, among other matters, specifically on the project submitted by SMB (C-152). Thus, it was clear that the expert would make specific recommendations with respect to Claimants' project. The expert selected to provide assistance to Mauritius was Dr. Abungu.

6. On August 1, 2005, Dr. Abungu prepared his first report (C-025), in which he stated that limited development in the buffer zone should be allowed, the Government should consider taking back the land in the core zone that was leased to private parties, and that there

must be “a clear policy on compensation, including acquisition of property that the owners may not be allowed to develop.” Dr. Abungu’s recommendations were significant for Claimants. First, he allowed for some limited development in the buffer zone. Second, he recognized the existence of rights that could not be extinguished without proper compensation. With respect to the project planned by Claimants, Dr. Abungu noted specifically that Claimants’ intention was “to develop a win-win situation” and that they were prepared to be flexible as to what needed to be done and where.

7. On September 7, 2005, Dr. Abungu submitted further preliminary recommendations in his second report (C-027). Dr. Abungu recommended that the Claimants’ development be allowed, subject to adjustments to the location and number of villas (no more than 45). He considered that a golf course and small clubhouse could be built, but that a hotel may not be appropriate. Again, while he recommended certain adjustments and restrictions, Dr. Abungu blessed the development of Claimants’ project. Dr. Abungu emphasized that the recommendations were submitted “after thorough consultation” with UNESCO and after visiting the site with “government representatives and developers so as to agree on a way forward.”

8. On October 12, 2005, after further consultations with the Government, including a meeting with the Minister of Arts and Culture, Dr. Abungu submitted his final recommendations in his third report (C-029). He recommended that the number of villas be limited to 65 and that the construction of a moderate-sized hotel with a maximum of 35 rooms be permitted. He also viewed favorably Claimants’ proposal to replace the golf course with an indigenous forest and noted that “[t]his would be an extremely positive move as it would not only enhance the environment around but would greatly add value to the site of Le Morne by ensuring it remain as close as possible to what it should be.”

9. In sum, Dr. Abungu prepared two preliminary reports and one final report with recommendations. Those recommendations were made after extensive discussions with the Government and consultations with UNESCO. The recommendations allowed for the development of Claimants’ project, albeit with some restrictions. Clearly, the process and the results of Dr. Abungu’s efforts created expectations that the development of the project, within the parameters he recommended, was consistent with the Government’s objective of inscribing Le Morne as a World Heritage Site.

10. On December 19, 2005, Mr. Giroux, Claimants’ local partner, wrote to the BOI on behalf of SMB (R-066). He explained that at a meeting on October 15, 2005, the Minister of Arts and Culture had proposed to Claimants to modify the project in compliance with Dr. Abungu’s recommendations, in particular, to build 65 villas, a hotel with 35 rooms, a restaurant, a golf course and a golf country club. Mr. Giroux further explained that, while initially Claimants had been reluctant to accept the Minister’s proposal, they had decided to “espouse the philosophy of the Government and more particularly that of the Ministry of Arts and Culture,” and to accept the proposal made to Claimants during “the second session of the fast track committee.” Mr. Giroux further stated that, in light of Claimants’ acceptance of the Government’s proposal, there was no reason not to proceed to the issuance of a Letter of Intent (“LOI”).

11. This letter is significant for several reasons: (i) it shows that it was Respondent's proposal that Claimants proceed with a modified project in compliance with Dr. Abungu's recommendations; and (ii) after initial hesitation, Claimants accepted the Government's proposal and sought the issuance of a LOI on the basis of that proposal. The fact that Claimants accepted the Government's proposal explains why, as discussed below, the Government approved the project, and the BOI issued the first LOI, only some 10 days after Mr. Giroux's letter.

12. That approval and the issuance of the LOI came on December 30, 2005. In a letter from the Ministry of Arts and Culture to the BOI of December 30, 2005 (C-161), the Ministry of Arts and Culture stated clearly that: (i) the Government had approved Dr. Abungu's recommendations regarding Claimants' Le Morne project; (ii) the project would include 65 villas, a hotel of 35 rooms, a small restaurant, a golf course and a small club house; (iii) those recommendations should be "strictly adhered to" for the purpose of developing the project; (iv) the boundaries of the core and the buffer zone had also been approved as per Dr. Abungu's recommendations; and (v) the BOI could now proceed to issue the LOI. Thus, on December 30, 2005, Respondent approved Claimants' project pursuant to the recommendations of Dr. Abungu, stating explicitly the parameters within which Claimants would be allowed to build, and allowed the BOI to proceed with the issuance of the LOI.

13. The BOI memo of the same date (C-160): (i) described in detail what the project should comprise in compliance with Dr. Abungu's recommendations, (ii) noted that on December 19, 2005, Mr. Giroux informed the Government of Claimants' agreement to modify the project "to be aligned with" Dr. Abungu's updated recommendations, and (iii) very importantly, stated that:

*The project was submitted to Cabinet on 30 December 2005. In an even-dated letter, the Ministry of Arts and Culture informed BOI that [the] Government has approved the recommendations of Dr Abungu, UNESCO Expert, to comprise the construction of 65 villas, a hotel of 35 rooms, a small restaurant, and [a] golf course of 18-holes with a small club house. Moreover, the Ministry informed BOI that the latter can proceed with the issue of a Letter of Intent to the project.*

14. Thus, the BOI memo seeking the Managing Director's approval of the issuance of the LOI explicitly stated that it was based on the Government's approval of the project. The LOI was issued on the same date. The Award states (para. 230) that the LOI "did not confer any development rights to the Claimants." But the LOI was a necessary step in the process of developing the project. Moreover, the Government's approval of the project, within the parameters recommended by Dr. Abungu, and the issuance of the LOI on the basis of that Government approval, created legitimate expectations that Claimants would be allowed to pursue the development of the project.

15. In sum, in the fall of 2005, the Government proposed to Claimants a scaled-down project in compliance with Dr. Abungu's recommendations; Claimants eventually agreed to scale down their project accordingly; the Government approved the project within the agreed parameters; and the BOI issued the LOI on that basis. It was the Government's proposal—the Government's wish—that the Claimants proceed with a modified and scaled-down project, and

after Claimants' acceptance of the Government's proposal, the Government approved the project. The evidence at the hearing showed that the project (as well as the Pointe Jérôme project) was considered a top priority project approved by a fast-track committee chaired by the Prime Minister and comprised of the relevant ministers.

16. Thus, Claimants proceeded on the basis of the Government's approval and the LOI. Among other things, they prepared and submitted a Detailed Master Plan (C-137), worked with banks and investors to obtain financing, and submitted a detailed Environmental Impact Assessment, which was discussed with relevant Government agencies and their consultants, including during a site visit by the Ministry of the Environment (First Gosling WS, paras. 49-50). Those facts have not been disputed. The only dispute between the parties was whether Claimants submitted the documents requested by the BOI in its letter of June 2, 2006 (corporate documents, updated feasibility study and master plan, layout plans and architectural drawings, financial structure, work plan, and implementation schedule) (C-050). Mr. Gosling testified at the hearing that the documents were submitted (Tr. Day 2, 388:1-389:19), which is supported by the fact that there were no further letters by the BOI asking for those documents.

17. In the meantime, Respondent's actions continued to be consistent with Dr. Abungu's recommendations and the Government's December 30, 2005 approval of the project. As noted above, on June 2, 2006, the BOI sent a letter to SMB asking for the submission of the plans, feasibility studies, and other documents set out in the LOI "to enable BOI to process the Investment Certificate" (C-047). According to the Award (para. 233), this letter did not provide any assurances that an Investment Certificate would be issued. This is correct but it is beside the point. The letter was consistent with the policy of the Government to allow the development of the project within the recommendations of Dr. Abungu and as approved by the Government in December 2005. The BOI would not be asking about feasibility studies and development plans if the intention of the Government was to prohibit the implementation of Claimants' project (or any development at Le Morne).

18. Further, on February 7, 2007, the BOI sent Claimants a copy of the Draft Land Management Plan for the Le Morne Cultural Landscape prepared by the Ministry of Arts and Culture (C-063), which allowed for the development of the project. Critically, in June 2007, the Ministry of Housing and Lands issued a Planning Policy Guidance for the Le Morne Cultural Landscape, effective from June 25, 2007, and approved by the Cabinet – the so-called PPG2 (CL-010). PPG2 was consistent with the Draft Management Plan and again allowed development at Le Morne, including, specifically, the development of "hotels, villas with a more residential architecture" and "quality/luxury hillside retreats and eco-tourism lodges."

19. This was the official Government policy and the Government's position as of June 2007. Claimants relied on this official Government policy, and on the representations specifically made to them by the Government (ranging from the approval of their project by the Government in the fall of 2005 to the issuance of PPG2 in June 2007) to continue investing in the project.

20. Between June and September 2007, however, Respondent changed its mind, to the detriment of Claimants. In September 2007, the Ministry of Housing and Lands, with the

approval of the Cabinet, issued a revised Planning Policy Guidance, the Revised PPG2 (CL-011), prohibiting any development on Claimants' land situated within the buffer zone. This was a dramatic change of policy and came as a surprise to Claimants.

21. Respondent changed its mind pursuant to, among others, the advice of Dr. Odendaal, a consultant engaged by the Government after the Le Morne dossier was rejected by the UNESCO World Heritage Committee. Claimants had been led to believe that the limited development recommended by Dr. Abungu and approved by the Government was consistent with the overarching objective of inscribing Le Morne as UNESCO World Heritage Site. Everything that happened, starting in 2004 with the Saliba report and continuing through June 2007 with the adoption of PPG2, served that overarching objective while at the same time allowing the development of the project. During that period, the project, as amended and adjusted, was considered by Respondent to be consistent with the inscription objective. Claimants proceeded on that basis.

22. In September 2007, however, Claimants found out that the Government had changed its mind; their project now (with the adoption of the revised PPG2) was considered inconsistent with the UNESCO inscription. The Government may have been right to change its mind; it may well have been necessary to prohibit any development at Le Morne in order to ensure UNESCO inscription. But this is not the relevant question. The key point is that the Government's conduct of representing to Claimants for years that the development of their project, within the agreed parameters, was permitted, and then suddenly prohibiting any development, is a violation of the protections provided in the BIT.

23. The Award focuses on the fact that Claimants had not obtained all the necessary permits and authorizations and thus did not have the rights to begin the development of the project. Indeed, Claimants did not have all the necessary permits and certificates to take the project forward to completion. The Award concludes, therefore, that Claimants did not have development rights and dismisses the claims on that basis.

24. Claimants, however, were entitled to rely on the Government's proposal for the development of the project, which they accepted, and on the Government's approval of the project within the agreed parameters. The Government approved the recommendations of Dr. Abungu and, very specifically, approved the precise parameters of what Claimants were allowed to build. In reliance on this approval, Claimants continued investing in the project. Claimants had contractual rights to an income stream from the project. Those contractual rights were destroyed by the Government's change of policy in September 2007.

25. The Award itself recognizes (para. 132) that Claimants' rights under the 2006 contracts had value. According to the Award, the 2006 contracts "conferred contractual rights among their respective parties and constitute the contractual structure for the investors to carry out the Le Morne Project." The Award continues (para. 132):

*For this project to become a reality, the Claimants needed the PMO authorization but also had contemplated in the alternative a sponsor's contract if that authorization was not forthcoming. Under whichever alternative, the Claimants*

*needed the permits listed in the 2005 LOI. In other words, they had a potential investment, based on their contractual rights, in case they would obtain the necessary permits to develop their investment. The extent that progress or lack of it in the realization of the Project implicated the responsibility of the Respondent as argued by the Claimants is a matter for the merits.*

26. The Award's logic on this point is flawed. The contractual rights in question existed. The Award so finds in paras. 133 - 135, where it concludes that Claimants' contractual rights constituted "assets" within the BIT's definition of investment, prior to the time of the alleged breach. The value of the assets may have been in doubt, but that is a matter of quantum, not a matter of liability. As a matter of liability, the question is whether Claimants were deprived of those assets or whether their rights to those assets were interfered with in an unfair and inequitable manner. That Claimants had not obtained all necessary permits, including an Investment Certificate, reduced materially the value of their rights. But one can hardly argue that the rights that constituted Claimants' assets, *i.e.*, Claimants' investment, had no value whatsoever prior to the alleged breach. By characterizing Claimants' rights as "assets," the Award itself recognizes that those rights had value. That value would have been much higher had Claimants acquired development rights; but it cannot be disputed that whatever rights, whatever assets, Claimants possessed prior to September 2007 had some value. In an attempt to cure the flaws in its analysis, the Award seeks to characterize Claimants' contractual rights as a "potential investment" (para. 132) or "potentially protected assets" (para. 135) thus contradicting its own finding of jurisdiction *ratione materiae*.

27. It is undisputed that Respondent's primary objective was the inscription of Le Morne as a UNESCO World Heritage Site. It is also undisputed that, particularly in light of the rejection of the first application, Respondent was very concerned that the objective might not be achieved if any development, including in the buffer zone, was allowed. It is undisputed that the inscription of Le Morne as a UNESCO World Heritage Site was in the public interest of Mauritius and its people, and that it was a noble goal consistent with the objective of preserving the history of the place, honoring the dignity of the slaves who lived and died there, creating a symbol of freedom and human dignity, and – last but not least – preserving the physical beauty of Le Morne. In sum, Respondent was fully entitled to prohibit any development at Le Morne, including in the buffer zone, in the interests of the people of Mauritius – and it did so. In doing so, however, Respondent deprived Claimants of their investments, namely their contractual rights to develop the project. Respondent's new policy adopted in September 2007 stands in sharp contrast with Respondent's proposal to Claimants to pursue a more limited project, Respondent's December 2005 approval of the project, Respondent's PPG2 until the Revised PPG2 was issued in September 2007, and, in sum, with all of Respondent's actions and representations to Claimants up until September 2007. Therefore, Respondent deprived Claimants of the value of their rights in violation of the fair and equitable treatment standard and expropriated Claimants' investment. Claimants, therefore, must be compensated for the value of those rights.

28. Put differently, the questions of how advanced the project was, whether Claimants had acquired development rights or were yet to acquire them, whether the project was well advanced or was still at its inception, are not relevant to liability – they are relevant to quantum.

It is at the damages phase that the question of the value of Claimants' assets arises. For liability, by contrast, what matters is: (i) the existence of an investment, *i.e.*, an asset (such as contractual rights as defined by the BIT); and (ii) the destruction of the value of that asset through unfair treatment or dispossession (even if the dispossession may be for a public purpose). The Award correctly acknowledges the existence of such assets by concluding that the Tribunal has jurisdiction *ratione materiae* (because of the existence of an investment). The first element is therefore established. In performing its analysis under the second element, however, the Award mistakenly concludes that Claimants had no development rights and therefore could not have been deprived of those rights. But this is not dispositive of the matter. Even if Claimants had rights that were short of full and final development rights, the destruction of those rights would still be a violation of the BIT.

### **B. Pointe Jérôme**

29. The Pointe Jérôme lease qualifies as an investment under the BIT: it involves a bundle of contractual rights to develop the Pointe Jérôme project. Those rights fall within the definition of "investment" under the BIT. Being an asset, those rights had some value – how much value is a matter of damages. What matters for the purposes of liability is whether Respondent properly terminated the lease or not; improper interference with Claimants' rights would be a violation of the BIT.

30. The termination of the lease was not inconsistent with the law of Mauritius and with the lease itself – it is undisputed that the Government had the discretion not to grant the requested extension and to terminate the lease. On that basis, the Award concludes that Respondent did not violate the BIT. The inquiry should not stop there, however. The question remains how Respondent exercised the discretion it had under the lease and the law of Mauritius. The evidence shows that Respondent exercised its discretion in a non-transparent, unfair, arbitrary, and discriminatory manner.

31. On August 1, 2006, Claimants wrote to the Ministry of Housing and Lands to request a one-year extension of the lease (C-052). Fourteen months later, on September 20, 2007, the application for the extension was rejected and the lease was terminated (C-088 and C-089). The process of reaching that decision was non-transparent, unfair, and arbitrary.

32. A letter dated October 4, 2006 (R-087) by the principal surveyor to the deputy chief surveyor, Mr. Seebun, briefly discussed the Pointe Jérôme project, noted that the investors had already invested £1 million, and stated that a decision on the requested lease extension was needed. The letter made no recommendations. Next, five months later, on March 8, 2007, the Permanent Secretary of the Ministry of Housing and Lands conducted a meeting with the participation of officials from other ministries and the BOI. The minutes of the meeting (R-098) reflect the discussion of the Pointe Jérôme project in a couple of sentences only. The discussion appeared to be inconclusive – no recommendation was made.

33. The next document is an internal memorandum addressed from Mr. Seebun to Mr. Conhye dated March 19, 2007 (R-099). Mr. Seebun concludes the memo by pointing out that a decision was required as to whether to grant a last and final extension of the lease. An additional

handwritten paragraph, dated March 27, 2007, says that Mr. Seebun's memorandum "is submitted for approval, please." The memorandum was submitted by Mr. Conhye to the Permanent Secretary and to the Minister of Housing and Lands with a further handwritten note expressing support for granting a final extension to the company to deal with the issues set forth by Mr. Seebun. Thus, the fact that the previous extension had been labeled "final" was no obstacle to the staff of the Ministry of Housing and Lands supporting a further extension.

34. Next in the record is a handwritten note by the Permanent Secretary to the Minister of Housing and Lands dated April 4, 2007, transmitting Mr. Seebun's memorandum (R-103). This note says, "You may wish to discuss. Please."

35. However, there is no evidence of any discussion. On the contrary, on May 12, 2007, the Minister of Housing and Lands, in a hand-written note of two sentences (R-103), instructs the Permanent Secretary to "cancel lease as lessee has not fulfilled the conditions as agreed. Please consider to reallocate the land to a bona fide developer."

36. This is the whole of the process that led to the decision not to extend the lease, and the two hand-written sentences by the Minister of Housing and Lands comprises the whole of the decision. There is no discussion, justification, reasoning, or analysis whatsoever. There is no discussion, for example, of (i) what conditions were not fulfilled; (ii) why construction had not started; (iii) what the investors had already done in relation to the project and what they had failed to do; (iv) whether the requested extension would allow the investors to go forward with the project and complete construction; or (v) why Claimants were not *bona fide* investors, as "decided" by the minister.

37. The last point is quite surprising because there had been no suggestion in any correspondence, any document on the record, or any witness testimony, that Claimants were not *bona fide* investors. Indeed, as noted earlier, the first of the documents discussed, the letter by the principal surveyor to the deputy chief surveyor (Mr. Seebun) (R-87), stated that the investors have already invested £1 million. The Minister of Housing and Lands did not seem bothered by the fact that £1 million had been invested – in his view, that did not make Claimants *bona fide* investors. He knew that Claimants were not speculative investors, however. The record shows clearly that Claimants wanted to develop the project and Respondent was fully aware of that.

38. The Minister of Housing and Lands rejected without any explanation or justification his staff's support for granting a final extension to the company. There is no record of the Minister discussing that recommendation with the Permanent Secretary or anyone else. There is no record of any discussions with Claimants, including about the fulfillment of the conditions of the lease. The documents discussed above constitute the whole "process" of decision-making, culminating with the Minister's two hand-written sentences.

39. This is in stark contrast with the description of the proper process by the former principal surveyor, Mr. Naidoo, who testified in para. 6 of his witness statement that typically "the Ministry would investigate why the promoter had failed to start construction work and consider whether granting an extension would serve the overriding objective of fostering development at the site." He elaborated on that point in his witness statement and emphasized

that the fact that construction had not started was not in itself a proper reason to deny an extension.

40. None of what Mr. Naidoo describes in his witness statement happened in the case of the Pointe Jérôme project. Nobody recommended to the Minister of Housing and Lands that the lease should be terminated. Nobody investigated why construction had not started, even though the investors had presented a plan, were in the process of obtaining permits, and had invested significant amounts in the project. How and on what basis the Minister reached his decision remains an enigma. The inevitable conclusion is that Respondent abused its discretion to terminate the lease. The termination was unreasonable, unfair, arbitrary, and unjustified.

41. It was also discriminatory. The evidence shows that other projects, where construction had not started either, received lease extensions. Mr. Naidoo testified that extensions were typically granted, even when the lease had expired, if it was determined that the investor had the commitment and the resources to develop the site. Mr. Naidoo was a credible witness who did not appear to have any interest in the outcome of the case. Further, there is no evidence in the record, and it was not argued by Respondent, that any other lease for any other project was cancelled by a two-sentence decision without any inquiry or investigation, without any discussion with the developer, and without any reasoning and any justification.

42. Finally, it is significant that the Government did not approach Claimants throughout this process, which took more than one year, with any questions or requests for information. The process was anything but transparent. Moreover, the Minister's decision, made on May 12, 2007, was not communicated to Claimants until September 20, 2007 (more than four months later). In the meantime, Claimants continued pursuing the project.

43. All this leads to the conclusion that the Government abused its discretion when it cancelled the lease. The Award acknowledges that the Government did not behave properly. It says (para. 271):

*It is surprising that the Government would take thirteen months to make a decision on the request for an extension and then that the decision would not be communicated to the requester for four months even if legal advice was sought. During this time, there were no interactions with the investors, no further information was requested, no meetings with the authorities were convened, no indication on the administrative progress of the request was given. There is no record either that the Claimants bothered to inquire.*

44. The Award, however, goes on to say that Claimants continued pursuing the project knowing that the Government was within its rights to cancel the lease and, therefore, knowingly took the risk of pursuing the project in the interim. But this logic is flawed, because Claimants could not have expected that the Government would act in a non-transparent manner and that it would cancel the lease without any discussion with Claimants, without any inquiry or investigation, without any meaningful internal discussion, and without any analysis or justification. Claimants may have taken the risk of pursuing the project knowing full well that the Government was within its rights to decline the extension of the lease. However, Claimants

could not, and should not, have accounted for the risk that the Government would exercise its rights in a non-transparent, discriminatory, arbitrary, and unfair manner.

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45. In sum, my view is that Respondent violated Art. 2(2) of the BIT by denying Claimants fair and equitable treatment and Art. 5 of the BIT by expropriating Claimants' investments (albeit for a public purpose) without paying compensation, both with respect to the Le Morne and the Pointe Jérôme projects. The value of Claimants' assets (*i.e.*, their contractual rights) may be fairly limited in light of the fact that they were yet to obtain the necessary permits and authorizations and that none of the projects had approached construction; this is, however, a matter of damages rather than liability.



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Prof. Stanimir Alexandrov  
Arbitrator

Date: FEB 14 2020