AD HOC ARBITRATION UNDER THE 1976 UNCITRAL ARBITRATION RULES

PCA CASE 2016-20

DAWOOD RAWAT

Claimant

v.

THE REPUBLIC OF MAURITIUS

Respondent

ORDER REGARDING CLAIMANT'S AND RESPONDENT'S REQUESTS FOR INTERIM MEASURES

11 January 2017

Before:

The Arbitral Tribunal
Professor Lucy Reed (Presiding Arbitrator)
Mr Jean-Christophe Honlet
Professor Vaughan Lowe QC

I. INTRODUCTION

1. The Claimant, Mr Dawood Ajum Rawat (***Rawat***), is pursuing this arbitration against the Respondent, the Republic of Mauritius (***Mauritius***), to claim for alleged breaches of the Investment Promotion Treaty entered into on 22 March 1973 between the Republic of France and Mauritius (***France-Mauritius BIT***).[1] Rawat brings this arbitration under the 1976 UNCITRAL Arbitration Rules (***UNCITRAL Rules***) through the Most Favored Nation (***MFN***) clause in the France-Mauritius BIT and the arbitration clause in the 2007 Agreement between the Government of the Republic of Finland and the Government of the Republic of Mauritius on the Promotion and Protection of Investments (***Finland-Mauritius BIT***).[2]

2. In brief, Rawat alleges that Mauritius violated the France-Mauritius BIT by freezing and misappropriating his protected investment in the group of companies known as British American Investment Co. (Mtius) Ltd (***BAICM Group***), which includes the Bramer Banking Corporation Ltd (***Bramer Bank***). He seeks compensation for these alleged treaty breaches in an amount exceeding US$ 1 billion. Mauritius does not dispute that certain of the actions alleged by Rawat have occurred, but denies any violation of its obligations under the France-Mauritius BIT. According to Mauritius, the freeze of Rawat's personal and business assets and related actions are part of an ongoing, and legal, investigation of alleged Ponzi-like schemes orchestrated by him and/or his family members, involving money laundering and fraud at the level of MUR 1 billion.

3. Both Parties have submitted applications for interim measures in this Initial Phase of the arbitration.

4. First, Rawat requests the Tribunal to order Mauritius to fund the entire advance on costs directly or by unfreezing certain of his bank accounts and real property and/or releasing certain documents to potential third party funders; to enjoin

[1] *Convention entre le Gouvernement de la République française et le Gouvernement de l'Ile Maurice sur la protection des investissements, signée à Port-Louis le 22 mars 1973* (Exh C-1). The authentic language of the France-Mauritius BIT is French.

[2] Agreement between the Government of the Republic of Finland and the Government of the Republic of Mauritius on the Promotion and Protection of Investments dated 12 September 2007 (Exh C-2).

Mauritius from continuing alleged retaliation measures against his family; and to enjoin Mauritius from taking action aggravating the dispute such as media campaigns and retaliatory measures. Second, Mauritius seeks € 3 million in security for costs.

5. For the reasons set out below, the Tribunal denies both applications, with leave to re-apply.

II. PROCEDURAL HISTORY

6. On 8 June 2015, Rawat sent a Notice of Dispute to Mauritius, through his legal representatives Dr Andrea Pinna and Prof Xavier Boucobza. By letter dated 11 September 2015, through its appointed legal representatives LALIVE SA, Mauritius informed Rawat that it found no basis in the France-Mauritius BIT for his claims.

7. On 9 November 2015, Rawat sent a Notice of Arbitration and Statement of Claim to Mauritius (***Notice of Arbitration***).

8. In the Notice of Arbitration, Rawat notified Mauritius of his appointment of Mr Jean-Christophe Honlet as the first arbitrator. By letter dated 9 December 2015, Mauritius notified Rawat of its appointment of Professor Vaughan Lowe QC as the second arbitrator. By Rawat's letter dated 6 May 2016 and Mauritius' letter dated 15 May 2016, the Parties appointed Professor Lucy Reed as Presiding Arbitrator of the Tribunal. In paragraph 4.4 of the Terms of Appointment executed on 2 September 2016, the Parties confirmed that the members of the Tribunal have been validly appointed in accordance with the France-Mauritius BIT, the Finland-Mauritius BIT and the UNCITRAL Rules.

9. Pursuant to Article 3(2) of the UNCITRAL Rules, and as confirmed in paragraph 2.6 of the Terms of Appointment, these proceedings are deemed to have commenced on 9 November 2015, the date on which the Respondent received the Notice of Arbitration.

10. By email dated 31 May 2016, counsel for Mauritius sent the Tribunal drafts of the Terms of Appointment and Procedural Order No. 1, prepared jointly by the Parties. The drafts highlighted remaining differences between the Parties, notably the place of arbitration, the language of arbitration, and the responsibility to pay the advance on costs.

11. By email also dated 31 May 2016, Rawat indicated his intention to request that Mauritius bear the entire advance on costs:

> *As regards the advance on costs, Mr Dawood Rawat has seen in April 2015 all of its assets in Mauritius (i) either appropriated (it is Claimant's position that they have been misappropriated) by the Republic of Mauritius (ii) or frozen. As a consequence of the actions of the Republic of Mauritius, the Claimant is not in a position to finance the advance of costs in this arbitration. It is Claimant's intention to ask the Tribunal by way of an application of interim relief to decide that the advance of costs will be paid in full by the Republic of Mauritius.*
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> *The abovementioned application will also include other requests for interim relief.*

12. By letter of 31 May 2016, Mauritius indicated its intention to seek termination of the case should Rawat refuse to contribute his equal share of the advance on costs – in this arbitration, which he had commenced against Mauritius – in violation of Article 41(1) of the UNCITRAL Rules.

13. After further exchanges of correspondence, the Tribunal conducted a procedural conference call with counsel for the Parties on 9 June 2016 to address the Initial Phase of the arbitration.

14. The Tribunal issued Procedural Order No. 1 on 15 June 2016. Procedural Order No. 1 provides in full:

> *We agree with the Claimant that it is premature to rule on its request to shift responsibility for the advance on costs without allowing the Parties to make full submissions. We also consider it premature to terminate the case, without having yet ordered deposits of an advance on costs.*
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> *We appreciate counsel's agreement during the conference call that the Tribunal is validly constituted and the proceedings are validly underway under the Rules. Given this status, and in light of Article 39 of the Rules, which allows an UNCITRAL tribunal to fix its fees, we find that an executed Terms of Appointment is not necessary for us to exercise our jurisdiction and to set advances on costs and order deposits.*
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> *We agree with the Respondent that, without prejudice to the final decision of the Tribunal on the requested shifting of advances and other interim relief requested, the first step at least under Article 41(1)*

of the Rules has to be to request deposits from both Parties in equal shares.

We have determined to set an advance on costs for an initial phase of proceedings ("Phase 1") [also called the Initial Phase] *of Euro 100,000 to cover: (a) the Tribunal members' fees and expenses to date for pre- and post-constitution services; (b) the Claimant's anticipated application for interim measures to shift responsibility for the full advances on costs to the Respondent, including the Respondent's anticipated defenses; (c) the Respondent's anticipated application for security for costs for the interim measures application; (d) the review of both Parties' arguments regarding the place and language(s) of the arbitration; and (e) the Tribunal's decisions on the applications on the basis of written submissions only. If either Party demands a hearing on any application, we will have to revisit the amount of the advance for Phase 1.*

Subject to the Parties' compliance with the steps ordered below and related developments, the Tribunal expects to issue a Procedural Order No. 2 based on the Parties' draft Procedural Order No. 1, with the addition of the place and language of the arbitration and any other direction that the Tribunal may deem proper at that time. Also dependent on developments, the Tribunal would expect to issue a further Procedural Order for a jurisdictional objections phase.

The Tribunal's Order below regarding the administration of the arbitration by the Permanent Court of Arbitration or such other administering institution as the Parties may agree, as well as the language used in this Order, are without prejudice to the ultimate decision of the Tribunal regarding the place and language(s) of the arbitration.

In light of all of the above, the Tribunal ORDERS as follows:

1. *By 17 June 2016, the Parties are jointly to request the Permanent Court of Arbitration ("PCA"), or such other administering institution as they may agree, to administer this arbitration, and copy the Tribunal on all relevant correspondence.*

2. *By 13 July 2016, each Party is to deposit one-half of the Phase 1 advance on costs, in the amount of Euro 50,000, with the PCA or substitute administering institution.*

....

15. By email dated 17 June 2016, in response to inquiries from the Parties, the Tribunal clarified the role for an administering institution as follows:

> *. . . Procedural Order No. 1 does not require the Parties to agree to full administration by the PCA or other institution. We expect the Parties to discuss the various administration options available from the PCA and other institutions, for example the LCIA. Most important is collection and management of deposits toward the advance on costs for Phase 1, as the Tribunal members are not in a position to open and manage an escrow account.*

16. The Parties proceeded to arrange depository services with the PCA. By email dated 14 July 2016, the PCA acknowledged receipt of the Respondent's and Claimant's deposits of € 50,000 for the Initial Phase on 30 June and 12 July 2016, respectively.

17. The Tribunal issued Procedural Order No. 2 on 12 August 2016. Procedural Order No. 2 establishes Brussels as the place of arbitration and English as the language of arbitration, and annexed the procedural calendar for the Initial Phase. The Initial Phase is described to include the Claimant's "*request for interim measures to shift responsibility for the full advances on costs to the Respondent*" and the Respondent's "*application for security for costs in relation*" to the Claimant's interim measures request.

18. On 1 August 2016 (before the 5 September deadline), Rawat submitted his Request for Interim Measures (***Rawat Request***). The Rawat Request includes 10 witness declarations, including the Witness Statement of Rawat dated 29 July 2016 (***Rawat Witness Statement***) 65 documentary exhibits, and six legal authorities. The full Request for Relief in the Request for Interim Measures is set out below in Section V.

19. The Terms of Appointment were executed and finalized on 2 September 2016.

20. On 5 September 2016, Mauritius submitted its Application for Security for Costs (***Mauritius Application***). The Mauritius Application includes four documentary exhibits and 20 legal authorities. The full Prayers for Relief in the Mauritius Application are set out below in Section VI.

21. On 26 September 2016, Mauritius submitted its Answer to the Rawat Request with 22 legal authorities. On the same date, Rawat submitted his Answer to the Mauritius Application with five additional documentary exhibits, and one additional legal authority.

22. On 10 October 2016, Mauritius submitted its Reply to Claimant's Answer with three witness statements, three additional documentary exhibits, and four additional legal authorities. On the same date, Rawat submitted his Reply to Respondent's Answer with three additional documentary exhibits and one additional legal authority.

23. By letter dated 14 October 2016, Rawat asked the Tribunal to direct Mauritius to indicate whether two of his properties, described as his "*former residence in Mauritius and the villa at La Preneuse*" were subject to freezing orders in Mauritius.

24. On 16 October 2016, with leave of the Tribunal, Mauritius submitted six new exhibits related to Mauritian court proceedings involving, among others, Rawat's daughter, Ms Laina Rawat.

25. By letter dated 17 October 2016, Rawat asked to submit a short declaration of Ms Rawat explaining her motivation to discontinue her request for appointment of a new receiver to represent Bramer Bank in Mauritian court proceedings.

26. As envisioned in Procedural Order No. 2, the Tribunal conducted a procedural conference call on 17 October 2016 "*to consider hearing requests and next steps for the Initial Phase*". As neither Party had requested a hearing, the Tribunal confirmed that it would decide the Rawat Request and the Mauritius Application on the written submissions. During the conference call, counsel addressed Rawat's requests in his letters of 14 and 17 October 2016 and, at the request of the Tribunal, the question of *prima facie* jurisdiction for the Initial Phase in relation to the MFN clause in the France-Mauritius BIT.

27. In Procedural Order No. 3, the Tribunal ordered as follows:

> 1. *The Parties are to consult on the status of the two properties that are the subject of the Claimant's letter dated 14 October 2016, namely a former residence and a villa at La Preneuse, as to whether the properties are subject to a freezing order or not, and to report to the Tribunal by 25 October 2016;*
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> 2. *The Parties are to file any further legal submissions on the issue of prima facie jurisdiction in relation to the Most Favored Nation provision of the France-Mauritius bilateral investment treaty dated 22 March 1973, also by 25 October 2016; and*
>
> 3. *The Claimant's request by letter of 17 October 2016 to submit the short declaration of Ms Laina Rawat, explaining the motivation of her*

> *decision, as effected through her counsel's letter dated 18 July 2016 (Exh R-12), to discontinue the request for appointment of a new receiver to Bramer Bank to represent the latter in legal proceedings, is granted, and the declaration is to be filed by 19 October 2016.*

28. On 18 October 2016, Rawat submitted Ms Laina Rawat's declaration dated 17 October 2016 (***Laina Rawat Declaration***), which annexed three documents from the Mauritian Supreme Court case of *Laina Dawood Rawat v Financial Intelligence Unit* (Serial No. 914/2016). By letter dated 20 October 2016, Mauritius requested the Tribunal to exclude the Declaration from the record as being outside the scope of Procedural Order No. 3 or, in the alternative, to afford the Declaration no weight. On 21 October 2016, Rawat responded. By Procedural Direction dated 22 October 2016, the Tribunal "*determined not to strike the Declaration, with the assurance that we will give it — like all the evidence in the record — appropriate weight in our future analysis and decisions*", and directed Mauritius to submit any reply to the Declaration by 28 October 2016. In its reply of 28 October 2016, Mauritius challenged the accuracy and relevance of the Declaration, and underscored that Ms Rawat is receiving MUR 100,000 monthly pursuant to a September 2015 court order; Mauritius attached a copy of the relevant agreement as Exh R-16.

29. On 25 October 2016, Rawat filed its Submission on the Issue of *Prima Facie* Jurisdiction in Relation to the Most Favoured Nation Provision of the France-Mauritius Bilateral Investment Treaty, with three additional documentary exhibits, and five additional legal authorities.

30. Also on 25 October 2016, Mauritius filed its Supplementary Submission on *Prima Facie* Jurisdiction, with two documentary exhibits and 16 legal authorities. By letter dated 2 November 2016, Rawat commented on Mauritius' discussion in its Supplementary Submission of the 2010 France-Mauritius bilateral investment treaty, which has not yet entered into force.

31. On 4 November 2016, Mauritius informed the Tribunal that the two properties Rawat had inquired about – his former residence and the villa at La Preneuse – are not on the list of his frozen properties but that they are subject to charges granted by him to creditors.

III. FACTUAL BACKGROUND

32. At this Initial Phase of the proceedings, none of the facts alleged by the Parties has been tested. In ruling on Rawat's Request for Interim Measures and

Mauritius' Application, we are to take the facts alleged by Rawat as true, without prejudice to our findings at any further stage of this arbitration. Nothing in this Decision is to be construed otherwise.

33. The Tribunal below summarizes the alleged facts necessary to place the Parties' interim measures requests in context.

34. Rawat alleges that he ultimately owns and controls the BAICM Group, including Bramer Bank, and that his indirect ownership of shares in BAICM is an "*investment*" under the France-Mauritius BIT. He accuses Mauritius of a series of actions violating its obligations under the France-Mauritius BIT to protect a US$ 1 billion investment. The alleged violations include: a campaign of premature encashment by Government of Mauritius officials and Government-related entities of funds from their Bramer Bank accounts; revocation of Bramer Bank's Banking License; appointment of receivers for Bramer Bank and transfer of Bramer Bank assets to a company wholly-owned by Mauritius for a value far below their market value; appointment of conservators for BAICM affiliate British American Insurance Company Ltd (***BAI***); improper enactment of the Mauritius Insurance (Amendment) Act 2015 with a retroactive effect applying to BAI; appointment of special administrators for BAI and all BAICM Group companies; and disposal of assets of BAICM Group companies to the benefit of Mauritius or third parties.

35. In May 2015, the Bank of Mauritius commissioned an investigation of BAICM Group activities from nTan, an accounting firm based in Singapore, into the activities of the BAICM Group from 2007 through 2014. According to the nTan interim report dated 27 January 2016 (***nTan Report***), which is publicly available, BAICM Group liabilities exceeded assets by MUR 12 billion by the end of financial year 2013, which the Group was able to hide by operating Ponzi-like schemes. As characterized by Mauritius, the nTan Report sets out evidence that the BAICM Group channelled funds exceeding MUR 1 billion to Rawat and/or his family members. The nTan Report caveats that the investigation proceeded without informing all individuals and entities investigated, and such individuals and entities were not provided the opportunity to offer comments or corrections and "[t]*his report should be read subject to this limitation*" (Exh C-34, page i).

36. Rawat is currently facing a warrant of arrest in Mauritius for money laundering, conspiracy to defraud, and misuse of company assets. Rawat, who remains

outside Mauritius, has not been convicted of any of these crimes. According to Mauritius, as a matter of Mauritian criminal law, Rawat faces "provisional charges" until he can be physically presented before a judge. Receivers of Rawat's companies have also initiated civil suits in Mauritius, in which Rawat and various family members are named defendants.

37. Rawat's daughters Laina and Adeela Rawat and sons-in-law Brian Burns and Claudio Feistritzer have been questioned by Mauritius' Central Criminal Investigation Department; and arrested and provisionally charged for money laundering, conspiracy to defraud, misuse of company property, and giving false statements. According to both Parties, all are currently free on bail. They are barred from leaving Mauritius by operation of an Objection to Departure issued by the Mauritius Passport and Immigration Office, and have had to surrender their passports to the Mauritius courts.

38. In connection with the investigation, the Mauritian Supreme Court issued an Order on 18 April 2015 listing immovable properties allegedly belonging to Rawat that "*shall not be disposed of, or otherwise dealt with, by any person, except upon a Judge's Order*"[3] (Exh C-29). As reported by Mauritius in its submission of 4 November 2016, this Order was extended for one year on 18 April 2016 (Exh R-17). The two properties that Rawat has inquired about in these proceedings – a former residence and the Villa La Preneuse – are not on the list of frozen properties. According to Mauritius in its 4 November 2016 submission:

> *The Respondent has however been informed that the Two Properties are subject to several fixed and floating charges granted by Mr Rawat to his creditors as security for loans and other credit facilities, including (but not necessarily solely) from companies of the BAI Group and Bramer Bank. We understand that these charges may preclude the Claimant from disposing of the Two Properties.*

39. The freezing order also covers the assets of several of Rawat's family members, who have also lost their employment with BAICM Group companies. Laina Rawat and other of Rawat's immediate family members do receive funds for living expenses in Mauritius.

[3] Order issued by Her Ladyship, Mrs Gaytree Jugessur-Manna, Judge of the Supreme Court of Mauritius sitting in Chambers dated 18 April 2015, p. 2 (Exh C-29) .

40. According to Rawat, Mauritius has orchestrated a negative media campaign against him and his family.

41. In the Request for Interim Measures (paras. 60-62), Rawat states that he has no assets available for living except those in foreign countries and, of those, he has been obliged to sell an apartment in London, reportedly his only asset outside Mauritius (Rawat Witness Statement, para. 43), and his wife is the owner of other properties. Rawat also alleged that Mauritius' freezing of assets of his close family deprived them of the possibility of assisting him, and he had to borrow the € 50,000 to pay the advance on costs for the Initial Phase of these proceedings from friends.

42. Rawat alleges that third party funders are interested in funding this case, but they cannot take a decision without access to the documents underlying the nTan Report, to perform the necessary due diligence. He does not identify interested funders or details of his discussions with them.

IV. THE APPLICABLE STANDARD FOR INTERIM MEASURES

43. The applicable UNCITRAL Rule is Article 26.1, which provides (emphasis added):

> *At the request of either party, the arbitral tribunal may take any interim measures it deems* ***necessary in respect of the subject-matter of the dispute****, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.*

44. The Parties agree, and the Tribunal concurs, that a grant of interim measures requires exceptional circumstances.

45. One element of necessity under Article 26.1 of the UNCITRAL Rules is that the applicant must have a recognizable right to be preserved, whether substantive or procedural. More concretely, for an interim measure to be necessary, the requesting party must demonstrate that the measure is both (a) urgent, and (b) essential to prevent irreparable harm to its rights. The accepted test for urgency is whether "*action prejudicial to the rights of either party is*

likely to be taken before [a] *final decision is given*".[4] As for irreparable harm, it is well-established that harm claimed is not irreparable if it can be compensated by monetary damages.[5]

46. In determining whether interim measures are necessary for purposes of Article 26.1 of the UNCITRAL Rules, tribunals also consider the balance of the parties' respective interests and assess whether such measures would harm either party. Further, tribunals avoid granting interim measures if to do so would involve prejudgment of the merits of the dispute.[6]

V. RAWAT'S REQUEST FOR INTERIM MEASURES

47. In his Request for Interim Measures of 1 August 2016, Rawat requests seven separate interim measures, broken down into three categories:

i. End of the Retaliation Measures by the Republic of Mauritius against the Investor and his family

> *102. The Investor respectfully requests that the Arbitral Tribunal issue an order to end the retaliation measures against the Investor and members of his family by enjoining the Republic of Mauritius, directly and through any entity it controls – including for the avoidance of doubt, entities and persons appointed as "Special Administrator", "Receiver", "Conservator" or otherwise – to stop the Retaliation Measures against the Investor and Members of his family, including for the avoidance of doubt the stay of the conditions to the bail imposed and the Objection to Departure concerning Adeela Rawat, Laina Rawat, Claudio A.S. Feistritzer and Brian Burns.*

ii. The measures to be ordered to allow the Investor Access to Justice in these proceedings

> *103. The Investor respectfully requests that the Arbitral Tribunal, either alternatively or concurrently:*

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[4] For example, *Case Concerning Passage Through the Great Belt (Finland v Denmark)*, Request for the Indication of Provisional Measures, Order of 29 July 1991, (1991) *I.C.J. Reports* 12, para. 23 (Exh RLA-36).

[5] For example, *Plama Consortium Limited v Republic of Bulgaria*, Order on Provisional Measures, ICSID Case No. ARB//03/24, 6 September 2005, para. 46 (Exh RLA-38).

[6] For example, *Transglobal Green Energy LLC and Transglobal Green Panama S.A. v Republic of Panama*, Decision on Respondent's Request for Shifting the Costs of the Arbitration, ICSID Case No. ARB/13/28, 4 March 2015, para. 43 (Exh RLA-41) (***Transglobal v Panama***).

- *order the Republic of Mauritius to pay, in its entirety, the advance on costs of an amount to be determined by the Tribunal or, alternatively, the advance on costs related to the jurisdictional objection announced by the Republic of Mauritius; and/or*

- *order the unfreezing by the Republic of Mauritius of the bank account n°3100002222MUR03 held at the Bramer Bank (now MauBank) with a balance of 14,126,650 Mauritian rupees as at 2 April 2015 (approximately USD 403,000); and/or*

- *order the unfreezing by the Republic of Mauritius of the following two contiguous plots of land in Port Louis, Mauritius:*

  A plot of land of the extent of 878.70m2 situated at no.35, Rue Monseigneur Gonin, Port Louis, Mauritius, acquired by Mr Dawood Rawat on 1 December 2008 by virtue of title duly transcribed in Vol 7247/26, of an approximate value at the time of the freezing order of Mauritian rupees 31,861,440 (approx. USD 909,000);

  A plot of land of the extent of 809.14m2 situated at no.34, Rue Dr. Eugene Laurent, Port Louis, Mauritius, acquired by Mr Dawood Rawat on 24 September 2009 by virtue title deed duly transcribed in Vol 7496/61, of an approximate value at the time of the freezing order of MUR 16,000,000 (approx. USD 456,000); and/or

- *order the Republic of Mauritius to provide the Claimant with all documents made available to nTan for making its report; and/or*

- *order any other measure that it deems appropriate to ensure the respect of the Investor's right to access justice.*

iii. Non-aggravation of the Dispute

104. *The Investor respectfully requests that the Arbitral Tribunal issue an order enjoining the Republic of Mauritius to refrain from taking any measure or action that would have the effect of aggravating the dispute, including but not limited to, any further retaliatory measures and media campaign against the Investor, any member of his family and their respective property until the Tribunal has issued a final award in the instant case.*

48. For ease of reference, the Tribunal will refer to these three categories of measures as the Retaliation Measure, the Costs Advance Measures, and the Aggravation Measure.

A. Scope and Admissibility of the Rawat Request

49. As a preliminary matter, Mauritius asks the Tribunal to reject as inadmissible all but one of the seven specific interim measures requested – Rawat's request to shift responsibility for the entire advance on costs to Mauritius – as outside the scope of the Initial Phase of these proceedings. The Tribunal turns first to this issue.

i. The Parties' Positions

50. The Parties take directly opposite positions.

51. The heart of Mauritius' position is that the Tribunal, in Procedural Orders No. 1 and No. 2, expressly defined the scope of the Initial Phase to be Rawat's demand that Mauritius fund the entire advance on costs, on grounds that Mauritius wrongly deprived him of his assets. All other requests for interim measures, says Mauritius, are inadmissible in this Initial Phase.

52. In reply, Rawat argues that neither Procedural Order No. 1 nor Procedural Order No. 2 expressly limits the scope of the interim measures encompassed. Further, he emphasizes that he clearly indicated prior to the Procedural Orders that he would seek interim measures beyond his request to shift responsibility for the entire advance on costs to Mauritius. In his email of 31 May 2016, quoted above at paragraph 11, he stated that his application on the advance on costs "*will also include other requests for interim relief*". In his Notice of Arbitration (at para. 95), he indicated that he: "*will apply for other interim measures such as the interruption of the local media campaign and of the retaliations effected by the Republic of Mauritius and the unfreeze of its bank accounts*".

ii. The Tribunal's Analysis and Decision

53. The Tribunal considers that both Parties have valid arguments, as the language in Procedural Orders No. 1 and 2 can be read as ambiguous.

54. Mauritius is correct that, following the first procedural conference call on 9 June 2016, the Tribunal in Procedural Order No. 1 did describe the "*immediate*

issue before the Tribunal" to be "*the Claimant's request that the Respondent bear the full amount of the advances on costs in this arbitration*" and did order the Parties each to deposit € 50,000 to cover "*the Claimant's anticipated application for interim measures to shift responsibility for the full advances on costs to the Respondent, including the Respondent's anticipated defenses*".

55. Rawat is correct that we also stated in Procedural Order No. 1 that our order for the shared initial advance on costs was "*without prejudice to the final decision of the Tribunal on the requested shifting of advances and other interim relief requested ...*".

56. Procedural Order No. 2 anticipates, but without restriction, that "*in the Initial Phase of this arbitration the Claimant will submit a request for interim measures to shift responsibility for the full advances on costs to the Respondent ... and the Respondent will submit an application for security for costs ...*".

57. Under the circumstances, in the interests of fairness and efficiency, we have determined to admit all seven of Rawat's specific requests for interim measures. The Parties' thorough submissions allow us to rule on all seven requests.

B. *Prima Facie* Jurisdiction of the Rawat Request

58. As a second preliminary and overarching matter, Mauritius submits that Rawat has failed to establish that the Tribunal has *prima facie* jurisdiction to hear his claims on the merits, which he must do before the Tribunal can order interim measures in his favor. Rawat insists that he has established such *prima facie* jurisdiction.

59. Rawat is a French national as well as a Mauritian national. Without prejudice to the Tribunal's ultimate decision on Mauritius' objection to jurisdiction related to his dual nationality, the Tribunal accepts that *prima facie* Rawat is a French investor and may benefit from the France-Mauritius BIT.

60. For reasons explained below, the critical issue of *prima facie* jurisdiction now before us turns on the interpretation of the MFN clause in the France-Mauritius BIT.

61. The Tribunal first sets out the relevant treaty provisions and then summarizes the Parties' contrary interpretive positions.

i. The Relevant BIT Provisions

62. The France-Mauritius BIT does not provide for a direct right of arbitration of a dispute between an investor and the host state under the treaty.

63. Article 9 does provide that investment contracts between an investor and the host state must include a dispute resolution clause providing for ICSID arbitration if amicable resolution cannot be reached:

> *Les accords relatifs aux investissements à effectuer sur le territoire d'un des Etats contractants, par les ressortissants, sociétés ou autres personnes morales de l'autre Etat contractant, comporteront obligatoirement une clause prévoyant que les différends relatifs à ces investissements devront être soumis, au cas où un accord amiable ne pourrait intervenir à bref délai, au Centre international pour le règlement des différends relatifs aux investissements, en vue de leur règlement par arbitrage conformément à la Convention sur le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats.*
>
> In free translation:
>
> *Agreements relating to investments to be made in the territory of one of the Contracting States by nationals, companies or other legal persons of the other Contracting State, must include a clause providing that their disputes relating to these investments shall be submitted, in the event that an amicable agreement cannot be reached within a short period of time, to the International Center for the Settlement of Investment Disputes, with a view to their settlement by arbitration, in accordance with the Convention on the Settlement of Investment Disputes between States and nationals of other States.*

64. The relevant MFN clause of the France-Mauritius BIT, Article 8 paragraph 2, provides (emphasis added):

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

In free translation:

> ***For the matters governed by[7] the present Convention*** *other than those referred to in article 7 [tax matters], investments made by nationals, companies or other legal persons of one of the contracting States shall also benefit[8] from all provisions more favourable than those of the present Agreement, which may result from international obligations already entered into or to be entered into by this other State with the first contracting State or third States.*

65. The MFN clause expressly applies to the "*matières régies par la présente Convention autres que celles visées à l'article 7*" (the matters governed by the present Convention other than those referred to in article 7). Article 9 of the France-Mauritius BIT refers to the obligation of the host States to include an ICSID arbitration clause in investment agreements.

66. Article 9 of the Finland-Mauritius BIT of 2007, executed almost 35 years after the France-Mauritius BIT, expressly includes a right for an investor to pursue arbitration directly against the host state:

> *1. Any dispute arising directly from an investment between one Contracting Party and an investor of the other Contracting Party should be settled amicably between the two parties to the dispute.*
>
> *2. If the dispute has not been settled within three months from the date on which it was raised in writing, the dispute may, at the choice of the investor, be submitted:*
>
> *(a) to the competent courts of the Contracting Party in whose territory the investment is made; or*
>
> *(b) to arbitration by the International Centre for Settlement of Investment Disputes (ICSID), ...; or*
>
> *(c) to any ad hoc arbitration tribunal which unless otherwise agreed on by the parties to the dispute, is to be established under the Arbitration*

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[7] Rawat translated the introductory clause of Article 8 paragraph 2 as "[f]*or the subject matter covered by this agreement*" (Notice of Arbitration, para. 70). Mauritius translated the same as "[f]*or the matters subject to the present Convention*" (Respondent's Answer to Rawat Request, para. 37). The Tribunal considers that the English verb "govern" more closely captures the French verb "régir" in the original text. The difference in translation is of little import, however, because the French text of the France-Mauritius BIT is the authentic text and the one relied upon by the Tribunal.

[8] We note that the French present tense of "*bénéficient*" denotes an existing imperative, as opposed to an obligation to do something in the future.

Rules of the United Nations Commission on International Trade Law (UNCITRAL).

67. In 2010, Mauritius and France entered into a new bilateral investment treaty, which also includes a right for an investor to pursue arbitration directly against the host state under the ICSID Rules.[9] France has not ratified the treaty, and it has not come into force.

ii. The Claimant's Position

68. It is Rawat's case that Mauritius consented to UNCITRAL arbitration of disputes arising between it and French investors in two steps:

(1) in 1973, by consenting to the MFN clause in the France-Mauritius BIT, Article 8; and

(2) in 2007, by consenting to the direct arbitration provision in Article 9 of the Finland-Mauritius BIT, fully aware of the MFN clause in the France-Mauritius BIT.

69. Rawat emphasizes that the determination of whether an MFN clause applies to dispute resolution mechanisms, on a *prima facie* or definitive basis, can only be done with reference to the particular clause. This is what the International Law Commission Study Group on the Most-Favoured-Nation Clause sets out in its 2015 Final Report (***ILC MFN Report***): "*the key question of ejusdem generis – what is the scope of the treatment that can be claimed – has to be determined on a case-by-case basis*".[10]

70. Rawat interprets the opening phrase of the MFN clause in the France-Mauritius BIT – "*les matières régies par la présente Convention*" – to apply to Article 9, the contractual investor-state dispute settlement provision of the France-Mauritius BIT, and to allow Rawat, as a French investor, also to benefit from – and be able to accept – the arbitration "offer" made by Mauritius to Finnish

[9] *Accord entre le Gouvernement de la République française et le Gouvernement de la République de Maurice sur l'encouragement et la protection réciproque des investissements, signé à Port-Louis le 8 mars 2010* (Exh R-14).

[10] Final Report of the Study Group on the Most-Favoured-Nation Clause, Adopted by the International Law Commission at its 67th session in 2015, and submitted to the UN General Assembly, para. 147 (Exh CLA-8) (*ILC MFN Report*).

investors in Article 9 of the Finland-Mauritius BIT and, by virtue of the MFN clause in the France-Mauritius BIT, to French investors as well.

71. Rawat argues, first, that this MFN clause is drafted in very broad terms, and falls into the broad ILC MFN Report category of MFN clauses referring to "*all treatment*" or "*all matters governed by the treaty*". Article 8 expressly excludes only tax matters from the scope of the MFN clause. There is no such exclusion of Article 9 addressing dispute resolution matters and, according to Rawat, it is therefore included.

72. Second, Rawat argues that investor-state arbitration in fact is expressly a "*matter subject to*" (or "*governed by*") the France-Mauritius BIT, because Article 9 provides that investments made in the territory of one of the two states by natural or legal persons of the other state are to include ICSID arbitration clauses in investment contracts.

73. Third, there is a strong line of investor-state treaty arbitration decisions recognizing that direct arbitration is essential to protect the investor's substantive rights in the treaty, and hence procedural protections fall within language such as "*all matters governed by the treaty*". Rawat cites the tribunal in the *Maffezini v Spain* case:

> *Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors ....*[11]

74. Rawat submits that these interpretive arguments are sufficient to meet the *prima facie* standard for an order of interim measures, recognizing that the Tribunal is not to make a final determination of jurisdiction at the interim measures stage. He relies on the recent case of *Menzies v Senegal*, first mentioned by Mauritius, in which the tribunal found that it had *prima facie* jurisdiction to decide on interim measures sought by the claimant on the basis of the MFN provision in Article II of the General Agreement on Trade in

[11] *Emilio Augustin Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7 (Decision of the Tribunal on the objections to jurisdiction dated 25 January 2000), pp. 20-21 (Exh CLA-10) (***Maffezini v Spain***).

Services.[12] That the *Menzies v Senegal* tribunal ultimately found that it lacked jurisdiction, says Rawat, does not undermine the importance of its decision on *prima facie* jurisdiction to get to that stage of the case.

iii. The Respondent's Position

75. As set out in its Supplementary Submission on *Prima Facie* Jurisdiction (para. 2), Mauritius argues that the relevant test for determining *prima facie* jurisdiction to grant interim measures here is "*to consider whether the underlying BIT contains a dispute resolution clause incorporating the parties' consent to arbitrate*". The France-Mauritius BIT does not. Article 9 of the treaty envisions only contractual investor-state ICSID arbitration based on specific consent in each relevant investment agreement. The MFN clause in the treaty – however broad – cannot on its own create the necessary standing consent to direct investor-state arbitration under the treaty.

76. Mauritius distinguishes *Maffezini v Spain* and its progeny, in which claimants were allowed to import some more favorable aspect of a direct investor-state arbitration clause in another treaty by invoking the MFN clause in the relevant base treaty, on the ground that the base treaty in each and every case contained a clause expressly giving investors the right to initiate arbitration directly against the host state. The France-Mauritius BIT does not contain such a clause.

77. Mauritius emphasizes that the state's consent to arbitration is "*the cornerstone of an arbitral tribunal's imperium*" (Supplemental Submission, para. 9). To emphasize the importance of consent, Mauritius cites the ICJ in the *Case Concerning Mutual Assistance in Criminal Matters*:

> *whatever the basis of consent, the attitude of the respondent State must be "capable of being regarded as 'an unequivocal indication' of the desire of that State to accept the Court's jurisdiction in a 'voluntary and indisputable' manner".*[13]

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[12] *Menzies Middle East and Africa S.A. et Aviation Handling Services International Ltd. v Republic of Senegal*, ICSID Case No. ARB/15/21, 6 August 2016, Procedural Order 2, 2 December 2015, paras. 111-112 (Exh RLA-39) (***Menzies v Senegal***).

[13] *Case Concerning mutual assistance in criminal matters (Djibouti v France)*, Judgment, 4 June 2008, (2008) I.C.J. Reports 177, para. 62 (Exh RLA-49).

78. In investor-state arbitration, the requirement of consent is mandatory. As stated by the tribunal in *Menzies v Senegal*, the requirement "*flows from the respect of the sovereignty of States and the principle that under international law, States' consent to arbitration is the exception and not the rule.*"[14]

79. Absent a clause in the France-Mauritius BIT, as the base treaty, providing for a direct right of French investors to commence arbitration against Mauritius, Rawat simply cannot rely on the MFN clause in Article 8 to benefit from the direct investor-state arbitration clause in the Finland-Mauritius BIT (or in any other French BIT) to establish jurisdiction *ratione voluntatis*. The silence means that direct investor-state dispute settlement, as opposed to contractually-agreed ICSID arbitration, is not and cannot be among the "*matters subject to the present Convention*".

80. Accordingly, Mauritius argues that the Tribunal lacks jurisdiction, even on a *prima facie* level, to grant the interim measures Rawat seeks.

iv. The Tribunal's Decision and Analysis

81. The central interpretation question posed to the Tribunal is the scope of "*les matières régies par la présente Convention*" in the MFN clause of the France-Mauritius BIT and, in specific, whether the "*matière*" in Article 9 of the France-Mauritius BIT is "contractual ICSID arbitration", "investor-state dispute settlement" or otherwise, and whether that "*matière*", once defined, can be considered *ejusdem generis* with the "*matière*" in Article 9 of the Finland-Mauritius BIT, as also to be defined, it being recalled that this provision includes a direct right to investor-state arbitration.

82. In other words, to grant the interim measures Rawat seeks in this Initial Phase, the Tribunal would have to decide whether, as a *prima facie* matter, the MFN language in Article 8 of the France-Mauritius BIT is capable of extending to French investors the offer of direct arbitration made by Mauritius to Finnish investors in Article 9 of the Finland-Mauritius BIT and thus, by hypothetically allowing French investors to accept the offer through the MFN clause in the France-Mauritius BIT, can be interpreted to constitute Mauritius' consent to UNCITRAL arbitration. The Tribunal focuses in its analysis on the specific

[14] *Menzies v Senegal*, *supra* note 12, para. 130 [translated by Respondent].

terms of the treaties,[15] to be interpreted pursuant to Articles 31 and 32 of the Vienna Convention on the Law of Treaties (***VCLT***).

83. As a preliminary matter, we note that many international decisions addressing *prima facie* jurisdiction are concerned with the question of whether the facts alleged by a claimant, if assumed to be true without regard to the respondent's jurisdictional defenses, would amount *prima facie* to a breach of the claimant's substantive treaty rights within the limits of the tribunal's jurisdiction. Here, the very question before us concerns the limits of our jurisdiction, and so the "*prima facie*" issue arises at an earlier stage. The question is not whether Rawat's claims, if assumed true, would constitute breaches of the France-Mauritius BIT – it is apparent that they would. The question is whether the Tribunal has jurisdiction at all, via the MFN clause in the France-Mauritius BIT.

84. This has proven to be a difficult question, not answerable by categorical positions. There are many cases in which claimants bringing claims under base treaties with clauses expressly providing in some way for direct investor-state arbitration – including, for example, an 18-month "cooling off period" or a local remedies requirement – have obtained the benefit of better elements of arbitration from other host state BITs – for example, a shorter "cooling off period" or waiver of a local remedies avenue[16] In comparison, counsel for the Parties have been unable to point the Tribunal to any decision in which an investment tribunal tasked with interpreting a BIT without any direct investor-state arbitration clause has found jurisdiction on the basis of an MFN clause in the base treaty, thereby allowing an investor effectively to accept an arbitration offer made by the host state to investors of a third state.[17]

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[15] We agree with the conclusions of the Study Group in the ILC MFN Report, *supra* note 10 at para. 215, that "[t]*he application of MFN clauses to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, brought a new dimension to thinking about MFN provisions and perhaps consequences that had not been foreseen by parties when they negotiated their investment agreements. Nonetheless, the matter remains one of treaty interpretation*".

[16] For example, *Impregilo v Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011.

[17] The *Menzies v Senegal* tribunal found *prima facie* jurisdiction at the interim measures stage in the absence of any arbitration agreement in the base treaty including the MFN clause, the General Agreement on Trade in Services Agreement, although it ultimately denied jurisdiction in its award. The Tribunal notes, however, that the *Menzies v Senegal* tribunal did not order interim measures that went beyond an order for non-aggravation of the dispute, something international law provides for in any event (*supra* note 12, para. 134).

85. Nor, however, have counsel for the Parties been able to point us to any decision interpreting a base treaty providing for contractual investor-state arbitration but not direct investor-state arbitration. This seems to be a case of first impression in investment treaty interpretation.

86. After full consideration, and despite the high quality of the Parties' written submissions to date, including the assistance of the requested submissions on the issue of *prima facie* MFN jurisdiction, the Tribunal decides that a finding of *prima facie* jurisdiction is unnecessary to dispose of the applications, because we have determined to deny the applications on non-jurisdictional grounds.

87. We address arrangements for the next jurisdictional phase at the end of Section V.C below. The Parties will then be able to complete their jurisdictional briefings on what is a complex issue of treaty interpretation under the VCLT.

C. The Costs Advance Measures

88. The heart of the Rawat Request, and the focus of most of the Parties' attention, is on Rawat's request that Mauritius pay his equal half share of the advance on costs – if not for the full proceedings, then at least for this Initial Phase and the next jurisdiction phase – either directly or indirectly by unfreezing certain of his assets or otherwise facilitating his efforts to obtain financing.

89. Again, the Parties take squarely contrary positions.

i. The Claimant's Position

90. Rawat takes the position that Mauritius should fund the entire advance on costs, even though he is the claimant, because it was Mauritius' misappropriation of his assets that has left him unable to contribute. In the Request for Interim Measures (para. 96), he alleges that Mauritius' conduct "*aims at preventing* [him] *from financing the arbitration proceedings and thereby from exercising his basic right to access justice*", thereby "*caus*[ing] *harm to the arbitral process*".

91. Rawat alleges that, as a consequence of the wrongful freezing of personal and professional assets in Mauritius, he "*does not have any assets available for living with the exception of the ones located in foreign countries*" (Rawat Request, para. 60). These include an apartment in London, which he has been obliged to sell, and real property owned by his wife. Further, "*the freezing of members of his close family's assets prevent him from seeking financial support*

from them" and he was forced to borrow the € 50,000 for his advance on costs for this Initial Phase from friends (Rawat Request, paras. 61-62).

92. Rawat argues that, under the circumstances, it is imperative that the Tribunal order Mauritius to pay the advance on costs for the entire proceedings or for a next jurisdictional phase, or to facilitate his payment of such advance by unfreezing certain bank accounts and/or real properties. He commits to use such unfrozen funds only for these arbitration proceedings. As a further alternative, he seeks release of the documents underlying the nTan Report to facilitate his arranging third party financing.

93. In the words of Article 26.1 of the UNCITRAL Rules, Rawat argues that it is "*necessary*" for Mauritius to fund or assist him to fund the advance on costs, or his substantive treaty rights will go unprotected. He relies upon *Quiborax v Bolivia*:

> *In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute, but may extend to procedural rights ....*
>
> *The rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal ....*[18]

94. Rawat argues that he will suffer irreparable harm if Mauritius does not fund this arbitration or at least unfreeze enough of his allegedly wrongfully frozen assets in Mauritius to allow him to pay the advance on costs himself. In the Rawat Request (paras. 10 and 30), he explains that he originally desired to seek restitution, but the *fait accompli* of Mauritius' sale and transfer of his assets has left him with no choice but to seek monetary damages. Therefore, Mauritius' argument that his monetary damages claim demonstrates that the harm alleged is *per se* reparable, by indemnity, is an "*absolute non sense*"; it is his position that the harm he faces is precisely being barred from proceeding with the arbitration (Reply to Respondent's Answer, para. 74). Where the right to be protected is his right to access justice, the potential harm is the very impossibility of ever obtaining the damages claimed.

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[18] *Quiborax S.A. Non Metallic Minerals S.A. and Allan Fosk Kaplan v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, paras. 117-118 (Exh CLA-5) (***Quiborax v Bolivia***).

95. Looking to the balancing of interests between the Parties, Rawat argues that his fundamental right to access justice substantially outweighs Mauritius' potential right to be able to collect costs if its defenses prove successful.

ii. The Respondent's Position

96. Mauritius contends that Rawat has failed to show that he is seeking the protection of a right capable of being protected by way of interim measures. Absent consent by Mauritius to arbitrate in the France-Mauritius BIT, Mauritius is not obliged to provide a corresponding legal right to access arbitral justice before an international tribunal.

97. Mauritius argues that Rawat's refusal to pay his share of the advance on costs is a breach of his own purported consent to arbitrate this dispute. Such consent brings with it an obligation to comply with Article 41.1 of the UNCITRAL Rules, which calls for equal deposits by both parties. Mauritius recognizes that Article 41.4 on its face gives UNCITRAL tribunals discretion to request either party to make the full advance should the other party refuse to pay its half share, but emphasizes that there is not one instance of a BIT tribunal requiring the respondent state – as compared to the claimant investor – to fund the entire advance on costs.

98. In the Answer to the Rawat Request (para. 8), Mauritius emphasizes the dangers posed should the Tribunal order such unprecedented relief:

> *Allowing a shift of the burden to bear the total advance on costs on to the Respondent, or any measure akin thereto, would in fact set a dangerous precedent in investor-state arbitration. It would in effect relieve claimants from any litigation risk, provided they could submit prima facie evidence of their impecuniosity. Claimants could even be incentivized to organize their insolvency or impecuniosity, for instance by putting their personal assets in the name of relatives, as Mr Rawat did. The end result would be that respondent states facing frivolous claims, as Mauritius in this case, would have to fund these cases on tax payers' money.*

99. Even if the Costs Advance Request is a proper matter for interim relief, argues Mauritius, Rawat has failed to show that the relief requested is necessary for purposes of Article 26 of the UNCITRAL Rules.

100. First, Rawat cannot show irreparable harm because he is seeking relief only in the form of monetary damages. Mauritius cites the *Menzies v Senegal* tribunal in support of this argument:

> *as the Claimants requested to be compensated for their loss and did not make a request for specific performance, the Arbitral Tribunal infers therefrom that they consider their loss as reparable by the award of monetary damages. ... The Arbitral Tribunal thus considers that the harm invoked by the Claimants is not irreparable.*[19]

101. Second, Rawat cannot show urgency as he has not demonstrated exhaustion of all options to finance his case. He admits, in the Rawat Request (para. 60), that he owns assets in his own or his wife's names. He has chosen not to seek extensions of time to obtain financing to pay his share of advances.

102. Third, the balance of the Parties' respective interests falls on Mauritius' side, as it has the greater interest – on behalf of its tax payers – in recovering its share, as well as Rawat's share, of the costs should the Tribunal accept its defenses and rule in its favor. (This argument overlaps with Mauritius' own Application for Security for Costs, discussed below.)

103. Finally, the Costs Advance Request is inseparable from Rawat's case on the merits – Mauritius' alleged misappropriation of and interference with his assets – and so the Tribunal cannot grant the requested measures without prejudging the merits. Mauritius relies on the outcome of the *Transglobal Green Energy v Panama* arbitration, where the tribunal denied Panama's application to shift the arbitration costs to the claimants because of the risks posed by the claimants' financial difficulties, which were allegedly due to Panamanian actions:

> *As regards the financial condition of the Claimants, it is a contentious matter between the Parties whether such condition is the result of alleged measures of Respondent subject of this arbitration.... At this very early stage of the proceedings it would be premature for the Tribunal to make a determination on the financial condition of Claimants and the extent to which it may or may not be the result of Respondent's measures.*[20]

104. Mauritius resists Rawat's requests that it unfreeze the bank accounts and/or real property he designates in his Request for Relief. Even if those requests are admissible, the decisions to freeze those assets have been made by independent Mauritian courts in an ongoing criminal investigation. Furthermore, if those

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[19] *Menzies v Senegal, supra* note 12, Procedural Order No. 2, paras. 120-121 [translated by Respondent].

[20] *Transglobal v Panama, supra* note 6.

assets were released to Rawat to fund this arbitration, it would be to the prejudice of creditors.

105. Mauritius also resists Rawat's request for production of documents underlying the nTan Report. Even if the request were admissible, Rawat has not submitted any evidence that such documents would improve his position vis-à-vis third party funders.

iii. The Tribunal's Analysis and Decision

106. The issue before the Tribunal is whether Mauritius can and should be made responsible to fund – either directly or indirectly – the entire advance on costs for the entire proceedings, or initially for the next jurisdictional phase, in an arbitration it is defending.

107. The applicable rules are technically straightforward. Article 41.1 of the UNCITRAL Rules authorizes a tribunal to direct the parties to deposit the advance on costs in equal shares. Pursuant to Article 41.4, if one party does not pay its deposit within 30 days, "*the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment*".

108. As far as the Tribunal is aware, and with the assistance of the Parties' counsel, no other tribunal has ordered the respondent state to pay the investor's share of the advance on costs for a BIT arbitration. The reported decisions all concern decisions ordering the claimant – the party that commenced the arbitration – to pay the respondent state's share of the advance on costs.

109. Rawat acknowledges this, but differentiates his situation by presenting his Costs Advance Requests under the umbrella of the alleged right to protected access to arbitral justice. As such, Rawat's claims based on his impecuniosity skate very close to the merits of his case, which turn on whether Mauritius violated the France-Mauritius BIT by freezing and taking other actions depriving him of his assets in Mauritius. This is, to a certain degree, inherent in the process of assuming the facts as alleged by Rawat to be true (which we do), at this preliminary stage.

110. Having considered both Parties' positions on this vigorously contested issue, the Tribunal finds that it does not need to decide Mauritius' defense that the Costs Advance Requests do not engage rights capable of being protected with interim measures. This is because we find that Rawat has not proven, on a

balance of the probabilities, that he meets the separate requirements of urgency and irreparable harm to his rights in this arbitration.

111. In our view, Rawat has not sufficiently demonstrated that he has exhausted the options available to finance his case, at least through the next jurisdiction phase. We are not convinced Rawat does not have short-term access to sufficient funds to pay his share of the next advance on costs to cover a focused jurisdiction phase, in which the Parties are to make additional submissions on the MFN issue, the dual nationality issue, and any other jurisdictional issues. We cannot ignore the fact that Rawat was successful in obtaining funds to pay the first deposit of € 50,000 on the advance on costs for the Initial Phase, and that he has succeeded in having his lawyers make substantial filings in the case thus far.

112. We recognize Rawat's argument that it is circular for Mauritius to argue that he admits he will suffer no irreparable harm by pursuing only monetary damages, when he allegedly is impecunious because of Mauritius' own misappropriation of his assets, and so cannot fund the arbitration necessary to attempt to recoup damages for that alleged misappropriation. But this is the situation faced by any investor claimant in a similar situation. If Mauritius were required to fund the proceedings, it would protect Rawat from all litigation risk, at the expense of the Mauritian tax payers.

113. We also find no basis for Rawat's alternative requests that Mauritius be ordered to fund his share indirectly by unfreezing the bank accounts and/or the real property identified in his Request for Relief. In any event, to order such an interim measure would risk crossing the border into the merits of the case, as unfreezing the relevant assets would in effect provide to Rawat the first instalment of the relief he seeks on the merits.

114. Nor can we find any basis for Rawat's request that we order Mauritius to release the documentation underlying the nTan Report to assist him in obtaining third party funding for this arbitration. Rawat has not supported this request with particulars as to the identity of allegedly interested funders, or the information they require to complete their necessary due diligence.

115. In our view, this document production request would in any event more appropriately be made at the merits phase of the arbitration, if the case reaches that phase and Mauritius has not voluntarily produced the requested nTan documents.

116. Under the circumstances, the Tribunal will establish the next advance on costs for the jurisdictional phase at € 200,000, which should be sufficient to cover the full expenses of the Initial Phase and to allow the Tribunal to consider the Parties' full written submissions and, if requested, oral submissions in a short hearing. We accordingly direct the Parties to arrange for the PCA to continue to provide depository services, and to each deposit € 100,000 with the PCA within 60 days.

117. Our determination is without prejudice to Rawat's resubmitting his Costs Advance Requests if he is unable to obtain funds sufficient to make his share of the requested deposit within 60 days, and is able to prove that he has exhausted reasonable funding avenues.

D. The Retaliation and Aggravation Measures

118. Rawat combines the arguments supporting his requests for interim measures of protection against Mauritius' alleged retaliation against him and his family, and against Mauritian actions aggravating the dispute. The Tribunal accordingly addresses the Retaliation and Aggravation Measures together.

i. The Claimant's Position

119. In the Request for Relief in his Request for Interim Measures (para. 102), Rawat seeks an order from the Tribunal ending all retaliation measures against him and his family members, by:

> *enjoining the Republic of Mauritius, directly and through any entity it controls – including for the avoidance of doubt, entities and persons appointed as "Special Administrator", "Receiver", "Conservator" or otherwise – to stop the Retaliation Measures against the Investor and Members of his family, including ... the stay of the conditions to the bail imposed and the Objection to Departure concerning Adeela Rawat, Laina Rawat, Claudio A.S. Feistritzer and Brian Burns.*

120. As briefly described in Section III above, this alleged retaliation campaign includes the criminal charges, travel bans and orders that have frozen certain assets of his daughters and sons-in-law; the termination of his relatives' employment by BAICM Group special administrators; the civil suits brought against Rawat and other BAICM Group directors; and a media campaign

against Rawat and his family. Rawat supports these allegations with witness statements and documentary evidence.[21]

121. In the Request for Relief (para. 104), Rawat also requests the Tribunal to enjoin Mauritius (emphasis in original):

> ***to refrain from taking any measure or action that would have the effect of aggravating the dispute****, including but not limited to, any further retaliatory measures and media campaign against the Investor, any member of his family and their respective property until the Tribunal has issued a final award in the instant case.*

122. Rawat connects the necessity for the Retaliation and Aggravation Measures sought to his overall argument based on denial of access to arbitral justice. He submits that the Mauritian legal proceedings and negative media campaign have left him and his family impecunious, and have so compromised his reputation that he can no longer obtain external financing.

123. These Requests also overlap with his Costs Advance Request in relation to the nTan Report. He alleges that Mauritius' actions have prevented him from obtaining third party funding, in particular the public distribution of the nTan Report without release of the underlying BAICM financial documentation that Mauritius confiscated.

124. To demonstrate the necessity for the Retaliation and Aggravation Measures under Article 26.1 of the UNCITRAL Rules, Rawat relies on the arguments made in connection with the Costs Advance Measures as to urgency, irreparable harm, and balancing of interests. As summarized in the Request for Interim Measures (para. 55), he submits:

> *The suspension of the legal proceedings and retaliation measures requested by* [him] *is necessary to safeguard the fairness and the integrity of the arbitral process and to insure the non-aggravation of the dispute.*

[21] By letter to the Tribunal dated 7 September 2016, counsel for Rawat objected that the paucity of factual evidence in the Mauritius Application violated paragraph 4.3 of Procedural Order No. 2, which requires Parties to identify the evidence adduced or to be adduced in the submissions in support of their cases. This requirement was not meant to apply to this Initial Phase, in which we are to assume the truth of facts alleged in relation to the Parties' interim measures applications.

ii. The Respondent's Position

125. In reply, Mauritius argues that there are no justifiable grounds for the Tribunal to order the Retaliation and Aggravation Measures. Neither Rawat, who is outside of Mauritius, nor his relatives are under any direct or immediate threat that could justify the granting of interim measures under the necessity standard of Article 26.1 of the UNCITRAL Rules.

126. Mauritius emphasizes that none of Rawat's relatives is being held in custody, all have been given the opportunity to be heard in court, and all have been given appropriate access to assets for living expenses. Among other things, the Laina Rawat Declaration records that she reached a settlement with the administrator for Bramer Bank, allowing her to transfer funds in her name.

127. It is Rawat's decision, says Mauritius, not to return to Mauritius to defend himself in the investigation and court proceedings. Given that decision, there is no urgency in his request for interim measures and no showing whatsoever of irreparable harm from the status quo.

iii. The Tribunal's Analysis and Decision

128. The Tribunal's assessment of Rawat's requests for the Retaliation and Aggravation Measures need not be lengthy. His arguments in support of these requests are derivative of those made in support of his requests for the Costs Advance Measures, which we have rejected as not meeting the necessity standard for interim measures.

129. Even assuming as true all the facts Rawat alleges concerning retaliatory Mauritian criminal investigations, the freezing of his and his family's assets, the termination of his relatives' employment, and a negative media campaign, the Tribunal perceives no threat entailing a risk of irreparable harm to his or his family interests in relation to these proceedings. Should Rawat ultimately prove that Mauritius has taken retaliatory actions against him or his family in violation of the France-Mauritius BIT, any harm proven will be reparable via the monetary damages he claims.

130. For the avoidance of doubt, the Tribunal sees no need for any further procedural action concerning the Laina Rawat Declaration. That Declaration is now in the record and, as stated in our Procedural Direction of 22 October

2016, "*we will give it — like all the evidence in the record — appropriate weight in our future analysis and decisions*".

131. Nor does the Tribunal see any need for any further procedural action concerning the former residence and Villa La Preneuse that Rawat inquired about through these proceedings. Mauritius has reported that those two properties were not and are not on the relevant list of Court-ordered frozen properties, although Rawat may have made them subject to creditor claims.

132. This being said, the Tribunal recalls the general legal principle requiring each party to a dispute to avoid any action that might prejudice the rights of the other party in respect of the fulfilment of any future tribunal decision on the merits, and to avoid any action of any kind, including media statements, that might aggravate or extend the dispute.[22] This principle applies to the parties at all stages of arbitration, independently of the criteria for ordering other interim measures. Without prejudice to the public to be informed fairly and accurately of developments, the Tribunal expects both Parties to abide by this principle.

VI. MAURITIUS' APPLICATION FOR SECURITY FOR COSTS

133. In its Application for Security for Costs, in the amount of € 3 million, Mauritius makes the following Prayers for Relief:

a) *to order the Claimant to provide security for the Respondent's costs of these proceedings in the amount of EUR 3 million, as the case may be in stages:*

- *In the form and terms indicated in Annex 1 of this Application for Security [Model Bank Guarantee];*
- *Alternatively, in the form and terms indicated in Annex 2 of the Application for Security [Model Escrow Agreement]; or*

[22] For example, *Quiborax v Bolivia*, *supra* note 18, paras. 132-138; *Electricity Company of Sofia and Bulgaria* (*Belgium v Bulgaria*), Order of 5 December 1939, PCIJ series A/B, No. 79, p. 199; *Amco Asia v Indonesia*, Decision on Request for Provisional Measures of 9 December 1983, ICSID Reports, 1993, p. 192; *Victor Pey Casado & Fundación Presidente Allende v Chile*, Decision on Provisional Measures, ICSID Case No. ARB/98/2, 25 September 2001, para. 67 (Exh RLA-5).

- *Alternatively, in any other form and terms deemed appropriate by the Tribunal;*

b) *In any event, to declare that the present proceedings will be immediately terminated with prejudice, in case of non-compliance by the Claimant;*

c) *to order the Claimant to pay the Respondent's costs of this Application.*

134. In many respects, the Parties' arguments on the Mauritius Application duplicate their arguments on the Rawat Request. The discussion below can therefore be relatively succinct.

135. As a preliminary matter, the Parties agree that, like any interim measure, an order for security for costs is warranted only if Mauritius can show that security for costs is necessary, urgent, required to prevent irreparable harm and required by exceptional circumstances.

136. Mauritius further submits that, as compared to the Rawat Request, the Tribunal need not have jurisdiction to order security for costs, because it is well established that respondent states are not required to demonstrate or agree to the tribunal's *prima facie* jurisdiction to obtain security for costs. Mauritius cites the assenting opinion of Dr Gavan Griffith QC in the security for costs decision in *RSM v St Lucia* in support.[23]

A. The Respondent's Position

137. As set out at the opening of the Mauritius Application (para. 2), Mauritius bases its Application on Rawat's "*acknowledgement that he will not be able to, and thus will not, pay his share of the costs deposit to be ordered by the Arbitral Tribunal for the conduct of the proceedings pursuant to Article 41.1 of the UNCITRAL Rules*". Mauritius submits that this is a breach of Rawat's purported consent to arbitrate, which justifies termination of the proceedings under Articles 34.2 and 41.4 of the UNCITRAL Rules. Mauritius maintains its

[23] *RSM Production Corporation v. Saint Lucia*, Decision on Saint Lucia's Request for Security for Costs, ICSID Case No. ARB/12/10, 13 August 2014, Assenting Opinion of Dr Gavan Griffith QC, paras. 4-6 (Exh RLA-8).

request that the Tribunal terminate these proceedings immediately if Rawat fails to pay any advance on costs ordered by the Tribunal.

138. Mauritius argues that Rawat's admission that he cannot pay any further advance on costs *a fortiori* amounts to an exceptional admission that he will not satisfy any adverse costs award. This suffices, says Mauritius, to satisfy the necessity test for an order for security for costs, because, without such early protection, there is every possibility that Mauritius will suffer the irreparable harm of never being able to recover the costs expended to defend itself. Mauritius again relies on the example of the *RSM v St Lucia* tribunal awarding security for costs in favor of St Lucia.

139. Mauritius also contends that it has established an arguable defence to Rawat's claim, in particular on jurisdiction, and the general principle of costs following the award ensures the possibility that Mauritius will be awarded costs. Therefore, argues Mauritius, the Tribunal need not prejudge the outcome on jurisdiction or the merits to protect Mauritius here with security for costs.

B. The Claimant's Position

140. Rawat does not dispute that he does not have the financial capacity to fund this arbitration, as evidenced by the fact that he had to borrow funds from friends to pay his initial € 50,000 share on the advance on costs. He also does not dispute that he has been unable to secure external financing.

141. Rawat relies, however, on the proposition that mere financial difficulties of a party do not constitute the necessarily exceptional circumstances that would justify an order of security for costs against him. Rawat also cites the *RSM v St Lucia* case, which is the sole case in which an investment treaty tribunal has ordered security for costs against a claimant.

142. Rawat argues that Mauritius has not demonstrated a risk that it will suffer irreparable harm. This is because, by seizing and freezing all of his personal and professional assets, Mauritius has effectively created for itself a *de facto* security for costs. Mauritius is now in the position of being able to sell his assets and thereby recover any costs.

143. In light of Mauritius' self-redress for costs, Rawat argues in his Answer to the Mauritius Application (para. 44) that an order for security for costs against him would be would be a "*triple penalty*". He would not only be denied his assets,

but also prevented from accessing his assets to finance the arbitration and obliged to find more funds to finance a security for costs order.

C. The Tribunal's Analysis and Decision

144. The Tribunal is not prepared to order security for costs in Mauritius' favor against Rawat at this juncture. As far as we are aware, the *RSM v St Lucia* tribunal stands alone in ordering security for costs against a claimant in an investment treaty arbitration. The tribunal reached its decision on the basis of a panoply of exceptional circumstances, including first and foremost the claimant's proven history of failing to comply with costs orders and awards, and, incidentally, uncertainties posed by the claimant's unidentified third party funder.

145. We do not find that Rawat's impecuniosity is sufficient to create the exceptional circumstances necessary to order security for costs. Our determination is not based on Rawat's allegations that Mauritius has access to funds belonging to him to satisfy any ultimate costs order against him. Our determination is without prejudice to Mauritius resubmitting this application should future developments so warrant.

146. The Tribunal also denies Mauritius' prayer for a declaration that the proceedings are to be immediately terminated if Rawat fails to comply with the Tribunal's decision that it deposit one-half of the advance on costs for the jurisdictional phase. Again, this decision is without prejudice to Mauritius re-submitting this application should future developments so warrant.

VII. ORDER

For the foregoing reasons, the Tribunal orders as follows:

(1) The Respondent's request to deny as inadmissible all of the Claimant's specific requests for interim measures except the request for shifting to Mauritius the responsibility to fund the entire advance on costs, as falling outside of the scope of this Initial Phase as determined in Procedural Orders No. 1 and No. 2, is denied.

(2) The Claimant's Request for Interim Measures, including all of the specific requests for interim measures, is denied, with leave to re-apply.

(3) The Respondent's Application for Security for Costs is denied, with leave to re-apply.

(4) The Tribunal sets the advance for costs for the next jurisdiction phase at € 200,000. The Parties are to liaise with the Permanent Court of Arbitration (***PCA***) to continue its depository services for the jurisdiction phase. Subject to Rawat's leave to re-apply, each Party is to deposit its half-share of € 100,000 for the jurisdiction phase with the PCA within 60 days of the date of this Order.

(5) Upon confirmation from the PCA that the entire advance on costs for the jurisdiction phase has been deposited, the Tribunal will schedule a further procedural conference call to establish the procedural timetable for the jurisdiction phase.

(6) The allocation of costs in relation to this Initial Phase is reserved.

(7) All other requests for relief are denied.

Place of arbitration: Brussels, Belgium

Date: 11 January 2017

On behalf of the Tribunal:

Lucy Reed
Presiding Arbitator