

**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