

2012 Foreign Direct Investment International Arbitration Moot

Max Solutions, Inc.
(Applicant/Claimant)

v.

Bela Rano Insularo
(Respondent)

BENCH BRIEF*

Introduction

Max Solutions has applied to the *ad hoc* Committee to annul the award dated 29 July 2009 in *Max Solutions v. Bela Rano Insularo* (the *Award*). In the Award, the tribunal declined jurisdiction over Max Solutions' claim against Bela Rano Insularo (*BRI*) under the Oscania-BRI BIT on the basis that Max Solution's frog removal contract with BRI "fails to meet the requirements of the ICSID definition of "investment"". ¹

Max Solutions has ~~raised five~~ applied to the *ad hoc* Committee on five grounds for the annulment of the Award. ²

Formatted: Font: Italic

1. The tribunal was not properly constituted, as the initial challenge to Dr. Iracunda should have been successful.
2. The tribunal exceeded its powers in declining jurisdiction, as the ICSID Convention does not require that an "investment" contribute to the development of the Host State.
3. The annulment committee has the power, through Articles 41(2) and 52(4) of the ICSID Convention, to decide whether the transaction in question qualifies as an "investment" under the ICSID Convention, as this is an issue that goes to the jurisdiction of the Centre, not of the tribunal.
4. Even if a contribution to the Host State's development is considered to be essential to an ICSID "investment", the transaction in question meets this standard, as the

* This Bench Brief provides an outline of the issues and arguments that are likely to be raised in the oral rounds. It is not intended to be exhaustive or to provide definitive answers. The Bench Brief was prepared by Daniel Barbosa, Jonathon Egerton-Peters, Pedro Martini and Andrew Newcombe.

¹ Line 800.

² Lines 197-215.

point of the contract was to eliminate a problem that was preventing Bela Rano Insularo's development.

5. The tribunal's decision not to exclude Dr. Ranapuer's Expert Report constituted a serious departure from a fundamental rule of procedure.

Each of the five grounds is addressed below, after a brief overview of general principles governing annulment.

Annulment under the ICSID Convention – General Principles

The recently released *Background Paper on Annulment for the Administrative Council of ICSID* dated 10 August 2012 (***Background Paper***)³ prepared by the ICSID Secretariat highlights that annulment is a limited and exceptional remedy—the finality of ICSID arbitration awards is a fundamental goal for the ICSID system.⁴

The Background Paper provides a helpful, up to date, and authoritative summary of a number of established principles relating to annulment proceedings under Article 52:⁵

- (i) The grounds listed in Article 52(1) are the only grounds on which an award may be annulled.
- (ii) Annulment is an exceptional and narrowly circumscribed remedy and the role of an *ad hoc* Committee is limited.
- (iii) *Ad hoc* Committees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* Committee cannot substitute the Tribunal's determination on the merits for its own.
- (iv) *Ad hoc* Committees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards.
- (v) Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly.
- (vi) An *ad hoc* Committee's authority to annul is circumscribed by the Article 52 grounds specified in the application for annulment, but an *ad hoc* Committee has discretion with respect to the extent of an annulment, *i.e.*, either partial or full.

³ Online:

<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShowDocument&DocId=DCEVENTS11>

⁴ Background Paper, paras. 72 and 74.

⁵ The Background Paper at para. 75 enumerates these principles, accompanied by excerpts of annulment decisions confirming the relevant principle.

The Background paper notes that:

The task of an *ad hoc* Committee should also be assessed in the overall context of the ICSID case load. In its 47 year history, ICSID registered 344 cases and issued 150 awards. Of these, 6 awards have been annulled in full and another 6 awards have been partially annulled. In other words, only 4 percent of all ICSID awards have led to full annulment and 4 percent have led to partial annulment.⁶

The principles set out above and the empirical data highlight that the bar for a successful annulment application is very high.

Ground 1: The tribunal was not properly constituted, as the initial challenge to Dr. Iracunda should have been successful.

ICSID Convention Article 52(1)(a) provides that a party may request annulment on the ground “that the Tribunal was not properly constituted”.

The Background Paper notes that:

The drafting history of the ICSID Convention indicates that the ground of improper constitution of the Tribunal was intended to cover situations such as a departure from the parties’ agreement on the method of constituting the Tribunal or an arbitrator’s failure to meet the nationality or other requirements for becoming a member of the Tribunal.⁷

Applications for annulment under Article 52(1)(a) are not common—the ground has been raised in only four cases.⁸ Three Committees rejected the allegation based on this ground.⁹ In *Sempra*, the *ad hoc* Committee did not address the ground, as it had already decided to annul the award in full based on another ground.¹⁰

The Background Paper highlights:

The 4 decisions indicate that annulment applications based on this ground are likely to succeed only in rare circumstances. One annulment decision [*Azurix*] held that the *ad hoc* Committee’s role is limited to considering whether the provisions concerning constitution of the Tribunal were respected in the original proceeding, and did not extend to matters such as review of the Tribunal’s decision on a request for disqualification of a Tribunal member under Article 58 of the Convention. *Ad hoc* Committees have also indicated that a party with knowledge of an alleged improper constitution of the Tribunal in the original proceeding who fails to raise such issue may be taken to have waived its right to raise this as a ground for

⁶ Para. 112.

⁷ Para. 78.

⁸ *Vivendi II* and *Azurix Corp v. The Argentine Republic*.

⁹ *Vivendi II*; *Azurix*; and *Transgabonais*.

¹⁰ See Background Paper, para. 80.

annulment.

Applicant

- Applicant will argue that the Tribunal was not properly constituted because Dr. Iracunda (*Iracunda*) did not “exercise independent judgment” as required by Article 14(1), ICSID Convention and the challenge application should have been successful. **Note:** Both parties accept that, although the ICSID Convention only refers to “independence”, the term refers to the traditional notions of both “independence” and “impartiality”.¹¹
- Applicant will likely highlight that the obligation to exercise independent judgment is ongoing. A determination that Iracunda had the capacity for independent judgment does not mean that capacity continued and was exercised throughout the entire proceedings. Thus, the challenge should have been successful because, in fact, Iracunda failed to exercise independent judgment and lacked the qualities required for an ICSID arbitrator.
- Applicant will rely on the dissenting opinion of Mr. Albert Viator (*Viator*) as highlighting circumstances that ought to prove that the Tribunal was not properly constituted due to manifest lack of ability to exercise independent judgment. Viator’s statements raise reasonable doubts as to the impartiality of the arbitrator. In that opinion, Mr. Viator’s states, *inter alia*, that:
 - (a) “[he] has never experienced a tribunal that operated as unprofessionally as this one”,¹²
 - (b) he is “convinced that [the challenge] decision cannot have been correct”,¹³
 - (c) Dr. Iracunda’s “primary role [was] to hijack the tribunal’s deliberations and ensure that her own pre-decided views are reflected in the final award surely cannot be consistent with ICSID arbitration, and ICSID’s rules on arbitrator challenges need to be interpreted with this in mind”,¹⁴
 - (d) “[f]rom the beginning of the tribunal’s work, Dr. Iracunda repeatedly pressed for her own views on the interpretation of the term ‘investment’...distributing copies of her writings to both myself and Dr. Honesta, along with other writings that she believed supported her conclusions”,¹⁵
 - (e) whenever alternative views were considered “each time [this was] rebuffed by Dr. Iracunda, who insisted that she had already considered each point I proposed”,¹⁶ and¹⁷
 - (f) “It rapidly became clear, then, that there was literally nothing that could change Dr. Iracunda’s view on the meaning of ‘investment’...[a]s a result, the

¹¹ Line 276.

¹² Line 827.

¹³ Line 857.

¹⁴ Lines 857-860.

¹⁵ Lines 862-865.

¹⁶ Line 875.

¹⁷ Line 238.

majority's decision is not based on a serious consideration of the facts and law applicable to this case, and should be annulled"¹⁸.

- Applicant can point to Iracunda's own statement in her letter, in which she emphasizes her ability to change her mind, as evidence that Iracunda herself acknowledged that an arbitrator has a responsibility to consider legal issues anew, rather than simply rely on previous conclusions. Applicant can then point to the statements in Viator's dissent, in which he notes that Iracunda simply refused to reconsider her views, rather than reconsidering them and reaffirming them, in contradiction of her own acknowledged responsibility to do so.
- Applicant will argue that Mr. Viator's opinion establishes that Dr. Iracunda did not exercise independent judgment, as required by Article 14(1) of the ICSID Convention. Accordingly, she was not fit to act as an arbitrator and the Tribunal was not properly constituted.
- With respect to the standard required to challenge an arbitrator, the Applicant must show facts that demonstrate "a manifest lack of qualities" that are required by Article 14(1) of the ICSID Convention.¹⁹ In *Suez*, the *ad hoc* Committee stated:

[t]he term manifest means 'obvious' or 'evident'. Christoph Schreuer, in his Commentary, observes that the wording manifest imposes a 'relatively heavy burden of proof on the party making the proposal...' to disqualify an arbitrator.²⁰
- Furthermore, in *Vivendi II (Decision on the Challenge to the President of the Committee)* the *ad hoc* Committee stated:

...If the facts would lead to the raising of some reasonable doubt as to the impartiality of the arbitrator or member, the appearance of security for the parties would disappear and the challenge by either party would have to be upheld.²¹
- Applicant may rely on *Vivendi II*, in which an *ad hoc* Committee considered whether an award should be annulled because one of the arbitrators was alleged to have a conflict of interest. In that case, the *ad hoc* Committee considered the new facts but found that that "despite most serious shortcomings", the arbitrator's "exercise of independent judgment under Article 14 of the ICSID Convention was in the circumstances not impaired. The Tribunal was thus functional and operated properly in respect of both parties." In contrast to *Vivendi II*, the Applicant will

¹⁸ Line 878.

¹⁹ Article 57 ICSID Convention.

²⁰ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v The Argentine Republic and Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. and The Argentine Republic* (ICSID Case No. ARB/03/19), (Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal) ("*Suez*"), paragraph 34.

²¹ *Vivendi II*, Decision on the Challenge to the President of the Committee, paragraph 25.

argue that the facts here prove that Iracunda's mind was closed to its arguments and that she failed to exercise independent judgment.

- In response to Respondent's arguments that Article 52(1)(a) cannot be interpreted as providing the parties with a *de novo* opportunity to make challenges and only protects against procedural irregularities, Applicant may argue that the Committee ought to protect the integrity of ICSID arbitration and annul the award. Applicant may refer to *Vivendi II* in which it was said that the integrity of ICSID arbitrations is a "fundamental premise"²² and a "paramount policy decision"²³ when reviewing the grounds for annulment. Applicant will likely argue that the integrity of an ICSID arbitration would be affected if the Committee did not annul an award when there is evidence that an arbitrator was not acting impartially.

Respondent

- Respondent is likely to argue that the Applicant is essentially trying to appeal the merits of the challenge decision. Respondent will rely on *Azurix*, in which the *ad hoc* Committee stated that:

The Committee considers that Article 52(1)(a) cannot be interpreted as providing the parties with a *de novo* opportunity to challenge members of the tribunal after the tribunal has already given its award. A Committee would only be able to annul an award under Article 52(1)(a) if there had been a failure to comply properly with the procedure for challenging members of the tribunal set out in other provisions of the ICSID Convention.²⁴
- In the case at bar, there do not appear to be any procedural irregularities in the process under which the challenge decision was made. The ICSID Rules and Convention were properly followed in all respects.²⁵
- Respondent will also likely argue that, to the extent the Applicant relies on newly discovered facts (as set out in the Dissenting Opinion) about the Dr Iracunda's lack of independence, new facts may provide the basis for a revision of an award, but not its annulment (*Azurix*, para. 281: newly discovered facts "...may provide a basis for revision of the award under Article 51 of the ICSID Convention but, in

²² *Vivendi*, paragraph 200.

²³ *Ibid.*

²⁴

²⁵ In the current situation, it seems Applicant promptly filed a proposal to disqualify Dr. Iracunda pursuant to Article 57 of the ICSID Convention. The proceedings were suspended in accordance with ICSID Arbitration Rule 9(6). The Applicant and the Respondent both filed submissions in response to the disqualification proposal. Dr. Iracunda then submitted her statement as required by Rule 9(3) of the ICSID Arbitration Rules. The Applicant and the Respondent were then both able to file submissions in response to Dr. Iracunda's statement. The remaining members of the arbitrator tribunal then delivered a decision on the disqualification proposal. These remaining tribunal members were the proper individuals to decide on the disqualification proposal, as set out in Article 58 of the ICSID Convention.

the Committee’s view, such newly discovered fact would not provide a ground of annulment under Article 52(1)(a).”

- In any event, Respondent is likely to point out that Dr. Honesta does not share Mr. Viator’s opinion. In addition, Respondent is likely to argue that Mr. Viator’s opinion discloses no new facts, which were not considered in the proposal for disqualification of Dr. Iracunda. Instead, Respondent is likely to suggest that Mr. Viator’s opinion: (a) discloses only his opinions on Dr. Iracunda; and (b) actually establishes that Dr. Iracunda did consider alternative arguments, but that Mr. Viator took issue with the fact that Dr. Iracunda did not reconsider arguments which he admits that Dr. Iracunda had said she has previously considered.
- On the merits of whether Iracunda exercised independent judgment, Respondent is likely to refer to the challenge decision in *Urbaser v. Argentina*, where the remaining members of the tribunal rejected a challenge based on an academic’s previous writings, noting that “it seems extremely strange...to accept Claimant’s position that a view previously expressed on an item relevant in an arbitral proceeding should be qualified as a prejudgment that demonstrates a lack of independence or impartiality.”²⁶
- Respondent can refer to the Green List in the IBA Guidelines on Conflicts of Interest in International Arbitration, which provides at 4.1.1 “The arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated).”
- Respondent might also argue that the issue of Dr. Iracunda’s alleged lack of independence and impartiality is *res judicata* and cannot be disturbed.²⁷

Ground 2: The tribunal exceeded its powers in declining jurisdiction, as the ICSID Convention does not require that an “investment” contribute to the development of the Host State.

ICSID Convention Article 52(1)(b) provides that a party may request annulment on the ground “that the Tribunal has manifestly exceeded its powers”.

The Background Paper highlights the following general interpretative points with respect to Article 52(1)(b):

- *Ad hoc* Committees have identified two methodological approaches to determine whether there is an annulable error on this ground. The first is a two-step analysis determining whether there was an excess of powers and, if so, whether the excess was “manifest.” The second is a *prima facie* test, consisting of a summary

²⁶ *Urbaser*, Decision on Proposal to Disqualify, Para. 48.

²⁷ Claimant raised this argument in the annulment proceedings in *Vivendi II* (para. 109).

examination to determine whether any of the alleged excesses of power could be viewed as “manifest”.²⁸

- The “manifest” nature of the excess of powers has been interpreted by most *ad hoc* Committees to mean an excess that is obvious, clear or self-evident, and which is discernable without the need for an elaborate analysis of the award. However, some *ad hoc* Committees have interpreted “manifest” to require that the excess be serious or material to the outcome of the case.²⁹
- *Ad hoc* Committees have held that there may be an excess of powers if a Tribunal incorrectly concludes that it has jurisdiction when in fact jurisdiction is lacking.³⁰
- The drafting history suggests—and most *ad hoc* Committees have reasoned—that in order to annul an award based on a Tribunal’s determination of the scope of its own jurisdiction, the excess of powers must be “manifest.” However, one *ad hoc* Committee found that an excess of jurisdiction or failure to exercise jurisdiction is a manifest excess of powers when it is capable of affecting the outcome of the case.³¹
- The non-exercise of an existing jurisdiction has been decided in 12 decisions and has resulted in one full and 2 partial annulments.³²

The *Max Solutions* Tribunal declined jurisdiction holding that Applicant’s activities did not constitute an investment under Art. 25(1) of the ICSID Convention, as they did not contribute adequately to the economic development of Respondent.³³ The majority’s found that, since the Convention does not define the term “investment”, the only acceptable approach was to consider prior case law of ICSID tribunals on the question. The majority found a contribution to the host state’s economic development was a requirement of the definition of investment.³⁴ For the Tribunal, only a clear and significant contribution to Respondent’s economic development could suffice in order for Applicant’s activities to be considered an investment.³⁵

(i) Manifest Excess of Powers

Applicant

²⁸ Para. 83.

²⁹ Para. 84.

³⁰ Para. 88.

³¹ Para. 89.

³² Para. 90, referring to *Vivendi I* (partial); *Helnan* (partial); *MHS* (full).

³³ Lines 186-190.

³⁴ Lines 631-649.

³⁵ Lines 754-755.

- Applicant teams will emphasize the holding by the *ad hoc* Committee in *Vivendi I* that failure to exercise an existing jurisdiction constitutes an excess of powers and suggest that any failure to excess jurisdiction is by definition manifest.

Respondent

- Teams will emphasize that tribunals have the jurisdiction to determine their jurisdiction and that *ad hoc* Committee are not entitled to review jurisdictional decisions on a de novo “correctness” standard. Only jurisdictional errors resulting from a manifest excess of powers are annulable. In light of the contested ICSID jurisprudence on the applicable criteria for defining investment, it was not a manifest excess of powers for the Tribunal to apply the *Salini* criteria and hold that there is a requirement for a clear and significant contribution to economic development.
- Respondent teams might argue that a failure to confirm jurisdiction should never be considered an “excess” of powers, as an excess of powers only occurs where powers are used wrongly. Drawing on the *travaux*, the Respondent might argue that the Convention was designed to prevent tribunals hearing cases when they had no right doing so (no jurisdiction), but not to insist cases be heard. Applicants might respond that tribunals are not empowered to deny jurisdiction where it exists (and that a distinction between misfeasance and non-feasance is not defensible). Further, the Respondent’s argument is inconsistent with existing jurisprudence as affirmed by the *ad hoc* Committee in *Vivendi I*.

(ii) Whether the ICSID Convention requires that an “investment” contribute to the economic development of the host State

Claimant

- Claimant will be able to rely on a rich literature and jurisprudence suggesting that contribution to economic development is not a necessary element/criterion of the meaning of investment for the purposes of Art. 25(1).
- Contribution to the economic development of the Host State is not a jurisdictional requirement under Art. 25(1) of the ICSID Convention. Art. 25(1) of the ICSID Convention neither defines the term investment nor sets out the requirements for an activity/asset to be considered an investment, and it certainly does not require “contribution to the development of the host state”.
- The *Oscania-BRI BIT* contains, in Art. 1, a precise and asset-based definition of investment that does not require contribution to economic development. Considering the lack of definition in the ICSID Convention and the will of the States involved to give a specific meaning to investments in the treaty that

governs that relationship, the BIT's definition is the one to be considered by the annulment committee.³⁶

- The preparatory works of the ICSID Convention could also be taken into account to determine the meaning of the term investment (Art. 32 Vienna Convention on the Law of the Treaties(VCLT)), especially with respect to the reluctance of parties to choose a narrow definition that would create jurisdictional difficulties in ICSID arbitration and that would restrict their freedom to limit their own consent to the jurisdiction of the Centre.³⁷
- In response to argument that the economic development criteria arises from the object and purpose of the ICSID Convention, teams may develop a counter-argument that the presence of the expression “considering the need for international cooperation for economic development” in the preamble does not create a jurisdictional requirement. Teams may also rely on the sequence of that sentence in the preamble that reads “and the role of private international investment therein”, alleging that contribution to economic development at some level is an inherent result from international investment that has the other general criteria that define investment.

Respondent

- Contribution to the economic development of the host State is a jurisdictional requirement under Art. 25(1) of the ICSID Convention. Even though Art. 25(1) does not define the term investment nor does it impose the requisites that would define it, several tribunals (such as *AES v. Argentina*, *Bayindir v. Pakistan*, *CSOB v. Slovakia*, *Fedax v. Venezuela*, *SGS v. Pakistan*, *Jan de Nul v. Egypt*, *Joy Mining v. Egypt*, and *Mitchell v. Congo Annulment Decision*) have applied the so called *Salini* criteria (from *Salini v. Morocco*), which include the requisite of a contribution to the host state's economic development. This criterion derives mainly from the joint interpretation of the ICSID Convention's preamble and its Art. 25(1), following the application of the Arts. 31(1) and 31(2) VCLT.
- Resorting to the preparatory works of the ICSID Convention – as an application of the VCLT – can also help teams arguing for Respondent, since there is evidence that there was an intention, while drafting the Convention, that it should establish an outer limit of what should be considered an investment under the Convention, in order to set a boundary to the parties' freedom to consent on what they considered an investment (preparatory works as quoted by the *ad hoc* Committee in *MHS*, paras. 63-68).
- The definition of investment contained in the *Oscania-BRI BIT* cannot be used to establish the jurisdictional requisites of an investment under ICSID.

³⁶ *MHS* (Annulment) para.61; *Biwater*, paras. 312-318).

³⁷ *MHS* (Annulment) paras. 63-68.

Ground 3: The annulment committee has the power, through Articles 41(2) and 52(4) of the ICSID Convention, to decide whether the transaction in question qualifies as an “investment” under the ICSID Convention, as this is an issue that goes to the jurisdiction of the Centre, not of the tribunal.

As highlighted in Clarification 100, arguments on under this ground require the teams to demonstrate an understanding of the distinction between the jurisdiction of the Centre, which derives from the fulfillment of requirements provided by the Convention, and the jurisdiction of a specific tribunal, which is predominantly a matter of the consent of the parties.

Ground 3 also provides the basis or “hook” for Ground 4, which requires the teams to argue *de novo* whether the investment in question contributed to the economic development of the host State. This issue would not normally be before an *ad hoc* Committee as it is essentially an appeal on the merits from the Tribunal’s determination. The Applicant has a very difficult case to make here as the weight of authority is an *ad hoc* Committee is not empowered to conduct a *de novo* review of whether a Tribunal’s jurisdictional determination is correct.

With respect to the *ad hoc* Committee proceedings, Article 52(4) provides:

The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.

Article 41(2), in turn, provides:

Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

The teams are thus presented with the task of distinguishing between matters that go to the competence of a specific tribunal and what matters are within the jurisdiction of the Centre.

Applicant

- The *ad hoc* Committee has the power to decide if the transaction qualifies as an investment under the ICSID Convention, as the issue goes to the jurisdiction of the Centre, pursuant to Arts. 41(2) and 52(4) of the ICSID Convention. Considering that Art. 25(1) of the Convention states that “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment”, when analyzing if a tribunal exceeded its powers when denying jurisdiction, an *ad hoc* Committee is entitled to analyze, in the case in question, whether or not there

is an investment, as this goes to the jurisdiction of the Centre, rather than the competence of any particular tribunal based on the consent of the parties.

- The Applicant might also argue that the reference to the “Tribunal” in Article 41(2), should be read as the “the Committee” by virtue of Article 52(4). This would mean that *ad hoc* Committees review all jurisdictional decisions *de novo*. The *ad hoc* Committee as a body constituted by the Centre (and not appointed by the parties) plays a special role as a guardian of the jurisdiction of the Centre. An analogy might be made to power of the Secretary-General to refuse to register a claim under Article 36(3), in order to protect the jurisdiction of the Centre from being misused.

Respondent

- The Respondent is likely to argue (relying on Schreuer, 2nd ed. at p. 532) that the distinction between jurisdiction and competence is “of little consequence”. The reference in Article 41(1) that the tribunal shall be the judge of its own competence necessarily means that the tribunal must judge whether the Centre has jurisdiction in the case.
- It is well established that the grounds for annulment are limited to those found in Article 52. There is no support either in the negotiating history of the ICSID Convention, or more generally, in any ICSID cases, that an *ad hoc* Committee can review the correctness of decisions that relate to the matters “within the jurisdiction of the Centre”.

Ground 4: Even if a contribution to the Host State's development is considered to be essential to an ICSID “investment”, the transaction in question meets this standard, as the point of the contract was to eliminate a problem that was preventing Bela Rano Insularo’s development.

The team’s arguments under this ground are made on the basis that the *ad hoc Committee* has the power to assess the correctness of the tribunal’s determination on the merits. Teams will likely make arguments about: (i) the applicable standard; (ii) when the criterion is to be applied; and (iii) the application of the law to the facts.

(i) Standard to establish contribution to development:

Applicant

- The Tribunal considered that “[o]nly a clear and significant contribution to Bela Rano Insularo’s economic development could indicate the existence of an investment.”³⁸ However, if the requirement exists, the assessment should be done with certain flexibility as provided by cases such as *CSOB v. Slovakia* and

³⁸ Lines 754-755.

Mitchell v. Congo Annulment,³⁹ that considered that minor and or indirect contributions to the State should satisfy the requisite, relying mainly on the broad and uncertain definition of development.

Respondent

- The standard set out by the tribunal is correct and accords with ICSID jurisprudence: (i.e. *Joy Mining v. Egypt*, Award, where the tribunal considered that there must be a “significant contribution to the host state’s development” (para.53)).

(ii) Time for assessing contribution to economic development

In the Problem, the Tribunal considered that no significant economic development had occurred by the time of the Award, in a way that any argument that future tourism would generate benefits to Respondent would be purely speculative and could not be accepted.

Although authority on this point is sparse, teams are expected to discuss the issue of timing: should the contribution to economic development requirement be considered at the time the investment is made (and therefore the expectations of development arising from it); or at the date for the determination of jurisdiction (normally the date of the request for arbitration).

Applicant

- The analysis should consider the expectations of development arising from the investment when it is made, since supervening events may prevent investors from performing their obligations and actually contributing to the host State’s economic development.
- Further, since all investment involves risk, there is no guarantee that particular investment projects will, in fact, result in economic development (just as there is no guarantee of profits or returns).

Respondent

- Respondent will argue that only investment that contributes in fact to economic development is entitled to protection.

³⁹ “The *ad hoc* Committee wishes nevertheless to specify that, in its view, the existence of a contribution to the economic development of the host State as an essential – although not sufficient – characteristic or unquestionable criterion of the investment, does not mean that this contribution must always be sizable or successful; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case. “

(iii) Contribution to Economic Development**Applicant**

- The GASP Council only granted Respondent's bid to host the GASP after it demonstrated it had concluded the agreement with Claimant.⁴⁰ If it was not for the transaction it would have lost the bidding, even if at a later point in time it became known that the frogs would die of a disease.
- According to declaration made by a government's representative, holding the 2008 GASP and clearing the country of the frogs would create long-term benefits to Respondent, resulting from a combination of increased tourism and the presence of the international media.⁴¹
- Although the development does not follow directly from the investment, any subsequent investment enabled by the removal of the frogs would not be possible without Max Solutions' investment in the first place.
- Finally, since the estimation by scientists that the frogs would be naturally removed by 2011⁴² there was still a long time before the natural removal of the frogs would fully enable tourism in BRI, especially considering that the GASP would take place in 2008. This is even more evidenced by the fact that "the necessity of precluding tourists from those parts of the island still colonized by the Sireno Kanto reduced the immediate tourism of the games"⁴³ creating the presumption that even with the disease, the removal by Max Solutions' would have been necessary to allow the full tourism potential of the island during the GASP.

Respondent

- On the merits of this issue, the Tribunal considered that (i) the statement made by the government indicating that Claimant's activities would have an impact on the State's economic development merely represented politically-motivated optimism and could not constitute decisive proof of the causal link between the activities and an economic development;⁴⁴ (ii) due to the disease that affected the frogs, even without Claimant, the frogs were being naturally removed, therefore any resulting development could not be attributed to Claimant;⁴⁵ and (iii) no significant economic development had occurred by that time, any argument that

⁴⁰ Lines 32-39.

⁴¹ Lines 61-63.

⁴² Lines 79-81, 765-767 and Clarification 28),

⁴³ Lines 123-124.

⁴⁴ Lines 761-762.

⁴⁵ Lines 765-774.

future tourism would generate such benefit would be purely speculative and could not be accepted.⁴⁶

- Teams may argue the same reasons stated by the Tribunal, especially that the actual contribution cannot (and was not) demonstrated. First of all, the frogs started dying because of a disease, being removed by nature and not by the Claimant.⁴⁷ If any contribution to development resulted from the decrease of frogs, it could not be attributed to Claimant.
- Secondly, the Claimant did not share its revenues from the profits made with the frogs removed, such as those provided by the recordings and the pharmaceutical contract⁴⁸ which actually evidences a refusal to further contribute to the country's development.
- Finally, even with the contract avoided, the Respondent achieved its objective (to successfully host the GASP), demonstrating that there is no causal link between the agreement with Claimant and the alleged development provided by the GASP.
- Moreover, removing the frogs does not naturally entail development: it requires further investments. The government would have to decide encouraging further investments; other investors would still have to decide to build hotels, etc. The removal of frogs eliminates an obstacle, but does not cause by itself the development: it merely clears the way for subsequent investments that will cause development.

Ground 5: The tribunal's decision not to exclude Dr. Ranapuer's Expert Report constituted a serious departure from a fundamental rule of procedure.

ICSID Convention Article 52(1)(d) provides that a party may request annulment on the ground "that there has been a serious departure from a fundamental rule of procedure".

As noted in the Background Paper, *ad hoc* Committees have applied a dual analysis to Article 52(1)(d): the departure from a rule of procedure must be *serious* and the rule must be *fundamental*.⁴⁹ Further, *ad hoc* Committees have consistently held that not every departure from a rule of procedure justifies annulment and some *ad hoc* Committees have required that the departure have a material impact on the outcome of the award for the annulment to succeed.⁵⁰

⁴⁶ Lines 781-783.

⁴⁷ Clarification 124.

⁴⁸ Clarification 24.

⁴⁹ Background Paper at para. 100, citing *Amco II*, para. 9.07; *MINE*, para. 4.06; *Wena*, para. 56; *CDC*, para. 48; *Fraport*, para. 180.

⁵⁰ Background Paper at para. 100-101.

Considering that Dr. Ranapuer's report constitutes an "expert report" under the applicable rules (Clarification 49) and that the parties have agreed on the *Belo Rano Model Rules on the Taking of Evidence* (identical in all respect to the 2010 IBA Rules) (the **Rules**), Article 5.5 is the relevant provision in the present case:

If a Party-Appointed Expert whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Expert Report by that Party-Appointed Expert related to that Evidentiary Hearing unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

Article 52(1)(d) combined with the requirements in Article 5.5 of the Rules, suggests that the Claimant must demonstrate that satisfies a four part test: (i) Dr. Ranapuer did not provide a valid reason to its absence in the hearings; (ii) that the circumstances were not exceptional to allow the Tribunal to consider the Report; (iii) that Article 5.5 (or otherwise allowing in an expert report on which there was no opportunity for cross-examination) is a fundamental rule of procedure; and (iv) that by accepting the Expert Report, the Tribunal made a serious departure from such rule.

Applicant

- Dr. Ranapuer did not provide a valid reason for his absence. Dr. Ranapuer did not join Wilderness recently⁵¹, but has been a member since 1995 (Clarification 46). Membership of Wilderness entails no specific duties or responsibilities (Clarification 41). The only reason for not attending was her personal beliefs about the treatment of the frogs—an issue that was not relevant to the subject matter of the arbitration.
- The Tribunal failed to explain why that fact that the information was not available from other sources was an exceptional circumstance. Although Dr. Ranapuer was one of the three experts in the issue worldwide, he was not the only one and the Tribunal could invite another expert to submit its Report and participate in hearings. Furthermore, there is no evidence that the other two experts were contacted (Clarification 64).
- Annulment Committees in *Amco I* and *Klöckner II* acknowledged that departure from the rules on taking of evidence can constitute a serious departure from a fundamental rule of procedure. The practice of others tribunal has been to place no weight on statements where the witness or expert has not been available for cross-examination.⁵² The ability to cross-examine an expert is fundamental and the departure was serious. In *Metalpar*, the Tribunal noted: "To proceed differently would imply causing a serious procedural inequality for Respondent,

⁵¹ Lines 175-176.

⁵² *Metalpar S.A.*, Award, 6 June 200, para. 153; *Gemplus*, Award, 16 June 2010, Part I, para. 27.

who expressly requested the presentation of those persons in order to examine them.”

- Further, the Tribunal made a serious departure because the result would have been different if the rule were followed and the Report was not accepted. Dr. Ranapuer’s expert report included significantly more evidence on the likely impact of the disease on the Sireno Kanto than was available at that time from any publicly accessible source (Clarification 93) and Ranapuer’s evidence was a key factor in the Tribunal deciding that there was no contribution to the economic development of the State.
- Applicant might argue that the fact that Ranapuer is such a longstanding member of Wilderness (joined in 1995 (Clarification 46)), and failed to disclose the membership, and then lied about it (joined “recently” according to line 176), undermines the credibility of his report, and undermines the decision not to get another opinion.

Respondent

- Dr. Ranapuer was one of the only three experts in the issue worldwide, being the lead scientist in the relevant country, i.e. it has not only expertise in the issue, but it has the local knowhow to better address the case. A request for an elaboration of a Report from another Expert would have caused unreasonable delay to the proceedings.
- Article 5.5 is not a fundamental rule of procedure. Teams may especially rely on the preparatory works of the Convention, which demonstrate a consensus that not all applicable rules of procedure could be considered fundamental, only procedural principles of special importance qualify.⁵³ It is up for the teams to develop a comparison between Article 5.5 and other principles of process in order to demonstrate their difference and why the former cannot be considered as fundamental.
- Even though Article 5.5 set out conditions for the acceptance of a Report from an absent expert, it ultimately leaves the decision to the Tribunal to accept it or not according to the circumstances. Since the very rule provides for certain discretion to the Tribunal, mostly on the basis of the broad and subjective expressions “exceptional circumstances” and “valid reasons”, an exercise of such discretion cannot be understood as a serious departure from the rule.

END

⁵³ Schreuer, *The ICSID Convention: A Commentary*, 2nd ed., at p. 979-981 citing *MINE*, Decision on Annulment.