

FDI Moot 2012 Problem
Consolidated Text with Responses to Clarification Requests¹
Uncontested Facts

5 Introduction

10 The Global Athletics Season Preview (“GASP”) was held in 2008 on the island of Bela Rano Insularo, an independent small island nation located off the north eastern coast of Brazil. The nation has a population of approximately 8 million (per its 2010 census) and recognises Esperanto as its primary language. It presently obtains most of its income from the export of its strong coffee crop and related products, including filters and sweeteners sourced from relatively rapidly self-regenerating natural resources such as moss and tree-sap.

15 It is a peaceful and politically stable country, neither impoverished nor especially prosperous, but of astounding natural beauty, with great beaches, and wonderful food. However, it has long faced a challenge in attracting tourism, which has been virtually non-existent until recent years, due to the extraordinary number of poisonous Sireno Kanto frogs that inhabit the country. The poison of the Sireno Kanto is not deadly to all humans, but is fatal to any individual, no matter how healthy, that has one of a wide variety of allergies, including dust, cat hair, and peanuts. Unfortunately, scientists have yet to identify all the allergies through which the poison has its effect, and so the danger of contact with any of these frogs is high. Local residents managed to solve the problem centuries ago, shortly after first arriving on the island, by introducing small amounts of the poison into the food of their children. As a result of this practice, local residents have grown to be practically immune to the poison and can live happily on the island (so long as they don't mind all the frogs).

20 However, as foreigners do not have the benefit of immunity to the frog's poison, they have scrupulously avoided the island. A few tourists have ventured onto the island in recent years to witness the astonishing frog population, but in order to safely access the island they have had to wear cumbersome protective gear. This reality was, of course, a difficulty in the island's attempts to convince the GASP International Competition Council (“Council”) to let the island host the 2008 athletic event. The Council only granted Bela Rano Insularo's bid to host the games, submitted in 2003, after the island demonstrated that it had, in January 2002, entered into an agreement with a key investor, Max Solutions, Inc. (from the nation of Oscania), who wished to procure as many Sireno Kanto frogs as possible. In exchange for gaining authorisation to capture Sireno Kanto, Max Solutions agreed to clear the island of the frogs, with the exception of a small, highly protected and secure nature reserve to be built by the government.

25 The Council concluded that successful performance of this agreement would allow both athletes and tourists to visit Bela Rano Insularo safely, and so awarded it the games.

30 The Contract

35 Although signed in 2002, the contract did not require either side to perform any actions until January 2006, with all obligations scheduled to be fulfilled by December 2007. The terms of the contract required the government to pay Max Solutions on a “bounty” basis payments to be made monthly (i.e. Max Solutions is paid each month per frog captured and removed from the island in the previous month). The contract did not specify what Max

¹ Requests to which there was „no response“ removed.

Uncontested Facts

Solutions must do with the frogs, only requiring that they be removed from the island and treated “humanely” at all times.

55 The only performance requirement specified in the contract was that all frogs outside the designated nature reserve must be removed from the island by the end of December 2007. If this goal was not met, Max Solutions would lose the right to all payments under the contract.

60 The GASP was timed to take place at the beginning of the athletics season that was to culminate in the 2008 Olympic Games. As a result, it was expected to receive as much global publicity as the Olympic Games themselves. In publicly announcing the contract with Max Solutions, the government spokeswoman emphasised the great long-term benefits that Bela Rano Insularo would receive from the combination of holding the athletics events and
65 clearing the island of frogs. Not only would hosting GASP bring tourists who desired to witness the games, but the global television coverage received by GASP would present an unprecedented opportunity to publicise the wonders of Bela Rano Insularo to a global audience, as well as an opportunity to demonstrate that the island could now be visited safely. According to the spokeswoman, GASP would therefore result in an enormous boom
70 in tourism.

 In the months following the announcement, the government opened bids for the construction of new hotels and resorts in Bela Rano Insularo. Construction of these projects has already brought a significant amount of money into the country, which had been
75 struggling economically as a result of the global economic crisis.

 On January 26, 2006, scientists at the highly respected Frog Research Unit at Bela Rano Insularo University announced that they had found conclusive evidence of the early stages of a previously unknown disease among the Sireno Kanto. This disease is both
80 highly contagious and fatal to Sireno Kanto, although the first fatalities were not expected for another two months. There was no known treatment for the disease, and the scientists estimated that the disease would impact the Sireno Kanto population so seriously that within five years 95% of Sireno Kanto would be dead.

85 In February 2006, Bela Rano Insularo's newspapers began publishing stories reporting rumours that Max Solutions was not just removing the Sireno Kanto from the island, but was also identifying still-healthy Sireno Kanto and transporting them by freight to a secure location in a nearby country. Half of the frogs transported were then sold to a pharmaceutical corporation and used for medical research for the development of allergy
90 immunity treatments. It was reported that Max Solutions was contractually entitled to 10% of all royalties generated from the products of this research.

 The remaining Sireno Kanto removed by Max Solutions were rumoured to be alive and healthy, and kept under humane conditions in a large storage facility. According to the
95 newspapers, Max Solutions had realised that the noises made by large groups of Sireno Kanto during their annual croaking season (May-November) were enormously beautiful to some ears, producing instant relaxation, even though the sound was regarded as an annoyance by the local population. Max Solutions was reported to be planning to sell recordings of the frog symphonies to overworked people around the world.
100

 Max Solutions has subsequently confirmed both of these rumours. Neither use of the Sireno Kanto was ever discussed with the government of Bela Rano Insularo, and the government will receive no income from either venture.

Uncontested Facts

105 On March 1, 2006, Max Solutions announced that it was accelerating its operations, and now estimated that it would have 80% of all Sireno Kanto removed from the island by the end of December 2006. However, when the government requested the opportunity to inspect its new operations, in order to verify this claim, Max Solutions refused.

110 On March 13, 2006, the government cancelled the contract with Max Solutions, arguing inadequate performance. At the time of the cancellation Max Solutions had removed only 3% of the frog population from the island.

115 In May 2006 newspapers reported that the Bela Rano Insularo National Research Institute had, in January 2006, submitted a report to the government proposing that the songs of the Sireno Kanto be recorded and sold for foreign consumption. There is no evidence that Max Solutions were aware of the report prior to it being publicly revealed in May 2006.

120 After termination of the contract, the government of Bela Rano Insularo adopted a policy of containment of the Sireno Kanto, driving the disease-weakened frogs out of the parts of the island to be used during the GASP, where they were left to die natural deaths.

125 The GASP were an enormous public relations success for Bela Rano Insularo, although the necessity of precluding tourists from those parts of the island still colonised by Sireno Kanto reduced the immediate tourism impact of the games.

130 Nonetheless, as predicted, 95% of the Sireno Kanto died within five years. With the remaining Sireno Kanto confined to a government preserve, Bela Rano Insularo is now an ecological tourism "hot spot", and is experiencing an economic renaissance beyond even the most optimistic hopes of the government.

135 The contract between Max Solutions and the government of Bela Rano Insularo had no specific choice of forum clause, and in December 2008, after an extended period of negotiations, Max Solutions filed a Request for ICSID arbitration ("Request"), relying on a bilateral investment treaty ("BIT") between the Republic of Oscania and Bela Rano Insularo.

The ICSID Arbitration

140 As its nominee to the tribunal, Bela Rano Insularo nominated a prominent investment law academic and experienced arbitrator, Professor Alessandra Iracunda. Dr. Iracunda is a leading proponent of the view that an ICSID "investment" must contribute to the development of the Host State. This is a position for which she has argued for many years, and which she continues to voice consistently and strongly.

145 Max Solutions' nominee, Mr. Albert Viator, is a leading arbitration practitioner and experienced commercial arbitrator. He has never written on investment arbitration, or served as an arbitrator on an investment arbitration tribunal.

150 The Chair of the tribunal is Dr. Humberto Honesta, a retired academic with many years' experience as an arbitrator in both commercial and investment arbitrations.

155 Shortly after receiving notification of the appointment of Dr. Iracunda, Max Solutions challenged her on the ground of a lack of impartiality. Max Solutions argued that her decision on jurisdiction had in effect already been made, as her firm and long-held views on the meaning of "investment" meant that she could not approach the issue with an open mind. In addition, it argued that her membership in Wilderness, an environmental organisation that has strongly criticised Max Solutions' treatment of the Sireno Kanto, undermines her

Uncontested Facts

160 impartiality. In response, Dr. Iracunda insisted that she would perform her role in a fully open-minded and impartial manner, emphasising that she personally had made no public comment on any aspect of the dispute between Max Solutions and Bela Rano Insularo.

Dr. Iracunda was subsequently confirmed by her co-arbitrators on the tribunal.

165 The parties agreed that all proceedings of the arbitration would be governed by the Bela Rano Model Rules on the Taking of Evidence in International Arbitration, which are identical in all respects to the 2010 IBA Rules on the Taking of Evidence in International Arbitration.

170 An initial hearing was held in May 2009 to consider the objections of Bela Rano Insularo to the tribunal's jurisdiction. Prior to the hearing Bela Rano Insularo submitted an Expert Report from Dr. Herbert Ranapuer, the lead scientist at the Frog Research Unit at Bela Rano Insularo University, as to the nature and expected consequences of the disease afflicting the Sireno Kanto. Dr. Ranapuer is one of only three scientists worldwide who have
175 a detailed knowledge of these matters.

On the morning of the hearing Dr. Ranapuer called to say that he would not be coming, as had recently joined Wilderness, and members of the group had convinced him not to participate in the arbitration. He stated that he now believed that participating in the
180 arbitration would be equivalent to providing his implicit approval of Max Solutions' treatment of the Sireno Kanto, as the arbitration was not specifically addressing the issue of Max Solutions' treatment of the frogs.

185 Max Solutions requested that Dr. Ranapuer's Expert Report be rejected, since he was not available to be cross-examined. After considering the matter, the tribunal decided that it would consider Dr. Ranapuer's Expert Report, as it provided information available from no other source.

190 After the hearing on jurisdiction, on July 29, 2009 the tribunal issued an award declining jurisdiction over the case. The tribunal held that Max Solutions' activities did not constitute an "investment" under Article 25(1) of the ICSID Convention, as they did not contribute adequately to the development of Belo Rano Insularo.

195 Albert Viator issued a strongly worded dissenting opinion, complaining not only that the ICSID Convention does not require that an investment contribute to the development of the Host State, but that Dr. Iracunda had been closed-minded on this issue throughout all the tribunal's discussions.

200 Max Solutions has applied to the present ad hoc committee on the following grounds:

(1) that the tribunal was not properly constituted, as the initial challenge to Dr. Iracunda should have been successful.

205 (2) that 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.

210 (3) that the annulment committee has the power, through Articles 41(2) and 54(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.

Uncontested Facts

(4) that 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.

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

Challenge Decision

BACKGROUND

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On December 4, 2006 the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received a request for arbitration filed by Max Solutions, Inc. (“Claimant”) against the State of Bela Rano Insularo (“Respondent”). The Claimant submitted this request pursuant to Article 24 of the Treaty Between the Government of Oscania and the Government of Bela Rano Insularo Concerning the Encouragement and Reciprocal Protection of Investment (“Treaty”).

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On December 15, 2006 Claimant appointed Mr. Albert Viator as arbitrator, and he duly accepted his appointment. Claimant simultaneously proposed as Dr. Humberto Honesta as Chair of the Tribunal.

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On February 9, 2007, Respondent appointed Professor Alessandra Iracunda as arbitrator. Respondent also agreed to the appointment of Dr. Honesta as chair of the tribunal.

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On February 13, 2007, ICSID informed the Parties that Professor Iracunda and Dr. Honesta had both accepted their appointment, and that accordingly the Tribunal was deemed to be constituted and the proceedings to have begun on that date.

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On March 1, 2007, Claimant filed with the Centre a Proposal to disqualify Professor Iracunda pursuant to Article 57 of the ICSID Convention (“Convention”). The same day, the Centre confirmed receipt of the Proposal and declared that in accordance with Arbitration Rule 9(6) the proceeding was suspended until a decision on the Proposal for disqualification was taken.

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On March 23, 2007, Respondent filed its submissions in response to the disqualification proposal.

Dr. Iracunda was invited to make her own statement on the matter, and submitted her statement in the form of a letter dated April 7, 2007. The letter is annexed to this decision. Both parties filed further submissions in response to Professor Iracunda’s letter on April 16, 2007.

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Under Arbitration Rule 9(4), where one member of the Tribunal is the subject of a disqualification proposal, “the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned.” Consequently, Mr. Viator and Dr. Honesta (hereafter the “Two Members”) have considered the Proposal and agreed on the decision delivered below.

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There is no question that Claimant has acted promptly as required by Arbitration Rule 9(1).

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Convention Provisions Relevant to Claimant’s Proposal for Disqualification of Professor Iracunda

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Under Article 57 of the Convention, “[a] party may propose to a...Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.”

Challenge Decision

275 Article 14(1) of the Convention addresses the standards to be applied in the designation of individuals to the Panel of Arbitrators. Through Article 57, these same standards are applicable to disqualification proposals of members of tribunals, whether or not those members are designated to the Panel of Arbitrators. Thus, through the combination of Article 57 and Article 14(1), the Convention requires that arbitrators “shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.”

280 Both Claimant and Respondent agree that although the ICSID Convention refers only to the “independence” of arbitrators, this reference must be taken as including both the traditional notions of “independence” and “impartiality”.

285 **The Grounds for Claimant’s Proposal for Disqualification of Professor Iracunda**

290 Claimant has proposed two grounds for the disqualification of Professor Iracunda. The first relates to views expressed by Professor Iracunda in her recently published book *Re-thinking ICSID Arbitration* (Oxford University Press 2006). The second relates to Professor Iracunda’s membership in and regular donations to the charity Wilderness International (“Wilderness”).

Ground I: The Views Expressed by Professor Iracunda in *Re-thinking ICSID Arbitration*

295 Claimant has highlighted a number of passages in *Re-Thinking ICSID Arbitration* that they find problematic, along with passages in several articles published by Professor Iracunda. However, for present purposes this decision will focus on one extract from *Re-Thinking ICSID Arbitration*, highlighted by the Claimant repeatedly in its submissions. Nonetheless, while the following discussion will be focused on a single passage, it should be understood as applicable also to all other passages identified by the Claimant. The extract in question is as follows:

305 It is hardly controversial to insist that States enter into IIAs [International Investment Agreements] out of a desire to boost the inflow of foreign investment. Nonetheless, it does not follow from this that States retain no interest in the kind of transactions that receive the protections that IIAs offer. Foreign investment, after all, has no value to a State in and of itself. It is purely a means to an end, and that end is the boosting of the State’s economic development.

310 For this reason, it is necessary to move beyond the dangerous view that absolutely anything may qualify as an “investment” under Article 25 of the ICSID Convention, so long as it meets whatever criteria are stated in the instrument containing the required consent to ICSID jurisdiction. Given the wide definitions incorporated in most IIAs, this view results in a situation in which there is almost no economic transaction that a foreigner can undertake that cannot subsequently serve as the basis for an ICSID arbitration. It creates a future in which States will potentially be subjected to dozens of ICSID claims each year, for transactions worth almost nothing from a national perspective, but that require an often-impooverished State to divert valuable resources to defend. It is simply ridiculous to assert that this result was in any way what was intended by those who entered into what has been called the “grand bargain” of the ICSID Convention. Indeed, it entirely eliminates any notion of a “bargain”, and instead transforms the ICSID Convention into nothing more than a forum for wealthy business people who dislike some aspect of treatment they have received from a State into which they freely chose to enter.

Challenge Decision

330 There is however, no reason to accept this view, a point that has repeatedly been made by the many proponents, both academics and arbitrators, of the *Salini* test for the existence of an ICSID investment. ICSID is not a commercial center for arbitration, taking any dispute brought to it so long as the parties are willing to pay for its services. It is an inter-State dispute resolution forum, and it is expressly restricted to “investment” disputes.

335 Contemporary IIAs, by contrast, do not attempt to restrict the access of parties to their coverage, as it is impossible to know in advance precisely what forms of transaction will be undertaken in the future. As a result, IIAs include expansive definitions, intended to cover almost any kind of business transaction.

340 The definition of “investment” in an IIA, that is, is simply a fundamentally different type of thing than the definition of “investment” in the ICSID Convention. The latter is restrictive, while the former is encompassing. To equate the two simply undermines the entire purpose of Article 25.

345 The ICSID Convention requires the existence of an “investment”, and an “investment” for the purposes of the Convention must contribute to the economic development of the Host State. Only the *Salini* criteria reflect this reality, and only the inclusion within the *Salini* criteria of the requirement of a contribution to the development of the Host State fulfills the true purpose of the ICSID Convention. Moreover, only *new* development can suffice. States do not agree to the risks and unpredictability of investor-State arbitration merely to change the method by which development is delivered.

355 Both arbitrators and academics have recently begun to refer to the risk that over-expansive approaches to ICSID jurisdiction will undermine the support of States for the ICSID system. They argue that ICSID arbitration needs to be saved from itself. However, as anyone familiar with life in a developing country will know, saving ICSID from itself is not a priority. What is needed, instead, is saving developing countries from ICSID arbitrators.

360 The recent criticism of ICSID and the threatened withdrawal of many countries is evidence that States are not happy with the way ICSID is moving forward – without regard to the developmental objectives of the Host State. This balance must be set right by recognizing and giving effect to ICSID’s role in balancing the rights of private investors against those of host countries.

365 This passage addresses the meaning of the term “investment” in Article 25 of the ICSID Convention, and particularly the relevance to that meaning of the contribution of a transaction to the economic development of the Host State. While no arguments have yet been made in this case, Claimant submits that this issue is likely to be central to any defense offered by the Respondents. The Respondents have not commented on this contention.

375 Claimant advances two arguments with respect to Professor Iracunda’s published writings. Firstly, Claimant argues that through her work on this topic, as evidenced in the cited passages, Professor Iracunda has established herself as potentially the leading exponent of what they term the “development-inclusive” interpretation of an ICSID “investment”. As a result, Claimant argues, Professor Iracunda would face significant personal and professional embarrassment were she now to issue an award rejecting this criterion. Therefore, Claimant concludes, Professor Iracunda must be viewed as lacking the ability to “exercise independent judgment” as required by the ICSID Convention.

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Challenge Decision

385 Respondents insist that Professor Iracunda's expertise in international investment law must be viewed as providing a benefit to the Tribunal. An approach to disqualification proposals that allowed successful challenges based on the presence of expertise, they argue, would preclude from tribunals precisely those individuals that are best placed to serve upon them.

390 Claimant's second argument is that the language used by Professor Iracunda in the quoted passage indicates a strength of commitment to her views that makes implausible any contention that she might reach an alternative conclusion in this arbitration. As a result, they conclude, Professor Iracunda must be viewed as lacking the ability to "exercise independent judgment" as required by the Convention.

395 Respondents reply that an author's willingness to consider alternative views cannot be judged from the tone of language she adopts, as such stylistic concerns merely reflect personal preferences in writing styles. They emphasize that Claimant has presented no evidence that Professor Iracunda is unwilling to change her opinions beyond her choice of language, and argue that purely stylistic evidence cannot meet the standards required in an ICSID disqualification proposal.

400 II: Professor Iracunda's membership of Wilderness

405 Wilderness is an international charity with members in over 78 countries. According to its website, its primary goal is to inculcate respect for all life forms by increasing recognition of the "right" of animals to live "unmolested" in their natural habitat. Claimant has presented evidence that Wilderness, along with other international charities, has protested the removal of Sireno Kanto frogs from Respondent's territory. Protests undertaken by Wilderness have taken the form of a peaceful march in Respondent's capital city and an international campaign to generate public and governmental opposition to the removal of Sireno Kanto frogs from their natural environment.

410 Claimant contends that Professor Iracunda's membership of Wilderness and her annual donations indicate her strong support for their activities. They argue that because Wilderness has opposed the specific transaction at stake in the present dispute, Professor Iracunda cannot be viewed as impartial between the parties, as she has already morally pre-judged Claimant's removal of the Sireno Kanto.

420 Respondent replies that mere membership of a large international charity cannot suffice to demonstrate a manifest lack of independence. They emphasize that Claimant has presented no evidence that Dr. Iracunda has personally supported the specific protests involving the Sireno Kanto. As a result, they argue, there is nothing to suggest that Professor Iracunda does not meet the requirements of the ICSID Convention.

425 **The Decision of the Two Members**

430 The Two Members have reviewed the submissions made by both parties and the statement made by Professor Iracunda. Neither party has challenged the honesty of Professor Iracunda's statement, or challenged her independence on any ground other than those raised in the disqualification proposal.

435 The Two Members believe that Professor Iracunda is indisputably correct in the distinction she draws between the roles of scholars and arbitrators. It is common practice for legal scholars to sit on arbitral tribunals, and their contributions to the work of tribunals have been central to the development of international investment law. If Claimant were correct that the mere expression of a view on a legal issue relevant to an arbitration sufficed for the

Challenge Decision

purpose of a disqualification proposal, few if any scholars would be able to serve on tribunals. Moreover, professional arbitrators would refrain from publication, lest they too be subjected such viewpoint-based challenges. In this way purely speculative concerns would seriously undermine the future development of international investment law, a field in which the lack of binding precedent has made published commentary particularly important.

Further, while Professor Iracunda's writing style is at times passionate, it must be remembered that she was writing an academic publication, not an arbitral award. Passionate language in such contexts is hardly unknown. Admittedly the language used by Professor Iracunda in the passage cited above does tend toward an extreme, but it must nonetheless be remembered that, as noted by the Claimant itself, Professor Iracunda is recognized as a leading commentator on the meaning of "investment" in the ICSID Convention. She did not achieve that status through pure rhetoric. Whatever concerns may be raised by individual passages in Professor Iracunda's writing must be balanced against the unchallenged professionalism of her substantive analyses.

Finally, as pointed out by Professor Iracunda in her statement, the essence of an arbitrator is the ability to mold his/her opinions to the facts presented and deliver an award appropriate to the dispute at hand. Professor Iracunda offers reassurance that she fully intends to fulfill this obligation, and Claimant has offered its acknowledgement of this intention.

For the above reasons, the Two Members do not believe that Professor Iracunda's writings present any reason to believe that she fails to meet the requirements of Article 57 of the ICSID Convention.

Turning now to Professor Iracunda's membership in the organization Wilderness, the Two Members are satisfied by the statement of Professor Iracunda. Neither her membership in a large international organization nor her regular donations to that organization give reason to question her independence. Claimant has presented no evidence of her personal involvement in any protest against the removal of the Sireno Kanto, or of any public statement in which she expressed support for the actions of Wilderness in this regard. Merely supporting conservation in principle does not suffice

For this reason, the Two Members conclude that Professor Iracunda's membership in and support of Wilderness do not present any reason to believe that she fails to meet the requirements of Article 57 of the ICSID Convention.

Therefore, Claimant's proposal to disqualify Professor Iracunda from the Tribunal is dismissed and the proceedings are resumed, effective from the date of this decision.

Annex I: Professor Iracunda's Statement

I would like to begin by clarifying the difference between the role of an arbitrator and a scholar. A scholar benefits from the freedom to express an opinion that can be changed at any time, with no direct impact on any other person or entity. This allows a freedom of expression that is simply inappropriate for an arbitrator, who must be more measured in the language in which she chooses to express herself. While I stand by all the arguments that I have made in my writings, I nonetheless reserve the right to contradict myself at any point in the future. For an academic, self-contradiction is an inherent right.

Moreover, a scholar examines and critiques legal principles in the abstract, while an arbitrator is constrained by the facts before her. I have many years' experience as an arbitrator, and I am fully aware that every claim is different and all decisions must be tailored

Challenge Decision

to the facts at hand. Indeed, as I have argued in *Re-thinking ICSID Arbitration*, “[w]hat constitutes ‘development’, however, is a matter of fact, to be assessed on the individual facts in each case.”

495 As for my membership in and donations to Wilderness, I do indeed fully support the
conservation principles for which Wilderness stands. However, I do not believe that this has
any relevance to my role as arbitrator. While there may be ecological issues present in the
surrounding context of this dispute, the dispute itself concerns a business transaction and an
international investment agreement, not the removal of Sireno Kanto from Bela Rano
500 Insularo. This removal is a fact agreed by both sides, and so cannot be a matter that I will be
asked to decide. I reject, therefore, Claimant’s proposition that my personal views on
conservation will affect my independence as an arbitrator in this dispute.

Award

MAX SOLUTIONS, INC.

505

v.

THE GOVERNMENT OF BELA RANO INSULARO

ICSID Case No. ARB/08/21

510

AWARD

515

1. The Parties and the Background of the Dispute

OMITTED

2. Procedural History

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****OMITTED****

3. Jurisdiction

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a. Relevant Provisions of the ICSID Convention

Preamble (extract):

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Considering the need for international cooperation for economic development, and the role of private international investment therein.

Article 25(1):

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The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

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b. Relevant Provisions of the Treaty Between the Government of Oscania and the Government of Bela Rano Insularo Concerning the Encouragement and Reciprocal Protection of Investment

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Article 1: Definitions (extract)

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“Investment” means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

Award

- 555 (a) an enterprise;
(b) shares, stock, and other forms of equity participation in an enterprise;
(c) bonds, debentures, other debt instruments, and loans;
(d) futures, options, and other derivatives;
560 (e) turnkey, construction, management, production, concession, revenue-sharing,
and other similar contracts;
(f) intellectual property rights;
(g) licenses, authorizations, permits, and similar rights conferred pursuant to
domestic law; and
565 (h) other tangible or intangible, movable or immovable property, and related
property rights, such as leases, mortgages, liens, and pledges.

“Investment agreement” means a written agreement between a national authority
of a Party and an investment or an investor of the other Party, on which the
investment or the investor relies in establishing or acquiring an investment other
570 than the written agreement itself, that grants rights to the investment or investor:
(a) with respect to natural resources that a national authority controls, such as for
their exploration, extraction, refining, transportation, distribution, or sale; (b) to
supply services to the national authority for the benefit of the public, such as
575 power generation or distribution, water treatment or distribution, or ecological
monitoring or control; or (c) to undertake infrastructure projects, such as the
construction of roads, bridges, canals, dams, or pipelines, that are not for the
exclusive or predominant use and benefit of the government.

Article 12(2):

580 Nothing in this Treaty shall be construed to prevent a Party from adopting,
maintaining, or enforcing any measure otherwise consistent with this Treaty that it
considers appropriate to ensure that investment activity in its territory is
undertaken in a manner sensitive to environmental concerns.

585 Article 24:

1. In the event that a disputing party considers that an investment dispute cannot
be settled by consultation and negotiation, the claimant, on its own behalf, may
590 submit to arbitration under this Section a claim
(i) that the respondent has breached
(A) an obligation under Articles 3 through 10,
(B) an investment authorization, or
(C) an investment agreement;
595 and
(ii) that the claimant has incurred loss or damage by reason of, or arising
out of, that breach
provided that a claimant may submit pursuant to subparagraph (i)(C) a claim for
breach of an investment agreement only if the subject matter of the claim and the
600 claimed damages directly relate to the investment that was established or
acquired, or sought to be established or acquired, in reliance on the relevant
investment agreement.

Article 25:

605 1. Each Party consents to the submission of a claim to arbitration under this
Section in accordance with this Treaty.
2. The consent under paragraph 1 and the submission of a claim to arbitration
under this Section shall satisfy the requirements of Chapter II of the ICSID

610 Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for
written consent of the parties to the dispute.

c. Claimant's Position on Jurisdiction

615 ***OMITTED***

d. Respondent's Position on Jurisdiction

620 ***OMITTED***

e. Decision of the Arbitral Tribunal

625 **(i). The Requirement of an 'Investment' Under the ICSID Convention**

ICSID, as is made clear by the name of the institution, is not a general dispute
630 resolution centre. Rather, it was formed to address a very specific type of dispute,
"investment" disputes" that had gained particular importance in the post-colonial context that
existed after World War 2. As a result, it is beyond challenge that an ICSID tribunal only has
jurisdiction over disputes that arise directly out of an "investment".

635 Unfortunately, the Convention itself gives no indication as to what the term
"investment" means, or how it is to be determined whether or not one exists. A variety of
theories have been advanced as to why no definition of "investment" was included in the
Convention, and as to how the term should be interpreted by tribunals. However, ultimately
640 the only acceptable approach for an ICSID tribunal to take is to consider the prior caselaw of
ICSID tribunals on this question. Decisions by ICSID tribunals are not binding, but
nonetheless an ICSID tribunal is not a single-use arbitration panel. It is part of a long-term
investment-regulation mechanism. As a result, it is only appropriate that ICSID tribunals
attempt to interpret vague terms in the Convention in the way that is most consistent with
prior caselaw.

645 For this reason, the majority of this tribunal accepts the analysis of Professor
Christoph Schreuer, who has identified a set of characteristics common to those
"investments" over which ICSID tribunals have accepted jurisdiction. Known as the *Salini*
criteria, they include the following: (i) Regularity of Profit and Return, (ii) Substantial
Contribution/Commitment of Resources, (iii) Duration of the Transaction, (iv) Assumption of
650 Risk, and (v) Contribution to the Economic Development of the Host State.

Drawn as they are from prior ICSID jurisprudence, these criteria provide a checklist
for the existence of an ICSID "investment". While the failure of a transaction to meet one of
655 these criteria does not *per se* preclude the transaction being an ICSID "investment", it
increases significantly the burden placed on the other criteria. Ultimately if one of the *Salini*
criteria is missed, the others need to be *clearly* met, or the transaction fails the test. In such
a case, an ICSID tribunal has no jurisdiction.

660 It should be acknowledged that not all tribunals have accepted the *Salini* criteria, and
recently the annulment committee in *Malaysian Historical Salvors, SDN, BHD v. Malaysia*,
ICSID Case No. ARB/05/10 expressly rejected the use of the *Salini* criteria, arguing instead
that the only relevant definition of "investment" is that contained in the instrument including
the consent of the parties to arbitration.

665 The members of the *MHS* annulment committee are certainly learned, but ultimately an annulment committee has no power to bind an ICSID tribunal - as shown by the *MHS* committee's own rejection of the use of the *Salini* criteria by the annulment committee in *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7.

670 The majority of this tribunal, then, rejects the view of the *MHS* annulment committee, and defers instead to broader ICSID caselaw. The third member of the tribunal has attached a dissenting opinion to this award, but as that dissent consists of little more than *ad hominem* attacks on a member of the majority, it need not be addressed here.

675

(ii). Application of the *Salini* criteria

Regularity of Profit and Return

680 While certain the Claimant expected profits from the contract, it is hard to see how any regularity of profit and return could have existed. Max Solutions was to be paid on a "bounty" basis, which meant that its return each month depended entirely on the success of its activities in the previous month. At the time the contract was terminated, only 3% of Bela Rano Insularo's Sireno Kanto population had been removed from the island. At this rate of
685 capture and removal successful completion of the contract would have been impossible.

However, prior to the termination of the contract Max Solutions had announced a planned increase in its rate of capture and removal. Consequently, it is not implausible that Max Solutions foresaw that for the remainder of the contractual term it would be able to
690 generate a consistent income as the remaining frogs were steadily removed from the island. Consequently, this criterion should be regarded as having been met, even if somewhat tenuously.

Substantial Contribution/ Commitment of Resources

695

While it might be argued that a transaction for the supply of services by definition cannot involve a significant commitment of resources, such a view ignores the reality of this transaction. While Max Solutions did not build a factory or construct any other major work, it is uncontested that Bela Rano Insularo possessed neither the equipment nor the trained
700 personnel necessary to undertake the frog removal itself without the involvement of Max Solutions. Max Solutions, then, clearly contributed both these resources to Bela Rano Insularo. Indeed, the reality of this commitment is clearly shown by the ability of the Bela Rano Insularo government to continue with the frog removal after termination of its contract with Max Solutions, drawing on the knowledge it had gained through its association with Max
705 Solutions.

This criterion, then, must be taken to have been met. Nonetheless, while there was certainly a contribution of resources by Max Solutions, it is far from clear that this contribution can genuinely be viewed as "substantial", except from Max Solutions' own perspective.
710 Consequently, this criterion too has only been met tenuously.

Duration of the Transaction

Although the Contract only imposed obligations on the parties to perform actions from
715 January 2006 to December 2007, it had nonetheless been in effect since 2002. As a result, Max Solutions had been undertaking preparatory work prior to the January 2006 commencement of actual operations.

Award

720 Consequently, the majority believes it appropriate to treat the contract as taking place
over a 6-year period, rather than a 2-year period, and thus to have satisfied this criterion.
Nonetheless, while this criterion must be taken as having been met, the very limited nature of
the activities taking place prior to January 2006 means that this criterion has, again, been
met rather tenuously.

725

Assumption of Risk

730 As the Contract was undertaken on a bounty basis, it is beyond question that Max
Solutions bore significant risks. A failure to remove large numbers of Sireno Kanto from Bela
Rano Insularo would have resulted in a significant loss for the company.

735 However, it must be remembered that for Max Solutions this type of risk was merely a
regular commercial risk that was encountered in every project it undertook, “bounty” being
Max Solution’s standard method of payment. It is simply implausible that this type of regular
commercial risk can constitute an adequate “assumption of risk” under the ICSID
Convention, as there would then simply be no commercial transaction that did not meet this
criterion. Every commercial transaction, after all, entails some level of risk, even if only with
respect to the willingness or ability of the other party to pay as agreed.

740 Nonetheless, while the risk entailed in “bounty” payment may be a regular commercial
risk, it must also be remembered that Max Solutions was required to operate on a very tight
schedule, with a completely inflexible deadline, and at the risk of losing all payments under
the contract if it was not properly performed. For these reasons, it should be acknowledged
745 that significantly more risk was involved in the Bela Rano Insularo transaction than was
conventional for Max Solutions’ projects.

As a result, this criterion must also be taken to have been satisfied, although again
only tenuously.

750

Contribution to the Economic Development of the Host State

755 Without doubt the most important *Salini* criterion, the requirement that the removal of
Sireno Kanto from Bela Rano Insularo by Max Solutions have contributed to the economic
development of Bela Rano Insularo becomes even more important given the tenuous way in
which all the other criteria have been satisfied. Only a clear and significant contribution to
Bela Rano Insularo’s economic development can suffice.

760 Max Solutions appeals to the statements made by Bela Rano Insularo’s
spokeswoman predicting a boom in tourism as a result of the GASP, as indicating the
government’s own recognition of the impact of Max Solutions’ activities on the economic
development of the State. At best, however, such statements merely represent politically-
motivated optimism, and cannot constitute decisive proof of the causal connection required
here.

765

770 More persuasive for current purposes is the Witness Statement submitted by Dr.
Herbert Ranapuer, in which he states that even without the removal activities undertaken by
Max Solutions, the Sireno Kanto population will by 2009 have dropped to only 5% of its 2006
level. That is, the frogs were being “removed” by nature, even while Max Solutions own
activities were ongoing.

The unavoidable conclusion, then, is that while the activities of Max Solutions may
well have contributed to the ability of Bela Rano Insularo to host the GASP, any future

775 economic development that can be attributed to the removal of Sireno Kanto cannot be attributed to Max Solutions. The Claimant cannot take credit for potential economic benefits that will be generated whether or not it undertakes its work.

780 In addition, while Max Solutions was generating additional profits through the use of the Sireno Kanto in pharmaceutical research and through the sale of recordings of frog “symphonies”, it is clear that none of this revenue was to be shared with Bela Rano Insularo. Consequently, it could have contributed nothing to Bela Rano Insularo’s development.

785 Moreover, no significant economic development has as yet occurred, meaning that any argument that future tourism will generate such a benefit is purely speculative, and cannot be accepted.

As a result, this criterion cannot be taken to have been met.

790 **(iii). Determination on the Existence of an “Investment”**

795 No analysis has here been performed of the possible satisfaction of the definition of “investment” contained in the Treaty Between the Government of Oscania and the Government of Bela Rano Insularo Concerning the Encouragement and Reciprocal Protection of Investment. As explained at the outset of this award, however, such an analysis is simply unnecessary. While it is beyond question necessary for this tribunal to have jurisdiction that the definition in the Treaty be met, it is also necessary that the requirements of Article 25 of the ICSID Convention are met. If either of these two prongs is not met, this tribunal has no jurisdiction.

800 As the analysis above has indicated, however, the Max Solutions-Bela Rano Insularo transaction clearly fails to meet the requirements of the ICSID definition of “investment”. No contribution to the economic development of Bela Rano Insularo could be proven. While this is not in itself completely determinative, the combination of this failure of the economic development criterion, the most important criterion in the *Salini* test, with the tenuous nature of the satisfaction by the transaction of every other *Salini* criterion, clearly compels a conclusion that no ICSID “investment” was undertaken by Max Solutions.

810 As one member of this tribunal has recently argued, “the recent criticism of ICSID and the threatened withdrawal of many countries is evidence that States are not happy with the way ICSID is moving forward – without regard to the developmental objectives of the Host State. This balance must be set right by recognizing and giving effect to ICSID’s role in balancing the rights of private investors against those of host countries.” By recognising the restriction of ICSID protections to only those transactions that contribute to the economic development of the Host State, this decision attempts to achieve this goal.

5. Costs

820 ****OMITTED****

6. Decision

825 In the light of the above considerations, the Tribunal decides that ICSID lacks jurisdiction and the Tribunal lacks competence to consider the claims made by the Claimant.

MAX SOLUTIONS, INC.

v.

830

THE GOVERNMENT OF BELA RANO INSULARO

ICSID Case No. ARB/08/21

835

AWARD

DISSENTING OPINION

840

1. Introductory Remarks:

845

While it is with regret that I am forced to write these comments, it would be unprofessional of someone who takes the role of arbitrator with great seriousness to remain silent in the face of a decision such as the one delivered here by the majority. I have served as arbitrator for many years, in a variety of contexts, but have never experienced a tribunal that operated as unprofessionally as this one. While I am aware that the grounds for annulment of an ICSID award are narrow, respect for the integrity of ICSID arbitration requires that this award be annulled, and a new arbitration held before a new tribunal.

850

2.1 The Bias of Dr. Iracunda

855

At the beginning of this arbitration Max Solutions brought a challenge against Dr. Iracunda based on the views that she had expressed in her writings. I reluctantly agreed with the decision of Dr. Honesta that ICSID rules regarding challenges did not allow a challenge to succeed on the grounds argued by Max Solutions, but I am now convinced that this decision cannot have been correct. To allow an individual on a tribunal whose primary role will be 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.

860

865

From the beginning of the tribunal's work, Dr. Iracunda repeatedly pressed for her own views on the interpretation of the term "investment" in Article 25 of the ICSID Convention to be the guide for the tribunal's deliberations, distributing copies of her writings to both myself and Dr. Honesta, along with other writings that she believed supported her conclusions.

870

As was my responsibility I insisted that alternative views be considered, but each time was rebuffed by Dr. Iracunda, who insisted that she had already considered each point I proposed. Moreover, whenever I suggested to Dr. Iracunda that she read a particular writing on the topic, both arbitral awards and academic publications, that I had found insightful (and there is an enormous range of such material that disagrees with Dr. Iracunda's own conclusions) she responded that she had already read the piece during her previous research and did not need to read it again. Even if it was indeed true that she had considered all the arguments and writings I mentioned, any professional would have revisited her views for the purpose of this arbitration. The parties to this dispute deserved no less.

875

880 It rapidly became clear, then, that there was literally nothing that could change Dr. Iracunda's view on the meaning of "investment" in Article 25 of the ICSID Convention. As a result, the majority's decision is not based upon a serious consideration of the facts and law applicable to this case, and should be annulled.

885 2.2 The Inadequacy of the *Salini* Criteria

890 Leaving to one side the issue of Dr. Iracunda's unprofessional behaviour, I am also forced to dissent from the majority's decision because of its erroneous interpretation of the term "investment" in Article 25 of the ICSID Convention.

895 Much controversy has, of course, surrounded the meaning of this term, but it is difficult to find a more compelling statement of the case against the *Salini* criteria than that made by the annulment committee in *Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10*. Moreover, this decision was delivered after Dr. Iracunda had published her views on the meaning of Article 25. As a result, it can only be concluded that her views had been considered by the august members of the annulment committee and rejected as fallacious. While an annulment committee's views are not binding on a tribunal, an award that is supported by both a former President of the International Court of Justice and the current Vice-President must surely be given considerable deference. International investment law cannot develop if arbitrators insist on seeing their positions as little more than soapboxes from which they can present their own views.

900 As a result, I must dissent from the conclusion of the majority, both because I am personally convinced that the *Salini* criteria are inapplicable to Article 25, and because although the views of annulment committees may not be binding on tribunals, the hierarchical structure of the ICSID system requires that the views of higher tribunals be respected where they are not clearly wrong. Professionalism and respect for the integrity of international investment law requires this deference.

910 3. Conclusion:

915 For the reasons stated above, I firmly dissent from the decision of the majority. In addition, I strongly urge that the majority's decision be annulled, and a new tribunal empanelled to re-hear this dispute.

Clarifications

Teams: 16 August 2012 Clarifications

136 16 2012-08-17 02:45:18

Arbitrator qualifications

Was Prof. Iracunda involved in Wildernessâ€™™ activities or internal projects?

No.

135 16 2012-08-17 02:44:13

Industry practices

Were any other companies bidding along with Max Solutions to obtain the contract with Bela Rano Insularo?

Yes

133 14 2012-08-17 02:31:16

Composition of Tribunal (Team Spiropoulos - Question 10)

Does the BIT in question address the composition directly, or does it simply refer to the ICSID rules?

The BIT does not address the composition of the tribunal.

131 14 2012-08-17 02:20:41

(Team Spiropoulos - Question 8)

How many frogs did Max Solutions remove each month?

Max Solutions removed some frogs, and so received some payment, for each of the months before the contract was terminated.

129 14 2012-08-17 01:49:42

Expert Report (Team Spiropoulos - Question 6)

Does the expert report contain an explanation of its methodology?

Yes.

128 31 2012-08-16 23:04:21

Q5

Did Claimant within its activities in BRT provide any additional value to BRT such as creating job opportunities or at least paying direct taxes?

Max Solutions paid local taxes and hired some local personnel while pursuing its business activities in Bela Rano Insularo.

124 31 2012-08-16 22:55:42

Q1

Is it to be taken as a fact that the Sireno Kanto died out as a result of the disease that is described in expert report by prof. Ranapuer?

Yes.

123 34 2012-08-16 21:24:17

Parties to the ICSID Convention

Are Bela Rano Insularo and Oscania parties to the ICSID Convention?

Yes.

119 34 2012-08-16 21:03:59

Arbitrators' nationality

What is the nationality of each of the arbitrators?

None of the arbitrators is a national of either Bela Rano Insularo or Oscania.

Clarifications

118 3 2012-08-16 20:07:12

Format of Memorial

Besides "statement of facts" do other sections, for example the introduction/"summary" need to be numbered in arabic numerals? Which word limit do they count towards?

The table of contents, the list of authorities and any other indices or appendices shall have small Roman numeral page numbers and count, together with the cover page, toward the 2,500 word limit referred to in Rule 6.3; all other parts shall have Arab numeral page numbers and count toward the 13,000 word limit referred to in Rule 6.3.

114 6 2012-08-16 19:25:08

frogs treatment and its consequences

Does Bela Rano Insularo take any measures to ensure Max Solutions' compliance with their obligation to treat the frogs humanely?

Actions taken by Max Solutions in Bela Rano Insularo itself were monitored, but not actions taken abroad.

108 44 2012-08-16 19:10:30

UFPR - 2

Did BRI notify Max Solution of its intention to rely on an expert opinion, according to article 5.1 of the IBA Rules on the Taking of Evidence in International Arbitration?

Yes.

107 44 2012-08-16 19:09:07

UFPR - 1

How much time did the Tribunal have to give his award? And why didn't the Tribunal itself appoint an expert to replace Dr. Ranapuer?

The tribunal was under no obligation to deliver its award by a particular time.

106 9 2012-08-16 17:22:36

Armand-Ugon Q5

If the Award (including dissenting opinion) contains facts contradictory to those given in the uncontested facts, does the content of the Award(including dissenting opinion) supersede the ones given in uncontested facts?

The "uncontested facts" are uncontested by both parties in the current proceeding.

104 9 2012-08-16 17:20:09

Armand-Ugon Q3

Is economic renaissance experienced by Bela Rano Insularo (lines 125-130) merely because of Bela Rano Insularo being an ecological hotspot?

Yes.

100 2 2012-08-16 16:57:01

University of Ottawa, Q4

In Max Solution's third point for their application to the ad hoc committee, what did they mean by: "as this is an issue that goes to the jurisdiction of the Centre, not the tribunal" (line 207-208)?

Teams are urged to attend to the distinction between the jurisdiction of the Centre, which derives from the fulfilment of certain requirements listed in the Convention, and the jurisdiction of a specific tribunal, which is predominantly a matter of the consent of the parties.

99 2 2012-08-16 16:54:51

University of Ottawa, Q3

Clarifications

Is it the first time that Bela Rano appoints Professor Iracunda as an arbitrator?

Yes.

98 2 2012-08-16 16:53:55

University of Ottawa, Q2

When Max Solutions entered into the contract with Bela Rano Insularo, did Bela Rano Insularo inform Max Solutions that it planned to host the GASP event?

Yes.

97 12 2012-08-16 16:25:24

Herczegh 5

Would the failure of Belo Rano Insularo to sign a contract with Max Solutions necessarily mean the 2008 athletic event would not have been held in Belo Rano?

Bela Rano Insularo was required by the Council to demonstrate that it possessed an effective means of eliminating the problems posed by the island's frog population, but the Council did not require that a specific method be used.

96 12 2012-08-16 16:24:48

Herczegh 4

Did Wilderness protest specially against the actions of Max Solutions?

Wilderness has strongly criticised Max Solutions' treatment of the Sireno Kanto.

94 12 2012-08-16 16:23:16

Herczegh 2

Did the Tribunal consider and discussed with the parties the option of putting questions to Dr. Ranapuer in writing or attempted to approach Dr. Ranapuer itself to persuade him to testify?

Prior to reaching its decision on Dr. Ranapuer's expert report, the tribunal requested that Bela Rano Insularo attempt to secure the participation of Dr. Ranapuer for a subsequent day. When Bela Rano Insularo confirmed that Dr. Ranapuer refused to participate at all, the tribunal accepted this as a fact and made no further efforts to secure Dr. Ranapuer's participation.

93 12 2012-08-16 16:22:10

Herczegh 1

Would the Tribunal know that 95% frogs will die by 2011 without Dr. Ranapuer's report?

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.

89 24 2012-08-16 10:01:48

NALSAR University of Law, Hyderabad, India: Question 1

Is there a clause in the contract providing that the Bela Rano can inspect the facilities of Max Solutions?

No.

87 17 2012-08-15 19:03:33

Q3

Did the Parties expressly agree to apply IBA Guidelines on conflict of interests as the arbitration rule for challenge of arbitrator?

No.

86 17 2012-08-15 19:00:43

Clarifications

Q2

Did the Tribunal's explanation of his decision not to exclude expert report contain any sentences that could be characterised as hostile or in any way showing partiality of the Tribunal when deciding this procedural question?

No.

Clarifications

Teams: 7 June 2012 Clarifications

66 22 2012-06-08 02:52:22

Line 55 of Uncontested Facts

Will Max Solutions lose all payments due to them or payments already received as well?

Max Solutions would lose the right to all payments under the contract. They would, therefore, have to reimburse those payments already made.

60 14 2012-06-07 23:36:32

Investment Issue (Team Spiropoulos)

On what calendar date was Bela Rano Insularo's bid to host the games granted?

The bid was granted in late 2003.

64 14 2012-06-07 23:35:16

Expert Issue (Team Spiropoulos)

Lines 168-73 of the Undisputed Facts state that Dr. Ranapuer is one of three scientists with knowledge of the Sireno Kanto. However, the Tribunal held that his report contained "information available from no other source." Is there any evidence the other two academics were unavailable, unwilling to participate, or unknowledgeable about the issue?

There is no evidence that the other two experts were contacted.

52 12 2012-06-07 18:40:20

Herczegh - 5

Whether Max Solutions was aware of the potential commercial use of frogs and whether it was under an obligation pursuant to the contract to disclose such use to Bela Rano Insularo?

There is no evidence that Max Solutions was aware of the potential commercial uses of Sireno Kanto at the time the contract was signed. Nothing in the contract explicitly obligates Max Solutions to disclose such uses to Bela Rano Insularo.

50 12 2012-06-07 18:38:22

Herczegh - 3

Disclosure by Dr. Iracunda. Did Dr. Iracunda sign a declaration under ICSID Rule 6(2) and if she did, did she disclose her membership in the Wilderness or the content of her book or anything else in the declaration?

Yes, a declaration was filed. Neither her membership in Wilderness nor the publications cited in the subsequent challenge to her appointment were mentioned.

49 12 2012-06-07 18:37:33

Herczegh - 2

Dr. Ranauper's Report. Please provide more details about the status of Dr. Ranauper and the report that he prepared (whether he was called as an expert or as a witness, whether Bela Rano Insularo University has any links to the government of Bela Rano Insularo, did the report comply with or was challenged on the basis of provisions of Articles 5.2 or 9.2 of the IBA Rules, did the contract between Bela Rano Insularo and Dr. Ranauper provide for his obligation to attend the hearing)?

Dr. Ranapuer's report constitutes an "expert report" under the applicable rules. Bela Rano University is government-owned, and hence Dr. Ranapuer is an employee of the Bela Rano Insularo government. No challenge was made to his report on this ground. Dr. Ranapuer's employment contract related only to his

Clarifications

research work, and did not obligate him to attend hearings of any type.

48 12 2012-06-07 18:36:29

Herczegh - 1

Treatment of Dr. Ranauper's report by the Tribunal. Did Max Solutions submit a separate request for Dr. Ranapuer to attend the evidentiary hearing and if such a request was submitted did the Tribunal expressly invoke any exceptional circumstances to justify admission of the report (did the award deal in any way with the evidentiary weight of the report)?

Max Solutions had requested Dr. Ranapuer attend the hearings for the purpose of cross-examination. The tribunal's explanation of its decision to consider the report did not extend beyond what is given in the Uncontested Facts. The tribunal made no explicit reference to the evidentiary weight it gave to the report beyond those comments included in the Award as excerpted.

46 9 2012-06-07 18:22:51

Armand-Ugon Q4

When exactly did Dr. Ranapeur join Wilderness?

Dr. Ranapuer joined Wilderness in 1995.

44 9 2012-06-07 18:16:21

Armand-Ugon Q2

There is a conflict regarding the date of filing for ICSID arbitration by Max Solutions. When exactly did Max Solutions file a request for ICSID arbitration?

The reference to December 2008 should be to December 2006.

41 2 2012-06-07 16:56:21

University of Ottawa, Question 2

What are the duties and responsibilities expected of a member once admitted to Wilderness?

Membership of Wilderness entails no specific duties or responsibilities.

40 2 2012-06-07 16:55:45

University of Ottawa, Question 1

What criteria must a person meet in order to become a Wilderness member?

There are no criteria for Wilderness membership.

32 18 2012-06-07 13:41:30

Question 3 - ICSID Articles

Issue #3, on the annulment committee's power to decide the investment claim, says that this power exists through Arts. 41(2) and 54(4) of the ICSID Convention. Should the second Article referenced in the claim be Art. 52(4) ("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"), rather than Art. 54(4)?

All references to Article 54(4) should be to Article 52(4).

31 3 2012-06-07 04:43:14

Article 24

Are Articles 3-10 of the treaty relevant to this dispute, and if so what is the text of the pertinent Articles?(See line 590)

Articles 3-10 are not relevant.

28 21 2012-06-06 22:16:08

Scientists' Estimations

Clarifications

Why was the estimation by the scientists, one of them presumably being Dr. Ranapuer himself, (§§79-81, i.e. 95% naturally removed by 2011) different from that by Dr. Ranapuer's Statement (§§765-7, i.e. by 2009)?

The reference to 2009 should be to 2011.

24 25 2012-06-06 20:29:47

University of Cologne Q.5

5) Does Claimant generate income from its contract with the pharmaceutical corporation, and/or by selling frog symphony recordings? (§§ 83 – 99 Uncontested Facts)

The Claimant generates income from both.

21 25 2012-06-06 20:27:26

University of Cologne Q.2

2) When exactly was the announcement by the Bela Rano government spokeswoman made, announcing the contract with Max Solutions? (§§ 60 – 63 Uncontested Facts)

January 2002.

13 27 2012-06-06 17:36:08

UGM Clarifying Question 1

Is the scope of the Counsel's argumentation truly limited to the annulment of the initial decision, and thus excludes merits or questions otherwise left out in the initial decision?

Issues to be addressed in the proceedings are strictly limited to those specific grounds on which Max Solutions has requested annulment. No other issue should be addressed, even if it might itself provide an additional ground for annulment.