INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/8/21

(ANNULMENT PROCEEDING)

BETWEEN:

MAX SOLUTIONS, INC.  THE GOVERNMENT OF BELA RANO INSULARO

APPLICANT/INVESTOR  RESPONDENT/PARTY

MEMORIAL FOR THE APPLICANT
# TABLE OF CONTENTS

LIST OF AUTHORITIES ........................................................................................................ iii
LIST OF LEGAL SOURCES ..................................................................................................... ix
STATEMENT OF FACTS ........................................................................................................ 1
ARGUMENTS ADVANCED ....................................................................................................... 4

I. THE TRIBUNAL WAS IMPROPERLY CONSTITUTED AS THE INITIAL CHALLENGE TO PROF. ALESSANDRA IRACUNDA SHOULD HAVE BEEN SUCCESSFUL ........................................................................................................................... 4

A. THE AD HOC COMMITTEE HAS THE JURISDICTION TO DETERMINE THE CHALLENGE OF PARTIALITY AGAINST PROF. ALESSANDRA IRACUNDA ................................................................. 4

1. Article 52(1)(a) can be invoked due to lack of Impartiality of the Tribunal .............. 4
2. Article 52(1)(d) can be invoked in cases of lack of impartiality of the tribunal ......... 5

B. PROF. IRACUNDA DID NOT EXERCISE INDEPENDENT AND IMPARTIAL JUDGMENT ........... 6

1. Prof. Alessandra Iracunda Prejudged the Subject Matter of the Present dispute through her Legal Writings ............................................................................................................................... 7
2. Prof. Iracunda had morally Prejudged the Present Dispute ....................................... 11

II. THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS IN DECLINING JURISDICTION ................................................................................................................................. 13

A. THE ANNULMENT COMMITTEE HAS THE POWER TO ANNUL THE AWARD UNDER A. 52(1)(B) OF THE ICSID CONVENTION .................................................................................. 13

B. THE TRANSACTION IN QUESTION QUALIFIES AS AN INVESTMENT UNDER THE ICSID CONVENTION .......................................................................................................................... 14

1. The term ‘investment’ under the ICSID Convention should have been interpreted broadly ................................................................................................................................. 14
2. The provisions relating to investment in the Bela-Oscania BIT were not duly appreciated ................................................................................................................................. 16

C. THE TRIBUNAL COMMITTED A GRAVE ERROR IN RELYING SOLELY ON THE SALINI CRITERIA TO DETERMINE THE EXISTENCE OF INVESTMENT .................................................. 19
1. The ‘Salini Criteria’ are based on a fundamentally flawed premise

2. The ‘Salini Criteria’ are merely indicative of existence of an investment and cannot be elevated to jurisdictional requirements

D. CONTRIBUTION TO ECONOMIC DEVELOPMENT IS NOT A JURISDICTIONAL CRITERION OF AN ICSID INVESTMENT

1. Contribution to economic development is an intended consequence of an ICSID investment and not its constitutive element

2. The requirement of a ‘significant’ contribution to economic development unjustifiably restricts the notion of investment

E. THE MANNER IN WHICH THE SALINI CRITERIA WERE APPLIED WAS FLAWED

III. ARGUENDO, THE CRITERION OF CONTRIBUTION TO ECONOMIC DEVELOPMENT WAS SATISFIED

IV. THE ANNULMENT COMMITTEE HAS THE POWER TO DETERMINE THE MEANING OF INVESTMENT UNDER THE ICSID CONVENTION

V. THE TRIBUNAL’S DECISION NOT TO EXCLUDE DR. RANAPEUR’S EXPERT REPORT CONSTITUTES A SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

A. CROSS-EXAMINATION AND INDEPENDENCE OF THE EXPERT ARE FUNDAMENTAL RULES OF PROCEDURE

B. RELIANCE ON THE EXPERT REPORT WITHOUT PROVIDING AN OPPORTUNITY FOR CROSS-EXAMINATION WAS A SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

1. Not Excluding the Expert Report amounted to a Departure from a Fundamental Rule of Procedure

2. The Departure is Serious as it deprived the Applicant of an intended benefit and would have led to a Substantially Different Award

REQUEST FOR RELIEF

LIST OF AUTHORITIES
**BOOKS**

**Carreau, D.**
D. Carreau, T. Flory & P. Juillard, DROIT INTERNATIONAL ECONOMIQUE, Revue Internationale De Droit Compare (3rd Ed. 1990)

**Fouchard**

**Muchlinski, Peter**
Christoph Schreuer, Federico Ortino and Peter Muchlinski (eds.), THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, Oxford University Press (1st Ed. 2008)

**SCHREUER, Christoph**

**JOURNALS**

**Balas, Vladimir**

**Bellhouse, John**

**Anjomshoaa, Poupak**
John Bellhouse & Poupak Anjomshoaa, “The Implications of a failure to cross-examine in International Arbitration”, available at http://www.whitecase.com/files/Publication/c85b98c6-ff96-4ea9-896b-
Bernardini, Piero

Berti, Giovanni

Boddicker, Joseph

Broches, Aron

Brubaker, Joseph R.

Cole, Tony

Davis, Bob


Ehle, Bernd Bernd Ehle, “Practical aspects of using expert evidence in international arbitration”, in Marianne Roth & Michael Geistlinger (eds.), *YEARBOOK ON INTERNATIONAL ARBITRATION*, available at 


http://www.armstrongdavis.co.uk/downloads/ADA_high_noon_for_hired_guns.pdf.
Harris, Christopher

Kim, Dohyun

Kohler, Gabrielle

Luttrell, Sam

Manciaux, Sebastien

Mortenson, Julain Davis

Musurmanov, Ilyas
Ilyas Musurmanov, “The Way Towards Consistency of Inconsistency in Defining
Park, William


Rees, Peter


Reinish, August


Schlemmer, Engela

Engela C Schlemmer, “Investment, Investor, Nationality and Shareholders” 49 in Christoph Schreuer, Federico Ortino and Peter Muchlinski (eds.), THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, Oxford University Press (1st Ed. 2008)

Schreuer (I), Christoph

Christoph Schreuer, “From ICSID Annulment to Appeal: Halfway Down the Slippery Slope”, 10 The Law and Practice of Intl Court & Tribunals 211 (2011)

Schreuer (II), Christoph

Tevendale, Craig


Tupman, Michael


Van Houtte, Hans


**LIST OF LEGAL SOURCES**

**DECISIONS**

*Abaclat*

*Abaclat and Others v. The Argentine Republic*, Request for Disqualification of President Pierre Tercier and Arbitrator Albert Jan Van den Berg, ICSID Case No. ARB/07/5 (15 September 2011)

*ADC Affiliate Limited*

*ADC Affiliate Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16.

*Alpha Projektholding*

*Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Award (Oct. 20, 2010)

*Amco I*

Azurix

Azurix Corp. v. The Argentine Republic, Decision on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/12 (1 September 2009).

Bayindir

Bayindir v. Turkey, ICSID Case No. ARB/03/29, Decision on Jurisdiction (Nov. 14, 2005)

BIVAC BV

BIVAC BV v. Paraguay, ICSID Case No. ARB/07/9, Decision on Objection to Jurisdiction (May 29, 2009)

Biwater

Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (July 24, 2008)

CDC

CDC Group Plc. v. Republic of the Seychelles, Annulment Proceeding, ICSID Case No. ARB/02/14 (29 June 2005).

CME

Czech Republic v. CME Czech Republic B.V., Svea Court of Appeals, 42 ILM 919 (May 15, 2003)

CMS Annulment

CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic (Sept 25, 2007)

CSOB

CeskoslovenskaObchodni Banka (CSOB) v. Slovak Republic, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction (May 24, 1999)
EDF


Enron Jurisdiction


Fedax

Fedax v. Republic of Venezuela, ICSID Case No. ARB/96/03, Decision of the Tribunal on Objections to Jurisdiction (July 11, 1997)

Fraport

Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, Decision on the Application for Annulment of Fraport AG, ICSID Case No. ARB/03/25 (23 December 2010)

Gemplus

Gemplus S.A. and Talsud S.A. v. United Mexico States, ICSID Case Nos. ARB (AF)/04/3 & ARB (AF)/04/4, Part I.

Hrvatska

Hrvatska Elektroprivreda, d.d. v. The Republic of Slovenia, Tribunal’s Ruling regarding Participation of David Milden QC in further stages of the Proceedings, ICSID Case No. ARB/05/24 (6 May 2008)

Inmaris

Inmaris Perestroika Sailing Maritime Services Gmbh and Others v. Ukraine, ICSID Case No. ARB/08/8, Decision on Jurisdiction (August 3, 2008)
<table>
<thead>
<tr>
<th>Case</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Iran Aircraft Industries</em></td>
<td><em>Iran Aircraft Industries v. Avco Corp.</em>, 980 F.2d 141 (2nd Cir.1992)</td>
</tr>
<tr>
<td><em>Joy Mining</em></td>
<td><em>Joy Mining v. Egypt</em>, ICSID Case No. ARB/03/11, Award on Jurisdiction (Aug. 6, 2004)</td>
</tr>
<tr>
<td><em>LESI ASTALDI</em></td>
<td>Consorzio Groupement LESI and ASTALDI v. Algeria, ICSID Case No. ARB/05/3, Decision on Jurisdiction (July 12, 2006)</td>
</tr>
<tr>
<td><em>MCI</em></td>
<td><em>M.C.I. Power Group, L.C. and New Turbine Inc. v. Republic of Ecuador</em>, ICSID Case No. ARB/03/6, Award, (July 31, 2007)</td>
</tr>
<tr>
<td><em>Methanex Corporation</em></td>
<td><em>Methanex Corporation v. United States of America</em>, NAFTA Arbitration under UNICITRAL Rules, Final Award (7 August 2005)</td>
</tr>
<tr>
<td><em>MHS Annulment</em></td>
<td><em>Malaysian Historical Salvors v. Malaysia</em>, ICSID Case No. ARB/05/10, Decision on Annulment, (Apr. 16, 2009)</td>
</tr>
<tr>
<td><em>MINE</em></td>
<td><em>Maritime International Nominees Establishment v. Republic of Guinea</em>, Decision on the Application by Guinea for Partial Annulment of</td>
</tr>
</tbody>
</table>

xii
<table>
<thead>
<tr>
<th>Case Title</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pantechniki</td>
<td><em>Pantechniki SA Contractors and Engineers</em> v. <em>Albania</em>, ICSID Case No. ARB/07/21, Award (July 29, 2009)</td>
</tr>
<tr>
<td>RFCC/Morocco</td>
<td><em>Consortium RFCC</em> v. <em>Kingdom of Morocco</em>, ICSID Case No. ARB/00/6 (22 December 2003)</td>
</tr>
<tr>
<td>Re Pinochet 1999</td>
<td><em>Pinochet, Re</em> [1999] UKHL 52 (15 January 1999)</td>
</tr>
</tbody>
</table>
Saba Fakes

Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award (July 14, 2010)

Salini

Salini Costruttori, S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001)

SGS

SGS v. Pakistan, Case no. ARB/01/13, 8 ICSID Reports 398, 402 (Dec. 19, 2002)

Soh Beng Tee


Soufraki Annulment

Hussein Nuaman Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr. Soufraki (June 5, 2007)

Suez


Tidewater

Stern, Arbitrator, ICSID Case No. ARB/10/5 (23 December 2010)

Telekom Malaysia

Republic of Ghana v. Telekom Malaysia


Tokios Tokeles

Tokios Tokeles v. Ukraine, ICISD Case No. ARB/02/18, Decision on Jurisdiction (April 24, 2004)

Tunari

Aguas Del Tunari v. Republic of Bolivia,

Decision on Jurisdiction, ICSID Case No.ARB/02/3.

Urbaser

Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, Decision on Claimant’s Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ICSID Case No. ARB/07/26 (12 August 2010).

Victor Pey Casado

Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Award (May 5, 2008)

Vivendi

Compania de Aguas del Aconquija S.A. & Vivendi Universal v. The Argentine Republic, ICSID Case No. ARB/97/3, Decision on Challenge the challenge to the President of the Committee

Vivendi I Annulment

Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002)
**Vivendi II**  
Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment (20 August, 2007)

**Wena Hotels**  
Wena Hotels Lt. v. The Arab Republic of Egypt, Decision on the Application by Egypt for Annulment of Arbitral Award, ICSID Case No. ARB/98/4 (5 February 2002)

**Whitehouse**  

**MISCELLANEOUS**

**IBA Guidelines on Conflicts of Interest**  
International Bar Association Guidelines on Conflicts of Interest, by the Council of the International Bar Association (approved on 22 May 2004)

**IBA Rules on Taking of Evidence**  
International Bar Association Rules on Taking of Evidence in International Commercial Arbitration (29 May, 2010).

**ICSID Arbitration Rules**  
Rules of Procedure For Arbitration Proceedings (Arbitration Rules)

**ICSID Convention**  
<table>
<thead>
<tr>
<th><strong>ICISD Background Paper</strong></th>
<th>ICSID Background Paper on Annulment For the Administrative Council of ICSID (August 10, 2012)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Revised Commentary on IBA Rules</strong></td>
<td>Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, 2 B.L.I. 16-36 (2000)</td>
</tr>
<tr>
<td><strong>UNCITRAL MODEL LAW</strong></td>
<td>UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, RESOLUTION 61/33 (18 DECEMBER, 2006).</td>
</tr>
</tbody>
</table>
STATEMENT OF FACTS

The Contract

1. In 2002, Max Solutions, Inc. [‘the Applicant’], a company incorporated in the nation of Oscania, entered into a contract with Bela Rano Insularo [‘the Respondent’], an independent island nation to remove the extraordinary number of poisonous Sireno Kanto frogs which inhabited the territory of the Respondent. The contract required the Applicant to clear all the poisonous Sireno Kanto frogs by the end of December 2007, with the only performance requirement of treating the frogs humanely at all times.

2. The bid of the Respondent, submitted in 2003, to host the Global Athletics Season Preview [‘GASP’] 2008 was granted only after the Respondent demonstrated its commitment to remove the island of the frogs before the start of the games, relying on the contract with the Applicant.

3. In January 2002, the Government Spokeswoman of the Respondent State, in publicly announcing the contract with the Applicant, emphasized that GASP would bring significant long term benefits to the Respondent as GASP was expected to receive as much global publicity as the Olympic Games which were to be held later in 2008.

4. In January 2006, scientists at the prestigious Frog Research Unit at Bela Rano Insularo University publicly announced that they had discovered conclusive evidence of a highly contagious and fatal disease that had afflicted the Sireno Kanto. It was estimated that 95% of the frogs would die because of the disease by 2011.

5. In February 2006, newspapers in the Respondent country rightly reported that the Applicant was commercially exploiting the frogs by recording and selling the sounds they make during their mating season and by selling some to a pharmaceutical company.

6. On March 1, 2006 the Applicant announced that it would accelerate its operations so as to remove 80% of the frogs by December 2006 itself, instead of December, 2007. The Respondent requested the Applicant to inspect their activities to verify such a claim, but the Applicant refused. Subsequently, on March 13, 2006 the Respondent terminated the contract with the Applicant citing inadequate performance since only 3% of the frogs had been removed by that time.
7. After the termination of the contract, the Respondent relied on the knowledge it had gained from the Applicant, to push the frogs away from the areas where GASP was being organized. The GASP turned out to be an enormous success. However, precluding the tourists from having access to all parts of the country reduced the immediate tourism impact of the games.

8. In December, 2006, the Applicant filed a Request for ICSID Arbitration, relying on the Bilateral Investment Treaty between Bela Rano Insularo and the Republic of Oscania [‘Bela-Oscania BIT’].

Appointment of Arbitrators

9. The Respondent appointed Prof. Alessandra Iracunda, a leading proponent of the view that an ICSID investment must contribute to the economic development of the Host State who has passionately argued thus and continues to do so. She is also a member of Wilderness International [‘Wilderness’], an organization which is strongly critical of the alleged mistreatment of Sireno Kanto by the Applicant. Due to these factors, her appointment as an arbitrator was challenged by the Applicant on the ground of her inability to exercise independent and impartial judgment, as is required under the ICSID Convention.

10. The Applicant appointed Mr. Albert Viator, a leading arbitration practitioner and experienced commercial arbitrator as their nominee. The Chair of the Tribunal was Dr. Humberto Honesta, a retired academic with many years’ experience as an arbitrator in both commercial and investment arbitrations.

The Expert Report

11. The Respondent submitted an Expert Report by Dr. Herbert Ranapuer, one of only three scientists worldwide to have detailed knowledge on matters relating to sireno Kanto, as to the expected consequences of the disease afflicting them.

12. On the morning of the evidentiary hearing, Dr. Ranapuer decided not to participate in the proceedings on account of his membership in Wilderness. The Tribunal nevertheless placed considerable reliance on Dr. Ranapuer’s Expert Report.

Procedural Facts

Decision on Proposal of Disqualification of Prof. Iracunda
13. The other Two Members of the Tribunal rejected the Disqualification Proposal as they were of the considered opinion that there was no manifest lack of qualities required of an arbitrator.

**Decision on the exclusion of Dr. Ranapuer’s Report**

14. The Tribunal unanimously decided that Dr. Ranapuer’s Expert Report was admissible even with the Applicant being deprived of an opportunity to cross examine him.

**Award on Jurisdiction**

15. On July 29, 2009, the majority of the Tribunal, comprising of Dr. Honesta and Prof. Iracunda, delivered an Award declining jurisdiction holding that the activities of the Applicant did not constitute an investment within the meaning of the ICSID Convention, as there was no contribution to economic development of the Respondent State by the Applicant’s activities.

16. Mr. Viator, issued a strongly worded Dissenting Opinion, stating that the majority was merely using the arbitration proceedings to propagote their own views and opinions regarding an ICSID investment.

17. Aggrieved by the holding of the majority of the tribunal, the Applicant has filed a request for annulment of the Award under Article 52(1) (a), (b) and (d) of the ICSID Convention.
ARGUMENTS ADVANCED

I. THE TRIBUNAL WAS IMPROPERLY CONSTITUTED AS THE INITIAL CHALLENGE TO PROF. ALESSANDRA IRACUNDA SHOULD HAVE BEEN SUCCESSFUL

18. The Applicant submits that the Tribunal was improperly constituted as (A) the ad hoc committee has the jurisdiction to determine a challenge of partiality against Prof. Alessandra Iracunda to annul an Award, and (B) Prof. Iracunda did not exercise impartial judgment as is required under the ICSID Convention.

A. THE AD HOC COMMITTEE HAS THE JURISDICTION TO DETERMINE THE CHALLENGE OF PARTIALITY AGAINST PROF. ALESSANDRA IRACUNDA

19. The jurisdiction of the ad hoc committee can be determined through impartiality of the Tribunal under (1) Article 52(1)(a), and (2) Article 52(1)(d).

1. Article 52(1)(a) can be invoked due to lack of Impartiality of the Tribunal

20. The Drafting history of the ICSID Convention indicates that the ground of ‘improper constitution of the tribunal’ for annulment was intended to cover a variety of situations such as, for instance, serious departure from the parties’ agreement on the method of constituting the tribunal, an arbitrator’s failure to meet the nationality requirement, or the entitlement of a person to be a member of a Tribunal, etc.\(^1\) The requirements for becoming a member of a Tribunal are in turn provided in Article 14(1) read with Article 40(2) and Section 2 of Chapter IV of the ICSID Convention.\(^2\) It is a settled principle in ICSID jurisprudence and one which has been accepted by the parties to the present dispute that a combined reading of Article 14(1) in its English and Spanish versions shows that Tribunal members must be persons who may be relied upon to exercise both independent and impartial judgment.\(^3\)

21. Thus, if a Tribunal decides that it has been properly constituted following an objection to a member by a party, that party can file an application for annulment on the ground of ‘improper constitution of Tribunal’ after the Tribunal has rendered its Award challenging

\(^1\) ICSID Background Paper on Annulment, 9.
\(^2\) Article 14(1) & Article 40(2) & Section 2 of Chapter IV, ICSID Convention.
\(^3\) Abaclat, ¶63; Vivendi, ¶14; Suez, ¶28; Urbaser, ¶36; Challenge Decision, ¶278-280.
the manner the challenge and alleged conflicts of interest were handled. Therefore, the Applicant submits that an allegation on lack of impartiality or independence of an arbitrator can be raised before the annulment committee after an Award has been rendered by the Tribunal.

22. In the instant case, even though the disqualification proposal against Prof. Iracunda was dismissed by the other two members of the Tribunal, the present ad hoc committee has the power to hear the issue of her lack of impartiality again as the challenge decision was flawed.

2. Article 52(1)(d) can be invoked in cases of lack of impartiality of the tribunal

23. Article 52(1)(d) as a ground for annulment of Award under the ICSID Convention requires the fulfilment of two cumulative criteria: the rule of procedure must be fundamental and the departure from the rule must be serious. The ad hoc committee in Klockner I observed that lack of impartiality of an arbitrator would constitute a valid ground for annulling the Award rendered under Article 52(1)(d) as it would constitute a serious departure from a fundamental rule of procedure. Thus, impartiality of Tribunal or members constituting the Tribunal is a fundamental rule of procedure and any proof to the contrary would be a serious departure.

24. The above position is premised on the reasoning that an Award issued whilst an arbitrator lacked impartiality, integrity of the proceedings of the arbitration are compromised upon. So, an Award passed by a Tribunal which lacks ‘any sign of impartiality’ is liable to be challenged in front of an ad hoc committee by virtue of Article 52(1)(d).

25. Thus, it can be concluded that if a challenge for disqualification of an arbitrator under Article 57 fails, and a party believes that one of the members is still not impartial and an Award is passed, then Article 52(1)(d) can be invoked for annulling the Award as the participation of the arbitrator in rendering the Award accounts for a serious departure from a fundamental rule of procedure of impartiality of Tribunal.

---

4 ICSID Background Paper, 42; SCHREUER, 935.
5 Challenge Decision, ¶424-473.
6 Wena Hotels, ¶56; MINE, ¶4.06; CDC, ¶48; MINE, ¶5.07; SHREUER, 970.
7 Klockner I, ¶95; Abaclat, ¶66; Luttrell, 241.
8 Klockner I, ¶95; Abaclat, ¶66.
9 Hrvatska, ¶30.
10 Shreuer (I), 29.
26. In the present situation, by virtue of the dismissal of the Challenge Proposal against Prof. Iracunda, she actively took part in the formation of the Award.\textsuperscript{11} Her presence did not make the Tribunal completely devoid of partiality. Thus, since Prof. Irancunda lacked the ability to exercise impartial judgment (as shall be proved hereinafter) there was a serious departure from a fundamental rule of procedure and the ad hoc committee has the power to annul the Award rendered by such the improperly constituted Tribunal under Article 52(1)(d).

B. PROF. IRACUNDA DID NOT EXERCISE INDEPENDENT AND IMPARTIAL JUDGMENT

27. Article 57 of the ICISD Convention provides for disqualification of a member of a Tribunal when there is a ‘manifest’ lack of the qualities mentioned in Article 14(1) of the ICSID Convention which, \textit{inter alia}, includes the ability to exercise independent and impartial judgment.\textsuperscript{12} Since the ICSID Convention provides no indication as to the interpretation of the term ‘manifest’ arbitrators and authors alike have attempted to formulate standards to determine its construction and scope. The trend of deducing lack of impartiality in terms of ‘manifest’ after \textit{Amco I},\textsuperscript{13} has been towards a combination of the ‘reasonable doubts’\textsuperscript{14} standard and the ‘reasonable third person’\textsuperscript{15} standard.\textsuperscript{16} This is primarily because of the fact that the standard of ‘manifest’ has been recognised to be an objective one, i.e., determined in relation to the perceptions of a third person.\textsuperscript{17} Thus, there is a manifest lack of the abilities in an arbitrator when a reasonable third person, aware of the facts and circumstances of the case, would have reasonable doubts as to the arbitrator’s ability to exercise independent and impartial judgment.\textsuperscript{18} In other words, a reasonable third person would come to a conclusion that the arbitrator cannot exercise independent or impartial judgment if he reasonably apprehends that the arbitrator would not give due consideration to the facts and circumstances of the case and arguments presented by the parties.\textsuperscript{19}

\textsuperscript{11} Challenge Decision, ¶471-473.
\textsuperscript{12} Article 57, ICSID Convention.
\textsuperscript{13} Schreuer, 1203.
\textsuperscript{14} Vivendi, ¶28; SGS, ¶46; EDF, ¶64.
\textsuperscript{15} Urbaser, ¶43; Vivendi, ¶25.
\textsuperscript{16} Lutrell, at 248-249; SGS, ¶20; Suez, ¶31; Vivendi II, ¶57; Urbaser, ¶45.
\textsuperscript{17} Suez, ¶39.
\textsuperscript{18} Morelite ¶84; Urbaser, ¶43.
\textsuperscript{19} Urbaser, ¶43.
28. Furthermore, the term ‘manifest’ has been construed to mean the easiness with which the lack of the qualities can be discerned or understood\(^{20}\) with employing little effort and without deeper analysis\(^{21}\) which does not bar challenges brought solely on the basis of appearance, \emph{i.e.} manifest does not mean actual\(^{22}\). If facts are proven that give rise to reasonable doubts as to the partiality of an arbitrator, the appearance of security of the parties is compromised thereby satisfying the requirement of manifest lack of the qualities.\(^{23}\) Furthermore, the Tribunal in \textit{Abaclat} applied the ‘justifiable doubts’ test which is similar to the reasonable apprehension test; if there are justifiable doubts as to the ability of an arbitrator to exercise independent and impartial judgment then the fundamental requirements of Article 14(1) are considered not met.\(^{24}\)

29. As a general rule, ‘manifest’ is something when the court does not need the assistance of the counsel to see it as it ‘obvious’.\(^{25}\) Thus, what is required is not that there must be a high probability of the lack of qualities mentioned in Article 14(1) but a reasonable apprehension giving rise to reasonable or justifiable doubts as to the required qualities possessed by an arbitrator to be disqualified under Article 57 of the ICSID Convention. This sets a high threshold for the qualities ensuring the highest possible guarantee of impartiality and independence of an arbitrator to serve as a member on the Tribunal keeping in mind the unique system of the ICSID of balancing the rights of States and investors.\(^{26}\)

30. On the basis of the above legal position, the Applicant submits hereinbelow that Prof. Iracunda was not capable of and did not in fact exercise impartial judgment through the circumstances involving her legal writings and her moral conservative standpoint.

\textbf{1. Prof Alessandra Iracunda Prejudged the Subject Matter of the Present dispute through her Legal Writings}

31. An ‘issue conflict’ refers to actual or an appearance of bias that arises from an arbitrator’s relation with the subject matter of the dispute, rather than with any of the parties.\(^{27}\) The IBA Guidelines on Conflicts of Interest were published to address the growing problem of conflicts of interest of arbitrators in the international scenario, by

\(^{20}\) SHREUER, 932; \textit{EDF}, ¶15; \textit{Tidewater}, ¶64.
\(^{21}\) SCHREUER, 933.
\(^{22}\) \textit{Vivendi}, ¶25; \textit{Urbaser}, ¶43.
\(^{23}\) \textit{Vivendi}, ¶25.
\(^{24}\) \textit{Abaclat} ¶69; \textit{Urbaser} ¶43.
\(^{25}\) Luttrell, 247.
\(^{26}\) Tupman, 51.
\(^{27}\) Brubaker, 111.
methods such as proper and timely disclosures and setting standards for assisting Tribunals in deciding challenges.\footnote{IBA Guidelines on Conflicts of Interest, ¶1-3.} The Guidelines provide for three non-exhaustive situational Lists that mention the required disclosures and the extent to which parties can waive them.\footnote{IBA Guidelines on Conflicts of Interest, ¶1, Part II.} The Green List, as opposed to the Orange List and the Red List refers to innocuous situations that do not require disclosure by the arbitrator;\footnote{IBA Guidelines on Conflicts of Interest, ¶6, Part II.} the other two Lists however, make disclosure mandatory.\footnote{IBA Guidelines on Conflicts of Interest, ¶2 & 3, Part II.}

32. They provide for ‘previously expressed legal opinions’ under the Green List.\footnote{IBA Guidelines on Conflicts of Interest, Green List No. 4.1.} These legal writings should however, be ‘general’.\footnote{IBA Guidelines on Conflicts of Interest, Green List No. 4.1.1.} If the views expressed are such as being passionately and strongly argued that their author will not, in the opinion of a reasonable third person aware of the facts and circumstances of the case, give proper consideration to the arguments presented by a party in an arbitral proceeding, then there can be said to be a lack of impartiality on the part of the arbitrator.\footnote{Urbaser, ¶43.}

33. Further, if the firm opinion expressed by the author is on a narrow controversial point on which the case hangs, the party that received the tough side of the analysis might not believe in the absolute impartiality of the arbitrator.\footnote{Park, 200-201.} Thus, though experience in the international sphere is a required qualification for international arbitrators and dissemination of scholarly opinions is a requirement for the growth of international arbitration law, the underlying unfairness is nevertheless striking and unacceptable when there is an appearance that an arbitrator has closed his/her mind on important issues being considered in the dispute.\footnote{Brubaker, 112.}

34. In a challenge against Prof. Gaillard in \textit{Telekom Malaysia}, the District Court of Hague held that there was an appearance of bias in the role played by him as an arbitrator since he was arguing, simultaneously in another case (\textit{RFCC/Morocco}) against the Award in annulment proceedings as a counsel, vehemently on a point of law which as an arbitrator in \textit{Telekom Malaysia} he had to consider.\footnote{\textit{Telekom Malaysia}, 6-7.} The Court thus asked him to step down from one of the positions as his concurrent dual role gave rise to justifiable doubts in relation
to his impartiality; he could not impartially decide on a matter on which he as a counsel was passionately and strongly arguing against.\footnote{Telekom Malaysia, 6-7.}

\textbf{35.} The present case finds close semblance in the principle set out in the above case. In \textit{Telekom Malaysia} it was the duty of Prof. Gaillard as counsel, to present all possible legal stands and arguments to further his party’s cause.\footnote{Telekom Malaysia, 6.} However, the firm and uncompromising stand on, and passionate arguments put forth by Prof. Iracunda in her articles and books with regard to a specific interpretation of the term ‘investment’ under the ICSID Convention is her personal take on the matter \footnote{Challenge Decision, ¶308-362.} as an academic, not a duty she had to carry out. Further, she plays the role of a leading proponent in this regard \footnote{Uncontested Facts, ¶140.} which is a continuing role as can be seen through the publication of her book one year before the start of the arbitral proceedings.\footnote{Challenge Decision, ¶286-287.}

\textbf{36.} Thus, though her dual role of leading proponent of one particular narrow controverted point in ICSID arbitration does not flow from any pecuniary or economic interest, as did with Prof. Gaillard, her conviction to favour her point of view as an author and leading proponent would be more in view of the humiliation she would face for not propounding her opinions strongly enough in the arbitration. This is a clear sign of conflict of interest and her lack of impartiality is in this respect reasonably ascertainable.

\textbf{37.} Further, in the passages extracted from her book, \textit{Re-Thinking ICSID Arbitration}, Prof. Iracunda does not only give a general opinion as to the ideal interpretation of the term ‘investment’ in view of the various authorities on the matter making an academic evaluation thereof, but vehemently argues in favour of ‘contribution to economic development’ being crucial, terming any other view as ‘dangerous’, ‘simply ridiculous’, and ‘nothing more than a forum for wealthy business people’ thereby clearly prejudging the case in favour of Host States.\footnote{Challenge Decision, ¶307-322.} These clearly indicate that she was and is completely against considering any alternative opinion other than the one propounded by her. Further, the issue of what constitutes or does not constitute an ‘investment’ is a moot point on which cases, authors and commentaries have considerably differed.\footnote{Salini, ¶52; MHS Annulment, ¶57; Biwater, ¶312; Mitchell Annulment, ¶33; Mortenson, 273.} Thus, since ICSID jurisprudence has generated highly inconsistent standards in determining the
notion of investment, particularly in relation to whether or not ‘contribution of economic development’ constitutes a jurisdictional criterion of an ICSID investment, the Applicant submits that Prof. Iracunda’s strong views on such a controverted issue easily raises justifiable doubts of her gross inability to have decided the issue with an open mind.

38. Furthermore, Prof. Iracunda’s statement submitted during the disqualification hearing before the other two members sheds light on her stoic refusal to change her strong views on the legal position regarding the notion of investment. An excerpt from her statement ‘what constitutes ‘development’, however, is a matter of fact, to be assessed on the individual facts of each case’\(^\text{46}\) clearly indicates that she had already decided what interpretation to accord to the term ‘investment’ even though it was in dispute. In other words, she had already decided that ‘contribution to economic development’ was an essential criterion of an ICSID investment and she was only open to determining what constitutes ‘development’ according to the factual matrix. The Applicant submits therefore that the other two members committed a grave error in relying on Prof. Iracunda’s statement to conclude that she was capable of exercising impartial judgment since she had already prejudged a crucial issue in dispute, namely, the interpretation of the notion of investment.

39. The grave error by the two members in dismissing the Challenge Proposal despite the above points ultimately culminated in the Award rendered by the majority. The Award without deeper analysis and on a \textit{prima facie} reading lays undue stress on the requirement of ‘contribution to economic development’ as an extremely important factor for determining the existence of investment when the other factors do not satisfy their thresholds\(^\text{47}\) which is unprecedented in any prior ICSID case including the Salini Test which the majority relied upon. This goes on to show a reasonable apprehension on Prof. Iracunda for not exercising impartial judgment in view of the subject matter when viewed in conjunction with the Dissenting opinion.

40. The Dissenting Opinion in its turn, exposes Prof. Iracunda’s conduct during the deliberative process and shows that she was not willing to enter into healthy discussions with the other members about other possible interpretations of the term ‘investment’ despite there being vast material on the same\(^\text{48}\) only because she had already considered all possible arguments. This clearly establishes her close-mindedness and partiality. Her

\(^{46}\) Challenge Decision, ¶490-491.  
^{47}\) Award, ¶754-755.  
^{48}\) Dissenting Opinion, ¶871-873.
dismissive conduct would undoubtedly lead a reasonable third person having knowledge of the facts and circumstances presented hereinabove to come to a conclusion that she was not in a position to exercise impartial judgment and in fact did not exercise the same.

41. The Applicant thus submits that the above facts and circumstances presented show a ‘manifest’ lack of the qualities required under Article 14(1) of the ICSID Convention in Prof. Iracunda as there is a clear case of ‘issue conflict’.

2. **Prof. Iracunda had morally Prejudged the Present Dispute**

42. Bias was held to be present in the *In Re Pinochet* case where an international arrest warrant was issued against the ex-Dictator of Chile, Senator Pinochet, for alleged crimes against humanity. The House of Lords had to decide on the issue of his immunity and the Court narrowly voted against granting immunity.\(^{49}\) It was later discovered that one of the Lords was a member of Amnesty International; this was held to constitute sufficient evidence of an appearance of bias as Lord Hoffmann could have been interested in the outcome of the case.\(^{50}\) The judgment was thus not enforced and a new hearing was convened as the original judgment was tainted with an apprehension of partiality.\(^{51}\)

43. In the present case, Prof. Iracunda unequivocally mentioned in her statement to the two members that she fully supports and believes in the conservation principles that Wilderness advocates.\(^{52}\) This can also be discerned from the annual donations she makes to the Organization in support of its activities.\(^{53}\) One of the stated objectives of Wilderness is to propagate and sensitize the society of the problem of displacement of animals based upon which it pursues to advocate for the rights of animals to be allowed to live unmolested and in their natural habitats.\(^{54}\) The activities of the Applicant however, would have resulted in the Sireno Kanto frogs removed from their natural habitat, which is in stark contrast to the stated objectives of Wilderness, despite the fact that their treatment would be humane\(^{55}\). This would thus have led her to morally prejudge the case against the Applicant as it was taking the frogs away from their natural habitat which was sorely against what Prof. Iracunda strongly believed in. The Award was thus tainted with prejudice against the Applicant.

---

\(^{49}\) *Re Pinochet*, ¶8.  
\(^{50}\) Order of 25 November, 1998.  
\(^{51}\) *Re Pinochet*, ¶1.  
\(^{52}\) Challenged Decision, ¶ 493-494.  
\(^{53}\) Challenge Decision, ¶410.  
\(^{54}\) Challenge Decision, ¶402.  
\(^{55}\) Uncontested Facts, ¶51.
44. Further, noting the influence Wilderness exercised on Dr. Ranapuer that prevented him from presenting himself for the cross-examination Hearing,\textsuperscript{56} it can be safely assumed that Wilderness exercises a strong control over its members. It can be deduced at the same time that it was in a position to and could have in fact exercised the same or similar pressure on Prof. Iracunda to not favour The Applicant in the arbitration. Wilderness had in turn assumed great momentum to oppose the Applicant’s activities for the removal of Sireno Kanto by staging several protests in the Respondent country and created an international campaign against the Applicant.\textsuperscript{57}

45. Thus, by acknowledging her firmly held beliefs in the ideology of Wilderness and the influence the organization exerts on its members there was an appearance of bias for morally prejudging the activities of the Applicant. She was thus, interested in the outcome of the dispute proving a manifest lack of the qualities mentioned in Article 14(1) of the ICSID Convention.

\textsuperscript{56} Uncontested Facts, ¶176-177.

\textsuperscript{57} Challenge Decision, ¶403-407.
II. THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS IN DECLINING JURISDICTION

46. The Applicant submits that the Annulment Committee has the power to annul the award under A. 52(1)(b) of the ICSID Convention, as the tribunal committed a manifest error in declining jurisdiction (A). The Applicant further submits that the Tribunal manifestly exceeded its powers in declining jurisdiction because the transaction in question qualifies as an investment within the meaning of the ICSID Convention (B). Moreover, the ‘Salini Criteria’, upon which sole reliance was placed by the Tribunal to determine the meaning of investment under the ICSID Convention, is fundamentally flawed (C). Further, the requirement of contribution to economic development of the host State is not a jurisdictional criterion of an ICSID investment, but its consequence (D). Furthermore, the Tribunal erred in imposing an overly restrictive requirement of quantitative and qualitative satisfaction of the ‘Salini Criteria’, which finds no basis either in the ICSID Convention or jurisprudence (E).

A. THE ANNULMENT COMMITTEE HAS THE POWER TO ANNUL THE AWARD UNDER A. 52(1)(B) OF THE ICSID CONVENTION

47. The Applicant submits that the Annulment Committee has the power to annul the award because the tribunal committed a manifest excess of powers in declining jurisdiction as all the jurisdictional requirements had been met. It is a settled principle of ICSID jurisprudence that failure to exercise jurisdiction when jurisdiction in fact exist constitutes a manifest excess of powers. In Vivendi I Annulment, it was held that failure to exercise jurisdiction constitutes a manifest excess of powers ‘if the tribunal fails to exercise a jurisdiction which it possesses under the ICSID Convention and the relevant provisions of the BIT’. Further in Soufraki Annulment, it was held that ‘the manifest and consequential non exercise of one’s full powers conferred or recognized in a tribunal’s constituent instrument such as the ICSID Convention and the relevant BIT, is as much a disregard of the power as overstepping of the limits of that power’. In Lucchetti Annulment as well, the annulment committee was of the opinion that an unwarranted failure to exercise jurisdiction amounts to an excess of powers.

58 Schreuer, 947.
59 Vivendi I Annulment, ¶86.
60 Soufraki Annulment, ¶44.
61 Lucchetti Annulment, ¶99; Schreuer, 948.
48. The Applicant submits that in the present case, the tribunal had the jurisdiction under the ICSID Convention and the relevant provisions of the BIT. However, by using the Salini Criteria, which is fundamentally flawed and lacks foundational legitimacy, for determining the meaning of investment under the ICSID Convention, and not even analyzing the relevant provisions of the BIT, the tribunal failed to apply the proper law in relation to jurisdiction of the Centre.

B. THE TRANSACTION IN QUESTION QUALIFIES AS AN INVESTMENT UNDER THE ICSID CONVENTION

1. The term ‘investment’ under the ICSID Convention should have been interpreted broadly

49. A.25(1) of the ICSID Convention, while prescribing the fundamental jurisdictional rules for access to ICSID, provides inter alia, that the legal dispute must arise ‘directly out of or in relation to an investment’. However, since the term ‘investment’ has not been defined in the ICSID Convention, arbitral tribunals and jurisprudence differ significantly in their interpretative approaches to understanding and defining ‘investment’. Further, since the doctrine of stare decisis is not applicable in ICSID in so far as the principle of applicability of binding precedent to successive ICSID cases has been excluded, arbitral decisions and jurisprudence have generated exceedingly inconsistent standards in characterizing the notion of investment and the criteria associated with it. The Applicant proposes the VCLT as the framework of interpretation of the notion of investment under the ICSID Convention as the term is quintessentially ambiguous, and thus “recourse to the preparatory work of the treaty and circumstances of its conclusion” is justified.

50. The Applicant submits that perusal of the travaux preparatoires conclusively indicates that the term investment was deliberately left undefined in order to enable the parties to the dispute to contribute meaningfully in providing content to the meaning of investment under A. 25(1) of the ICSID Convention. A. 25(4) of the ICSID Convention provides

---

62 Article 25, ICSID Convention.
63 Desierto, 298.
64 Article 53, ICSID Convention; Enron Jurisdiction, §25; ADC, §293. Schreuer, 1101.
65 Manciaux, 3.
66 Article 32, VCLT.
67 Mortenson, 260; MHS Annulment, §57.
68 Boddicker, 1046.
for an ‘opt out’ mechanism whereby Contracting States have been conferred the power of notifying other signatories, those categories of disputes which they ‘would not consider submitting to the jurisdiction of the Centre.’\(^{69}\) Thus, it is submitted that the intention of the drafters, in not defining investment, was to adopt a broad jurisdictional position wherein the Centre would have jurisdiction over any dispute which satisfied requirements of A. 25(1) while simultaneously providing Contracting States opportunity to decide the classes of disputes they would not consider submitting to the jurisdiction of the Centre.\(^{70}\) In other words, the scope of investment was left broad and expansive within the ICSID Convention ‘because individual states were charged with doing the tailoring themselves’\(^{71}\) and were conferred powers under the ICSID Convention to place limits on the definition of ‘investment’ within the meaning of A. 25(1) that would be applicable to any dispute to which such states were parties\(^{72}\), thereby making ‘consent of the parties the cornerstone of the jurisdiction of the Centre.’\(^{73}\)

51. Furthermore, A. 64 of the ICSID Convention provides that the Contracting States may resolve any dispute regarding the ‘interpretation and application’ of the ICSID Convention through negotiation or other methods of settlement\(^{74}\), which is another instance of conferral of powers on the states to ‘adopt an interpretation of the Convention that will be applicable between them.’\(^{75}\) Thus, it is submitted that the Convention evidently confers powers on the parties to determine the meaning of investment, \textit{inter alia}, through BITs.

52. The Applicant submits that the aforementioned analysis of provisions and preparatory works of the ICSID Convention highlights the pivotal responsibility the states were envisaged to discharge in providing content to the meaning of investment within the meaning of A. 25(1) of the ICSID Convention. Further, arbitral tribunals have rightly recognized that the term investment must be afforded a broad interpretation within the meaning of ICSID Convention\(^{76}\) as it is consistent with ‘the negotiating history of the Convention’.\(^{77}\) Due deference must be shown to the parties’ ‘articulation in the

\(^{69}\) Article 25(4), ICSID Convention.
\(^{70}\) Report of the Executive Directors, ¶27.
\(^{71}\) Mortenson, 292.
\(^{72}\) Cole, 11.
\(^{73}\) Report of the Executive Directors, ¶23.
\(^{74}\) Article 64, ICSID Convention.
\(^{75}\) Cole, 13.
\(^{76}\) CMS Annulment, ¶71.
\(^{77}\) Fedax, ¶29.
instrument of consent, i.e., the BIT as to what constitutes an investment’.\textsuperscript{78} Therefore, it is clear that the term investment was envisaged as being interpreted expansively under the ICSID Convention.

2. The provisions relating to investment in the Bela-Oscania BIT were not duly appreciated

53. The definition of the term ‘investment’ in BITs is generally inclusive and not prescriptive or exhaustive.\textsuperscript{79} Such inclusion of broad and expansive definitions indicates an understanding of investments as reference to the ‘types of disputes which states are willing to arbitrate directly with investors’ rather than an attempt at exhaustively defining investments.\textsuperscript{80} Therefore, the definitions of investment in BITs are indicative of the willingness of the states to arbitrate directly with investors with respect to the categories of disputes mentioned therein.

54. A.1 of the Bela-Oscania BIT defines an ‘Investment agreement’, the relevant excerpts of which are reproduced below:

“a written agreement between a national authority of a Party and … an investor of the other Party, on which the … investor relies in establishing or acquiring an investment other than the written agreement itself, that grants rights to the investor: (a) …; (b) to supply services to the national authority for the benefit of the public, such as power generation or distribution, water treatment or distribution or ecological monitoring and control; (c) …”\textsuperscript{81}

(Emphasis supplied)

55. It is pertinent to note that the definition of Investment and Investment agreement as provided in the Bela-Oscania BIT mirrors the corresponding provisions in the US Model BIT, except for one fundamental addition in the Bela-Oscania BIT: ‘ecological monitoring and control’ has been included in the Bela-Oscania BIT which is not provided for in the US Model BIT.\textsuperscript{82} This specific inclusion clearly indicates that the Respondent envisaged an agreement to provide services relating to ecological monitoring and control which were beneficial to the public, as constituting an Investment agreement.

\textsuperscript{78} *Inmaris*, ¶130.
\textsuperscript{79} US Model BIT, 2004.
\textsuperscript{80} Cole, 14.
\textsuperscript{81} Article 1, Bela-Oscania BIT, Award, ¶565-575.
\textsuperscript{82} US Model BIT, 2004.
56. The Applicant submits that the contract between the Applicant and the Respondent, a written agreement signed in 2002\(^{83}\), on which the Applicant relied\(^{84}\) to gain exclusive authorization to capture and procure as many Sireno Kanto frogs as possible\(^ {84}\), while agreeing to clear the island of frogs\(^ {85}\), which was in the nature of a concession contract, qualifies as an Investment agreement within the meaning of A.1 of the Bela-Oscania BIT.

57. The Applicant had been given exclusive authorization to capture and remove from the island as many Sireno Kanto as possible, with the exception of a highly protected and secure nature reserve to be built by the Respondent.\(^ {86}\) Bela Rano Insularo, an island nation with astounding natural beauty, great beaches and wonderful food had long faced challenges in attracting tourism because of the extraordinary number of poisonous Sireno Kanto frogs that inhabited the country.\(^ {87}\) Since cumbersome protective gear was a mandatory prerequisite to access the island safely, few tourists ventured onto the island\(^ {88}\) and as a result the tourism industry was suffering despite tremendous potential. Furthermore, the noises made by Sireno Kanto during their annual croaking season (May-November) were regarded as an annoyance by the local population.\(^ {89}\)

58. Therefore, the Applicant, by agreeing to clear the island of poisonous Sireno Kanto frogs, which were considered as an annoyance by the local population itself, was providing a service relating to ecological monitoring and control, to the Respondent, for the benefit of the public. Thus, it is submitted that the contract between the Applicant and Respondent qualifies as an Investment agreement within the meaning of the Bela-Oscania BIT, and the Tribunal committed a manifest excess of powers in not appreciating the intention of the Respondent to include services relating to ecological monitoring and control within the meaning of Investment agreement. It is further submitted that the VCLT clearly envisages that a 'special meaning be given to the term if it is established that the parties so intended'.\(^ {90}\)

A. 24 of the Bela-Oscania BIT provides that a claimant, on its own behalf, may submit to arbitration a claim that the Respondent

\(^{83}\) Uncontested Facts, ¶45.
\(^{84}\) Uncontested Facts, ¶36.
\(^{85}\) Uncontested Facts, ¶36-37.
\(^{86}\) Uncontested Facts, ¶37-38.
\(^{87}\) Uncontested Facts, ¶14-17.
\(^{88}\) Uncontested Facts, ¶27-30.
\(^{89}\) Uncontested Facts, ¶94-96.
\(^{90}\) Article 31(4), VCLT.
breached an Investment agreement. The claimant must also establish loss or damage incurred by reason of or arising out of the breach of the Investment agreement. The proviso to A. 24(1) of the Bela-Oscania BIT further requires that a claim for breach of an Investment agreement may be submitted ‘only if the subject matter of the claim and the 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’. Further, A. 25(1) of the Bela-Oscania BIT provides for the consent of the Respondent for submission of a claim to arbitration.

59. The contract between the Applicant and the Respondent was entered into in 2002, and required that all obligations be fulfilled by December, 2007. It is pertinent to note that capturing the poisonous Sireno Kanto frogs was a unique challenge and the Respondent did not possess the infrastructure or the technological know-how to address this challenge. Preparatory works, including setting up of infrastructure and developing the crucial and technical technology to successfully capture and remove the Sireno Kanto frogs were undertaken solely by the Applicant between 2002 and 2006.

60. As per the terms of the contract, the Applicant was to be paid monthly on a ‘bounty basis’ a certain prescribed amount for each frog captured and removed from the island in the previous month. Therefore, payments were to start only upon commencement of actual operations; the entire cost of setting up of infrastructure and developing the technology to capture and remove the frogs was borne by the Applicant. Further, the only performance requirement specified in the contract was that the Applicant was to successfully remove all the frogs outside the designated nature reserve by the end of December, 2007 failing which the Applicant would lose the right to all payments under the contract.

91 Article 24(1)(i)(C), Bela-Oscania BIT, Award, ¶585-590.
92 Article 24(1)(ii), Bela-Oscania BIT, Award, ¶594-595.
93 Proviso to Article 24(1), Bela-Oscania BIT, Award, ¶597-600.
94 Article 25(1), Bela-Oscania BIT, Award, ¶604-605.
95 Uncontested Facts, ¶46.
96 Award, ¶714.
97 Uncontested Facts, ¶48-49.
98 Uncontested Facts, ¶53.
99 Uncontested Facts, ¶55-56.
61. The Applicant started capturing and removing the Sireno Kanto in January 2006, as per the mandate of the Contract. On March 13, 2006 the contract was unilaterally terminated by the Respondent despite the fact that the Applicant had committed to clear the island of Sireno Kanto by December 2006 itself, well before the contract mandated deadline of December, 2007. The Applicant had successfully captured and removed 3% of the Sireno Kanto within a short period of 3 months of initiating the actual operations.

62. The Applicant therefore submits that it was entitled to invoke A. 24 of the Bela-Oscania BIT and submit to arbitration a claim that the Respondent had breached the Contract entered into between the Applicant and the Respondent, as it qualified as an Investment agreement. The Applicant had incurred loss and damage as a result of the breach as the Applicant had invested considerable amounts of capital, intellect and energy in setting up the infrastructure and developing the complex technology to capture and transport the poisonous Sireno Kanto frogs, for which no technology or infrastructure existed previously. Further, as a result of the unilateral termination of the contract by the Respondent, the Applicant had not been able to capture all the frogs by the stipulated deadline, as a result of which it lost rights to all payments for capturing the frogs.

63. Further, the proviso to A. 24 of the Bela-Oscania BIT provides that a claim for breach of the Investment agreement may be submitted if the subject matter of the claim and claimed damages directly relate to an investment either: (i) established or acquired or (ii) sought to be established or acquired. The Applicant’s claim for breach of contract directly arose from an investment which was sought to be established or acquired and hence it is submitted that the Applicant was entitled under the Bela-Oscania BIT to submit the claim to arbitration, which was not duly appreciated by the Tribunal.

C. THE TRIBUNAL COMMITTED A GRAVE ERROR IN RELYING SOLELY ON THE SALINI CRITERIA TO DETERMINE THE EXISTENCE OF INVESTMENT

100 Uncontested Facts, ¶45.
101 Uncontested Facts, ¶108.
102 Uncontested Facts, ¶105.
103 Uncontested Facts, ¶110.
104 Proviso, Article 24, Bela-Oscania BIT.
1. The ‘Salini Criteria’ are based on a fundamentally flawed premise

64. The Tribunal in Salini prescribed the following ‘objective checklist’ of criteria, which must be satisfied mandatorily and cumulatively, to determine whether a transaction qualifies as an investment for the purposes of the ICSID Convention: contributions, certain duration of performance of the contract, a participation in the risks of the transaction, and contribution to the economic development of the Host State.\(^{105}\)

65. It is submitted that the Salini tribunal combined two fundamentally diverging approaches then existing in scholarly literature and therefore was lacking in intellectual pedigree in prescribing a formalistic, objective ‘test’ to determine the meaning of investment.\(^{106}\) The first approach, propounded by Carreau, Flory, Juillard and Gaillard, explained that the notion of investment presupposes the presence of the following ‘criteria’, which were to be applied cumulatively: contribution, a certain duration and risk.\(^{107}\) The second approach was advanced by Georges Delaume as an alternative to the first ‘traditional’ approach, which he construed as being too restrictive, and thus proposed a ‘flexible’ approach to understanding investment based on ‘contribution of the investment to the economic development of the country in question’.\(^{108}\)

66. The Salini tribunal combined these two approaches, which were admittedly envisaged as substitutes of each other, and transformed characteristics of a transaction identified in jurisprudence as ‘typical’ to legally binding, fixed and inflexible prerequisites for the transaction to qualify as an ICSID investment.\(^{109}\) Further, the Salini tribunal itself observed that the prescribed criteria may be interdependent and must be assessed globally.\(^{110}\) Therefore, it is submitted that since the different characteristics of the ‘Salini Criteria’ are rooted in divergent reasoning, and were envisaged as being alternative to, and not in addition to each other, it would not be sufficient to merely examine each criterion in isolation without appreciating the underlying context in which these characteristics were propounded, to determine an ICSID investment.\(^{111}\) Furthermore, it is pertinent to note that three core elements of the ‘Salini Criteria’ used to define an

\(^{105}\) Salini, ¶52.

\(^{106}\) Gaillard I, 405.

\(^{107}\) Carreau, ¶935.

\(^{108}\) Delaume, 801.

\(^{109}\) Gaillard II, 3.

\(^{110}\) Salini, ¶52.

\(^{111}\) Gaillard I, 406.
investment - contribution, risk and duration - were expressly considered and rejected while drafting the ICSID Convention.112

67. Thus, it is submitted that the tribunal, by relying solely on the ‘Salini Criteria’ to determine the notion of investment within the meaning of the ICSID Convention, did not appreciate the fundamentally flawed premise on which the ‘Salini Criteria’ are based.

2. The ‘Salini Criteria’ are merely indicative of existence of an investment and cannot be elevated to jurisdictional requirements

68. In the event the Committee decides to uphold the foundational legitimacy of the ‘Salini Criteria’, it is submitted that ‘Salini Criteria’ are merely an enumeration of ‘typical characteristics’ of an ICSID investment and not formal prerequisites for the existence of an investment under the ICSID Convention.113 In other words, the Applicant submits that satisfaction of all the criteria is not mandatory as a matter of law, to conclude the existence of an investment.114

69. The tribunal in MCI observed that characteristics referred to as the Salini Criteria ‘must be considered as mere examples and not necessarily as elements that are required for the existence of an ICSID investment’.115 Further, in Inmaris, the tribunal refused to apply the ‘Salini Criteria’ as it was of the opinion that imposition of a mandatory definition of investment developed through case law ‘where the Contracting States to the ICSID Convention chose not to specify one’ would be inappropriate.116 Also, the tribunal in Alpha Projektholding, refused to strictly apply the ‘Salini Criteria’, holding that there was no ‘universal definition’ of investment under the ICSID Convention and application of the ‘Salini Criteria mandatorily and cumulatively was not required according to A. 25(1) of the ICSID Convention. 117

70. The most vehement rejection of the ‘Salini Criteria’ was expressed in most authoritative terms by the tribunal in Biwater, in which the tribunal was called upon to determine the notion of investment in a dispute concerning a project for improvement of water and sewerage services in Dar Es Salam.118 The tribunal asserted that there was ‘no basis for a rote or overly strict application of the Salini Criteria in every case’ as the Salini Criteria

---

112 Morentson, 281.
113 CSOB, ¶90.
114 Gaillard II, 2.
115 MCI, ¶165.
116 Inmaris, ¶129; Tokios Tokeles, ¶80.
117 Alpha Projektholding, ¶311.
118 Musurmanov, 8.
are neither ‘mandatory as a matter of law’ nor do they ‘appear in the ICSID Convention’.119

71. Further, the tribunal in the present case accepted the analysis of Professor Christoph Schreuer, who has ‘identified a set of characteristics common to those investments over which the ICSID tribunals have accepted jurisdiction’.120 It is pertinent to note however that Professor Schreuer has not only clarified that these characteristics ‘should not be understood as jurisdictional requirements but merely as typical characteristics of investment’121 but has also termed ‘unfortunate’ the practice of arbitral tribunals that elevate the ‘descriptive list of typical features’ to ‘mandatory legal requirements’.122

72. Therefore, it is submitted that the characteristics enumerated in the ‘Salini Criteria’ must not be understood as ‘distinct jurisdictional requirements each of which must be met separately’.123 Instead, they may be interdependent and closely interrelated124 and thus must be assessed globally.125 The Applicant therefore submits that the tribunal in the present case gravely erred in declining jurisdiction only on the ground that one of the characteristics of ‘Salini Criteria’ was not met, despite concluding that the other criteria had been met.126

D. CONTRIBUTION TO ECONOMIC DEVELOPMENT IS NOT A JURISDICTIONAL CRITERION OF AN ICSID INVESTMENT

1. Contribution to economic development is an intended consequence of an ICSID investment and not its constitutive element

73. In the event the Committee is of the opinion that there are outer limits to the jurisdiction of the Centre which must be ‘objectively’ satisfied by establishing certain jurisdictional criteria for defining investment, the Applicant submits that contribution to economic development cannot be considered to be one of the jurisdictional criteria but is rather a consequence of investment.

74. Since the notion of investment is sought to be defined according to the criteria associated to it, only those criteria must be used which are essential elements of investment and

119 Biwater, ¶312.
120 Award, ¶645.
121 SCHREUER, Article 25 - Jurisdiction, ¶153.
122 SCHREUER, Article 25 – Jurisdiction, ¶171.
123 SCHREUER, Article 25 – Jurisdiction, ¶171.
124 Bayindir, ¶130.
125 Salini, ¶52.
126 Award, ¶805.
which isolate and differentiate the notion of investment from other international commercial transactions.\textsuperscript{127} Therefore, only those core characteristics should be used to define investment which unquestionably isolates the notion of investment from other transactions.

75. The Applicant submits that the contribution to economic development must not be considered as a jurisdictional criterion as it does not have the effect of ‘differentiating transactions that are investments from those that are not’\textsuperscript{128} as all transactions contributing to economic development of the Host State are not necessarily investments.\textsuperscript{129}

76. Further, numerous tribunals have expressed grave skepticism in elevating the ‘contribution to economic development’ requirement as a constitutive element of the notion of investment.\textsuperscript{130} In \textit{Saba Fakes}, the tribunal rejected the argument that reference the Preamble of the ICSID Convention, which provides for the ‘need for international cooperation for economic development’\textsuperscript{131}, justified the inclusion of the contribution to economic development criterion, holding that ‘it would be excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording’.\textsuperscript{132} Economic development may well be one of the proclaimed objectives of the ICSID Convention; however ‘this objective is not in and of itself an independent criterion for the definition of an investment’.\textsuperscript{133} Contribution to economic development of the Host State is, therefore, an expected consequence and not a separate requirement of an ICSID investment.\textsuperscript{134} Further, the tribunal in \textit{Saba Fakes} held that ‘the criteria of (i) contribution, (ii) a certain duration, and (iii) and element of risk are both necessary and sufficient to define an investment within the framework of the ICSID Convention’ as these ‘criteria derive from the ordinary meaning of the word investment’.\textsuperscript{135}

77. The tribunal in \textit{Alpha Projektholding} subscribed to the reasoning in \textit{Saba Fakes}, expressing ‘particular reluctance’ in undertaking an assessment of the impact of the transaction on economic development, observing that the development criterion merely

\begin{itemize}
\item \textsuperscript{127} Manciaux, 8.
\item \textsuperscript{128} Manciaux, 17.
\item \textsuperscript{129} Manciaux, 17.
\item \textsuperscript{130} Reinisch, 4.
\item \textsuperscript{131} Preamble, ICSID Convention.
\item \textsuperscript{132} \textit{Saba Fakes}, ¶111.
\item \textsuperscript{133} \textit{Saba Fakes}, ¶111.
\item \textsuperscript{134} \textit{Saba Fakes}, ¶111; \textit{BIVAC BV}, ¶82-83.
\item \textsuperscript{135} \textit{Saba Fakes}, ¶110.
\end{itemize}
reflected the ‘consequences of other criteria’ and brought ‘little independent content to the inquiry’. 136

78. Further, in LESI ASTALDI and Bayindir, the tribunals observed that the development criterion was not a separate jurisdictional criterion as it is ‘implicitly covered by the other three criteria’. 137

79. Furthermore, in Victor Pey Casado, the tribunal observed that the requirement of contribution to economic development related to the substance of the dispute rather than jurisdiction of the Centre as an ‘investment could prove useful – or not – for a country without losing its quality as an investment’. 138

80. Therefore, it is amply clear that the development criterion is certainly not the ‘most important criterion’ for existence of an investment and the tribunal in the present case gravely erred in terming it so; 139 in fact ICSID case laws and jurisprudence clearly indicate that it cannot even be construed as a jurisdictional criterion but merely as a consequence of investment. The inherent ambiguity in ascertaining economic development and proliferation of different methods of its assessment is reflected in the skepticism with which the tribunals and jurisprudence have treated the development criterion. 140

2. The requirement of a ‘significant’ contribution to economic development unjustifiably restricts the notion of investment

81. The tribunal in the present case imposed another restriction on the requirement of contribution to economic development of the host state, by requiring that only a ‘significant contribution to the Respondent’s economic development would suffice’. 141 It is submitted that the tribunal in Salini itself did not impose the requirement that contribution to economic development be significant. 142 It is further submitted that such substantiality requirements were expressly rejected during drafting of the ICSID Convention. 143 The Annulment Committee in Mitchell Annulment, while discussing the development criterion, expressly observed that the contribution need not always be ‘sizable or successful’ and that ICSID tribunals do not have to evaluate the real

136 Alpha Projektholding, ¶312.
137 LESI ASTALDI, ¶72-73; Bayindir, ¶130.
138 Victor Pey Casado, ¶232.
139 Award, ¶751.
140 Desierto, 314.
141 Award, ¶755.
142 Mortenson, 273.
143 Morentson, 297.
contribution of the operation in the development’. Further, the tribunal in *Phoenix Action* noted that ‘the development of economic activities must have been foreseen or intended, but need not necessarily be successful’. The tribunal went on to opine that as long as the ‘Claimant had bona fide intentions to engage in economic activities, and made good faith efforts to do so and that its failure to do so was a consequence of the State’s interference’, the fact that no significant activities were performed would not be sufficient to disqualify the operation as an investment.

82. The aforementioned analysis of ICSID case law and jurisprudence clearly indicates that the imposition of the requirement that there must always be a significant and positive contribution to the Host State’s development is unjustified as it qualifies an already restrictive criterion and narrows the scope of the notion of investment even further. The Applicant submits that the tribunal committed a grave and manifest error in *first*, elevating the criterion of contribution to economic development’ to a jurisdictional criterion and *second*, further imposing constraints on an already restrictive development criterion by requiring that there be a significant contribution, both of which do not find foundational backing in either ICSID case law or jurisprudence.

83. Therefore, in the event the Committee is of the opinion that investment has an inherent meaning within the meaning of the ICSID Convention, the Applicant submits that content must be lent to the inherent ‘objective’ meaning of investment only in reference to the three traditional and undisputed criteria of investment: contribution, risk and duration. It is submitted that addition of the development criterion will have a restrictive effect on the notion of investment, which would be contrary to the broad interpretation which the drafters of the ICSID Convention intended to accord to the notion of investment.

E. THE MANNER IN WHICH THE SALINI CRITERIA WERE APPLIED WAS FLAWED

84. The Applicant submits that ICISD jurisprudence is in unanimous agreement that the *Salini* Criteria are interdependent and interrelated and must be assessed globally. This understanding of application of the *Salini* Criteria highlights and appreciates the fact that in different operations, the *Salini* Criteria may be present in varying magnitudes and

---

144 *Mitchell Annulment*, ¶33.
145 *Phoenix Action*, ¶114.
146 *Phoenix Action*, ¶133.
147 Desierto, 311.
148 Gaillard I, 413.
149 *Salini*, ¶52; Schreuer, Article 25 – Jurisdiction, ¶171; Schlemmer, 57.
therefore the assessment must be made according to the circumstances in each case.\textsuperscript{150} Thus, it is clear that there is no hierarchy in terms of importance within the Salini Criteria.

85. The tribunal in the present case gravely erred in holding that the criterion of contribution to economic development was ‘without doubt the most important Salini criterion’.\textsuperscript{151} Further, the tribunal, while admitting that failure to satisfy one of the Salini Criteria would not ‘\textit{per se} preclude a transaction from being considered as an ICSID investment’\textsuperscript{152}, imposed the requirement that tenuous satisfaction of some criteria would require the remaining criteria to be met ‘clearly’, thereby imposing a higher standard of proof for satisfaction of the remaining criteria.\textsuperscript{153} The Applicant submits that imposition of such addition burden on the remaining criteria finds no basis in either ICSID case law or jurisprudence.\textsuperscript{154}

86. Moreover, the Applicant submits that tribunal committed a grave error in holding that requirements of regularity of profit and return, contribution, risk and duration were met only tenuously.

87. The tribunal itself noted that the Applicant had made contributions in terms of developing the requisite technology to capture the Sireno Kanto, providing equipment and trained personnel for capturing the frogs.\textsuperscript{155} The tribunal also rightly noted that the Respondent did not have the ability to remove the frogs by itself and the removal would not have been possible without the resources contributed by the Applicant.\textsuperscript{156} Further, the Applicant also contributed in terms of know-how, which as the tribunal observed, was reflected in the Respondent’s ability to continue with the frog removal after the termination of the contract, ‘drawing on the knowledge it had gained through its association with Max Solutions’.\textsuperscript{157} Therefore, it is amply clear that the Applicant made a significant contribution of resources as well as know-how, which enabled the removal of Sireno Kanto frogs. As held in \textit{Mitchell Annulment}, if it is clear that an investor, through his know-how, had ‘concretely assisted the Host State’\textsuperscript{158}, the criterion of significant commitment of resources would be satisfied. In the present case, the Applicant not only

\textsuperscript{150} \textit{Joy Mining}, ¶47.
\textsuperscript{151} \textit{Award}, ¶751.
\textsuperscript{152} \textit{Award}, ¶652.
\textsuperscript{153} \textit{Award}, ¶653-654.
\textsuperscript{154} \textit{Gaillard I}, 416.
\textsuperscript{155} \textit{Award}, ¶699.
\textsuperscript{156} \textit{Award}, ¶696.
\textsuperscript{157} \textit{Award}, ¶701-703.
\textsuperscript{158} \textit{Mitchell Annulment}, ¶39.
assisted the Respondent through his know-how, but also made significant commitments in terms of equipment and trained personnel, thereby clearly satisfying the criterion of significant contribution of resources, which was not appreciated by the tribunal. Furthermore, it is evident that the Applicant expected returns in lieu of capturing the frogs and was to be paid on a ‘bounty basis’, according to the terms of the contract.\textsuperscript{159} Further, the Applicant had made a commitment to remove all the frogs well before the contract mandated deadline, clearly expecting profits for the services rendered, thereby clearly satisfying the criterion of ‘regularity of profit and return’.

88. The Applicant submits that the duration criterion was also clearly satisfied in the present case. It is uncontested that the Applicant had undertaken preparatory works prior to initiating actual operations in 2006. Since no technology or procedure existed to capture or transport the poisonous Sireno Kanto frogs, it is submitted that the Applicant undertook rigorous preparations during the four year period to develop the technology and set up the infrastructure to address the unique challenge of capturing and transporting the Sireno Kanto.

89. With respect to the ‘Assumption of Risk’ criterion, it is submitted that there was no technology existing for successful capture, removal, storage and transport of the poisonous Sireno Kanto frogs, which is evident by the fact that the Respondent had endured the inconvenience caused by the Sireno Kanto frogs without being able to find a feasible solution.\textsuperscript{160} Therefore, the Applicant was undertaking an operation which had never been attempted before and for which the Respondent had no existing technology, on a very tight schedule, and with an inflexible deadline.\textsuperscript{161} Further, the risk was magnified by the contract itself which mandated that the Applicant would lose right over all payments if all the frogs were not captured within the prescribed deadline.\textsuperscript{162} Thus, the Applicant submits that this criterion was also clearly met as the Applicant had assumed considerable risks by agreeing to remove the Sireno Kanto.

90. It is clear from the analysis presented above that all the other criteria as imposed by the tribunal had been clearly met. The Applicant submits that the findings of the tribunal that the criteria were only tenuously met, in-spite of such overwhelming evidence on record which clearly indicates unequivocal satisfaction of the aforementioned criteria, were for

\textsuperscript{159} Uncontested Facts, ¶48.
\textsuperscript{160} Uncontested Facts, ¶15.
\textsuperscript{161} Award, ¶740.
\textsuperscript{162} Uncontested Facts, ¶55.
the sole purpose of imposing a higher standard on the satisfaction of the development criterion.

91. It is uncontested that amongst the members who delivered the majority decision in the present case, one of them, Professor Iracunda, has consistently argued that the development criterion be given the most importance within the Salini Criteria and continues to believe so. The Applicant submits that the majority decision, the tenor of which clearly reflects the view that the development criterion be considered as the most critical criterion to constitute investment, was an attempt to further the strong views espoused by one of the tribunal members.

92. As has been submitted previously, the power to lend content to the notion of investment was conferred on the parties under the ICSID Convention and not tribunals. The tribunals, by relying upon their own intuitive understanding as to what should constitute an investment, without relying on the intention of the parties, in effect encroach upon the powers vested in the parties to determine the meaning of investment. It is submitted that arbitration proceedings must not be used by arbitrators as a platform to enforce and apply their own intuitions and convictions as to what constitutes as an investment under the ICSID Convention. Even if objective criteria are to be applied to determine the notion of investment, only those criteria must be applied which are undisputed, non-controversial and unambiguous. The Applicant submits that the majority decision of the tribunal clearly reflects an attempt to prioritize the development criterion above all other criteria and thus reeks of manifest excess of powers.

III. ARGUENDO, THE CRITERION OF CONTRIBUTION TO ECONOMIC DEVELOPMENT WAS SATISFIED

93. Assuming but not conceding that the tribunal was justified in using the Salini Criteria to determine the notion of investment under the ICSID Convention and contribution to economic development is a constitutive element of an ICSID investment, the Applicant submits that the tribunal committed a manifest excess of powers in not appreciating that the Applicant contributed significantly to the economic development of Bela Rano Insularo.

163 Award, ¶483.
164 Mortenson, 292.
165 Cole, 15.
166 Boddicker, 1041.
The Respondent entered into the contract with the Applicant in 2002 for the removal of the poisonous Sireno Kanto frogs.\(^{167}\) In order to bid for holding the Global Athletics Season Preview [‘GASP’], a season opener of sorts for the Olympic Games\(^{168}\), in Bela Rano Insularo, the Respondent then used the contract it had entered into with the Applicant, before the GASP International Competition Council [‘Council’] to demonstrate their commitment to clearing the island of poisonous frogs, which were admittedly a major hindrance to Bela Rano being awarded the bid to host the games.\(^{169}\) It is also uncontested that the Respondent did not possess the requisite expertise or know-how required to remove the frogs by itself.\(^{170}\) The demonstration of commitment by the Respondent that the dangerous frogs would be removed before the games, which was principally based on the contract with the Applicant, was instrumental in the Respondent being awarded the bid to host the games. In other words, it was the contract with the Applicant which enabled the Respondent to demonstrate its commitment to clear the island of frogs, on the basis of which the bid to host GASP was awarded to the Respondent. Without the contract, the Respondent would not have been able to demonstrate its commitment as the Respondent did not possess the equipment or the know-how required to remove the frogs.

Further, as a consequence of being awarded the right to host GASP, there was a considerable inflow of capital into Bela Rano Insularo, as the government opened bids for construction of new hotels and resorts.\(^{171}\) This significant inflow of capital helped Bela Rano Insularo to cope with the global economic crisis.\(^{172}\)

Furthermore, the government spokeswoman emphasized the long term benefits that would result from holding the GASP as it would be an ideal platform to publicize the ‘wonders of Bela Rano Insularo’ and would result in a enormous boom in the tourism industry.\(^{173}\) Admission by government officials of contribution to economic development, as a result of the operations undertaken by the investor, has been held to be sufficient evidence for satisfaction of the development criterion.\(^{174}\) In Bayindir, the tribunal based its finding of existence of contribution to economic development on the
basis of the statements made by government officials of the benefits that would result from the investor’s operations.175

97. It is evident that the tourism industry of Bela Rano Insularo had considerable potential for growth, but was hindered by the presence of the dangerous Sireno Kanto frogs. Admittedly, the Respondent was not capable to removing the frogs by itself.176 The Applicant submits that by providing the Respondent with the requisite know-how, which enabled the Respondent to remove the frogs even after the termination of the contract, the Applicant significantly contributed to the economic development of Bela Rano Insularo by assisting in removing the only hindrance to realization of the tremendous potential of the tourism industry in Bela Rano Insularo. The long term benefits which the tourism industry would derive as a result of the removal of frogs would be unprecedented. Thus, the Applicant submits that the ‘economic renaissance’177 being experienced by Bela Rano Insularo as a result of its transformation into an ‘ecological tourism hot spot’178 was a direct result of the know-how developed by the Applicant, which was relied on by the Respondent to remove the frogs.179

98. Further, the Applicant submits that it rendered a service for the benefit of the public of Bela Rano Insularo, by providing the Respondent with the know-how to remove the Sireno Kanto frogs, which were considered an annoyance by the local population.180 Therefore, in providing a service to Bela Rano Insularo which was ‘beneficial to public interest’ and making available the ‘know-how’ to the Respondent, the Applicant submits that the twin test for satisfaction of the development criterion as envisaged in Salini itself was satisfied.181

99. Thus, the Applicant submits that it contributed significantly to the economic development of Bela Rano Insularo, which was not duly appreciated by the tribunal.

IV. THE ANNULMENT COMMITTEE HAS THE POWER TO DETERMINE THE MEANING OF INVESTMENT UNDER THE ICISD CONVENTION

175 Bayindir, ¶137.
176 Award, ¶696.
177 Uncontested Facts, ¶128.
178 Uncontested Facts, ¶128.
179 Award, ¶702.
180 Uncontested Facts, ¶96.
181 Salini, ¶57.
100. The Applicant submits that through a combined reading of A. 41(2) and A. 52(4) of the ICSID Convention, the Annulment Committee has the power to determine the jurisdiction of the Centre, and thus the meaning of investment. It is submitted that an authoritative pronouncement by annulment committee with sound legal reasoning would further the cause of consistency and predictability in application of legal rules with respect to which considerable inconsistencies exist. Though the doctrine of *stare decisis* is not followed under ICSID, it is submitted that arbitral tribunals strive to achieve consistency, at-least in their interpretation of legal principles which are independent of the facts of the case, to ensure consistency and predictability of ICSID decisions, which is of paramount importance as there has been a severe backlash against the ICSID regime due to highly inconsistent decisions. The ‘prevalence of de facto adherence to stare decisis is a typical feature of international arbitration’. Therefore, an authoritative pronouncement by the annulment committee would further the attempt to bring the semblance of consistency and predictability in ICISID.

101. Furthermore, the fact that A. 25 is not mentioned in A. 52(4) is not conclusive as the provision of disqualification of arbitrators of a tribunal, Article 57, is also not mentioned but the Committee in *Vivendi I Annulment* held that such non-inclusion did not mean that members of the Annulment Committee could not be challenged and allowed the request for disqualification of the President of the Committee, though subsequently rejecting the disqualification proposal.

102. Therefore, it is submitted that the Annulment Committee has the power to determine the meaning of investment under the ICSID Convention as it relates to the jurisdiction of the Centre.

V. THE TRIBUNAL’S DECISION NOT TO EXCLUDE DR. RANAPEUR’S EXPERT REPORT CONSTITUTES A SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

103. Article 52(1)(d) of the ICSID Convention, as a ground for annulment, requires that there be a ‘serious departure from a fundamental rule of procedure’ by the tribunal. It

---

182 Bernardini, 29.
183 Schreuer II, 42.
184 Mortenson, 264.
185 Kim, 246.
186 *Vivendi I Annulment*, ¶3-13.
187 Article 52(1)(d), ICSID Convention.
thereby requires the fulfillment of two cumulative conditions: the rule of procedure must be fundamental and the departure therefrom serious.\textsuperscript{188} In other words, an Award cannot be annulled if the rule of procedure is fundamental but there has been no serious departure or if there has been a serious departure but the rule of procedure is not fundamental.\textsuperscript{189} It has been interpreted by \textit{ad hoc} committees that satisfaction of the requirement of a ‘serious’ departure requires that had the procedure been followed, the tribunal would have reached a substantially different result,\textsuperscript{190} or that one of the parties was deprived of a benefit or protection as a result of such ‘serious’ departure,\textsuperscript{191} i.e., material prejudice was caused to its interests\textsuperscript{192}.

\textbf{104.} The Applicant admits that not all rules binding on the parties are fundamental rules of procedure; in this respect it has been held that the ICSID Arbitration Rules as a whole are also not to be considered as ‘fundamental’.\textsuperscript{193} Though the Drafters of the Convention refrained from enumerating as to what rules are fundamental, the consensus however seems to be that only rules of natural justice, concerned with the essential fairness of the proceedings,\textsuperscript{194} i.e., due process,\textsuperscript{195} are fundamental. In this regard, the \textit{ad hoc} committee in \textit{Wena Hotels} observed that Article 52(1)(d) makes applicable to ICSID arbitrations the minimal standards of procedure to be respected as a matter of international law,\textsuperscript{196} such as, \textit{inter alia}, the principle that each party be given a right to be heard before an independent and impartial tribunal.\textsuperscript{197} The right to be heard includes the right of each party to state its claim or its defence and to produce all arguments and evidence in support of it,\textsuperscript{198} meaningful deliberation of the tribunal,\textsuperscript{199} equal treatment of the parties, and full opportunity to present one’s case\textsuperscript{200}.

\textbf{105.} Therefore, the Applicant submits that the Tribunal in the present case committed a grave departure from a fundamental rule of procedure as (A) cross-examination is a fundamental rule of procedure, and (B) reliance on Dr. Ranapuer’s Report despite the

\footnotesize{\begin{itemize}
\item\textsuperscript{188} \textit{Wena Hotels}, ¶56; MINE, ¶4.06; CDC, ¶48.
\item\textsuperscript{189} MINE, ¶5.07; SCHREUER, 970.
\item\textsuperscript{190} CDC, ¶49; \textit{Wena Hotels}, ¶58; \textit{Azurix}, ¶51.
\item\textsuperscript{191} MINE, ¶5.05; \textit{Wena Hotels}, ¶58.
\item\textsuperscript{192} Fraport, ¶184
\item\textsuperscript{193} MINE, ¶5.06; SCHREUER, at 980.
\item\textsuperscript{194} CDC, ¶49.
\item\textsuperscript{195} Klockner I, ¶28.
\item\textsuperscript{196} \textit{Wena Hotels}, ¶57.
\item\textsuperscript{197} SCHREUER, 987.
\item\textsuperscript{198} \textit{Wena Hotels}, ¶57; CDC, ¶49.
\item\textsuperscript{199} Schreuer (II), 29-32; CDC, ¶49.
\item\textsuperscript{200} Article 18, UNCITRAL Model Law; Soh Beng Tee, ¶28; Noble China Inc., 91.
\end{itemize}
fact that the Applicant had been deprived the opportunity of cross-examining him amounted to a serious departure.

A. CROSS-EXAMINATION AND INDEPENDENCE OF THE EXPERT ARE FUNDAMENTAL RULES OF PROCEDURE

106. First, in Tunari, the Tribunal observed that witnesses, whether of fact or law, must be made available for examination if so requested, as is customary in international arbitration. The same principle was relied upon by the Tribunal in Methanex Corporation wherein the applicant was given the full opportunity to cross examine all the Experts who prepared Reports on different aspects of the role of methanol in contaminating the ground water supplies in the state of California.

107. Further, the IBA Rules on Taking of Evidence, which are in pari materia to the Bela Rano Insularo Rules on Taking of Evidence, state that ‘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 the Expert Report’. The use of terminology which makes it mandatory to disregard Expert Evidence without cross examination clearly indicates its importance in international arbitration. This rule is thus, an exception to Rule 34(1) of the ICSID Rules which gives the Tribunal complete discretionary authority regarding admissibility and probative value of evidence. The Tribunal failed to accord due importance and consideration to this aspect and disregarded the IBA Rules which provide for basic, universal standards to be followed by arbitrators in international arbitration as they reflect a consensus on best practices and are generally acceptable norms for their intrinsic merit.

108. The provision in respect to cross-examination assumes greater importance and relevance when compared to the other provisions as it refers to it as being mandatory. Without the fulfillment of this essential requirement the Report must be disregarded which is indicated by using the word ‘shall’. Thus, it places cross-examination on a higher pedestal that must be complied with.

---

201 Tunari, ¶41.
202 ¶76, ¶79, ¶84, ¶93, ¶100.
203 Uncontested Facts, ¶164-166.
204 Bela Rano Insularo Rules on Taking of Evidence, Article 5.5.
205 Revised Commentary on IBA Rules, 17.
206 Kohler, 7; Tevendale, 827; Railroad Development, ¶32.
In ADC Affiliate Limited, the Tribunal dealt with a similar issue in so far as the key Expert witness could not be presented for cross-examination. The Tribunal however, allowed two other Expert witnesses to prove the veracity of the Expert Report in order to accept it.\textsuperscript{207} Thus, reliance must not be placed on an Expert Report if its maker is not available for being cross-examined.\textsuperscript{208} Thus, it is fundamental that there be cross-examination in relation to an Expert Report as it ‘can conceivably decide a dispute’\textsuperscript{209}, and if cross-examination is not possible, the Report must be disregarded by the Tribunal.

\textbf{Second}, party-appointed Experts are required to be independent of the party.\textsuperscript{210} It means that the expert is under a duty to provide his honest opinion about the matter entrusted to him and to evaluate the case in an independent and neutral fashion.\textsuperscript{211} The principle of independence of party-appointed Expert witnesses has been universally recognized as an established principle in international arbitration.\textsuperscript{212} Further, the Preamble to the CIArb states that experts should provide assistance to the Arbitral Tribunal and not advocate the position of the party appointing them.\textsuperscript{213} This is an implicit recognition of the fundamental and crucial position of the norm of independence of an Expert.

\section*{B. RELIANCE ON THE EXPERT REPORT WITHOUT PROVIDING AN OPPORTUNITY FOR CROSS-EXAMINATION WAS A SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE}

It is a settled principle in ICSID jurisprudence that though exercise of discretion by a Tribunal in admitting and placing reliance on evidence produced before it is a rule of procedure and not a departure therefrom, if its exercise \textit{in toto} amounts to a serious departure from another rule of procedure which is fundamental, then there shall be a ground for annulment under Article 52(1)(d).\textsuperscript{214}

\subsection*{1. Not Excluding the Expert Report amounted to a Departure from a Fundamental Rule of Procedure}

\textbf{First}, as submitted hereinabove, the IBA Rules on Taking of Evidence provide that an Expert Report shall be disregarded by the Tribunal if there is no valid reason for the non-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{207} ¶53.
\item \textsuperscript{208} Gemplus, ¶27; S.D. Myers, ¶70.
\item \textsuperscript{209} Ehle, 82.
\item \textsuperscript{210} Bela Rano Insularo Rules on Taking of Evidence, Article 5(2)(c).
\item \textsuperscript{211} Revised Commentary on IBA Rules.
\item \textsuperscript{212} Harris, 214.
\item \textsuperscript{213} CIArb, ¶4.
\item \textsuperscript{214} Azurix, ¶210.
\end{enumerate}
\end{footnotesize}
appearance of the Expert for the purpose of cross-examination.\textsuperscript{215} In the present dispute, Dr. Ranapuer informed the parties on the morning of the Hearing that he would not be making himself available for examination and cross-examination citing his association with Wilderness as the reason for his refusal to participate in the proceedings.\textsuperscript{216} The reason cited by him to justify his non-appearance was that his participation in the oral proceedings would amount to an implicit approval of the treatment of Sireno Kanto, which Dr. Ranapuer, as a member of Wilderness, believed to have been mistreated by the Applicant. Since the issue of treatment of frogs was not in dispute, Dr. Ranapuer reasoned that his associates convinced him that participation would amount to an implicit approval of the treatment of the frogs. However, it is pertinent to note that Dr. Ranapuer has been a member of Wilderness since the year 1995.\textsuperscript{217} Therefore, it can be safely presumed that Dr. Ranapuer was well-aware of the objectives and principles that Wilderness propagated. Despite this fact, he agreed to prepare the Expert Report containing information that was at time being not available in the public domain,\textsuperscript{218} knowing fully well that the treatment of the frogs was not in dispute\textsuperscript{219}. Thus, the fact that he went ahead and submitted the Expert Report is evidence enough of his willingness to participate in the proceedings and his refusal to make himself available for cross-examination was a frivolous ground to frustrate proceedings.

\textbf{113.} Furthermore, Dr. Ranapuer informed the Tribunal of his inability to participate in the Evidentiary Hearing on the morning of the proceeding.\textsuperscript{220} Assuming but not conceding that his reason was valid enough, the timing of the disclosure reeks of unprofessional conduct and was designed just to frustrate the proceedings.

\textbf{114.} However, the Bela Rano Insularo Rules on Taking of Evidence provide that the Expert Report can still be relied upon if the Tribunal is of the considered opinion that there are exceptional circumstances.\textsuperscript{221} Dr. Ranapuer, prepared the Expert Report which dealt with the nature and expected consequences of the disease afflicting the Sireno Kanto frogs,\textsuperscript{222} and he along with only two other scientists had detailed knowledge on these matters.\textsuperscript{223} The Respondent should have followed the sound reasoning laid down in \textit{ADC Affiliate}}

\textsuperscript{215} Bela Rano Insularo Rules on Taking of Evidence, Article 5(5).
\textsuperscript{216} Uncontested Facts, ¶175-177.
\textsuperscript{217} Clarifications, Request N. 46.
\textsuperscript{218} Clarifications, Request N. 93.
\textsuperscript{219} Challenge Decision, ¶496-497.
\textsuperscript{220} Uncontested Facts, ¶175-177.
\textsuperscript{221} Bela Rano Insularo Rules on the Taking of Evidence, Article 5(5).
\textsuperscript{222} Uncontested Facts, ¶171-172.
\textsuperscript{223} Uncontested Facts, ¶172-173.
**Limited** and used the all possible endeavours to ensure that Dr. Ranapuer was made available for cross-examination. In the event Dr. Ranapuer was not willing to appear due to his personal reasons, the Respondent ought to have contacted the other two Experts in this field, requesting them to submit a statement assessing the veracity of Dr. Ranapuer’s Report.

115. Further, a Tribunal may dispense with the appearance of a witness if the same is unreasonably burdensome. Considering that only two other experts are available worldwide other than Dr. Ranapuer, the requirement of cross-examination could have been dispensed if either of the two Experts’ attendance was established as unreasonably burdensome. However, no attempt was made to even contact them. The Respondent could have arranged a video-conferencing call to ensure the presence of any one of the other two Experts as this could be done without incurring major cost, however, none of this was done to ensure their availability. It thus did not amount to an exceptional circumstance as there was an alternate available eliminating the discretionary power given to the Arbitral Tribunal to not disregard the Expert Report.

116. **Second**, the Tribunal did not appreciate the fact that Dr. Ranapuer’s Report furthered the claims of the Respondent, which is in gross violation of an established principle in international arbitration that party-appointed Experts must only provide assistance to the Tribunal and not advocate the position of the party appointing them. Expert evidence presented should be the creation of the uninfluenced mind of the Expert and should not be dictated by the exigencies of litigation with regard to its matter, content or structure. Dr. Ranapuer stated in his Report that due to the disease, by 2011, the population of the Sireno Kanto would drop by 95% of its 2006 population, as they were being removed by nature ‘even while the activities of Max Solutions were on-going’. This statement in Dr. Ranapuer’s Report, on which the Tribunal relied considerably, suffers from patent inaccuracies. Had the applicant been allowed to complete its activities, most of the Sireno Kanto population would have been removed by the

---

224 Uncontested Facts, ¶175-180.
225 Rule 4(9), ICSID Arbitration Rules.
226 Bela Rano Rules on Taking of Evidence, Article 8.2.
227 Clarifications, Request N. 64.
228 Tunari, ¶41.
229 CIArb, ¶4.
230 Whitehouse, 8.
231 Award, ¶767-768.
232 Award, ¶765-768.
233 Award, ¶764.
Applicant’s effort and technology, by December 2006 itself\textsuperscript{234}. Dr. Ranapuer’s assertion that the frogs would have been removed ‘by nature’ even while the activities of the Applicant were on-going\textsuperscript{235} therefore reflects subscription to the Respondent’s stand on this issue. As an Expert Report, all it required was to provide data and the relevant conclusion and not advocate for the party that appointed the Expert. By placing the study in relation to the activities purported to be undertaken by the Applicant, it in effect stated that its work would not substantially contribute to the removal of Sireno Kanto.

\textbf{117.} Notwithstanding the kind of instructions Dr. Ranapeur received from the Respondent based on which the Report was prepared, the tone and tenor of the Report indicates that it was prepared with the aim of advancing the case of the Respondent against the Applicant. The presentation in the Expert Report clearly points to a non-independent maker and in the process exemplifies the most common apprehension in relation to party-appointed experts, i.e. Experts being ‘hired guns’\textsuperscript{236} of the party appointing them merely reiterating the arguments made by the party itself in the garb of expert report.

\textbf{2. The Departure is Serious as it deprived the Applicant of an intended benefit and would have led to a Substantially Different Award}

\textbf{118.} Cross-examination being a mechanism to test the authenticity and accuracy of the testimony of witnesses presented by the other party in a dispute affords the cross-examiner an opportunity to highlight inaccuracies in, and generally discredit, the testimony of the opponent’s witness;\textsuperscript{237} the Applicant submits that the Tribunal, in the present dispute denied this intended benefit and protection to the Applicant.\textsuperscript{238}

\textbf{119.} Had cross-examination been allowed, the Applicant would have been able to establish that with the acceleration in its operations,\textsuperscript{239} it would have cleared the island of the frogs by late 2006 itself\textsuperscript{240}. Since the frogs would have been removed by the Applicant by 2006 itself, the estimation presented in the Report that 95% of the frog population would be removed by nature by 2011 would be rendered meaningless. Further, the removal of the frogs by 2006 would have resulted in instant benefits to the economy of the Respondent and the impact of tourism during the GASP would have been substantial.

\textsuperscript{234} Uncontested Facts, ¶104-105.
\textsuperscript{235} Award, ¶767-768.
\textsuperscript{236} Davis, 3; Berti, 58.
\textsuperscript{237} Bellhouse & Anjomshoaa, ¶1.
\textsuperscript{238} MINE, ¶6.01.
\textsuperscript{239} Uncontested Facts, ¶103-105.
\textsuperscript{240} Uncontested Facts, ¶103-105.
Such a construction would fundamentally alter the finding of the Tribunal with respect to satisfaction of the criteria of ‘contribution to economic development’ for determining the meaning of investment under the ICSID Convention. Therefore, non-appreciation of such a construction severely affected the legal rights of the Applicant.

120. Therefore, the Tribunal gravely departed from a fundamental rule of procedure in denying the Applicant the fundamental and customary right of cross-examination and thereafter placing reliance on the Report without conclusively establishing its veracity.

121. Furthermore, the Tribunal, while assessing whether there was contribution to economic development to the Respondent State as a result of the activities of the Applicant, failed to appreciate the fundamental and crucial fact that the Respondent relied on the ‘knowledge it had gained’ with its association with the Applicant to push the frogs away from areas where GASP was being organized\textsuperscript{241}. Therefore, even after the contract was terminated the Respondent relied on the technology and know-how developed by the Applicant to clear parts of the island of frogs. Admittedly, the Respondent would not have been able to do so without the know-how it gained from the Applicant. Thus, it is evident that there was a know-how transfer in the present case. Further, the transfer of technical know-how has been recognised as an element which satisfies the requirement of contribution to economic development for the purposes of determining the meaning of an ICSID investment\textsuperscript{242}.

122. Therefore, had the fact of know-how transfer been considered by the Tribunal, instead of placing excessive reliance on the Expert Report prepared by Dr. Ranapuer, the conclusion in relation to the satisfaction of the development criterion would have been substantially different. Thus, failure to consider and appreciate the know-how transfer severely affected the legal rights of the Applicant as the Award would have been in their favour.

123. Therefore, the Applicant submits that the Tribunal committed a grave and serious departure from a fundamental rule of procedure in placing considerable reliance on the Expert Report prepared by Dr. Ranapuer without according the Applicant an opportunity to cross-examine him which prevented the Tribunal from appreciating other pertinent facts which severely affected the legal rights of the Applicant in relation to the outcome of the Award.

\textsuperscript{241} Award, ¶700-703.
\textsuperscript{242} Salini, ¶57.
REQUEST FOR RELIEF

124. The Applicant respectfully requests this *ad hoc* committee to annul the Award in full:

1. UNDER Article 52(1)(a), because, the Tribunal was not properly constituted, as the initial challenge to Dr. Alessandra Iracunda should have been successful;
2. UNDER Article 52(1)(b), because, the Tribunal manifestly exceeded its powers in declining jurisdiction when in fact it had jurisdiction;
3. UNDER Article 52(1)(d), because, the Tribunal seriously departed from a fundamental rule of procedure by not excluding Dr. Ranapuer’s Expert Report.


-----

TEAM RAU

On Behalf of the Applicant

Max Solutions, Inc.