International Centre for Settlement of Investment Disputes

ICSID Case No. ARB/08/21

In the Annulment Proceeding Between

Max Solutions, Inc. (Claimant)

and

The Republic of Bela Rano Insularo (Respondent)

MEMORIAL FOR RESPONDENT
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STATEMENT OF FACTS

1. Claimant, Max Solutions, Inc., is a company incorporated in the Republic of Oscania.¹

2. Respondent, Bela Rano Insularo, and the Republic of Oscania are parties to the BIT.²

3. In January 2002, Respondent entered into a contract with Claimant on the removal of the poisonous Sireno Kanto frogs from the island.³ Under the contract, with the exception of a small nature reserve to be built by Respondent, Claimant was obliged to remove all frogs from the island by December 2007.⁴ Payment would be made monthly on a bounty basis,⁵ but Claimant would lose right to all payments if it failed to remove all frogs within the deadline.⁶ The contract required neither party to begin performance prior to January 2006.⁷


5. On January 26, 2006, scientists at the renowned Frog Research Unit at Bela Rano Insularo University announced that the Sireno Kato frogs were affected by a frog disease that would likely destroy 95% of the population within five years, by January 2011.⁹

¹ UF, l. 34 et seq.
² Id. 134, 542 et seq.
³ Id. 33 et seq.
⁴ Id. 53 et seq.
⁵ Id. 47.
⁶ Id. 55 et seq.
⁷ Id. 45 et seq.
⁸ Clarifications, No. 6.
⁹ UF, l. 126.
6. In **February 2006**, newspapers reported that Claimant sold healthy frogs to a pharmaceutical company for purposes of allergy immunity treatment research and that Claimant also planned to sell recordings of the annual Sireno Kanto frog croaking worldwide.\(^{10}\) Claimant subsequently confirmed these reports\(^{11}\) and today receives income from both ventures.\(^{12}\)

7. On **March 1, 2006**, Claimant announced acceleration of its performance and estimated that it would remove 80% of the frogs by **December 2006**.\(^{13}\) As Claimant refused inspection of its alleged new operations upon Respondent’s request,\(^ {14}\) however, this statement could not be verified.

8. By **March 13, 2006**, Claimant had removed only 3% of the frog population from the island.\(^ {15}\) Accordingly, having seen no affirmation that adequate performance would be forthcoming, Respondent cancelled the contract due to inadequate performance.\(^ {16}\)

9. Between the contract cancellation and the GASP, Respondent moved the disease-weakened frogs from the parts of the island to be used during the GASP to other parts of the island.\(^ {17}\) Respondent also established a government preserve for the remaining frogs. As a result of these actions, Respondent today is an ecological tourism hot spot.\(^ {18}\)

10. In **2008**, Respondent hosted the GASP. The games were an enormous success due to Respondent’s action of moving the disease-weakened frogs to parts of the island not used during the GASP.\(^ {19}\)

\(^{10}\) Id. 83.
\(^{11}\) Id. 99.
\(^{12}\) Clarifications, No. 46.
\(^{13}\) UF, l. 103 et seq.
\(^{14}\) Id. 105.
\(^{15}\) Id. 109.
\(^{16}\) Id. 108.
\(^{17}\) Id. 118 et seq.
\(^{18}\) Id. 126 et seq.
\(^{19}\) Id. 119 et seq.
11. On December 4, 2008, Claimant filed a request for arbitration with ICSID pursuant to Article 24 of the BIT.20

12. On February 13, 2009, the arbitral tribunal composed of Mr. Viator and Prof. Iracunda as arbitrators and Dr. Honesta as chair of the tribunal was constituted. Both parties had agreed upon Dr. Honesta’s appointment as tribunal chairman.

13. On March 1, 2009, Claimant moved to disqualify Prof. Iracunda pursuant to Arts. 57 and 14(1) ICSID Convention. After considering the proposal and hearing Dr. Iracunda on the matter, the two members of the Tribunal dismissed Claimant’s disqualification proposal.21

14. An initial hearing was held in May 2009 to consider Respondent’s objections to the tribunal’s jurisdiction. Prior to the hearing, Respondent submitted an expert report from Dr. Herbert Ranapuer, the lead scientist at the Frog Research Unit at Bela Rano Insularo University, as to the nature and expected consequences of the disease afflicting the Sireno Kanto.22 On grounds of conscience, however, as he did not approve of Claimant’s treatment of the Sireno Kanto frogs, Dr. Ranapuer was not available to be cross-examined during the evidentiary hearing.23 Claimant requested to exclude the expert report drafted by Dr. Ranapuer as there was no opportunity to cross-examine him. The Tribunal, however, declined Claimant’s request and decided to consider Dr. Ranapuer’s expert report since it provided information that was available from no other source.24

15. On July 29, 2009, the tribunal issued an award declining jurisdiction over the case, in which it held that Claimants’ activities did not constitute an “investment” under Art. 25(1) ICSID Convention. Mr. Viator, Claimant’s party-appointed arbitrator, issued a dissenting opinion in which he

20 Id. 133 et seq., 219 et seq.
21 Id. 161, 472 et seq.
22 Id. 169 et seq.
23 Id. 175 et seq.
24 Id. 183 et seq.
personally attacked his co-arbitrator Prof. Iracunda for her diverging view on the interpretation of the term “investment.”25 Claimant has subsequently applied to this Committee to have the award annulled.

16. In January 2011, as predicted, 95 % of the frogs have died of the frog disease.26 The remaining frogs live in the government-built ecological preserve.27 Both of these facts have tremendously boosted Respondent’s tourism,28 which had until then not been “especially prosperous”29 and struggled with the consequences of the global economic crisis.30

25 Id. 862 et seq.
26 Id. 126.
27 Id.
28 Id.
29 Id. 13 et seq.
30 Id. 72 et seq.
ARGUMENTS

I. THE TRIBUNAL WAS PROPERLY CONSTITUTED, AS THE INITIAL CHALLENGE TO DR. IRACUNDA WAS PROPERLY DISMISSED

1. Insofar as Claimant bases his request for annulment on an improper constitution of the initial Tribunal due to an allegedly wrongful challenge decision by the Two Members and pursuant to Art. 52(1)(a) ICSID Convention, its contention fails for two reasons: Firstly, the present ad hoc Committee does not have jurisdiction to reassess the merits of the initial challenge decision (A). Secondly, even if one assumes that the ad hoc Committee was competent to reassess the merits, this reexamination would only prove that the initial disqualification proposal by Claimant was rightfully dismissed, as nothing in the behavior of Prof. Iracunda amounted to a manifest lack of the qualities required by Art. 57, 14(1) ICSID Convention (B). Neither does the dissenting opinion issued by Claimant’s party-appointed arbitrator operate to sustain the annulment request (C).

A. The Committee may not reassess the merits of the challenge decision

2. As the ICSID Secretariat itself points out in its recent Background Paper on Annulment referring to the statement by Broches, “[a]nnulment is an essential but exceptional remedy.”31

3. In order to keep this remedy exceptional, certain restrictions have to be made when it comes to the competence of ICSID annulment committees. As stated by the ad hoc Committee Azurix, annulment committees are competent only to verify whether the correct law has been applied, not whether the law has been applied correctly.32

31 ICSID Annulment Report, para. 111.
32 Azurix Annulment, para. 288.
4. Claimant, however, argues that the Tribunal was not properly constituted, “as the initial challenge to [Prof.] Iracunda should have been successful.”

5. Evidently, Claimant does not submit to the court for annulment due to a failure of the Tribunal to apply the correct law, but due to a failure to apply the law correctly. It does not point to a certain legal norm, which the Two Members might have overlooked, but merely complains about the result they reach in their Challenge Decision.

6. The Two Members clearly applied the correct law by examining Claimant’s allegations concerning Prof. Iracunda’s qualities in the light of Art. 57 and Art. 14(1) ICSID Convention, and by proceeding according to ICSID Arbitration Rule 9. It is this re-assessment of the actions of the Two Members to which the ad hoc Committee’s competences are confined.

7. Everything else, i.e. the reconsideration of arguments put forwards during the disqualification proceeding or the re-examination of the reasoning as laid down by the Two Members in the Challenge Decision, would be “tantamount to an appeal.” It would, thus, constitute a departure from annulment as an “exceptional remedy.”

8. Therefore, the ad hoc Committee is incompetent to reassess the merits of the Challenge Decision. Such an enterprise has to be qualified as an action ultra vires not least in order not to let slip ICSID annulment proceedings “down the slippery slope” to an appeal.

B. Impermissible reassessment of the merits would only prove that the initial challenge decision was rightfully dismissed

9. Prof. Iracunda’s conduct did not substantiate Claimant’s challenge. Respondent insofar seconds the Two Members’ appraisal in their Challenge

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33 UF, l. 199 et seq.
34 Id. 265 – 267; 456 – 458; l. 468 – 470.
35 Id. 239 – 242; 252 – 254; 258 – 259.
36 Azurix Annulment, para. 282.
37 Schreuer, ICSID Annulment, p. 211-225.
Decision that turned down Claimant’s disqualification proposal. An analysis of the legal threshold for the disqualification of an arbitrator pursuant to Arts. 57 and 14(1) (1) and their application to Prof. Iracunda’s conduct (2) will prove that Claimant’s disqualification proposal was at all times unsubstantiated and thus rightfully turned down.

**1. Disqualification of an arbitrator requires a manifest lack of the capability to exercise independent judgment**

10. Art. 57 ICSID Convention allows for the disqualification of an arbitrator on account of “a manifest lack of the qualities required by paragraph (1) of Article 14” ICSID Convention. As Claimant does neither disavow Prof. Iracunda’s “high moral character” nor her “recognized competence in the field of law”\(^{38}\), it is the requirement to be capable to “be relied upon to exercise independent judgment” of Art. 14(1) ICSID Convention, which is pertinent to the present dispute (a). Furthermore, Art. 57 ICSID Convention sets out the threshold of a “manifest lack” (b).

a. *Lack of the capability to exercise independent judgment*

11. A vast and constant majority in international investment jurisprudence is interpreting the expression “may be relied upon to exercise independent judgment” as a dual standard of independence and impartiality, especially with reference to the equally authentic Spanish formulation of Art. 14(1): “inspirar plena confianza en su imparcialidad de juicio”\(^{39}\) - to inspire full confidence in [the arbitrator’s] impartiality of judgment.\(^{40}\)

12. The standard “Independence” is generally being understood as relating to the lack of any relations with a party that might influence an arbitrator’s

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\(^{38}\) UF, l. 376 – 377; 388 – 389; 410 – 413.

\(^{39}\) Conoco Phillips Challenge, para. 54, emphasis added; also points to: Universal Compression Challenge, para. 70; Suez’Vivendi Challenge, para. 29; Tidewater Challenge, para. 37; Alpha Projektholding Challenge, para. 35 et seq.

\(^{40}\) Paraphrased by author.
University of Cologne, Memorial for Respondent

decision, whereas “Impartiality”, on the other hand, is said to concern the absence of a bias or predisposition toward one of the parties.41

b. Requirement of a “manifest” lack

13. According to Art. 57 ICSID Convention, the lack of impartiality or independence on the part of Prof. Iracunda would have to be “manifest.”

14. This threshold is generally being translated as “obvious” or “evident”42 and is said to impose “a relatively heavy burden of proof” on the party submitting a disqualification proposal.43 As a result, the term “manifest” establishes the requirement to proffer objective evidence as to the bias of the challenged arbitrator.44

15. The very recent challenge decision in Conoco Phillips v. Venezuela45 demonstrates that the requirement of objective evidence has been carburized in ICSID challenges.

2. Prof. Iracunda’s behavior does not constitute objective evidence of her alleged impartiality or independence

16. As outlined above, Claimant would have had to prove with objective evidence that Prof. Iracunda lacked independence and/or impartiality in order to sustain its challenge – an enterprise that rightly failed since the Two Members dismissed the Challenge.46

17. Respondent, supportive of this decision, will demonstrate that Prof. Iracunda’s conduct has at all times met the requirements set out in Art. 14(1) ICSID Convention. Neither her role as leading academic in the field of international investment law (a) nor her membership with the global

41 Alpha Projektholding Challenge, para. 36; Suez/Vivendi Second Challenge, para. 28; Conoco Phillips Challenge, para. 54; Universal Compression Challenge, para. 70.
42 Universal Compression Challenge, para. 71; Suez/Vivendi Challenge, para. 34.
44 Universal Compression Challenge, para. 71; Suez/Vivendi Challenge, para. 40; Suez/Vivendi Second Challenge, para. 29.
45 Conoco Phillips Challenge, para. 56.
46 UF, l. 472 et seq.
University of Cologne, Memorial for Respondent

charity “Wilderness” (b) nor her comportment as a member of the Tribunal (c) give any reason to assume a lack of independence or impartiality on her part.

\[a. \textit{Her role as leading academic in the field of international investment law}\]

18. It belongs to the essential work of an academic to publish scientific writings (i) – an activity that is unproblematic to combine with arbitral activities, as both fields are quite distinct (ii). The compatibility of arbitral and academic activities is, furthermore, a key requirement for the development of international investment law (iii).

\[i. \textit{Her academic publication “Re-thinking ICSID Arbitration”}\]

19. In her publication “Re-thinking ICSID Arbitration”, Prof. Iracunda portrays ICSID arbitration from the States’ perspective. She focuses on their “desire to boost the inflow of foreign investment”\(^{47}\) and observes the challenges that governments, particularly in development countries, face by means of ICSID claims that “require an often impoverished State to divert valuable resources to defend.”\(^{48}\)

20. From her State-centered view, she draws the conclusion that there should be limits to what can be defined as an investment according to Art. 25(1) ICSID Convention and in these respects refers to the \textit{Salini} criteria, which foresee the contribution to the economic development of the host state as one exigency for an “investment.”\(^{49}\)

21. She concludes that there is an imbalance between investors and host states: “This balance must be set right by recognizing and giving effect to ICSID’s role in balancing the rights of private investors against those of host countries.”\(^{50}\)

22. Evidently, Prof. Iracunda is not stolidly fighting for “her” position. She is much rather pointing to pressing issues and difficulties that States face

\(^{47}\) Id. 302.
\(^{48}\) Id. 316 et seq.
\(^{49}\) Id. 344 – 346.
\(^{50}\) Id. 360 – 362.
within the ICSID system.\textsuperscript{51} In her profession as an academic, it seems perfectly comprehensible to add to the international doctrine a more State-oriented perspective through her writing. It is the balance with other texts showing more understanding for investor-related interests that creates a rewarding academic environment in international investment law.

23. While Prof. Iracunda undisputedly prefers to enlighten the reader on State-related issues in investment law, she does not pursue her enterprise in an imbalanced way. She merely expresses her support for a popular doctrine that has been well-disputed in investment law, namely the application of the \textit{Salini} criteria.

24. Again it seems to be no infringement of any rule whatsoever to take up, as an academic, one side in an open debate. Eventually, she does in no way long for a radical reform, but merely asks for a better “balance” of investors’ and States’ interests in the ICSID system. Her writings thus demonstrate that she has, in course of an academic exercise, well developed her view on the matter and arrives at a moderate conclusion.

25. Consequently, Prof. Iracunda’s publication reflects a fine standard of academic dialectics that diverts any allegation of bias.

\textit{\textit{ii. Distinction between arbitral and academic activities}}

26. Respondent highlights the distinction between the roles of a scholar and an arbitrator drawn by Prof. Iracunda in her written statement.\textsuperscript{52} While an arbitrator applies the law and rules on specific facts, an academic studies the law in the abstract and has the freedom to express his scientific opinion on the matter. Consequently, as laid out by Daele “opinions expressed as an arbitrator and as a scholar have to be kept distinct.”\textsuperscript{53}

27. It is, furthermore, one of the main qualities of an academic to be able to change his opinion as required in the light of the current state of academic knowledge.\textsuperscript{54} Nothing done, said or written in an academic capacity can

\textsuperscript{51} Id. 314 et seq.
\textsuperscript{52} Id. 476 et seq.
\textsuperscript{53} Daele, Disqualification, Chapter 7, IV., A. (p. 400).
\textsuperscript{54} Urbaser Challenge, para. 51.
shed light on the position, which that same individual will take up as an arbitrator.

28. This is also the reasoning of the Two Members in the Urbaser challenge decision, which had to address facts quite similar to the present proceeding. The decision points out that the mere showing by an arbitrator of an academic opinion is not sufficient to sustain a challenge.55

29. Prof. Iracunda expressed her views on Art. 25(1) ICSID Convention as a scholar.56 Since this activity has to be kept clearly distinct from her arbitral function, none of her statements made as an academic can give information about her ability to serve as an arbitrator. It is this result the Two Members had reached in their initial Challenge Decision that is imperative.57

30. Moreover, in Suez/Vivendi the Two Members found that the fact that an arbitrator had made a determination of law in one case does not mean that he cannot decide the law impartially in another case.58 What is valid for opinions expressed previously in an arbitral function has to apply a fortiori for arbitrators who had formerly expressed opinions as a scholar.

31. Looking at the IBA Guidelines on Conflicts of Interest in International Arbitration, it becomes nonambiguous that Prof. Iracunda’s conduct as an academic gives no reason whatsoever to assume her dependence or partiality.

32. Although the IBA Guidelines are not legally binding, they are still

   “widely accepted as a reflection of current international practice in international arbitration and therefore as an important standard with persuasive value in ICSID challenge proceedings.” 59

33. Furthermore, several ICSID tribunals have acknowledged the convincing authority of the IBA Guidelines60, while one even recognizes them as “instructive.”61

55 Id. para. 45.
56 See above, I.B.2.a.i; UF, l. 293 et seq.
57 UF, l. 429 et seq.
58 Suez/Vivendi Challenge, para. 36; Urbaser Challenge, para. 47.
59 Markert, p. 242.
34. The Guidelines’ Green List defines conduct that does not give rise to the appearance of a conflict of interest. In its pertinent part, 4.1.1, it states:

“The arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated).”

35. As outlined above, Prof. Iracunda published a general opinion on the interpretation of Art. 25(1) ICSID Convention. She did not focus on any specific case and particularly not on the one now before us. Her comments thus fall under 4.1.1 IBA Guidelines. Accordingly, they do not suffice to sustain a challenge.

iii. The compatibility of arbitral and academic activities is crucial for the development of international investment law

36. As a regime of public international law, investment law is typically dominated by State-created law, especially BITs. At the same time, this legal system has been created for the settlement of disputes under participation of its own legislators, again the States. Since the development and evolvement of a legal system whose legislators might at the same time be parties to a conflict governed by their own laws would be quite conflictive and, hence, difficult, it is essential to have individuals with a thorough understanding of the matter to the centre of this legal order.

37. It is, thus, very common in international investment law to have individuals that are active as scholars sit on tribunals. Would one allow for the disqualification of such personalities due to their academic publications, so the concern of the Two Members in the Urbaser case,

“the consequence would be that no potential arbitrator of an ICSID Tribunal would ever express views on any such matter, whether it may

60 Alpha Projektholding Challenge, para. 56 refers to, e.g.: Hrvatska Challenge Decision, para. 12]; EDF Challenge Decision, para. 25, 34, 50, 60; Azurix Annulment para. 263; Participaciones Challenge Decision, para. 15; Rompetrol Counsel Challenge Decision, note 3.
61 Alpha Projektholding Challenge, para. 56.
62 Cf. B.2.a.i.
63 Urbaser Challenge, para. 48.
64 Id.
be procedural, jurisdictional, or touching upon the substantive rights
deriving from BITs.” 65

Such a result would, in the words of the Two Members, “undermine the
future development of international investment law.” 66

38. In accordance with Markert, the “better view seems to be” that prior
academic writings should not suffice to sustain a challenge. 67

b. Prof. Iracunda’s membership with Wilderness

39. Prof. Iracunda’s membership of Wilderness entails no specific duties or
responsibilities. 68 She has in no way shown sympathy or support for the
protests by Wilderness members against Claimant’s activities to remove
Sireno Kanto from Bela Rano Insularo. Instead she restricted her support
for the organization to a passive membership. 69

40. If the mere association with an international charity would suffice to
demonstrate a manifest lack of independence, this would mean to assess an
arbitrator’s eligibility by means of his personal life. Quite likely this would
induce many individuals to desist from further arbitral activities.

41. Prof. Iracunda herself has given evidence that she simply endorses the
“conservation principles” Wilderness stands for. 70 If one takes a closer look
on the merits of the case, it appears that not the treatment of the Sireno
Kanto is at the heart of the dispute, but Claimant’s failure to perform
contractually. The removal had been agreed by both sides and was thus at
no point in time up for decision. 71

42. Besides, Prof. Iracunda would unlikely have accepted the appointment by
Respondent – the very government who had ordered the removal – had she
been opposed to the removal of the Sireno Kanto.

65 Suez/Vivendi Challenge, para. 41.
66 UF, l. 437.
67 Markert, p. 263.
68 Clarification, No. 41.
69 UF, l. 463 – 465.
70 Id. 493 et seq.
71 Id. 498 et seq.
43. Consequently, Claimant did not present objective evidence that Prof. Iracunda’s membership caused a bias on her part. The threshold of a “manifest” lack of independence and/or impartiality is not met.

3. Even measured by the obsolete, lower standards of “high probability” or “reasonable doubts”, Prof. Iracunda’s behavior would still not constitute a manifest lack of impartiality or independence

44. An outdated standard for the disqualification of an arbitrator pursuant to Arts. 57 and 14(1) ICSID Convention requests the challenging party to establish facts that make it “highly probable, not just possible” that the challenged arbitrator lacks independence and/or impartiality.72

45. Even if one applies this threshold, Prof. Iracunda’s behavior cannot suffice for the challenge to be successful since neither her academic activities nor her membership with Wilderness make a bias on her part “highly probable.” Her publication is a mere expression of her opinion as a scholar and can thus give no evidence whatsoever as to her conduct as an arbitrator. The same holds true for her passive membership with Wilderness, which is an expression of her personal interests and not an impediment to her reasoning powers.

46. An even lower threshold that originates in commercial arbitration law73 and asks for mere “reasonable doubts” about an arbitrator’s bias has recently been transferred to investment arbitration by a few ICSID tribunals.74 Apart from the fact that it represents a threshold that might be suitable in a commercial arbitration but actually circumvents the requirement of manifestness as set out in Art. 57 ICSID Convention in its literal meaning,

72 Amco Asia Corp. v. Indonesia, ICSID Case ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator (June 24, 1982); the case is also referred to in Schreuer, ICSID Convention Commentary (1st edition), p. 1200.
73 E.g. IBA Ethics Rules, Art. 3.3; Art. 10.3 LCIA Arbitration Rules, Art. 14 SCC Arbitration Rules speak of “justifiable doubts.”
74 SGS Challenge, p. 404 et seq; Vivendi Challenge, para. 25.
even this low-defined standard would not operate to sustain a challenge against Prof. Iracunda.

47. No reasonable person would have doubts as to her impartiality and independence because of her academic opinion or her association with Wilderness since it would be able to discern the difference between, firstly, scholarly and arbitral activities and, secondly, the private and the professional domain.

48. Consequently, even the application of outdated lowest thresholds could not have substantiated a challenge against Prof. Iracunda. Claimant’s proposal was thus rightfully turned down.

C. The dissenting opinion by Claimant’s party-appointed arbitrator is irrelevant for Claimant’s annulment request

49. Insofar as Claimant might seek to base its annulment request on the dissenting opinion issued by its own party-appointed arbitrator, Dr. Viator, this endeavor would have to fail because it has to be qualified as information that appeared after the award was rendered and is thus to be seen as irrelevant (1). Even if Dr. Viator’s dissenting opinion could contain relevant information, it would not represent an objective fact due to the meritless, subjective nature of the statement (2).

1. Information concerning an arbitrator’s disqualification that appears after the award was rendered does not provide a ground for annulment

50. As argued in Azurix, information concerning disqualification that appears after the award was rendered may not provide a basis for annulment under Art. 52(1)(a) ICISID Convention. ⁷⁵

⁷⁵ Azurix Annulment, para. 281.
51. Dr. Viator issued his dissenting opinion in the annex to the original Award and thus after it was rendered. In other words, the proceeding had already ceased when his statement was published. Accordingly, no information contained in Dr. Viator’s dissenting opinion can operate as a ground for annulment.

52. The assessment made by the Azurix committee particularly seems imperative if one considers the rationale of an annulment as set forth in Art. 52 ICSID Convention as opposed to a revision pursuant to Art. 51 ICSID Convention.

53. Whilst an annulment is meant to be an “exceptional” remedy, revision can be requested due to any fact that appears after the award was rendered.

54. Annulment is explicitly not meant to operate as an appeal, where virtually every fact will be reconsidered. For this reason annulment is restricted to five enumerated grounds set out in Art. 52 ICSID Convention.

55. It, furthermore, needs to be seen as an exigency of legal certainty that after the 90 days’ time-period for the request of a revision has run out, an award can only be attacked for one of the grounds for annulment set out in Art. 52 ICSID Convention.

56. It follows, therefore, that Claimant would have to have asserted any claim based on its party-appointed arbitrator’s dissenting opinion by means of revision. However, as the 90-days-period set out in Art. 51 has run out, it is now time-barred. An annulment pursuant to Art. 52(1)(a) ICSID Convention, on the other hand, is simply the wrong legal remedy and therefore subject-barred for Claimant.

76 UF, l. 824 et seq.
77 ICSID, Background Paper on Annulment, para. 74.
78 Schreuer, ICSID Annulment, p. 212.
2. Dr. Viator’s dissenting opinion was subjective and thus meritless

57. Even if one would assume that Dr. Viator’s dissenting opinion could be considered in annulment, it would still fail to sustain such request because of its subjective and thus meritless nature.

58. Van den Berg adverts to the fact that “dissenting opinions are almost universally issued in favor of the party that appointed the dissenter.”79 He arrives at the conclusion that investment law is positively “polluted” by dissenting opinions by party-appointed arbitrators.80

59. While dissenting opinions thus already in general have little evidentiary value due to their subjectivity, Dr. Viator’s statement is a sheer textbook example for a “polluting” dissent. Style and temper of the text suggest that Dr. Viator mainly expresses his frustration that he could not convince his co-arbitrators of his personal view on the interpretation of Art. 25(1) ICSID Convention.

60. Insofar as Dr. Viator accuses Prof. Iracunda of having stood up for her personal legal opinion throughout the discussions among the tribunal members, one can only respond that there lies nothing unusual in this conduct – most notably since Dr. Viator seems to have neither been willing to give up his original opinion.

61. It is, in fact, more than usual to distribute copies of own writings and naturally legal uncertainties are to be discussed within the arbitral tribunal with every arbitrator having an equal opportunity to present their own views in a secret environment.81

62. Furthermore, the Tribunal consisted of three arbitrators. Therefore, not Prof. Iracunda’s opinion was decisive for the decision, but the opinion of the majority.

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79 Van den Berg, p. 824 speaks of around 75%.
80 Ibid., p. 833.
81 Redfern & Hunter, para. 9.159 et seq.
63. It seems quite telling that the experienced Dr. Honesta, who himself had been proposed as chair to the Tribunal by Claimant, decided to follow Prof. Iracunda’s opinion. This fact indicates that a substantiated legal debate took place within the tribunal – a debate in which Dr. Viator, possibly due to his lack of expertise in investment arbitration, was unable to convince his co-arbitrators of his views.

64. All in all, the dissenting opinion by Dr. Viator thus in no way meets the threshold of “objective evidence” as required in order to sustain a challenge. It does not have any evidentiary value since, especially against the background of the numbers portrayed by Van den Berg, one has to assume a lack of evenhandedness on the part of Dr. Viator.

II. THE TRIBUNAL DID NOT MANIFESTLY EXCEED ITS POWERS IN DECLINING JURISDICTION

65. Claimant’s second submission that the Tribunal manifestly exceeded its powers in requiring a host state contribution is clearly to be rejected. The Tribunal neither manifestly exceeded its powers in declining jurisdiction under Art. 25(1) (A.), nor in not applying the BIT (B.).

A. The Tribunal did not manifestly exceed its powers in declining jurisdiction under Art. 25(1)

66. Any assertion of a manifest excess of powers in the way that the Tribunal determined its lack of jurisdiction under Art. 25(1) must fail. The Committee is restricted in its review of the award as to whether the award is tenable; it may not review misapplications of the law because by this it would impermissibly assume the function of an appellate court. It will be demonstrated that the Tribunal evidently did not commit a manifest excess

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82 UF, l. 148 et seq.
83 Id. 227 et seq.
84 Id. 145 et seq.
85 Universal Compression Challenge, para. 71.
of powers under this review standard (1). Even in the improbable case that the Committee should adopt the function of an appellate court and fully and strictly review the award, it would come to no other conclusion as the Tribunal’s holding was correct (2).

1. Under the restricted annulment review, the Tribunal did not manifestly exceed its powers

   a. The Committee may not review misapplications of the law

67. What Claimant in fact seeks under the guise of this annulment ground is the Committee’s full review of whether Art. 25(1) can be interpreted as requiring a significant contribution to the host state development. Even if investment required no such contribution, which Respondent contests, the Tribunal’s holding would merely constitute a false interpretation of Art. 25(1), that is, a misapplication of the law. Claimant thus requests the Committee to sanction an alleged misapplication of the law.

68. Misapplication of the law - even if it is manifest – does however not constitute an annulment ground under Art. 52(1)(b), as sanctioning such misapplication would turn the annulment mechanism into one of appeal. Art. 53 explicitly stipulates that ICSID awards are not subject to appeal. Indeed, review of the tribunal’s application of the law would transform the annulment procedure into an appellate mechanism as the Committee is not empowered to review the award’s substantive correctness. This concern is confirmed by a review of the drafting history of the ICSID Convention.

69. During the Regional Consultative Meetings in 1964 Chairman Broches remarked that “a mistake in the application of the law would not be a valid ground for annulment of the award.” He added that errors of law or fact

86 ICSID, Background Paper on Annulment, para. 73, 91; Soufraki Annulment, para. 85; Enron Annulment, para. 237.
87 Klöckner Annulment I, p. 110; Pinsolle, Annulment, p. 250.
88 Id.
89 ICSID, Convention History, p. 518.
constitute an inherent risk in judicial decisions.\textsuperscript{90} In fact, the Convention’s drafters explicitly rejected a proposal to include “manifestly incorrect application of the law” as a ground for annulment.\textsuperscript{91}

70. In the case of treaty interpretation (here: Art. 25(1) ICSID Convention) it must also be taken into account that there are often several possible interpretations, and that the Committee is not empowered to assume the role of an appellate court and substitute its view of what is the most correct or best interpretation for that of the tribunal.\textsuperscript{92} Furthermore, restraint must be exercised in reviewing tribunals’ interpretation of treaties as the consent of two sovereign states is at stake.\textsuperscript{93}

b. The Committee may only review the award’s tenability

71. Annulment constitutes a limited exception to the principle of the finality of awards contained in Art. 53.\textsuperscript{94} It only sanctions procedural illegitimacy and only in the form of the five specific grounds enumerated in Art. 52(1).\textsuperscript{95} Among them, as Claimant has moved, is the exercise of a “manifest excess of powers.”

72. It follows from this and from the wording of Art. 52(1)(b) “manifestly exceeded” that the Committee is not empowered to review the award for simple excess of powers. Rather, the inclusion of the word “manifestly” “is a significant restriction of the Committee’s annulment power.\textsuperscript{96}

73. An award can only be annulled for manifest excess of powers if it violates the integrity of the arbitral process because this integrity constitutes the protective purpose of Art. 52(1)(b).\textsuperscript{97}

\textsuperscript{90} Id.
\textsuperscript{91} ICSID, Background Paper on Annulment, para. 26.
\textsuperscript{92} Amco Annulment I, para. 23; Klöckner Annulment I, p. 107; Vivendi Annulment II, para. 247(i); Patrick Mitchell Annulment, para. 19.
\textsuperscript{93} Fraport Annulment, para. 44.
\textsuperscript{94} Schreuer, ICSID Convention Commentary, Art. 52, para. 3.
\textsuperscript{95} Id, Art. 52, para. 11.
\textsuperscript{96} Feldman, p. 101.
\textsuperscript{97} MHS Annulment Diss. Op., para. 55; Sociedad Anónima Annulment, para. 236; Vivendi Annulment II, para. 247(i); CDC Annulment, para. 34; similar Soufraki Annulment, para. 24.
74. Due to annulment’s character as an exceptional remedy, annulment for manifest excess requires a high threshold and must be “easily perceived or discerned by the mind, without the need for deeper analysis.” The excess must be found “with certainty and immediacy, without it being necessary to engage in elaborate analyses of the award.” The excess must be “evident”, “clear”, and “obvious.”

75. It is therefore general consent that as long as the Tribunal’s reasoning is tenable, it cannot constitute a manifest excess of powers.

76. There are also no particularities in cases as the present one where Claimant under Art. 52(1)(b) attacks a jurisdictional holding. Not every excess of jurisdiction amounts to a manifest excess of powers. It does not constitute an own annulment ground and must therefore be subsumed under the restrictive standard of “tenability” and violation of the arbitral process’ integrity just as any other alleged ground for annulment under Art. 52(1)(b).

77. Finally, in the case of doubt as to the existence of a manifest excess of powers, the Committee would be well advised to follow the principle of in dubio pro validitate / in favorem validitatis sententiae (“in doubt for the award’s validity”). Annulment constitutes a very rare exception to the fundamental principle of the finality of ICSID awards so that in case of doubt it is preferable to uphold them.

c. Even if an excess of powers, the Tribunal’s decline of jurisdiction was not a manifest excess of powers

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98 CDC Annulment, para. 34; RFCC Annulment, para. 223; MTD Annulment, para. 54; CMS Annulment, para. 44; Soufraki Annulment, para. 20; M.C.I. Annulment, para. 24.


100 Id. See for the same finding Patrick Mitchell Annulment, para. 20.

101 Patrick Mitchell Annulment, para. 20.

102 Vivendi Annulment II, para. 245.

103 Wena Hotels Annulment, para. 25.

104 Azurix Annulment, para. 68; See also Soufraki Annulment, para. 39 (“obviousness”).

105 Klöckner Annulment I, para. 52(b); Helnan Int’l Hotels Annulment, para. 55.

106 MHS Annulment Diss. Op., para. 51; Soufraki Annulment, para. 118 et seq.

107 Klöckner I Annulment, para. 52(e).
78. Even if the Tribunal’s reasoning constituted an excess of powers, it would fail to constitute a manifest excess of powers and therefore not give rise to annulment. In order to constitute a manifest excess of powers, it has been shown above that the award would need to be untenable and/or violate the integrity of the arbitral process.

79. The award is not untenable and does not violate the integrity of the arbitral process. Even if the Tribunal erred in deriving the criterion of a significant host state contribution from the interpretation of Art. 25(1), it is very far from untenable to draw such a conclusion from context and prior case law where it is not expressly articulated in the text. This would be absurd given that no definition of investment is contained in the Convention and given that

“no specific statutory mandate is required to enable a judicial body to understand the concept of a contribution as meaning a substantial contribution, absent any contrary indication in the governing text.”

The AES Annulment committee has aptly held that, absent an ICSID system binding precedent, it does not constitute an error of law not to follow the prevailing jurisprudence. In fact, since ICSID arbitrators are not (both Convention-wise and democratically) legitimized to create legally binding precedent for ICSID parties, it would be manifestly absurd to hold an award untenable simply because it does not follow a different line of jurisprudence.

80. It is also implausible to hold the requirement of a (significant) host state contribution a manifest excess of powers given that even the Convention’s Preamble makes mention of the importance of the host states’ economic development.
81. If this Committee should find that the Tribunal committed a manifest excess of power, it would imply by this that all of the above-cited ICSID tribunals and scholars in support of Respondent’s argumentation apply a concept of investment that violates the integrity of the arbitral process. This would be manifestly absurd.

2. Even under appellate review, the Tribunal did not manifestly exceed its powers

82. Even if the Committee should choose to fully and strictly review the Tribunal’s interpretation of Art. 25(1), which it is not permitted to do, it would find that the Tribunal was correct in requiring a contribution to Respondent’s economic development (a.) and that it was also correct in requiring this contribution to be significant (b.).

   a. The Tribunal correctly required a contribution to Respondent’s economic development

83. The Tribunal was correct in requiring a host state contribution from Claimant because, as will firstly be shown, the term “investment” in Art. 25(1) has an objective, judiciable meaning. It will then subsequently be demonstrated that a contribution to the host state contribution is such an objective requirement.

84. Investment is not defined in the Convention. Absence of an express definition does however not mean its inexistence or redundancy. Rather, the term “investment” in Art. 25(1) has an objective meaning, serving as a key jurisdictional requirement of ICSID proceedings. Even claimants in ICSID proceedings have recognized that Art. 25(1) has objective outer

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112 MHS Annulment Diss. Op., para. 10; Cole & Vaksha, p. 315 et seq.
113 Joy Mining, paras. 49 et seq.; Patrick Mitchell Annulment, para. 25; MHS Jurisdiction, para. 55; Pey Casado, para. 232; MHS Annulment Diss. Op., paras. 7 et seq.; Global Trading, para. 44; Cole & Vaksha, p. 326 et seq.
114 AES, para. 38; MHS Jurisdiction, para. 55; Pey Casado, para. 232.
limits “beyond which party consent would be ineffective,”\textsuperscript{115} that is, outer limits that cannot be overcome by party consent alone.

85. The term “investment” stringently provides for objective judiciable criteria as its content must be differentiated from the condition of consent.\textsuperscript{116} Denying objective requirements of investment would make it wholly subject to party consent and totally deprive it of its \textit{effet utile}.\textsuperscript{117} The \textit{effet utile} principle requires a tribunal to consider the object and purpose of a term.\textsuperscript{118}

86. The objective meaning of “investment” can also be derived from the \textit{travaux préparatoires}. During the Convention’s drafting, the Chairman emphasized that the

> “purpose of Section 1 is not to define the circumstances in which recourse to the facilities of the Center would in fact occur, but rather to indicate the outer limits within which the Center would have jurisdiction”.\textsuperscript{119}

Had the Convention’s drafters wished to leave this term without a meaning, they would have stated so expressly.\textsuperscript{120}

87. The objective and restrictive approach can further be derived from Art. 4(3)(b) Additional Facility Rules according to which even transactions under the Additional Facility Rules must have features distinguishing them from ordinary commercial transaction. This must a fortiori apply to investments under Art. 25(1).

88. The requirement of a contribution to the host state’s economic development derives from the Convention’s object and purpose which in its Preamble states:

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

\textsuperscript{115} Rompetrol, para. 80.
\textsuperscript{116} Gaillard, Identify or Define, p. 410.
\textsuperscript{117} Given, p. 473.
\textsuperscript{118} VCLT, Art. 31; Pey Casado, para. 232.
\textsuperscript{119} ICSID, Convention History, Vol. II-1, p. 566.
\textsuperscript{120} Global Trading, para. 44.
Even though the Preamble is not binding, it is the “major (if not primary) basis” upon which the contracting states ratified the Convention.\textsuperscript{121} Numerous tribunals and scholars have cited the Preamble in support of the conclusion that contribution to the economic development of the host state constitutes a requirement for “investment” under Art. 25(1) ICSID Convention.\textsuperscript{122} Schreuer has commented on this formulation arguing that contribution to the host state’s economic development is the “only possible indication of an objective meaning”\textsuperscript{123} of the term “investment” to be drawn from the Convention.

89. This development-friendly interpretation is affirmed by the Executive Directors Report, which highlights the Convention’s “desire to strengthen (...) the cause of economic development.”\textsuperscript{124} In fact, states’ economic development was conceived of “as the very rationale of the arrangements.”\textsuperscript{125} ICSID jurisprudence has confirmed that as a consequence, the term “investment” must be interpreted so as to contribute to the host state’s economic development.\textsuperscript{126} An interpretation of “investment” that takes this aim of the Convention into consideration at the same time takes due account of the fact that the Convention is aimed at protecting the interest of host states as much as that of investors.\textsuperscript{127}

90. Moreover, States bear certain financial burdens in connection with ICSID. It would therefore be unreasonable to assume that the Contracting States agreed on a definition of investment according to which a transaction does not in return have to promote their economic development.\textsuperscript{128} Additionally,

\textsuperscript{121} Hwang & Fong, p. 120.
\textsuperscript{122} MHS Jurisdiction, para. 66; MHS Annullment Diss. Op., paras. 17 et seq.; C.S.O.B., para. 64.; indirectly Amco Jurisdiction, para. 23; Patrick Mitchell Annullment, para. 28; Bayindir, para. 137; Schreuer, ICSID Convention Commentary, Art. 25, para. 121, calls this interpretation “arguable”; Hwang & Fong, p. 119; Given, p. 475.
\textsuperscript{123} Schreuer, ICSID Convention (1st Edition), Art. 25, para. 88. This argument was confirmed in MHS Annullment Diss. Op., para. 30.
\textsuperscript{124} Executive Directors Report, para. 9; MHS Jurisdiction, para. 66.
\textsuperscript{125} MHS Annullment Diss. Op., para. 19.
\textsuperscript{126} MHS Jurisdiction, para. 66. Similar MHS Annullment Diss. Op., para. 28.
\textsuperscript{127} Amco Jurisdiction, para. 23.
\textsuperscript{128} MHS Annullment Diss. Op., para. 21.
if the term “investment” had no outer limits, a floodgate of arbitrations would be opened against states and drain their resources.129

91. Even if the Committee should not assume an original requirement to contribute to the host state’s development, the Convention would have been amended by subsequent practice.130 And indeed, claimants (arguably most affected by a more restrictive jurisdictional approach), scholars and ICSID tribunals131 have recognized this implicit amendment. In Biwater, the claimant recognized the requirement of contributing to the host state’s development.132 Scholars have noted that in the last decade133 a new stream of ICSID jurisprudence has emerged which follows a strict test of investment.134 This approach has “rapidly become dominant among the tribunals that guard ICSID’s gates.”135

92. Until today, an enormous number of ICSID tribunals has recognized contribution to the host state’s economic development as a requirement of investment.136

b. The tribunal correctly required the contribution to be significant

93. Contribution to the host state’s development must be significant.137 This high threshold has been applied by ICSID tribunals. For example, the Joy Mining tribunal found a bank guarantee of £ 9,605,228 did not constitute a significant contribution to the Egyptian economy.138 The MHS tribunal found that a marine salvage did not constitute a significant contribution, even though it allegedly contributed over US$ 1 million in cash to the

129 Hwang & Fong, p. 106.
130 MHS Annulment Diss. Op., para. 64.
131 MHS Annulment Diss. Op., para. 64.
132 Biwater, paras. 233(e), 234, 240.
133 Mortenson, p. 259.
134 Id.
135 Id.
136 Fedax, paras. 42 et seq.; Salini, para. 52; C.S.O.B., para. 76; Joy Mining, para. 53; Bayindir, paras. 130, 137; L.E.S.I-DIPENTA, Section II, paras. 14(i) - (ii); Jan de Nul, paras. 91 et seq.; Patrick Mitchell Annulment, para. 27, 29 et seq.; MHS Jurisdiction, para. 143; MHS Annulment Diss. Op., paras. 14 et seq.
137 C.S.O.B., paras. 88; Joy Mining, paras. 49, 53; Bayindir, para. 137; L.E.S.I-DIPENTA, Section II, paras. 14(i) - (ii); Jan de Nul, para. 92, highlighting the transaction’s “paramount significance for Egypt's economy and development”; MHS Jurisdiction, para. 143.
138 Joy Mining Jurisdiction, para. 57.
Malaysian treasury.” Although the operation was probably also the largest of its kind ever performed, the sole arbitrator still denied the operation’s significance. He clearly stated that it is the overall contribution and not the relative contribution compared to other transactions in the same industry that is relevant. He also held that the contract’s benefits were no different from those of any ordinary service contract.

94. In accordance with the internationally recognized \textit{minimis non curat lex} (“The law does not concern itself with trifles”) principle, minimal contributions to a host state’s economic development cannot be taken into account as the significance requirement is already inherent in the contribution requirement. The Sole Arbitrator in \textit{MHS Jurisdiction} correctly held that since

“[a]ny contract would [make] some economic contribution to the place where it is performed … that does not automatically make a contract an “investment” within the meaning of Article 25(1).”

Even the \textit{MHS Annulment} committee’s majority who denied a requirement to contribute to the host state’s development confirmed that argument in admitting that

“[w]ere there not the requirement of significance, any contract which enhances the Gross Domestic Product of an economy by any amount, however small, would qualify as an ‘investment.’”

95. Tribunals not stressing the necessity of the contribution’s significance might have omitted to do so simply because the significance of the contribution was evident.

\begin{footnotesize}

\begin{enumerate}
  \item[139] \textit{MHS Jurisdiction}, 133.
  \item[140] Id. 134 - 143.
  \item[141] Id. 135.
  \item[142] \textit{MHS Jurisdiction}, para. 144.
  \item[143] \textit{MHS Annulment Diss. Op.}, para. 35, see also para. 38.
  \item[144] \textit{MHS Jurisdiction}, para. 125, 144.
  \item[145] \textit{MHS Annulment}, para. 123.
  \item[146] Id. 113.
\end{enumerate}
\end{footnotesize}
96. The Tribunal was also correct in requiring a significant contribution because the other investment criteria were only tenuously satisfied. In cases of transactions not readily recognizable as investments, the threshold of contribution is even higher. As put by the tribunal in *MHS Jurisdiction*,

“where many of the typical hallmarks of “investment” are not decisive or appear to be only superficially satisfied, the analysis of the remaining relevant hallmarks of “investment” will assume considerable importance. … therefore … for it to constitute an “investment” under the ICSID Convention, the Contract must have made a significant contribution to the economic development of the Respondent.”

97. It follows from the above arguments that the Tribunal was correct in requiring a significant contribution to Respondent’s development, and that it rightly declined jurisdiction for absence of such a contribution. It is thus demonstrated that even if the Committee should impermissibly decide to fully review the Tribunal’s holding, the decline of jurisdiction would stand.

**B. The Tribunal was not required to apply the BIT**

98. The so-called double standard for the determination of investment requires that both the Convention’s and the BIT’s definition of investment are met (1.). Since the investment definition of Art. 25(1) was not met in this case, the Committee was not required to apply the BIT (2.), as jurisdiction was wanting under the Convention already.

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147 Aron Broches, cited by Christoph Schreuer, *ICSID Convention Commentary* (First Edition), Art. 25, para. 86: “Mr. Broches recalled that none of the suggested definitions of the word “investment” had proved acceptable. He suggested that while it might be difficult to define the term, an investment was in fact readily recognizable”.

148 *MHS Jurisdiction*, para. 124; implicitly *Joy Mining*, para. 57.

149 *MHS Jurisdiction*, paras. 124. See also para. 130. For a similar argumentation see Patrick Mitchell *Annullment*, para. 39.
1. **The double-barreled standard requires jurisdiction under Art. 25(1) and the BIT**

99. Treaty-based ICSID proceedings require the existence of an investment both under Art. 25(1) and under the BIT.\(^{150}\) It is this so-called double-barreled test that the Tribunal followed.\(^{151}\)

100. Art. 25(1) establishes an own jurisdictional standard autonomous of the jurisdictional requirements contained in the BIT.\(^ {152}\) Parties cannot by their agreement in a BIT arbitrarily open the Centre’s jurisdiction.\(^ {153}\)

101. In fact, regarding the investment definition the Convention even has supremacy over BITs.\(^ {154} \) Otherwise, if the definition of investment under Art. 25(1) were determined according to the parties’ instrument of consent, it would be deprived of any meaning, which interpretation would violate the *effet utile* principle.\(^ {155} \) It is widely recognized in ICSID jurisprudence that the Convention’s investment requirement cannot be diluted by party consent.\(^ {156} \)

102. In the award, the Tribunal acknowledge that generally, the BIT would be relevant, as it listed several BIT clauses, inter alia Art. 1 containing the BIT’s definition of investment, among the provisions relevant for jurisdiction.\(^ {157} \) The Tribunal thus did not ignore that ICSID jurisdiction also requires party consent as here expressed in the BIT. The Tribunal simply chose to examine the existence of an investment under Art. 25(1) first.

103. Since it would be an inversion of the logical process to start the determination of jurisdiction with an examination of the BIT whose

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\(^{150}\) C.S.O.B., para. 68; Toto, para. 66; Global Trading, para. 43 et seq.; Malicorp, para. 107; Schreuer, ICSID Convention Commentary, Art. 25, paras. 122 et seq.

\(^{151}\) UF, l. 790 et seq.

\(^{152}\) MHS Annulment Diss. Op., para. 8.

\(^{153}\) Patrick Mitchell Annulment, para. 31; Phoenix, para. 96; Joy Mining, para. 50.

\(^{154}\) Patrick Mitchell Annulment, para. 31.

\(^{155}\) Pey Casado, para. 232; Global Trading, para. 45.

\(^{156}\) Salini v. Morocco, para. 52.

\(^{157}\) UF, l. 542 et seq.
requirements of jurisdiction are in the sole discretion of the parties,\textsuperscript{158} the Tribunal cannot be criticized for starting its examination with Art. 25(1).

2. \textit{The Tribunal was not required to apply the BIT}

104. Since the Tribunal lacked jurisdiction under Art. 25(1), the Tribunal was not required to apply the BIT. It is settled ICSID jurisprudence that a manifest excess of powers only exists where the failure to exercise a jurisdiction “is clearly capable of making a difference to the result.”\textsuperscript{159} As a necessary jurisdictional requirement under Art. 25(1) was missing, and as there consequently existed no jurisdiction under the Convention, application of the BIT would not have changed the outcome. Jurisdiction would have been declined on the basis of the prior negative finding on jurisdiction anyway.

105. ICSID jurisprudence also habitually declines jurisdiction after finding a jurisdictional obstacle without examining other jurisdictional requirements.\textsuperscript{160}

106. Moreover, arguing that the BIT had to be considered would mean that the objective criteria of ICSID jurisdiction could be completely blurred by party consent.\textsuperscript{161}

107. Non-application of the BIT is therefore a logical, in any case tenable, consequence of the absence of jurisdiction under Art. 25(1) and thus does not give rise to annulment.

\textsuperscript{158} MHS Annulment Diss. Op., para. 45.
\textsuperscript{159} Vivendi Annulment I, para. 86.
\textsuperscript{160} MHS Jurisdiction, para. 148.
\textsuperscript{161} MHS Annulment Diss. Op., para. 40 et seq.
III. ARTICLES 52(4), 41(2) DO NOT EMPOWER THE COMMITTEE TO DECIDE ON THE EXISTENCE OF AN INVESTMENT

108. The Committee is not empowered to review the Tribunal’s decision on whether there is an investment under the Convention. It must adopt the Tribunal’s finding of fact and law that there was none.

109. The powers of ad hoc committees are exclusively regulated in Art. 52. Art. 52(4) stipulates that a number of enumerated Conventional provisions apply mutatis mutandis to annulment proceedings. Art. 25 is not among them, but Art. 41 is.

110. Art. 25 sets out the requirements for the Centre’s jurisdiction and thus makes the existence of an investment a prerequisite for the Centre to exercise jurisdiction over a dispute.

111. According to Art. 41(1), the tribunal is the judge of its own competence (Kompetenz-Kompetenz), and under Art. 42(2), the tribunal is empowered to consider party objections that the dispute is not within the Centre’s jurisdiction or not within the tribunal’s competence.

112. This differentiation in terminology between the “jurisdiction of the Centre” and the “competence of the Tribunal,” used consistently within the Convention’s English text, refers to two different sets of jurisdictional requirements. While the “jurisdiction of the Centre” refers to the jurisdictional requirements of Art. 25, inter alia the existence of an investment, the “competence of the Tribunal” refers to Art. 41(1) and only encompasses the “the narrower issues confronting a specific tribunal,” e.g. lis pendens. Art. 41(2) thus endows the tribunal with the power to decide both on issues of Art. 25 and of Art. 41(1).

162 Schreuer, ICSID Convention Commentary, Art. 41, para. 56.
163 Id. Art. 41, para. 56.
164 Id.
113. Since Art. 52(4) provides that Art. 41 is applicable to annulment proceedings but that 25 is not, Art. 41(1) which provides for the tribunal’s Kompetenz-Kompetenz thus applies to annulment proceedings by virtue of Art. 52(4) so that the Committee is the judge of its power to hear the annulment request.\(^ {165}\)

114. Since however Art. 25 which provides for the Centre’s jurisdiction and inter alia requires the existence of an investment does not apply to annulment proceedings by virtue of Art. 52(4), the Committee is not empowered to decide on issues of Art. 25 through Arts. 52(4), 41(2).\(^ {166}\) It is therefore not empowered to decide on the existence of an investment for the purpose of Art. 25.

IV. THE TRANSACTION DID NOT SIGNIFICANTLY CONTRIBUTE TO RESPONDENT’S ECONOMIC DEVELOPMENT

115. As the Committee is barred from any factual review, it must adopt the Tribunal’s finding that there was no contribution to the host state’s development (A.). Even if the Committee should impermissibly choose to fully review the existence of such a contribution, it would find that the transaction did not meet this threshold (B.).

A. The Committee must adopt the Tribunal’s finding on the lack of a significant contribution

116. Since annulment is only concerned with the legitimacy of the process,\(^ {167}\) even the most blatant error of fact does not constitute a ground for annulment and thus cannot be reviewed.\(^ {168}\) The Committee is therefore not

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\(^ {165}\) Id. Art. 52, para. 554.
\(^ {166}\) Soufraki Annulment, paras. 24, 50 et seq.; Schreuer, ICSID Convention Commentary, Art. 52, para. 169.
\(^ {167}\) Schreuer, ICSID Convention Commentary, Art. 52, para. 11.
\(^ {168}\) RFCC Annulment, para. 222. See also Mayer, p. 243.
empowered to reassess the existence of a significant contribution to Respondent’s economic development.

117. The Committee is also barred from any factual review because, as an annulment rather than an appeal body, it may not substitute the tribunal’s decision on the merits. 169 The question of whether Claimant significantly contributed to Respondent’s economic development is an issue of the merits. 170 In making an own determination of the facts, the Committee would impermissibly substitute the Tribunal’s findings on the merits by its own.

B. The transaction did not significantly contribute to Respondent’s economic development

118. Four reasons will in the following be presented as to why, even under full factual review, Claimant did not contribute to Respondent’s economic development. Claimant failed to share its additional economic benefits from the frog removal with Respondent (1.). Second, no economic development has occurred through Claimant’s activity (2.). Third, Claimant did in any case not contribute significantly to Respondent’s economic development (3.). Fourth and finally, there is no causal relationship between the frog removal contract and the impact of the GASP (4.).

1. Claimant failed to share its additional economic benefits with Respondent

119. Claimant generates income both from its contract with the pharmaceutical corporation and by selling frog symphony recordings. 171 The fact that Claimant did not communicate its plans on income generation by disposing

169 Sociedad Anónima Annulment, para. 235 (free translation from Spanish as contained in ICSID, Background Paper on Annulment, p. 36); MHS Annulment Diss. Op., para. 39; Maritime Int’l Nominees Annulment, para. 4.04.
170 Malicorp, para. 106.
171 Clarifications, No. 46.
of the frogs to Respondent shows that it had no intention to contribute to Respondent’s economic development. Until this day, Respondent has not received any shares in these revenues. Claimant has thus failed to contribute to Respondent’s economic development. The Tribunal has rightly taken this into account when denying jurisdiction.

2. **No economic development has occurred through Claimant’s activity**

In the improbable case that Claimant relies on the spokeswoman’s statements as evidence of a significant contribution, these statements cannot be taken into consideration for the present issue because they are mere political statements. This has been correctly determined by the Tribunal and reflects the more general rule under public international law that mere politically intended declarations do not legally bind states. Due to their sovereignty and in line with the *in dubio pro mitius* ("in doubt for deference to the sovereignty of states") principle, the intention of a state to legally bind itself may “not lightly be presumed.”

The spokeswoman’s statements can also not be considered because they were made before the scheduled execution of the contract. They were thus made at a time when Respondent still believed that Claimant would fulfill its contractual obligations. Obviously, had the spokeswoman known of the future inadequate performance, there would have been no such statements.

No economic development has occurred through the games. The immediate tourism impact of the games was reduced due to the fact that Claimant had failed to remove the frogs and not all of the frogs had yet died of the frog disease. It is only this point in time that is relevant for

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172 UF, l. 99-100.
174 Id. 776 et seq.; MHS Jurisdiction, para. 137 where the Respondent argued in a similar vain.
175 UF, l. 760.
176 Shaw, p. 122.
177 North Sea Continental Shelf Case, para. 28. See also Shaw, p. 122.
178 UF, l. 122.
determining whether there was a significant economic development. As the UF evidence, it is the government preserve that plays a decisive role in the tourism boom and the resulting economic renaissance.\textsuperscript{179} The preserve, however, was built by the government; no contribution was made by Claimant in this regard.\textsuperscript{180} Therefore, as the Tribunal has correctly found, no economic development has occurred through the GASP.\textsuperscript{181}

3. \textit{Even if there was a host state contribution, it would not be significant}

123. All the above-cited arguments speak even more against a significant contribution. Besides, even if one were to consider the transaction as a contribution to Respondent’s economic development, it would not meet the necessary standard of a significant contribution. It would be manifestly absurd to hold that Claimant has made a significant contribution to Respondent’s economic development even though it has altogether failed to remove the frogs and the removal was done by nature.

124. Furthermore, even had the removal been successful, the contribution would not even amount to the threshold of contributions that other ICSID tribunals have held to be insignificant.\textsuperscript{182} For example, the \textit{Joy Mining} tribunal found that a bank guarantee of £ 9,605,228 did not constitute a significant contribution to the Egyptian economy.\textsuperscript{183} The present transaction therefore \textit{a fortiori} fails to meet the standard of a significant contribution to Respondent’s economic development.

\textsuperscript{179} Id. 37, 126.
\textsuperscript{180} Id.
\textsuperscript{181} Id. 781.
\textsuperscript{182} Joy Mining Jurisdiction, para. 57; MHS Jurisdiction, paras. 133, 143.
\textsuperscript{183} Joy Mining Jurisdiction, para. 57.
4. In any case, there was no causality between the contract and the impact of the GASP

125. First, Claimant did not make a contribution to Claimant’s economic development by removing the frogs, as it failed to adequately perform the contract. Second, Claimant by its own inadequate performance caused the rescission of the contract. As a consequence, Claimant cannot take any credit from the contract. It would be absurd if Claimant could invoke to have contributed to Respondent’s economic development merely by concluding the contract, if it subsequently failed to perform its contractual obligations.

126. The frogs died a natural death. 95% of the frogs have died of the frog disease as of January 2011. As a consequence, the transaction was no *conditio sine qua non* ("indispensable condition") for the removal and any of its consequences. The fact that the “GASP were an enormous public relations success for Bela Rano Insularo” even though Respondent only removed a minuscule percentage of 3% of the frogs further speaks against a causality. As the majority of the Tribunal has correctly argued, any potential economic benefits arising with or without Claimant’s activity cannot go to its favor.

V. THE TRIBUNAL’S CONSIDERATION OF DR. RANAPUER’S EXPERT REPORT DID NOT CONSTITUTE A SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

127. The *ad hoc* Committee does not have the competence to reassess the Tribunal’s consideration of Dr. Ranapuer’s report since the Tribunal’s decision was covered by its discretion conferred upon it by Art. 5.5 BRMR and is thus out of place in an annulment proceeding (A.). In any

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184 UF, l. 126.
185 Id. 122.
186 Id. 109 et seq.
187 Id. 773 et seq.
case there was no serious departure from any fundamental rule of procedure (B.). Claimant’s annulment request based on Art. 52(1)(d) ICSID Convention therefore has to fail.

A. The ad hoc Committee may not second-guess the Tribunal’s exercise of discretion

128. If an ad hoc committee were to substitute a tribunal’s exercise of discretion with its own appreciation of the facts, this would constitute an action ultra vires since annulment is “concerned with error in procedendo, not with error in judicando.”

129. As pointed out in Enron Annulment, Arbitration Rule 34(1) provides that “The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.” This prevents the annulment committee from substituting its own judgment for that of the Tribunal.

130. The present proceedings are governed by the BRMR. Provided that the Tribunal’s decision to consider Dr. Ranapuer’s report was taken through the application of the corresponding norm of Art. 5.5 BRMR, the ad hoc Committee, accordingly, would exceed its competences in assessing the Tribunal’s exercise of discretion.

131. A broad series of ad hoc committees have held that tribunals have a wide margin of discretion on how to organize a proceeding. In this connection, Art. 5.5 BRMR sets out a dual standard for the Tribunal. First, it is competent to determine whether the excuse presented by the non-appearing expert constituted a “valid reason.” Second, it may determine what “exceptional circumstances” allow for the consideration of an expert’s report despite his non-appearance.

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188 Fraport Annulment, para. 183; International Law Commission (A/CN.4/92), 105 (emphasis added); Schreuer, ICSID Annulment, p. 212.
189 Enron Annulment, para. 170.
190 Id. para. 192.
191 Rumeli, para. 104; Helnan, paras. 24 – 27, 38, 64 – 65; Vivendi, paras. 249, 255, 265; Sempra, para. 18.
132. In rejecting Claimant’s request to exclude Dr. Ranapuer’s report due to exceptional circumstances, the Tribunal exercised its discretion according to Art. 5.5 BRMR. Consequently, the ad hoc Committee cannot reexamine this decision as it would constitute an illegal expansion of its competences.

B. There was no serious departure from any fundamental rule of procedure

133. The Tribunal’s admission of Dr. Ranapuer’s expert report does not constitute a ground for annulment pursuant to Art. 52(1)(d) ICSID Convention.

134. There was no violation of any fundamental rule of procedure (1.). In any case, admitting Dr. Ranapuer’s expert report would not have qualified as a “serious departure” (2.). Furthermore, there was no violation of, not to say serious departure from, the ordinary arbitration rule of Art. 5.5 BRMR (3.).

135. In attacking the tribunal’s appraisal of evidence, Claimant is longing for annulment for an exceptional reason. Errors occurring at this enterprise have been said to generally not operate as grounds for annulment. Consequently, the standards laid down in Art. 52(1)(d) ICSID Convention of a “fundamental rule of procedure” and a “serious departure” need to be applied even more restrictively than annulment grounds in general.

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192 UF, l. 182 – 185.
194 Schreuer, ICSID Convention Commentary, p. 993.
195 Schreuer, ICSID Annulment, p. 213.
1. **No fundamental rule has been violated**

   a. **No violation of Claimant’s right to be heard**

136. The historic example for a fundamental rule of procedure according to Art. 52(1)(d) ICSID Convention delivered by Chairman Broches during the drafting of the ICSID Convention is the parties’ right to be heard.196

137. In the present case, however, there was no violation of Claimant’s right to be heard.

138. As stated in *Enron*, it cannot be “inconsistent with any fundamental rule of procedure” to allow a party to present evidence on a particular point, “where the tribunal finds that there are circumstances that justify this.”197 Consequently, it cannot be inconsistent with any fundamental rule of procedure, e.g. the right to be heard, either to regard the sole expert report in light of the justifying circumstances that there has been no other piece of evidence on the Sireno Kanto disease.

139. As reflected e.g. in Art. 18 UNCITRAL Model Law and confirmed in the ILC Commentary the right to be heard comprises the right to address every piece of evidence.198

140. Claimant at all times had the opportunity to address Dr. Ranapuer’s expert report or any other matter of the case and to present evidence thereto. Consequently his right to be heard remained untouched.

141. It was merely the means of cross-examination of Dr. Ranapuer that was unavailable for Claimant. This, however, was not a consequence of the Tribunal’s decision but due to the expert’s non-appearance.

   b. **No violation of Claimant’s right to a fair trial or due process**

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196 ICSID, Background Paper on Annulment, para. 21.
197 *Enron* Annulment, para. 192.
198 Fraport Annulment, para. 185; Carlston, p. 110.
142. As laid out earlier, tribunals have wide latitude to organize proceedings and admit evidence.\(^{199}\) It is in this light that principles, such as the due process and the right to a fair trial, need to be assessed.

143. Concerning cross-examination, a tribunal should grant, in order to guarantee minimum due process and the fairness of the proceeding, the opposing party the right to address the statement of a non-appearing witness either orally or in writing.\(^{200}\)

144. As Claimant at all times was granted this right, there was no violation of any due process or fairness requirement.

145. Furthermore, a tribunal applying the IBA Rules is encouraged “to consider the economy of procedure in making procedural decisions.”\(^{201}\) The Tribunal, by considering Dr. Ranapuer’s report, came to a time and cost efficient decision. It prevented an unnecessary prolongation of the taking of evidence and thus contributed substantially to due process.

2. *Even in case of a violation, it did not constitute a “serious departure”*

146. For a departure from an alleged fundamental rule of procedure to be “serious”, it must be substantial. Schreuer points to the standard set by *Wena Hotels*\(^{202}\) and *CDC*\(^{203}\):

“[T]he departure must potentially have caused the tribunal to render an award 'substantially different from what it would have awarded had the rule been observed’.”\(^{204}\)

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\(^{199}\) See section V.A.; also Johnson, p. 9.

\(^{200}\) O’Malley, p. 479 also refers to a 2004 Swiss Federal Tribunal decision, which explicitly denied an absolute right to cross-examine witnesses.

\(^{201}\) Jones, p. 306.

\(^{202}\) Wena Hotels Annulment, para. 58.

\(^{203}\) CDC Annulment, para. 49.

\(^{204}\) Schreuer, ICSID Convention Commentary, p. 982; Enron Annulment, para. 71; Azurix Annulment, para. 51.
147. Whether or not the alleged violation of a hypothetical fundamental rule of procedure constituted a “serious departure” depends on the question whether the Tribunal would have arrived at a materially different Award had the alleged violation not occurred.

148. The content of Dr. Ranapuer’s expert report by now, however, has proven to be a fact. Consequently, the award was not substantially different from the hypothetical award that would have been rendered had Dr. Ranapuer’s expert report been excluded. Hence, the alleged departure was not serious within the meaning of Art. 52(1)(d) ICSID Convention.

3. The Tribunal acted consistently with the ordinary arbitration rule of Art. 5.5 BRMR

a. No violation of Art. 5.5 BRMR

149. Art. 5.5 BRMR was respected, since Dr. Ranapuer presented a valid reason for his non-appearance to the Evidentiary Hearing (i.). In any case, exceptional circumstances allowed the Tribunal to consider the piece of evidence delivered by him (ii.).

i. Dr. Ranapuer did not appear before the Tribunal for a valid reason

150. Dr. Ranapuer excused his non-appearance to the Evidentiary Hearing due to his own moral decision based on his membership with Wilderness and the political implications deriving from it. His personal appearance at the hearing would have shown to the public that he was willing to participate in a proceeding in which, with Prof. Iracunda’s words, the removal of the Sireno Kanto was not disputed, but mutually agreed by both parties.

205 Clarification, No. 124.
206 UF, l. 175 – 180.
207 Id. 498
151. Being heavily opposed to the removal of the Sireno Kanto, Dr. Ranapuer would, thus, have had to act against his own moral and political values had he participated in the Evidentiary Hearing.

152. When assessing the threshold of a valid reason, one has to be asked what grounds if not such based on deeply inherent morals and political values, should operate to represent a valid excuse within the meaning of Art. 5.5 BRMR.

153. Keeping in mind the functioning of the system of international investment arbitration, one, furthermore, has to observe the negative implications that might derive from the constitution of a threshold that qualifies moral and political reasons for an excuse as invalid. This would very likely ignite some nominated experts to refrain from submitting their expert opinion to an arbitral proceeding at all because they would be denied the opportunity to later abstain from the participation in a cross-examination should moral incertitude be caused for them.

154. This consequence, however, would be detrimental to the arbitral process. The threshold of a valid reason should, therefore, be as low as possible.

155. It remains, after all, the central task of an expert to submit the report, not to be present at any kind of hearing. It is his expertise that is valuable to the proceedings – an expertise that can very sufficiently be reflected by means of a report. Especially experts’ opinions, who are often well-trained scholars and highly respected personalities, need to be safeguarded – their subjective excuses have to be respected in order to ensure that their objective expertise will continue to nourish arbitral proceedings.

156. Dr. Ranapuer’s excuse, therefore, meets the threshold of a “valid reason” pursuant to Art. 5.5 BRMR.

\[\text{ii. In any case, exceptional circumstances allowed the Tribunal to decide otherwise}\]
157. By all means, the Tribunal was competent to include Dr. Ranapuer’s expert report due to the exceptional circumstances of the case. They laid primarily in the fact that Dr. Ranapuer is the leading scientist in the field of Sireno Kanto research. His expert report included significantly more evidence on the probable consequences of the Sireno Kanto disease than was available during the time of the proceedings from any other public source.  

158. Consequently, it was only his expert opinion that could have been authoritative.

159. Apart from that it seems quite unlikely that one of the two other experts on Sireno Kanto research worldwide would have been available to create and submit an expert report timely without delaying the proceedings to a great extent.

160. Also, Dr. Ranapuer was the only scientist who had the opportunity, as a local, to follow closely the development of the disease and to rightly assess its consequences. Therefore, it was the right decision not to exclude his report, but at least to give attention to his written statement, as he was justifiably absent at the Evidentiary Hearing. Consequently, the Tribunal did not violate Art. 5.5 BRMR.

b. Art. 5.5 BRMR is not a fundamental rule of procedure but an ordinary arbitration rule

161. Annulment according to Art. 52(1)(d) ICSID Convention “excludes the Tribunal’s failure to observe ordinary arbitration rules.”

162. Art. 5.5 BRMR does not meet the accustomed standard of a “rule of natural justice” (i). Yet if one is to refer to the lowest threshold, which asks

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208 Clarification, No. 93.
209 UF, l. 169 et seq.
210 ICSID, Background Paper on Annulment, para. 99.
for “general [procedural] principles of law”, Art. 5.5 BRMR can still not be qualified as a fundamental rule of procedure (ii). Consequently, it is to be seen as an ordinary rule of procedure.

i. Art. 5.5 BRMR does not constitute a rule of “natural justice” but merely serves organizational purposes

If one is to apply the standard established in *CDC Annulment* and recalled by Schreuer, according to which “only rules of natural justice, concerned with the essential fairness of the proceeding, are fundamental”\(^\text{212}\), this results in the contention that Art. 5.5 BRMR does not qualify as such.

The provision is not essential to the fairness of the proceeding as it does not safeguard any essential right of any party, but rather constitutes a procedural rule with organizational value. It regulates the proceedings in situations where a party-appointed expert is not available to be cross-examined.

This is evidenced by the diverse provisions contained in other legal instruments that set out different forms of organization under such circumstances.\(^\text{213}\) If one would assume, with this detection in mind, that Art. 5.5 BRMR is a rule of “natural justice”, this would, therefore, have to lead to the conclusion that e.g. the ICSID Arbitration Rules contravene “natural justice” since they contain different standards.

In other words, the cross-examination of an expert is not as important as the Tribunal’s requirement for reliable facts, particularly in order to reach a just decision. In what way a Tribunal accomplishes this elementary task – e.g. by application of ICSID Arbitration Rules 35, 36 or Art. 5.5 BRMR – however does not in and of itself concern “natural justice.”

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\(^{211}\) Fraport Annulment, para. 187.

\(^{212}\) Schreuer, ICSID Convention Commentary, p. 982; CDC Annulment, para. 49.

\(^{213}\) ICSID Arbitration Rules 35, 36; Art. 21.2 LCIA Arbitration Rules; Art. 49 WIPO Arbitration Rules; Art. 28 SCC Arbitration Rules.
167. Evidently, only rules that form an integral part of due process and are concerned with essential requirements such as the parties’ right to present their case, are to be qualified as “rules of natural justice.”

168. Art. 5.5 BRMR does not hinder a party to present its case, but merely excludes cross-examination under specific circumstances. It is thus an organizational provision that structures arbitral proceedings, but has no value of “natural justice.”

ii. Art. 5.5 BRMR does neither represent any general principle of law

169. The ad hoc committee in the recent Fraport decision stated that rules are fundamental within the meaning of Art. 52(1)(d) ICSID Convention if they represent general principles of law.\(^ {214}\)

170. Art. 5.5 BRMR, however, does not meet this threshold. General principles of law within the meaning of Art. 38(1)(c) ICJ Statute naturally reflect analogies to existing private law provisions that have become generally accepted in the international legal order.\(^ {215}\)

171. Rules 35 and 36 of the ICSID Arbitration Rules, however, which usually govern the participation of experts in ICSID proceedings, do not foresee a mechanism comparable to Art. 5.5 IBA Rules, which is identical to Art. 5.5 BRMR. Instead, the Tribunal is free according to Rule 36 to admit written expert evidence notwithstanding of Rule 35, which merely sets out that “experts shall be examined before the tribunal…”

172. As this and other examples\(^ {216}\) show, there is still ambiguity of rules governing the cross-examination of experts in the international legal order. The provision set out in Art. 5.5 BRMR is thus far from being generally accepted in the international legal order.

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\(^ {214}\) Fraport Annulment, para. 187.
\(^ {215}\) Brownlie, p. 17, 19.
\(^ {216}\) ICSID Arbitration Rules 35, 36; Art. 21.2 LCIA Arbitration Rules; Art. 49 WIPO Arbitration Rules; Art. 28 SCC Arbitration Rules.
173. Instead, being identical to Art. 5.5 IBA Rules, it is to be used “in conjunction” with the respective institutional rules\textsuperscript{217} – a fact that underlines its complementary character.

174. As a result, Art. 5.5 BRMR does not qualify as a general principle of law. Even if one applies this wide standard of appraisal, it therefore does not constitute a fundamental rule of procedure. The Tribunal’s discretionary decision to consider Dr. Ranapuer’s report thus constitutes no ground for annulment according to Art. 52(1)(d) ICSID Convention.

\textsuperscript{217} Jones, p. 303.
REQUEST FOR RELIEF

The Respondent respectfully asks the ad hoc Committee to find that:

1. The tribunal was properly constituted;
2. The tribunal did not manifestly exceed its powers in declining jurisdiction as the ICSID Convention requires that an “investment” contributes to the development of the host state;
3. The annulment committee does not have the power, through Articles 41(2) and 52(4) of the ICSID Convention, to decide whether a transaction qualifies as an “investment” under the ICSID Convention, as that is an issue that goes to the competence of the Tribunal, not the Centre’s jurisdiction;
4. The transaction does not meet the standard of significantly contributing to Bela Rano Insularo’s economic development; and
5. The tribunal’s decision to consider Dr. Ranapuer’s expert report was fully covered by its discretion and did not constitute a serious departure from a fundamental rule of procedure.

Respectfully submitted on 27 September 2012 by
Ms. Clara Wirths and Mr. Maximilian Oehl, University of Cologne

(Team Azevedo)

On behalf of the Respondent

GOVERNMENT OF THE REPUBLIC OF BELA RANO INSULARO