Uncontested Facts

Introduction

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

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

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

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

The Contract

45 Although signed in 2002, the contract did not require either side to perform any actions until January 2006, with all obligations scheduled to be fulfilled by December 2007. The terms of the contract required the government to pay Max Solutions on a "bounty" basis payments to be made monthly (i.e. Max Solutions is paid each month per frog captured and removed from the island in the previous month). The contract did not specify what Max
50 Solutions must do with the frogs, only requiring that they be removed from the island and treated "humanely" at all times.

The only performance requirement specified in the contract was that all frogs outside the designated nature reserve must be removed from the island by the end of December

2007. If this goal was not met, Max Solutions would lose the right to all payments under the contract.

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

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

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

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

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

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

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

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

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

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

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

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

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

The ICSID Arbitration

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

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

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

Shortly after receiving notification of the appointment of Dr. Iracunda, Max Solutions challenged her on the ground of a lack of impartiality. Max Solutions argued that her decision on jurisdiction had in effect already been made, as her firm and long-held views on the meaning of “investment” meant that she could not approach the issue with an open mind. In addition, it argued that her membership in Wilderness, an environmental organisation that has strongly criticised Max Solutions’ treatment of the Sireno Kanto, undermines her impartiality. In response, Dr. Iracunda insisted that she would perform her role in a fully open-minded and impartial manner, emphasising that she personally had made no public comment on any aspect of the dispute between Max Solutions and Bela Rano Insularo.

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

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

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

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

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

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

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

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

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

(2) that the tribunal exceeded its powers in declining jurisdiction, as the ICSID Convention does not require that an "investment" contribute to the development of the Host State.

(3) that the annulment committee has the power, through Articles 41(2) and 54(4) of the ICSID Convention, to decide whether the transaction in question qualifies as an "investment" under the ICSID Convention, as this is an issue that goes to the jurisdiction of the Centre, not of the tribunal.

(4) that even if a contribution to the Host State's development is considered to be essential to an ICSID "investment", the transaction in question meets this standard, as the point of the contract was to eliminate a problem that was preventing Bela Rano Insularo's development.

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

Challenge Decision

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

The Grounds for Claimant's Proposal for Disqualification of Professor Iracunda

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

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

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

> It is hardly controversial to insist that States enter into IIAs [International Investment Agreements] out of a desire to boost the inflow of foreign investment. Nonetheless, it does not follow from this that States retain no interest in the kind of transactions that receive the protections that IIAs offer. Foreign investment, after all, has no value to a State in and of itself. It is purely a means to an end, and that end is the boosting of the State's economic development.
>
> For this reason, it is necessary to move beyond the dangerous view that absolutely anything may qualify as an "investment" under Article 25 of the ICSID Convention, so long as it meets whatever criteria are stated in the instrument containing the required consent to ICSID jurisdiction. Given the wide definitions incorporated in most IIAs, this view results in a situation in which there is almost no economic transaction that a foreigner can undertake that cannot subsequently serve as the basis for an ICSID arbitration. It creates a future in which States will potentially be subjected to dozens of ICSID claims each year, for transactions worth almost nothing from a national perspective, but that require an often-impoverished State to divert valuable resources to defend. It is simply ridiculous to assert that this result was in any way what was intended by those who entered into what has been called the "grand bargain" of the ICSID Convention. Indeed, it entirely eliminates any notion of a "bargain", and instead transforms the ICSID Convention into nothing more than a forum for wealthy business people who dislike some aspect of treatment they have received from a State into which they freely chose to enter.

> There is however, no reason to accept this view, a point that has repeatedly been made by the many proponents, both academics and arbitrators, of the *Salini* test for the existence of an ICSID investment. ICSID is not a commercial center for arbitration, taking any dispute brought to it so long as the parties are willing to pay for its services. It is an inter-State dispute resolution forum, and it is expressly restricted to "investment" disputes.
>
> Contemporary IIAs, by contrast, do not attempt to restrict the access of parties to their coverage, as it is impossible to know in advance precisely what forms of transaction will be undertaken in the future. As a result, IIAs include expansive definitions, intended to cover almost any kind of business transaction.
>
> The definition of "investment" in an IIA, that is, is simply a fundamentally different type of thing than the definition of "investment" in the ICSID Convention. The latter is restrictive, while the former is encompassing. To equate the two simply undermines the entire purpose of Article 25.
>
> The ICSID Convention requires the existence of an "investment", and an "investment" for the purposes of the Convention must contribute to the economic development of the Host State. Only the *Salini* criteria reflect this reality, and only the inclusion within the *Salini* criteria of the requirement of a contribution to the development of the Host State fulfills the true purpose of the ICSID Convention. Moreover, only *new* development can suffice. States do not agree to the risks and unpredictability of investor-State arbitration merely to change the method by which development is delivered.
>
> Both arbitrators and academics have recently begun to refer to the risk that over-expansive approaches to ICSID jurisdiction will undermine the support of States for the ICSID system. They argue that ICSID arbitration needs to be saved from itself. However, as anyone familiar with life in a developing country will know, saving ICSID from itself is not a priority. What is needed, instead, is saving developing countries from ICSID arbitrators.
>
> The recent criticism of ICSID and the threatened withdrawal of many countries is evidence that States are not happy with the way ICSID is moving forward – without regard to the developmental objectives of the Host State. This balance must be set right by recognizing and giving effect to ICSID's role in balancing the rights of private investors against those of host countries.

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

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

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

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

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

II: Professor Iracunda's membership of Wilderness

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

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

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

The Decision of the Two Members

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

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

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

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

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

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

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

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

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

Annex I: Professor Iracunda's Statement

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

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

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

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

MAX SOLUTIONS, INC.

v.

505 **THE GOVERNMENT OF BELA RANO INSULARO**

ICSID Case No. ARB/08/21

510 **AWARD**

1. The Parties and the Background of the Dispute

515 ***OMITTED***

2. Procedural History

****OMITTED****

520

3. Jurisdiction

a. Relevant Provisions of the ICSID Convention

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Preamble (extract):

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

530

Article 25(1):

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out
> 535 of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

540

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

545

Article 1: Definitions (extract)

> "Investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such
> 550 characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

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

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

Article 12(2):

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

Article 24:

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation, the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Articles 3 through 10,
(B) an investment authorization, or
(C) an investment agreement;

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach

provided that a claimant may submit pursuant to subparagraph (i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

Article 25:

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

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

610

c. Claimant's Position on Jurisdiction

OMITTED

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d. Respondent's Position on Jurisdiction

OMITTED

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e. Decision of the Arbitral Tribunal

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

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

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

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

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

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

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

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

(ii). Application of the *Salini* criteria

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Regularity of Profit and Return

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

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

Substantial Contribution/ Commitment of Resources

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

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

710 *Duration of the Transaction*

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

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

Assumption of Risk

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

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

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

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

Contribution to the Economic Development of the Host State

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

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

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

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

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

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

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

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

(iii). Determination on the Existence of an "Investment"

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

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

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

5. Costs

****OMITTED****

6. Decision

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

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MAX SOLUTIONS, INC.

v.

THE GOVERNMENT OF BELA RANO INSULARO

ICSID Case No. ARB/08/21

AWARD

DISSENTING OPINION

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1. Introductory Remarks:

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

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2.1 The Bias of Dr. Iracunda

At the beginning of this arbitration Max Solutions brought a challenge against Dr. Iracunda based on the views that she had expressed in her writings. I reluctantly agreed with the decision of Dr. Honesta that ICSID rules regarding challenges did not allow a challenge to succeed on the grounds argued by Max Solutions, but I am now convinced that this decision cannot have been correct. To allow an individual on a tribunal whose primary role will be to hijack the tribunal's deliberations and ensure that her own pre-decided views are reflected in the final award surely cannot be consistent with ICSID arbitration, and ICSID's rules on arbitrator challenges need to be interpreted with this in mind.

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

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

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

2.2 The Inadequacy of the *Salini* Criteria

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

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

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

3. Conclusion:

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