BEFORE THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of Arbitration Between:		
DRONUS CORPORATION,		
Claimant,	:	ICSID Case No. ARB/04/16
and		
THE REPUBLIC OF GRACELANDIA,		
Respondent.		

PARTY SUBMISSIONS ON THE JURISDICTION AND THE MERITS

Friday, April 8, 2016

American University
Washington College of Law
4300 Nebraska Avenue, N.W.
Weinstein Courtroom, Room C116
Washington, D.C.

The hearing in the above-entitled matter convened at 5:14 p.m. before:

DR. CLAUDIA FRUTOS-PETERSON, President

PROFESSOR JOHN R. CROOK, Co-Arbitrator

MR. JUDD L. KESSLER, Arbitrator, Co-Arbitrator

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT FRUTOS-PETERSON: Good afternoon, everybody, and thank you for the Parties and counsel for the Parties for being here today.

We are here in the Hearing of the case of Dronus Corporation versus Republic of Gracelandia. We are here today to hear arguments on jurisdiction, some objections to jurisdiction that the Republic of Gracelandia has introduced, and as well the arguments on the merits from both Parties.

But before we start listening to counsel, I wanted to welcome and introduce my co-panelists here at the Tribunal: Professor John Crook, who was appointed in this case; and also Mr. Judd Kessler, who is also a co-Arbitrator in the case; and my name is Claudia Frutos-Peterson. I am the President of the Tribunal.

We thank you for traveling all the way here, and we want to be very efficient with time. I understand that we have some limits for the arguments that are going to be presented. If counsel can introduce themselves and also remind us about the particular timings that we are going to be applying in today's hearing, I will appreciate it.

MR. KALIA: Madam President and the learned Members of the Tribunal, a very good afternoon.

I, Karan Kalia, along with my co-counsel,

05:15 Mr. Philipp Scheibenpflug and our desk counsel Ms. Angeles Femenia, will be presenting the case for Dronus Corporation, the Claimant.

We have decided with the respondent State that we will take 14 (heard "40") minutes each for the arguments on the merits and jurisdiction, and we will reserve the right to have rebuttal for one minute after that. And we also decided that, on the point of jurisdiction, the Respondent will raise the Preliminary Objections in the beginning, if that's okay.

PRESIDENT FRUTOS-PETERSON: Okay. So, we have an agreement that Respondent is going to present objections to jurisdiction?

MR. KALIA: That's right.

PRESIDENT FRUTOS-PETERSON: Also for 14 minutes, and you reserve one minute for rebuttals and then we will move to the arguments on the merits.

I think there is a question.

ARBITRATOR KESSLER: The Transcript reads "40" minutes. Is that what you intended?

MR. KALIA: That's right, Mr. President--14 minutes.

COURT REPORTER: One-four or four-zero?

MR. KALIA: One-four.

PRESIDENT FRUTOS-PETERSON: I think we will have

05:16 some corrections of the Transcript at the end of the Hearing, so we can talk about the logistics after the arguments.

But counsel for Respondent, could you please introduce yourself.

MS. JEVREMOVIC: Good afternoon, Madam President and Members of the Tribunal. My name is Nevena Jevremovic, and my co-counsel James Ochieng. Together, we represent the Republic of Gracelandia, the Respondent in these proceedings. I will be addressing Preliminary Objections to Jurisdiction, whereas my co-counsel will address arguments on the merits of the case.

PRESIDENT FRUTOS-PETERSON: Okay. Perfect.

And, of course, I neglected to tell you that we have David Kasdan, who is doing the Transcript pro bono for us today, so please speak slowly and clearly. David is great, but even sometimes you go too fast, and it's a little problematic for the Transcript.

So, you have the floor. Thanks.

OPENING STATEMENT ON JURISDICTION BY COUNSEL FOR RESPONDENT

MS. JEVREMOVIC: Thank you, Madam President.

Respondent contests jurisdiction of this Tribunal and for three main reasons, and these reasons will be addressed in alternative, so it will be sufficient for you to agree with only one of the three arguments that we will

05:18 present today to conclude that you lack jurisdiction to entertain the present case and should, therefore, dismiss Claimant's claim on those grounds.

Now, the requirements on the basis of which we bring or contest this Tribunal's jurisdiction are set out in Article IX of the Bilateral Investment Treaty between Gracelandia and State of Megaoil.

Now, this Article has been carefully negotiated between the two States as the most appropriate dispute-resolution mechanism for disputes arising out of this Treaty, and this dispute-resolution mechanism is a three-step process. It contains two pre-arbitration conditions that need to be duly exhausted, and I know "exhausted," not "circumvent." And the last requirement is offer to go to ICSID Arbitration.

Now, in this particular case, that offer was revoked by the denunciation of the ICSID Convention made by the Respondent; and, therefore, Claimant's Request for Arbitration does not amount to mutual consent, which is necessary under Article 25 for this Tribunal to have jurisdiction to entertain the present case.

PRESIDENT FRUTOS-PETERSON: Counsel, I'm sorry to interrupt, but we are clear that this Agreement is still in effect?

MS. JEVREMOVIC: The Bilateral Investment Treaty,

yes, we are clear on that.

PRESIDENT FRUTOS-PETERSON: Proceed.

ARBITRATOR CROOK: Counsel, let me just pursue the point you just made. The only consent to jurisdiction is that contained in the ICSID Convention. There is not as well a consent to jurisdiction in Article IX(4)?

MS. JEVREMOVIC: Respondent's position is that Subsection 4 of Article IX is a mere offer to consent; and, in itself, it does not meet the jurisdictional threshold which are defined in Article 25 of the ICSID Convention.

Now, the position of Professor Schreuer as well as the interpretation of this Article under ICSID Commentary is that, in order for an ICSID Tribunal to have jurisdiction, there must be a clear and express consent of both Parties in writing.

ARBITRATOR CROOK: But, counsel, aren't we in the situation where ICSID is no longer relevant? Let's put ICSID out of the picture. Do you then have--you are saying that Article IX(4) does not contain an offer to arbitrate? Is that your position?

MS. JEVREMOVIC: Mr. Arbitrator, our position is that--part of Subsection 4 of Article IX that refers to ICSID Arbitration has been essentially inoperable due to denunciation of the ICSID Convention.

ARBITRATOR CROOK: I understand, but then do not

the final words of that section provide a way forward in that situation?

MS. JEVREMOVIC: They did, Mr. Arbitrator, provided that both Parties are Contracting States to the ICSID Convention; and, in this present case, Respondent is no longer a Contracting State to the Convention; and, therefore, even under that assumption, this Tribunal's jurisdiction does not exist.

ARBITRATOR CROOK: Well, what about the words "otherwise the dispute shall be submitted to the above-mentioned ad hoc tribunal"? Are you saying those words are inoperative?

MS. JEVREMOVIC: Mr. Arbitrator, the access to an ad hoc arbitral tribunal is not in dispute here. Claimant brought this case before an ICSID tribunal, and we--the Respondent is contesting jurisdiction of the ICSID Tribunal; therefore, what will--whether the Parties can and will go to an ad hoc tribunal is not at case here.

Thank you.

Now, moving back to the first--to the Subsection 1 of Article IX, this subsection sets forth a jurisdictional requirement which essentially means that the Party bringing the claim has to resort to amicable settlement, which Claimants failed to do in the present case.

Now, to put it in the words of the Tribunal in

Murphy versus Ecuador, the obligation to negotiate is an obligation of means, not of an end, which essentially means that the intent--the purpose of this provision is to allow the Parties to go through the cooling-off period; essentially, that the Parties can take a step back to reassess their position and then try to amicably settle their dispute.

However, in order for the Parties to actually do so, and in order for this Tribunal to assess what would the outcome of those negotiations be, there would have to be an affirmative action on the side of Claimant, so the claims that are brought before you today needed to be communicated to Respondent, and Claimant made no efforts--

PRESIDENT FRUTOS-PETERSON: Counsel, but we understand that Claimants have submitted--have raised some argument for the applicability of the MFN clause and bring it under the Rodolandia provisions of the BIT into effect in this case.

So, can you just focus your argument on that? I mean, I understand that you're going to present other arguments in a little bit, but I think the Tribunal is interested in seeing your position in that respect.

MS. JEVREMOVIC: Thank you, Madam Arbitrator.

The MFN clause, the principles on which Respondent relies in its submission that the MFN clause in this

particular case cannot be interpreted broadly, can be found in the Plama versus Bulgaria Case as well as Telenor versus Hungary, and are supported by Professor Stern's Dissenting Opinion in Impregilo versus Argentina.

PRESIDENT FRUTOS-PETERSON: Are you asking us to apply those cases in this case, in the arbitration? What do we do? I mean, there is not the obligation for the application of precedent. This Tribunal should have to decide this case on its own facts and circumstances.

MS. JEVREMOVIC: Of course, Madam Arbitrator. What we're saying is that the analysis that those courts--on which those tribunals found not to invoke the MFN clause to cover procedural matters is an adequate one. In particular, in both of those cases, an MFN clause was found to be broad, but the Tribunal's focus on the interpretation of the actual wording of the clause and raised a strong policy argument as to why an MFN clause should not and cannot be interpreted to cover procedural matters.

Now, in terms of interpreting the wording of the MFN clause, both tribunals focused on the meaning of the words "treatment granted by a Contracting State to foreign investors," and they have found that this--the ordinary meaning of this is to cover only substantive matters. If an MFN clause is to be interpreted broadly, it must

expressly say so, as it is the intent of the Parties.

Now, the Tribunal in Plama versus Bulgaria, when it made its analysis on this point, referred to U.K. Model BIT, which included in its Article III a specific exception stating that MFN clause--the treatment under MFN clause is to encompass the procedural matters, as well.

PRESIDENT FRUTOS-PETERSON: But let me stop you there because you have presented the case of Plama and the Telenor Cases, but to be fair, and if we look at the text in Article V of the BIT for the most-favored-nation-treatment clause, I mean, we have the words "in respect of all matters covered by the provisions of this Agreement." "All matters."

It is the understanding of the Tribunal that, and I think as Claimant has argued, that there are a line of cases that they also resolved the issue by looking at the exact text, the language of the provision. How do you answer to that question?

MS. JEVREMOVIC: Thank you for that question, Madam Arbitrator.

But it is--we're aware of the case law cases that have, in fact, interpreted MFN clause to cover procedural matters. However, the Tribunals in Plama versus Bulgaria and especially in Telenor versus Hungary stated that this interpretation is not an adequate one because it is an

interpretation made solely from the perspective of the Investor.

And I remind this Tribunal that the MFN clause here, as every other provision in this Treaty, is negotiated and agreed upon by the two States, and we have to look at the intent of the States in order to determine what the subject matter of the MFN clause is.

ARBITRATOR CROOK: Counsel, is that right? Does the Vienna Convention tell us we should look for intent? Doesn't it say we should look at the plain language?

MS. JEVREMOVIC: That is true, Mr. Arbitrator, but the Vienna Convention also says "good faith" and "good-faith interpretation."

And if we look from the position of the good-faith interpretation, if we do invoke MFN clause to cover procedural matters, what we would have as a consequence is allowing investors to treaty-shop and pick and choose the dispute-resolution mechanisms that fit the best their current situation, and this would allow investors to misuse the position that they're in in order to go around requirements set out in the Treaty.

ARBITRATOR CROOK: But, counsel, isn't that what MFN does generally? I mean, doesn't that criticism apply to any application of an MFN clause?

MS. JEVREMOVIC: Mr. Arbitrator, it is--MFN

clauses traditionally have been introduced in the trade law in order to ensure that States provide the same treatment in terms of the substantive rights that they give to investors, and it is easy, so to say, to measure which treatment is more favorable than the other. But when we enter the realm of dispute-resolution mechanism, it is not clear because whether the dispute-resolution mechanism in one Bilateral Investment Treaty is different from another, it is per se more favorable. And this has been voiced again by the Tribunal in Plama versus Bulgaria and in Telenor versus Hungary.

And if I may use this question as an opportunity to bring your attention to the position of Professor Stern, again, she advocates the absurdities that this interpretation would lead to, and one of the main arguments why we should not interpret MFN clause to cover procedural matters is the issue of State consent.

Now, we need to distinguish State's consent within an MFN clause where a State's consent to grant all of its investors at the equal treatment or equally favorable treatment--put it that way--but it's a completely other thing when the State consents and conditions its access to international forum--international arbitration.

Consent to--

ARBITRATOR KESSLER: Can you point to any document

or evidence in the record as to the meaning of the word "treatment" that is narrow in that form in this case?

MS. JEVREMOVIC: Mr. Arbitrator, there is--the record does not provide for definition of the word "treatment." But the Tribunals found that the ordinary meaning following the Vienna Convention Law of Treaties standards of interpretation to mean substantive rights and not procedural rights, as well.

ARBITRATOR KESSLER: Well, suppose we accept your argument on that point, are there also some rules about the six-month period and the submission to the local courts when it would appear that in the circumstances of the case that any action of that sort might be futile?

MS. JEVREMOVIC: Mr. Arbitrator, that is a question related to amicable settlement.

Now, granted, the Respondent was in a State of turmoil, to put it mildly, but that in itself does not mean that the Respondent Government was not willing to sit down and negotiate dispute with Claimant. The record indicates that the communication channel between Respondent and Claimant was never interrupted.

Moreover, Respondent communicated all of its decisions with Claimant, and it even offered to buy the concession rights within--in between the making of these decisions.

Now, it is true that the record shows that the Claimants did communicate certain things with Respondent; however, the record does not show that the Claimant raised the issue of negotiating the dispute, nor does it show that the Claimant, in fact, raised an issue of a breach of a treaty which is before you today.

ARBITRATOR KESSLER: So, the denial of the right to continue operating and commercializing the gas can be understood to be an opening for negotiation?

MS. JEVREMOVIC: Mr. Arbitrator, Respondent's position is that that is a one-sided interpretation of the facts in the present case.

Now, those facts are relevant for the merits of the case, and my co-counsel will explain why, firstly, the Measures taken by Respondent were necessary; and, secondly, that each of those measures that you have just indicated were justified. And, after that, we can assess on an objective ground whether negotiations were--would be futile or not.

ARBITRATOR KESSLER: I look forward to hearing from your colleague, but it is also a jurisdictional matter for us; no?

MS. JEVREMOVIC: That is true. Respondent's position is that amicable settlement in this particular case is a jurisdictional requirement, and failure to meet

this requirement bars this Tribunal's jurisdiction. But even if you do accept the opposing position which is that this is a procedural matter, we still have the issue with interpreting the MFN clause to go around the local-courts requirement, and--which brings me back to the MFN position.

Professor Stern made a clear point that MFN clauses cannot be used to--as a magic trick, essentially, to transform a dispute-resolution mechanism which provides conditions to ICSID Arbitration into a dispute-resolution mechanism which provides no condition to the access to ICSID Arbitration.

And, on that note, I would like to draw this Tribunal's attention to the fact that both bilateral investment treaties were negotiated and entered into at the same time, but both provide for a different dispute-resolution mechanism, which is a clear demonstration of the Respondent's intent to have different dispute-resolution mechanisms for the two separate treaties.

PRESIDENT FRUTOS-PETERSON: Counsel, I think we have--you have argued that point in great detail. And because of time, I'm interested in your objection in connection with the denunciation of the ICSID Convention, if you could elaborate a little bit on that.

MS. JEVREMOVIC: Madam arbitrator, I'm aware I'm

out of time, could I have--

PRESIDENT FRUTOS-PETERSON: Yes. I think we can do five minutes and then--take five minutes, that you were going to present, because you were going to present three objections, isn't it?

MS. JEVREMOVIC: Yes.

ARBITRATOR CROOK: Let me ask you to address the ICSID Convention. I'm sure you will address Article XII(3) of the implications of the continuing coverage after termination. Will you be addressing that as part of your comments?

MS. JEVREMOVIC: Yes, Mr. Arbitrator, I will briefly address the Article--well, I will address the tax-related measures issue.

ARBITRATOR CROOK: Thank you.

MS. JEVREMOVIC: As noted in the Vienna Convention, as I noted in my earlier submission, Subsection 4 of Article IX is an offer to consent. This offer was revoked when the Respondent denounced the Convention and, therefore, had become inoperable, and Claimants cannot accept it.

There is no case law that deals with these exact facts as we have before us today. As scholars indicate, the case law that we do have can be misleading in the sense that the investors from the State that have denounced the

Convention secured their consent prior to the denunciation, and this issue will not be dealt with in those cases.

Now, we're aware of the different positions on the effects of denunciation to offer to consent.

PRESIDENT FRUTOS-PETERSON: Sorry to interrupt you, but you say that there is no case law. I seem to recall that there is at least one case, Venoklim versus Venezuela, where the denunciation by the Republic of Venezuela was entering into effect by the time when the case was registered; in other words, the case, if I recall correctly, the denunciation was already in effect when the Request for Arbitration was submitted before ICSID.

MS. JEVREMOVIC: I believe that is the case that reflects to a consent given in national legislation, and there are no recorded cases where the offer to consent was given in a bilateral investment treaty--at least that's available on the official Web site of ICSID. So, we need to rely in this particular case on scholarly work and opinions of academics.

And Respondent submits that the appropriate--the proper interpretation of the relation between Article 72 of ICSID Convention and Article 25 of the ICSID Convention is the following: The term "consent" in Article 72 means mutual consent. Article 72 is a protective provision, which means that it protects investors from State's actions

after the State has accepted obligations--has obligations which are in effect.

Now, in terms of jurisdictional matters, an obligation exists only when a mutual consent has been perfected. That is the only situation where a State has an obligation to go to the ICSID Convention. In any other situation such as we have here, such obligation does not exist. And this is the position of Professor Schreuer, and it is also the position of the ICSID Commentary.

Now, we're aware of the position of the other side which said under which the term "consent" under Article 72 means a unilateral consent. But even the Professors who argued this position, in particular Professor Gaillard, said in those cases the wording of the Bilateral Investment Treaty has to be express and explicit, and the consent has to be unconditional.

And he gives several examples of a wording of a treaty which meets this threshold; and, essentially, the adequate wording that meets this threshold is "each Party consents to ICSID Arbitration." When we compare that to the wording that we have here, we see that resorting to ICSID Arbitration is contingent upon mutual agreement of the Parties. It is not a clear, express and explicit consent for ICSID Arbitration. And even a unilateral approach cannot be safeguarded by Article 72 of the

Convention.

If the Tribunal has no question on this issue, I would like to briefly touch upon the issue of tax-related measures.

Following the wording of Article VIII(2), this Tribunal can have jurisdiction over tax-related measures only if those measures amount to expropriation. Now, Claimant brings before you today two tax-related measures claims, one related to a refund from 2011, and another--the second one related to enactment of Stabilization Law and increase of royalties.

Now, my co-counsel will demonstrate how these two measures did not amount to a taking of the property as the effect of these measures was not--such to meet the standards of expropriation, whether you interpret it as direct, indirect, and particularly creeping expropriation.

ARBITRATOR KESSLER: You can leave this for your colleague, if you wish, but in saying what you just said, how are you defining a "tax-related measure"?

MS. JEVREMOVIC: In this particular case, tax-related measures are acts of State that are within the fiscal system of the State, and we concede that tax refund and increase of royalties fall within the scope.

ARBITRATOR KESSLER: No matter--okay. I heard the answer. Thank you.

MS. JEVREMOVIC: Thank you.

If the Tribunal has no further questions, I would like to conclude my submissions by restating that the preconditions set out in Article IX were not met by Claimants and that offer for consent to ICSID Arbitration set out in Subsection 4 was revoked and, therefore, this Tribunal does not have jurisdiction to entertain this present case. Even if you find that you do have jurisdiction, that jurisdiction is limited in terms of its scope, given the tax-related measures do not fall within--do not amount to expropriation.

Thank you.

PRESIDENT FRUTOS-PETERSON: Thank you.

Counsel, you want to do your rebuttal on jurisdiction at this point?

MR. KALIA: Yes.

OPENING STATEMENT ON OBJECTIONS TO JURISDICTION BY COUNSEL FOR CLAIMANT

MR. KALIA: Madam President and learned Members of the Tribunal, a very good evening once again.

I will start with submitting my major contentions against the submissions of Respondent host State. My First Submission would be that the Tribunal has jurisdiction because the conditions under the ICSID and Bilateral Investment Treaty have been met;

Second, that the most-favored-nation clause replaces the provisions of Gracelandia and Rodolandia Bilateral Investment Treaty because it was more favorable to us;

Thirdly, that tax measure is an expropriation.

To come back to my First Submission, I state that the Tribunal has jurisdiction because it has accepted the Bilateral Investment Treaty as consent, whereas the conditions in ICSID has also been met.

Now, undisputedly, as the learned Members of the Tribunal, AS conceded by the opposite side that it's the Bilateral Investment Treaty treatment is still in place. Article XII is the only way you can renunciate it. Well, that has not been done, and the Bilateral Investment Treaty is still in place. So, the condition in bilateral treatment has been met; there is consent in that.

Now, the second condition is in ICSID.

PRESIDENT FRUTOS-PETERSON: Okay. Go ahead.

MR. KALIA: In ICSID, Article 71 states the procedure of denunciation. After the procedure of denunciation has been initiated by the Respondent host State, the Notice is sent to the Secretary, and it takes effect after six months. My submission is that, once that denunciation takes place, there is no other Article of ICSID Convention except Article 72 which applies. For

that, Article 72, the provision--our submission is that that the provision shows that States do not frustrate unilaterally the effectiveness of existing rights and obligations by withdrawing from the Convention, and this statement in Article 72 is in conformity with the Article 71 and 72 of the Vienna Convention Law of Treaties.

PRESIDENT FRUTOS-PETERSON: But how do you explain, then, the question of the moment when the consent from both Parties have been perfected? I think that's a question that the Tribunal is very interested in.

MR. KALIA: Thank you for the question, Madam President, and I understand that, and I will address that.

Well, the time of consent for the Respondent host State is at the time denunciated because Article 72 says that the pre-existing obligation of the Respondent host State will not be affected by the effect of Article 72; thus, we perfected the consent by initiating a claim after six months in this matter.

Does that answer your question, Madam President?

PRESIDENT FRUTOS-PETERSON: We take note. Thank you.

MR. KALIA: Thank you.

Yes, so, as referred to by Madam President about the Venoklim Case, I would like to refer to it that Article 72 of the ICSID Convention has not yet been in any

of the awards except the case mentioned here.

Now, the Venoklim versus Venezuela Award, the contention of Venezuela was--against jurisdiction was, once they give the Notice, the initiation of the claim that that is the perfection of the consent was done at that time. Well, that is completely different from our case. I just mentioned this case because it's the only award which talks about Article 72, and it only was applicable to the procedural aspect of it and no substantial effect of it.

PRESIDENT FRUTOS-PETERSON: But isn't Article 72 there to protect the rights of consent that had been perfected under the ICSID Convention? I mean, once the consent is perfected, then wouldn't you have the protections of Article 72? But if the consent is not perfected, do you know why it's under 72? That's part of the dilemma here.

MR. KALIA: I understand.

Madam President, the Bilateral Investment Treaty, it goes on for the next ten years. We derive a consent from the Bilateral Investment Treaty because it's still in place.

Now, when you apply Article 72, it talks about the pre-existing rights and obligations. The obligation of the Respondent host State was there in the Treaty; and, thus, at the time of denunciation itself, the consent of--the

consent of the Respondent host State was there and was perfected when we initiated our claim. So, the consent was still going on from the time we initiated the claim because the consent is derived from the Bilateral Investment Treaty itself, which is still going on and still in place.

If that answers your question, may I proceed, Madam President?

PRESIDENT FRUTOS-PETERSON: Yes, please.

Do you have a question?

Go ahead.

MR. KALIA: With this, I will move on to my Second Submission, which states that the most-favored-nation clause treatment--the Claimant is entitled for the most-favored-nation clause because we were given the treatment less favorable than the treatment given to the State of Rodolandia.

Now, for this, I would like to draw your attention to Article V(1), which clearly states that in all matters referred to in this BIT--that's the Bilateral Investment Treaty--it covers all the matters. Thus, it clearly says that it covers the matter from Article I to Article XII of the Bilateral Investment Treaty, and it means that dispute-resolution mechanism is one of the mechanism, and thus it applies to the procedure. For this, we rely on the Maffezini versus Spain Award.

In the Maffezini Award, there was a similar in that they rely on the Argentina-Spain BIT. From there, they take the most-favored-nation clause and import a dispute-resolution mechanism from the Argentina-Chile BIT.

Now, in that, the wordings of the Maffezini versus Spain--the Argentina versus Spain BIT are exactly similar to what is the wording of the dispute-resolution mechanism here.

Now, in that, there was a parameter--

PRESIDENT FRUTOS-PETERSON: Are they the same or similar?

MR. KALIA: Similar. There are few words here and there, Madam President.

Article IX of the bilateral treatment--bilateral investment treatment of the State of Megaoil versus Gracelandia, we say that the Maffezini Case completely applies to it because the amicable resolution--the first Article IX(1), the first subsection, talks about the amicable resolution. When in Maffezini versus Spain Case, there was a parameter set--it was the first award of investor's arbitration in which the MFN was applied to procedural matters; thus, it laid down the parameters that the intention of the Parties, when drafting the BIT as conceded by the opposing counsel as well, should be taken in consideration, and this applies with the Vienna

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05:49 Convention on the Law of Treaties as mentioned by Mr. Arbitrator. Article 31(1), the ordinary meaning should be taken in good faith with the objects and reasons of the Bilateral Investment Treaty.

And thus, when we see the objective reasons here, it says that treatment should be intending to create favorable treatment. Thus, we submit that when we see the Bilateral Investment Treaty of Gracelandia and Megaoil and Gracelandia and Rodolandia, if we compare them together, the first clause is the same that they want amicable resolution. When we step down to the second clause, it talks about domestic--to go to domestic courts.

ARBITRATOR CROOK: Counsel, I wonder if I could interrupt you here. I'm reflecting on the point that Respondent raised that was raised by Professor Stern. Now, Professor Stern obviously reflects a particular point of view on this, but it does seem to me she does raise an interesting point: The basis of jurisdiction here is consent and that we're dealing here with sort of the most fundamental expression of consent to arbitrate.

How would you respond to Professor Stern?

MR. KALIA: Thank you, Mr. Arbitrator.

Well, as I earlier said that we will agree--we submit that the consent is perfected because of the operation of Article 72.

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05:50 ARBITRATOR CROOK: Well, I'm thinking here about the point of--we're assuming here that the MFN clause is operative for bringing in the other--the provisions under the other Treaty.

Now, what Professor Stern would say, I think, is that by doing that, you are, in essence, altering the terms of Respondent's consent and that that is fundamentally inappropriate and unreasonable thing to do, to construe this language against that--the fundamental role of consent, that it is wrong by applying an MFN provision to fundamentally alter the terms of a party's consent.

Now, what would you say to Professor Stern?

MR. KALIA: Thank you, Mr. Arbitrator.

Well, I would take a step back and say that the Bilateral Investment Treaty's main purpose is to protect the Investor.

Now, we negotiated the dispute-resolution mechanism and all the Articles of the Bilateral Investment Treaty. Most-favored-nation clause as well has been negotiated, and the Parties agreed that there will be no less favorable treatment. Hence, we submit that we take the consent from Article 72, and at the same time, if there is a pre-existing condition or some prerequisites to go to that condition, we are eligible to apply the most-favored-nation clause so that we can import better

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05:52 treatment given by any other State.

PRESIDENT FRUTOS-PETERSON: But that would put us in a situation where the State could just have a bilateral investment treaty with one Article, a most-favored-nation Article, because you could import from other treaties.

MR. KALIA: Sorry, Madam President, I can't hear you.

PRESIDENT FRUTOS-PETERSON: Oh, I'm sorry.

I was saying that it seems to me that probably that will put us in a position where the States can just have very simple bilateral investment treaties with one provision with an MFN clause because, through the MFN clause, you could bring provisions from other treaties that, of course, that are more favorable.

I think the concern of the Tribunal is what is the meaning for the other provisions, especially consent, consent of the State. And I take this opportunity to link to Professor Crook's question, also to bring to your attention the text in Paragraph 4 of Article IX, when you have the express wording under the provisions of this Article "shall be submitted by mutual agreement."

So, if you could--I'm sorry, we have put a lot of questions on you, but if you could add your position on that particular language.

MR. KALIA: Yes, of course, Madam President.

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05:54 Thank you very much, again.

Well, I would say that, as you mentioned, that the treaties can be put with one provision or maybe with ten provisions or twelve provisions. That's the negotiation between the State Parties, and I will still stick to my submission saying that we negotiated with the Respondent host State; and, at that time, when we negotiated, we gave it--according to us, we gave the MFN clause very broad meaning. We contend that the intention of the Parties at that time to put the MFN clause was a treatment no less favorable than any other State.

So, we still say that, because of that treatment, the consent of the Party as mentioned by IX(4), when we invoke MFN clause and we get the State of Rodolandia and Gracelandia's BIT, we import the whole dispute-resolution mechanism.

And when we see--

ARBITRATOR CROOK: Counsel, I know you've got limited time, and we have taken a lot of time on MFN, let's assume for a moment--and I don't pretend to judge what the Tribunal will do--but let's assume we disagree with you, let's assume we conclude that the MFN clause does not operate to bring in the provisions of the other treaty. All right. In that case, do you depend entirely on the MFN clause? And if not, how is it that we have jurisdiction?

MR. KALIA: Thank you, learned Arbitrator.

Well, I submit that we will interpret Article IX and its provisions, all of the provisions keeping the Vienna Convention on the Law of Treaties Article 31(1) the interpretation in our mind. The first of--the first--well, for this, the Article IX(1) talks about agreement should be resolved, if possible, to amicable discussions. Well, for this, I can refer to one of the cases of Ambiente versus the Argentine Republic, in which at Paragraph 583 the finding talks about the sufficient minimum amount of concentration was conducted or at least offered; (b), that amicable consultation in order to resolve the case is not possible in the first place.

We will submit that because of the hostile nature and uncooperative attitude of the Respondent host State, amicable discussions were not possible.

ARBITRATOR CROOK: Did you make any effort? Did you try? Or are you just assuming that any effort would be futile?

MR. KALIA: Well, for that, we would like to direct the attention of the learned Tribunal Members to Paragraph 39 of "Clarification" which says that we tried to communicate with them. We infer from that that we tried to have some oral amicable resolution with them, that--that that would be all for that argument.

When we come to Paragraph 2, it talks about the "resolved in six months as per the Request," so it does not it says that it should be submitted. Article IX(2) states that "shall be submitted to the competent tribunal." Well, we submit that it's not an exhaustion of domestic remedies, and this applies to Maffezini Case, that it did not apply to the exhaustion of domestic remedies at all. It gave them a choice to do that.

PRESIDENT FRUTOS-PETERSON: It gives them a choice?

ARBITRATOR CROOK: I'm just curious how to square what I believe you just said, it "shall be submitted per the Request of one of the Parties."

Now, again, the Tribunal may not have the benefit of all the clarifications. Was there a request by either of the Parties here? And, in particular, did the Respondent make such a request? Or do we know?

MR. KALIA: Let me say that Paragraph 39 "Clarifications" talks about--only about some communication with the Respondent host State. We assume here that it was oral communication because we have nothing in writing on record.

Now, coming back and addressing the Article IX issue, well, Article IX(1) is a procedural matter. It's not a mandate. It says "if possible."

So, we had a choice that we could have followed it, and it was not mandatory. With Article IX(2), we would contend the argument of futility again because when President Calvo came into power, there was economic crisis and a lot of other environmental issues and other things. We consider that--we consider that is an argument of--if we would have submitted the dispute to the local courts, it would have been in futility.

As mentioned, futility also is an argument which is accepted--it's a fundamental principle which is accepted by the Draft Convention on Diplomatic Protection as well 15(a).

ARBITRATOR CROOK: Counsel, let's assume for a moment we agree with you, just for purposes of discussion, and that it would have been a futile matter to go to national courts. So, essentially the Tribunal--we take that out of the Treaty, and we are then left with Article IX(3), which says you can have international arbitration under one of two circumstances: Circumstance 1, at a party's request, if the national court proceedings haven't gone anywhere--and we're not in that case; and, second circumstance, when the Parties have agreed to it, and it would appear from the presence of both of you here that there is no such agreement.

Now, if that's true, how does this Tribunal have

jurisdiction?

MR. KALIA: Well, thank you, learned Arbitrator.

Well, Article IX(3) said--talks again about the procedural about a choice that it can be submitted, and it's not mandatory, and the argument of futility extends to Article IX(2) as well as Subsection 3(a) for us.

ARBITRATOR CROOK: Well, counsel, let me draw your attention to the first words of IX(4). That is, in the cases indicated in Paragraph 3--what I'm grappling with here--and, you know, help me, maybe I don't understand it, but it kind of looks as though if you do not have either recourse to national courts or the agreement of both Parties, then you fall into a black hole. Am I misunderstanding this? And, if so, can you tell me how.

THE WITNESS: Well, I would submit that Article IX(4), as pointed out by learned Arbitrator, it talks about Paragraph 3, and then it says that "dispute between the Parties under the provision of this Article shall be submitted by mutual agreement." We contend that "mutual agreement" talks about the consent which is there in the Bilateral Investment Treaty; and, hence, then we proceed to the ICSID Tribunal for jurisdiction because of that. We say that the mutual agreement is the consent itself.

ARBITRATOR CROOK: Okay. So, is the consequence

of that, then, that sort of 3(a) drops away and becomes meaningless, that the 3(b) covers all circumstances?

MR. KALIA: Yes, that is our submission.

ARBITRATOR CROOK: Thank you.

ARBITRATOR KESSLER: Let me just go back to one thing you said earlier. You stated that the purpose of a bilateral investment treaty is to benefit the Investor. Is that really your position?

MR. KALIA: I'm sorry, learned Arbitrator. I said that the purpose is to protect the Investor, to protect the Investor.

ARBITRATOR KESSLER: Only protect the Investor?

MR. KALIA: Protect the Investor and promote the investment.

ARBITRATOR KESSLER: Thank you.

PRESIDENT FRUTOS-PETERSON: And I'm really sorry, this is a very interesting and fundamental question for the case, so we interrupt you on your argument. I have been taking the time, but I will deduct the time from the questions from the Tribunal and taking into consideration that we extended some additional time to the Respondent, but we're getting to the end of your argument on jurisdiction.

Do you want to add anything in connection with the tax issue in connection with jurisdiction?

MR. KALIA: Well, Madam President, that issue will be taken care of by my learned co-counsel.

PRESIDENT FRUTOS-PETERSON: Okay.

MR. KALIA: And just one last submission I would like to make, with the permission of Madam President and learned Arbitrators, that the opposing counsel relied a lot on the case of Plama versus Bulgaria. I would like to submit that that was a case in which the Bulgarian and the Cyprus BIT was in place. It was a case in which they wanted to--they were invoking MFN clause from the Energy Charter Treaty. The Treaty provided ICSID Arbitration, but the other Treaty provided ad hoc arbitration. So, I submit that that's the case of complete--it does not apply to the present circumstances of the case.

Also in the Plama Case, it held that there was subsequent negotiation between Bulgaria and Cyprus, which meant that the intention of the Parties were not to do this.

And also, it did only apply the substantive--to the substantive part. It did not apply to the procedural aspects.

If the Tribunal has no more questions, I will rest my case here.

PRESIDENT FRUTOS-PETERSON: Thank you. Shall we move on to the other arguments?

You have the rebuttal. I think you reserve a couple of minutes for rebuttal?

MS. JEVREMOVIC: We can rebut, if the Tribunal grants us the right.

PRESIDENT FRUTOS-PETERSON: Yes, go ahead.

REBUTTAL ARGUMENT ON JURISDICTION BY COUNSEL FOR RESPONDENT

MS. JEVREMOVIC: Thank you.

In light of the discussions and arguments raised by the counsel for Claimant, we would like to restate that the Tribunal in Plama versus Bulgaria actually faced the situation where the MFN clause that was invoked was invoked with the intent to have a State consent from another Treaty to introduce it in the another dispute that's before the Tribunal; and, because of that attempt, which is essentially what Claimant is arguing for here, the Plama versus Bulgaria Tribunal rejected Maffezini versus Spain, on the basis of policies that I stated in my initial submission rejected such broad interpretation of the MFN clause.

Therefore, we ask respectfully this Tribunal to follow the Tribunal in Plama versus Bulgaria.

PRESIDENT FRUTOS-PETERSON: Thank you.

Any other questions from my colleagues? No?

Okay. So, then now Claimants have the floor to introduce your arguments on the merits.

MR. SCHEIBENPFLUG: Can we have the right to rebuttal first?

MR. KALIA: Surrebuttal for one point? Can we have the right to surrebuttal just one point?

PRESIDENT FRUTOS-PETERSON: On jurisdiction, that was her rebuttal--no?--on your argument, so we still have a rebuttal, I don't know about the rules.

Okay. One minute.

REBUTTAL ARGUMENT ON JURISDICTION BY COUNSEL FOR CLAIMANT

MR. KALIA: Just one point on the Plama versus Bulgaria Case. Well, we submit that the Plama versus Bulgaria Case, if you see our most-favored-nation treatment in our Bilateral Investment Treaty, it falls under Article 5(2) and not 5(1). 5(1) applies to the procedural method, and the MFN clause in the Plama versus Bulgaria Case is similar to what is in 5(2), which says that it "grants to investments of investors." It's not "accords to investors," which is Article 5(1). Thus, it applies to the substantive part of it and not the procedural part of it.

Thank you.

PRESIDENT FRUTOS-PETERSON: Okay. Thank you.

OPENING STATEMENT ON THE MERITS BY COUNSEL FOR CLAIMANT

MR. SCHEIBENPFLUG: Good afternoon. My name is Philipp Scheibenpflug, and I will represent the Claimant on the merits.

My pleading will be divided up into two main parts:

First, the Claimant will establish that Gracelandia breached substantive breach--clauses of the BIT. Claimants will establish that it got expropriated by Gracelandia and treated unfair and inequitably and the treatment violated the national-treatment clause.

In my second part of the pleading, the exceptions laid down in Article VIII of the BIT are all not applicable or its requirements are not met here.

Coming back to the first point, Gracelandia violated Articles III, IV and VI of the BIT. Let me make clear here with what matters I will be referring to:

First, the withdrawal of the Commercialization Permit in 2014, the denial of the exploration phase in 2015, the eviction from the Promotus Field in 2015, and the tax-refund request in 2011.

If you--if I may direct attention of the learned Members of the Tribunal to Article VI of the BIT, according to this Article, there are very strict conditions for taking an expropriation and nationalization or measure similar to such measures. Here, such a similar measure is given: An indirect expropriation. And as a broad term of indirect expropriation for State actions which have a similar effect as a direct expropriation, a direct

expropriation is given as if a transfer of formal title from investor to a State or to a third party by the State.

In this case here, the economic value of the investment by Dronus was totally or at least substantially deprived by Gracelandia's actions.

Let me be clearer as well, what is investment of Dronus? Dronus was granted a concession contract in an auction. After getting granted said contract, it imported cutting-edge machines and equipment into the territory of Gracelandia to explore the Promotus region. After it found oilfields there and started to commercialize it, it hired more than 200 personnel, it undertook an investment program of $40 million, and it wanted to use the machines and equipment process there. Now, after the withdrawal of the Commercialization Permit and after the eviction action, Dronus cannot make use of this investment anymore. The Commercialization Permit is gone, they hired experts and local personnel, Dronus is still the employer but it has no personnel anywhere, and machines and equipment are still property of Dronus. We do not contend that. But it's still unclear if it can ever be used--

PRESIDENT FRUTOS-PETERSON: Did you recover the machines? I think there was--I'm sorry, I forget, but what is the situation with the equipment? Was it returned to you? Do you have the equipment?

MR. SCHEIBENPFLUG: Gracelandia sent a letter to us and said we should take this equipment away from the Promotus region, so there may be a chance it could be deployed elsewhere, but this would lead to tremendous costs.

Just to remind the Tribunal, the costs of dismantling, of packing it, of transporting it to a port, to pay for transportation and shipping, insurance, the costs of deploying it elsewhere, paying import tax again, and putting it up again. So, we contend that substantially the investment is rendered useless.

ARBITRATOR KESSLER: Counsel, we understand this part of the argument. What is it that you claim has been expropriated?

MR. SCHEIBENPFLUG: The whole investment, sir, and everything taken together: the Commercialization Permit, which was granted to us and constitutes an investment under Paragraph I(e) of the BIT, but also the investment of the machines and in the equipment bring to the State of Gracelandia, paying of the import tax, the hiring and paying salaries to the local personnel--everything--all this is an "investment," an economic term, is rendered useless because Dronus cannot deploy it more in the Promotus region.

ARBITRATOR KESSLER: The equipment you're going to

be able to use elsewhere. You refer to the Concession. What's the value of the Concession?

MR. SCHEIBENPFLUG: The Concession gave Dronus the right to explore in the Promotus region and look for oil-and-gas fields, and after it found such oil-and-gas fields, it gave them the Commercialization Permit and the right to the commercialize. Since both permits were taken away from Dronus, now the Concession Contract was rendered useless.

ARBITRATOR KESSLER: So, you're interested in the value of what that Concession would have been?

MR. SCHEIBENPFLUG: Yes, as in the remedy section, which we will be addressing in a later hearing, we would be very interested in the economic value, but for the question of damages, but right now we just want to make clear that all the investments taken by Dronus were rendered useless, and so there was a total deprivation of the investment and economic value and that constitutes an indirect expropriation and its Sole Effects Doctrine which we apply here.

ARBITRATOR KESSLER: And then you mentioned the Article III, protection of the investment. What's your specific claim there?

MR. SCHEIBENPFLUG: Thank you very much.

We contend for this question--we also contend that

the mentioned measures by Gracelandia not only constituted indirect expropriation, but also breach of the fair-and-equitable-treatment clause under Article III(2) of the BIT.

ARBITRATOR KESSLER: Is it your position that, for example, in changing the--not commission, but the royalty fee, that the Government has no right to change the royalty fee at all?

MR. SCHEIBENPFLUG: We do not contend the right of the Government to take general measures, economic measures. We do not do that. We concentrate solely on the four factors: the withdrawal of the Commercialization Permit which was granted to us for 30 years and was nevertheless destroyed after three years; the denial of the exploration phase based on no valid reasons; and of the anti-tax measures.

ARBITRATOR KESSLER: Just focusing on the royalty, change in the royalty, is it your position that the Government has no right to change that royalty throughout the life of the Concession?

MR. SCHEIBENPFLUG: We think--we think that the Government has such a right, but only as long as it does not make our investment economically unviable because, in that case, it would amount to an expropriation.

But just to be perfectly clear, we do not contend

that the royalty increase constitutes indirect expropriation. We focus on the role of the Commercialization Permit mostly.

ARBITRATOR KESSLER: Thank you.

MR. SCHEIBENPFLUG: Thank you very much.

ARBITRATOR CROOK: Okay. So, just to be clear, if the royalty increase had not taken place, you would still be in precisely the same position?

MR. SCHEIBENPFLUG: Yes.

ARBITRATOR CROOK: Okay.

Will you be addressing Article III in greater detail, or is it an opportune time to ask about it?

MR. SCHEIBENPFLUG: I was just going to start with it.

If you look at Article III(2), "fair and equitable treatment," this is a very disputed term. We ask the Tribunal here to interpret this clause autonomously and broadly in light of the motive of the Bilateral Investment Treaty and certain case law.

ARBITRATOR CROOK: Let me ask you here, counsel. You know, I'm sure, that the world is divided between two great camps in their understanding of fair and equitable treatment: those who say it is tied to customary international law and those who say it isn't. In which of those camps do you fall? And if you fall into the camp

that says it isn't, how do you address the words "in accordance with international law"?

So, are you a "minimum standard" guy, or are you something different?

MR. SCHEIBENPFLUG: Thank you very much, Mr. Arbitrator.

We are not "minimum standard" guys because of this case here. We have no contention or no valid opinion on the broad debate, but just looking at the wording according to Article 31 of the Vienna Convention, the most important means of interpretation, we think that in this case as in other NAFTA cases, the wording does not lead to a conflation of the customary standard with fair and equitable treatment. The term "in accordance with international law" just means that the autonomous interpretation of fair and equitable treatment should not violate or should not be in violation of customary international-law standard, but does not confine this broad term to the international minimum.

To make this point clear, let me bring up a quote from a textbook here which I think brings it to the point. It seems implausible that a treaty would refer to a well-known concept like the minimum standard of treatment and customary international law by using the expression "fair and equitable treatment," especially in a BIT

concluded in the Year 2010, after the dispute with the Pope & Talbot Case and the S.D. Myers Case in 2001 and 2002 took place. They still use this wording and did not use the wording like, for example, in NAFTA "in accordance with international law," e.g. or for example, "fair and equitable treatment."

So, we think--

PRESIDENT FRUTOS-PETERSON: I was just going to say because prior arguments you have been asking us to follow precedents here, to follow other cases applicable in the different issues.

MR. SCHEIBENPFLUG: Yes.

PRESIDENT FRUTOS-PETERSON: So, what is your position or explanation in how this Tribunal has to handle a series of cases where it has been interpreted by the wording "in accordance with international law," but the intent of the Parties was related to the minimum standard of treatment related to customary international law?

MR. SCHEIBENPFLUG: Thank you very much, Madam President, for this question.

We think that all the NAFTA cases, which are the majority of the cases--

PRESIDENT FRUTOS-PETERSON: But I want to step a little bit away from NAFTA cases because, in NAFTA, we have interpretation from the Contracting States. We have the

interpretive notes, and I think that has put the NAFTA cases probably in a different camp.

MR. SCHEIBENPFLUG: Yes.

PRESIDENT FRUTOS-PETERSON: But I'm talking about cases like this where you have exactly the same wording, and it has been interpreted as to be customary international law, minimum standard of treatment.

MR. SCHEIBENPFLUG: We think this is only, of course, persuasive authority, but in our point of view, not persuasive authority since we wanted to direct the attention of the Tribunal Members to cases like Tecmed versus Mexico or Ioann Micula and others versus Romania where it was stated that no such interpretation shall take place but should be a broader interpretation of fair and equitable treatment--

PRESIDENT FRUTOS-PETERSON: Where did those cases include the international law in the BITs in question? I just can't recall.

MR. SCHEIBENPFLUG: Pardon me?

PRESIDENT FRUTOS-PETERSON: Can you remind us whether you were talking about Tecmed and you were talking about Micula?

MR. SCHEIBENPFLUG: Micula versus Romania.

PRESIDENT FRUTOS-PETERSON: Did you check those Bilateral Investment Treaties? Do they have a similar

language or not? I just don't recall.

MR. SCHEIBENPFLUG: I think the Tecmed versus Mexico was a NAFTA case that has a different language.

PRESIDENT FRUTOS-PETERSON: Tecmed I don't think is a NAFTA case.

MR. SCHEIBENPFLUG: We will bring this in our later submission.

I think there is a fair-and-equitable-treatment clause that says, but I'm not a 100 percent sure in what ways the international law reference is treated here.

We want to direct the attention of the Tribunal to the Preamble of the BIT which is saying, in our point of view, and states the purpose of this BIT, and it's solely focused on the intention to create and maintain favorable conditions for the Investors and of investments, and to promote and protect foreign investors in the State of Gracelandia, and we think that should be an incentive for the Tribunal to give broader protection to investments and investors in State of Gracelandia.

ARBITRATOR KESSLER: Counsel, how does your argument under Article III(2) relate to the requirements under Article III(3)? Do they cross over? Are they related?

MR. SCHEIBENPFLUG: We think Article III(3) is a different issue here, but it's a linked one because, in our

interpretation of Article III(2), a State has the obligation to act transparently, to act in a consistent manner, to act unambiguously towards its investors. If it takes measures which impairs management, for example, of an investment like, for example, here is the criminal charges against the Director of Dronus, that is a part of FET, but here the Contracting Parties even elevated, said part of FET to its own contract clause, so we could also submit there is a violation of Article III(3). I don't think they're exclusively to be written that one a measure can only violate one clause but not the other.

I see that my time is already up. If the Tribunal would grant me another two minutes just to shortly address the issues in the second part of my pleading.

PRESIDENT FRUTOS-PETERSON: Yes, please, go ahead.

MR. SCHEIBENPFLUG: Thank you very much.

The Respondent will argue extensively about Article VIII of the BIT. We suppose that all the Measures we mentioned are not covered by the BIT. We dispute that. Article VIII(2) is the tax-related measures. Here, clearly an indirect expropriation took place, all the Measures together, so we think the carve-out of Article VIII(2) is more applicable.

More importantly, Article VIII and VIII(3) allow the State to take measures necessary to protect essential

security interest or the nature and environmental issues. But all the Measures we listed like the withdrawal of the Commercialization Permit, the eviction and tax measures have no bearing on the economic crisis in--

PRESIDENT FRUTOS-PETERSON: But how do you respond to their argument that there were issues in connection with the health of some indigenous groups that live close to that area? How do you answer to that question?

MR. SCHEIBENPFLUG: Thank you very much, Madam President, for this question.

We think that these are only speculations. There is no substance behind that. First, all these health issues like the malformation of babies is based only on speculative media reports. There is no other government-backed or some real research.

Second, during the time Dronus was allowed to operate in the Promotus regions there were several small companies operating in the same gas-and-oil sector. There was no causality between Dronus and ill health, even if they exist. We don't know.

PRESIDENT FRUTOS-PETERSON: We have that in the record? We have evidence on your last argument in the record, there were other oil companies?

MR. SCHEIBENPFLUG: Yes. If you give me one second, I have it here.

Yes. In Clarification Number 31, it is stated that there were other companies operating in the region in the oil-and-gas sector during that time. And in Clarification Number 16, it is stated that Gracelandia not even in its letters on June 2014, when it withdraws the Commercialization Permit, or in March 2015, when it says Dronus had to leave the region, it gave no explanation. It stated, however, due to Government's lack of explanation for specific reasons for the heads of environmental regulation, it is only speculative, it means all are speculative, and there is no--nothing in the record which indicates or proves that Dronus is in any way responsible for terrible things which happened to the babies.

Let me conclude now: First, Dronus was expropriated. The investment--its investment was rendered useless. It was treated unfairly, and it was a violation of the FET clause because there was no transparency, no formal hearing--nothing.

And all the Measures, all the exceptions laid down in Article VIII of the BIT are not applicable, and its requirements are not met. There is no proof or link between the Measures taken against Dronus and the safety of the environment or having this economic crisis in Gracelandia.

If there are further questions, I rest my case.

PRESIDENT FRUTOS-PETERSON: Okay.

OPENING STATEMENT ON THE MERITS BY COUNSEL FOR RESPONDENT

MR. OCHIENG: Thank you, Madam President and Members of the Arbitral Tribunal. My name is James Ochieng, and I would make the Respondent's arguments on merits.

The Respondent in this case did not breach any provision of the Treaty. My arguments have been made in two alternative parts:

First, I will demonstrate that Article VIII(1) of the Treaty precludes all wrongfulness on the part of the Respondent for the Measures that were taken in order to preserve its essential security interests and maintain public order;

And, secondly, I will demonstrate that each of the claims made by the Claimant based on specific measures that were taken lack merit as each of the actions taken by the Respondent were in any event specifically justifiable in each case.

I will make my arguments in that order because, if the Tribunal agrees with my first argument on Article VIII(1) of the Treaty, then, indeed, the Tribunal should not proceed to consider any of the Claimant's actual claims on merit. Nonetheless, I will go to the second part just so as to demonstrate that, in fact, those claims still

lack merit.

Now, starting from Article VIII(1) of the Treaty, and if Article VIII(1) of the Treaty provides that the Contracting Parties to the Treaty are not precluded from taking any measures that are necessary to promote--to maintain public order or to preserve its essential security interests, how should this provision of the Treaty be interpreted? The Respondent submits that this Tribunal should adopt the interpretation advocated by the CMS Annulment Tribunal as well as the Sempra Annulment Tribunal in considering a United States-Argentina BIT who's Article XI had words in all material ways similar to Article VIII(1) of the current treaty.

Now, those Tribunals, the totality of their division would be as follows:

First, an economic crisis would potentially amount to a situation that warrants invocation of such provision of a treaty.

Secondly--

ARBITRATOR CROOK: Counsel, let me just ask you: Is that what the CMS Annulment Panel actually held? Wasn't the substance of what they actually held that the CMS Tribunal--well, we could debate about what they held, but the substance of what they said was that the CMS Tribunal got it wrong by focusing on the question of necessity under

customary international law as opposed to what the Treaty said. I mean, isn't that what the Annulment Panel really did?

MR. OCHIENG: Thank you, Mr. Arbitrator. Indeed, I was going to say that. What I was trying to lay out--and maybe this did not come out clearly--the test that could be deduced from the generality of the Argentina Cases and not specifically what each--what was decided in each of the Tribunal, but they--the CMS Annulment Tribunal had to deal with the question whether in interpreting this specific provision of the Treaty, the Tribunal, the original tribunal, was right to apply the international law, the customary international law, test for necessity. And, indeed, that was going to be my next point in order to urge this Tribunal to adopt the reasoning in that case that this Tribunal should look to the words of the Treaty and not consider the customary-international-law test.

ARBITRATOR CROOK: Okay. So, let's assume that necessity is not--is out of the picture here, but it's just the Treaty.

Now, are you the sole judge of whether--that is, is the respondent State the sole judge of whether that condition has been met, or must the Tribunal make that judgment on the basis of the evidence before it? Are you the judge here, or are we?

MR. OCHIENG: Thank you, Mr. Arbitrator.

ARBITRATOR CROOK: I'm personalizing--are you, the State, the judge here, or we, the Tribunal, the judge? And if the latter, can you help us with whatever may be in the record that would support the conclusions that the State has drawn?

MR. OCHIENG: Thank you, Mr. Arbitrator.

Now, especially in the Argentina Cases, an argument was made by the State, an argument which to some extent we might say might be possible, that the State could determine initially whether this is a situation that warrants invocation of this provision of the Treaty. Nonetheless, the predominant view taken by the tribunals in these cases was that the tribunals should decide looking at the conditions at the State at that time whether the conditions warranted invocation of this provision.

But the tribunals also recognized that, when States are faced with such situations, they're not expected to file a Request for Arbitration, for instance, to ask a tribunal to pronounce that this situation warranting such invocation. They would ordinarily proceed to take the measures that are necessary or that they consider necessary. And if these are challenged as the CMS and Sempra Annulment Tribunals suggested or held, then the Tribunal should first consider, first, whether the

circumstances in the State at that time amounted to a situation allowing such invocation. And if the Tribunal finds so, the Tribunal should not consider the merits argument by the Claimant, and that's what we submit today.

PRESIDENT FRUTOS-PETERSON: So, you're telling us that it is up to the Tribunal to decide those issues?

MR. OCHIENG: The Respondent is before the Tribunal today, and we ask the Tribunal to find that the situation in the respondent State at the material time amounted to a situation allowing the invocation of Article VIII(1); and, therefore, the Respondent properly invoked Article VIII(1). If the Tribunal makes that finding, this Tribunal should not consider the merits arguments raised by the Claimant.

ARBITRATOR KESSLER: At this point, I probably should recuse myself because I was an arbitrator in the National Grid versus Argentina Case, but let me ask another question: If we accept your argument that the Government in good faith believed that there was such a crisis and that this was necessary to protect its security, et cetera, I don't understand how the actions taken against the Claimant advanced that cause.

MR. OCHIENG: Thank you, Mr. Arbitrator.

Now, there are two types of actions that have been challenged here by the Claimant, and I will address them

separately. Now, the actions that were taken specifically to address the economic crisis that was going on in the respondent State, and if I could group those together, I would say that would be for the Stabilization Law and the tax measures it brought about and the royalties that it increased; and, secondly, to an extent, the formation of Gracelandia and the fact it was provided the Concession.

Now, there are two other measures that the Claimant bases its complaints about, and the first one is the fact that the Commercialization Permit was withdrawn, and the second one is that the point when the Exploration Permit expired after four years because it was granted for a limited period of four years subject to a possible renewal that at the time when this renewal was denied because they did not comply with the concession requirements, that those two latter factors and measures are independent, and each is justifiable separately, and the Respondent will address the Tribunal on that shortly.

But going back to the first two factors I alluded to--and these are tied to the other two facts in terms of when they occurred but not in terms of being done specifically to deal with the financial situation--the material time, the respondent State was faced with a serious economic crisis that led to the following effects on the economy.

First, the GDP--the debt-to-GDP ratio was at 160 percent, which was very high with the debt being 160 percent of the GDP. Unemployment rose from 9 percent to 26 percent. Consumer spending was at an all-time low; and, due to the reserves held by the Central Bank, the foreign reserves were also at a very low level.

ARBITRATOR KESSLER: But, counsel, how does the action taken against the Claimant somehow improve those serious economic problems?

MR. OCHIENG: Thank you, again, Mr. Arbitrator.

Part of the actions that the Claimant complains about, specifically the Stabilization Law in this case, was clearly enacted to deal with the financial crisis and specifically to stabilize the economy, and that was a measure necessary for stabilizing the economy and falls within Article VIII(1).

ARBITRATOR CROOK: Counsel, let me just ask you, then, following up on my colleague's question.

So, you had a functioning hydrocarbon field being exploited by, presumably, a competent company. And after the actions the State took, did the field remain in operation, or the operator apparently was asked to leave, what happened? How did that interruption stabilize the economy?

MR. OCHIENG: Thank you, Mr. Arbitrator.

Once again, the fact that the Claimant ended up leaving the concession area was not based on the Measures that were intended to deal with the economic crisis--

PRESIDENT FRUTOS-PETERSON: But with all due respect, counsel, there was the stay granted the same field, I think, to the State-owned company; no? To Gracelandia S.A.? Is that correct?

MR. OCHIENG: Yes.

PRESIDENT FRUTOS-PETERSON: But we want to understand the same situation here.

MR. OCHIENG: This happened in August 2014. This is two months after the Commercialization Permit that the Claimant had was withdrawn because of the Claimant's failure to comply with environmental laws.

Now, at the time the Claimant invested in the respondent State, the environmental laws were in place. And throughout the time that the Respondent had investments in the respondent State, then the environmental laws did not change.

The Claimant states that they complied with international standards of environmental law, but the local standards were higher than the international standards, and they failed to comply with the local standards of environmental and health laws. And because of this--and if you look at Paragraph 31 of the Request for Arbitration, it

shows the letter from the Provincial Authorities for the Province of Promotus, which explained to the Claimant the reason why the Commercialization Permit was withdrawn, and this is as a result of failure to comply with the laws which posed a risk to animal and health life two months later.

ARBITRATOR CROOK: Counsel, let me interrupt you here. We're dealing here with a lot of facts which may or may not be in the record. They're not facts that at least this arbitrator has been made aware of other than in the very brief statement that we have been given, but let me turn to a slightly different conversation. Everything we've heard so far seems to involve Article VIII, that the actions the State have been entirely justified by Article VIII. Is that the substance, the entirety of your defense on the merits? If we were to disagree--do we have to agree with you on Article VIII in order for the State to prevail?

MR. OCHIENG: Thank you, Mr. Arbitrator.

As I stated when I started, I'm making two arguments in the alternative; therefore, whether you agree with our argument based on Article VIII(1) of the Treaty or not, this--you could still agree with our second argument that each of the claims made by the Claimant lacks merit, and I will proceed to address them as follows:

First, the Expropriation Claim made by the Claimant, and the Claimant has made a specific claim of indirect expropriation. Now, the Respondent's case that the proper test for indirect expropriation is that the Tribunal should look at whether a series of measures, as the Claimant put it, amounted--in the end, in the aggregate, to a taking or a substantial deprivation of the Claimant's investment.

And the Respondent's case is that, in fact, this is not the case, that each of the actions that were taken by the Respondent were, by themselves, justified, and that, in fact, the aggregate effect was not a taking or an expropriation.

ARBITRATOR CROOK: Well, counsel, do they have anything left at this point? Now, they have no more concession, they're not claiming for the equipment that they can get back. So, isn't this a substantial deprivation of the value of the investment? And if not, why not?

MR. OCHIENG: Thank you, Mr. Arbitrator.

Now, it is not--when an investor makes an investment in a State, they do not have a right perpetually to continue enjoying the investments while breaching the laws of the State without any actions being taken; and, in this case, the reasons for the actions were taken were

communicated to the Claimant, and they were as a result of by the Claimant, failure to comply with environmental laws, failure to comply with the Concession Agreement. And this ties with the fair-and-equitable-treatment requirement, and the fact that the Claimant claims they had a legitimate expectation that the exploration phase would be extended.

While the Claimant may have had an expectation, that expectation could not have been legitimate, considering that they knew from the beginning that the exploration phase was for four years. Their expectation could only have been to enjoy this phase for four years. And after that, in fact, it is the State that invited them to apply for an extension; and, when they failed to meet the requirement was an extension, the exploration phase came to an end.

And the State took the prudent measure of forming a State-owned corporation to take over the concession area because the Claimant no longer had the Commercialization Permit, and it was necessary to continue having that field generating revenue.

ARBITRATOR CROOK: Here again, counsel, we're off on a lot of facts that we may not have a fully developed record on, but let me just ask you, let's assume that your characterization, the State's characterization, of the facts is, indeed, accurate. Was it in any--and I'm

thinking here particularly of Article III(3), the obligation to avoid arbitrary, unjustified measures.

Either in that context or in the context of Article III(2), did the State have any obligation to give notice before this action? It would appear that suddenly the State withdrew the exploitation--did not renew the exploitation authorization, it did not extend the Concession, but without any prior notice, any prior warning whatsoever, did it have any obligation under the BIT to give some notice of its intended action?

MR. OCHIENG: Thank you for asking that, Mr. Arbitrator.

I noticed that my time is running out. May I have a few more minutes to respond to your question or any subsequent questions you may have?

PRESIDENT FRUTOS-PETERSON: Please.

MR. OCHIENG: Now, the Respondent's case is that the proper test for the standard in Article III is the test proposed by the Micula versus Romania Case which, indeed, the Claimant alluded to, and it sets out a test that may be used in understanding the fair-and-equitable-treatment requirement and similar requirements in treaties.

And part of what the Arbitrators in this case state is that the interpretation of this requirement does not depend upon the idiosyncratic views of parties, and we

would ask this Tribunal to consider the test as follows, and not to rely on what the Claimant relies on which are the Claimant's idiosyncratic views.

Now, first, a fair and equitable treatment would have been denied where an investor's legitimate expectation is--an investor's legitimate expectation is not granted or is impeded, and where the State's conduct is not substantively profiled. And that is why I have made the argument first that if the Claimant had an expectation, it was not legitimate because they knew from the beginning that this was for a period of four years and it was subject to renewal upon meeting certain conditions.

And, secondly, I have demonstrated that the State took its actions for specific reasons that were explained to the Claimant in its letters that were sent to the Claimant both when the exploration phase was not extended and when the Commercialization Permit was withdrawn; and, therefore, the test for fair and equitable treatment and Article III of the Treaty has not been met.

And it is also the Respondent's case in understanding this provision of the Treaty because this was often--this standard is often debated and common ground has not been reached. This Tribunal could get good guidance from customary international law standards, and the proper standard is that this is a minimum standard requirement;

and, therefore, if the State acted in a manner that is consistent with the minimum accepted standards, then the State did not breach this requirement of the Treaty.

PRESIDENT FRUTOS-PETERSON: I think we have reached--

MR. OCHIENG: I would like to wrap up my arguments by setting up once again that the Tribunal find as follows:

First, that the Tribunal lacks jurisdiction to hear this matter;

Secondly, that even if the Tribunal has jurisdiction to hear this matter, that the Claimant's claims are inadmissible because of Article VIII(1) of the Treaty that precludes wrongfulness on the part of Respondent.

And, thirdly, even if those claims are admissible, they lack merit and should be dismissed.

Thank you.

PRESIDENT FRUTOS-PETERSON: Thank you.

Claimant?

REBUTTAL ARGUMENT ON THE MERITS BY COUNSEL FOR CLAIMANT

MR. SCHEIBENPFLUG: Thank you very much.

I want to make only two short points:

First, I want to stress once again that why Article VIII does not have the Respondent in this case says there is no, as already pointed out by the Tribunal Members

as well, no link between the Measures taken and the substantive protected interests. Just speculation about environmental issues are not enough, and so there needs to be more by the State to waive the Investor's right in that regard.

And one legal point: The Respondent mentioned that the Tribunal should take the FET clause as customary international--as minimum standard, should interpret it as a minimum standard. Even if the Tribunal were to do so, then the minimum standard would be very different from the Neer standard in 1926. It would be as a model standard, and like mentioned in the Mondev v. USA Case doesn't mean this is very egregious and shocking act but since had to have taken into account the reason over 2000 investment treaties were concluded and very many awards were rendered; and, in that case, there had to be some transparency, some form of due process, some hearing of some explanation that is not given here.

Thank you very much.

ARBITRATOR KESSLER: A further question for counsel for the Claimant: When Dronus came into Gracelandia, wasn't it required to understand all the laws of the country and to agree to abide by them? Isn't that a given? So, how can you complain that environmental laws were then violated or at least claimed to be violated by

the Government?

MR. SCHEIBENPFLUG: Thank you, Mr. Arbitrator, for those questions.

We do not dispute--Dronus does not dispute that, of course, it had to operate in the region in compliance with all the domestic legislation. We dispute the fact that Dronus actually violated these laws, so there is no reasoning, no explanation in what way or how it should have violated it. All the letters just referred to a violation of environmental laws without any further explanation. And Dronus tried to contact the Minister of Mines several times. It was futile. There was no real reaction.

So, we think that the real purpose, the real motive behind these actions is just harassment and eviction of Dronus, and in accordance with President Calvo's campaign to renationalize natural resources.

ARBITRATOR KESSLER: We understand what you think, but let's jump over to another argument that counsel made. Here I am, the President of Gracelandia, faced with an economic crisis--what I think is a very serious one--and I'm doing my best to respond to it however I think best.

Isn't it the right of the Government to determine whether there is that kind of necessity? Can you respond to that?

MR. SCHEIBENPFLUG: Thank you very much.

Dronus does not dispute the right to regulate the State's sovereignty of costs, but the Measures taken have to have valid link/nexus to the protected interest. There is no self-judging language in this BIT opposite to, for example, in new U.S. Model BIT or TPP Clause, clauses not taken are necessary or measures which are considered necessary. This is the model language.

But, in this case, the language is missing, is lacking, and that's why the Tribunal has to think about are the taking measures in any way helpful to solving economic crisis, and the harassment of Dronus, we submits, is not helpful.

ARBITRATOR KESSLER: The point I'm trying to get at has to do with a case called EnCana. I don't know whether you're familiar with it. There was a Majority Opinion, and then there was a Separate Opinion by someone named Horacio Grigera Naón, and what it basically said was that it's the Government's judgment as to when there is a sufficient crisis to allow it to act. What is your response to that?

MR. SCHEIBENPFLUG: We think there has to be some margin of appreciation in such an emergency situation, but there should be at least a good-faith investigation by the Tribunal if the Measures have any link to the protected interests, and we think not even this good-faith test would

be valid here.

And in case there is missing language like--missing self-judging language, there should be an even stronger standard. So, under no standard--think about it--except total, arbitrary, possibility for Government to act in an emergency state.

If the Government can declare we have an emergency state now and all the tribunals, all investment tribunals, have to look away because in emergency no rules would govern, there would be arbitrary, and bilateral investment treaties would not render any protection, any meaningful protections for investors anymore because the Government can always create an emergency state or always can declare emergency state. So, we think there should not be a total discretion for the government action.

ARBITRATOR KESSLER: Thank you.

PRESIDENT VEEDER: Are you asking us to consider bad faith as part of the test that we should apply in interpreting fair and equitable treatment?

MR. SCHEIBENPFLUG: Well, to be honest, we don't think you should only apply a good-faith argument test here because of lack of self-judging language. But if the Tribunal is of the opinion that State sovereignty has to get bigger importance in emergency state, then it should at least apply the good-faith standard, and we think this

threshold would not be met here.

PRESIDENT FRUTOS-PETERSON: I was talking about bad faith.

MR. SCHEIBENPFLUG: A bad-faith standard? We don't think so. We think the Government has to--or Dronus doesn't think so. The Government has to submit, and it has to substantiate its measures. It cannot just say "We acted in good faith," and then it's the Claimant's responsibility to bring facts. Even if the facts here are given like President Calvo's campaign is, I think, a very good indicator of the real motives behind the Government's actions.

PRESIDENT FRUTOS-PETERSON: Okay. I'm going to ask my colleagues--do you have any other questions? No?

(Tribunal conferring.)

PRESIDENT FRUTOS-PETERSON: Thank you very much, counsel. I think now the Tribunal will deliberate, and we will come back in a few minutes. Thank you.

MR. OCHIENG: Madam Arbitrator, if I say--and, sorry, I did not want to interrupt you, but according to the argument of the Parties at the beginning, we were going to have a minute to do our rebuttals, so are you satisfied with the submissions we have made, or would you like us to...

PRESIDENT FRUTOS-PETERSON: I apologize, I think

06:54 the Tribunal understood that you did your main presentation and the rebuttals on jurisdiction and the merits, so I don't know if my colleagues would like to hear anything else.

I think it was very well explained. Unless you feel like you want to tell us--that you feel you want to advance a particular argument...

MR. OCHIENG: If the Tribunal is satisfied with the submissions I made, I rest.

PRESIDENT FRUTOS-PETERSON: Are you satisfied, was the question? Are you satisfied?

MR. OCHIENG: Yes.

PRESIDENT FRUTOS-PETERSON: Is the Claimant satisfied with the Hearing?

MR. SCHEIBENPFLUG: Yes.

PRESIDENT FRUTOS-PETERSON: Thank you very much.

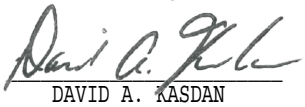
(Applause.)

(Whereupon, at 6:55 p.m., the Hearing was concluded.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.



DAVID A. KASDAN